

1. Are the writing requirements inconsistent and out of date?

Suggested Answer

See the Introduction and 4.2. Many of the writing requirements date back to the seventeenth century, but have been re-enacted to this day. They differ for different types of property, irrespective of the value of that property. Land is attended with the greatest formality, with writing required for declarations of trust and contracts, whereas deeds are required to move the legal estate. Not everyone understands the difference between a contract for the sale of land and the conveyance of a legal estate, nor the difference between an ordinary piece of writing and a deed. A chattel can be transferred by merely handing it over, but there must also be an intention to give, which can be hard to prove: *Day v Arnold* [2013] EWCA Civ 191. In contrast, the transfer of a chose in action requires writing. Unless land is involved, a declaration of trust can be oral, but it is not always clear whether property is being transferred or a trust being declared. See 4.2.3.3 in particular *Paul v Constance* [1977] 1 All ER 195 and *Hunter v Moss* [1994] 3 All ER 215. Reform has been considered in an age when electronic communication is replacing writing, but so far no changes have been made to the law.

FURTHER READING: M.P. Thompson 'Oral Boundary Agreements' [2004] EWCA Civ 79

2. Is there really a significant difference between the disposition of an equitable interest and a declaration of trust?

Suggested Answer

See 4.3. Section 53(1) (c) of the Law of Property Act 1925 states that the disposition of an equitable interest must be in writing. Some have wished to avoid putting such transactions in writing for tax reasons. Settlers have tried to argue that their disposition of an equitable interest was really a declaration of trust. A declaration of trust may be made orally, unless land is involved. In the case of *Grey v IRC* [1960] AC 1, this declaration of trust argument did not succeed, but in *Re Vandervell (No 2)* [1974] Ch 269 it did. The facts of these two cases are different, but so is the legal reasoning. Another attempt to avoid the writing requirement involved claiming that an oral contract created a constructive trust and so no separate piece of writing was required to dispose of the equitable interest: *Oughtred v IRC* [1960] AC 206. That claim also failed, but whether the judgment was particularly logical is another matter. Where tax avoidance is not involved, the courts have been more lenient: *Neville v Wilson* [1996] 3 WLR 460.

FURTHER READING: B Green, 'Grey, Oughtred and Vandervell: a contextual reappraisal' (1984) 47 MLR 385 and G Battersby, 'Formalities for the disposition of an equitable interest under a trust' [1979] Conveyancer 17.

3. Is there any consistency in the exceptions to *Milroy v Lord*?

Suggested Answer

See 4.5 and 4.6. *Milroy v Lord* (1862) 4 D & G, F & J 264 lays down strict rules for the establishment of a trust and for making a gift. The *legal* rules for transferring property must be adhered to. The rule in *Milroy* states that the settlor must do everything necessary to transfer that type of property. In subsequent cases the courts have used *equity* to moderate the harshness of the rule.

In *Re Rose* [1952] Ch 499 the settlor had to do everything in his power to transfer the type of property. This changed yet again in *Mascall v Mascall* (1985) 49 P & CR 119 to saying that the property was transferred if the donee had everything under his control necessary to complete the title. Finally, in *Pennington v Waine* [2002] 1 WLR 2075, the court held that the gift should be allowed, even though the correct procedures had not been followed, because it would be 'unconscionable' not to do so. Another way round the strict writing requirement was found in *T Choithram International v Pagarini* [2001] 1 WLR 1, by holding that what looked like a gift was really a declaration of trust. Proprietary estoppel (Chapter 5) and constructive trust (4.4) also provide ways of avoiding formality requirements such as writing.

FURTHER READING: P. Luxton [2012] Conv. 70 'In search of perfection: the *Re Rose* rationale'.

4. If the beneficiaries in a marriage settlement can enforce a covenant to transfer property to the trustees, why cannot all beneficiaries do this?

Suggested Answer

See 4.8. Perhaps this question is the wrong way round! It is marriage settlements that are the exception to the normal rule, which comes from contract law. The covenant is a contract, usually between the husband and wife and the trustees. Non-parties to a contract cannot enforce it and the other beneficiaries of the trust are not parties to the covenant. An exception is made if there is a marriage settlement, for those within the marriage consideration. Equity allows them to enforce it, although they could not do so in common law. This leads to the odd seeming result that some beneficiaries, typically issue of the marriage, can enforce the covenant, while other beneficiaries, typically the next of kin, cannot. If the covenant is not in a marriage settlement, it also seems odd that the trustees have made a legally binding contract with the beneficiaries who are parties to the deed, but cannot enforce that contract. This is justified on the grounds that to direct the trustees to sue would allow the beneficiaries to enforce by indirect means what they cannot enforce directly: *Re Pryce* [1917] 1 Ch 234. A close study of what the judges actually said in the cases reveals that they are not always totally convinced by the idea that these covenants cannot be enforced, e.g. *Re Kay* [1939] Ch 32. There are also some cases, e.g. *Fletcher v Fletcher* (1844) 4 Hare 67, that have allowed the enforcement of these covenants. There is much academic comment on these matters.

FURTHER READING: D W Elliott 'The Power of Trustees to Enforce Covenants in Favour of Volunteers' (1960) 76 LQR 100.

J A Hornby 'Covenants in Favour of Volunteers' (1962) 78 LQR 228.

