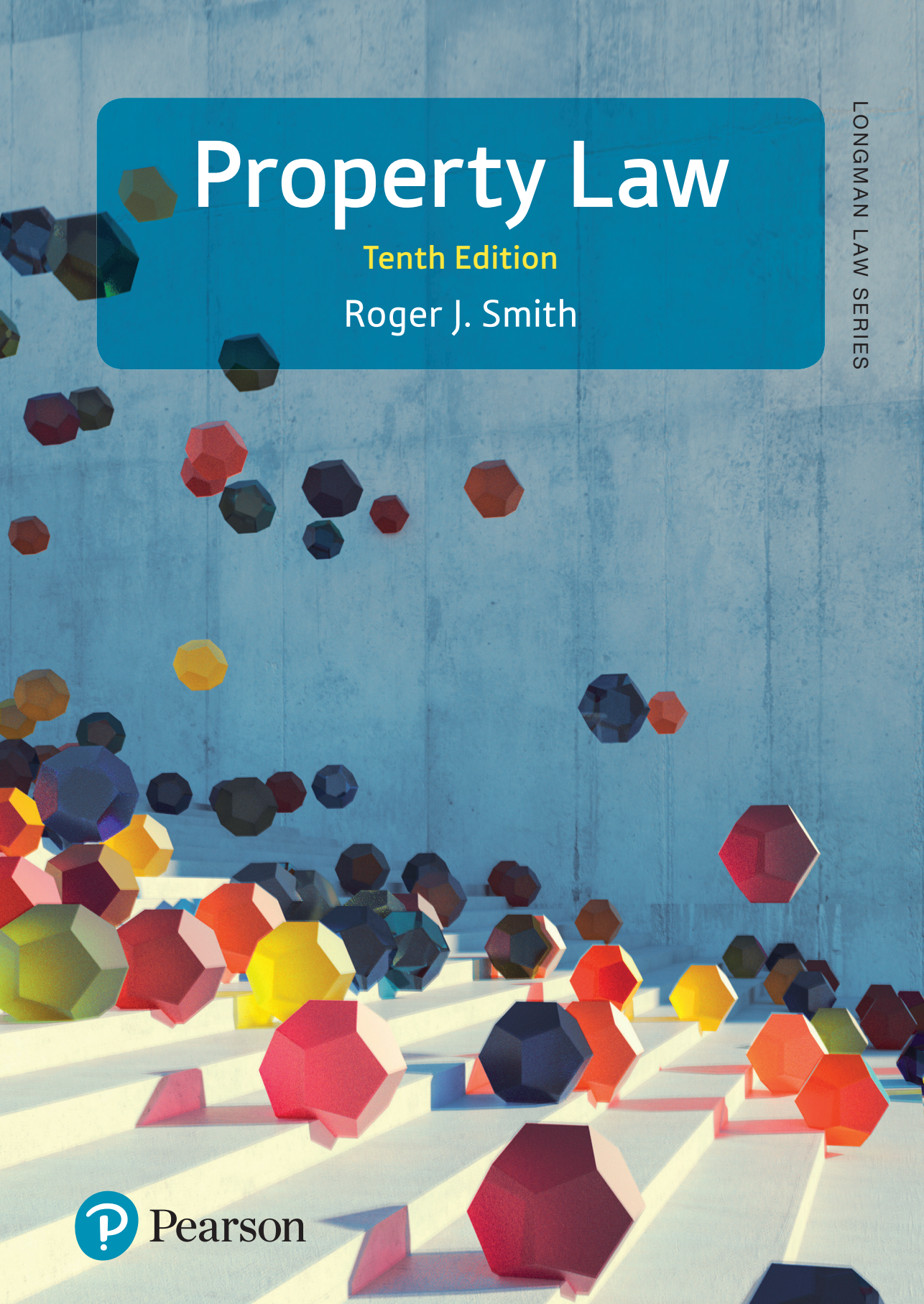
Property Law
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Property Law

To be valid, wills must satisfy special formality requirements. Section 9 of the Wills Act 1837[268] requires that the will be signed by the testator in the presence of two witnesses,[269] each of whom must sign as a witness.[270] Until 1982, it was necessary that the testator sign at the end, but the repeal of this requirement has not solved all difficulties. In *Wood* v *Smith*,[271] the testator commenced his will by writing 'my will by Percy Winterborne'. Although writing one's name in this way can amount to a signature, it is required by s 9 that the signature must intend to give effect to the will. It was held that the writing of the will was a single operation on the facts of the case and that the signature was effective. The Court of Appeal left open the question whether the signature would have been valid if the will had been written on two separate occasions, so that it could not be regarded as a single operation.[272]

The witnessing rules provide traps. In particular, a will is invalid if both witnesses are not present together when the testator signs the will (or acknowledges his signature). Another trap is that a witness (or their spouse)[273] cannot take any benefit under a will. It is, however, possible to avoid this if (most unusually) there are two other witnesses, neither of whom is also a beneficiary.

Wills are revoked by the subsequent marriage of the testator, save where it appears from the terms of the will that it is made in contemplation of marriage to a particular person and it is not intended that the will should be revoked.[274] Somewhat similarly, divorce (or annulment of marriage) has the effect of invalidating provisions in favour of the former spouse. However, in the case of divorce, other provisions in the will remain valid.[275] A will may also be revoked by another will or by 'burning, tearing or otherwise destroying' it with the intention of revoking it.[276]

Merely losing the will does not necessarily invalidate it. In many cases, there will be no record of the contents and the will must necessarily fail. However, it suffices if the terms are known. An obvious circumstance would be where a copy is retained by the testator's solicitors, although a more colourful example is provided by *Sugden* v *Lord St Leonards*.[277] Lord St Leonards, a former Lord Chancellor, lavished such care on his will that he constantly talked about it with his daughter. When he died and the will could not be found, the daughter's recollection of the will was sufficient to render it effective. Her recollection

[268] As amended by the Administration of Justice. Act 1982, s 17. The law relating to wills is reviewed by Law Com CP 231 (2017).

[269] Alternatively, a prior signature may be acknowledged.

[270] Or acknowledge his or her signature in the presence of the testator.

[271] [1993] Ch 90; the will was in fact held invalid as the testator lacked testamentary capacity. See also *Weatherhill* v *Pearce* [1995] 1 WLR 592.

[272] An amendment of an existing will clearly cannot rely on a signature in that will: *Re White* [1991] 1 Ch 1.

[273] Civil partnerships have the same status as marriage for the purpose of the rules for wills: see p. 333 below.

[274] Wills Act 1837, s 18.

[275] Ibid, s 18A (as substituted by Law Reform (Succession) Act 1995, s 3).

[276] Wills Act 1837, s 20. Destroying part of a will may revoke that part: *Re Everest* [1975] Fam 44; *In the Goods of Woodward* (1871) LR 2 P&D 206.

[277] (1876) 1 PD 154. The controversial questions were whether conversations after the execution of the will were admissible as evidence of its contents and whether it should be inferred that the testator had revoked the will by destroying it.

was not perfect, but that was no more significant than if part of a will has been rendered illegible or a codicil (a later supplement to a will) has been lost. In all these cases, the courts will give effect to what does exist.

8. Restrictions upon transfers

This area will be considered very briefly. There are several rules, not of a formality nature,[278] that restrict the effectiveness of transfers, especially gifts. The only area considered in this section is that of bankruptcy.[279] One obvious risk is that a person about to become bankrupt might give all his property to, for example, his wife. If valid, this would defeat the creditors, whilst keeping the property in the family. Several statutory restrictions have been developed to cope with such problems.

Section 423 of the Insolvency Act 1986[280] enables the court to reopen gifts and transactions at a significant undervalue if the purpose was to defeat or prejudice creditors. That provision has no time limit, being based upon the purpose of the transferor.[281] Rather different is s 339 of the 1986 Act. This enables the court to reopen gifts and transactions at a significant undervalue[282] if they have been made within two years of bankruptcy (five years if the transferor was insolvent at the time of the gift). There is no requirement of any purpose regarding creditors. It may be added that preferences shown to creditors are regulated by s 340, without any gift requirement.

Further reading

Bridge, M (2016) 132 LQR 47: The nature of assignment and non-assignment clauses.
Edelman, J and Elliott, S (2015) 131 LQR 228: Two conceptions of equitable assignment.
Hall, J C [1959] CLJ 99: Gift of part of a debt.
Harpum, C (2001) 'Property in an electronic age', in *Modern Studies in Property Law*, Vol 1 (ed E. Cooke), Chapter 1.
Tettenborn, A [1987] Conv 358: Fraud, cross-claims and the assignment of choses in action.
Thornely, J W A [1953] CLJ 355: Transfer of choses in possession between members of a common household.

[278] The Bills of Sale provisions (see p. 119 above) combine some formality elements together with registration requirements. For registration requirements in respect of land transactions, see Chapters 12 and 13.

[279] Another well-known example is that transfers intended to defeat a spouse's rights on marriage breakdown may be defeated: Matrimonial Causes Act 1973, s 37 (purchasers in good faith are protected); similar rules apply to civil partnership.

[280] Replacing earlier legislation. For details, see Miller [1998] Conv 362.

[281] It may therefore apply to a 'precautionary' transfer, despite solvency at the time and no contemplation of an early hazardous transaction. *Midland Bank plc* v *Wyatt* [1995] 1 FLR 696.

[282] For an example in a matrimonial breakdown scenario, see *Re Kumar* [1993] 1 WLR 224. Court orders on matrimonial breakdown will not normally be caught: *Hill* v *Haines* [2008] Ch 412.

9
Formalities: rationale and trusts

Introduction

In the previous chapter, it was seen that legislation often requires writing (sometimes a deed) before a disposition can be effective, especially where land is involved. It is not surprising that there are frequent problems arising from failure to comply with these requirements. The first section of this chapter will consider the reasons for having formality rules. This will help us assess the arguments for and against the development of exceptions by the courts. Resulting and constructive trusts provide major exceptions; these will be considered in the second part of this chapter. The most significant modern use of these trusts (mainly the constructive trust) has been in the context of the family home, where there is a mass of controversial case law. This is the subject matter of Chapter 11. Estoppels provide another particularly significant exception, and they will be considered in Chapter 10. Estoppels and constructive trusts overlap to a considerable extent, and it is debated how far they should be assimilated. This is also considered in Chapter 11.

It should be added that resulting and constructive trusts perform a dual role (as is also true for estoppel). The first is that they may be used to impose obligations where none would otherwise exist. This is not a formality function, but for convenience, aspects of it will be dealt with in this chapter. The most significant aspect of this role is that it governs the holding of interests in the family home, whenever the transfer fails to stipulate the interests of the family members. The second role, of course, is that these trusts enable formality rules to be avoided. Not surprisingly, these roles shade into one another. A good example is the resulting trust. If A contributes to the purchase of property by B, then B will hold the property on resulting trust for A in proportion to the contribution. The resulting trust both confers an interest on A and enables it to be enforced notwithstanding a lack of writing.

1. Reasons for formality requirements

An obvious effect of any formality requirement is that it may defeat the intentions of the parties. This effect must be justified.[1]

[1] The discussion will concentrate upon writing requirements. Other requirements, such as delivery for gifts, play a similar role. They are described by Gulliver and Tilson (1941) 51 Yale LJ 1 at p. 4 as performing a 'ritual function'. See also Howard and Hill (1995) 15 LS 356.

Most of our present rules date back to the Statute of Frauds 1677. As its name indicates, the statute was designed to avoid the fraudulent assertion of contracts, trusts and assignments that in truth did not exist. This purpose is still relevant today, although most commentators believe that the circumstances of the seventeenth century made such fraud infinitely more likely than it is today. It is paradoxical that, when fraud is discussed in the cases today, it is almost invariably the fraud of the person who relies on the lack of writing as a technical justification for denying an obligation.

It is common to explain the purposes of formality requirements as threefold: evidential, cautionary and channelling.[2]

The evidential function may be said to be twofold. First, it makes it clear that an obligation has been undertaken. It is obvious that fraudulent or mistaken assertions of obligations are reduced by a requirement of writing. Next, writing clarifies the terms of the agreement or trust. The problems are not limited to fraud. The parties may have genuinely different impressions of what has been orally promised or whether matters have progressed from negotiation to contract.

The cautionary function is intended to be protective of the promisor. The problem is that people frequently make oral promises that they have not thought through. Indeed, it is a common (and erroneous) public perception that there can never be legal liability without writing. When we require writing, we give the promisor an opportunity to reflect upon what obligations are really intended. This is further enhanced as regards the witnessing requirements for wills[3] and deeds: in these cases, even a hastily prepared written promise is likely to fall foul of the rules.

The channelling function is to persuade people to use standard forms (often utilising professional advice), which will make it clear what sort of obligation is being undertaken and what the detailed terms are. This makes it easier to draft the promise and reduces problems of interpretation and the need to imply terms. Two examples may be given. A will is generally recognised as requiring a special form. It follows that it is rare for scraps of paper to be argued to be parts of a will. Similarly, contracts for the sale of land are normally in a detailed form used by lawyers, dealing with most of the problems that might arise. The use of this form not only makes it clear that a contract really is intended but also renders litigation concerning its performance less likely. Nobody can pretend that writing requirements will always result in the appropriate forms being used, but they do encourage their use.

Whilst the benefits of writing are widely recognised, it is equally widely accepted that injustice would result from too rigid an insistence upon them.[4] Within a few decades of the Statute of Frauds, exceptions had been developed, generally based upon the idea that statutory writing requirements cannot be insisted upon where it would be fraudulent to do so. Otherwise, a statute designed to inhibit fraud on the part of a claimant could be used as a cloak to hide fraud practised on the claimant. A clear example would be if B persuades A to transfer

[2] Fuller (1941) 41 Col LR 799. See also Youdan [1984] CLJ 306; Moriarty (1984) 100 LQR 376 at pp. 398–404. The Law Commission considered that the purposes justified strengthening the formality requirements for contracts to sell land: Law Com No 164, paras 2.6–2.13.

[3] Protection of the testator from undue deathbed influence was an original purpose of the Wills Act 1837, although of little significance today: Gulliver and Tilson (1941) 51 Yale LJ 1 (especially p. 10).

[4] Critchley in *Land Law: Themes and Perspectives* (eds Bright and Dewar), Chapter 20, whilst also identifying benefits extending beyond the interests of the parties.

land to him on the oral understanding that B will hold on trust for A. It would be fraudulent for B to deny the trust obligation. There have been suggestions for more broadly based relaxations of the operation of the rules,[5] but these do not at present form part of English law.

Much of the early case law on these exceptions is based upon what became the law of part performance of contracts, though this will have little, if any, effect after the Law of Property (Miscellaneous Provisions) Act 1989. Resulting or constructive trusts and estoppel constitute the two general principles operating today.

2. Resulting and constructive trusts

The principles of resulting and constructive trusts are of general application within the law; they are not limited to the formalities context. In this section, we will consider only those constructive trusts relating to formalities; there are many other examples of them. The exclusion of resulting and constructive trusts from formality requirements[6] was, it seems, intended to allow them to continue to function. Consider two examples. If A transfers property to trustees without declaring beneficial interests, then there will be a resulting trust in favour of A. In the second example, a trustee obtains, for himself, property that ought to belong to the trust. A constructive trust will be imposed upon him. It was no part of the legislative policy to prevent either trust from being enforced. In neither of them is the trust being employed by the courts as a device to get around the need for writing.

A. Presumption of resulting trust

The presumption of resulting trust[7] (that is, that the beneficial interest results back to the person providing the property or money) provides one way of dealing with the question of who owns land or other property. If A provides £120,000 and B £60,000, but the legal title is conveyed to A alone, then A will hold the legal title on resulting trust for them in proportion to their contributions. Equity has long presumed that an unexplained transfer of property is not a gift but gives rise to a resulting trust.[8] Similarly, the provision of money for a purchase from a third party is seen as giving rise to a trust which attaches to the property bought with the money.[9]

The proposition that a transfer of property to another gives rise to a trust for the transferor does, at first sight, look distinctly odd. Indeed, Hope JA described it as 'completely anachronistic'.[10] One might suppose that a gift is intended when property is transferred to another. Yet some cases do not look like gifts. A transfer of assets to one's solicitor would not normally be intended to benefit the solicitor personally, though this example does

[5] Perillo (1974) 43 Fordham LR 39 argues for enforcement if there is 'clear and convincing' evidence of the promise.

[6] Going back to Statute of Frauds 1677, s 8.

[7] See p. 31 above.

[8] Chambers (2001) 15 *Trust Law International* 26 observes the lack of authority for direct transfers of land before *Lohia* v *Lohia* [2001] WTLR 101.

[9] *Dyer* v *Dyer* (1788) 2 Cox 92 (30 ER 42).

[10] *Dullow* v *Dullow* (1985) 3 NSWLR 531 at p. 535. Mee argues that there is no longer sufficient justification for presumed resulting trusts: [2017] CLP 189.

involve a fiduciary. Further, the presumption comes into its own when considering substantial transfers of property. People do not normally make such transfers without making it plain why they are doing so. Take the facts of *Sekhon* v *Alissa*.[11] A mother gave her daughter £22,500 to enable a house to be bought. The daughter argued that this was a gift and that any obligation owed to her mother was merely a moral one. However, Hoffmann J stressed that the money represented virtually all the mother's savings and found that the true intention was to take part in a commercial venture, her name being omitted on the basis of tax advice. Looking at these factors and bearing in mind that there were two other children, one can see that it would be odd to conclude that there was a gift.

Where family homes are involved, today we employ a constructive trust analysis rather than a resulting trust.[12] However, it remains true to assert that we do not regard contributions to the purchase of a house as a gift. In any event, the presumption of resulting trust is generally of small importance. This is because there will be evidence showing that a gift was or, as the case may be, was not intended. Thus, the facts of *Sekhon* v *Alissa* showed clearly that no gift was intended. Nevertheless, the presumption can be a useful starting point.

(i) *Transfers of land*

One special problem concerns the transfer of land, where it is argued that there is a resulting trust for the transferor. Section 60(3) of the Law of Property Act 1925 provides that 'In a voluntary conveyance a resulting trust for the grantor shall not be implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee.' The reason for this provision is tied in with conveyancing changes introduced in 1925.[13] For many years, its effect was not entirely clear,[14] but in a full review of the area, Nicholas Strauss QC at first instance in *Lohia* v *Lohia*[15] held that s 60(3) ousts the presumption. Perhaps unfortunately, the Court of Appeal did not find it necessary to decide the point and clearly regarded it as open for argument.[16] Although there is a first instance decision[17] asserting that the presumption survives, the point was conceded – the effect of s 60(3) remains unclear! Given the weakness of the presumptions today, it is important only in those rare cases where there is no other evidence as to intentions. In any event, the provision is inapplicable in the more common case where money is provided towards the cost of purchase. In this situation nobody is arguing that the seller of the land (the grantor) has a resulting trust in his favour: it is the contributor who argues that there is a trust.

[11] [1989] 2 FLR 94.

[12] See p. 188 below.

[13] The repeal of the Statute of Uses, coupled with an intention that such words should no longer be necessary.

[14] See *Hodgson* v *Marks* [1971] Ch 892 at p. 933; *Tinsley* v *Milligan* [1994] 1 AC 340 at p. 371.

[15] [2001] WTLR 101. Mee [2012] Conv 307 reaches a similar result but by reference to the operation of resulting trusts.

[16] [2001] EWCA Civ 1691 at [24], [25]; (2002) 16 *Trust Law International* 231; see also *M* v *M* [2014] 1 FLR 439 at [171]–[174]. The analysis of Strauss QC was cited with approval in *Ali* v *Khan* (2002) 5 ITELR 232 at [24], but apparently in ignorance of the Court of Appeal dicta.

[17] *National Crime Agency* v *Dong* [2018] BPIR 477, doubted by Mee [2018] Conv 184.