

## Creation of Express Trusts

Express trusts can be created during the settlor's lifetime (*inter vivos*) or by the testator's will (*testamentary*).

### Consequences of Creating a Trust

Generally, the creation of a trust is irrevocable – once property is vested, where certain intention exists, it is taken as the settlor parting with the property, with a permanent disposition (***Mallott v Wilson***)

- Once a trustee disclaims a trust, the legal title reverts back to the settlor who has to hold it on the terms in the trust (as if a self-declaration trust)

### Right of revocation

A right of revocation must be inserted into the trust deed at the time the trust is created in order for it to be valid.

Per ***Mallott v Wilson***, once an express trust has been created, the disposal of the beneficial interest cannot be revoked by the settlor, unless by the valid exercise of a power of revocation reserved in the trust instrument.

### Essential Components of an Express Trust

An express trust has several components:

- The three certainties:
  - Certainty of ***intention***
  - Certainty of ***subject matter*** (trust property)
  - Certainty of ***object*** (beneficiary/purpose)
- Formalities under PLA s53
- Full Constitution – trustee holds legal title to the trust property – only relevant to trusts by transfer
  - Means title to property has passed from settlor to trustee

### Modern application of the trust

#### Unit Trust

Beneficiaries ('unit-holders') have fixed interest in all trust property and usually right to call for distribution of income attributable to unit and proportionate distribution of proceeds (assets) of trust on termination. It is a popular means of effecting joint investment.

Unit differs from a share in a company – a share is a separate piece of property, whereas a unit confers equitable interest in trust property. It consists of a Manager (usually private company) who purchases property and vests in trustee.

- Trust property divided into shares ('units') – represent investor's entitlement to annual distributions and interest in assets
- Manager sells units to public for market value + service charge
- Additional units may be created

## What kind of trust is it?

	<u>Inter Vivos</u>	<u>In a Will</u>
<p><b>Trust by Transfer</b></p> <p>S sets out terms of trust and transfers obligations to another person (trustee)</p>	<p>Must have:</p> <ul style="list-style-type: none"> <li>• Certainty of Intention</li> <li>• Certainty of Subject Matter</li> <li>• Certainty of Object</li> <li>• Statutory Formalities (if land or subsisting equitable interest)</li> <li>• Constitution requirements</li> </ul>	<p>Must have:</p> <ul style="list-style-type: none"> <li>• Certainty of Intention</li> <li>• Certainty of Subject Matter</li> <li>• Certainty of Object</li> </ul> <p><u>No stat formalities</u> - Assume they're complied with in the Wills Act</p> <p><u>No constitution</u> requirements as it will pass in the Will</p>
<p><b>Trust by Self-Declaration</b></p> <p>Person declares they hold the property on trust for others</p>	<p>Must have:</p> <ul style="list-style-type: none"> <li>• Certainty of Intention</li> <li>• Certainty of Subject Matter</li> <li>• Certainty of Object</li> <li>• Statutory Formalities</li> </ul> <p><u>No constitution</u> requirements as settlor/trustee already 'holds' the trust assets</p>	<p>Must have:</p> <ul style="list-style-type: none"> <li>• Certainty of Intention</li> <li>• Certainty of Subject Matter</li> <li>• Certainty of Object</li> </ul> <p><u>No Stat. Formalities</u> – you can assume they've been complied with in the Wills Act</p> <p><u>No constitution</u> requirements as it will pass in the Will</p>

## Certainty of Intention

We are looking for evidence that the settlor creates a kind of relationship of the kind in law known as a trust. We look at the words of the trust instrument (trust deed) or the words that were used (if oral declaration).

It may be possible to look at extrinsic evidence but this is much less significant after *Byrnes v Kendle* (2011).

We look for:

1. Clarity of Intention
2. Objective Intention
3. Immediacy of Intention

### Rules of Construction

Equity looks to intent rather than form, therefore, no particular form of words is necessary. The court will attempt to construe the language of the settlor according to its ordinary meaning of the words in the context of the overall document. We are looking for imperative words – words imposing an obligation (c.f. permissive words).

### Step 1 – State the following

The onus of proof lies with the party seeking to establish the existence of the trust. The trust comes into effect as soon as intention is formed and is irrevocable unless otherwise provided (*Mallot*).

### Step 2 – Clarity of Intention

- Sufficient certainty of intention for the creation of a trust is required for there to be a valid express trust. The settlor must have indicated, by words or conduct, that he or she intended to create a trust.
- The settlor does not need to use the word ‘trust’ (*Re Armstrong* – bank account in son’s name).
- The court may look at subsequent conduct to read what the intention of the parties was at the time, or to contextualize statements like ‘the money is as much yours as mine’ (*Paul v Constance*)

In *Paul v Constance* it was held that there would be an intention to create a trust, regardless of whether or not the term “trust” is used or the parties are aware of the precise legal nature of a trust, provided there is “an intention to dispose of property so somebody else acquires beneficial interest”.

### Step 3 – Objective Intention

Prior to the High Court decision in *Byrnes*, Australian courts looked at whether or not the settlor had a subjective intention (*Joliffe*) to create a trust. In *Byrnes*, however, the Court unanimously overturned the reasoning of the majority in *Joliffe*, and held that the relevant intention was the objective intention to create a trust.

The judges’ views can be outlined as follows:

French CJ: The relevant intention is that manifested by the declaration of trust. It doesn’t require any further inquiry into the subjective or real intention of the settlor. He agrees with Gummow and Hayne JJ in regards to objective intention.

Gummow and Hayne JJ: Like contract law, the test is not concerned with the real intention of the parties, but the outward manifestation of the parties (objective). While the origin and nature of contract and trust are different, there is no dichotomy between the two.

Crennan and Heydon JJ: Emphasise the importance of looking at the text itself, consistent with contract and constitution law. Often trusts are declared unilaterally, without any intention on behalf of both parties.

#### **Step 4 – Is it Ambiguous and no Trust Deed**

Sufficient certainty of intention for the creation of a trust is required for there to be a valid express trust. The settlor must have indicated, by words of conduct, that he or she intended to create a trust. Can look at extrinsic circumstances in order to resolve ambiguity (*Byrnes*).

As Neave JA pointed out in *Harpur v Levy*, where the words of a deed are ambiguous, an exception to the parole evidence rule allows the admission of extrinsic evidence.

#### ***Extrinsic Evidence***

Extrinsic evidence cannot be used to contradict a *clear manifestation* of an intention to create a trust, unless there are vitiating factors (*Byrnes*). If there is clear writing, then there is no need to go beyond the text. Similarly, if there are clear oral statements of a declaration of trust, there is no need to go beyond what was said.

If there is ambiguous writing or statements, you can look to all surrounding circumstances to help resolve the ambiguity (*Byrnes*).

- This doesn't change the nature of the task
- We are trying to work out what a reasonable person would make of the words in the context of the conduct and surrounding circumstances
- If there is a sham trust or a vitiating factor, we can immediately have regard to extrinsic evidence to prove that

#### ***Sham Trust***

- Sham trusts are transactions which, whilst appearing to be legally effective, are not intended by their parties to have apparent, or any, legal consequences
- Parties asserting that a sham exists must establish on the balance of probabilities that the transaction was artificial and intended to deceive
- Burden of proof on the person arguing that the transaction is artificial
- Essentially an allegation of fraud against parties involved
- Presumption against a document being a sham – document assumed to have its legal consequences unless there is sufficiently strong evidence to go behind the document

#### **Step 5 – Immediacy of Intention**

In order to create a trust, the intention must be to create a trust immediately, as opposed to at some future date (*Harpur*). To purport to declare a trust but to state that it won't come into operation until a later date is inconsistent with an intention to relinquish beneficial interest in the property.

It is therefore necessary to distinguish between the creation of a trust immediately, and the creation of a promise to create a trust in the future (which equity will not enforce).

- If the beneficiary has provided consideration, equity will enforce the trust at the date specified

**WHERE THE TRUST IS TO COME INTO EFFECT ON A LATER DATE, STATE:** In *Harpur*, the Vic CoA (by majority) held that a deed which provided that property would be held on trust as from the "commencement date" did not create a valid trust as it did not express a present intention to create a trust. As Neave JA put it: "To purport to declare a trust, but to state that it will not come into operation until a later date, is inconsistent with an intention to relinquish the beneficial interest in the property from the date of execution of the deed".

### **Intention to create a trust in the context of wills**

Since [X's] will has been validly executed, then it will have complied with all the necessary statutory requirements under the *Wills Act* (section 53 formalities are not required).

In the context of a will, it is clear that the testator intended to dispose of all of their interest in the subject of the will. The issue at hand is whether their intention was to do so by way of trust or some other method. Alternatives include an outright gift, or a gift subject to a condition or a charge. It may even be the case that the testator was only expressing a wish that the person benefits in some way, and did not intend that wish to be enforceable (precatory words – see below).

If there is no clear manifestation of an intention to create a trust, an alternate legal characterization as a gift may be recognised instead. The options per Dixon J in *Countess of Bective*:

1. Trust: The recipient of the gift would be a trustee for the other named party
2. Charge: The recipient takes the gift, subject to a charge
3. Legal or Equitable Condition: Gift is subject to a legally enforceable personal obligation
  - a. By accepting the gift subject to the condition, the donee incurs an equitable duty to person the obligation (i.e. the donees' rights to the property are subject to performance of a condition)
  - b. An equitable condition says that if you get the property, you must do 'A', and if you don't, the person who in favour for it must be done, can sue for performance
    - i. The court will generally try to avoid construing a true condition – since everyone 'loses' if a trust condition is not met due to the forfeiture of property
  - c. We analyse what type of condition it is in light of the proportionality of the condition to the gift (*Gill*)
  - d. Giving all property to one son (of 5) subject to him paying sums to his brother in 2 years is a true condition, due to the centrality of the condition to the gift (*Re Gardiner*)
4. Gift with no condition/restriction/obligation

### **Precatory Words**

Precatory words are words which are not imperative in nature – *wish, desire, hope, confidence, request, recommendation* – that A will benefit B. They only create moral obligations and not binding legal obligations.

The issue is whether the words of *hope, confidence* are merely words expressing a *wish*, or whether they are a command but expressed in a non-imperative fashion. It may be intended to create no obligation on the recipient at all, or it may be intended to create an enforceable obligation.

Precatory words give rise to no more than a moral obligation unless instrument, read as a whole, leads court to conclude intention to create trust.

**TRUST EXISTS** – *Hayes v National Heart Foundation [1976]* – Estate to daughter “on the understanding that she will write into her will, that at her death, these shares are to be sold [and proceeds divided between three charities].”

- “On the understanding” indicated that there was a legal imperative attached to the obligation, which created a trust.

**NO TRUST** – *Dean v Cole (1921)* – Estate left to wife “trusting to her that she will...divide in fair just and equal shares between my children...all such part...of my estate as she may be in the use and enjoyment of.”

- Merely expressed hope that the wife would act in a certain way.

**TRUST EXISTS** – *Cobcroft v Bruce [2013]* – Shares left to wife “to deal with as she in her absolute discretion thinks fit, but otherwise on condition that she ultimately gives those shares or the remainder thereof to my nephews.”

- **Young J** had regard to Dixon J's four categories (below) and held there WAS an obligation imposed on the wife.

- She was subject to an equitable condition (as in **Gill v Gill**) – the money was given beneficially for a specific purpose i.e. she either had to use up the shares during her lifetime or leave them to her nephews. If not, the nephews could sue for enforcement.
  - May read the WHOLE document to understand context.
  - May COMPARE clauses against each other i.e. clause (a) v clause (b) – weaker language tends to imply a moral obligation, not an enforceable obligation.
  - May COMPARE relationships between parties.
    - Testators and settlors generally less keen to impose trustee obligations on close relatives, especially when they are expected to look after the beneficiary anyway (**Dean v Cole**). Daughter in **Hayes** has no relationship with the charities and no reason to give them money unless she had an enforceable obligation.
    - “On the condition” is stronger language than “trusting to her that”.

Examples of precatory words:

- Estate left to wife ‘trusting to her that’ she would divide among the children (**Dean v Cole**)
  - This simply expresses a confidence/hope or expectation that she will do this
- Residuary estate left to wife in the ‘fullest confidence’ that she would leave certain property to their daughter upon her death (**Re Williams**)
  - There is a lack of imperativeness in the language used – not enough to give rise to a trust
- ‘Feeling confident that she will act justly to our children’ (**Mussourie Bank v Raynor**)
- ‘It is my express wish that...’ (**Re Alston**)
- Gift of shares made on ‘the understanding that’ she leaves them in her will to three charities (**Hayes v National Hear Foundation**)
  - ‘On the understanding’ is enough to create a legal imperative, which in this case amounts to a trust
- Testator wrote in letter ‘look after her when I am gone’ – usually precatory words (**Chang v Tijong**)