

PRINCIPLES OF TRUSTS
EXAM NOTES
(TRIMESTER 2, 2017)

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Key players:**Settlor: creates the trust**

If the trust is created by will, the settlor will also be the testator.

The settlor generally drops out of the picture, unless:

- The trustee declares themselves trustee (e.g. From this point on, I own my house on trust for my children);
- The trustee is a beneficiary (has an equitable interest in the trust property); or
- Retains a power to revoke the trust.

Beneficiary: receives the benefit of the trust property

- Can be more than one or more person (including non-natural person) or can be an object.
- Charitable trusts: the charitable purpose takes the place of individual beneficiaries.

Trustee: holds the title to the trust property

- The trustee may be an individual or a body corporate.
- No minimum number of trustees; max. number is four.
- The trustee may also be a beneficiary, but cannot be the only beneficiary.
- A trust will terminate when one person becomes the sole trustee and beneficiary.

Types of trusts:**Key difference:**

- The difference between these trusts is the intention.

Express trusts:

- Settlor has an intention to set up a trust.
- Intention may be expressed orally or in writing.
- Relevant intention is to benefit another.

Resulting trusts:

- Arises by operation of law.
- RTs depend on negative intention.
- Arise where person did not intend to benefit party now holding property.

Constructive trusts:

- A CT is imposed regardless of the intention of the parties.
- Imposed where it would be unconscionable for party holding property to assert ownership.
- Wide variety of applications.

Time of creation:**Two types:**

- **Intervivos trust:** created during settlors' life.
- **Testamentary trust:** Created by will of testator, comes into effect on death.

Who benefits:**Private express trusts:**

- Established for the benefit of private individual/s

Public express trusts:

- Benefit for the public, or sections of the public
- For example: **charitable trusts**.

Nature of the beneficiaries' interest:**Fixed trusts:**

- **Settlor decides who gets what**, trustee has not discretion.

Discretionary trusts:

- Gives the trustee the choice to select among a class of beneficiaries.
- The trustee decides the share that each beneficiary will receive.
- But the trustee must distribute the trust property.

Express trusts:**Valid express trusts:**

Four requirements:

1. **Three certainties** (intention, subject matter and object);
2. Compliance with any relevant **statutory formalities**;
3. Properly **constituted**; and
 - Properly transferred; or
 - There must be consideration; or
 - The trust must be created by declaration.
4. Additionally, a trust will fail if it is void for illegality.

What happens if a trust fails?

- **Unless each and every element is satisfied, the trust will fail, or at least be unenforceable.**
- **If trust by declaration fails**, the settlor remains owner of the property.
- If trust by transfer fails:
 1. If the property has been transferred to trustee, trustee holds it on RT for settlor or settlor's estate
 2. If the transfer itself has failed, settlor continues to hold property.

Forms of trusts:**Different forms of express trusts:**

- Intervivos v testamentary;
- Self-declaration v transfer;
- Fixed v discretionary; and
- For persons v for a purpose.

Brief overview:

- Need to establish the three certainties, must be validly constituted and satisfy the formalities.
- If not validly created it will be held on RT trust for his [settlor/settlor's] estate.

**Certainty of intention –
assess whole deed and
examine each clause:**

Look at the circumstances of the case to determine if there is an intention to create a trust

Step One: Preliminaries

- Intention is positively required because the Settlor is giving away all his interest and puts very onerous obligations on the Trustee
- Unless expressly provided, a trust is an irrevocable disposition of property (**Mallot v Wilson**)
- If no certainty of intention the trust will fail

Step Two: Intention – objective

- Settlor must have shown an objective intention to create a trust (**Byrnes** overturned subjective approach in **Joliffe**)
- **It can be created words or conduct** (orally or written – must be written in cases of land)
- Note: Subjective intention is still relevant where there are grounds to challenge the transaction – vitiating factor or sham (**Byrnes**, Heydon & Crennan JJ).

If there is a trust deed and unambiguous:

- Note the focus of the question, state unambiguous and move on.
- **Byrnes**: The opening language of the deed described it as a trust twice.
 - Clause 1 (a key operative provision) used the language of trust
 - The surrounding circumstances affirmed the creation of an intention to create a trust

If ambiguous (eg no trust deed – just words):

- Look to surrounding circumstances (**Paul v Constance**)
- You do not have to use the word 'trust' to establish a trust (**Re Armstrong**).
- Settlor does not even need to realise they are creating a trust (**Re Armstrong**).
- **Look for specific intention to benefit a third party** (**Re Armstrong**):
 - He wanted to benefit his sons by putting his money in a long-term deposit as recommended by bank manager.
 - There was a clear intention to benefit his sons.
 - Presence of names on receipts – showed intention.
 - He put the money in a separate account.
 - George was the beneficiary and his sons were the remaindermen once he died, as the income would go to them.
- **Words used by the parties** (**Paul v Constance**):
 - 'The money is as much yours as mine'
 - Held, husband held the money on trust – half for himself and half for her (not married at time).
 - Both has access to the account even though it was in the husband's name.
 - Husband was acting as though the money was both of theirs.
 - Husband did not have to be aware of the precise legal nature.
 - Look to the behaviour over a number of years.
 - Written evidence showing trust, intention doesn't matter
- **Continued below...**

Certainty of intention –
assess whole deed and
examine each clause:

– **Other factors:**

| Indicating intention: | Against intention: |
|--|---|
| <ul style="list-style-type: none"> – Trust drafted by a professional – Settlor inexperienced and would not know mandatory language needed, and there was no obligatory wording elsewhere in the trust – Family dynamic (Chang) – Trust by transfer – act of transferring property to T evinces an objective intention to create a trust. | <ul style="list-style-type: none"> – Precatory terms – Other clauses use strong language (Dean v Cole) – S was experienced in trusts and knew obligations were required – Drafted by solicitor and did not use the term 'trust' or used permissive language – Vague language suggests no intention to create a trust (Dean v Cole) – If subject matter of trust uncertain (Mussoorie) |

– **Precatory words:**

| Mandatory words: | Precatory words: |
|--|--|
| <ul style="list-style-type: none"> – 'Upon trust' (Byrnes) – 'On the understanding that' (Hayes) – 'Look after her after I am gone' (Chang) – 'Provided that' – 'On condition that' | <ul style="list-style-type: none"> – 'Trusting to her' (Dean v Cole) – 'Absolutely in the fullest confidence she will carry out wishes' (Re Williams) – 'Feeling confident that' (Mussoorie Bank) |

– **Construing contractual terms (Kordo v Southern Australian):**

- On the basis of the documentation, it did not support the existence of a trust
- Fiduciary duty won't change the terms of the contract either expressed or implied
- A trust will only be applied if it is the most appropriate legal mechanism

Step Three: Intention must be immediate

- Intention to create trust must be immediate (unless consideration given) (Harpur – reference to 'commencement date' showed no present intention)
- A trust can take effect immediately even though the beneficiaries' enjoyment of property under the trust is deferred.

Step Four: Other options if not trust

- A person may give a gift which imposes an obligation but is not necessarily a trust.

X may argue that Y did not intend to create a trust, rather intended to create – (per Dixon J, Countess of Bective):

1. No obligation – gift; or
2. Gift with equitable condition; or
3. Gift with trust legal obligation (eg payments); or
4. Equitable charge.

Gift with precatory words – no obligation:

- Look for precatory words, consider this re other clauses.
- continued below...

**Certainty of intention –
assess whole deed and
examine each clause:**

Gift with equitable condition:

- Equitable condition, attaches to the property but does not take the property away.
- May be liable to pay compensation or specific performance depending on the condition attached.
- **Cobcroft v Bruce**: 'my shares in public companies to deal with as she in her absolute discretion sees fit, but otherwise on condition that she ultimately gives those shares to my nephews'
 - Could not be a legal condition, can only be enforceable in equity.
- **Gill v Gill**: An equitable condition creates personal rights against the relevant party, they do not lose the benefit of the gift.

Gift with trust legal obligation (Re Gardiner):

- If there is a legal obligation, if you do not fulfil the obligation then you will lose the property.
- The legal condition (\$1000) was a prerequisite.
- Time limit was important, indicates that this was a condition of his receiving the property.
- Matter of construing the words, nature of the parties and circumstances in determining if it is a legal or equitable condition.

Equitable charge (Gill v Gill):

- Father left farm to his son on the condition that he allow his three sisters to live in part of the farmhouse as long as they remained unmarried.
- Transfers of property which are subject to obligations being fulfilled to third parties will ordinarily be viewed as equitable charges.
- An equitable condition creates personal rights against the relevant party, they do not lose the benefit of the gift.
- The conditions were said to impose a personal obligation on the son to provide accommodation to his sisters.
- Necessary to take into account the type of property and the nature of the obligation.
- Unlikely father wanted son to lose the farm, obligation could be met by the son paying compensation to his sister.

Step Five: Conclude

- Conclude whether it is a trust.
- **If intervivos trust**, state if it is a trust by self-declaration or trust by transfer:
 - **Trust by declaration**: S already holds the property and declares himself T of it for another person.
 - **Trust by transfer**: S transfers property to a T to hold the property for B.

Summary:

- Once a trust is created, it is irrevocable.
- No certainty of intention means the trust will fail and be unenforceable.