

# LAWS 5103

## Equity & Trusts



SAMPLE EXTRACT

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## Certainty of Intention

### General:

- ❖ Burden of proving intention on the person alleging a trust (*Herdegen* (1988) HCA).
- ❖ A trust & a debt may co-exist (*Barclays Bank v Quistclose* [1970] UK).
- ❖ Intention may be inferred from nature of transaction and whole circumstances (*Trident* (1988) HCA).

### NO FORMAL WORDS REQUIRED

- ❖ *Re Armstrong* [1962] Vic – GA followed bank manager suggestion of investing money in fixed deposit so that when it matures after his death the principal sum would go to his sons but he would receive the interest in his lifetime, receipts issued reading ‘GA in re WJA’ & ‘GA in re BA’, issue whether he needed to use the words of a trust. Held: **no words are necessary provided there is an intention to create (word trust is not necessary for creation)**, GA intended to retain the choses in action (therefore not a gift), GA’s **intention evidenced by the names of the sons on the receipts & statement to the bank manager** that he wished to create a fund for the benefit of his sons.
- ❖ *Paul v Constance* [1977] UK – C & P lived to all appearances as man & wife, went to the bank together & C told the bank manager he wanted to open a joint account but was refused, clear intention that C wanted P to have access (‘the money is as much yours as it is mine’), no formal words used in an effort to create a trust, Mrs C claimed the money in the account (no will; legal heir), issue whether C held money on trust for himself & P. Held: **no formal words required, only need to look at all of the circumstances** (C unsophisticated & unlikely to use words of a trust; withdrawal of money for C and P together, statements to bank manager, relationship with P), using the words C had done something equivalent to declaring himself a trustee, trust created & therefore P’s half not included C’s estate.

### OBJECTIVE APPROACH

- ❖ *Joliffe* (1920) HCA – issue whether money held on trust for Mrs J. Held: use of the word ‘trust’ or ‘trustee’ does not necessarily indicate creation of a trust, Mr J’s intention was to generate more interest & not to benefit Mrs J, trust not imputed (decision motivated by the fact that many persons were opening more accounts for the same purposes as Mr J at the time).
  - Isaacs J (dissent): argued Mr J should not be able to use evidence of secret intention, unless no express declaration of trust [**it is now suggested Joliffe should be limited to bank accounts**].
- ❖ *Byrnes v Kendle* (2011) HCA – issue whether K held property on trust for B. Held: K had manifested an objective intention to create a trust (mental reservations irrelevant). Gummow & Hayne JJ: question is **what is the meaning of what the parties said, not what they meant to say** [**focus on presence of the word ‘trust’, rather than the conduct of the settlor**].

### WORDS CANNOT BE PRECATORY

- ❖ Words of prayer, entreaty, recommendation, desire or hope are used = trust or a beneficial gift to donee coupled with non-binding expressions of desire/hope (Jacobs).
- ❖ If precatory words used it is necessary to determine intention to create legal or merely moral obligation.
- ❖ Courts construe Will as a whole (if suggests a trust intended, then no need to analyse precatory words).
- ❖ If precatory, then absolute gift (no obligation to use money in direction).

#### Examples:

- ❖ I give \$100K to X to be used by them for the maintenance/education of their children (likely a trust due to imperative language “to be used” & lack of precatory words).
- ❖ I give \$100K to X & it is my will & desire that she use this money for the maintenance/education or her children (could go either way, precatory likely but “will” could be considered imperative).

#### Case Law:

- ❖ “Absolutely, in the fullest confidence that she will carry out my wishes”
    - Re Williams [1897] UK – testator bequeathed residue of estate to his wife to pay all premiums on her own life insurance policy & leave proceeds of her policy & his to their daughter, she bequeathed his to the daughter but her policy to someone else. Held: wife took the policy free from any obligation (language only **precatory**), ‘confidence’ language likely to indicate an intention but countered by “absolutely” as it means to give the property to the wife).
  - ❖ “It is my express wish”
    - Re Altson [1955] – Will written by lawyers, used professional language indicating a trust in many clauses, but commercial properties were to be leased to NS as her ‘express wish’, concern arose that if they granted the lease in this way it would diminish the rights of the residual beneficiaries (due to low rent). Held: **precatory** words created a bare power, discretion to create a lease (not mandatory), professional nature of the Will played an important part in analysis, **if an intention to create a trust power (obligatory) then the same professional language would have been used, as it had not then there was no intention inferred).**
  - ❖ “Feeling confident that she will act justly to our children in dividing...when no longer required by her.”
    - Mussoorie Bank v Raynor (1882) – testator gave whole of real & personal estate to his widow. Held: **‘no longer required by her’ indicated no trust** (discretion; took the property **absolutely**) & the subject matter of the trust was uncertain).
  - ❖ “To be at her disposal in any way she may think best for the benefit of herself & family”
    - Lambe v Eames (1871) – testator gave all of his estate to his widow. Held: widow took the property **absolutely**; subject matter of the trust was unclear).
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# Formalities

## METHODOLOGY

1. What is the type of property?
2. What is the nature of the interest?
3. What is the appropriate subsection of PLA s34(1)?
4. Have the statutory requirements been complied with?

### PROPERTY LAW ACT 1969 (WA) s34(1)

- ❖ No interest in land is capable of being created or disposed of except by writing (a).
- ❖ Declaration of trust respecting any land shall be manifested & proved by writing (b).
- ❖ Disposition of an equitable interest subsisting at the time of disposition shall be in writing (c).

	PLA s34(1)(a)	PLA s34(1)(b)	PLA s34(1)(c)
<b>Transaction</b>	Creation or Disposition.	Declarations of Trust.	<p>Disposition (not creation).</p> <ul style="list-style-type: none"> <li>PLA s7 (not helpful).</li> <li>Given natural ordinary meaning (<i>Grey v IRC</i> [1960]; Lord Reid).</li> </ul> <p>Methods (<i>Comptroller of Stamps</i> (1936); Dixon J).</p> <ul style="list-style-type: none"> <li><b>Self-declaration of trust</b> (bare sub-trust).</li> <li><b>Transfer/assignment</b>.</li> <li><b>Direction</b> (not a revocable mandate).</li> </ul>
<b>Property</b>	Land only.	Land only.	<p>Land &amp; Personalty.</p> <p>(<i>Grey v IRC</i> [1960]; <i>Baloglow v Konstantinidis</i> [2006]).</p>
<b>Interest</b>	Legal & Equitable ( <i>Adamson v Hayes</i> (1973) HCA)	Legal & Equitable.	<p>Subsisting Equitable.</p> <p>(split from legal estate and/or exists separately from legal estate prior to disposition (<i>Grey v IRC</i> [1960])).</p>
<b>Writing Requirement</b>	Writing required to affect the creation/disposition (void if not in writing).	<p>Must be manifested in writing (can be created orally but requires writing to enforce).</p> <ul style="list-style-type: none"> <li>Oral evidence can clarify terms; not augment them (<i>DSS v James</i> (1990)).</li> <li>Can be made post-declaration (<i>Rouchefoucauld</i> [1887]; <i>Benjamin v Leicher</i> (1998)).</li> <li>Evidence may be a single or combination of documents read together.</li> </ul>	Writing required to affect the creation/disposition (void if not in writing).
<b>Signature</b>	Settlor or Agent (authorised in writing).	<p>Settlor (person who can declare trust).</p> <p>Trustee (<i>Hagan v Waterhouse</i> (1992) NSW).</p>	Settlor or Agent (authorised in writing).

**IF BOTH (A) & (B) APPLY, THEN (B) APPLIES TO THE EXCLUSION OF (A)**  
(B would have no purpose if A were to apply) (*DSS v James* (1990) FCA).

**TRUST TERMS, PROPERTY & BENEFICIARIES MUST BE ASCERTAINABLE FROM WRITING.**

### **NON-COMPLIANCE**

- ❖ If required formalities not complied with the trust will be:
  - **Void if s34(1)(a) or s34(1)(c) is required.**
  - **Unenforceable if s34(1)(b) is required.**
- ❖ Exceptions to the need to comply with requirements.
  - Creation/operation of resulting or constructive trusts (PLA s34(2)).
  - Part performance has occurred.
  - Interests in land created/disposed of by will.
  - Strict compliance would allow the statutory provision to be used as an instrument of fraud.

### **TESTAMENTARY TRUSTS**

- ❖ Maker has the necessary state of mind.
  - ❖ Maker satisfies any requirements of minimum age.
  - ❖ Maker satisfies any relevant requirements as to form (i.e. statutory formalities).
    - *Wills Act 1970* (WA) s8.
      - Must be in writing.
      - Signed by testator at the end (or by another person in their presence/direction).
      - Signature made/acknowledged in presence of min 2 witnesses at the same time.
    - *Wills Act 1970* (WA) s34 = court can apply less strictly & admit to probate where the court is satisfied (BRD) that the intention of the maker was that the instrument was to be their will/codicil despite not being executed in complete conformity with statutory requirements.
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# Complete Constitution

## ONLY APPLIES TO TRUST BY TRANSFER

- ❖ Executed when the title of trust property has been completely & irrevocably transferred to the trustee.
- ❖ Settlor bound if the trust has been completely constituted or consideration has passed to the settlor.
- ❖ Completely constituted = any beneficiary may enforce even if no consideration (*Ellison* (1802) UK).
  
- ❖ Complete constitution is an issue here as transfer of property needs to occur.
  - Three certainties must be met.
  - Statutory formalities must be met.
  - Trust must be completely constituted.

## CASE LAW

- ❖ *Milroy v Lord* (1862) UK – Medley executed voluntary deed purporting to assign 50 shares in LB on trust for M, constitution of LB said shares could only be assigned by transfer registered in their books (not done), L held share certificates & PoA from Medley authorising him to execute a transfer of the shares (L only agent; Medley had not directed him to use PoA to transfer shares), Medley lived for 3 years after executing deed (dividends received by L & remitted to M during this time). Held:
    - **Court will not hold the transfer to operate as a declaration of trust if intended to take effect by transfer** (an imperfect assignment will not be held to be a declaration of trust).
    - **Transferor must use appropriate mode of transfer according to nature of the property:**
      - A gift will be effective at law if all CL & statutory requirements are met.
      - A gift will be effective in equity if donor has done everything necessary to be done by them so that the donee has been equipped to achieve transfer of legal ownership.
  
  - ❖ *Anning* (1907) HCA – WA executed deed of gift conveying all property to wife & 5 children before he died (leased land from Crown, promissory notes, debt with mtg, chattels), nothing more done to assure property to donees. Held: deed fails on assignment of everything except bank deposits & book debts.
    - Isaacs J: donor must ensure that all necessary acts are done irrespective of who can do them.
    - Higgins J: donor must do those acts which it is possible for him to do.
    - Griffith CJ: **donor must do only those acts obligatory for them to do & no-one else.**  
[subsequent authorities prefer the view of Griffith CJ] (*Corin v Patton* (1990) HCA).
  
  - ❖ *Corin v Patton* (1990) HCA – Mr & Mrs P were JTs of Torrens land, Mrs P terminally ill & executed 3 documents (transfer of her interest; deed in which C declared he held interest as TiC with Mr P on trust for Mrs P; Will leaving estate to her children equally), transfer not registered prior to Mrs P's death, CT with mtgee & Mrs P had taken no steps to arrange for its production or to authorise C to apply for its production to enable registration. Held: Mrs P had not done everything necessary to effect a transfer.
    - Mason CJ & McHugh J: **if an intending donor of property has done everything which it is necessary for them to have done to effect a transfer of legal title equity will recognise the gift, provided the donee has been equipped to achieve the transfer of legal ownership.**
    - Deane J: donor must have done all that is necessary to place the vesting of the legal title within the control of the donee & beyond the recall/intervention of the donor.
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**LEGAL & EQUITABLE REQUIREMENTS**

	<b>Land (unregistered)</b>	<b>Torrens Land</b>	<b>Chattels (passing by delivery)</b>	<b>Shares</b>
<b>Legal</b>	Deed (PLA s33(1)) or by writing & signed if by parol (PLA s34).	TLA s82. <ul style="list-style-type: none"> <li>Validly executed instrument (signed by settlor &amp; tfree in registerable form).</li> <li>Access to CT.</li> <li>Registration.</li> </ul>	Deed of assignment & physical delivery with intention to convey ownership.	<i>Corporations Act.</i> <ul style="list-style-type: none"> <li>Validly executed share transfer form (signed by settlor &amp; tfree).</li> <li>Registration by company in their share register</li> <li>Share cert issued to tfree.</li> </ul>
<b>Equitable</b>	Settlor must deliver executed deed of conveyance to tfree.	Settlor must deliver validly executed instrument to tfree & authority to use CT for registration ( <i>Corin v Patton</i> ).	Deed of assignment or physical delivery ( <i>Anning</i> ).	Validly executed share transfer form (no delivery necessary) ( <i>Corin v Patton</i> ).

**EXCEPTIONS ALLOWING ENFORCEMENT****Rule in *Strong v Bird* (1874) UK**

- ❖ **A must have intended to make an inter vivos gift of specific property to B.**
- ❖ **A's intention to make the gift must have continued until their death.**
- ❖ **B becomes executor of A's will.**
- ❖ Onus on B to establish (if satisfied, B is entitled to hold the property for their benefit (equitable claim)).
- ❖ Applies where there are two donees & only one is appointed executor (*Blackett* (2005) NSW).  
[uncertain application to purported gifts of land in Australia (*Cope v Keene* (1968) HCA)].

**Gifts in Contemplation of Death (*donation mortis causa*):**

- ❖ Vests title in the donee immediately (provided the donor's death occurs soon after).
- ❖ Until death of the donor, the gift is defeasible; can be gifted through an agent of the donor.
- ❖ Requirements for validity (*Sen v Headley* [1991] UK).
  - Gift must be made in contemplation (not necessarily expectation) of death.
    - Sufficient if suffering from an illness that may prove fatal (*Dufficy v Mollica* [1968]).
  - Gift must be made on condition that it is to be absolute & perfected only upon death of donor.
  - Deliver subject-matter amounting to parting with dominion (not mere physical possession).
    - Handing over car keys sufficient if unequivocal (*Woodard* [1995] UK).
  - Query application to land [issue of Torrens land in Australia, may apply to general law land].
- ❖ *Dufficy v Mollica* [1968] NSW – P gave neighbour keys to safe deposit box & house prior to being hospitalised, M (sister) visited P & confirmed she had keys, P told M there was money in house & 'she might as well have it', M found money in house & box. Held: M entitled to money in house (**dispositive intention**), M not entitled to box because no clear evidence of dispositive intention.

**Estoppel.**

**Unconscionability** (*Pennington v Waine* [2002] UK) [not currently accepted in Australia].

**Consideration** (if trust declared but settlor not divested of trust property, then incompletely constituted & operates merely as agreement to create trust; if settlor promises to create, then enforceability depends on law of contract; if a party to the promise has given consideration for the promise, then they may enforce it)