Trusts

A trust is essentially the separation of legal and equitable ownership - a relationship that involves holding property for the benefit of another.

The trust is an equitable obligation, binding a person (the trustee) to deal with property (trust property) owned by him, as a separate fund, distinct from his private property for the benefit of a third party

Elements of the trust:

1. **Trustee:** This person has the legal title to the property, can be an individual or a corporation, the trust will not fail for want of a trustee as you can reappoint. However there needs to be property that is vested in a trustee.
2. **Trust Property:** Property which is capable of being held on trust – must be vested in the trustee and it must be identifiable. Must be existing and not conditional – can be real/personal and corporeal or incorporeal *if it does not have certainty of subject matter it will fail*
3. **Must be a beneficiary or a charitable purpose:** There must be a beneficiary or a charitable purpose – as there must be someone who can enforce the trust. Without a beneficiary you cannot have a trust. Can be:
   - A designated class
   - A fixed interest beneficiary

   The Attorney-General will enforce charitable trusts. The beneficiary can be a designated class, does not have to be born but must exist or have a purpose defined as a charity.
4. **Trustee must be under a personal obligation which attaches to the trust property:** there must be a duty attached to the property, attaches to the trustee in personam but also to the property and confers an equitable interest upon the beneficiary
5. **Intention:** Settlor must intend to create a trust, and to separate legal and equitable title; intention can be manifested through writing/deed/conduct
6. **Complete Constitution:** Trust property must be vested in the trustee
   - If the express trust is by transfer this means compliance with legal requirements for transferring ownership of the trust property to the trustee
   - Settlor will usually disappear but may reserve powers to direct trustees in the exercise of their discretion: see foreign trust examples
7. **Defined beneficiaries:** Beneficiaries under an express trust must be defined (both individually or via a defined class); if the trust supports a purpose rather than beneficiaries the purpose must come within the definition of a charity
8. **Duties:** Trustee holds fiduciary duties and additional duties

- Is exists only in the equitable jurisdiction
- Separation between legal and equitable ownership; i.e. land, trustee is registered proprietor, there is an agreement that the trustee is to look after the land for two children X and Y, pay any income from the land etc. so the trustee is legal owner subject to a clause, the children are the equitable owners.
- Trustee is the highest in the equitable hierarchy of duties; all trustees are fiduciaries not all fiduciaries are trustees
- In circumstances where an equitable interest is held on trust the trustee with have legal ownership of equitable property.
- The property in equity is generated by the creation in a duty – whatever the trust property is **will always have separation between legal and equitable ownership**

Legal Ownership	Equitable Ownership
• Title, subject to the trust agreement • Trustee is the registered proprietor • Exclusive possession • A trustee can have legal ownership over equitable property	• Entitled to the property at the stipulated point in time but until then do not have legal ownership • May be entitled to income from land etc.

TRUSTEE DUTIES

Duty to act with reasonable prudence	T must act reasonable care with respect to management and administration of trust. 1. A T must act – cannot just do nothing i.e. not invest funds and allow them to dwindle *s. 5 Trustee Act* 1958 (Vic) 2. Must be reasonable – this will be decided on all elements of the party's relationship *Attorney-General Cth v Breckler* 3. Prudence – cannot act in a risky manner as you might with your own money; must look after the money *Bartlett v Barclays Bank Trust Co Ltd (No 1)* 4. Discretion – this may be impugned where it is not exercised reasonably and with care i.e. irresponsibly Standard for a professional T is higher *Speight v Gaunt*
Duty to act in the best interests of the beneficiary	Look after the property in best interests of B can be: a. Financial *Cowan v Scargill*, with respect to superannuation will always be financial and court will be v. stringent *Finch v Telstra Super Pty Ltd* b. Other factors *Cowan v Scargill*, Must not consider their own OR others interest.
Duty to keep trust funds separate	Must ensure trust funds are kept separate; usually involves: 1. Separate bank account 2. Separate financial and accounting records If T mixed their funds with trust fund assume T spent their money 1st
Duty to act gratuitously	Must act gratuitously **without remuneration;** duty to avoid profit *Avliffe v Murray* EXPECTIONS 1. Professional trustee with: a clear agreement between T and B 2. Court order approving remuneration i.e. where administering the trust is complex/timely. Focus here is on 'just and reasonable' **TRUSTEE ACT 1958 - SECT 77**
Duty to invest in authorised securities	Extension of the duty to act with reasonable care 1. The T must, unless otherwise directed, invest funds *Byrnes v Kendle* 2. Must invest diligently *Nestle v National Westminster Bank* Modern portfolio theory provides guidance for this: diversify investments, minimize admin costs
Duty not to purchase trust property	1. T must not purchase trust property; constitutes a breach of fiduciary duties *Keech v Sandford* and a conflict 2. T must avoid a conflict of interest – not purchase trust property *Chan v Zachariah*
Duty to allow beneficiaries access to trust documents	T must provide beneficiaries access to all documents which relate to the general administration of the trust *Re Londonderry's Settlement*. There are two positions here: **Proprietary rationale – STRONGER** *McDonald v Ellis:* Fixed beneficiary: access Remainder interest ben: access Object of discretionary int: No access **Court rationale:** *Schmidt v Rosewood Trust Ltd* Fixed beneficiary: access *Breen v Williams* Remainder interest ben: access Object of discretionary int: May have an interest sufficient for access. *Schreder v Murray*

TRUSTEE ACT 1958 - SECT 5
Investments of trust funds
A T may, unless prohibited by trust deed
a. invest trust funds in any form of investment;
b. vary an investment at any time.

TRUSTEE ACT 1958 - SECT 6
Duties of T in respect of investment
1. Subject to trust deed a T must,
a. If a professional T: exercise care/ diligence/skill a prudent professional trustee would
b. If not professional: exercise care/diligence/skill a prudent person would in managing the affairs of another.
3. Must review the performance of trust investments at least annually.

TRUSTEE ACT 1958 - SECT 8
Outlines the factors a T ought to have regard to when using their trust power:
a. purposes of the trust and needs/ circumstances of beneficiaries;
b. desirability of diversifying trust investments;
c. nature/risk associated with trust investments and trust property;
d. need to maintain the real value of the capital/income of trust;
e. risk of capital/income loss/depreciation;
f. potential for appreciation;
g. likely return and the timing of return;
h. length of term of investment;
i. probable duration of trust;
j. liquidity/marketability of proposed investment during/after term of proposed investment;
k. aggregate value of trust
l. effect of the proposed investment
m. likelihood of inflation affecting value of proposed investment
n. costs of making the investment;
o. results of a review of existing trust investments

DEFENCE OF ACTING IN HONESTLY AND REASONABLY

1. Trustee acted honestly and reasonably
   a. Honestly; in good faith and for the welfare of trust on facts *Re Allson*, not fraudulently *Wilden Pty Ltd v Green*
   b. Reasonably; on facts, was trustee paid *Pateman v Heven*, has T relied on advice of others *NSW Masonic Youth*
2. Ought to be excused for the breach; on facts *spellson v George* must not cause prejudice against beneficiaries *Hagan v Waterhouse*
3. Ought to be excused for not obtaining court directions – **TRUSTEE ACT 1958 – SECT 63**

Certainty requirements for express trusts

The certainty of intention

Intention means that specific language i.e. references to trusts, trustees or beneficiaries, is unnecessary. The word ‘trust’ itself does not create a trust. The party alleging the existence of a trust bears the burden of proof.

The question here is does the writing itself reflect the intention to create a trust.
The words used by the settlor must unequivocally point towards an intention to create a trust.

Is the Court likely to find a trust exists?	
Yes	**No**
1. What kind of language did the settlor use?	
The use of mandatory words i.e. will or must Must also be unequivocal	The use of precatory words i.e. wish, hope, desire, trust *Jones v Lock*
2. What kind of setting is the statement made in?	
A business situation	A domestic situation *Paul v Constance*

Indicative elements:

- Knowledge of the law of trusts is not a requirement
- The nature of the intention is however important, vests others with interests in or an entitlement to benefit from specific property
- Focus on mandatory words
- Are the funds held separately? *Korda v Australian Executor Trustees SA*
- Should be in a legal context not a domestic i.e. not at a dinner party

KORDA AND BARCLAYS BANK/QUISTCLOSE ARE CONTROVERSY; IS THE FACTUAL SITUATION A KORDA OR A QUISTCLOSE?

Korda v Australian Executor Trustees SA

- Trustee of an investment scheme argued that a trustee deed should limit the interests of investors to those proceeds from the scheme that were transferred to the trustee.
- VSCA upheld decision of trial judge – that the partied intended the proceeds from timber sales to be held on trust for investors who applied for covenants issued through a prospectus, subsequently issued prospectuses meant that the proceeds were held on trust for investors
- The proceeds only because trust acts when they were given to T co.
- Could the creditors get their hands on the funds even though they had not been transferred over to T co?
  HELD
- Could not establish intention. The HC identified the following issues:
  - Lack of segregation of funds,
  - Prospectus did not indicate an intention to create a trust,
  - Taxation advantages were incompatible with the creation of a trust.
- *Gageler J* argued that the critical point was the absence of an obligation to hold the proceeds separately from their own, this precluded any intention to separate legal and equitable title.
- *Keane J* Held that no trust arose because the documents did not make express provision for a trust