TOPIC 1: CREATION OF EXPRESS TRUSTS

Consequences of Creating a Trust

Case: *Mallott v Wilson* (1903)

Facts: The parties were undertaking a marriage settlement. The husband declared a trust prior in favour of his wife and children, stating a particular person would be trustee. The would-be trustee refused to be trustee. At that point, the husband declared the trust was off, but later declared another trust over the same property.

Issue: Which trust is valid?

Held:

The first trust is valid, because at the point the husband declared the trust it operated immediately i.e. the metaphorical 'split' occurred. The husband no longer owned the trust property; that is, the property is owned at equity for somebody else. A settlor can reserve the right to revoke the trust in the trust instrument, but unless it is expressed, the trust is validly created. A settlor cannot simply change their minds.

1: Certainty of Intention

1.1 Oral Statements and Actions

Case: *Paul v Constance* (1977)

Facts: Mr. Constance was married, but had been living in a de facto relationship for some time; he and his wife had broken up many years prior.

When Mr. Constance died, his wife was due to inherit his assets because he had failed to make provision for his de facto, and she had no means for a statutory cause of action. The de facto's only chance at receiving Constance's money was by proving she was the beneficiary of a trust he had created during his lifetime.

Prior to his death, Constance placed bingo winnings and a small injuries payment into his bank account. When the money was placed, he and his de facto attended the bank attempting to set up a joint account. The bank manager informed them incorrectly that they couldn't set up a joint account, being of the view that de facto spouses could not set up joint accounts.

As a result, all funds were placed in Constance's name. However, there was evidence provided at trial showing that, on several occasions, he had stated in front of other people to the de facto wife that "the money is as much yours as it is mine." This was all that could be used to point to a declaration of trust.

Issue: Were Constance's words sufficient to amount to a declaration of trust?

Held:

The situation could not amount to a trust by transfer, as funds were not transferred to the de facto wife. Neither could it be said Constance was gifting half the account, as he had failed to take the proper steps to transfer half the account.

The only salvation for the de facto could be trust by declaration. The de facto spouse has argued that Constance had demonstrated an intention to create a trust in the sense that he would be settlor, holding the money on trust for them both.

On the bank manager's evidence, there is manifest intention to create a trust. Secondly, several witnesses have attested to the fact that Constance said on separate occasions "the money was as much his as it was hers." Mr. Constance's attributes also tended towards manifest intention to create a trust: he was not a sophisticated or well-educated man, and could not be expected to understand what a trust was. Yet his actions can only be described as an intention to create a trust.

Finally, the account has been sparsely used; there are very few transactions on the account. However, both parties have made several deposits at different points in time, and all withdrawals have been used for joint purposes.

Therefore, Constance's behavior subsequent to the declaration of trust showed that he had not intended his funds to be solely his, that he had intended they be used for joint purposes.

NOTE: This case is an anomaly. Evidence of actions further down the track ('on day 200') were used to prove his intention on day 1. Normally evidence after the event will not be used to demonstrate intention upon the event because an intention to create a trust must be an immediate intention to create a trust. Concessions were made in this circumstance because there were no express or written words to look at in demonstrating intention.

1.2 Intention to Create Obligations v Mere Gifting

Case: *Countess of Bective*

Facts: The Countess of Bective was a secretary in Sydney. She married well, moved to England, left her first husband and married the Earl of Bective. During the Earl's lifetime, he set up an inter vivos arrangement whereby money would be held for his daughter, but the income of the fund was to be paid to the mother until the daughter was 15 for her maintenance, education etc. After the daughter turned 15, income from the arrangement was to be paid to her. When the daughter turned 21, she was to receive the capital.

After the Earl died, the Countess moved back to Australia with the daughter. The holders of the fund paid the income to the mother, the daughter being under 15. The Australian Tax Department tried to assess the income as being the mother's income. The mother argued it was not her income; she was the one being paid, but it was not being paid for her own purposes - it was being paid to her as an appropriate person while her daughter was a minor for the child's expenses.

Held:

There are 4 ways in which the Earl's arrangement could be interpreted -

a) **The arrangement might be a gift with merely precatory words** - in which case the income might be paid to the mother, for the mother, with a recommendation she use it to pay for the daughter's maintenance. The money belongs to the mother, who is under no legal obligation to spend it in any way.
b) **The arrangement might be a gift on legal condition** - in which case the mother, in taking the money, is under an obligation to perform the condition and use it for the child's maintenance. If she doesn't, the whole gift fails.
c) **The arrangement might be a gift on equitable condition/charge** - in which case the whole gift does not fail if the mother does not meet the condition, but if she fails to pay for the daughter's maintenance, the daughter has a right in equity to pursue the mother. This is like an equitable charge, although a charge is usually quantifiable.
d) **The arrangement might be to have the mother act as trustee, holding the money on trust for the daughter** - in which case the mother has no beneficial interest in the money.

The income should not be included as part of the mother's taxable income. However, if there is evidence the mother has used the income for herself, she should be taxed on that amount. *As long the mother maintains the daughter, she can use the excess herself i.e. the agreement is more like an equitable condition.* Trustee obligations would not ordinarily be imposed upon someone who can be trusted to do the right thing. The familial relationship here is important - she can be relied on to do what is right for the daughter without having trustee obligations thrust upon her.

NOTE: If the case was decided today, it would probably be viewed as a trust.

1.2.1 Precatory v Formal Words

Case: *Re Williams* (1897)

Facts: Dr Williams left his estate to his wife. The words he used were "absolutely, in the fullest confidence, that she would leave to their daughter Lucy on her death the proceeds on 2 insurance policies: one on his life, and on her life."

When the wife died, she left Lucy proceeds from Dr Williams' insurance policy, but left the proceeds from her own life insurance to a third party.
Issue: Did this impose an obligation on wife to leave property in a certain way on her death?

Held (Lindley LJ):

Equitable obligations can be imposed *"by any language which is clear enough to show an intention to impose an obligation, and is definite enough to enable the court to ascertain what the precise obligation is and in whose favour it is to be performed."*

The words here were only precatory words, conveying a wish/hope/prayer. They did not impose an obligation on the wife to do anything. If a party wants to demonstrate a manifest intention to create a trust, they must show an obligation the court can enforce: what the obligation is and in whose benefit the obligation existed.

Here:

a) **The words must be looked at in the context of the entire document** - from the entire document, it is evident the wife was not only intended to be a life tenant on the proceeds from Dr Williams' policy.
b) **The Dr could not impose binding direction with respect to Mrs Williams' policy** - after all, it was her policy and property. It was impossible for him to deal with it.
c) **The words 'in fullest confidence' are weak words** - akin to 'hoping that' or 'wishing that', they do not convey an imposition of obligation. Imperative language, like 'trust' or 'on condition' must be used.

If the words are merely precatory, the wife can do whatever she likes with the property; Lucy has no rights.

Case: *Chang v Tjiong* (2009)

Facts: A father gave money to his son to purchase a home unit. This amounted to a resulting trust.

However, following the transfer, the father wrote a letter in multiple languages to the son conveying the following:

"I have already phoned our solicitor …and confirmed that the home unit is to register in [your] name without caveat of my interests…After I go, Mamie [i..e the mother] is better to live in the home of a child. The money in Belmore St is for Mamie's needs, and after she is gone give the remainder to Kazuko Nikaido in Yokohama."

Time went by and the mistress married someone else. The father then sent another letter expressing the following:

"My ways have offended and upset Mum. Look after her after I am gone. It is better that she lives with a child. Use the money from the home unit for her. If there is any left over after she is gone, use it for Roy if he still needs it (the illegitimate son with the mistress). There are also others in the family who need the money for their studies."

Following the father's death, the issue of resulting trustee arose.

Issue: Were the words in the letters precatory?

Held:

There is no doubt the words here resemble a trust, rather than being merely precatory. The terms in the 2 letters, although informal, were clear: the property is to be held for the father and mother during the father's life, income is to then be given to the mother following his death, with capital granted to the mistress. Later, the terms were varied to superimpose Roy over the mistress. This change in terms would not ordinarily be allowed - the money should have gone to the mistress - but the parties conceded that it was within the father's rights to alter the trust's terms, failing to dispute it (*Mallot v Wilson is still good law*).

There is a clear, unequivocal and emphatic direction in the letter. Given the father's family are not on good terms with the mistress, it is unlikely the father would have relied on the son's goodwill to pay the mistress.

Case: *Re Armstrong* (1960)

Facts: George Armstrong was a Victorian farmer with 8 children: 5 girls and 3 boys. He had a stroke, and decided in relatively poor health that he'd like to do something for 2 of his sons. He'd seen an article in the paper about buying bonds in the SEC, and visited the bank to purchase these bonds, raise income and eventually transfer to his sons. When he got to the bank, the bank manager convinced him instead to take out 2 term deposits. The term deposits had a printed form on the back stating the account could only be held by the person who took the account out and that any payments would only be made to that person.

On the front were 2 receipts, one stating "George Armstrong in re William John Armstrong" and the other "George Armstrong in re Bernard Armstrong." The term deposits were for 2 years, but George died in the interim. The question arose over who was entitled to the term deposits - the sons or the estate? The rest of the children sued to have the rest of the deposits returned to the estate.

Held (Herring J) - Considering the difference between a trust created by declaration and a gift:

When a gift is made, all rights in the property are immediately given away. However, when a trust by declaration is made, trustee obligations are imposed. George could have given the property away immediately by transferring the rights in the property to his sons. However, he failed to do so.

Upon considering the bank manager's account that George intended to receive the income from the 2-year period, thereupon granting the deposits to his sons, the Court finds that George intended to create a trust by declaration i.e. as life tenant for 2 years, with capital granted to his sons thereafter. Even though the word 'trust' was not used, this is the best explanation for what George was trying to do.

"Although the person need not say "I declare myself a trustee", he must do something equivalent to it, and use expressions which have that meaning" (Herring J).

1.2.2 Equitable Conditions

Case: *Cobcroft v Bruce* (2013)

Facts: Mr Cobcroft left his shares to his wife using the following wording:

"…(v) 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, or the remainder thereof, to my nephews David Gavin Baxter Cobcroft and Nicklas William Baxter Cobcroft as tenants in common in equal shares or the survivor of them absolutely"

The wife was also an executor of Mr Cobcroft's will. When she died, the shares were worth $6-$7m. But instead of leaving the shares to the nephews, she left them to charities under her will.

Held:

Words to the effect of "… deal with as she in her absolute discretion sees fit" prima facie indicate permission for the wife to deal with the shares as she sees fit. However, they are followed up by the words "but otherwise on condition", which is relatively strong language. Perhaps the husband intended for the wife to deal with the shares as she saw fight, but to bequeath whatever remained at her death to the nephews.

It cannot be said that the husband imposed a trust obligation on the wife because she was able to deal with the shares as if they were her own during her lifetime. She would have to hold them on trust for the nephews. "As she sees fit" is almost antithetical to a trust, unless she was also a beneficiary - which she was not.

Rather, the clause is likely to be either a legal or equitable condition. A legal condition would require full compliance with the conditions of the gift, at risk of losing the benefit of the gift altogether. However, it cannot be a legal condition because it is too difficult to assess whether the wife complied with the condition at or by the time of her death.

Thus, the condition seems to be equitable re *Gill v Gill* (1921):

Gill v Gill: *A farmer left his farm to his son on condition the son would keep the homestead and house his unmarried in the homestead. The father set out the rooms in the homestead that the sisters would receive the benefit of. Several years later the matter proceeded to court, at which time there was only one unmarried sister who had had a falling out with the son and had since been evicted from the homestead.*

The court looked at the type of property being dealt with, being a farm, and considered whether the father could have intended a legal condition to subsist i.e. could he have intended the son would lose benefit of the farm altogether had he not provided accommodation to his sisters? This would prima facie be a disproportionate result.

On the other hand, the father probably intended for the daughters to receive an enforceable right. It is unlikely the father's words were precatory in the sense the son could simply ignore them. Therefore, it is best to find that what was intended was an equitable condition, that the sister had an enforceable right in equity. Equity would not compel the brother and sister to live together; rather, it would calculate a dollar amount in compensation to remedy the unjust eviction.

The precedent of *Gill v Gill* seems most appropriate here. The wife is intended to be able to use the shares during her lifetime if she so wishes. But if she does not do so, she is subject to a condition to leave the shares to the nephews. It was not intended to be a legal condition - she was not intended the lose the whole value of the gift - because the premise of the gift was to enable her to provide for herself during her lifetime.

The nephews are entitled to recover a dollar amount, especially because the wife could not be relied upon to do the right thing by her husband's nephews given there was no blood relationship with the wife.

1.2.3 Legal Conditions

Case: *Re Gardiner* (1971)

Facts: Mr Gardiner left his property to his son, Ivor, *"subject to my said son paying the sum of 1,000 pounds within 2 years from my death to my son, Albert."* The money was not paid at the end of the 2 years.

Issue: *What is the effect of the clause?*

Held:

This clause was intended to be a legal condition. It was not intended to be a trust because the trust property, the land, was not intended to benefit Albert. The 1,000 pounds is split from the land altogether. It does not seem Ivor has the responsibility to hold the land subject to trustee obligations.

However, the strong language "subject to Ivor paying the 1,000 pounds", together with the strict time limit imposed, seems to suggest Ivor will only receive the land if he performs the requisite condition. Failing to perform the condition, Ivor does not inherit the land exclusively. This leaves the land subject to a partial intestacy, under which both sons can now share in the property.

1.2.4 Explicit Words

Case: *Byrnes v Kendle* (2011)

Facts: A husband and wife sought to purchase land. In the end, only the husband purchased the land, as the term of his loan required he be the sole purchaser. After purchasing the land, the husband declared a trust over the land, half for himself and half for the wife. The trust was a formal document which made multiple references to the term 'trust' and used the technical language of such.

Later, when the husband and wife were in the process of splitting up, the husband allowed his son to take possession of the land under lease. The son paid rent for 2 weeks, but then stopped. The husband and wife then split up and the land became the subject of dispute.

The husband claimed that despite this explicit, written document he had not intended to create a trust to create a trust - relying on *Joliffe's Case*:

Joliffe's Case: *Joliffe arrived in Queensland at a time when the laws were such that a person could hold only one interest-earning bank account. Joliffe, wishing to open a further interest-bearing account, proceed to open a new account under the name "Mrs Hannah Joliffe, Edwin Joliffe trustee". Mrs Joliffe died shortly after.*

On the face of it, it appeared as if Mrs Joliffe was beneficially entitled to the bank account. However, when faced with paying death duties, Joliffe claimed he did not really intend to create a trust for his wife, that it was really his property and that he should not have to pay.

The majority of the High Court said that there was not a demonstrated intention to create a trust. The term 'trust' is not necessary to create a trust. "We know of no authority that would justify us deciding that by using any form of words a trust can be created contrary to the real intention of the person alleged to have created it". Just using the term trust does not mean a trust is created.

Isaacs J (dissent): The Court should be able to rely on the words used. The words here demonstrate a self-evident intention to create a trust. To find otherwise would be contrary to public policy. Equitable principles should not be used to circumvent paying tax.

Principle: *There must be a subjective intention to create a trust, no matter the words used.*

Held in *Byrnes* (overruling *Joliffe*):

A settlor must have an intention to create a trust. However, where a trust is created by explicit, written words, the Court only has to look at those words to assess the settlor's intention. If the words are clear and unambiguous, a sufficient intention will have manifested. However, if the written words are inexplicit or informal, or where the trust is created orally, the Court will have to consider all the circumstances of the case to see if an intention can be inferred.

The only time the Court will look behind the words to assess intention are where the existence of the trust is challenged. This could be on several bases, including illegality, the trust being a 'sham trust', where the trust is rescinded on equitable grounds due to undue influence or unconscionability. In all of those cases, the Court will not hold themselves bound by the words used and will look behind them to determine intention.

Joliffe overruled; Isaacs J dissent preferred

On the facts here, the formal explicit words used clearly manifested an intention to create a trust. There is no reason to go behind those words.

As a matter of precedent, *Byrnes* strictly speaking is **only authority for bilateral trusts, not unilateral trusts.** A unilateral trust arises where the settlor, and only the settlor, decides to settle property on trust by way of a voluntary settlement, owing nothing to the other side. However, a vast number of trusts are created bilaterally, with the beneficiary giving some consideration for the trust. But the Court speaks as if the law is being set down as a general proposition for unilateral and bilateral trusts.

1.2.5 Sham Trusts

Case: *Lewis v Condon* (2013)

Facts: Mrs Lewis was involved in a Family Court dispute. She wished to hide property from the Court to minimise tax. She later became bankrupt.

Issue: *Could this trust be set aside as a sham?*

Held:

This trust will not be set aside as a sham. The trust was created for an improper motive, but it was nevertheless intended to take effect as a trust. She was attempting to settle the property on trust for the children, albeit for the intention of defeating the husband in the Court. "Every sham involves deception, but not every improper purpose is a sham."

1.2.6 Contractual Terms

Case: *Korda v Australian Executor Trustees* (2015)

Facts: Korda attempted to set up a timber plantation scheme. Part of the scheme was an express trust, but there were other arrangements in place concerning the running of the scheme.

The issue here was whether a trust had been created by contract between 2 parties. One of the parties was entitled to fell and sell the timber, but contractually had to eventually pass the proceeds on to investors. However, before the money had been passed on to the investors, the scheme failed. The only way the investors would receive the money was through the tree-feller holding the funds on trust i.e. the funds would be held on trust for the investors as beneficiaries and not passed on to secured creditors.

Issue: *Were the proceeds from sale of the timber and land meant to be held on trust for the investors?*

Held:

Trial Judge: There must have been a trust. The investors would not have agreed to invest in the scheme unless there was a trust.

FRENCH CJ: There are no words here indicating an express declaration of trust. The underlying circumstances of the trust must be assessed to determine whether there is any possibility of this being a trust.

GAGELER J: The trustee/beneficiary relationship is fiduciary, but in this case based on contract. Trusts and contracts can co-exist, and often do so. In accordance with the ordinary rules of construction (*per Hospital Products*), a trust cannot be interpreted in a way that is inconsistent with the terms of the contract. This is not a case of clear declaration of trust; this is a case where the parties have said nothing about trust. Therefore, a trust will only be imputed if it is vital to the relationship.

A particular term stands out. Under the contract, the felling company could use the proceeds from the timber as it saw fit: it could mix the proceeds with their own funds or keep the funds for a time. All the felling company was obliged to do was make payment. This was effectively the antithesis of a trust. "The absence of a contractual intention that money be held in a separate fund must surely be fatal to the imputation of a contractual intention to create a trust over that money."

If there is a trust, the trustee is under an obligation keep the funds separate from his own. Mixing the funds would be a breach. The fact the contract allowed the mixing of funds is a strong indication that a trust was not intended. If it is said that a trust is created by the terms of a contract, the terms of the trust cannot be inconsistent with the terms of the contract.

1.3 Immediate Intention

Case: *Harpur v Levy* (2007)

Facts: Peter Rand made his money by owning brothels and low-cost accommodation throughout Victoria. He became very wealthy, and in the last couple years of his life lived in South Yarra with the Harpur family. Paul Harpur, the husband, was a solicitor.

Eventually, Mr Rand passed away. The Harpurs expected to receive inheritance from Rand, but the will left very little to them. A month after Rand died, in August, Paul Harpur received a strange photocopy of a document, the original claimed to have been stolen from his car. The document, appearing as though cobbled together from various others, professed to the following:

"1. The trustee is the owner of the property and assets specified in Schedule A and he now irrevocably declares that as from the commencement day he holds the property and assets specified in Schedule A for the beneficiary specified opposite each of those specified properties and assets ...

"3. From the commencement day [1 October 1997] the trustee will ... transfer the property ...".

The beneficiaries were named as the Harpur businesses.

Issue: *Was this an immediate and binding intention to create a trust?*

Held:

Maxwell P: There was an immediate intention to declare a trust, given by the words "and he now irrevocably declares…". The commencement date is simply a matter of machinery; the overall intention of the document was to benefit Harpur.

Neave & Redlich JJA (majority): This was not an irrevocable intention to create. There is a gap between the date the term was constructed (August) and the commencement date (October). There is no immediate intention. 'Irrevocably declare' or other like strong language does not overcome the failing that the trust is only to come into effect at a later date. To declare a trust but not make it come into effect immediately is inconsistent with the requirements of a voluntary settlement: a settlor must give away all their entitlement to the property immediately. For this reason, there is no intention to create a trust.

2: Certainty of Subject Matter

Case: *Mussoorie Bank v Raynor* (1882)

Facts: The husband bequeathed his estate to his wife stating that he was "feeling confident that she would act justly by dividing what was left over fairly between their children when no longer required by her". Although the trust would fail for lack of intention to create a trust (the above words are merely precatory), the issue at hand concerned certainty of subject matter?

Issue: *Is there a certainty of subject matter? Can it be said what it is exactly that would be held on trust?*

Held:

The wording is too uncertain to amount to the subject of a trust. It must be stated precisely which property would act as the property of the trust and which must be kept aside for someone else, separate from his own property. The 'property' here is too vague.

Case: *Hunter v Moss* (1993)

Facts: Hunter was going to work for Moss Electrical. During negotiations over his salary it was eventually agreed that he would eventually receive a 5% shareholding in the company (which turned out to be 50 shares). The shares would not be transferred immediately, as the company was still working out the best way to minimise tax on shares. During this period, Moss would hold the shares on trust for Hunter.

The parties eventually fell out and Moss refused to transfer the shares to Hunter, on the basis there was 'insufficient certainty of subject matter'. He claimed that it could not be said which of his 950 shares were held on trust for Hunter i.e. the specific shares could not be identified.

Hunter argued shares did not require segregation for certainty purposes. This would only be an issue if the trustee had breached the trust, which Moss had not.

Issues: *Do shares require segregation for the purposes of certainty of subject matter?*

Held:

The identification '5% of the shares' is sufficient. The shares were all in the one company and all identical i.e. they were not of different classes or differently numbered. This draws the law re shares in line with the law re wills; that is, it has always been sufficient to leave certain percentages of shares in wills.

Case: *Shortall v White* (2007)

Facts: Shortall and White were previously in a de facto relationship before it broke down. The parties proceeded to counselling, where they agreed to split their assets. One of the de facto husband's assets was 1.5m shares in Unitract, which had only just floated and which he could not yet transfer. However, he declared that he held 220,000 shares on trust for the wife, placing it in writing. After counselling, the husband stated that he had transferred too much to the wife, who subsequently wrote him a cheque.

Later, the husband refused to transfer the shares to the wife. One of his arguments was that he had not yet had a real intention (*before Byrnes v Kendal*). This was not successful because it was a bilateral trust. The Court disagreed, finding he had sufficient intention. The husband also argued *Hunter v Moss*, claiming there was insufficient identification of the shares i.e. subject matter was not sufficiently certain.

Held: There was sufficient identification of the shares. They were all held within the same company, they were identical and it did not matter which was held on trust and which was not. The husband has declared a trust, and holds 220,000 on trust for the wife with the rest for himself. This is best way of interpreting the arrangement.