

TOPIC 2: CREATION OF EXPRESS TRUST

To create a valid express trust, the following elements are required:

1. Certainty of Intention - to create a trust; **2. Certainty of Subject-matter**; **3. Certainty of Object** - either by identifiable beneficiaries or by having a valid charitable purpose; **4. Statutory Formalities** - the trust must comply with relevant statutory formalities eg. some trusts must be created or proved in writing; and **5. Constitution** - the trust must be properly constituted.

Unless each element is satisfied, the trust will fail or be unenforceable.

TOPIC 2A: CERTAINTY OF INTENTION

"[Settlor] must have shown an objective intention to immediately create a legal arrangement within the characteristics of a trust..."

What sort of intention must be found?

There must be an intention to impose on the titleholder an enforceable equitable obligation for the benefit of another person, or a charitable purpose. The test is "whether in the circumstances of the case and on the true construction of what was said and written, a sufficient intention to create a trust has been manifested" (*Tito v Waddell*, per Megarry VC). Intention is discovered by looking at all the circumstances of the case. If explicit wording is used, the relevant intention is the intention manifested by the words. The onus of showing intention lies on the person alleging a trust arose (*Byrnes v Kendle*).

Informal Words: No particular words are necessary to create a trust. Even without use of the word 'trust', intention to create a trust might have manifested. Evidence of circumstances can be used to support ambiguous words or statement: **Re Armstrong**

"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*, *Re Armstrong*)

Oral Statements and Actions: When there are no written words, the Court looks at what was said and done to determine whether there was the requisite intention.

Words, actions and characteristics which may be considered relevant:

- Where the settlor affirms on several occasions to witnesses that property is being held on trust - "the money is as much yours as it is mine";
- Where the settlor lacks sophistication and knowledge of the trust concept, and therefore cannot be expected to use the word 'trust';
- The way in which an account is used i.e. if there are various transactions, deposits made by both parties and drawings used for joint purposes, evidence suggests a trust (*Paul v Constance*).

NOTE: *Paul v Constance* is an anomaly. Evidence of actions later in time were used to prove intention at the outset. This is not usually the case -

IMMEDIATE INTENTION: Evidence after the event will not be used to demonstrate intention upon the event, because intention must be immediate upon creation.

Intention to create a trust in the future, or a trust which will only come into effect in the future, is not binding. In declaring a trust, a settlor must give away all their entitlement to the property immediately (*Harpur v Levy*).

Obligation v Intention: In determining intention, there must be an *inherent obligation* placed on one person to hold property. When imprecise words are used, the court will look at the context of the entire document to ascertain available options *other than imposition a trust*, such as a mere wish (*Countess of Bective*):

- A gift with precatory words** - precatory words are mere wishes, imposing no more than a moral obligation. Property transferred belongs to the trustee, who is under no legal obligation to hold or spend it on behalf of the beneficiary (*Re Williams; Cobcroft*).
- A gift on legal condition** - the trustee is under an obligation to perform the condition, using the trust property for beneficiary's benefit. If the obligation goes unperformed, the gift fails (*Re Gardiner; Cobcroft v Bruce; Gill v Gill*).
- A gift on equitable condition/charge** - the gift does not fail if the trustee fails to meet the condition, but failing the condition, the beneficiary has a right in equity to sue the trustee (*Cobcroft v Bruce; Gill v Gill*).
- A gift on trust** - the trustee has no beneficial interest and must perform their trust obligation. **NOTE:** Trustee obligations are not ordinarily imposed on people who can be trusted to 'do the right thing' (*Re Williams*). The familial relationship is an important consideration to this end, **BUT** a trust will usually be imposed where familial relationships are fraught, and the settlor cannot rely on familial good to transfer trust property (*Chang v Tjong*).

Precatory Words:

"Absolutely, in the fullest confidence..."

In determining whether words are precatory, the Court will look at the context of the entire document. However, courts will usually construe words as precatory when (a) the words are incongruous with an obligation when read in the document's context, (b) the settlor does not have the right to place binding directions over property (eg. where a settlor is assigning the rights under someone else's insurance policy), or (c) the words are weak, failing to convey imposition of an obligation (*Re Williams*).

Cf. Chang v Tjong: Clear, unequivocal and emphatic directions are not precatory, and usually convey an express intention (eg. directions to use money in such a way, and to convey left over monies elsewhere).

Equitable Conditions:

"... to deal with as she in her absolute discretion sees fit, but otherwise on condition she ultimately gives to..."

Words expressing trustee discretion followed by strong, conditional language are likely considered equitable conditions. Equitable obligations may allow a trustee to deal with trust property for a period (eg. their lifetime) **on condition** the remainder is left to beneficiaries. Equitable conditions are rights enforceable in equity. *Cf. Legal Obligations*, where full compliance with the gift's condition is required, at risk of the trustee losing the gift altogether (*Cobcroft v Bruce; Gill v Gill*).

Legal Conditions:

"... subject to my said son paying the sum of..."

The stronger the language used, coupled with factors such as time limits, the more likely an obligation is imposed (*Re Gardiner*). Conversely, weaker language is indicative of a non-legal obligation, but more a moral obligation (*Re Williams*). However, an obligation may be a legal condition, not a trust obligation. The relationship between the parties is relevant in determining whether trust obligations arise: testators are unlikely to impose trust obligations on people who can be expected to do the right thing (eg. family members) (*Bective, Cobcroft; cf. Chang*). **NOTE:** The court also considers the *nature* of the trust property to determine whether imposing a legal or trust obligation would be disproportionate (*Gill v Gill* - would have been disproportionate for the son to lose the whole farm over failure to provide the daughter with accommodation).

Written words - explicit, formal v. implicit, informal: Formal declarations of trust, with multiple references to the term 'trust'.

Where a trust is in writing, intention is manifested by the words used. The test is objective (*cf. Joliffe's Case*): if words are clear, formal and unambiguous, intention will be manifested. Extrinsic evidence is inadmissible (*Byrnes v Kendle*); if words used are implicit or informal, or the trust is orally created, the court will determine intention based on surrounding circumstances. Extrinsic evidence is admissible (*Paul v Constance; Re Armstrong; Chang*).

Sham Trusts:

Sham trusts are trusts set up purely to defraud people. They are intended to have the appearance of a legally enforceable trust, but cannot be enforced a trust. However, a trust will not be a 'sham trust' if it is intended to be a trust, albeit for an improper purpose (eg. using a trust to hide property in a Court dispute). A 'sham trust' will only be made out if *deceit* is proven, which is typically hard to prove (esp. in trusts by transfer --> both settlor and trustee must have shown *deceit* (*Lewis v Condon; cf. Joliffe's Case*)).

Contractual Terms:

Trusts and contracts can coexist, but a trust cannot be interpreted in a way inconsistent with the terms of the contract.

However, if there is no express declaration of trust in the contract, underlying circumstances will need to be assessed to determine whether there is a trust (*Korda, French CJ*). A trust will only be imputed if it is vital to the relationship.

Regardless, "the absence of a contractual intention that trust money be held in a separate fund is fatal to the imposition of a contractual intention to create a trust over said money" (*Korda v Australian Executor Trustee, per Gageler J*).

TOPIC 2C: CERTAINTY OF OBJECT

A trust must be in favour of definite beneficiaries, ascertainable or capable of ascertainment, or for a valid charitable purpose (*Morice v Bishop of Durham*). The clause *"entitled to select such objects... as he wished"* was too broad to satisfy the test for certainty of object. There needs to be identifiable people, or a valid charitable purpose, so that there is someone with standing to sue (*per Grant MR*).

Trust Structures: The structure of a trust dictates the rules which must be complied with for certainty of object to be achieved. The principles below relate primarily to **TRUSTS FOR PERSONS**

Fixed-interest/unit trusts:

Trusts in which the beneficiaries and their shares in the trust property are specified at the time of trust creation.

Examples

1. *"To be distributed in favour of my 3 children"* -

if no more is stated, the court will assume in equal shares of 1/3rd each.

2. **Paul v Constance:**

As nothing more was specified, the Court assumed Mr Constance held for himself and Mrs Paul in equal shares.

3. **Hunter v Moss:**

From the outset, Hunter was entitled to 5% of the shares.

Test for Certainty

List certainty: The trustee must be able to make a list identifying all beneficiaries at date of distribution

(*McPhail v Doulton, Lord Wilberforce*)

Rights of

Objects/Beneficiaries

I) Enforcement: Court will enforce the exercise of a fixed interest trust.

II) Proprietary rights:

Beneficiaries have equitable rights in the property, and can deal with their interest as they wish.

III) Standing:

Beneficiaries always have standing to insist the trust is performed according to its terms.

Discretionary Trusts: Trusts in which the trustee has the power to choose between objects. A discretionary trust is achieved by the use of a **power of appointment** - the power to 'appoint' the property i.e. dispose of the trust property in favour of certain beneficiaries. The person with the power of appointment, usually the trustee, is known as the *donee of the power*; beneficiaries are known *objects of the power*; the settlor as the *donor of the power*; and the person who will receive the property if the power of appointment is not exercised is the *taker in default* (*Re Hay's Settlement*).

Classifying the Powers of Appointment: There are various types of powers of appointment. Each can be classified by the *class of objects* they are directed to, and the *type of power* -

I) Class:

1. **General** - the power to appoint to anyone in the world, including the donee/trustee. Is virtually indistinguishable from a gift.
2. **Hybrid** - the power to appoint to anyone in the world, except for a class of, or named, individuals.
3. **Special** - the power to appoint to anyone within a specified class of individuals.

II) Types:

1. **Bare/Mere Power (aka Non-Exhaustive Discretionary Trust)** - the donee has the power to appoint, but is under no obligation to do so. If they exercise the power, they have discretion as to who to distribute to (within a specified class). Is 'non-exhaustive' because the trustee is under no obligation to exhaust/use up the trust fund. EG: *"S gives T land to hold on trust for such of T's children as T sees fit, and in default of appointment for the Red Cross"*.

2. **Trust Power (aka Exhaustive Discretionary Trust)** - the donee is under an obligation to appoint the property, but has the discretion in appointing. Is 'exhaustive' because the trustee must exhaust/use up the trust fund. EG: *"S transfers land to T to hold on trust and appoint within 5 years to such of S's children as T sees fit"*.

Trust Powers v Bare Powers:

III) Validity -

	Bare/Mere Power	Trust Power
<i>General</i>	Valid	Invalid
<i>Hybrid</i>	Valid	Invalid
<i>Special</i>	Valid	Valid

IV) Identification - how to determine whether a clause creates a trust or bare power:

1. **Language used** - this is the fundamental difference. The stronger (weaker) the language used, the more (less) likely an obligation is being imposed, and thus more likely a trust power. A trust power is *imperative* (must be exercised), a bare power is *permissive* (does not have to be exercised).
2. **Presence of a taker in default** - is conclusive of mere power; the settlor has considered the fact that the trustee might not complete the appointment, and has made provision for such circumstances. This indicates the trustee's power is permissive (*Re Hay's Settlement*). However, absence of a taker in default is not indicative of a trust power.
3. **Time limits on appointment** - generally indicates an obligation i.e. trust power. If there is no taker in default, time limits may be conclusive of trust powers. However, if there is *both* a time limit and taker in default clause, the taker in default clause trumps the time limit clause - takers in default are conclusive of a mere power.
4. **Choice** - trust powers: trustee must exhaust the fund, but will have a *choice* with respect to how much and to whom; fixed-interest trusts: the trustee has no choice with respect to disposing of trust property.

Rights of Objects/Beneficiaries - Discretionary Trusts

I) Enforcement: a) *Bare power* - the Court will not enforce the exercise of a bare power, but will insist the trustee periodically consider exercising. If they choose to do so, they must (a) act in good faith, (b) upon real and genuine consideration, and (c) in accordance with the purpose for which discretion was conferred and not an ulterior purpose. A trustee does not have to give reasons, but if they do, these must be examined (*Karger*); b) *Trust power* - the Court will enforce the exercise of a trust power.

II) Proprietary rights:

Beneficiaries have only an initial expectancy (no rights until the trustee decides to appoint). Once the trustee appoints, beneficiaries have equitable rights and can deal with the property as they wish (assign it, sell it, declare a sub-trust etc) (*Kennon v Spry, per Heydon J*).

III) Standing:

a) *Trust power* - beneficiaries have standing to insist the trustee exercise their power, but cannot insist on distribution being made in their favour. However, beneficiaries can compel the trustee to consider whether to make a distribution, and have a right to enforce proper administration of the trust (*Kennon v Spry, per French CJ*); b) *Bare power* - beneficiaries do not have to standing to enforce the exercise of the trustee's power, but have standing to insist that, if exercised, the power is exercised properly.

Obligations on Donees

a) *Bare power* - if the donee/trustee is a *non-fiduciary holder* (eg. where the trustee holds property but another person exercises discretion), they have no obligation to exercise their power, but if they choose to do so, must keep their exercise with good faith. If the donee/trustee is a *fiduciary holder*, they have no obligation to exercise their power, but must periodically consider whether to exercise, keeping in mind the class of objects and appropriateness of appointment; b) *Trust power* - donees/trustees are under a duty to survey the class of objects and adopt a strategy for selection (*McPhail v Doulton, per Lord Wilberforce*).

Certainty of Object - Test for Discretionary Trusts (Trust + Bare Powers)

Criterion Certainty: The trustee must be able to say whether a person is inside or outside of a class described (*McPhail v Doulton; Gulbenkian*), and amongst whom they are entitled to select. There are 2, sometimes 3, aspects:

1. **Semantic/Linguistic certainty** - the meaning of the words must be clearly understood i.e. described in a way ascertainable of objective meaning (*McPhail v Doulton*). A trustee cannot exercise subjective discretion - there must be guidelines sufficient to allow for reasoned determination. For example, *"to all my friends"* or *"to those of my friends who are worthy of my bounty"* - fail this test. **Failure of this first step is fatal:** Trusts by declaration - invalid; By transfer - resulting trust; By will - reverts to Estate.

2. **Evidentiary certainty** - where it is difficult but still possible for a trustee to determine whether a person falls within a specified class (eg. *"all passengers who caught the no. 48 tram in July"*), the clause will not be invalid. In such cases, the Court will inform the trustee of the evidence they can rely on (*McPhail v Doulton*).

3. **Administrative unworkability (re Trust Powers)** - where a class is semantically and evidentially certain, but is so hopelessly wide or big that it cannot be considered anything like a class (eg. *"all citizens of Richmond, past and present"*), the clause will be invalid (*McPhail v Doulton, per Lord Wilberforce; District Auditor*). The court cannot appear arbitrary or **capricious** in their decision making (*District Auditor*). **Re Bare Powers:** Administrative workability only applies to trust powers, as the Court only has to administer such powers. However, a **truly capricious mere power might be void, even if it isn't administratively unworkable** i.e. where the settlor has no discernible link of association with the class - eg. "I give my trust property to anyone in the world with red hair" (*Re Manisty's Settlement, per Templeman J*).

Examples, per *McPhail v Doulton*: *"Former and current employees and officers of a firm"* = sufficiently certain; *"Dependents"* = someone who is financially independent and who, pursuant to an evidentiary test, is sufficiently certain; *"Relative"* = blood relative; sufficiently certain. **NOTE:** *McPhail v Doulton* has never gone before the HC, but has been applied several times by superior courts and is now accepted as good law.

TOPIC 2D: FORMALITIES

Trusts will fail or be unenforceable if they do not comply with statutory formalities.

Statutory Formalities - because equity does not require writing for the formation of a trust, looking at intent as opposed to form, equity only requires the '3 certainties'. Therefore, so long as no illegality is involved, it is possible to declare a trust without writing under equity.

BUT, statutory overlay requires that some trusts be created or evidenced in writing to *protect against fraud*, as per the **Statute of Frauds**. If the **Statute** is applicable and not complied with, the trust is either void or unenforceable. If it does not apply, a trust can be created orally. Current statutory formalities in Australia are as follows:

s. 7, Wills Act - Formalities for testamentary trusts (wills): There are no testamentary trust formalities for wills other than formalities pertaining to creation. All that is required is: a) *That the will is signed by the testator, or someone on their behalf;* b) *In the presence of 2 witnesses, who are also required to sign.* If these 2 requirements are met, the will is valid. **NOTE:** Testamentary trusts do not require constitution; this is accomplished via will and probate.

s. 53, Property Law Act - Trusts: The PLA explicitly states that it does not apply to trusts created by wills (s. 55). S. 53 only applies to the creation of *express, inter vivos trusts*, created 1 of 2 ways: by self-declaration, or by transfer -

	Applies to	Wording	Requires
s. 53(1)(a)	Creation or disposition of an interest in land	"No interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law."	Writing and signed by the person creating/disposing, or their agent. If no writing = void ab initio
s. 53(1)(b)	Declaration of trusts	"A declaration of trust respecting <u>any land or interest therein</u> must be manifested and proved by some writing signed by some person who is able to declare such a trust or by his will."	Manifestation and proof in writing signed by declarer of trust. Writing isn't necessary at the start, but is used to show manifestation and proof. If declarations are created orally, the trust will not be invalid or void - just enforceable until there is manifestation and proof in writing (Kennon v Spry; DSS v James).
s. 53(1)(c)	Dispositions of subsisting equitable interests in land	"A disposition of <u>an equitable interest or trust subsisting at the time of the disposition</u> must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by his will."	Writing and signed by the person disposing of the interest or their agent. If no writing = void ab initio
s. 53(2)	Resulting, implied & constructive trusts	"This section shall not affect the creation or operation of resulting, implied or constructive trusts."	-

s. 53(1)(a) - Creation and Disposition of an Interest in Land: Refers to interests brought into existence by carving out a new interest, or disposing of an interest by moving it from one holder to another. Applies to both legal and equitable interests in land. All trusts by transfer must also meet the writing requirements of 1(a) (**Adamson v Hayes; DSS v James**).

s. 53(1)(b) - Declaration of Trusts ('Manifested and Proved by some Writing'): Trusts by declaration do not have to be created in writing, but can be 'manifested and proved' later by some form of written evidence (eg. documents), signed by the trustee or their agent (**Hagan v Waterhouse**). 'Manifestation' requires that the terms of the trust be obvious from the documents - that is, the essential terms: the 3 certainties. These can be gathered from various documents (**Chang v Tjong; DSS v James**). However, if these terms aren't present, the trust will not be manifested, even if proved in writing. **Overlap between 1(a) & 1(b)** - s. 53(1)(b) operates as an exception to s. 53(1)(a): 1(a) applies to all creations and dispositions of legal or equitable interests in land, *other than those created or disposed of by way of declaration of trust* (**DSS v James; cf. Adamson v Haynes, per Walsh & Steven JJ**). EG: *Equitable mortgages are captured by 1(a)*. **Overlap between s. 53(1)(a) and (c)** - no conflict: both have the same requirements - to be in writing.

s. 53(1)(c) - Disposition of a subsisting Equitable Interest: Only applies to pre-existing equitable interests at the time of disposition, *not the creation of a new equitable interest*. Thus, it applies to (a) a beneficial interest in a trust, (b) a partnership interest, and (c) an equitable mortgage over land. In fact, dealings with any equitable interest in any property (including non-real property - eg. shares) are considered dealings with a subsisting equitable interest (**Grey v IRC**). **Methods of Disposition** - there are numerous methods of disposing of subsisting equitable interests, including (a) selling it (**Halloran**), and (b) voluntarily disposing of it i.e. gifting property without consideration. This includes *declaring a sub-trust, manifesting an intention to immediately and irrevocably assign, or making a final direction to the trustee to hold the interest for someone else* (**Howard-Smith, per Dixon J**). 'Finality' will not meet the requires standard when (a) the language used is the language of request, not order; (b) there cannot be any certainty of what the property is from the direction (eg. *"I must request you... to pay these named charities*); or (c) the address is made to a power of attorney and not to a trustee; instructions to a power of attorney are inherently revocable (**Howard-Smith**). **NOTE:** s. 53(1)(c) will not apply, and writing will not be required, where (a) the interest is held on constructive trust, (b) the interest is in a will, or (c) applying s. 53(1)(c) would permit fraud (eg. *transferring interests to a related company to avoid stamp duty*) (**Halloran**).

TOPIC 2E: CONSTITUTION

Constitution - for a trust to be properly constituted, trust property must be placed in the trustee's hands. As such, trusts will fail when (a) the property is 'future property', (b) the property has been poorly described or is unidentifiable, or (c) has not been received by the trustee. Constitution is typically not an issue for *trusts by declaration*, as the settlor and trustee are usually one and the same person (**Paul v Constance**). However, it is usually an issue for *trusts by transfer*. As a trust by transfer usually involves a voluntary transfer, the rules governing gifts will determine whether the trust property has been vested. It will be sufficient if the trust property has passed to the trustee in equity.

Re Consideration: If the transferee has given consideration to the transferor, *equity deems as done that which ought to have been done*, and will regard the transferor's conscience as bound. The trust will be regarded as properly constituted.

Re Volunteers:

Legal Property

Q1: Is the property being assigned legal or equitable in nature?

Q2: If legal, have the legal requirements been fulfilled? a) If yes → transfer complete; trust constituted.

b) If no → has the donor done all that the donor alone had to do to put the gift beyond recall so that equity will recognise the transfer? (Anning; Corin v Patton; Marchesi) → if yes, the trust will be fully constituted. If not, the trust will fail.

'Doing all that has to be done' - in order for equity to recognise a trust by transfer over legal property, the donor must do everything that they alone have to do to place the gift beyond recall (**Milroy v Lord**). If the transferee is equipped with the ability to complete the transfer and obtain legal ownership themselves (**Anning**), the transfer is sufficient. But if not, or if the donor still intends on doing things after transfer documents are handed over (**Marchesi v Apostolou**), they will have not done all that has to be done and the gift fails (eg. **Corin v Patton**). **NOTE:** This case happened in NSW; if it happened in Vic, requirements would have been satisfied.

Equitable Property

Equitable property has only one method of transfer: the settlor must have **manifested an immediate intention to assign the property** (**Norman v FCT**). Equitable property includes (a) a beneficiary's interest in a trust; (b) partnership property; (c) equitable interests in land (eg. equitable mortgages); (a) equitable choses in action (*includes all equitable property*). **In addition, s. 53(1)(c) PLA applies**, and must be in writing.

Choses in Action

Absolute assignments of choses in action - transferred under **s. 134 PLA**, which requires an assignment (a) be done in writing, and (b) notice of assignment is given to the party who must pay the debt. Either party is able to give notice. **Partial assignments of choses in action** - assigned when the transferee has *manifested an immediate intention to assign the partial chose* (**Norman v FCT**).

Failure to constitute - if the property is not placed in the trustee's hands, *title remains with the settlor*, regardless of whether the trustee has satisfied the certainties (**Milroy v Lord**).

Successful constitution - whether a transfer at law or equity has been achieved depends on the nature of the property involved:

Interest	Requirements
Land: General Law	Deed (s. 52(1), PLA); s. 53(1) requirements
Land: Torrens System	Legal Registration of the instrument of transfer, signed by transferee and transferor, lodged with DCT (TLA, s. 40). Equity: Appropriate form signed and delivered by the transferor to transferee, placing the transferee in a position to take all remaining steps themselves (Milroy; Anning; cf. Corin; Marchesi) NOTE: S. 53(1) requirements
Choses in Possession	1. By delivery - with an intention to pass ownership. Delivery and intention can be separate, but both must occur (Milroy; Jones v Locke). Delivery can be constructive. 2. By deed of assignment .
Shares sold-off market	1. Legal - registration in the books of the company (s. 1071B, <i>Corps Act</i>). 2. Equity - same as Torrens System.
Cheques	1. Payable to cash - only needs to be handed over to the transferee; 2. Payable to a person - endorsed on back; signed; dated (Cheques Act, s. 40; cf. Jones v Locke)
Absolute choses in action	1. PLA, s. 134: Writing, signed by transferor; notice to other side