

Preview of certainty of intention:

Is there intention?

Test:

1. 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 true trust has been manifested’**: *Megarry VC in Tito v Waddell (No 2) [1977]*

When is the intention?

1. **Intention must be immediate** if it's **voluntary (no consideration)**
 - Cannot be **“trust to take effect from x date”** (*Neave and Redlich JJA in Harpur v Levy*)
 - Intention to create a **trust in the future does not operate as a present intention to create a trust** *Harpur v Levy*
 - **Doesn't matter** if it uses strong language like **“irrevocably declare”** (*Neave in Harpur v Levy*)

Dissent in Harpur v Levy

- **Maxwell P:**
 - o There was an **immediate intention to declare a trust**, and the **commencement date was a matter of machinery or implementation.**
 - o “irrevocably declare” = intention to create a trust
2. Matter of interpreting the facts not the law

Objective or subjective intention?

1. Objective intention. Must consider **what is the meaning of what the parties have said**, and **not** what did the parties **meant** to say. (*Per Gummow & Hayne JJ in Brynes v Kendle*)
2. Are the **words clear and unambiguous?** → sufficient intention manifested (*Brynes v Kendle*); **or**
 - Eg **technical, formal trust language** in a document with multiple references to the word trust (*Brynes v Kendle*)
 - Court will **not** look at any of the surrounding circumstances
3. **Inexplicit or informal?**
 - Courts will **look at all circumstances** of the case to see **if intention can be inferred** (*Brynes v Kendle*)
4. Challenge on basis of **illegality, sham trust, rescission on equitable grounds**, undue influence? *Brynes v Kendle*. See below if it's a sham:
 - Can inquire into the **subjective intention** of the settlor

Informal words: are particular words required?

1. Not necessary for settlor to use the word ‘trust’ or any other technical or legal word to create a valid trust (*Re Armstrong*)
 - Can be informal words
 - Not necessary to say “I declare myself a trustee”. Must do something **equivalent to it. Expressions which have meaning.**
 - **Putting sons name on the cheques was sufficient to show he was trying to create a trust** *Re Armstrong*

- Eg “home unit is registered in your name, after I go, Mamie is better to live in that home”
- 2. Can use circumstances to support ambiguous words
 - Eg bank manager’s evidence *Re Armstrong*

If there are no written words:

1. Court will look at **what was said** and **done (all facts of the case)** to decide whether there was an intention to create a trust at that time.
 - As no written words, **look to later conduct**. Normally you would not rely on evidence that happened after an event to prove intention at the time of the event as intention must be immediate. **However, no express written words used.** *Paul v Constance*
 - Partner said “the money is as much yours as mine” in front of witnesses *Paul v Constance*
 - o Words used several times, in front of friends too *Paul v Constance*
 - o Not a sophisticated man *Paul v Constance*
 - o Evidence of bank manager *Paul v Constance*
 - o Manner in which account was used *Paul v Constance*
 - When they withdrew money, it was for joint purposes

Words must impose an obligation, must not be mere ‘precatory words’

Must use language that is clear enough to show an **intention to impose an obligation** *Re Williams*

1. Was an enforceable obligation intended?

- **Precatory words**
 - o Expressed settlor/testator’s wishes, hopes, prayers, and desires **rather than imposing an obligation**
 - o **Not clear enough. Too much discretion**
 - o Weak words
 - o Only moral obligations
 - o **If precatory, see below for options.**
 - o **X** ‘in fullest confidence’ → precatory (*Re Williams*)
 - Not clear enough, too much discretion to be a trust
 - o **X** “to deal with as she in her absolute discretion sees fit, but otherwise on condition that she gives those shares... to my nephews” *Cobcroft v Bruce*
 - o **X** ‘trusting that’ → precatory. Too weak. *Mussoorie*
 - o **X** “subject to my son paying x” → Strong language, however, looked at the relationship of the parties
- **Imposing obligations**
 - o Must use imperative language
 - o Clear
 - o **✓** ‘to register in your name, and for X to live with you’ (*Chang v Tjong*)
 - o **✓** ‘trust’
 - o **✓** ‘condition’
- **Full context of the document:** *Re Williams*
 - o Use the entire document to construe meaning of particular words (*Re Williams*)
 - o Eg do they use obligatory words elsewhere? *Re Williams*

- Is he intending X to have the property? Or are there other arrangements made? *Re Williams*
- **Full context of the situation:** *Re Williams*
 - Is it their property to direct?
 - Eg wouldn't expect to give binding directions to wife who owns the property. Not his property to leave. *Re Williams*
 - **What are the familial relationships?**
 - Is there a blood relationship? *Countess of Bective*
 - a. Less likely to be a trust obligation if the person can be expected to do the right thing eg
 - Eg non-blood nephews, points to obligation (why expect her to do something there?) *Cobcroft*

2. What is the nature of the obligation?

Construing contractual terms

1. This involves **inferring** an intention to create a trust from **contractual terms**
 - Must be **necessary** to give **legal effect to a relationship; or** *Korda*
 - Be absolutely necessary
2. For this to occur:
 - The **intention to create a trust must be consistent with the terms of the contract**
 - If no explicit declaration of intention, look at the **language of the documents or oral dealings**, having regard to **the nature of transactions, circumstances of parties' relationship** *Korda*
 - **however it must be consistent with the terms of the contract** *Korda; Hospital Products*
 - In *Korda* proceeds of the sale were not to be held separately, and permitted to use the money as saw fit. Could mix the funds. Just obliged to make a payment.
 - **If there is a trust, trustee obligation to keep funds separately.**
 - **As mixing allowed = strong indication no trust intended**

Preview of certainty of subject matter

Must have trust property

Cannot have a trust over nothing. This could fail if: (Norman)

- 1. Trust property is **not presently existing property** (aka future property); or
- 2. The trust property itself is **uncertain** (cannot say what it is)
 - o Described so badly

1. Is it presently existing property? Or is it future property?

1. If it is future property:

- A **voluntary trust cannot be declared over future property**
- If consideration has been paid, different rules apply.
 - o ***if consideration received*** – equity will treat as a contract to assign, and when property comes into assignor's hands, equity deems done that which ought to be done

What is it:

1. **What is future property?**

- Property **not yet in existence; or**
 - o Eg pregnant cow – calf is future property
- Property that is **not yet owned** by the person who purports to deal with it
 - o Eg, I **intend to purchase a house**. I cannot yet give **it to a 3rd party, because it is 'future' re me.**
- An attempt to **assign income** (i.e. \$\$) that **has not yet accrued** will fail: *Williams, Norman*
 - o *Williams* – life tenant tried to assign 'the **first 500 pounds of net income**'- no consideration given. Assignment failed, as **this was future property**.
 - o *Norman* – taxpayer attempted to **assign dividends** on **shares not yet declared**; and **interest to accrue on a loan he had made**- no consideration given. Assignment failed – **this was future property**.
- **Can assign a declared right to a dividend but not an undeclared dividend** (*Norman*)

2. Mere expectancy

- **Expectancies cannot be assigned, and cannot form subject matter of trust**
- **(unless consideration given)**
 - o ***if consideration received*** – equity will treat as a contract to assign, and when property comes into assignor's hands, equity deems done that which ought to be done
- **Is it a mere expectancy? Also, known as an equitable right under a discretionary trust**
 - o
 - o Where trustee has **absolute discretion** as to who they distribute money to, **beneficiary can only insist upon the due administration of the trust and has no present property that can be assigned**
- **Eg being in grandma's will**
 - o **Grandma can change the will as much as she likes**

3. Or is it a **future interest** in a presently existing property? (**present property**)

- Although they have nothing at outset, and may never get anything, children's in the future interest in existing property is the estate and **not future property**
- An attempt to **assign a present right** that **may generate future income** will succeed if the **present right exists**: *Shepherd*
 - this time, taxpayer attempted to assign **90% of the** income that may accrue from royalties – this was successful. Taxpayer had **assigned right to receive income, rather than income itself**
- **Can assign a declared right to a dividend but not an undeclared dividend** (*Norman*)
- Eg, 'I leave my estate to my wife for life, then to my children'
- Eg trust fund/trust property: presently existing. Current interest is in presently existing property. Enjoyment is delayed.
- Eg contingent property: (eg I hold the funds in my term deposit on trust for my sons to be transferred to them on its maturity provided I die before them)
- **Can sell it, declare a trust over it etc**
 - Even though they have nothing at outset, and may never get anything, the **children's interest is a future interest in existing property (the estate) and**

2. **Sufficient certainty (assuming the trust property is present property):**

1. Is the **property sufficiently certain**?
 - Can we determine what it is? Is it described well? Can we identify it? Too vague?
 - Not normally a problem with trusts created by transfer
2. Not sufficiently clear:
 - "divide whatever was left over between the children" *Mussoorie Bank Ltd v Raynor*
 - What property must be kept separate?
 - Needs to state which property to hold
 - Too much discretion for the trustee
 - **Shares example below will not work for multiple companies, different types of shares. Then will need to specify which ones.**
 - Eg **one of my horses** (Eg 3 horses) **not good enough.**
 - Each horse different. Need to identify which horse
 - Eg **most of my painting** = too vague.
 - Can say 25% but could be difficult....
3. Sufficiently clear
 - **50 of 950 shares in the same pool of shares** *Hunter v Moss; Shortall v White*
 - Shares **all in one company**; all **identical**; same **classes**; **not numbered**
 - Don't need to have segregation of the shares for there to be certainty of subject matter (when they are as above)