

## TRUSTS SCRIPT

### **Has the trust been validly created?**

The three certainties must be satisfied: Knight v Knight

#### **1. Certainty of Intention**

Settlor needs to have **immediately** and **objectively** intended to create a trust as opposed to some alternative legal arrangement (Byrnes v Kendle)

Here, formal language such as \_\_\_\_\_ is used to manifest intention to create a trust.

- As a solicitor would understand the meaning of the word 'trust' and has deliberately not used it.
- However, in Korda, the intention that lacked express declaration of intention to hold on trust, when placed in its commercial and regulatory context, did not support the existence of a trust over the timber and land sales proceeds.

Here, the trust was orally created / created by informal language and the court will consider all of the surrounding circumstances to determine if intention has manifested. (Paul v Constance)

- statements to a bank manager and witnesses on more than one instance that the money was as much his as his de facto partner's in conjunction with both parties having access to the account: Paul v Constance

The court will consider whether the characteristics of a trust are present as evidenced in Re Armstrong where the trust was established through communication and conduct.

Here, precatory language such as \_\_\_\_\_ is used. This suggests that a trust structure was not intended, rather a gift to X.

- "in full confidence" is merely precatory per Re Williams
- "feeling confident that she will act justly" is merely precatory per Mussourie Bank
- language in letters indicated the existence of a trust structure in Chang v Tjong
- a gift on condition was found to be merely precatory and not obligatory per Bruce v Cobcroft
  - o gift with obligation attached found in Gill v GillIf gift: incomplete gift because there is no delivery. A failed gift will not be construed as a trust just to save it (Jones v Lock).

Furthermore, considering the relationship, mother and son, it is natural to assume that a mother would want to provide for her children in this way. (Countess of Bective)

As there has been a gift, it will need to be validly assigned in equity.

Subjective intention per Joleif will only be upheld where the trust was illegal (unconscionability, undue influence), a sham or a mistake – not an intention to create a trust because there was a subjective intention to break the law.

- The purported trust in Lewis v Codon was intended as a sham, it still operated with apparent effect as a legal trust

Deed purported to create a trust for some time in the future is not immediate – invalid: Harpur

## **2. Certainty of Subject Matter**

**The subject matter must be assignable.**

- X may argue that the \_\_\_\_ is a mere expectancy.
  - o object of a power of appointment in Re Rules Settlement was not certain
  - o dividends alone will be expectancies: Norman v FCT
  - o the right to income will be assignable: Kitto J in Shepherd
- X may argue that the \_\_\_\_ is future property. Future property is not assignable without consideration.
  - o An object under a discretionary trust has no present property right that is capable of assignment: Kennon v Spry
- A residual clause in a trust will be certain: Re Rules

**The subject matter must be ascertainable.**

- The property must be described with sufficient certainty to be identifiable
  - o property that was “left over” and “no longer required” by the primary beneficiary cannot be identified per Mussourie Bank
- reference to a percentage holding of shares of the same class will be sufficiently certain: Hunter v Moss
- argue that a proportion of bundle of shares will be uncertain where they are not homologous shares per Hunter; White v Shortall

Courts will give objective meaning to terms where possible.

## Formalities

A will must comply with the formalities contained in s 7 of Wills Act 1958.

An inter vivos trust must comply with s 53 of the PLA.

- s 53(1)(a) applies to creations or dispositions of legal and equitable interests in land
  - o Although Menzies J in Adamson considered this section to be confined to legal interests, the majority found it was not confined to legal interests and this is the preferred view
  - o applies to dispositions of land only per Maradona
  - o transfer must be in writing and signed by the settlor or his agent
    - non-compliance leads to invalidity
  
- s 53(1)(b) applies to any form of trust relating to land
  - o must be manifested and proved by some writing
  - o signed by some person able to declare such trust or will
    - the signature of the settlor would be required as a “person who is able to declare such trust”, but per Kearney J in Hagan v Waterhouse held that the signature of the trustees sufficed.

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