

TRUSTS FLOW CHART TABLE OF CONTENTS

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EXPRESS TRUSTS

Step 1: Satisfy formalities from PLA: in writing and signed

- (a) New interest – PLA s 53(1)(b)
 - Applies to *real property only*
 - Two requirements:
 - o In writing and signed
- (b) Equitable interest that existed before – PLA s 53(1)(c)
 - Applies equally to real and personal property
 - Applies to the disposition of an interest that existed before
 - Two requirements:
 - o In writing and signed

Step 2: Satisfy all three Certainties

(a) Certainty of intention

- Is it certain that the settlor wanted the trust to come into existence?
 - o *Paul v Constance* (substance over form inquiry)
 - Look at the substance of the transaction.
 - o *Byrnes v Kendel* (objective approach)
 - Explicit declaration of a trust cannot be overridden by external evidence to the contrary.

(b) Certainty of subject matter

- Is the subject matter of a trust has to be legally-recognised property?
- Expectancy is not property – therefore cannot have a trust over an expectancy
 - o *Palmer v Simmonds* (bulk = not certain)
 - o *Re Golay's Will Trusts* (reasonable = certain)
 - o *Hunter v Moss* (fungible subject matter need not separate)

(c) Certainty of object

- Is it a fixed or a discretionary trust?
- Fixed: each share that a beneficiary is entitled to is specified in the trust deed
- Discretionary: trustee has discretion over how much/how to distributed trust property.
 - o Trust power: mandatory. Trustee must distribute TP.
 - o Mere power: permissive. Trustee *may* distribute TP.

(i) Fixed: List certainty rule

- Trustee has to be able to draw up a complete list of all beneficiaries at any given time.
- Authority: HCA endorses test in *Kinsella v Caldwell*
- *Important: Is there conceptual certainty?* If the criterion is not described with enough certainty or detail and is so vague as to make it impossible to determine whom the beneficiaries are.

- I.e., there are 3 John Smiths. Which one?!?
- Evidentiary uncertainty: practical problems with constructing a list of beneficiaries. Difficult, but not impossible. As long as there is conceptual certainty, this requirement will not be fatal if not met.
 - I.e., the trust students living in Carlton.

(ii) **Discretionary: criterion certainty rule**

- **Mere powers: criterion certainty**
 - If one can say with certainty if any given individual 'is or is not' a member of the class
 - The trust will not fail simply because it is impossible to ascertain *every* member of the class
 - Authority: *Re Gulbenkian's Settlement Trusts*
 - Problems: *capriciousness (no rational criteria for choosing beneficiaries). Administrative unworkability – not a problem.*
- **Trust powers: criterion certainty**
 - Same as above.
 - Authority: *McPhail v Doulton*
 - Problems: *unclear.*