

Certainty of intention (p 1–2)

Use of words

It is not necessary to use the word "trust" to create a trust. Precise words need not be used so long as a trust is the best way to give effect to the settlor's intention.

- The name of a bank account may signify the funds are intended to be held on trust (*Re Armstrong*)
 - Consider what would happen if there was an intention to assign both income and capital
- Words signifying shared ownership may signify that funds are intended to be held on trust (*Paul v Constance*)
 - Consider what would happen if money is used only by one party

Context

If imprecise words are used, courts look at context and see if options other than a trust are available

- If it seems that the settlor did not intend for the donee to provide for another out of goodwill (for example, a son providing to the father's mistress), this points to a trust (*Chang v Tjong*)
- An intention to create a trust requires an obligation, which is more likely to be found in imperative language (*Re Williams*, per Lindley LJ)
- Particularity by itself does not create an obligation or point to an intention to create a trust (*Re Williams*, per Lindley LJ)
- If the same language is used in two parts of a document, it is presumed the two parts should have the same meaning and create the same rights (*Re Williams*, per Lindley LJ)

The alternatives to a trust are given by the authorities below, where there seems to be a conditional gift

- If the donee can deal with property with absolute discretion but otherwise on condition to give to a third party, there are four possibilities (*Cobcroft v Bruce*, per Young AJ; the fourth option applied)
 - The donee is entitled absolutely
 - The donee is entitled absolutely, subject to an equitable condition enforceable by specific performance or equitable compensation
 - The donee has a life estate
 - The donee has a life estate with a general power of appointment
- If timing is an integral part of a conditional gift, then the condition is likely to be a condition precedent which will cause a gift to fail if unfulfilled (*Re Gardiner*)
- If a condition is a continuing one, such as providing board and residence, the condition likely gives rise to a personal liability rather than forfeiture (*Gill v Gill*, per Harvey J)

- Whether a condition is one of forfeiture depends on the language used to describe the obligation, the nature of the property and the nature of the obligation (*Gill v Gill*, per Harvey J)

The role of subjective intention

Certainty of intention is determined objectively, and there is a limited role for the settlor's subjective intention

- The meaning of what the parties have said overrides what the parties meant to say (*Byrnes v Kendle*, per Gummow and Hayne JJ)
- Subjective intention is only relevant in limited circumstances such as a challenge for mistake, misrepresentation, duress or rectification. Subjective intention is irrelevant as to whether a trust exists or what its terms are (*Byrnes v Kendle*, per Heydon and Crennan JJ)
- Although a trust may be established to deceive others or for an improper purpose, a trust is only a sham when there is an intention that the trust not bear its apparent legal consequence (*Lewis v Condon*).

Where dealings reflect contractual obligations, *Korda v Australian Executor Trustees* may apply

- A trust does not arise if nothing suggests that parties' interests will be specifically protected (per Hayne and Kiefel JJ)
- If there is no obligation to hold proceeds separately from regular assets, there is no "hallmark duty of a trustee" (per Gageler J)
- For a trust, it is necessary that investors' contributions are separated from the general funds (per Keane J)

Requirement of immediacy

The intention to create a trust must be immediate

- The creation of a trust in the future is not enforceable, as opposed to an immediate creation of a trust with a postponement of enjoyment by the beneficiaries. Where the settlor retains the legal and equitable title until a commencement date, there is no immediate intention (*Harpur v Levy*, per Neave JA)
 - In dissent, Maxwell P considered that a trust can be immediately operative even if there is a future commencement date since there is an irrevocable declaration
- Once a trust is validly created, the equitable interest passes immediately, and a trust that does not contain a power of revocation cannot be revoked (*Mallott v Wilson*)

...

Mallot v Wilson (pp 27–31)

Facts: The settlor conveyed property to a person to hold on trust for the settlor's wife for life and then for the settlor's children. The person disclaimed the trust. The settlor then

conveyed the property to other persons. After the settlor and his wife died, his son claimed the land under the original settlement.

Judgement: A disclaimer will reverse the conveyance, but once a trust is validly created, the equitable interest passes immediately. A trust that does not contain a power of revocation cannot be revoked. Therefore, the settlor's son had the best claim to the property.

Certainty of intention

The settlor must manifest an intention to create a trust. It is not necessary that precise words be used, as long as a trust is the best means of effecting the settlor's objective intention.

Re Armstrong

Facts: George Armstrong wanted to buy bonds for two of his sons William and Bernard. George intended that he would receive income from the bonds and the sons would get the principal on maturity. The bank manager instead convinced George to open two term deposits instead. The accounts were named "George Armstrong in re William/Bernard Armstrong". George died before the term deposits matured, leaving a widow and eight children.

Judgement: George did not intend to make a gift, because he wished to keep the income. However, the bank manager's evidence and the titles of the accounts showed an intention to keep the principal for the benefit of the two sons. Even though George never used the word trust, there was still certainty of intention.

Paul v Constance

Facts: Mr Constance separated from his wife Mrs Constance and commenced living with Mrs Paul in a de facto relationship. He won an award of damages for personal injuries and deposited the money in a personal account. He wanted to make it a joint account with Mrs Paul, but this was not allowed by the bank manager. His words to others was that the money was as much Mrs Paul's as his own, and the only withdrawal was made, which was used for Christmas presents, food and personal spending between the new couple. Mr Constance died intestate and Mrs Constance took out letters of administration. Mrs Paul sued her for half the money remaining in the account.

Judgement: Mr Constance's words to the bank manager and others, as well as the use of the money, all pointed to an intention to create a trust for himself and Mrs Paul.

Chang v Tjong

Facts: Soei Chang, the executor of her mother's estate, sued Richard, the executor of her brother George's estate. Her father had purchased a property in George's name. In 1976, the father sent a letter to George stating that he confirmed with his solicitor that George is to have the legal title and the father's interest is not to be caveated, to avoid death duty. The letter went on to instruct George to apply proceeds to the mother's needs and then given to the father's mistress on the mother's passing. In 1978, the father wrote a second letter, instructing George to apply the remainder of proceeds to Roy and/or other children in the family, Roy being the father's illegitimate son. Both parents and George eventually died.

Soei claimed that George held the property on trust for solely the mother. Richard claimed there was no trust at all.

Judgement: The father intended to create a trust in 1976. Relevant was the fact that the father likely did not intend to rely on George's goodwill to provide for the mistress or for Roy and therefore intended to impose an obligation. It was conceded that the 1978 letter changed the terms of the trust. George effectively had discretion to distribute the money to the family according to need. Thus, George did hold the property on trust, but not only for the mother's benefit.

Re Williams

Facts: Dr Williams left his estate to wife "... absolutely, in fullest confidence she will carry out my wishes ..." He intended that his wife take out life insurance policy for herself and leave Dr Williams' and her own life insurance payout for their daughter on the wife's passing. The wife did bequeath the proceeds of Dr Williams' policy to the daughter, but not the proceeds of the other policy.

Judgement: Per Lindley LJ, there must be an intention to impose an obligation. There is likely such intention if there is imperative language, and particularity will not necessarily suffice. Dr Williams' words conveyed that he had confidence in his wife's discretion to provide for the daughter and the proper interpretation is that he expressed a wish that the daughter should have both policies unless his wife saw reasons otherwise. Dr Williams also used the same language in relation to both his and his wife's policy. Since the wife cannot be tenant for life over her own life insurance policy, Dr Williams did not intend that she be tenant for life over his policy.

Gill v Gill

Facts: The testator left a farm and homestead to his son "on condition that he keep the homestead as a home and provide board and residence for his sisters".

Judgement: Per Harvey J, the condition was not a condition of forfeiture. Therefore, the son was under personal liability and the sisters were entitled to equitable compensation. Whether a condition is one of forfeiture depends on the language used to describe the obligation, the nature of the property and the nature of the obligation.

Cobcroft v Bruce

Facts: Cobcroft left shares to his wife, Denise "to deal with as she in her absolute discretion sees fit, but otherwise on condition that she ultimately gives those shares, the remainder thereof, to my nephews David ... and Niklas". The wife left the shares to charity.

Judgement: Per Young AJ, there are four possibilities in the situation.

1. The wife took the shares absolutely
2. The wife took the shares absolutely, subject to an equitable condition enforceable by specific performance or equitable compensation
3. The wife had a life estate

4. The wife had a life estate with a general power of appointment

In this case, the wife had an equitable obligation either to give the shares to the nephews during her life or to leave them to them in her will.

Re Gardiner

Facts: Mr Gardiner died and left property to his son Ivor "subject to [Ivor] paying one thousand pounds within two years from my death unto my son, Albert". Ivor did not pay Albert.

Judgement: The requirement to pay was a condition precedent because the payment of money in time was an integral part of the condition. Therefore, the gift to Ivor failed.

Byrnes v Kendle

Husband purchased some land and then executed a deed saying that he held half on trust for his wife. They then separated and the husband allowed one of his sons to occupy the house rent-free. He claimed he did not have a subjective intention to create a trust, relying on *Jolliffe*.

Judgement: Per Gummow and Hayne JJ: "What is the meaning of what the parties have said" rather than "What did the parties mean to say".

Per Heydon and Crennan JJ: subjective intention is only relevant in limited circumstances such as a challenge for mistake, misrepresentation, duress or rectification. Subjective intention is irrelevant as to whether a trust exists or what its terms are.

Lewis v Condon

Facts: A trust was created in order to protect property from Family Court proceedings. One of the issues was whether the trust was a sham.

Judgement: Although a trust may be established to deceive others or for an improper purpose, a trust is only a sham when there is an intention that the trust not bear its apparent legal consequence.

Korda v Australian Executor Trustees

Facts: There was an investment scheme in a variety of forestry companies which had since been liquidated. An issue that arose was whether the proceeds from timber and land sales were held on trust.

Judgement: Per French CJ: The scheme was "at least analogous to" a multilateral agreement, and although a trust would have been commercially advantageous, it did not reflect the joint intentions.

Per Hayne and Kiefel JJ: The dealings reflected contractual obligations, and the documents did not suggest that the investors' interests would be specifically protected.

Per Gageler J: It was decisive that there was no obligation that the companies hold proceeds separately from their own money "as the hallmark duty of a trustee".

Per Keane J: The documents did not show that investors' contributions were to be separated from the general funds of the companies.

Harpur v Levy

Facts: Mr Rand declared himself to be trustee of certain property as from a commencement day in the future.

Judgement: Per Neave JA: equity will not assist a volunteer by enforcing an intention to create a trust in the future. This is different from creating a trust immediately with a postponement of enjoyment by the beneficiaries. The deed made it clear that Mr Rand retained the legal and equitable title until the commencement date and the words "irrevocably declares" do not convey an immediately operative trust.

Per Maxwell P, dissenting: the deed created an immediately operative trust, with property to be transferred in the future.