## CREATION OF EXPRESS TRUSTS

### INTRODUCTION:
- This is a purported express inter vivos trust by transfer in which [X] is the settlor and [X] is the trustee. The purported trust is created by a deed signed by [SETTLOR].
- This is a purported express testamentary trust in which [X] is the settlor and [Y] is the trustee. The purported trust is created by a Will.
- In order for the express trust to be valid it must satisfy the three certainties: intention, subject matter and object, as well as be validly constituted and satisfy the formality requirements.
- The key issue here is [CERTAINTY OF INTENTION/ CERTAINTY OF OBJECT/ CERTAINTY OF SUBJECT MATTER etc].

### CERTAINTY OF INTENTION

#### STEP 1: INTRODUCTION
- In order for the trust to be valid, [S] must have shown an immediate intention to create a legal arrangement with the characteristics of a trust, whether or not the word ‘trust’ was actually used. *(Harpur v Levy)*
- The onus of proof lies with [B/the party] seeking to establish the existence of the trust.
- If no certainty of intention the trust will fail

#### STEP 2: INTENTION = OBJECTIVE
- [S] must have shown an objective intention to create a trust *(Byrnes overturning subjective approach in Jollife)*
- [S] must have indicated by words (oral or writing) or conduct that they intended to create a trust
  - NB: subjective intention will be relevant where there are grounds to challenge the transaction- ie. vitiating factor or sham *(Byrnes per Heydon and Crennan JJ)*

#### STEP 3: IMMEDIACY OF INTENTION *(Harpur v Levy)*
- A declaration of an intention to create a trust must be declaration of immediate intention. A voluntary promise to create a trust at a future time creates no enforceable rights
- If the intention is to create a trust in the future, certainty of intention fails UNLESS consideration was paid and [S]’s conscience can be bound to complete the promised future transaction
- If consideration is given, equity treats property as held on trust when the future times arrives

### CREATED BY WRITING

#### UNAMBIGUOUS/ EXPLICIT WORDS
- Here [S] has used explicit words of [WORDS] in [DOCUMENT eg. trust deed]. We must examine the intention manifested by these words alone *(Byrne v Kendle)*.
- As the wording is clear an unambiguous, this will manifest an intention to create a trust that is difficult to challenge
- [CLAUSE #], which is a key operative provision has used [MANDATORY WORDS etc.], which is the language of trust
- CANNOT consider extrinsic evidence

#### AMBIGUOUS/ INEXPLICIT
- Here [S] has arguably used informal/ambiguous words of [WORDS] in [DOCUMENT], thus we must examine the intention manifested with reference to the circumstances of the case and the whole trust deed *(Re Armstrong; Chang v Tjong)*
- B will argue that the words, considered in light of [INTENTION TO BENEFIT B] demonstrated [S]’s intention for [B] to benefit from [PROPERTY] and thus certainty of intention is present *(Re Armstrong)*
  - Need a specific intention to benefit a third party *(RE Armstrong)*
Several ambiguous documents

- Where there are several informal documents, the earliest in time where an intention can be found will be effective (Chang v Tijong)

**CREATED ORALLY**

- Here [S] has not used ay written words and [B] is alleging a trust was created orally. Accordingly, we must examine all the surrounding circumstances of the case to determine if the intention is manifested (Paul v Constance)

**IS THERE AN INTENTION?**

- Not necessary to use the word trust or any other technical or legal words (Re Armstrong)
- Settlor need not realise they are creating a trust (Re Armstrong)
- Not necessary to tell the beneficiary that a trust is being created (Rose v Rose)

- [X] will argue the words are merely precatory and do not amount to an intention to create a trust (CASE).

**Factors pointing against intention:**

- Use of precatory terms
- Other clauses use strong language (Dean v Cole; Cobcroft)
- S was experienced in trusts and knew mandatory language was required
- Drafted by solicitor and did not use the term “trust” or used permissive language
- Vague language (Dean v Cole)
- Where subject matter of trust is uncertain (Mussorie)

**Factors suggesting intention**

- Trust drafted by a professional
- [S] is inexperienced and would not know that mandatory language is needed, and no obligatory wording elsewhere in the trust
- Family dynamic
- Trust by transfer- act of transferring property to a T evinces an objective intention to create trust

- eg. “on condition that” “provided that” “on trust”

**CASE EXAMPLES:**

<table>
<thead>
<tr>
<th>Case</th>
<th>Wording</th>
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<tbody>
<tr>
<td>Hayes</td>
<td>To my daughter “on the understanding that she write into her Will, that at her death, these shares are to be sold [and proceeds divided between 3 charities]”</td>
<td>An obligation imposed upon the daughter. She HAD to leave the specific property to the charities Needham J: Referred to the Countess of Bective and Dixon J’s alternatives and ruled out all possibilities.</td>
</tr>
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<td>Dean v Cole</td>
<td>To my wife “trusting to her that she will.... Divide in fair just and equal shares between my children.... All such part... of my estate as she ay be in the use and enjoyment of”</td>
<td>Merely precatory words. Other clauses gave the wife full ownership “at absolute disposal.” If she has full ownership this is inconsistent with an enforceable obligation to divide the property. “all that she may be in use and enjoyment of” suggests she can use it up throughout her lifetime.</td>
</tr>
<tr>
<td>Re Williams</td>
<td>To my wife “absolutely in the fullest confidence she will carry out my wishes”</td>
<td>Merely precatory words.</td>
</tr>
<tr>
<td>Mussorie</td>
<td>To my life “feeling confident that she will act justly to our children in dividing the same when no longer required by her”</td>
<td>Merely precatory words</td>
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**STEP FOUR: OTHER OPTIONS IF NOT TRUST**

Where the words fall short of a trust there are 3 potential options for the legal arrangement created *(Countess of Bective per Dixon J affirmed in Cobcroft)*

1. A gift with precatory (aspirational) words only- no obligation/ moral obligation at best
2. A gift with legal conditions attached- failure to comply= forfeiture of the interest/ gift
3. A gift on equitable conditions/equitable charge
   - Equitable condition: failure to comply= personal obligation enforced in equity eg. equitable compensation or equitable damages
   - Equitable charge- creates a security interest over property to the extent of the security. Once the amount is paid the owner of the property has full ownership.

Consider:
- Relationship between parties- generally testators less likely to impose trust obligations upon people who can be expected to do the right thing (not conclusive- consider Countess of Bective; Cobcroft; Tijong; Williams)
- Nature of the property- would the result be disproportionate (eg. Gill)

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<td><em>Gill v Gill</em></td>
<td>To my son on condition that he let his unmarried sisters stay in the farmhouse for their lives.</td>
<td>This was a gift on equitable condition. He could deny the condition but doing so would give rise to an action for compensation.</td>
</tr>
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<td><em>Cobcroft v Bruce</em></td>
<td>To my wife “to deal with as she in her absolute discretion thinks fit, but otherwise on condition that she ultimately gives those shares or the remainder thereof to my nephews”</td>
<td>When she died, the remainder of the shares was approximately $6-7m. However, she left them under her will to charities. <strong>Young J:</strong> Applying <em>Bective</em>, and looking at the terms of the will as a whole, this was most likely to be an equitable condition. She either had to give the shares away in her life-time or in her will.</td>
</tr>
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<td><em>Re Gardiner</em></td>
<td>All property to my son “subject to my son paying the sum of One Thousand Pounds within two years from my death unto my Son, Albert”</td>
<td>This was a gift on legal condition. Couldn’t be a trust for lack of trust property. Strong language and use of a time limit imposed a legal condition. If he failed to make the payment he forfeited his interest and the estate vested in testators next of kin</td>
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**STEP 5: REVOCATION**

- The trust comes into effect as soon as intention is formed and is irrevocable unless otherwise expressly provided *(Mallot v Wilson)*
- Here the [DATE][DOCUMENT] from [S] will likely to be sufficient to establish a trust arose at that point, this the [DATE][DOC 2] will be ineffective for failure to be properly constituted. [S] did not have the beneficial interest in [PROPERTY] to give away

**STEP 5: CONCLUSION**

- On this basis there is/is not certainty of intention
Here [X] may argue that the transaction was not intended to have its apparent legal consequence and is actually a sham to hide [ASSET].

[X] who is seeking to defeat the express declaration of trust must establish on the BoP the absence of intention
- i.e. fraud, illegality, unconscionability, undue influence, deceit

In order to invalidate the intention of this trust [X] must show on the balance of probabilities that all parties to the transaction were intending to mislead

However per Leeming J in Lewis v Condon, a transaction will not be a sham merely because it is entered into for an improper motive

- A sham “refers to the steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences (Equuscrop)
- Subjective test
- Not every improper purpose will be a sham
  - **Eg. Lewis v Condon**: Trust created for children in an effort to hide property from the Court in a Family law dispute- not set aside as a sham as the principal intention was to set up a trust for the children albeit for the bad intention of defeating the husband in the Family Court
- Difficult to prove, especially if it is a trust by transfer

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CERTAINTY OF SUBJECT MATTER (TRUST PROPERTY)

• Any asset equity recognises as property can form the subject matter of a trust
• Examples: Land (real property); Shares (White v Shorthall); Chattels eg. articles of furniture, plate and pictures; Intellectual property eg. secret recipes; life insurance policies; debts; Equitable interests in shares; Beneficial interest in a unit trust (JW Broomhead); Chose in action; Right or obligation under an ordinary legal contract
• Mere expectancy cannot form the subject matter of a trust

1. TRUST PROPERTY MUST BE PRESENTLY EXISTING

FUTURE PROPERTY- NO CONSIDERATION

➢ As [B] is not paying consideration to [S], the trust can only be created over present property (Kennon v Spry). Equity will not assist a volunteer thus the creation of a trust over future property will be ineffective (Williams)
• Property not yet in existence OR Property in existence but not yet owned by the person purporting to deal with it
• Examples of future property:
  o Expectancies under wills of living persons
  o Rights of an object under discretionary trust (Kennon v Spry)
  o Freight yet to be earned by a ship owner
  o Copyright in songs yet to be written
  o Future royalties
  o Damages which assignor may recover in pending litigation

NB: Trust property/trust fund= present property

INCOME CASES: (contractual right to receive money)

• Depending on the nature of the contract and the precise wording used in the assignment document, it may be that the subject of the assignment is the contractual rights themselves (a present chose in action) or the money to be received in under the contract in the future (future property)
• Words used in the assignment document are critical to the success to the attempted assignment

➢ The property here is [PROPERTY], which is arguably income that has not yet accrued.
➢ [X] will argue that this is future property that may never exist because [WAYS INCOME/BENEFIT MAY NOT ACCRUE]: Norman per Menzies CJ, cf Windeyer J.
➢ [B] will argue that this is in reality an assignment of those present rights [S] enjoys over [TREE/ASSET] that give rise to the benefit of any [BRANCHES/INCOME]: Shepherd.

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<td><strong>Williams</strong></td>
<td>The first £500 of trust income.</td>
<td>Invalid assignment of future property as income had not yet accrued. Reference to the monetary figure rather than proportion of his beneficial interest crucial</td>
</tr>
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<td><strong>Norman</strong></td>
<td>Next year’s dividends payable on shares.</td>
<td>Invalid assignment of future property as shares not declared.</td>
</tr>
<tr>
<td></td>
<td>All right, title and interest in respect of next year’s interest payable on the first 3,000 pounds of a loan.</td>
<td>Menzies CJ – invalid assignment because the future existence of the loan was contingent on it not being repaid which the debtor could do so at will. Windeyer J – valid assignment carving out a present property right.</td>
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