

## Wk. 1 – Trusts

### 4 Elements of a Trust

1. Trustee whom legal or equitable title to property is vested
  - Any person can be a trustee, including a person *Trustees Act 1962* (WA) s 6
  - Person can become a trustee either expressly, implication, or legal operation
  - Can appoint new trustees under express powers or statutory powers
  - Ceasing to be a trustee: death, retirement, removal, completion of trust purpose
2. Trust property
  - property includes real and personal property and any estate, share, and interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest, whether in possession or not – s.6 *Trustees Act*
3. Beneficiaries
  - Must have beneficiaries unless it's a charitable trust – *Morice v Bishop of Durham*
  - Trustee can't be the only beneficiary – *DKLR Holding Co Pty Ltd v Commissioner of Stamp Duties*
4. Equitable obligation binding the trustee to deal w/ the trust property for the benefit of the beneficiary
  - Binding on the trustee and attaches to the property

## Wk. 2 – Certainty of trusts

### Four ways:

**Moral obligation** – precatory words are not generally imperative in nature. They only create a moral obligation unless the circumstances show otherwise *Re Williams*

**Condition** - condition construed as a condition precedent will ordinarily be a condition involving forfeiture – such that the gift will fail if the condition is not fulfilled. Compare legal condition (failure to perform) and equitable (personal obligation to fulfil it). *Re Gardiner*.

1. A gift that imposes an obligation to make payments to a third party may be construed as giving rise to a mere personal obligation to perform the obligation. Can be enforced through equity by a degree of specific performance or compensation.

**Equitable charge** - May be created where a transferor gives the property subject to payments being made to a third party. E.g. *Hogden v Hogden* the testator bequeathed flats on trust to his son 'absolutely', the son to 'properly maintain my daughter'. Held: Clause gave the daughter an equitable charge over the properties as security for her proper maintenance. Sell the property, get the money you owe.

**Trust** – provides more direct protection to the third party.

### Three certainties to create an express trust:

1. *Intention to create an express trust*
  - Settlor must have indicated by words/conduct that he intended to create a trust *Byrnes v Kendle*
  - Settlor's language in the context of the instrument as whole *Re Altson*
  - Not necessary to use the word 'trust' *Re Armstrong*. Use of the word 'trust' may be an indicator. As well as intention to keep property separate, not mixed *Cohen v Cohen*
  - Not necessary for the settlor to have told the beneficiary that a trust is being created: *Rose v Rose*
  - Onus of proving that the settlor had an intention to create a trust lies on the person propounding the trust: see eg *Herdegen v FCT*
  - Intention depends on context: *Paul v Constance* (de facto)
  - Subjective intention of the settlor is irrelevant and inadmissible. Legal effect depends on the settlor's outward manifestation of intention. *Byrnes v Kendle*. Objective intention
  - Settlor must intend to create a trust that takes effect immediately *Harpur v Levy*
2. *Property that's subject to the trust*
  - If the trust property is uncertain then the trust is void

- The property which the settlor or testator intends should be held on trust must be defined or described so that it can be identified with certainty otherwise the trust will fail: see *The Mussoorie Bank Ltd v Raynor*
- There is no difficulty if the words used are capable of being interpreted with certainty by the courts, such as where objective criteria for the calculation of the quantum are available.
- Avoid using imprecise terms! *Palmer v Simmonds*
- 'expectancy' does not constitute property and cannot be held on trust. For example, the expectation of receiving property under a will

### 3. Identity of the beneficiaries

Transfer or declaration can create express trusts. Testamentary trusts are created by virtue of provisions in the terms of a will.

Summary of certainties:

- If the language is clear, look to the language's intention. If it is vague, look at the whole trust instrument, making sure that you are reading it in context. (*Hayes v NHF*). Also look to the nature and transaction of parties (*Bahr v Nicolay*)

## Wk. 3 – Formalities

### Statutory Formalities per s 34 of *Property Law Act 1969*

- (a) no interest in land is capable of being created or disposed of except by writing signed by the person creating or conveying the interest, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law;
- *Adamson v Hayes*
- (b) a declaration of trust respecting any land or any interest therein shall be manifested and proved by writing signed by a person who is able to declare the trust or by his will;
- (c) a disposition of an equitable interest or trust subsisting at the time of the disposition shall be in writing signed by the person disposing of the interest, or by his agent thereunto lawfully authorised in writing or by will.
- (2) This section does not affect the creation or operation of resulting, implied or constructive trusts.

*DSS v James*

**Facts:** Mrs James applied for a pension. The DSS assessed her assets as including a home unit but Mrs J argued she held the unit as trustee for her disabled daughter and grandchild and so should not be included in this assessment.

Was the unit subject to a trust given that the formalities in subsection (a) had not been complied with?

**Held (per Lee J):** Subsection (a) did not extend to declarations of trust, as subsection (b) would be rendered 'an odd exception or otiose.' Therefore, only subsection (b) applied to a declaration of trust over an interest in land and the requirements of proof of writing in this subsection had been satisfied.

### Point B:

*Wrattan v Hunter*

**Facts:** A father transferred land to one of his sons shortly before his death. On the day of the funeral, the son said to his sisters and brothers "I promise to live in the house and care for the home and the property for all of us."

**Held:** The oral declaration of trust was **not** enforceable. It did not attract the 'cloak of fraud' doctrine because the siblings had not relied on their brother's promise to their detriment.

*Hagan v Waterhouse* - writing signed by the trustee is sufficient to enforce the trust against the trustee.