

TABLE OF CONTENTS

COMPLAINTS YOUR CLIENT CAN HAVE:	2
<u>1.0 HAVE YOU GOT AN EXPRESS TRUST?</u>	2
1.1 INTENTION TO CREATE EXPRESS TRUST	2
1.1.1 <i>COUNTESS OF BECTIVE V FCT</i> – SPOTTING A TRUST AMONGST THE GIFTS	4
1.1.2 <i>QUISTCLOSE</i> TRUST	4
1.2 SUBJECT MATTER	5
1.2.1 FUNGIBLE INTERESTS	5
1.3 OBJECT	6
1.4 DISCRETIONARY TRUST?	7
1.5 GIFTS TO UNINCORPORATED ASSOCIATION FOR THEIR PURPOSE - CHARITIES?	7
1.5.1 WHAT IS THE CORRECT CONSTITUTION OF THE GIFT?	7
1.5.2 IS THE CLUB'S PURPOSE CHARITABLE?	8
1.6 CONSTITUTION AND FORMALITIES	11
<u>2.0 IF NO, DO YOU HAVE ANOTHER KIND OF TRUST?</u>	13
2.1 TESTAMENTARY TRUSTS	13
2.1.1 TESTAMENTARY CAPACITY	14
2.1.2 KNOWLEDGE AND APPROVAL	14
2.1.3 VARYING WILL / APPLYING FOR MORE DOSH FROM THE WILL	14
<u>3.0 SHIT HAS HIT THE FAN, WHAT CAN YOU DO?</u>	15
3.1 TRUSTEE OBLIGATIONS	15
3.2 HOW CAN YOU VARY OR TERMINATE A TRUST?	17
3.2.1 POWER OF COURT TO VARY TRUST	17
3.2.2 POWER OF BENEFICIARIES TO TERMINATE TRUST	18
<u>4.0 CAN YOU ASSIGN THAT?</u>	21
<u>5.0 INVALIDATING FACTORS</u>	24
<u>6.0 AND JUST CAUSE – WHAT IS THE NATURE OF A TRUST?</u>	25

COMPLAINTS YOUR CLIENT CAN HAVE:

1. Why not me, why her? - reasoning
2. What's in the trust doc terms? - reasoning
3. I wanted it, can I have it? - recovery
4. This trustee sucks, can we ditch her? – disqualifying trustee

1.0 HAVE YOU GOT AN EXPRESS TRUST?

For an express trust need 3 certainties:

1. Certainty of settlors intention
2. Certainty of subject matter (property)
3. Certainty of objects of the trust

Korda v Australian Executor Trusts (SA) [2015], per French CJ

1.1 INTENTION TO CREATE EXPRESS TRUST

Where a litigant alleges an express trust, he or she must prove, on the balance of probabilities, that a trust was *actually* intended to come into existence. As long as trust is *inter vivos* over personalty (not land) then can be created orally.

- Trusts may be created by a unilateral act (of declaration, direction or settlement) or may arise from a consensual bargain between settlor and trustee.
 - In either case, a trust-creating intention must be established as a matter of fact
- The question is one of substance, not form
 - ***Kauter v Hilton***
 - Facts: old man promised to leave his niece £5000 in trust accounts, had not included words in his will of this effect though. BUT niece had been looking after him up until death. Number of passbook accounts opened in man's name and he gave his niece each passbook. Withdrawals could not be made from accounts without them.
 - Held: trust arose except beneficial ownership of moneys postponed until man's death. The fact that man gave passbooks to his niece was indicative of the trust. He could not then operate the accounts without her consent and participation.
- Courts approach the interpretative task (to determine intention) objectively:
 - ***Twinsectra v Yeardley***
 - ***Byrnes v Kendle (2011) HCA***
 - ***Korda v Australian Executor [2015] HCA***
- Words cannot be construed in isolation, consider surrounding context (e.g. other words used contemporaneously (at the same time) or material facts bearing upon the intentions of the parties)
 - The extent to which the court will take note of extrinsic evidence depends on the circumstances e.g. whether the documents appear to be a definitive record of the parties' obligations
 - Note also that there are particular statutory restrictions that apply to **testamentary trusts** in respect of extrinsic evidence
 - S33C of *Succession Act 1981* (Qld)
 - Basically allowed to bring in evidence (including of testator's intention) if the language of the will is meaningless, ambiguous on the face of the will or ambiguous in the light of surrounding circumstances to help clear shit up.

- Note where the settlor has used words susceptible of more than one plausible construction, a court must ascertain the true meaning on a case-by-case basis – important to not rely too heavily on reasoning by analogy
- Recurring themes:
 - Intention to create a trust is not to be confused with words expressing an intention to create a revocable mandate
 - ***Smith v Hurst (1952)***
 - ***Comptroller of Stamps (Vic) v Howard-Smith (1936)***
 - Even the word ‘trust’ itself may not indicate an intention to create a trust in the ‘equitable sense’ of the term
 - ***Tito v Waddell (NO 2) [1977]***
 - Receipt of money or other property in the course of a commercial transaction will not, ordinarily, give rise to a trust in favour of the party paying or providing the money or other property. A trust will only arise in such an event where circumstances are sufficient to create obligations of a fiduciary nature on the recipient.
 - ***Walker v Corboy*** – because no separate account, was just debtor and creditor relationship
 - Absence of communication – not damning, but does lean towards showing they didn’t intend to create a trust (***Jolliffe*** – didn’t inform wife)

PRECATORY WORDS

Be mindful of distinction between imperative obligations and mere precatory words. Do the words (1) display the necessary intention to bind the alleged trustee, or do they (2) simply confer a power which is not binding, or are they (3) no more than words of request?

Important to determine, despite the use of words of request, prayer or entreaty, if a binding trust is nonetheless intended. Answer depends on facts of case.

- ***West v FCT*** – “it is my will and desire” that shares of a deceased estate be settled on testator’s daughters in certain way were HELD to be binding on the trustee
- ***Re Adams and Kensington Vestry (1884)*** – “unto and to the absolute use of my dear wife ... in full confidence that she will do what is right as to the disposal thereof between my children” → HELD no trust created
- BUT ***Comiskey v Bowring-Hanbury*** – “in full confidence that... she will devise it to one or more of my nieces as she may think fit” → HELD trust created because context of will as whole indicates this was testator’s intention
- ***Re Alston*** – “it is my express wish” that Newman Spielvogel be granted a lease of 2 properties for 10yrs at £2/wk with a right to terminate – HELD not a binding direction to trustee, but gave trustee authority to do so

Inter vivos trust for land: must be manifested and proved by writing - s11 PLA

Testamentary trusts: must be created by will.

Does the opening of a bank account create a trust? Depends on intention of the person opening the account, notwithstanding any words used. If the person intended to operate for his or her own benefit, no trust will be created (***Jolliffe***)

→ ***Commissioner of Stamp Duties (Qld) v Jolliffe***.

- Facts: deposited £900 of his own money under the name Mrs Hannah Jolliffe-Edwin Alfred Jolliffe, Trustee. Upon Mrs Jolliffe’s death, withdrew the £900 and claimed it for himself. Estate came after it claiming the money was Mrs Jolliffe’s, held by her husband on trust. However, Mr Jolliffe provided evidence that the money paid into the account