

NATURE OF TRUSTS

- Legal or equitable interest in property bound by fiduciary obligation, enforced in equity, hold for the benefit of others or for some purpose permitted by law
- Personal and proprietary remedies attached
 - o Personal duty binding on trustee = personally obliged to beneficiaries to deal with trust property for their exclusive benefits
 - o Proprietary remedy = money attached to asset. Ability to follow it and into different assets
- Resulting trust – arise from law. Settlor confers title to another person but retains beneficial ownership of property. On basis of presumed intention arising from particular form of transaction
 - o Automatic – goes back to settlor because certain object is not satisfied
 - o Presumed – X buys house with his own money, put it in A's name. Presumed that C retains some sort of interests in the house still
- Constructive trust – imposed by court where it would be a fraud for that person to assert a beneficial ownership, or not account for a gain or compensate for a loss
- Trust vs. debt – creditor to a debt only has personal remedy, no proprietary interest. Beneficiary of a trust stand outside of bankruptcy with personal & proprietary remedies
 - o Trust strengthens position of claimant considerably
 - o Mixing money (debt) vs. received money on behalf of another person (trust) + intention of parties [Cohen]

CERTAINTY OF INTENTION

- Must have sufficiently clear intention from the language or conduct, not about the understanding of settlor
 - o Burden of proof: person alleging a trust was created [Herdegen v FCT]
- Required because trustee takes onerous obligations & settlor gives away all his beneficial interest in property
 - o Once validly constituted trust is created, it won't fail for want of trustee/revoked by settlor (without an express power of revocation) [Mallott v Wilson]
- Consider language used, whole of instrument, all of circumstances (relationship between parties, nature of transaction, circumstances surrounding transaction [Trident v McNiece]) and subsequent consequences, professionally drawn up (higher expectation of language) -> intention
- No formal or technical words required [Re Armstrong] [Paul v Constance]
 - o Can be oral or in writing. Words given their ordinary natural meaning
 - o Construed to context of the instrument as a whole
 - o Don't need the word 'trust'
 - o [Re Armstrong] settlor intended that he would be entitled to the interest on bank accounts & his sons would get principal once investment matures 'George Armstrong re William Armstrong' -> intention to create a trust, doesn't need explicit words

- *[Paul v Constance]* 'the money is as much yours as it is mine', couldn't get joint accounts as they were de facto, deposit their joint winnings into account & withdraw \$ together. Trust
- Determined by objective intention *[Byrnes v Kendle]* K manifested an intention to create a trust and his mental reservation is irrelevant in construing the documents signed
- *[Joliffe]* the words 'trustee' does not automatically mean settlor intended to create a trust. Husband opened 2 bank accounts, one with his wife's name because interest payment was capped to first \$1000. No real intention that he was holding the money for the benefit of his wife
 - Dissenting (Issacs J): concerned about dishonesty of the transaction. Didn't think Mr J should be able to get away with deliberate scheme of defrauding the State. Said the bank form that Mr J should be an explicit declaration of trust, cannot use secret intention of trust to render the trust invalid. Intention is in the words, not mind. Once there are words, it is beyond recall, it is final.
- Precatory words – intention to create a moral obligation rather than legal to use property for the benefit of another
 - May not be an express intention to create a trust
 - Contrast with imperative words
 - Donee will take property as an absolute gift, up to them to do whatever they wish. Completely free of any legal obligation to use the property in way as directed by donor
 - Look at relationship between parties, intention, read the instrument as a whole
 - *[Re Williams]* 'Absolutely, in the fullest confidence that...' -> absolutely infers giving it to somebody, fullest confidence is just permissive words. Wife's insurance wasn't his to give away under his Will anyway
 - *[Re Altson]* 'it is my express wish...' -> professionals drafted the instrument, and other clauses of the will had imperative language. Reading the document as a whole implied this clause is only permissive, not obligatory
 - *[Lambe v Eames]* 'to be at her disposal in any way she may think best for benefit of herself and family' -> uncertain of subject matter ('any way she may think best'). Uncertainty negated the possibility that testator intended the widow to hold the property on trust as trustee

CERTAINTY OF SUBJECT

- Trust property must be capable of being the subject matter of trust and be identified with precision
 - **Description** of the trust property
 - *[Palmer]* 'bulk of my estate' 'appropriate amount...' -> too vague
 - *[Sprange]* 'remaining part which he doesn't want' -> too uncertain
 - *[Re Golay]* 'reasonable income' -> sufficiently certain, allowed executors to make a choice, capable of being interpreted. Not always a determinative factor though
 - **Beneficial interest** or shares in trust property

- *[Hunter v Moss]* segregation of shares not necessary if it is the SAME class of shares in the SAME company of the SAME value. If different from the rest, it leads to uncertainty
- Must be **presently existing** at the time the trust was created, not mere expectation
[Re Rule's Settlement]
 - Right to something = tree
 - Something = fruit – not presently existing, because it's not guarantee
 - It's about the nature of the property, not its duration
- *[Shepherd]* right to royalties = tree. Promise may not be fruitful but not incapable of assignment. Doesn't matter if the fruit does not exist at the date of settlement (Kitto J)
- *[Norman]* overruled.
 - Majority = 'right to receive interest' and 'dividends' are both mere expectancy
 - Dissenting = dividends are future property because court cannot compel company to distribute dividends, mere hope for shareholders & cannot be assigned under trust
 - Right to interests = presently existing right to receive the interest. Duration is irrelevant & does not affect the nature of the right
- *[Boyce]* estate given to mother who would convey her trust to his eldest daughter 'whichever she may think proper to choose', mother died without choosing which house -> daughter's interest was uncertain
- *[Mussoorie Bank v Raynor]* 'feeling confident that...when no longer required by her' - > up to her to decide which items of property were required by her or not. Subject matter was uncertain & negated intention that widow should accept property as trustee for his children. No legal obligation