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**Express:** Created where settlor has expressed intention to create trust of specific property for the benefit of some person or charitable purpose. They can be either

- **Private:** Intended to benefit one or more individuals
- **Public:** for charitable purposes as recognised by law (leaving farm on trust for the education of poor children)
  - **They may be Fixed:** all Beneficiaries (b's) are ascertained and their beneficial interests are fixed, no-one having any discretion to vary the group of b's or their interests.
  - **Discretionary:** Trustee is given a discretion to decide which of the defined class of beneficiaries is entitled to the trust property
    - It can be in relation to which b's are to take and whether they receive income, capital or both.
    - Although they have discretion, they are under a duty to distribute the trust money – this may not necessarily be immediate, they will be given the power to accumulate trust income and add to the income capital.
    - **Example:** *To pay the income and capital to whichever the trustee shall select.*

Express trust is created when a settlor (person who creates trust) makes declaration of trust over certain property

### Trusts & Powers

TP is distinguishable from bare power which also confers a discretion on Tees.

1. Powers of Appointment
2. Administrative and managerial power

Bare Power: Discretion to appoint gives discretion to appoint trust prop – but no obligation on trustee to exercise discretion.

### Types of Powers of Appointment:

1. General Power of appointment: - donee to appoint prop to anyone including themselves
2. Special power of appointment: - entitles donee to make an appointment among class of objects selected by the settlor.
3. Hybrid, or intermediate power of appointment: - entitles donee to appoint anyone except a specified class of persons.

### Express Intention to Create a Trust

#### Commissioner of Stamp Duties (Qld) v Jolliffe

Facts; There was a statute which said you could only have one bank account at the state saving bank in Qld and earn interest (you could have more than one account but you wouldn't earn interest). Mr Jolliffe wanted to earn interest so he said that the second account is money that he wanted to hold on trust for his wife so that he could earn interest on it. So he had to separate accounts and earning interest. Then his wife died and the duty commissioner was trying to establish how much duty to pay on her estate and tried to claim that the funds in the second account were actually the wife's money.

Mr Jolliffe then said actually no I never intended to create a trust as I was just doing it to get interest on the second account.

**Majority decision:** Jolliffe **did not intend to create trust** notwithstanding written statement (ie parole evidence on real state of mind admissible)

NB: Jolliffe asked whether the court would admit evidence of his secret intention that it was not really a trust.

Strong **dissent** by Isaacs J:

- 1) once clear declaration has been made, Jolliffe should not be permitted to bring parole and other evidence to bear on his 'secret intention' that there be no trust.
- 2) Parole evidence rule "I cannot believe that a solemn document (that is the acknowledgment that he signed when he opened the account) is open to evidence to lack of intention. In other words he made a declaration then he wanted to show a secret intention and that didn't sit well with Isaacs J.
- 3) As a matter of public policy the bank and others had been dealing with him on the basis that he was a trustee and therefore he should be treated as one.

NB: This case led to the belief that if you declared a trust but had a secret intention then you had no trust. But this **argument was rejected** in the recent HC of Byrnes v Kendall below.

**Jolliffe overturned – therefore you cannot bring evidence of a secret intention after a declaration.**

**Byrnes v Kendle 2011 HCA 26** – Mother and son were claiming a breach of trust against the trustee (husband). Husband had purchased the house in his own name. Husband had signed an acknowledgment that he held part of the property on trust as a tenant in common for her. He then let his son from a previous marriage live in the property without paying

rent. Hence the action of breach in trust from her. He then tried to argue that he had a secret intention and didn't intend to create a trust.

"Where there is a clearly expressed intention to create a trust (here in writing), it is not permissible to introduce parole evidence as to a contrary secret intention."

Heydon & Crennan JJ preferred Isaacs J's dissent in *Jolliffe* and reiterated that the intention referred to is an **objective intention extracted from words used and actions** as in contracts.

NB: So its an **objective intention** and look at what you did and said and the material facts to determine whether or not there was an intention to create a trust.

## Week 6: Certainty Requirements (3 Certainties)

- All trusts must be certain in 3 areas to be sufficiently enforceable.
- (a) Certainty of intention – settlor must have intended to create a trust of property, as opposed to making a gift or loan
- (b) Certainty of subject matter – must be specified with reasonable certainty
- (c) Certainty of objects: - Bs of the trust must be sufficiently identifiable

### Certainty of Intention

The court will look at the words and actions of the parties and the circumstances and may infer that a trust was intended from the conduct and the beneficiary does not need to be informed of that.

- Must have intended to create a trust as opposed to making a gift or loan
  - **Re Armstrong:** Father did not intend to make a gift of money in accounts of son because he intended to collect interest on the accounts.
  - The giving of life interest in the money on the father and remainder interests on the sons, was most appropriate method of giving effect to father's wishes.
  - Word trust need not be present to create a trust.

The problem of **precatory words** (words of prayer): e.g. wish, hope, pray, expect, recommend, believe, desire, beseech etc. Trust, moral obligation or something else?

Early approach of Chancery was to presume that any kind of indication was taken as imperative that trust be created.

### New attitude: trust not as easy to be established.

Testator left property to widow '**feeling confident** that she will act justly to our children in dividing the same when no longer required by her'.

Held : **No trust**. *Mussoorie Bank v Raynor* (1882); the question was did she have to divide this among the children or not. Court held that there was not. It's a bit hard to know what the subject matter of the trust was because of the words "when no longer required by her." Court said that the vagueness shows that there was no intention to create a trust which would lead her to be obligated to her children for the property.

NB: Nowadays the court looks very closely to try and decide whether or not some form of enforceable obligation is being placed on a person to constitute them in some trustee.

No intention to create a trust.

- **Objective Intention**
  - Intention is determined to settlor's objective intention: Would a reasonable person consider that in all the circumstances the settlor intended to create a trust.
    - (*Byrnes v Kendle*): D argued he never intended to create trust for P's benefit, notwithstanding the wording of the acknowledgement
    - HC refused the argument, and held that the D manifested an objective intention to create a trust and mental reservations were irrelevant in construing the document the parties had signed.
- **Ask: What intention must be proved?**
  - An intention to create a trust is an intention to impose on a prop owner, an obligation to apply the prop for the benefit of ID Bs or for a recognised charitable purpose.
  - Essence of a trust is that an owner of prop is obliged to apply the prop for another.

### *Williams v Williams* [1897] 2 Ch 12:

**Facts:** Dr. Williams's wife was trustee and executor of his Will along with another person. He left the residue of his estate (if you leave specific items to people what's left over is the residue of the estate). Testator left prop to wife in fullest confidence that she would carry out all wishes for their daughter Lucy

**Held:** Majority held that the words 'in fullest confidence' did not create a trust for Lucy and that the wife was entitled to keep insurance moneys for herself. there was no distinction made in the clause between the two insurance policies and so the court came to the conclusion that it **was merely a moral obligation** on the widow and that it was not binding because there was **no trust created in favour of the daughter** and that the **words trust and confidence were precatory**. This is an example of a change in attitude.

### The Position today?

Is a matter of construction in each case. '**Precatory words are in themselves neutral**'. If mere precatory words, even if subject and objects clear, **no trust**. But if on construction of whole document/circumstances it seems trust intended, precatory words won't prevent trust from being held to exist. *Jacobs*, 60

### **Dean v Cole (1921) 30 CLR 1.**

**Facts:** the funds were left to the wife at her absolute disposal, **trusting to her that** she will at some time during her lifetime or at her death divide amongst children in fair just and equal shares. **Not a binding trust** but a simple request, although Higgins J dissented finding that the words “trusting to her divide” mean in trust to divide.

**Held:** HC held that there was no binding trust. However, the majority thought that given the words used it would be difficult to be clear about what they mean precisely and therefore the majority found that there was no trust in that situation.

Look at the words to see if there is intention.

### **The Position today:**

Countess of Bective v Federal Commissioner of Taxation [1932] HCA 22; 47 CLR 417. (*Bective case*).

Where A (testator) uses obscure language in a bequest to B which suggests an intention to confer a benefit on C there are 5 possibilities.

### **Trust, Charge, Condition and Equitable Personal Obligation**

1. **They are mere words of precaution and B merely under a moral obligation but not a legal obligation to C** (eg *Re Williams*). Ie there is no enforceable obligation on B as in *Re Williams* and it is merely a moral obligation. B takes the bequest beneficially and they are the owner of it.
2. **B holds the property bequeathed on trust for C** (eg *Bective Case*). There B has all of the obligations of a trustee. *Bective case* found that there was a trust in favour of C.
3. **B holds property subject to a charge in favour of C** (especially bequests to parents for maintenance of children). **Rather than a trust** the words might create an equitable charge in favour of C. So B holds it in favour of C. So *Bective case* found that when there is obscure language which relates to the maintenance of children what is intended is that the bequest is to be owned beneficially by B but that B is charged with the obligation of maintaining and educating the children. Often the implication is that it means that if there is any money left over after you have maintained and educated the children then B can keep the rest. But it also means that you do not have to have all the accounting problems of a trustee. So the charge is on the property so if the wife does not maintain the educate the child the property will secure that obligation. Another positive is that because the charge is annexed to the property and it is not a trust it means that if the property goes to someone else then that person is now obligated to maintain the children. So the obligation to maintain and educate is secured by a charge over the property.
4. **It is a condition precedent (common law) to B obtaining a vested interest in the property bequeathed to him/her that he or she confers the benefit on C or a condition subsequent which divests the interest (*Re Gardner*)**. You have to do something before property will vest in you so this is another thing that these words will actually mean. If it is seen as a condition then the property will never vest in B until the condition is met. The property is likely to be defeased if they do not comply with the condition. So, the problem with this for C is that there is no obligation to prove any benefit to C in the long run. So B will either get the property or it gets defeased from them and C still doesn't get a benefit. Unlike point 3 where they do. So the **courts tend not to find these forfeiture type conditions**.
5. **B takes an unencumbered title to the gift but is under a personal equitable obligation to C to confer the benefit on C (*Gill v Gill*)**. This is different from a trust or the charge situation because it is a **personal obligation and it is not annexed or attached to any property**. So the beneficiary will only have a personal right against B to enforce the equitable obligation to confer the benefit. The problem with this from B's perspective is that if you take the property and you own the gift beneficially and you are under this personal equitable obligation to perform and provide the benefit to C there is no limit there. Therefore you have to provide the benefit regardless even if it costs you more than the benefit that you got under the Will. Under a trust if you have \$100k to maintain the children then you only have to spend \$100k to maintain the children. Same as point 3. But under this point you have to maintain the children regardless and if you don't you can be sued in equity. So if you accept the gift the obligation must be performed whatever the costs such as in *Re Hodge 1940 Chancery 260*.

