# TRUSTS HYPOTHETICAL NOTES

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EXPRESS TRUST

[X]= your client
[BS]= other potential beneficiaries of the trust
[T]= liable fiduciary (usually a trustee)
[Z]= liable 3rd party (Barnes v Addy or tracing analyses)

1. FORMALITIES

Two modes of creating a trust are recognized:

1. Creating a trust by self-declaration
   - A settlor can declare himself trustee of his own property

2. Creating a trust by transfer/settlement
   - A settlor can transfer property to another with the intention that the other shall hold the property as trustee.
     a. In order for a trust to be validly created by transfer, the common law or statutory formalities necessary to transfer the title to the property to the intended trustee must be complied with
     b. Failure to comply with the requirements will usually result in failure to create the trust (Milroy v Lord) unless the Corin v Patton principle applies (i.e. the settlor has done everything that is necessary for her to do to transfer her interest in the property. In this case the transfer may be validated in equity).

A distinction is drawn between testamentary and inter vivos trusts

i. Declaration of a testamentary trust (takes effect when settlor dies)
   - This is generally done through a will
   - Whether a testamentary trust has been validly declared will depend on the formality requirements for a valid will.
   - Exam → if you see the phrase ‘duly executed will’ you can assume that the will is valid, thus the writing requirements for a trust are also presumed to be satisfied (ss 53(1)(b) and (c) PLA).

ii. Declaration of an inter vivos trust (takes effect while settlor is alive)
    If land: s 53(1)(b) PLA – an inter vivos trust for land must be evidenced in writing and signed.
    A declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will
    - ‘Manifested and proved’ means the evidence can be supplied at a later time, such as during proceedings (James)
    - Evidence can be contained in more than one document
    - Applies to both trusts by declaration and trusts by transfer/settlement

If not land: no writing requirement; oral declaration would suffice.

   - Ex: In Paul v Constance, there was no writing in relation to the declaration of trust, the trust property being money in a bank account.

ii. Disposal of interest (fixed trust only, can’t dispose of mere expectancy)

→ applies for example where a beneficiary wants to dispose of or transfer his beneficial interest

a. Applies to any property (land; shares; paintings; money etc.): if a disposition of an existing trust, thus creating a ‘sub-trust’, then s 53(1)(c) PLA applied: in writing + signed
b. If writing problematic, can it be characterized as a declaration of a new trust? → s 53(1)(b) PLA: evidenced + signed
c. Stricter requirements than 53(1)(b) – must in in writing and signed, not merely manifested and proved by some writing, as in 53(1)(b)
iii. Was there fraud?

- s 53(1)(b) writing requirements cannot be used as an instrument for fraud (*Last v Rosenfeld*)
  - Has someone promised to do something, subsequently reneged and sought to rely on lack of s 53 formality compliance to defeat the claim?

### Dept. Social Security v James

**Facts:** James had held the property beneficially for her invalid daughter and her granddaughter

**Issue:** What of the writing requirements in s53(1)(b)?

**Held:**
- Any informal writing may stand as evidence of the existence of a trust.
- The date of creation of the writing is not material. It may come into existence at any time after the declaration of the trust
- The writing requirements were satisfied by: Various documents; written applications read together.

### Last v Rosenfeld

**Facts:** Ps orally agreed to transfer their interests in house to D in return for the promise that the interests would be transferred back to Ps if Ds did not personally occupy the house within 12 months. Instead of occupying the house, D sold it. Argued promise to transfer back not enforceable as it did not fulfil SoF requirements.

**Held:**
- The oral agreement between the parties was enforceable, applying the principle that equity will not allow a statute to be used as an instrument for fraud.
- Principle: Cannot use the Statute as an instrument/cloak for fraud.
- **What is fraud?** → A person makes a promise in relation to land; and another person relies on that promise
STATE: In addition to formality requirements, to be valid, an express trust must satisfy all three certainties: intention; subject-matter and objects (Knight v Knight, Lord Langdale MR).

Rule: Certainty of intention requires that the settlor intended to create the trust (Paul v Constance). Intention is to be assessed objectively (Byrnes; Paul). In the absence of a trust deed, courts will consider the words and conduct of the parties in light of their context (Paul).

- Language: No particular form of expression is necessary; emphasis on substance and effect (Paul v Constance). Importantly, the language should be imperative, not precatory (Paul).
  - Precatory words with no clear command – ‘understanding, request, recommendation, hope, belief, confidence, wish’
- Conduct: must evince objective intention to create trust; subjective intention irrelevant unless vitiating factors (Byrnes)
- Context: legal savvy of the parties (Paul)
- Subjective intention which imports extra conditions on trust is unimportant unless vitiating factors present (undue influence etc.) (Byrnes) – external evidence is not admissible to suggest a secret intention/lack of intention to create a trust, in absence of vitiating factors.

Cases

- **Paul v Constance**
  - Language – ‘the money in that account is as much yours as mine’.
  - Conduct:
    - Joint bank account which they both deposited and withdrew from;
    - Settlor inquired as to how account could be set up so that B could access funds.
  - Context:
    - Domestic and private context – it was material that these were ‘simple and unsophisticated’ lay-people with little legal savvy, such person can create a trust so long as they intended it

- **Byrnes v Kendle**
  - Parties were a married couple who purchased house in D’s name; D signed a deed acknowledging he held a half interest as tenant in common on trust for P. After they separated, D argued he never intended to create a trust for P’s benefit.
  - Language – ‘holds... upon trust for my wife absolutely’
  - Subjective intention – the question is not what the settlor meant to say, but what they did say (Gummow & Hayne JJ) → here D manifested an objective intention to create a trust.

- **Re Williams**
  - Language – will to wife ‘absolutely, in the fullest confidence’ that she will carry out my wishes in the following particulars’
    - Did not use words ‘on trust’ or ‘on the condition’
    - The testator has not used language sufficiently clear to impose upon his widow an obligation to leave either policy to his daughter
    - He refrained from using imperative language – no intention of imposing an obligation on his wife in respect of either life insurance policy
    - He really intended to trust his widow’s discretion with respect to his daughter

Subjective intention may be relevant in the following exceptional circumstances – where it is alleged that the trust is:
- a sham
- voidable for mistake; misrepresentation; duress; undue influence; unconscionability