

## CREATION OF EXPRESS TRUSTS

WRITE: An express trust will be valid if it is created by a valid method of trust creation and the three certainties of a trust are satisfied

### Method of Creation:

- *Trust be transfer:* Transfer of property coupled with intention for the transferee to be beneficial owner
- *Declaration of trust:* Where settlor declares himself to hold the property on trust for the beneficiary (this mean the settlor is ALSO the trustee)

## TRUSTS AND POWER

### FIXED INTEREST TRUST

- The trustees have no discretion regarding how the trust property should be distributed: exactly how much each beneficiary should receive has already been determined by the settlor.
  - *Example:* I give my trustees \$30,000 to hold on trust for my three children.

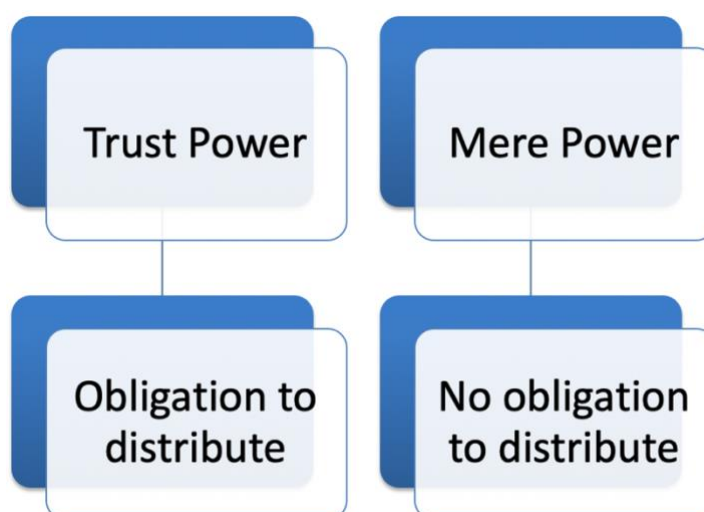
### DISCRETIONARY TRUST

#### Trust Power

- The trustee has discretion regarding who to appoint from a selection
- He must exhaust the trust
- It is power coupled with obligation and the trustee must exercise it within a reasonable time
  - *Re Gulbenkian's Settlement*

#### Mere/ bare power

- The trustee does not have to exercise the power and the courts cannot compel him to
- He must only consider exercising the POA.
- Non – exhaustive
  - *Re Gulbenkian's Settlements*



## CERTAINTY 1: CERTAINTY OF INTENTION

### STEP 1: IMMEDIACY

WRITE: *To prove that a trust exists, [X] will argue (Byrnes v Kendle) that [Y] manifested an immediate (Harpur) objective intention to create a trust rather than a voluntary promise to create a future trust (Byrnes v Kendle), that is irrevocable (Mallott v Wilson)*

→ If not, no trust – only mere legal arrangement

NOTE: If the words are clear, state it is an uncontentious ‘immediate and irrevocable disposition’.

### STEP 2: BURDEN OF PROOF

WRITE: *This is because the burden of proof is on the person claiming a trust is established. But if the language is unambiguous the onus shifts to the other party to prove that the trust did not exist (Byrnes v Kendle)*

### STEP 3: TEST

WRITE: *The circumstances of the case and on the trust construction of what is said and/or written must detail a sufficient intention to create a trust manifested by the [settlor] (Byrnes v Kendle). On the facts, the express trust was created [in writing/made orally]*

### IN WRITING

1. Where express trust is written, clear and unambiguous (e.g. ‘to X on trust’), settlor’s intention is objectively manifested by those words used (nothing clearer than by way of deed) (*Byrnes; Korda*)
2. Where written words used are ambiguous, informal, vague or there is no express statement of a ‘trust’ (*Re Armstrong*), the settlor’s intention is still objectively manifested with consideration of the following if applicable:
  - a. The language in the document(s), the nature of the transaction and the relationship between the parties (*Korda per French CJ; Byrnes per French CJ*)
  - b. Whether by language or conduct a sufficient intention to create a trust has been manifested (*Byrnes per Gummow & Hayne JJ; Korda per Gageler J*)
  - c. An agreement for money to be placed in a ‘trust account’ carries a strong presumption that it is trust money
  - d. Intention of party that property be kept separate and not mixed with another other fund is indicative of an intention to create a trust (*Korda per Gageler J*)
  - e. Absence of a contractual intention that money be held in a separate fund is fatal to the imputation of a contractual intention to create a trust over that money (*Korda per Gageler J*)
  - f. More sophisticated the language, the more likely an objective intention has arisen (*Byrnes*) but unsophisticated language is also OK (*Constance*) – “as much yours as it is mine”

### MADE ORALLY

1. Where trust is created totally orally, settlor’s intention is still objectively manifested, but also still look at all the circumstances of the case, including the words, actions, language, relationship and character of the all parties involved (*Byrnes; Paul v Constance*)
2. To establish intention where language is ambiguous, the question will be whether by oral language or conduct a sufficient intention to create a trust has been manifested (*Byrnes; Korda*)

Exception: in the case of illegality/sham, the test is subjective and considers all circumstances (*Byrnes*)

Also consider precatory words, below

#### STEP 4: CONSIDER PRECATORY WORDS - GIFTS

WRITE: *There are five interpretive possibilities, based on Dixon J in Countess of Bective. Upon assessment of the facts, that statement [“insert”] is like to fall within the interpretive device of a [insert relevant interpretive possibility]. This is because ...*

##### **No obligation – precatory words used (Re Williams)**

X ‘I leave my house to James in fullest confidence that he will ...’

X ‘I leave my house to James trusting to him that he will ...at absolute discretion’  
(Dean v Cole)

##### **Trust obligation - words suggesting an intention to create a trust**

✓ ‘I leave the balance of my estate to James on the understanding that he will ...’  
(Hayes v NHF)

NOTE: That the circumstances of this case, alongside these words, underpinned this decision of a trust obligation

##### **Condition (Re Gardiner)**

→ ‘I leave to my son John all of my estate subject to him paying his brother Robert the sum of \$35,000 within two years of my death’

##### **Equitable charge (enforceable against property) (Gill v Gill)**

→ ‘I give my flats to my son absolutely to properly maintain my daughter (nexus sufficient to create a security interest)’

→ If there is a sufficient nexus between the equitable charge and the obligation, then it creates a security interest in the property specified

##### **Equitable personal obligation (unenforceable against property because there is no security interest unlike in equitable charge)**

→ ‘I give to my wife ... my shares in public companies, to deal with as she in her absolute discretion sees fit, but otherwise on condition that she ultimately gives those shares, or the remainder thereof, to my nephews ... as tenants in common in equal shares of the survivor of them absolutely’ (Cobcroft v Bruce)

#### STEP 5: CONCLUSION

WRITE: *It [is/is not] likely that [insert clause/statement] will be found to be a [insert conclusion].*