

# **PROPERTY AND TRUSTS B**

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## Co-Ownership

### PROBLEM QUESTION FORMULAE:

- 1) Status of the title at law? I.e. JT or TIC
- 2) Status of the title in equity? I.e. JT or TIC
- 3) Is there anything severing the JT?
- 4) Is anyone entitled to compensation
- 5) Etc.

**Tenancy in Common** – Each owner has a proportionate share of the rights making up the property.

- On death intestate – a TIC's share descends to the persons entitled to his or her property  
The shares of TIC need not be equal

**Joint Tenancy** – An 'undivided share' where both parties own it equally, there is no distribution of ownership

To create a joint tenancy, the four unities must be present:

- 1) **Unity of title** – JTs take their interests under the same instrument
  - **EXCEPTION** – s9 Trustee Act – A trustee who is appointed under a separate instrument than existing trustees becomes a JT with those existing trustees
- 2) **Unity of interest** – The JT's interest in the property must be identical in nature, extent and duration
  - E.g. not possible to have a JT where one person owns a life estate, and the other a fee simple
- 3) **Unity of possession** – Each JT is entitled to possession of the whole property (also a characteristic of TIC)
- 4) **Unity of time** – All JTs are to take their interests, or have their interest vested in them at the same time
  - **EXCEPTION** – s9 Trustee Act – A trustee who is appointed at a later time than existing trustees becomes a JT with those existing trustees

Despite this – the presence of the 4 unities does not automatically result in a JT, if the instrument expressly provides otherwise.

### Right of survivorship:

- When one JT dies, the whole of his or her interest automatically passes to the surviving JTs until there is only one left who becomes the sole owner
  - Property owned as a JT can't be passed in a will, it remains with the surviving JTs
- s25(1) CA – Allows **corporations** to hold property as JTs, and under s25(2) CA the RoS comes into operation if the company is dissolved
- s25 CA – In cases where 2 or more JTs die, it is presumed that the **youngest JT survived** the elders

## Gifts and sales

### SEE GIFTS AND SALES CHART

#### PROBLEM QUESTION FORMULAE:

- 1) What type of property is being dealt with, and can the property be assigned?
  - a. Real (OS or TT) or personal (Chose in possession or chose in action?)
- 2) Is the assignment relating to presently existing or future property?
- 3) What are the requirements for an assignment at law/equity?

**1. Assignability** – Can the property be assigned?

**Rights that cannot be assigned:**

- Public pay:
  - Public policy – said to diminish the dignity of the role of the official – UNLESS the public servant is dead ([Arbutnot v Norton](#))
- Bare right to litigate = Right to claim damages divorced from the transfer of any other type of property (rights to sue in tort, bare rights to sue in equity etc.)
  - Despite proprietary characteristics, it is to prevent litigation between parties with no interest in the outcome of the proceedings
  - **Qualifications to the rule:**
    - **Debts** and rights to sue for **liquidated sums** are assignable because they are regarded as rights of property ([Fitzroy v Cave](#))
    - **Verdicts** may be assigned ([Glegg v Bromiley](#))
    - It may be assigned where a party has a **genuine commercial interest** in the outcome of the proceedings (see textbook)([Trendtex v Credit Suisse](#))
      - E.g. where a party has little hope of being repaid debts unless by assignment of a cause of action
    - **An insurer's right to subrogation:**
      - In a contract for insurance, an insurer can step into the insured's shoes and sue as if they were them
    - **Contractual rights** – while the benefit may be assigned, its burden may not ([Queensland Insurance](#))
- Contract for personal services:
  - Generally, contracts for personal services cannot be assigned ([Devefi v Mateffy](#)) – e.g. rights under employment contracts ([Nokes v Doncaster](#))
    - This applies to contracts where the identity of the person performing the services is an essential term of the contract
  - [Mid City Skin Cancer](#) – Despite this, in some circumstances a personal obligation in an employment contract can be assigned (e.g. implied obligation of confidence)
  - A contractual provision against assignment of contractual rights is enforceable, unless it is against public policy ([Linden Gardens](#))

**2. Future or present property** – Is the assignment relating to future or presently existing property?

# Introduction to Trusts

## PROBLEM QUESTION FORMULAE:

### 1. Is it a trust or some other type of relationship?

#### Distinguishing trusts from other kinds of relationships

##### *Contracts*

- **Obligations** – *Trusts* rely on conscience in equity
  - *Contracts* rely on agreement
- **Consideration** – *Trusts* don't require consideration
  - *Contracts* require consideration
- **Privity** – *Beneficiaries* of *trusts* can compel its performance and may seek relief for breach, even though they aren't parties to the instrument creating the trust, and have provided no consideration ([Corin v Patton](#))
  - A third party beneficiary to a *contract* can't sue for breach if he or she isn't a party to the contract ([Coulls v Bagot](#))

##### *Fiduciary relationships*

- Every trustee is a fiduciary, but not all fiduciaries are trustees ([Visnic v Sywak](#))
- People can owe separate and co-existing fiduciary and trustee obligations ([Chan v Zacharia](#))

##### *Deceased estates*

- **Proprietary interest** – Unlike *beneficiaries* of a *trust*, beneficiaries of a *deceased estate* gain no proprietary interest in the estate until it is administered ([Livingston](#))
- Executors like trustees are fiduciaries ([Johnson v Trotter](#))
- Executors can become trustees if they have completed their duties, but still retain possession of the property of the estate ([Pagels v Macdonald](#))

##### *Bailments*

- **Vested title** – Trustees gain legal title of the property in question, however bailees are only conferred a weak possessory title by a bailment ([Davis v Hueber](#))

##### *Agency*

- **Directions** – Agents are subject to directions of the principal, unlike a trustee who can manage day-to-day affairs of the trust ([Re Brockbank](#))
- Agency and trusts can **co-exist** in the same relationship, e.g. where an agent purchases property in his or her name on behalf of the principal ([R v Hopkins](#))

##### *Unsecured debts*

- **Equitable interest** – *Creditors* don't have an interest in the debtors property, while *beneficiaries* have an equitable interest in the property held by the trustee
- [Caruana v DPP](#) – Indicators distinguishing a debt and a trust: