Week 1: The Concept of a Trust and Certainty of Intention

What is a Trust?

- ***Jacobs definition***: a trust exists when the owner of a legal or equitable interest in property is bound by an obligation, recognised and enforced in equity, to hold that interest for the benefit of others, or for some object or purpose permitted by law
- ***Trustee***: holds legal title to trust property and has power to deal with property, subject to equitable obligations to act in beneficiaries' best interests (financial interests)
- ***Beneficiary***: the person or purpose for whose benefits the property is held
- ***Trust property***: must be identifiable, certain and vested in the trustee

Creation of a Trust

Requires three things (Knight; Vanta)

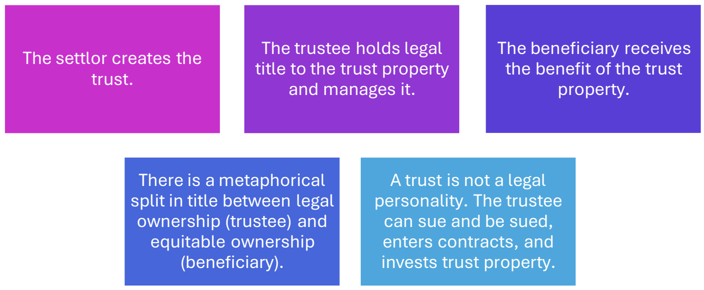
1. Three certainties → if any of three certainties fail, trustee holds assets on RESULTING TRUST for settlor subject to constitution being made out – s53(2) PLA applies so no formalities issues
2. Statutory formalities
3. Constitution → trust asset has passed to trustee validly and they have legal interest

- A trust is an irrevocable disposition of property (Mallott; Re McGowan)

Trustee Duties Regarding Holding Trust Property

- The trustee must deal with trust property with the care and skills of a prudent businessperson
- This includes conducting sales, implementing preservation measures, pursuing debt recovery, undertaking legal actions, engaging professional services and taking emergency protective measures
- The trustee must always act in the best interests of the beneficiaries
- Security = equitable lien to recover reasonable expenses → **Re Universal Distributing Co Ltd (1933)**

Trust Structure and Participants



Inter vivos trust: person who creates trust is living
Discretionary trust: no one has beneficial interest, only a right to be considered

Classification of Trusts by Intention

Express trust: arise when the settlor has the intention to set up a trust to benefit another
Resulting trust: arise by operation of law where a person did not intend to benefit the party now holding property → attempted to force on someone a fiduciary obligation on someone who doesn't exist, failure to specify valid class → trustee still holds legal title but no beneficiary, thus trustee holds on a resulting trust for the settlor
Constructive trust: imposed regardless of intention where it would be unconscionable for the party holding property to assert ownership

By time	• Inter vivos trusts are created during life • Testamentary trusts are created by will
By beneficiary	• Private trusts benefit individuals

	• Public trusts benefit charitable purposes
By interest	• Fixed trusts have predetermined shares • Discretionary trusts give trustees choice in distribution

Fixed vs Discretionary Trusts

- Fixed trust: The settlor decides who gets what and the trustee has no discretion. Example: "I hold my flat on trust for Sam, Harry, Jane and Sarah in equal shares." → self-declaration, inter vivos
- Discretionary trusts: The trustee chooses beneficiaries from a class and decides distribution shares. Example: "T distributes $100,000 among A, B and C in any proportions she decides."

Other Trust Structures

- Unit trusts are unincorporated mutual fund structures where profits go directly to unit owners.
- Quistclose trusts are created where a creditor lends money to a debtor for a specific purpose.
- The creation of a valid trust has immediate and irreversible legal consequences that cannot be undone by a change of heart

Creation of an Express Trust

Exam

1. Fixed vs Discretionary Trust?
2. Identify the nature of the disposition → what type of gratuitous disposition are we dealing with?
   - Gift with precatory words
   - Gift with legal condition
   - Gift with equitable condition
   - Trust

3. Apply the objective test for intention → intention is determined objectively from the words used and surrounding circumstances, NOT from subjective intention
   - Examine actual words used, either written or oral
   - Consider surround circumstances known to parties
   - Look at context of relationship and transaction
   - Ignore subjective intentions not expressed in document/words

*subjective intention only relevant for fraud, undue influence, duress, sham trusts or rectification claims

4. Distinguish between precatory and imperative languages

5. Check for immediate vs future intention → Harpur v Levy

6. Consider commercial context and documentation → Korda v Australian Executor Trustees
   - Are there any detailed written agreements?
   - Lawyers involved?
   - Express trust provisions elsewhere in document
   - Is there separation/earmarking of funds required
   - Are there contractual remedies or trust remedies available?

7. Assess informal trust creation → precise words like "I declare myself a trustee" are not necessary, but there must be something equivalent to it → Re Armstrong, Paul v Constance

8. Check for vitiating factors → are there any factors that would invalidate an otherwise valid trust?
   - Sham trust: did parties intend document to have no legal effect → very high threshold

- Fraud/ undue influence: was trust created through improper pressure
- Duress: was there coercion in creation
- Non est factum: did settlor not understand the document

9. Reach conclusion → does trust exist or no → Vanta v Mantovani [2023] VSCA: courts are hesitant in declaring a trust void for uncertainty, but will not create trusts where intention is absent

Consequences of Creating a Trust

- If a valid trust has been created, there are binding consequences and its is too late for the settlor to change his or her mind
- Once the three certainties are satisfied, the legal consequences are immediate and binding regardless of subsequent practical complications or changes in circumstances
- Trust law priorities certainty and finality over convenience

Mallot v Wilson [1903]

- Court held that equity will not allow a trust to fail for want of a trustee, the trust remained valid and the settlor became trustee by operation of law
- Valid trusts are irrevocable and equity will find alternative means to give effect to the trust even when practical difficulties arise

Re McGowan & Valentini Trusts [2021] VSC

- Two family discretionary trusts were established in 1977 with a corporate trustee that was not incorporated until 19 months later. Properties were acquired in various names and trusts continued operating after supposed vesting dates
- Court found valid trusts were created despite complications. Giuseppe and Norma (directors) became trustees until the company was incorporated
- Once the three certainties are satisfied, binding trust relationships are created with lasting consequences that courts will enforce

1. CERTAINTY OF INTENTION

- Intention is a fundamental requirement for creating an express trust. Courts must distinguish between **genuine trust creation** and other gratuitous dispositions.
- It is not necessary to use the words "on trust" → Imprecise words may still create a trust if intention is clear.
- Intention is determined **objectively**, not subjectively. Courts look at what was expressed, not what was privately intended.
- The court will inquire as to whether a reasonable person in all the circumstances would consider that the settlor intended a trust to be created (Kendle)

Informal Trust Creation – **Re Armstrong [1960]**

- George Armstrong deposited money with receipts stating "George Armstrong in re William Armstrong" and told the bank manager the investment was "for them".
- The court found a valid trust was created → Precise words are not necessary if there is "something equivalent" showing trust intention.
- Courts distinguish between intention to create a trust (retaining legal ownership with obligations) and intention to make a gift (getting rid of rights entirely).

Paul v Constance [1977]

- Dennis Constance repeatedly told his partner "the money is as much yours as mine" regarding a bank account in his sole name. They shared withdrawals and deposited joint winnings.

- The Court of Appeal found an express trust was created. The court looked at "various things said and done against their own background and circumstances".
- Key principle: Courts look at *substance rather than form*, particularly with "simple people unaware of the subtleties of equity".

Alternative Gratuitous Dispositions

- Courts must distinguish between four possibilities when analysing imprecise language:
  - Gift with precatory words only (expressing wish without legal obligation) → moral obligations, e.g. I give you $100 but only if you use it wisely
  - Gift with legal condition (subject to condition before taking ownership) → e.g. you can have the car but only if you pass trusts
  - Gift with equitable condition or charge (subject to equitable obligation) → e.g. you can have the car if you pay for the repair bill
  - Gift to trustee on trust (creating trust obligations)

Precatory Words vs Mandatory Words

- Precatory words express hope or desire without imposing obligation → Examples include "absolutely in fullest confidence", "trusting to her", and "feeling confident that".
- Mandatory words create trust or conditions → Examples include "upon trust", "on the understanding that", and "provided that".
- Courts must read the whole phrase in document context, the same words might be precatory in one context and mandatory in another.

Re Williams [1897]

- Dr Williams left his estate to his wife "absolutely, in fullest confidence that she will carry out my wishes" regarding leaving insurance proceeds to their daughter.
- The Court of Appeal held no trust was created. The words were **precatory language expressing hope, not imperative words creating legal obligations.**
- Key principle: Expressions of confidence or hope are insufficient to create trust obligations without imperative language.

Chang v Tjiong [2009] NSWSC

- A father provided purchase money for property registered in his son's name. Letters gave "clear, unequivocal and emphatic direction" about how the property should be used.
- The court found an express trust was created despite informal family correspondence.
- Key principle: Courts look beyond formal trust language to determine true intention from surrounding circumstances including source of purchase money and subsequent conduct, as in this case where court looked at mundane letters to find an express trust

***Equitable Conditions* – Cobcroft v Bruce [2013] NSWSC**

- A will gave shares to a wife "absolutely" but "on condition that she ultimately gives those shares to my nephews".
- The court found this created an equitable condition (Gill v Gill condition) that was binding on the widow's estate.
- Key principle: Even absolute gifts can be subject to enforceable equitable obligations if language is sufficiently clear and imperative.

Gill v Gill (1921) NSW

- Andrew Gill devised his farm to his son Edward "on condition that he keep the homestead as a home and provide board and residence for his sisters".
- The court found this created enforceable equitable obligations. Edward's acceptance of the gift created a "quasi contractual relationship" - he could not "approbate and reprobate" under the same instrument.
- Condition of forfeiture → if the thing not done in the condition, the person forfeits the gift
- Key principle: When property is given "on condition" that the recipient do something for identified third parties, this creates enforceable equitable obligations, not mere precatory words.

***Gifts with Legal Condition* – Re Gardiner [1971]**

- Henry Gardiner's will left his estate to his son Ivor "subject to my said son paying £1,000 within two years from my death" to another son Albert. Ivor failed to pay within the time limit.
- The court found this imposed a true condition, not a trust. Since the condition was not performed within the required time, the gift failed entirely.
- Payment was required within a specific time, thus the temporal element was integral to the condition, not merely directory
- Key principle: Courts distinguish between conditions and trusts based on precise wording. Words requiring performance "within" a time create conditions, whereas **"after" a time may create trusts**

***Objective Determination of Intention* – Byrnes v Kendle [2011] HCA**

- Clifford Kendle executed a formal "Acknowledgment of Trust" but later claimed he lacked "real intention" to create a trust.
- The High Court held that courts cannot look beyond unambiguous written declarations to examine subjective intention → *what the words mean, not what the person meant to say*
- Key principle: Trust creation depends on "intention manifested by the declaration", not the settlor's subjective or secret mental states

***Sham Trusts* – Lewis v Condon [2013] NSWCA**

- Colleen Lewis created a trust to conceal property from her ex-husband and avoid tax. The trustee in bankruptcy claimed it was a "sham".
- The Court of Appeal held the trust was not a sham → Improper motives do not make a transaction a sham if parties intended it to operate according to its terms
- Key principle: A transaction is only a "sham" if parties intend it should not have its apparent legal consequences. Mere impropriety of motive is insufficient.

***Proof of Trust Terms* – Vanta Pty Ltd v Mantovani [2023] VSCA**

- A trust was created in 1976 but the original deed was lost. The Court of Appeal found the trust remained valid despite missing documentation.
- The correct test for proving terms is balance of probabilities, not "clear and convincing proof". Only essential terms need to be proved.
- Key principle: Courts are hesitant to declare trusts void for uncertainty and can "fill gaps" regarding non-essential terms through judicial directions

***Commercial Context* – Korda v Australian Executor Trustees [2015] HCA**

- Investors claimed timber sale proceeds were held on trust, but there was no requirement to hold proceeds separately or any express trust language in sophisticated commercial documents.
- The High Court found no trust existed. Commercial necessity or advantage does not establish trust intention.

- Key principle: Clear objective evidence of intention is required. Courts will not imply trusts merely because they would provide commercial protection.
- Where documents are ambiguous, if there is no requirement for the money to be held separately = fatal to finding creation of a trust → trustees must keep trust property separate

Immediate Intention Requirement – **Harpur v Levy [2007] VSCA**

- A deed stated "I now irrevocably declare that as from the commencement day he holds the property for the beneficiary".
- The court held no immediate trust was created. The phrase "as from the commencement day" indicated the trust would only commence in the future.
- Key principle: There must be present declaration of trust, not merely a promise to create a trust in the future. Promises to create future trusts are legally ineffective without consideration.
- The declaration of trust must be intending to come into effect immediately, not intending to come into effect in the future

Immediate Trust (Valid)

- "I now declare myself trustee"
- "I hold this property on trust"
- Present tense declarations
- Postponed enjoyment is acceptable

Future Promise (Invalid)

- "I will create a trust"
- "As from [future date]"
- Future tense promises
- No present change in beneficial ownership

Week 2: Certainty of Subject Matter; Trust Structures; Trusts and Powers

Parkview Qld Pty Ltd v CBA [2013] NSWCA

- Case concerned the requirement for presently existing trust property
- The court held at paragraph fifty- that you cannot have a trust over nothing
- Key Principle: Trust must relate to specific property that can be *clearly identified*, establishing the fundamental principle that trust property must be *presently existing* rather than future property

2. CERTAINTY OF SUBJECT MATTER

- A trust created voluntarily requires presently existing trust property
- Trust must relate to specific property that can be clearly identified, as you cannot have a trust over nothing
- Two key questions:
  (i) Property presently existing rather than future property
  (ii) Property clearly identified or ascertainable

- Any interest in property can be subject to a trust, whether real or personal property, tangible or intangible property, or legal or equitable property
- Trust property must also be certain → trust property will not be uncertain merely because it cannot be precisely valued, e.g. children's remainder interest after a wife's life estate is certain even though the exact value depends on the wife's longevity
- Certainty matters because it ensures beneficiaries know their entitlements, prevent disputes between beneficiaries and trustees and allows courts to enforce the trust effectively

Presently Existing vs Future Property

- As Justice Windeyer stated in **Norman v FCT**: "As it is impossible for anyone to own something that does not exist, it is impossible for anyone to make a present gift of such a thing to another person
- "A trust requires presently existing property, meaning the property must exist at the time the trust is created
- Property must be currently owned or controlled by the settlor

- Contingent property = present property (**Re Armstrong**)
- Where property is bulk and identical = fungible = may not be necessary to specifically identify what asset is held on trust (Hunter; Shortall) → e.g. cash, no need to identify with serial numbers, amount is enough

Categories of Future Property

(i) <u>Property presently existing</u>

- Property that does not yet exist physically or legally
- Unborn animals where a calf still in its mother's womb doesn't legally exist as separate property
- Undeclared dividends where until the company board declares a dividend no legal right to payment exists
- Future crops where plants not grown cannot be presently owned
- Unwritten books where intellectual property not yet created has no present existence

(ii) <u>Property clearly identified or ascertainable</u>

- Existing property not yet owned by the purported transferor
- Rights of discretionary trust objects where beneficiaries have no present ownership until the trustee exercises discretion
- Expected inheritance being property that might be inherited in the future
- Contingent contract payments where conditions for payment haven't yet been satisfied

Exceptions to Future Property Rule

- Future property for consideration where if the property is ***<u>subject to a contract</u>*** for valuable consideration, this creates <u>equitable estoppel</u> preventing the settlor from denying the assignment
- This results in two trusts being formed: a constructive trust held by the settlor for the trustee, and an express trust held by the trustee for beneficiaries
- Vested interests, which are interests that are both already in existence and currently enforceable, even if possession or enjoyment is delayed → remainder beneficiary, e.g. life interest holder holds property for life (only possessory interest), property is owned by remainder beneficiary, only subject to right of possession of life interest beneficiary

Practical Drafting Solutions

- The problem that you cannot create a trust over future property directly can be solved by drafting the trust to focus on present rights that relate to future property
- For dividends: rather than "I declare a trust over the dividends that will be declared on my XYZ shares," use "I declare a trust over my rights as a shareholder that would entitle me to receive dividends if and when they are declared"
- For loan interest: rather than "I declare a trust over interest payments I will receive next year," use "I declare a trust over such of my contractual rights under the loan agreement as would entitle me to receive interest payments"
- The key distinction is that valid approaches focus on existing rights (present property), not on the future payments themselves

Norman v FCT (1963)

- Mr Norman purported to assign to his wife first, "All his right, title, and interest in and to" interest to accrue on a loan repayable at will, and second, "All his right, title and interest in and to all the dividends" which might be declared on certain shares
- The High Court unanimously held undeclared dividends could not be assigned by gift, with the court splitting three to two on interest also being future property
- Key Principle: Dividends were mere expectancies dependent on company decisions, while interest was paid in arrears and might never become payable since the loan was repayable at will

Shepard v FCT (1965)

- Shepherd invented a furniture castor and held the patent, licensed a manufacturer to produce castors for five per cent royalty of gross sales price, and executed a deed assigning "all his right, title and interest in and to an amount" equal to ninety per cent of income which might accrue under the licence for three years
- The Commissioner assessed all royalties as Shepherd's income
- The High Court held four to one that Shepherd made a valid gift of royalties
- Barwick CJ found the subject matter was "the right" to royalties, not the royalties themselves
- Key Principle: Kitto J's **"tree and fruit"** metaphor explained that "The tree, though not the fruit, existed at the date of the assignment as a proprietary right of which Shepherd was entitled to dispose; and he assigned ninety per cent of the tree"
- The present contractual right was assignable even if it might not produce "fruit"

Mussoorie Bank v Raynor (1882)

- Captain Raynor's will stated "I give to my wife the whole of my property including my promissory notes, Delhi Bank shares, my house feeling confident that she will act justly to our children in dividing the same when no longer required by her"
- Mrs Raynor treated the property as absolutely hers during her lifetime and made her own will disposing of it
- After her death, a dispute arose over twenty-four Delhi Bank shares between the Mussoorie Bank as creditors and Albert Charles Raynor, her son
- The House of Lords found no valid trust for children, identifying two key problems: first, the words "feeling confident" were precatory, not obligatory; second, the subject matter was uncertain with no specification of which assets were for the children
- Key Principle: The uncertainty had a **"reflex action"** on the previous words, casting doubt on the trust intention → If there is uncertainty about what property is to be held on trust, this suggests the testator could not possibly have intended their words of confidence, hope, or appeal to conscience to be imperative words creating binding legal obligations

Re Golay's Will Trusts [1965]

- The testator left his estate to his wife, Mrs Bridgewater, specifying that she should receive a "reasonable income" from his other properties
- The court held this was a valid provision because it was possible to make an objective measurement of what would constitute a reasonable income in any particular case
- Key Principle: The court explicitly contrasted this with a provision that would have given Mrs Bridgewater "an amount which the trustee considers reasonable," demonstrating that objective standards can satisfy certainty requirements

Sprange v Barnard (1789)

- The testator left annuities to A for his sole use, then stated that upon A's death, the "remaining part of what is left, that he does not want for his own wants" was to be held on trust for X's brothers and sisters
- The court held this provision was too uncertain to create a valid trust due to multiple uncertainty problems
- Key Principle: Multiple uncertainties compound to invalidate trust provisions, including vague descriptions of property, unclear amounts to be held on trust, and ambiguity about who determines the amount

Hunter v Moss [1993]

- Moss was the managing director and son of the founder of Moss Electrical Co Ltd, owning nine hundred and fifty of the one thousand issued shares, and told Hunter, the finance director, that Hunter could have fifty of these shares as part of his employment contract

- Crucially, Moss made no statement identifying which specific fifty shares would be held on trust, and no segregation of particular shares occurred
- The Court of Appeal, led by Dillon LJ, distinguished Re London Wine Co on the basis that it was "concerned with the appropriation of chattels and when property in chattels passes," whereas Hunter v Moss concerned "a declaration of trust" over intangible property
- Key Principle: **Segregation is not required for identical intangible assets** where the beneficiary's interest is clearly quantified, all assets are truly indistinguishable, no practical prejudice results, and commercial necessity supports flexibility

Shortall v White [2007] NSWCA

- Case arose from a de facto relationship breakdown requiring property settlement, where the defendant was a shareholder in Unitract Pty Ltd and wrote a letter confirming he held two hundred and twenty-two thousand of one point five million Unitract shares on trust for the plaintiff
- The NSW Court of Appeal held that a valid trust of two hundred and twenty-two thousand shares had been created by recognising a single trust over the entire one point five million shareholding, with the trustee having power to elect which two hundred and twenty-two thousand shares were for the plaintiff
- Key Principle: The **Australian approach rejected Hunter v Moss reasoning** while reaching a similar practical outcome through different legal analysis, focusing on **specific identification rather than creating a broad exception for intangible property**

Ellison v Sandini Pty Ltd [2018] FCA

- Case arose from Family Court orders in a property settlement between Mr and Ms Ellison, with the question being whether the orders resulted in a "change in ownership" of two million one hundred and fifteen thousand shares in Mineral Resources Limited
- The Full Federal Court held that for a trust to be valid, the subject matter must be sufficiently identified and not uncertain, and may include a specified proportion of a fungible asset (identical) if the proportions are clear
- Key Principle: Courts must adapt certainty of subject matter principles to contemporary realities while maintaining fundamental legal requirements, recognising that electronic share registers are now standard and physical share certificates are largely obsolete