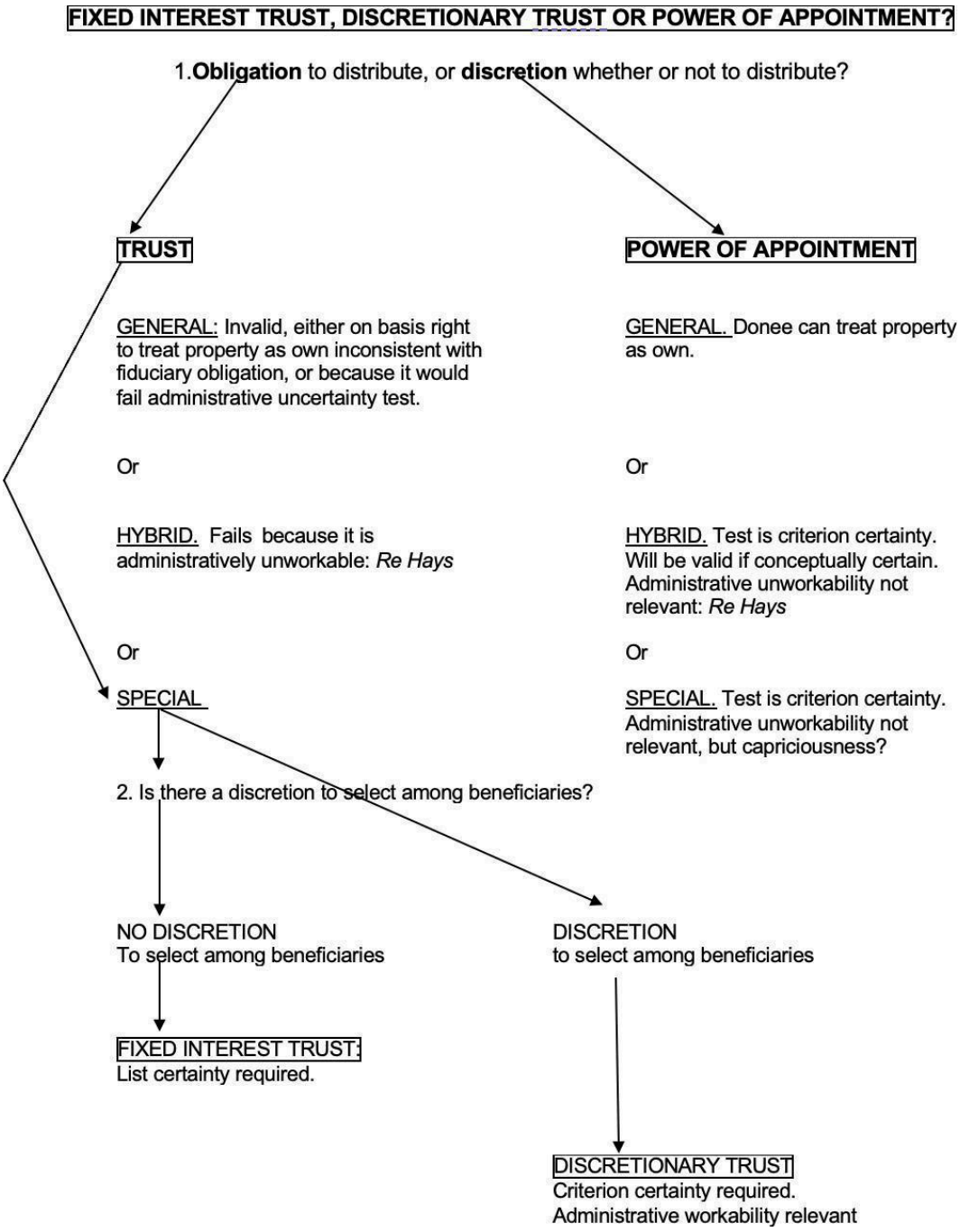
LAW5010
TRUSTS

TABLE OF CONTENTS

NO.	DESCRIPTION	PAGE
EXAM ANSWER STRUCTURE		3 - 7
1.	**CREATION OF TRUSTS**	**8 - 50**
1.1	THREE CERTAINTIES	8 - 23
	a. Certainty of Intention	8 - 15
	b. Certainty of Subject Matter	15 - 17
	c. Certainty of Object	18 - 23
1.2	QUITCLOSE TRUST	24 - 27
1.3	CHARITABLE TRUSTS	28 - 38
1.4	STATUTORY FORMALITIES OF CREATING A TRUST	39 - 44
1.5	CONSTITUTIONS OF TRUSTS (FOR TRUSTS BY TRANSFER)	45 - 50
2.	**POWERS & DUTIES OF TRUSTEES**	**51 - 90**
2.1	TRUSTEE DUTIES - CUSTODIAL DUTIES	53 - 55
2.2	TRUSTEE DUTIES - FIDUCIARY DUTIES	56 - 58
2.3	TRUSTEE DUTIES - ONGOING MANAGEMENT DUTIES	59 - 76
2.4	TRUSTEE DUTIES - INVESTMENT DUTIES	77 - 85
2.5	DEFENCES - INVESTMENT DUTIES	86
2.6	GENERAL DEFENCES	87 - 90
3.	**RIGHTS OF TRUSTEES**	**91 - 98**
3.1	RIGHT TO INDEMNIFICATION	91 - 96
3.2	RIGHT TO APPROACH THE COURT FOR DIRECTIONS	97 - 98

4.	**RIGHT OF BENEFICIARIES**	**99 - 116**
4.1	RIGHT TO GIVE CONSENT	99
4.2	RIGHT TO CALL (GET) TRUST PROPERTY	100 - 103
4.3	RIGHT TO REMOVE A TRUSTEE	104 - 107
4.4	RIGHT TO SEEK REMEDIES FOR BREACH OF TRUST - PERSONAL REMEDIES	108 - 116
4.5	RIGHT TO SEEK REMEDIES FOR BREACH OF TRUST - PROPRIETARY REMEDIES	112 - 116

EXAM ANSWER STRUCTURE



TRUSTEE DUTIES	EXAMPLES	OTHER TIPS
CUSTODIAL DUTIES		
Duty to comply with trust deed/adhere to the terms of the trust deed	• Lost trust deed	
Duty on assumption of trusteeship / to get in trust assets	• Trust is not properly constituted	Note: If the trust is not constituted, there is no real consequence for failing to get it. • If the trust was not complete because it was not constituted, then T is not liable. • If the trust was complete in equity, the failure to transfer the property at law has not led to any loss. Few answers proceeded to analyse the consequences of the trustee's failures here.
FIDUCIARY DUTIES		
Duty to avoid conflict of interest (incl. Self-dealing rule)	• Placing oneself in a position of real and sensible possibility of conflict • Trustee cannot engage with the trust assets (e.g. can't rent a property from the trust assets for themselves)	
Duty to avoid profits/act gratuitously	• Making a secret profit as a result of their position / information	
ONGOING MANAGEMENT DUTIES		
Duty to act with reasonable prudence	• Exercising discretions (i.e. paying out capital beneficiaries early) • Choosing whether to seek advice • Appointing an agent and overseeing their activities (N/B: also consider duty to act personally) • Insuring property	

Duty to keep trust assets separate	• Mixing trust assets with personal assets	
Duty to act personally	• Trustee has delegated powers to another person / hasn't considered it personally	Consists of 4 aspects: • Trustee cannot delegate their power • Trustee cannot act under dictation • Trustee cannot fetter their discretion • Trustee must act unanimously
Duty to act in the best interest of the beneficiary	• Trustees should act in the beneficiaries best financial interests (not consider social or political views) • Trustee act for their OWN personal financial benefit rather than the trustees • Beneficiaries have different / competing views • Trustees may have to act dishonorably (but not illegally) to do this (***Cowan v Scargill***). ○ E.g. where trustees have reached a gentlemen's agreement for the sale of trust property, but no enforceable contract, they are still under a duty to consider and explore better offers.	
Duty to act impartially	• Preferencing one type of beneficiary over the others (e.g. focussing on capital vs. income investments) • Consider if there are different age profiles of beneficiaries (younger, more likely to prefer capital growth vs. older, more likely to prefer income)	
Duty to keep account and render accounts/rights to inspect the trust document	• Lot trust deed	
Duty to consider exercising of power/discretion	• Trustee having power to distribute to X and instead distributing to Y	

	• Improperly surveying a class of objects for potential distribution • Trustee attempting to handball off distribution powers to someone else • Objects being mad about a distribution decision • Losing the trust deed → cannot consider the trust/exercise • discretion if you don't know the trust terms	
INVESTMENT DUTIES		
Duty to invest	• Failing to invest at all (i.e. leaving it in a non-interest account) • Consider - if the trustee is living in the property → Duty to rent out the property for income, and whether compensation was payable for the failure to earn income from the asset	
Duty to invest only in investments that are authorised by the trust deed	• Investing outside of the terms of the trust deed	
Duty to act with prudence when investing	• Investing in a risky investment • Investing in too conservative investments (HBL -other investment vehicles that offered higher returns and were equally as safe) • Focussing only on capital growth/income growth etc. (i.e. • not fit for the beneficiary's purpose) • Not diversifying the trust assets • Giving a co-trustee with a bearer cheque (of a significant amount), and they later leave the country • Failure to inform oneself properly about the details of the sale	
Duty to annual review trust performance	• If there are gaps in the dated OTF for when the trustee has reviewed the performance	

Duty to act impartially (N/B: overlap w/ongoing management duties)	• Preferencing one type of beneficiary over the other (e.g. focussing on capital vs. income investments) • Consider if there are different age profiles of beneficiaries (younger, more likely to prefer capital growth vs. older, more likely to prefer income)	
Duty not to make speculative investments	• Investing in a risky investment	
Duty to take advice	• Investing in a risky investment - should take some advice before proceedings	

CREATION OF TRUST

REQUIREMENTS OF A TRUST

1. Have sufficiently clear terms
2. Satisfy the three certainties
    a. Certainty of intention
    b. Certainty of subject matter
    c. Certainty of object
3. Comply with statutory formalities
4. Be properly constituted
5. Not be for illegal purposes

THREE CERTAINTIES

REQUIREMENTS FOR A TRUST TO BE VALID	
STEP 1 **INTRODUCTION**	• For a trust to be valid, it must possess certainty of intention, subject matter and object/be for a valid charitable purpose (***Knight***). In addition, the trust must comply with statutory formalities and constitution of trust property. • Once created, a trust is an irrevocable transfer of property and the settlor cannot change their mind (***Mallot***).
STEP 2 **STATE THE TYPE OF TRUST**	• It is also important to note what kind of trust this is. • **Exam tip**: always state at the start of your answer **Key types of trust** • **Inter Vivos trust:** A trust established during the lifetime of the settlor, effective immediately. • **Testamentary trust:** A trust established by will, effective upon the death of the settlor. • **Trust by transfer:** The settlor appoints another individual as trustee and must transfer trust assets accordingly. • **Trust by declaration**: The settlor appoints himself as trustee and no transfer is required
THREE CERTAINTIES	
1. CERTAINTY OF INTENTION	
STEP 1 **INTRODUCTION**	• **TEST:** In order to satisfy certainty of intention, [**P**] must establish that a reasonable person in all the circumstances would consider the [**settlor**] to have manifested an **immediate** and **irrevocable** intention to depart with their beneficial interest in the trust property (***Harpur***). • Intention is determined **objectively** (***Byrnes***). However, the subjective intentions

<table>
<tr><td></td><td colspan="2">of the settlor may be relevant if the trust is a sham or in instances of undue influence and/or unconscionability (Lewis).</td></tr>
<tr><td>STEP 2
IS THERE AN INTENTION TO CREATE A SHAM TRUST (OTF)?</td><td colspan="2">• TEST: The trust will be invalid if [settlor] creates a trust with the intention of deceiving third parties as to his real interest in the property.
• N/B:
○ A trust may be created for the purpose of avoiding potential claims of creditors, the Tax Office or Centrelink. Upon execution of the trust deed the settlor may insist that he no longer beneficially owns the property so that it is not available for distribution to his creditors and does not form part of his taxable assets.
○ A trust = sham where the settlor deals with property otherwise than in accordance with the terms of the trust he has created, with the intention of deceiving third parties as to the settlor's real interest in the property</td></tr>
<tr><td>STEP 3
IS THE INTENTION IMMEDIATE?</td><td colspan="2">• A declaration of intention to create a trust must be immediate (unless consideration is given) (Harpur).
• Distinguish: trust beginning at a later date vs trust beginning immediately with beneficiary only receiving benefits later</td></tr>
<tr><td rowspan="6">STEP 4
IS THE INTENTION IRREVOCABLE?</td><td colspan="2">• TEST: To determine if the intention is irrevocable, it is necessary to consider whether the settlor has used explicit written words, inexplicit written words, or oral statements and actions. Where there is unambiguous, explicit declaration of a trust, intention is satisfied as per French CJ in Byrnes
• GO TO → Statutory formalities for trust creation (need to make sure formalities have been satisfied, regardless if oral or written)</td></tr>
<tr><td colspan="2">HAS EXPRESS TRUST LANGUAGE BEEN USED?</td></tr>
<tr><td>Clear, unambiguous writing (strongest)</td><td>• STATE: OTF, the [settlor] has used explicit words in the [document] as it stated [insert facts here]. Therefore, further inequity is not required, mental reservations are irrelevant and objective intention is established (Byrnes). Where there is an unambiguous, explicit declaration of trust, intention is satisfied (French CJ in Byrnes)
• Examples: "on trust" "as my trustee" "the settlor gives". "I hold my house on trust"</td></tr>
<tr><td colspan="2">CAN THE SURROUNDING CIRCUMSTANCES/CONDUCT INFER THE EXISTENCE OF A TRUST?</td></tr>
<tr><td colspan="2">• TEST: A lack of explicit and unambiguous trust language is not fatal as laymen are not expected to use the formal language associated with creation of a trust (Paul v Constance). As the words are [informal/ambiguous], the court may consider the words and actions of [settlor] or the surrounding circumstances to assess whether [settlor] manifested an objective intention to create a trust (Re Armstrong). Accordingly, we must examine all the circumstances of the case to determine if the intention manifested (Byrnes)</td></tr>
<tr><td>Inexplicit writing, with or without</td><td>• Re Armstrong → son's names on receipt + bank managers evidence = evinced intention to hold money on trust</td></tr>
</table>

	other conduct (including conduct post-dating the writing)	○ The sons' names on the deposit receipts was a clear indication that he intended to benefit his sons. ○ The father used language the equivalent of declarations of trust. ○ → It it not necessary to use the word "trust" or even precise wording ● ***Chang v Tjiong*** → bad family relations; trustee couldn't be trusted w/ property unless he had legally enforceable obligations ○ 2 letters. ■ Letter 1 – stated income to be give to mother, capital to be given to mistress. ■ Letter 2 – terms were varied to give son rights over mistress. Change in terms would not ordinarily be allowed - the money should have gone to the mistress - but the parties conceded/did not dispute that it was within the father's rights to alter the trust's terms, failing to dispute it. ○ Court held that the words resemble a trust, rather than being merely precatory (hopeful). The terms in the 2 letters, although informal, were clear. ○ o + Bad family relations: the trustee couldn't be trusted with the property unless he had legally enforceable obligations (demonstrates intention, father would have had to rely on the son's goodwill to pay the mistress)
	Orally, with or without other conduct (including conduct post-dating the oral declaration)	● Trust can also be created orally (with or without other conduct) (***Paul v Constance***) ANALOGISE/DISTINGUISH ● ***Paul v Constance*** → "the money is as much yours as mine". ○ Put money into a bank account that was in Mr Constance's name only. Mrs Paul was authorised to draw on the account. ○ Minor deposits made from bingo winnings. ○ Withdrawals together to buy Christmas presents and food. ○ Lived together ○ He said to her **repeatedly**: "The money is as much yours as mine". ● Note: c.f. class example – winning a lottery and saying that it is "our" money (more of an exuberant circumstance), less strong of an example/may be distinguished from ***Paul v Constance***
	Contractual obligations (not a	● Contracts that do not have a clause that states money must be held in a separate fund "must surely be fatal to the imputation

<table>
<tr><td></td><td>trust)</td><td>of a contractual intention to create a trust over that money" (Gagelar J in ***Korda***).
○ → If money is held in a separate account – strong indicator that the parties meant to hold it on trust for someone else
○ → if terms of the contract is ambiguous as to whether it is/is not a trust (and money is not held separately) – then it may be fatal (no trust)
○ → if the terms of the contract is clear, then it doesn't matter that the trust money is mixed (N/B; will be in breach of trust, but trust will still exist)

ANALOGISE/DISTINGUISH

● ***Korda*** → requirement to keep trust money separate = trust obligation (c.f. contractual)
○ "Although failure in fact to hold money in a separate fund need not negate the existence of an express trust otherwise conclusively established, absence of a contractual intention that money be held in a separate fund must surely be fatal to the imputation of a contractual intention to create a trust over that money".</td></tr>
<tr><td></td><td colspan="2">IS THE BEST LEGAL MECHANISM TO DESCRIBE THE ACTION IN TRUST</td></tr>
<tr><td></td><td>What is the best legal mechanism?</td><td>● If it is the most appropriate legal mechanism to give effect to the settlor's wishes, the court will infer that the settlor intended to create a trust (c.f. a loan or a gift)</td></tr>
<tr><td>STEP 5
CONSIDER PRECATORY (i/e/ hopeful) WORDS</td><td colspan="2">● <u>TEST</u>: If precatory words exist, that will indicate that a trust is not present (***Chang***). These are words or phrases that only express a hope, a desire, or wish, but are not imperative and do not impose a duty.
● → 'I trust that you'll look after mum once I am gone' expresses a hope; it does not create a duty. It is therefore a gift.
● Examples:
○ I leave X to my wife, feeling confident that she will act justly towards our children
○ I leave my shares in Company X to my son in full confidence that he will look after his brothers.
○ I leave the farm to my daughter, trusting that she will continue to use it as a dairy farm.</td></tr>
<tr><td>STEP 6
IF NOT, CONSIDER THE POSSIBILITIES (GRATUITOUS DISPOSITIONS)</td><td colspan="2"><u>Consider the possibilities (gratuitous dispositions) discussed by Justice Dixon in ***Countess***</u>
● <u>TEST</u>: In the ***countess of Bective***, Justice Dixon discussed four interpretations of a situation wherein one person makes a gift to another but also seems to express a purpose that is beneficial to others.
○ A moral duty, not a legal one (thus it's an absolute gift).</td></tr>
</table>

<table>
<tr><td rowspan="4">DISCUSSED BY JUSTICE DIXON IN Countess</td><td colspan="2">A charge.
A condition (there are both legal and equitable ones).
A trust.</td></tr>
<tr><td>1. Moral duty only → Gift with precatory words only (e.g. Re Williams)

→ NOT A TRUST</td><td>Words that do not give an explicit direction, but rather express a hope or desire. Precatory words do not impose any obligation at all.
Examples of precatory words:
“absolutely in the <u>fullest confidence</u> she will carry out my wishes” (Re Williams)
“at her absolute disposal [of his widow]…trusting to her [to divide the property among the children]” (Dean v Cole);
“feeling confident that”
Examples of mandatory words (ie creating either a trust, or a gift with conditions attached):
“Upon trust” (Byrnes v Kendle);
“On the understanding that” [she would bequeath certain shares to charity] (Hayes v National Heart Foundation); or
“Provided that…”.</td></tr>
<tr><td>2. Gift with a legal condition (e.g. Re Gardiner).

→ NOT A TRUST</td><td>Where X gives Y property as a gift, but there’s a condition attached which Y must satisfy. If Y doesn’t satisfy the condition, then she loses the gift.
The condition is enforceable.
In addition to there being legal and equitable conditions, there are two kinds:
Condition precedent (legal)
Condition subsequent (equitable)</td></tr>
<tr><td>Condition precedent (legal)</td><td>TEST: This is likely a condition precedent as [condition] must be satisfied for transfer to occur. This is binding and will result in forfeiture of the property/interest if not complied with.
→ a condition that must be fulfilled in order for a gift to take effect
E.g. My car to Sally, on condition that she graduates law school. If it is impossible to fulfil, it fails completely
Note: If there is a time limit, more likely to be a legal condition.
ANALOGISE / DISTINGUISH
Re Gardiner – legal condition (condition subsequent)
In his will, a father left his son</td></tr>
</table>

			Ivor all of his estate "**<u>subject to</u>** the son paying the sum of ○ £1000 to his other son Albert **<u>within</u>** two years from of his death" ○ Held to be a legal condition due to the language of "within", therefore NOT a trust ○ N/B: different outcome if the words used would be "at the expiration of two years"
		Condition subsequent (equitable)	● **<u>TEST:</u>** This is likely a condition subsequent as [**property**] is already vested subject to [**condition**]. A condition, with no forfeiture of property/interest, enforceable in equity only (e.g. through specific performance, equitable compensation etc.) ○ → Looking for specific performance, equitable compensation etc. ● Consider the language, nature of property and the nature of the obligation in determining what type/whether a condition. ○ → If it is vague, it is more likely to be an equitable condition than a legal condition. ● What: A condition of defeasance - the gift will come to an end if the condition occurs. ● Example: ○ My car to Steve, but if he abandons his career in law to become an AFL player, then the car goes to Sally. ○ I devise my house and land at Clayton to my son John, subject to payment by him of $50.00 per week to my daughter Louise for the remainder of her life. ANALOGISE / DISTINGUISH ● ***Cobcroft v Bruce*** – specific performance / equitable enforcement ○ Cobcroft died in 2005, leaving his wife Denise: "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" to my nephews. ○ Equitable obligation most appropriate to give effect to the words. ○ Held: Equitable condition as words allowed her to exhaust shares completely. Cannot impose a legal obligation on wife
	3. Gift with an equitable condition / charge (e.g. ***Gill v Gill***) **→ NOT A TRUST**	● **TEST:** The giftee receives beneficial ownership charged with the payment of money. This is subject to the security interest of the giftor who has an enforceable proprietary interest to satisfy a debt if the condition is not met. ● Transfers of property which are subject to obligations being fulfilled to third parties will ordinarily be viewed as equitable charges. ● An equitable condition creates personal rights against the receiver of the gift; but they do not lose/ forfeit the benefit of the gift. ANALOGISE / DISTINGUISH ● ***Gill v Gill*** – Under his will, a father left the farm to his son on the condition that he allow his three sisters to live in part of the farmhouse as long as they remained unmarried. The conditions were said to impose a personal obligation on the son to provide accommodation to his sisters. ○ Court held it was necessary to take into account the type of property and the nature of the obligation. ○ It was unlikely that the father wanted his son to lose the whole farm, he just wanted to make sure the daughters had somewhere to live. ○ This obligation could be met by the son paying compensation to the sister or allowing her to live in the farmhouse	
	4. Given to trustee on trust for someone else (i.e. a trust)	● This will create a trust	
SUB-CONCLUSION	IF trust fails OTF: ● Trust by Declaration → **State**: As the trust has likely failed for certainty of intention, [**settlor**] will retain the property.		

<table>
<tr><td></td><td colspan="2">

Trust by Transfer → State: As the trust has likely failed for certainty intention matter, [trustee], will hold [property] on trust for [settlor].
Testamentary Trust → State: As the trust has likely failed for certainty of intention, the [property] will revert to the estate.

</td></tr>
<tr><td colspan="3">2. CERTAINTY OF SUBJECT MATTER</td></tr>
<tr><td>STEP 1
INTRODUCTION</td><td colspan="2">TEST: In order to satisfy certainty of subject matter, [P] must establish that the subject matter is presently existing, assignable, and identifiable.</td></tr>
<tr><td rowspan="2">STEP 2
IS THE PROPERTY PRESENTLY EXISTING?</td><td>Present Property → assignable</td><td>
STATE: Trust property must be presently existing and presently owned (Windeyer J, Norman). E.g. land, chattels etc.

Consider – contracts for future property/future property for consideration (i.e. the present ‘right’ the something)

Equity WILL recognise assignments of future property if there is a contract for valuable consideration (Tailby)
<u>Contractual right to future income:</u> [X] will argue [property] is a contractual right to future income - it is future property in presently existing property (Shepherd per Kitto J). It is a ‘right’ to the future income rather than the income itself, analogous to the fruit and tree analogy in Shepherd – presently existing.
<u>Contractual right to undeclared dividends:</u> [X] can argue these facts distinguishable from Norman as these are the ‘rights’ to dividends. Here, ‘rights’ to dividends can be seen as the tree, rather than the fruit of the tree (Shepherd) – presently existing.

Declared dividends is present property (Shepherd).

<u>Percentage of future income:</u> [X] will argue that [X], as a percentage of future income is assignable because it is future property in presently existing property (Williams). This is because it is a ‘right’ to a fraction of the future income rather that the income itself, analogous to the fruit and tree analogy in Shepherd
<u>Contingent Property:</u> [X] will argue that [the clause] is contingent property, as [apply facts] – presently existing (Re Armstrong).
<u>Royalties:</u> Even though [furniture] may never be sold and hence never get royalties, the right to royalties is a presently existing right regardless of whether it results in any income or not (Shepherd).

</td></tr>
<tr><td>Mere expectancies → not assignable</td><td>TEST: As the property here is [the interest in the will of a living person/the right of a person as an object under a discretionary trust (Kennon)], this would be considered a [mere expectancy/future property] and thus, a trust cannot be declared over this.</td></tr>
</table>

		CASES: ***Kennon v Spry*** ● Husband had created a discretionary trust some 10 years prior to the marriage. Husband made direct financial contributions to the trust assets; the primary judge found that the wife made indirect financial contributions to the trust assets, by her efforts in the marriage. The husband was at all relevant times the sole trustee. The marriage lasted for 23 years, after which the parties separated in 2001. There were four children of the marriage, each of whom subsequently intervened in the proceedings. A number of variations to the trust were affected over the years.
	Future property → **not assignable**	**STATE:** Future property (except future property for consideration) cannot be the subject of a trust. ● In other words, the constitution of the trust will fail because there is no transfer of property from the settlor to the trustee. ● Or immediacy of intention will fail because, as no property is in existence at the time of the attempted creation of the trust, there can be no immediately existing trust either by transfer or declaration ANALOGISE / DISTINGUISH: **Assignable (e.g. contractual rights which = present right)** ● ***Shepherd v FCT*** - Shepherd gifted 'all his right, title and interest in and to an amount equal to 90% of the income which may accrue during a period of 3 years'. The present right b/c contract would continue for 3 years – an existing and ongoing right to receive payment for 3 years. It does not matter that the promise may not be fruitful, because the right still exists. ○ Note: c.f. ***Norman v FCT*** - Norman assigned 'all his right title and interest in and to…'. Because the contract of loan could be repaid at any time and interest only accrued annually, the majority said Norman had no present right to be paid interest, because it had not yet accrued – that is, in 1956 interest for 1958 was nothing but an expectancy => future property ● ***Tailby*** – a contract to receive future book debts of a creditor **Not assignable** ● ***Kennon v Spry*** – where the trustee has absolute discretion as to who they distribute the money to, the beneficiary can only insist upon the due administration of the trust and has no present property that can be assigned or made subject matter

		of trust → **Equitable rights under a discretionary trust** ● ***Norman v FCT*** - dividends are an expectancy – company is not required to declare a dividend, so shareholder has no right to one until it is declared → **undeclared dividends** ● ***Williams v CIR*** - Williams held a life estate under a trust and was thereby entitled to trust income. He assigned 'the first £500 of the net income…together with the right to receive it'. NZ Court of Appeal said he attempted to assign the moneys which may arise – expectancy, not presently owned by assignor – he should have assigned a share in the equitable interest → **interest/money from trust income**
STEP 3 **IS IT CLEARLY IDENTIFIED / ASCERTAINABLE / DESCRIBED WITH SUFFICIENT PRECISION?**	**STATE:** Trust property must be identifiable to satisfy certainty of subject matter and cannot be loosely described (***Mussoorie***). [**Trustee**] must be capable of definitively saying what property is held on trust. **Identifiable:** ● My blue car, my Sandringham house; 'the rest and residue of my estate'. ● Shares where the company and class are specified (***Hunter***) (N/B: if company not named/different classes, unlikely identifiable shares); ○ Where property is bulk and identical, it may not be necessary to specify which exact assets are held on trust (***Shortall***) ■ ***Hunter***: X declared that he would give 5% shares he held in company to Y. He didn't identify which shares and they were all held together with his other shares. HELD: No issue if all shares/intangible assets are identical ■ ***Shortall:*** D promised to hold X number of shares on trust for P in exchange for $20,000. This is only a portion of his shares in Co. HELD: All his shares on trust. D beneficiary for the number of shares he promised her and P beneficiary of the rest. **Not identifiable:** ● Two books from my collection; four cows from my paddock; ● 'the bulk of my estate' (***Palmer***); ● 'give to the children whatever is no longer required by her' (***Mussoorie***).	
STEP 5 **CONSEQUENCES**	● It [**is/is not**] likely that [**insert clause/trust**] will be found to be a [**void/not void**] as [**insert conclusion**]. ● **NOTE:** If a trust fails to meet certainty of object, but the other two then that will lead to a resulting trust and not an express trust. **IF trust fails OTF:** ● Trust by Declaration → **State**: As the trust has likely failed for certainty of intention, [**settlor**] will retain the property. ● Trust by Transfer → **State:** As the trust has likely failed for certainty intention matter, [**trustee**], will hold [**property**] on trust for [**settlor**]. ● Testamentary Trust → **State:** As the trust has likely failed for certainty of intention, the [**property**] will revert to the estate.	

3. CERTAINTY OF OBJECT

STEP 1 INTRODUCTION

A trust must be in favour of definite beneficiaries, ascertainable or capable of ascertainment by the trustee (***Morice***). In other words, the beneficiaries of a trust must be identifiable in order for a trust to be valid.

STEP 2 IDENTIFY THE TRUST/POWER

Summary

Summary	Obligation to Distribute	Discretion to Select Objects			Test for Certainty
		General	Hybrid	Special	
Fixed Interest Trust	Yes	No discretion permitted			List Certainty
Discretionary Trust Power	Yes	No	No	Yes	Criterion Certainty
Discretionary Mere Power	No	Yes	Yes	Yes	Criterion Certainty

Gift

- Outright transfer

Fixed interest trust → mandatory obligation (trust power)

→ shall, must

- **TEST:** In reference to the wording [**insert construction of the clause/trust**], [**clause/trust**] is a fixed interest trust and the trustee must distribute to the identifiable beneficiaries in the amounts specified. This creates equitable property rights to [**B**] in [**trust property**] as they can insist the trust is distributed according to their proportionate interests.
- **WHAT:** The beneficial interest of the objects under the trust has been fixed, stated and defined.
- **OBLIGATION TO DISTRIBUTE:** Yes
- **DISCRETION TO WHOM TO APPOINT?** No.
- **EXAMPLES:**
  - I leave my personal property to my trustee who shall distribute it in her absolute discretion to my first cousins.
  - I give my trustee $5,000 to hold for my children in equal shares.

Discretionary trust → Discretionary obligation (trust power)

- **TEST**: In reference to the wording [**insert construction of the clause/trust**], [**clause/trust**] is a discretionary trust (trust power). [**Insert trustee**] has a discretionary obligation to select beneficiaries from a class of potential objects and has discretion as to the proportions and amounts that can be distributed.
- **WHAT:** A trust coupled with a power to distribute where the trustee must distribute the property but has discretion as to the proportions and objects.
- **OBLIGATION TO DISTRIBUTE**: Yes
- **DISCRETION TO WHOM TO APPOINT?** Yes.
- **EXAMPLE**:
  - I hold on trust my house in Carnegie for the trustee to give to my graduating classmates of 2021 the trustee chooses

		○ Clause 2 states that 'I leave my winnings from the baking contest for Frank to distribute among my old friends from culinary school'.
	Powers of appointment / Mere power	→ may, can → generally weak language; default clause ● **TEST:** There is no obligation to distribute the property, then it will be construed as a mere power of appointment (***Re Gulbenkian***). As [**insert factors**], it appears as if there is a mere power of appointment. ○ N/B: A default clause conclusively establishes the provision is a mere power, as the settlor has contemplated the possibility of non-performance, and made provision for it (***Re Hays***) ● **WHAT:** There is authority to deal with property but no obligation to distribute (includes default clauses/remainder interest). ● **OBLIGATION TO DISTRIBUTE**: No. ● **DISCRETION TO WHOM TO APPOINT**: Yes. ● **EXAMPLE:** ○ I hold my house on trust and the trustee may choose to give it to whoever they wish ○ I give my share of the pastry shop to the 2021 winner of the Belgravia Christmas baking competition, if Frank so desire N/B: Terminology The power is often held: ● By a trustee ("mere power") OR ● By a third party ("bare power") ○ If not held by a trustee, the holder of a power of appointment is empowered to act in a defined way, but is under no obligation to act ○ eg "$30,000 to be held on trust by X; Y [non-trustee] may appoint any amount therefrom to any of A, B and C." ● **Donee of power** (appointor): person who may exercise the power of appointment. ● **Donor of power** (settlor): person who grants the power of appointment. ● **Objects of the power** (appointees): potential recipients of the exercise of the power – persons to whom the property may be given, but noting that (as opposed to a fixed trust, they have no right to receive until selected).
STEP 3 RECOGNISE THE CLASS OF TRUST/POWER WE ARE	**General Class**	● Anyone in the world (incl. holder of the power) ● This is usually treated as equivalent to full ownership of the property. ● E.g. "I give my car to Sam with power to appoint whomever he selects, including himself".

<table>
<tr><td rowspan="2">CONCERNED WITH ON THE FACTS</td><td>Hybrid Class</td><td colspan="2">Anyone in the world except for certain individual's/a specified class
E.g. "I give my car to Sam with power to appoint the same to whomever he chooses except A, B and C"; or "Anyone in the world except A".</td></tr>
<tr><td>Special Class</td><td colspan="2">An ascertainable class defined by criteria
E.g. "I give my car to Sam with power to appoint to.. .[such of X, Y, Z as he selects]" or [my brothers except John] or [my children]</td></tr>
<tr><td rowspan="2">STEP 4
APPLY THE RELEVANT TEST</td><td>Fixed Trust Interest</td><td colspan="2">TEST: Discretionary trusts require criterion certainty and cannot have administrative unworkability (two step test) (McPhail)

"Is or ir not test" (McPhail) - can a person be said to be or not to be within the class

Follow the two-step test per:</td></tr>
<tr><td>Discretionary Trust</td><td>1: Criterion Certainty</td><td>TEST: trust power requires semantic and evidentiary certainty (Re Gulbenkian) and the language used should be sufficiently precise and not too vague
Failure to satisfy conceptual certainty will invalidate the clause (Re Blyth; McPhail) and the property will revert back to the settlor/estate
Semantic certainty (i.e. words makes sense objectively) → Language used must be sufficiently precise and not too vague
E.g. 'relatives', 'dependant' 'employees' (McPhail) = certain;
my old friends (Re Gulbenkian) = uncertain)
<table>
<tr><th>Certain</th><th>Uncertain</th></tr>
<tr><td>Distribution to "relatives" not uncertain as legal definition (McPhail)

Employers (Gulbenkian)</td><td>"A trust for my old friends" → conceptually uncertain unless more facts are provided (Gulbenkian).

"Favourite" or</td></tr>
</table>
</td></tr>
</table>

<table>
<tr>
<td></td>
<td></td>
<td></td>
<td>
<table>
<tr>
<td>Dependants (Baden)

Inhabitants (West Yorkshire)

Residents (Gulbemkian)

‘Former employee’ or ‘officer’ (Baden (No 2))

Organisations for raising standard of living (ReBlyth)

Neighbour = certain, neighbours = uncertain</td>
<td>“closest son”

Beneficiaries being described as being part of a “faith” - it if the trust puts the decision on what a term means on the conclusive opinion of someone else then you can get around something that is conceptually uncertain.</td>
</tr>
</table>

Evidentiary certainty: Trustee must be able to ascertain any given person whether they are inside or outside of the class.

N/B: Evidentiary uncertainty does not invalidate the clause (McPhail)

</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2: Administrative workability</td>
<td>

<u>TEST</u>: The trust will be invalid if the class is so wide so as not to form anything like a class making the trust administratively unworkable (R v District)

The class cannot be “so hopeless” (i.e. broad) that trustee has no objective criteria to make a decision between objects (R v District)
N/B: For discretionary trust → If general or hybrid classes of objects, AU will automatically prevent the trust power from being valid (Re Hays)

N/B: if drafting to avoid this

Include some relationship (e.g. company, numerically geographic groups, my relatives, people I started trusts with in 2023, people I lived with in

</td>
</tr>
</table>

			South Yarra) ○ NOT – fluctuating body of individuals, people moving in/out of class (***Re Harding***) ANALOGISE / DISTINGUISH ● a trust for residents of Greater London = too broad/administrative unworkability (***McPhail***) ● "inhabitants of the County of West Yorkshire"... "A trust with as many as 2½ million potential beneficiaries is, in my judgment, quite simply unworkable. The class is far too large..." (***R v District Auditor, ex parte West Yorkshire MCC***)
	Mere / bare power	General Class	● Criterion certainty (semantic certainty + evidentiary certainty) (***Re Gulbenkian***) (see above) – **always valid**
		Hybrid Class	● Criterion certainty (semantic certainty + evidentiary certainty) (***Re Gulbenkian***) (see above) - **always valid**
		Special Class	● Criterion certainty (semantic certainty + evidentiary certainty) (***Re Gulbenkian***) (see above); **AND** ● NOT Capriciousness: There must be a **discernible link** between the objects and the settlor, otherwise capricious and fails (Templeman J in ***Re Manisty***) → i.e. some logical link between the settlor/any institution; "irrational, perverse or irrelevant to any sensible expectation of the settlor **CASES:** ***Re Manisty*** ● The trustee may not be able to execute his or her fiduciary duties properly if the terms of a mere power are arbitrary or ● 'capricious'. ● "the terms of the power negative any ● sensible intention on the part of the ● settlor"; an 'accidental conglomeration of persons who have no discernible link with the settlor or with any institution' (eg tall women with red hair)

CONCLUSION	IF trust fails OTF: ● Trust by Declaration → State: As the trust has likely failed for certainty of intention, [**settlor**] will retain the property. ● Trust by Transfer → State: As the trust has likely failed for certainty intention matter, [**trustee**], will hold [**property**] on trust for [**settlor**]. Testamentary Trust → State: As the trust has likely failed for certainty of intention, the [**property**] will revert to the estate. ● **NOTE:** if a trust for persons, fails for certainty → can consider if it can be "saved" by seeing if it is a charitable trust