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EXPRESS TRUSTS

Basic requirements

Note: where an express trust fails, an automatic resulting trust may arise.

[Step 1]: What type of trust?

- **[1] Trust for persons**
 - **[a] Fixed trust**
 - The share of the trust property that each beneficiary will receive is determined by the instrument
 - Trustee has no discretion as to whether and how to distribute trust property
 - Beneficiary has an **equitable proprietary interest** in their share of the trust property
 - **[b] Discretionary trust ('trust power')**
 - The share of the trust property that each beneficiary will receive is determined by the trustee
 - Trustee has no discretion about whether to distribute
 - Beneficiary has a **mere expectancy**: no beneficial interest in trust property unless and until the trustee exercises their discretion
 - **[!] *Saunders v Vautier* exception**: if all beneficiaries are legally competent and ascertained, they can unanimously agree to end the trust and have the assets distributed
 - **[c] Power ('mere power' or 'bare power')**
 - Trustee has discretion over both whether to distribute and how to distribute the trust property
 - It is a matter of construction whether it is a trust or mere power (Lord Upjohn in *Re Gulbenkian*)
- **[2] Other**
 - **See below:**
 - [Quistclose trusts](#)
 - [Charitable purpose trusts](#)
 - [Non-charitable purpose trusts](#)

[Step 2]: Formalities?

- [1] Is the trust property land ('real property')? (PLA s 53(1)(b))
 - Declaration of trust must be manifested and proved by writing signed by the person declaring the trust (PLA s 53(1)(b))
 - Can occur after declaration of trust; can be in more than one document (James)
 - Trust takes effect at the time of the **declaration**, *not* at the time of the writing
- [2] Is the trust property personal?
 - Generally, **no formal requirements** — oral declaration will suffice
 - [!] Is it a subsisting equitable interest? (s 53(1)(c))
 - [a] Is this a disposition?
 - Complex question, don't need to consider in *any* detail
 - [b] Is it a disposition of a **subsisting equitable interest**?
 - Eg a beneficiary of a fixed trust purporting to create a new trust over their equitable interest
 - **Consider**: is this a sub-trust under which the beneficiary of the original trust (the new trustee) takes on administrative functions? If yes, might simply be a regular declaration of trust and **not fall within s 53(1)(c)**. But this is **unlikely** (so generally should swiftly be dismissed).
 - [c] Subsisting interest? —>
 - **Consider this briefly**: look to see if a **sub-trust** is created with the original beneficiary taking on administrative activities. If **YES**, likely that it is **not a subsisting interest** and therefore, that **formalities do not apply**.
 - Real question is **what the original beneficiary is doing?**
 - **Consider whether we can view this instead as creation of a new trust (s 53(1)(b))** — but likely **tenuous**
- [3] Does the rule in *Corin v Patton* have application?
 - If the settlor has done everything necessary for them to transfer their interest in their property, then the transfer may be invalid at law but valid in equity (*Corin v Patton*)
 - Do **not** consider this in any detail.

- [4] Some suggestion that formal requirements cannot be a cloak for fraud (consider both *Last v Rosenfeld*; *Wratten v Hunter*)
 - ***Last v Rosenfeld***: P + D = joint tenants. P transfers his interest to D, subject to oral agreement that D would transfer back to P if Ds did not occupy the house within 12 months. D sold house to C. D argues that the agreement with P was unenforceable due to a lack of writing. **Held**: P was entitled to 1/2 interest in proceeds. **Two interpretations**: (1) formalities can't be a cloak for fraud, so an express trust was created; **or** (2) D held P's interest on **constructive trust** for P, so no 'exception' to formalities was needed here.
 - There is **reliance** by P on the trust property in this case
 - Consider the nature of the parties' **relationship** and any **detrimental reliance** on the oral agreement
 - **Must** consider both the **constructive trust** and the **cloak for fraud** analyses of *Rosenfeld*
 - ***Wratten v Hunter***: Settlor orally declares trust for siblings. Settlor later denies existence of trust, relying on lack of formalities. **Held**: no trust. **Reasoning**: **no reliance** on the trust property in this case. In any event, this is better understood as a **proprietary estoppel case**.

[Step 3]: Certainty of intention?

- [1] We need objective intention to create a trust? (*Byrnes v Kindle*)
 - Key principles
 - **Objective, unilateral intention** (*Byrnes*), although often (as with trusts created by contract) this will coincide with bilateral intention of the parties
 - What meaning would the words convey to a **reasonable person**? (*Byrnes*)
 - Look for the language of **obligation** or **command** (ie **imperative** language) (*Re Williams*)
 - Do not expect lawyers' language from ordinary people (*Paul v Constance*)
 - Subjective intention is only relevant where there is a question of a **vitiating factor** (eg mistake, duress, unconscionable dealing). A sham trust (eg one used to deceive creditors) is liable to be set aside (*Byrnes*)
 - Useful factual scenarios
 - **Paul v Constance**: requisite intention existed for trust to exist. **Reasons**: 'this money is as much yours as it is mine'; joint withdrawals and deposits; discussions with the bank manager about opening a joint account.
 - **Byrnes**: trust deed stating that he held half share in house on trust for his wife. **Held**: clearly created a trust. **Reason**: what the husband *subjectively* intended is irrelevant.
 - **Re Williams**: deceased leaves his estate to his wife '**absolutely, in fullest confidence that she will carry out my wishes**'. **Held**: no trust. **Reasons**: language is not sufficiently clear to impose an obligation to leave either policy to the daughter. The will is better read as the expression of a **wish that the daughter** should have both policies unless the widow thinks otherwise.

[Step 4]: Certainty of subject matter?

- [1] Must be legally recognised property, to which the settlor must have present property rights.
 - Settlor must have present property rights to the property
 - An expectancy is not property (*Re Rules' Settlement*)
- [2] The quantum of the property must be clearly defined (need to discuss the tension between *Golay* and *Palmer*)
 - 'Reasonable income' was sufficiently certain because courts are accustomed to discerning what is 'reasonable' (*Re Golay's Will Trusts* — English High Court)
 - Briefly note this has been the subject of criticism
 - 'Bulk of my residuary estate' is too uncertain (*Palmer*)
- [3] Trust over a proportion of a mass? (need to discuss the tension between *Hunter* and *White* approaches!)
 - If fungible, no need to segregate (*Hunter*; *White*)
 - Shares of the same class in the same company = fungible
 - If not fungible, need to segregate (*Re Goldcorp*)
- Is it fungible?
 - It's fungible if there is no possibility of variance in quality or value between one part and another part of the whole
- Check to see whether the implication of the entire shareholding being trust property can be raised on the facts: as was the case in *White*
 - Unclear whether the *White* mechanical solution can operate when this is not the case (ie possible that *White* is tightly confined to its facts)
- Relevant cases
 - *Hunter* (English Court of Appeal — sufficiently certain!): Moss owned 950/1000 shares in Moss Electrical. Moss agreed orally to give Hunter 5% shareholding in the company. Moss later refused, claiming invalid trust because uncertain subject matter. Held: sufficiently certain. Reason: concerned shares of