

TOPIC 5 – CONSTITUTION:

If testamentary trust: Constitution does not have to be satisfied, instead, s 7 Wills Act applies.

If trust by declaration: Constitution is not relevant as there is no assignment of assets.

STEP 1: Introduction:

- The constitution of a trust is complete when the gift is complete at law or at equity. A trust may be fully constituted if the gift is complete in equity, even if it's not fully complete in law. The trust must be 'fully constituted' – a trust cannot be complete until the trustee has title to the property. The rules depend on the nature of the property and the method of transferring it. If your efforts to constitute the trust fail, then there is no trust.
- If legal property = legal title.
- If equitable property = equitable title.
- Only applies to trusts by transfer (Constance).

STEP 2: Is there an assignable right?

- The right must be a present property right in order to be assignable.

Present property:

- Tangible property:
 - Land, painting etc.
- Intangible property:
 - Patent, the right to enforce debt.
- Legal or equitable property.
- A beneficial interest under a fixed interest trust.
- An existing contractual right (Shepherd):
 - Shepherd's contractual right to receive monthly royalty payments.
 - Shepherd could therefore assign 90% of his royalties.
 - Can assign a contractual right to the money but not a specific amount (e.g., 90%, not \$90).

Future property:

- Property that does not (yet) exist
 - E.g., purported transfer of a calf that is not yet born.
- Property that does exist, but in which the transferor has not acquired rights
 - E.g., purported transfer of grandma's jewellery designated under her will, but she is still alive. Have not yet acquired transferable rights in relation to the jewellery – this will only be given upon administration of her will by her executors once she dies.

- Rights under a discretionary trust – the trustee has discretion not to give you any trust property – no present right to the property yet.
- Future income (Williams)
 - So, if the voluntary transfer is expressed in terms of the assignment of the money/income that the assignor expects to earn – but that they have not yet earned – this is a transfer of future property. Had Williams not made the mistake of transferring the income rather than a part of his right to the income, it would have been a valid transfer – at law and in equity – because it would have avoided the future property problem. He would be transferring present rights to property he had.
- The money receivable under the contract = future property (Williams).
 - Williams had purported to assign not part of his right to receive income, but the income itself. The unearned income itself namely the first 500 pounds that accrue. Needs to be a percentage not a specific amount.
- Equity will however recognise transfer of future property for value (i.e. the assignee has provided valuable consideration) (Taliby).

STEP 3: Was value given for that right? (only if it future property)

- As value was given, assignment will be enforced (Tailby). Assignor holds on constructive trust for assignee.
- As value was not given, a valid construction depends on the property type (legal or equitable) & the relevant rules.

STEP 4: Has the transfer been complied according to the relevant rules?

Legal property:

(1) Torrens title:

Legal Transfer rules:

- Section 45 Transfer of Land Act 1958 (Vic).
- Per s 45 of the Transfer of Land Act 1958 (Vic) a transfer of land under Torrens title will be valid if:
 - The transferor has executed an instrument of transfer (s 45(1)(a)).
 - Has lodged it along with a duplicate certificate of title at the Office of Land Titles for registration (s 45(1)(b)).
 - Upon registration the property will pass to the transferee (s 45(1)(b)).

(2) General law land:

Legal transfer rules:

- Section 52 Property Law Act 1958 (Vic).
- Conveyances to be by deed –

- (1) All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed.
- Once the donee / doner affix their signatures to the deed, title passes – there is no scope for the application of Milroy.
 - The donor participates in the transfer right up until the very moment title passes.

(3) Chose in Action:

Legal transfer rules:

- Includes a transfer of a debt, e.g. a declared dividend, royalty etc.
 - E.g., transferring my right to be paid money, to someone else (I lend you \$1000, you agree to pay me \$1000, at a later point I say from now on you will not owe me the \$1000, but you owe it to someone else – transferring my right to be paid). Also just includes money in a bank account.
- s 134 Property Law Act 1958 (Vic)
 - [1] Absolute assignment
 - [2] By writing (includes text message)
 - [3] under the hand of the assignor [i.e. signature] . . . of any debt or other legal thing in action, of which (question whether this is satisfied if a text message scenario)
 - [4] Express notice in writing has been given to the debtor . . .
 - Express given notice to debtor means TO THE BANK, the COMPANY, to the PUBLISHER etc.
 - The debtor is the person who needs to pay...
 - If the above is satisfied, it shall be deemed to have been effectual in law . . . to pass and transfer from the date of such notice . .

If the settlor provides the trustee with the cheque, this will satisfy s.134.

(4) Chose in Possession:

Legal transfer rules:

- (a) Either by deed; or
- (b) By delivery of the chose in possession coupled with the intention on the transferor's part to confer ownership.
- Re Stoneham [1919].
 - Thomas v Times Book Co Ltd [1966].

(5) Shares:

- Conceptually a chose in action, but there are special transfer rules for shares.
- Companies are not able to register transfers of shares unless a 'proper instrument of transfer' has been delivered to them (s 1071b Corporations Act).

- [1] Transfer of shares requires that a share transfer instrument is executed by the transferor.
- [2] The share transfer instrument is lodged along with the share certificates with the company to which the shares are owned for registration.
- [3] Title to the shares will pass upon registration.

Equitable property:

Types of equitable property:

1. Beneficiary's interest in a trust.
2. Partner's interest in a partnership.
 - The right to receive a proportion of the partnerships profits.
3. Equitable interests in property – e.g. equitable mortgages, leases.
 - All of these rights were recognised in, and enforced by, the court of Chancery rather than the courts of common law.
 - Note: all instances of equitable property are (equitable) 'choses in action'.

Rules:

1. It is in writing and signed by the transferor (s 53(1)(c) Property Law Act):
 - A disposition [assignment] of an equitable interest . . . subsisting at the time of the disposition, must be in writing signed by the person disposing of the same'.
2. The written transfer manifest a clear expression of an intention to dispose of the equitable interest.
 - Where the equitable assignment has been done in a deed, courts have accepted that sufficient clarity of expression will exist.
 - Needs to demonstrate the seriousness of the assignor to assign their interest.
 - If it says, "they are yours right now" and does not specify what it is that they are assigning question the clarity.
3. The disposition is to occur with immediate effect.
 - Immediate transfer of the beneficial interest of the transferor as distinct from an agreement to assign it.
 - The assignor must purport to assign their interest with immediate effect.
 - This means that however clearly expressed an intention to make a disposition in writing, the assignment may fail in equity if on its written terms the assignor can be said not to intend to immediately assign their equitable interest to the assignee.
 - Cannot be conditional on a future event happening or not happening – needs to have the character of immediacy to it.

Assignments of partial (or non-absolute) legal choses in action (Norman v FCT):

- This is like if X wants to transfer part of the money in their bank account to Y – this type of transfer can only take place in equity.