

2. Certainty of Intention

Certainty of intention requires the settlor to have manifested an objective, irrevocable, and immediate intention to create a trust (*Harpur v Levy*; *Kendle v Melsom*). It is assessed objectively from the surrounding circumstances. The party seeking to rely on the trust bears the evidential burden.

BACKGROUND DOCTRINE

Element	Rule
Immediate intention	The settlor must intend to create a trust taking effect immediately -- not merely promise to do so in the future (<i>Harpur v Levy</i>). Exception: equity may enforce a future promise if there is valuable consideration (<i>Harpur v Levy</i>).
Distinguished: deferred enjoyment	A trust can take effect immediately even where the beneficiary's enjoyment is deferred (<i>Re Armstrong</i> ; <i>Harpur v Levy dissent per Maxwell J</i>). Key question: does the instrument have present effect, or is it just a promise?
Irrevocable	The onus is on the beneficiary to establish that the settlor has manifested an objective, irrevocable intention (<i>Harpur v Levy</i>).
Objective assessment	Intention is assessed objectively from the surrounding circumstances, not from the settlor's private subjective intent (<i>Re Armstrong</i> ; <i>Byrnes v Kendle</i>).
Sham	Consider whether the documentation is a sham designed to disguise the true nature of the arrangement (<i>Lewis v Hillman</i>).

HOW INTENTION MAY BE MANIFESTED

Method	Rule and Key Cases
Clear and unambiguous writing	Use of mandatory words such as 'upon trust' points strongly toward a trust (<i>Byrnes v Kendle</i>). Where writing is clear, extrinsic evidence is inadmissible.
Inexplicit writing + conduct	The word 'trust' need not be used; conduct before and after the writing is relevant (<i>Re Armstrong</i>). Bank manager testimony, account naming, and surrounding arrangements all admissible.
Oral declaration + conduct	Oral evidence admissible where there is no written declaration or writing is ambiguous/precatory (<i>Paul v Constance</i>). Evidence from conversations and joint conduct can establish a trust.

Contract	An agreement creating trust obligations can manifest intention. Equity may enforce a contract to create a trust if consideration given (<i>Korda v Australian Executor Trustees</i>).
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Admissibility of Extrinsic Evidence

Extrinsic evidence (other documents, conversations, conduct) is admissible where: (1) there is no written declaration; or (2) the language in any written declaration is ambiguous or precatory (*Re Armstrong; Paul v Constance; Chang v Chang*).

Where admissible: interpretation is contextual and purposive (*Harpur v Levy*); other documents can be used (*Chang v Chang; Re Armstrong; Korda*); evidence from conversations can be adduced (*Paul v Constance*).

Tip: X used mandatory words in Clause 1 but not in Clause 3 -- the failure to do so highlights an absence of intention in the latter clause.

Word Type	Effect
Mandatory ('upon trust', 'must', 'I direct', 'I charge')	Points toward a trust -- imposes a legal obligation (<i>Byrnes v Kendle; Kendle v Melsom</i>).
Precatory ('in confidence', 'I hope', 'feeling confident', 'in the fullest confidence', 'morally bound')	Points away from a trust -- mere expression of wish or hope, not a legal obligation (<i>Re Williams</i>).
Absence of obligation to segregate funds	Points strongly against a trust (<i>Korda v Australian Executor Trustees</i>) -- lack of separation suggests no ring-fencing was intended.

SCRIPT: Certainty of Intention

Step 1: Identify what is claimed: The party seeking to rely on the trust bears the evidential burden of proving the trust exists (*Harpur v Levy; Kendle v Melsom*). Identify the alleged settlor, the alleged trustee, and the alleged subject matter.

WRITE: *[Party A]* seeks to establish that a trust was created by *[describe the arrangement -- e.g., the oral statement made by settlor]* on *[date]* that the \$*[amount]* deposited into the joint account was held for *[beneficiary's]* benefit]. The evidential burden lies with *[Party A]* to demonstrate that an objective, irrevocable intention to create a trust existed.

Step 2: Was the intention immediate?: The settlor must intend to create a trust taking effect immediately (*Harpur v Levy*). A promise to create a trust at a future date without consideration is invalid (*Harpur v Levy*). Distinguish: (a) a trust taking effect immediately where enjoyment is merely deferred -- valid (*Re Armstrong; Maxwell J dissent in Harpur v Levy*); from (b) a promise to constitute a trust in the future -- invalid unless supported by consideration.

- IF the instrument specifies a future commencement date with no present transfer of beneficial interest: apply *Harpur v Levy* -- this is a promise to create a trust, not a trust.
- IF the instrument takes present effect but enjoyment is deferred (e.g., 'I hold this for B until she turns 25'): apply *Re Armstrong* -- present intention exists, deferred enjoyment does not invalidate.
- IF there is valuable consideration for a future trust: equity may enforce it as a contract (*Harpur v Levy*).

WRITE: The *[deed / letter / oral statement] [does / does not]* evidence an ****immediate**** intention to create a trust because *[reasoning -- e.g., the deed specifies a commencement date of [date]]*, which is a future date with no present effect on the beneficial interest -- this is a promise to create a trust in the future and, applying *Harpur v Levy*, is invalid in the absence of consideration / the words 'as from today I hold this on trust for **[B]**' take present effect despite providing for deferred distribution at age 25, which, applying *Re Armstrong*, is valid as a trust with deferred enjoyment rather than a future promise].

Step 3: Was there an objective, irrevocable intention?: Assessed objectively from the surrounding circumstances (*Re Armstrong; Byrnes v Kendle*). Work through each available indicator -- writing, conduct, oral statements, and any counter-arguments.

- MANDATORY WORDS PRESENT (e.g., 'upon trust', 'I direct', 'must be applied'): These are strong indicators of trust intention (*Byrnes v Kendle; Kendle v Melsom*). The use of such words in one clause but not another is significant.
- PRECATORY WORDS ONLY (e.g., 'in the fullest of confidence', 'I hope', 'morally bound'): These point away from a trust (*Re Williams*). A testator may use 'trust' elsewhere in the same instrument but not in this clause, which highlights an intentional omission.
- NO WRITTEN DECLARATION / INEXPLICIT WRITING: Look to surrounding circumstances (*Re Armstrong*). Conduct after the arrangement (joint use of account, consistent treatment as trust assets) and third-party evidence (bank manager testimony) are all admissible (*Paul v Constance; Re Armstrong*).
- ABSENCE OF OBLIGATION TO SEGREGATE: Where T is under no obligation to separate the alleged trust assets from their own funds, this points strongly against a trust (*Korda v Australian Executor Trustees*).
- COUNTER-ARGUMENT -- PRECATORY OR AMBIGUOUS: [D] may argue that the language used was merely precatory and imposed no obligation, as in *Re Williams* where 'in the fullest of confidence' was insufficient. [D] may further argue that [reason -- e.g., the alleged settlor continued to treat the property as their own; the alleged trustee was given absolute discretion; no separation of funds was required].

WRITE: The *[words / conduct / documents] [do / do not]* manifest an objective, irrevocable intention to create a trust because *[select applicable branch -- e.g.: The use of the words '[quote]'* is mandatory in nature, analogous to 'upon trust' in *Byrnes v Kendle*, and imposes a legal obligation on *[trustee]* to hold the property for *[beneficiary's]* benefit / The phrase *'[quote]'* is precatory -- it merely expresses *[settlor's]* hope or confidence and, applying *Re Williams*, does not impose any legal obligation. The remainder of the instrument uses the specific word 'trust' in other clauses, which highlights that the absence of that word here was intentional / Although no formal written declaration was made, the oral statement *'[quote]'* combined with *[conduct -- e.g., joint management of the account, [trustee]* treating the funds as *[beneficiary's]* property], applying *Paul v Constance*, is sufficient to establish an objective intention to create a trust].

Step 4: Sham?: Consider whether the documentation is designed to disguise the true nature of the arrangement (*Lewis v Hillman*). A sham trust exists where the parties have no genuine intention to be bound by the trust instrument.

WRITE: There *[is / is no]* basis to argue the arrangement is a sham because *[reasoning -- e.g., there is no evidence that the trust deed was executed to defeat creditors or other third parties and the parties consistently conducted themselves in accordance with the trust terms / the alleged trust was created immediately before insolvency proceedings and the settlor continued to use the trust property for their personal benefit, suggesting the trust instrument does not reflect the parties' true intentions (Lewis v Hillman)].*

Step 5: Conclude: If intention is established, proceed to subject matter. If not, the trustee holds on resulting trust for the settlor (*s 53(2)* PLA).

WRITE: Certainty of intention *[is / is not]* established. *[If not: [Trustee] holds the [property] on resulting trust for [settlor] (s 53(2) PLA). No formality requirements apply to this resulting trust.]*

Key Cases -- Certainty of Intention

Case	Principle	Watch Out / Application
Re Armstrong	Trust need not use the word 'trust'. Court looks to surrounding circumstances, account naming, bank manager evidence. Trust upheld despite informal documents.	Inexplicit writing + conduct. Use where formal language absent -- argue by analogy to conduct.
Paul v Constance	Oral statement ('this money is as much yours as mine') + joint account conduct established a trust.	Oral declaration + conduct. Use where there is no writing but consistent treatment as shared property.
Harpur v Levy	Trust deed specifying a future commencement date held invalid -- promise, not a trust. Distinction between present trust (valid) and future promise (invalid).	Future date = promise not trust. Maxwell J dissent useful: present effect + deferred enjoyment = valid.
Byrnes v Kendle	Clear unambiguous writing using 'upon trust' established intention. Extrinsic evidence inadmissible where writing is clear.	Mandatory words case. Absence of mandatory words in one clause vs their use in another is significant.
Re Williams	'In the fullest of confidence' = precatory; mere words of hope insufficient. Other clauses of the same will used 'trust' specifically.	Classic precatory words. Key contrast: mandatory vs precatory; also use where trustee given absolute discretion (Cobcroft).
Kendle v Melsom	'Upon trust' in deed with joint survivorship arrangement established clear manifestation despite later dispute.	Mandatory words + deed execution. Subsequent conduct of co-owners does not override the deed.

Korda v Australian Executor Trustees	Absence of obligation to segregate funds pointed strongly against trust; language was permissive not imperative.	Use in QCT and express trust analysis -- no separation requirement = significant pointer against trust.
Chang v Chang	Multiple letters sent to son as trustee constituted sufficient written evidence under s 53(1)(b) PLA.	Extrinsic evidence / informal documents. Documents referring to each other can constitute sufficient writing.