

IS THERE A CHARITABLE TRUST? (SAMPLE)

STEP 1 – certainty of intention?

STEP 2 – certainty of subject?

STEP 3 – charitable purpose or anomalous purpose?

- ⇒ Look to Pemsel 4 heads of charity.
- ⇒ If falls under Head 4 “Other”, then consider if beneficial to community & reflects Statute of Elizabeth.
- ⇒ If falls under any of the first 3 heads then the purpose is considered charitable (don’t do further analysis).

A trust for a purpose will only be valid if it is a charitable purpose or anomalous purpose.

HEAD 1 – RELIEF OF POOR, AGED & IMPOTENT

A – RELIEF OF POVERTY?

- Covers circumstances where people not in position to maintain basic necessities of life (**Re Coulthursts**)
- Concept depends on standards in society at time.
- Absolute destitution not necessary.
 - ✓ A person’s financial resources are insufficient to allow him to obtain all necessary, not only for bare existence, but for modest standard of living in Aus community (**Ballarat Trustees**).
- A trust must FOSTER the RELIEF of poverty – i.e. provision of necessities or quasi-necessities (schoolbooks, public transport, take a break from employment if casually employed)
 - × Not provision of amusement or luxuries – **Inland Revenue**.
- Intention to relieve poverty is sufficient & can be inferred.
 - The word poverty isn’t needed in trust to fall under this head.

B – RELIEF OF AGED?

- No strict age cut off – but think what needs arise from old age?
 - Isolation – trust purpose to relieve loneliness from old age.
- Trusts for aged are prima facie charitable if they are for relief of the needs arising from old age (**City of Hawthorn**).
- × Cannot SINGLE out wealthy aged – e.g. gifts limited to wealthy aged are not charitable (**Hilder**).

C – RELIEF OF IMPOTENT?

- Trusts for those who live w/ disability or sickness
- ✓ Gifts to hospitals or similar institutions
- Just because a hospital charges for its patients for admission does not deprive of its charitable nature (**Re Resch’s**) – AS LONG as the hospital not set up as a profit-making enterprise and surplus is used to go back into the hospital.

FORMALITIES (SAMPLE)

STEPS:

- (1) What is the type of property?
- (2) What is the nature of the interest?
- (3) What is the appropriate subsection of PLA s34(1)?
- (4) Have the statutory requirements been complied with?

ALSO:

- (5) Are the 3 certainties satisfied?

PROPERTY LAW ACT 1969 (WA) s34(1)

- (a) No interest in land is capable of being **created or disposed** of except by writing
- (b) **Declaration of trust** respecting any land shall be manifested & proved by writing.
- (c) **Disposition** of an equitable interest subsisting at the time of disposition shall be in writing.

Even if a trust complies with the three certainties, it can still fail if it doesn't comply with the statutory formalities (s 34(1) PLA).

	PLA s34(1)(a)	PLA s34(1)(b)	PLA s34(1)(c)
TRANSACTION	CREATION or DISPOSITION	<p>DECLARATIONS of Trust</p> <ul style="list-style-type: none"> E.g A owns land & orally declares she holds it on trust for B. Following day A writes to B confirming. <p>EXAMPLES:</p> <ul style="list-style-type: none"> A declares a trust of her land for B = (b) to the exclusion of (a). A declares herself trustee of an equitable interest in land for B = (c) if BARE TRUST, otherwise (b). A owns land. A orally declares that she holds it on trust for B = (b) to the exclusion of (a). 	<p>DISPOSITION (not creation)</p> <ul style="list-style-type: none"> PLA s7 not helpful. Given natural ordinary meaning (<i>Grey v IRC</i>) <p>Methods of disposition (<i>Comptroller of Stamps</i>):</p> <ol style="list-style-type: none"> (1) Self-declaration (sub-trust). (2) Transfer/assignment. (3) Direction (not a revocable mandate). <p>EXAMPLES:</p> <ul style="list-style-type: none"> A owns shares. A ORALLY declares that she holds them on trust for B = (c). A declares herself trustee of AN equitable interest in shares for B = (c). A declares herself trustee of HER equitable interest in shares for B = (c). A declares herself trustee of AN equitable interest in LAND for B = (c) if BARE, otherwise (b). T holds shares for A. A directs T to hold them for B = (c).

			<ul style="list-style-type: none">• T holds shares on trust for A. A orally declares that she holds her interest in the shares on trust for B = (c).
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COMPLETE CONSTITUTION OF TRUSTS

SAMPLE

ONLY APPLIES TO TRUST BY TRANSFER

- Don't apply if self-declaration of trust: **I hold X on trust for B.**
 - SETTLOR/TRUSTEE → BENEFICIARIES.
 - Only requires a final and binding statement that the settlor's property is held on trust for Beneficiary.
 - Complete constitution is not an issue because no transfer required (settlor = trustee).
 - Self-declaration is effective to create a trust if (1) 3 certainties met and (2) statutory formalities complied with.
- Trust by transfer: **I transfer X to my trustee to be held on trust for B.**
 - Settlor and trustee are different legal people, thus complete constitution must be done.

METHOD FOR TRANSFER OF PROPERTY

- (1) 3 certainties must be met.
- (2) Statutory formalities must be met – s34(1).
- (3) Trust must be completely constituted.

COMPLETE CONSTITUTION:

- Complete constitution is the irrevocable transfer of trust property and creation of beneficial interest.
- *A trust is valid and enforceable by any beneficiary when the settlor has fully transferred the trust property to the trustee or received consideration (Ellison).*
- *Per **Milroy v Lord**, until the settlor does everything necessary to be done according to the nature of the trust property, the beneficiaries have no equitable interest in the trust property.*

STEP 1 – LEGAL REQUIREMENTS:

For [TRUST PROPERTY] to be completely constituted at law, [SETTLOR] must:

- **TORRENS LAND:** Validly execute an instrument of transfer, access the Certificate of title (COT) and register title (s82 TLA).
- **SHARES:** Validly executed a share transfer form (signed by [SETTLOR] and [TRUSTEE]), register in [company]'s share register and have the share certificate issued to [TRUSTEE] (Corporations Act).
 - In *Milroy v Lord*, *Not registered & no trust enforceable. Shares formed part of Milroy's estate.*
- **CHATTEL:** Validly execute a deed of assignment & physically deliver possession with an intention to convey ownership.
 - Chattel inc cars, jewellery etc.
- **UNREGISTERED LAND:** Deed under s33(1) or if orally declared, in writing & signed under s34 PLA AND registered certificate of title.
 - Unregistered land is less common – ownership proven via chain of title deeds (conveyances, wills, mortgages).

There steps [HAVE / HAVE NOT] been satisfied so the transfer is [COMPLETE / NOT COMPLETE] at law.

STEP 2 – EQUITABLE REQUIREMENTS:

However, for a transfer to be complete in Equity [SETTLOR] must have done everything necessary to be done so that [TRUSTEE] has been equipped to achieve the transfer of legal ownership (*Milroy v Lord*). Everything necessary to be done refers to acts which are obligatory for [SETTLOR] to do and no one else (*Griffith CJ in Anning v Anning; Corin v Paton*).

For [TRUST PROPERTY] to be completely constituted in Equity, [SETTLOR] must:

- **TORRENS LAND:** Settlor must deliver duly executed transfer to trustee and the authority to use COT for purpose of registering the transfer (*Corin*).
- **SHARES:** Validly execute a share transfer form (*Corin*) – no delivery is required.
- **CHATTEL:** Validly execute a deed of assignment OR physically deliver the property (*Anning*).
- **UNREGISTERED LAND:** Settlor must deliver duly executed deed of conveyance to trustee.

FIDUCIARY DUTIES

STEP 1 – IS THERE A FIDUCIARY RELATIONSHIP?

A – ACCEPTED CATEGORIES:

- Trustee/beneficiary
- Director/company
- Agent/principal
- Solicitor/client
- Partner/partner
- Receiver or liquidator/creditors
- Executor or administrator of deceased estate/beneficiaries of estate
- Stockbroker or financial adviser/client
- Company promotor/investor
- Guardian/ward
- Employee/employer – employee owes FD.

Onus is on person alleging a relationship does not exist to REBUT PRESUMPTION.

B – IS IT OUTSIDE ACCEPTED CATEGORIES?

Can justify a fiduciary relation through analogy with the accepted categories (Gibbs CJ, Hospital Products).

- (1) Trust & confidence?
 - Subordination of F's interests to those of P. P reposes sig trust & confidence in F.
- (2) Undertaking by F to act on behalf of P? **Hospital Products**
 - F exercises power/discretion which affects P legal/practical interests.
- (3) Reliance of P on F
 - Joint venture ≠ fiduciary (cf to partnership which is fiduciary) – **Paramasivan**
- (4) Property / info of P entrusted to F
 - Includes goodwill or reputation (**Reading**)
- (5) Vulnerability?
 - P in position of disadvantage which causes them to rely on F (**Hospital Products**).

C – DURATION OF FDs

- Can arise before formal legal relationship (**UDC v Brian**)

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B - DUTY / DUTY CONFLICT

**** arises for lawyers ****

- *Must be conflict bw duty to principal & duty to 3rd party.*
- TEST: Real and sensible possibility of conflict, not just a hypothetical or fanciful one (**Boardman**).
 - (1) Interests of P and 3rd party (or other P) are adverse to one another.
 - (2) F cannot act properly for both (**CBA v Smith**).
 - (3) Did not advise P to obtain independent advice.

CASE	FACTS	CONFLICT?	BREACH
CBA v Smith	<ul style="list-style-type: none"> CBA advised Smith to purchase hotel lease at EXCESSIVE price. Hotel lease seller is a client of CBA. Money from sale used to repay loans owed to CBA. 	<ul style="list-style-type: none"> Clear conflict bw interests of Smith & interests of Hotel. Could not act properly for both sides. CBA should have advised Smith to get independent advice. 	YEP
Farrington	<ul style="list-style-type: none"> F received large damages AWARE & asked solicitors how to invest. Solicitors advised F to invest in group of companies (their client). F lost LOTS of money. 	<ul style="list-style-type: none"> Clear conflict bw different clients' interests (<i>ensuring safe investment versus getting best terms for investment loan</i>). Solicitors should have advised F to get independent advice. 	YEP
Break Fast	<ul style="list-style-type: none"> BF = former client of solicitors who had acted in litigation where BF one of several defendants. Solicitors acted for all defendants in proceedings. 	<ul style="list-style-type: none"> Other defendants had adverse interests to BF. 	YEP

2 – NO PROFIT RULE

- F must not retain any unauthorised profit / gain by virtue of their position as F or by use of any opportunities, knowledge or info arising from that position.

- Identify how F made unauthorised profit / gain
- No defence that (*Boardman*)
 - Trust profited
 - Trust could not have taken advantage of the opportunity
 - F acted honestly & reasonably
- Breach may be negated (**Zacharia – Deane J obiter**) if:
 - Claim by P would be unconscientious OR
 - i.e. new owners who made payments constituting the profit seeking to claw it back (*Regal*)
 - Circs where no possible conflict & in P's interest to obtain benefit
 - i.e. no possible conflict & B's interests aligned w/ trust (*Boardman*)
- Profit / gain must go to P UNLESS authorised in advance or subsequently ratified.

CASE	FACTS	PROFIT?	BREACH
Keech v Sanford	<ul style="list-style-type: none"> Trustee working for a trust for benefit of child. Trust property = Family house on lease. Landlord refused to renew lease. Trustee takes lease extension for his own benefit (saw as good investment). Child beneficiary could not take lease due to being an infant. 	<ul style="list-style-type: none"> Trustee used his position to obtain the property for himself. Clear conflict. HELD – lease for child beneficiary, not for his own personal benefit. 	YEP