LAWS6205 Equity & Trusts — Exam Answer Scaffold

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Part I — Creating an express trust (Topics 4–5)

Work every express trust issue in this order. Spend time only on the requirements that are genuinely contentious on the facts; deal with the rest in one line.

Practice: *Tutorial Four (Steps 2–2C, 7); Tutorial Five (Steps 3–4); Tutorial Six (Steps 4, 4B, 7).*

Step 1 — Opening: identify and classify the alleged trust

Step	Relevant Law to Apply
Step 1: Who is who, how was the trust meant to arise, and what is in dispute?	
WHEN TO RAISE	• Every question that asks whether someone holds property on trust, whether a beneficiary has an interest, or whether a transfer was a gift or a trust. • The facts contain a will, a deed, a letter, an oral statement about property, or an account opened for someone else. • Use this step to pick out which of Steps 2–7 are really contentious; the rest get the one-liners below.
Overview	Before analysing any requirement, fix who is who, how the trust was meant to arise, and which requirements are actually in dispute.
1.1 Map the parties	Fill in the party map (reference table after this table) on scribble paper: settlor or testator, trustee, beneficiaries or objects, the property, and the mode of creation.
1.2 Did anyone intend a trust?	Yes → express trust (Steps 2–7). No → consider a resulting or constructive trust (Topic 9).
1.3 Mode of creation	• Declaration: legal title does not move, so constitution is never an issue. • Transfer (settlement): legal title must move, so constitution must be analysed (Step 6). • Will: a testamentary trust.
1.4 Fixed or discretionary?	Does the trustee choose who takes or how much (a special power of appointment)? This decides the certainty of objects test.
1.5 Inter vivos or testamentary?	This decides the formalities.
SENTENCE	**Opening paragraph** *The issue is whether [settlor/testator] created a valid express trust of [property], under which [trustee] holds the legal title for [objects]. [The trust would arise by a declaration of trust, as [X] already owned the property / by transfer of the property to [T] / under [X]'s will, as a testamentary trust.] An express trust requires: (1) certainty of intention, subject matter and objects; (2) compliance with any formal requirements; (3) where the trust is created by transfer, complete constitution, that is, the legal title vested in the trustee; and (4) the absence of any invalidating factor, such as illegality. The contentious issues here are [ ] and [ ]; the remaining requirements are clearly satisfied.*
SENTENCE	**Subject matter:** *"There is no issue as to subject matter, which is clearly [property]."* **Declaration:** *"As [X] declared herself trustee of property she already owned, no question of constitution arises."* **Will:** *"As the trust arises under [X]'s will, constitution is not in issue, and the will is assumed to be validly executed."*
EXAM TIP	Do not cite "Foreman v Hazard" for the four requirements: it cannot be verified, and the lecturer's slide states them without authority. Cite authority for each element as you analyse it.

Reference table: 1.1 Map the parties (scribble paper)

Role	Who	Note
Settlor	[ ]	Creates an inter vivos trust by transferring property to a trustee.
Testator	[ ]	Creates a testamentary trust by will (not called "settlor").
Declarant	[ ]	An owner who declares itself trustee of property it already owns.
Trustee	[ ]	Holds legal title; may be one beneficiary, but not the sole beneficiary.
Subject matter	[ ]	The trust property.
Objects	[ ]	Beneficiaries (private trust) or, generally, charitable purposes (public trust).

Step 2 — Certainty of intention

Step	Relevant Law to Apply
Step 2: Did the creator intend to create a trust? State the rule and choose the branch	
WHEN TO RAISE	• Words such as "on trust", "to hold for", "wish", "hope", "in full confidence", "trusting that" or "on the understanding that" in a will, deed or letter → Step 2A. • No clear words, but a separate or specially named account, money paid "only" for a purpose, customers' prepayments, or a loan for one use, usually with an insolvent recipient → Step 2B. • A party says they never "really" meant a trust, or a trust is argued only because it would protect someone → objective test (2A.5). • The named trustee refuses, or says nothing and then acts → disclaimer (2.1).
Overview	Open every intention issue with this paragraph. Then go to 2A (words), 2B (conduct), or both.
SENTENCE	**Rule** *The first requirement is that [settlor] manifested, by words or conduct, an intention to create a trust. What is required is an intention to impose on the holder of the property a legally enforceable obligation to deal with it for the benefit of others, rather than an outright gift or a merely moral obligation. No particular form of words is required: the word "trust" is neither necessary (Korda; Bahr v Nicolay (No 2)) nor sufficient (Dean v Cole). Whether the intention is sufficiently evinced is a question of fact (Korda [10], French CJ). It is ascertained objectively, by construing the relevant text or oral dealings in their context (Korda [11]) according to ordinary principles of contractual interpretation (Korda [109], Gageler J): the search is for the intention revealed by the words used, amplified by facts known to the parties (Byrnes v Kendle [286]).*
2.1 No agreement needed; disclaimer	A trust needs no agreement. The settlor's unilateral intention is enough, and a trustee who does not want to act must disclaim positively and promptly, preferably in writing, before acting as trustee.
Step 2A: Intention from words	
WHEN TO RAISE	• The creator used words in a will, deed, letter or conversation about how the property is to be held or used. • The words mix an absolute gift ("absolutely", "to her own use") with hopes or requests about others. • A document is called a "trust" or "acknowledgement of trust", but a party says it was not meant.
Overview	The question is whether the words, read in the whole instrument and against the shared background, impose an obligation (imperative) or merely express a wish (precatory).

Step	Relevant Law to Apply
2A.1 Quote the words	Quote exactly the words that might express an intention.
SENTENCE	*The operative words are "[quote]", contained in [the will / letter / deed / oral statement].*
2A.2 Classify them as imperative or precatory	• **Imperative indicators:** "on trust", "to hold for", "must", "shall", "on condition that", or a concrete scheme (specific property + specific beneficiaries + specific directions). • **Precatory indicators:** "in full confidence", "hope", "wish", "desire", "request", "I would be grateful", "trusting that".
SENTENCE	*These words are [imperative / precatory]: they [impose an obligation to … / merely express [X]'s hope that …].*
2A.3 Compare with the cases	See the reference table after this step's table.
2A.4 Read the instrument as a whole and keep it internally consistent	"Absolute" language points against a trust; a concrete scheme points towards one (Dean v Cole).
SENTENCE	*Reading the [will] as a whole, the gift is expressed to be [absolute], which is inconsistent with an obligation to hold for others (Re Adams; Dean v Cole). Alternatively: [X] laid down a concrete scheme as to [property], [beneficiaries] and [application], which points to legal obligation rather than mere hope (Hayes). That [T] may also benefit does not prevent a trust, provided [T] must deal with at least part of the property for others (Hayes).*
2A.5 Apply the objective test to the background	Secret subjective intention cannot contradict clear words; a trust is not found merely because it would protect someone.
SENTENCE	*Construed against the facts known to both parties (Byrnes v Kendle [286]), … [X]'s evidence that she did not "really" intend a trust is inadmissible to contradict the unambiguous language of the [document]; the test is objective (Byrnes v Kendle [291]). However, a trust is not inferred merely because it would be an appropriate means of protecting [B]'s interest (Korda [11], French CJ). The court gives effect to what the parties actually intended, not what they would have intended with better legal advice.*
2A.6 Argue both sides, then conclude	
SENTENCE	*[B] will argue that … . [T] will respond that … . On balance, …*
KEY CASES	**Re Adams and the Kensington Vestry (1884)** **Facts:** Estate to wife "absolutely" "in full confidence" she would do what is right for the children. **Ratio / use:** Precatory words: absolute gift, no trust. **Dean v Cole (1921) HCA** **Facts:** Widow "trusted" to divide equally among the children; an earlier clause gave her the fund at her "absolute disposal". **Ratio / use:** "Trusting" precatory in context; read the will as a consistent whole (Higgins J dissenting). "trusting" **Hayes v National Heart Foundation (1976) NSWSC** **Facts:** Estate to daughter "on the understanding" that her will would provide for the shares to be sold and the proceeds split among three charities. **Ratio / use:** Concrete scheme = imperative; trust; the trustee may also partly benefit. **Byrnes v Kendle (2011) HCA** **Facts:** Husband signed an "Acknowledgement of Trust" of a half interest in the house for his wife; failed to collect rent from his son. **Ratio / use:** Objective test; contractual interpretation [286]; unambiguous words cannot be contradicted by subjective intention [291].
Step 2B: Intention from conduct	
WHEN TO RAISE	• A business (often insolvent) put customers' or others' money into a separate account → Pattern 1 (Re Kayford).

Step	Relevant Law to Apply
	• Money was lent or advanced "only" for a stated purpose, often to a separate account the bank knew about, and the purpose failed → Pattern 2 (Quistclose). • Money was invested or contributed in exchange for shares or a business interest → distinguish Raulfs v Fishy Bite.
Overview	Where there are no clear words, ask whether all the circumstances show an intention to create a trust. These cases almost always arise in an insolvency, where a trust gives the claimant priority over unsecured creditors.
2B.1 Identify the conduct and context	Is there a separate account, and what is it called? Was money advanced "only" for a purpose? Was the bank told? Who is insolvent? Did the payer receive anything in exchange?
2B.2 State the rule	
SENTENCE	*Where no writing is required, an intention to create a trust may be inferred entirely from conduct. That the relationship is one of debtor and creditor does not preclude a trust; the same relationship may be both (Quistclose). A requirement that money be kept in a separate account is consistent with, but not conclusive of, a trust, and must be weighed with everything else the parties said and did (Re Kayford).*
2B.3 Pattern 1 — the recipient segregates others' money (Re Kayford)	The recipient can create the trust unilaterally, by declaration.
SENTENCE	*As in Re Kayford, where a mail-order company paid customers' money into a separate "customers' trust deposit account" so that it could be refunded if goods were not delivered, [R] segregated [payers]' money [in an account named "…"] in order to protect them. Viewed against that background, [R] intended to hold the money on trust for [payers]. The trust arises by [R]'s own declaration, even though [payers] were unaware of it.*
2B.4 Pattern 2 — money advanced for an exclusive purpose (Quistclose)	**Work through:** • Was the money to be used **only** for a specific purpose? • Was it not to form part of the recipient's general assets (separate account, notice to the bank)? • Can the purpose still be carried out? • If yes: the money is applied to the purpose, and the lender is an ordinary creditor for repayment. • If no: infer a trust for the lender.
SENTENCE	*In Barclays Bank v Quistclose, a loan made on terms that it be used only to pay a declared dividend, and held in a separate account at Barclays, was held on a primary trust to pay the dividend and, when the borrower's liquidation made that impossible, on a secondary trust for the lender. Here, [L] advanced the money "[only for …]" and it was [kept separately / the bank was notified], indicating that it was not to become part of [R]'s general assets. As the purpose [can no longer be carried out because …], it may be inferred that [L], as the source of the funds, intended the money to be held for [L]. This is not a distinct type of trust but an express trust based on inferred intention (Re Australian Elizabethan Theatre Trust, Gummow J).*
2B.5 Distinguish Raulfs v Fishy Bite where the facts are an investment	Money given for a purpose is not enough; an investment for consideration is not a trust.
SENTENCE	*This case is closer to Raulfs v Fishy Bite, where Mrs Raulfs contributed $400,000 to a fish-and-chip partnership in exchange for a 35% share and the controller misappropriated it. The mere fact that money is handed over for a particular purpose does not establish a trust; [X] received [consideration] in exchange, and nothing said or done shows an intention that the money be held on trust.*
2B.6 State the consequence	Trust money is outside the insolvent's estate; a bank with notice cannot set it off.

Step	Relevant Law to Apply
SENTENCE	*Because [R] holds the money on trust, it forms no part of [R]'s assets available to its general creditors, and [L] takes priority over them. [Bank], having notice of the terms on which the money was advanced, cannot set it off against [R]'s overdraft (Quistclose).*
KEY CASES	**Re Kayford (1975)** **Facts:** Mail-order company paid customers' money into a separate "customers' trust deposit account" before liquidation. **Ratio / use:** Trust inferred from conduct and background; unilateral declaration by the recipient. **Barclays Bank v Quistclose Investments (1970) HL** **Facts:** Loan to Rolls Razor "only" to pay a declared dividend, kept in a separate Barclays account; liquidation before payment; Barclays sought to set off its overdraft. **Ratio / use:** Debt and trust can coexist; primary trust for the purpose, secondary trust for the lender; a bank with notice cannot set off. **Raulfs v Fishy Bite (2012) NSWCA** **Facts:** $400,000 contributed to a fish-and-chip partnership for a 35% share; the controller misappropriated it. **Ratio / use:** No trust merely because money is given for a purpose; no separate "Quistclose trust" institution (Campbell JA). No Muschinski constructive trust where an express agreement governs, [83]–[84]. **Re Australian Elizabethan Theatre Trust (1991) FCA** **Facts:** Cite for Gummow J's analysis of Quistclose (at 503). **Ratio / use:** A Quistclose trust is not a new legal institution; an express trust based on inferred intention.
Step 2C: Conclude on intention	
WHEN TO RAISE	• Always: end the intention issue with an express conclusion and its consequence.
Overview	Always end the intention issue with an express conclusion and its consequence.
SENTENCE	**Intention found:** *Accordingly, certainty of intention is satisfied, and the next question is whether the subject matter is certain.* **No intention, gift context:** *[T] therefore takes [property] absolutely, subject at most to a moral obligation (Re Adams).* **No intention, loan or investment context:** *[L] therefore has only a personal claim in debt and ranks as an unsecured creditor in [R]'s [liquidation / bankruptcy] (Raulfs v Fishy Bite).*
EXAM TIP	• **Don't:** Cite "Foreman v Hazard" for the four requirements. → **Do:** State the requirements without a case. • **Don't:** Cite Hayes for "precatory words do not create a trust". → **Do:** Cite Re Adams and Dean v Cole; Hayes is a case where a trust was found. • **Don't:** Attribute the "ordinary principles of contractual interpretation" passage in Korda to French CJ. → **Do:** It is Gageler J [109]; French CJ is [10]–[11]. • **Don't:** Write "Byrnes v Kendle (Isaacs J dissenting)". → **Do:** Cite Byrnes v Kendle (2011) alone; Isaacs J dissented in Jolliffe (1920). • **Don't:** Rely on Commissioner of Stamp Duties v Jolliffe. → **Do:** The lecturer treats it as discredited; use Byrnes v Kendle. • **Don't:** Treat the word "trust" as decisive. → **Do:** Dean v Cole: "trusting" was precatory in context. • **Don't:** Treat a separate account as conclusive. → **Do:** Consistent with, not conclusive of, a trust (Re Kayford). • **Don't:** Say a trust "will" arise whenever money is given for a purpose. → **Do:** Say it "may" be inferred; contrast Raulfs v Fishy Bite.

Step	Relevant Law to Apply
	• **Don't:** Call a Quistclose trust a special category, implied by law, or a resulting trust. → **Do:** An express trust based on inferred intention (Re AETT, Gummow J; the lecturer's view). • **Don't:** Say "Barclays held the money on trust". → **Do:** The borrower (Rolls Razor) held it on trust; Barclays had notice. • **Don't:** Cite Walsh Bay, Henry v Hammond or Australasian Conference Association. → **Do:** Not in the lecturer's materials; cite Korda, Quistclose and Re Kayford.

Reference table: Which branch?

The facts give you	Go to
Words in a will, deed, letter or oral statement.	2A — Words
No clear words, but an arrangement: a separate account, money lent "only" for a purpose, an insolvency.	2B — Conduct
Both.	2A, then 2B

Reference table: 2A Case comparison: words

Case	Words / key facts	Result	Cite it when
Re Adams and the Kensington Vestry	Estate "to the absolute use of my dear wife … in full confidence that she will do what is right as to the disposal thereof between my children".	No trust: absolute gift; at most a moral obligation.	Words of confidence or hope; a gift expressed to be absolute.
Dean v Cole (HCA)	Estate to widow, "trusting to her that she will … divide in fair and just and equal shares between my children"; an earlier clause put a £1,300 fund at her "absolute disposal" if her son died under 21, which he did.	No trust over the £1,300: "trusting" read as precatory to keep the will consistent with "absolute disposal" (Higgins J dissenting).	The "t" word appears but the context points to a gift; inconsistent clauses.
Hayes v National Heart Foundation (NSW, Needham J)	Estate to daughter "on the understanding that she write into Her Will, that, at Her death, these Shares are to be sold and the capital … divided in equal parts" among three charities.	Trust: the concrete scheme turned ambiguous words into a legal restriction; she could keep the dividends during her life.	Ambiguous words plus specific property, beneficiaries and directions.
Byrnes v Kendle (HCA)	Husband, registered owner, signed an "Acknowledgement of Trust" holding a half interest as tenant in common for his wife; later let his son live there and collected only $250 rent over about 5 years.	Trust; his later evidence that he did not intend a trust was inadmissible; breach of trust.	Clear trust wording; a party now says "I didn't mean it".

Case	Words / key facts	Result	Cite it when
Bahr v Nicolay (No 2) (HCA)	The Bahrs sold land to Nicolay with a right to buy it back; Nicolay sold to the Thompsons, whose contract acknowledged that right; the Thompsons, once registered, refused to resell.	Express trust inferred in favour of the Bahrs (Mason CJ and Dawson J).	An arrangement designed to protect a third party's interest (subject to Korda).
Korda v Australian Executor Trustees (HCA)	Investors claimed that sums owed to a company in receivership were held on trust for them, to keep them from the receivers.	Intention is a question of fact; construe text in context; no trust merely because it would be an appropriate protection (French CJ [10]–[11]); contractual interpretation (Gageler J [109]).	Any claim that a trust should be found to protect someone, especially in insolvency.

Step 3 — Certainty of subject matter

Step	Relevant Law to Apply
Step 3: Is the trust property identified with sufficient certainty?	
WHEN TO RAISE	• The trust is of "some of", "part of", "the bulk of", a number or a percentage of a larger holding of shares, goods or money → 3.4, 3.6. • The settlor declares a trust of something not yet owned: a future inheritance, future dividends, "the share of my father's estate I will receive" → 3.2. • Several beneficiaries but no shares stated, or the property is described loosely ("my house in X Street") → 3.3, 3.5.
Overview	The trustee must be able to identify the property the trust attaches to and, where there are several beneficiaries, the share of each; the property need not be itemised, and it must exist now.
3.1 Quote the description	
3.2 Is it existing property of the settlor?	A future share of an estate, future dividends or an inheritance not yet received is a mere expectancy, so there is nothing for the trust to attach to (lecturer's "father's estate" example; cf Norman v FCT).
SENTENCE	**Rule** *The trust property must be identifiable with sufficient certainty that [T] can tell which assets the obligation attaches to; it need not be itemised in detail (Hunter v Moss).*
SENTENCE	**Mere expectancy** *By contrast, "[the share of X's estate that I will receive]" is a mere expectancy: until [X] dies and the administration of the estate is complete, it cannot be known what, if anything, [S] will receive. There is no present property to which a trust can attach, and the subject matter is uncertain.*
3.3 Can it be identified from the description plus the facts?	"My house in Macleay Street" is enough if the settlor owns only one there; the rest is research.
3.4 Part of a larger holding?	If the assets are fungible (same class), a fraction or number suffices (Hunter v Moss). If they are of different classes, or not interchangeable, there is more than one way to make up the parcel, so the subject matter is uncertain.
SENTENCE	**Part of a fungible holding** *Although the particular [shares] were never identified, they were all of the same class and therefore interchangeable, so [T] holds any [number] of them on trust (Hunter v Moss,*