

EXPRESS TRUSTS

1. Settlor: creates/testator
2. Trustee: Legal title + perform obligations → Need not consent to appointment, but must disclaim trusteeship if not; **MALLOT**
 - a. Limitation to 4 in NSW: s 6(5)(b) **Trustee Act 1925 NSW**
 - b. T cannot be u18; s 10(1)(b) **Conveyancing Act 1919 NSW**
 - c. Person underage not able to enter into contracts which bind the trust; **Minors (Property & Contracts) Act 1970 NSW**
 - d. Bankruptcy provides grounds for T's removal; **MILLER**
3. Beneficiary

Classification

1. **Express trust; (private)**
 - a. Fixed trusts; Beneficiaries defined, ascertainable & benefit is fixed or defined – equitable prop interests
 - b. Discretionary trusts; T disc. to apply income/capital of T to B = choose out of class, &/or, decide how much will receive – no eq. int
 - c. Executed v executory trusts; express intention; i.e. in a trust deed, & give property to trustee
 - i. Executory; in process of being formed
 - ii. Executed; everything done & trust in place – sign doc not enough, need transfer prop
 - d. Bare trust; T do nothing than hold property & transfer B when B asks for it
2. **Non-express trust:** Constructive trusts; used by law as a remedy, OR Resulting trusts; implied intention by the law
3. **Inter vivos v testamentary trusts;** Inter vivos; *Amongst living* – declaration of trust; OR, by transfer of prop & Testamentary; *wills*

Essential characteristics

1. T distinguishable from gift to B;
 - a. Once gift made all legal rights & obligations affecting subject-matter of gift vest in donee
 - b. B's of trust not immediately entitled to property; needs to be transferred or otherwise disposed
2. Trust, of itself, has no legal personality;
 - a. T – holds property on behalf of trust & trust activities are conducted through him
 - b. Actions in contract & tort can only be brought against the trustee, & not the trust
3. T owes FO to the B;
 - a. T is subject to 'no conflict' & 'no profit' prohibitions
 - b. T may owe FO to unascertained beneficiaries i.e. unborn children
4. **SAUNDERS** rule
 - a. ALL B of full age & capacity - terminate trust by requiring T to transfer assets/at their direction
 - i. Overrides any terms contained in trust instrument
 - ii. Operates regardless of whether trustees are opposed to termination
 - b. **NOT** apply to disc. T - only applies where B entitled to whole benef. int. in prop; **CPT CUSTODIAN**

3 certainties; KNIGHT

1. Intention

- a. Real intention (obligation), not a gift or loan, is necessary; **WYATT**
- b. Settlor need not have used word 'trust'; **RE ARMSTRONG**
- c. Cannot be created with precatory words – obligation must be clearly imposed; **WILLIAMS**
- d. Inference drawn if settlor intended to create one; **PAUL v CONSTANCE**
- e. Intention to create a trust must take effect immediately
- f. Exception: where **valuable consideration provided**, is enforceable by the intended trustee & there is no bar to specific performance – lack clean hands or delay; **HARPUR**
- g. Objectively ascertained; **BYRNES v KENDLE**
- h. Whether contract creates a trust is determined objectively; **SHORTALL**
- i. Sham trusts: s 37 **CONVEYANCING ACT 1919 NSW**: "Every alienation of property with intent to defraud creditors shall be voidable at the instance of any person thereby prejudiced"
- j. "Acts done or docs executed...to 'sham' which are intended to give 3rd parties or court appearance of creating b/n part. legal rights & obligs dif from actual leg rights & obligs (if any) which parties intend to create" - Lord Diplock **SNOOK**

2. Subject matter

- a. Must be legally recognised – real or tangible, cannot be an expectancy
 - i. Expectation of receiving property under will; **NORMAN**
 - ii. Expectation of receiving property as B under DT; **KENNON**
- b. Quantum of property must be clearly defined; **PALMER**
 - iii. Must be specified with reasonable certainty - objectively assessed; **RE GOLAY'S TRUST**
 - iv. SM certain where goods segregated/define from bulk; **RE GOLDCORP EXCHANGE**
 - v. T sufficiently certain if property consists of a % or fraction of fungible property; **HUNTER**

3. Objects