

## Certainty of Intention

- **Opening line:** The Courts require an **immediate** (*Harpur*) and **objective intention** (*Byrnes*) to create a trust.
- Not necessary for the settlor to use the word ‘**trust**’ or any other technical or legal word to create a valid trust (*Re Armstrong*)
- Question is whether in all the circumstances the words and conduct of the alleged settlor evince an express intention to create a trust? (*Paul v Constance*)
- **What will evidence CI?**
  - If there is a written, unambiguous trust document, as there was in *Byrnes*, then the court will only look at the document, and not consider any surrounding circumstances.
  - Ambiguous words (e.g. *Paul v Constance*) → courts can consider the settlor’s words and actions; i.e. surrounding circumstances
  - Oral trust → courts can assess surrounding circes
  - In terms of objective intention a revocation clause can actually evidence intention to create a trust. In effect it says, I have an intention but I wish to reserve the right to revoke it.
  - Court will **never consider subjective intention** (*Byrnes*). **Exception: sham trusts** (*Condon*) – **N.B.** sham trust is very high threshold and is defined to be a case where the settlor never intended to give rise to the ‘ordinary incidents of a trust’ (*Condon per Leeming JA at [69]*). Thus even where there is an improper motive the trust will not be a sham (*Ibid*)
- **Onus:** The onus of proving that the settlor had intended to create the trust lies on the person purporting that the trust exists (*Harpur v Levy*).
- **Timing:** Intention must be present at creation but later conduct consistent with the original intention will provide further evidence in favour of the intention (*Paul*)
- Unless the settlor has expressly allowed for **revocation** then that **disposal is final** and revocation clauses must be articulated carefully – see *Mallet*
- **Is there a contracts and/or managed investment scheme?**
  - If contract is written expressly we don’t delve into intention and conduct a ‘wider’ inquiry (*Korda per Gageler J*)
  - The case of *Trident* suggests that a commercial contract needs to explicitly use the wording ‘on trust’ as the Court will use narrow and commercial interpretation and may infer lack of intention from the omission.
- **Obligations vs precatory words:**
  - Precatory words are defined as ‘words of prayer, entreaty, recommendation, desire or hope’ (*Jacobs’ Law of Trusts in Australia, 58*).
  - Creation of trust requires **obligatory or ‘imperative’ language** (*Re Williams*).
  - In *The Countess of Bective v The FCT* Dixon J described four categories of obligations:
    1. Property given to A with precatory words favouring B
    2. Property given to A with personal equitable obligation favouring B
    3. Property given to A with equitable charge favouring B
    4. Property given to A to hold on trust for B

Primary Gift	Subject to?	Outcome	Result
\$1000 left to A	Precatory words in favour of B	A takes gift; under no obligation to B	A = \$1000 B = \$0
\$1000 left to A	Condition which favours B (for example	If A accepts gift, A must preform condition	A = \$1000, but must pay B \$200

	on condition that A pays B \$200	(personal equitable obligation)	*A can pay out of personal funds
\$1000 left to A	For a purpose of benefitting B (for example, to pay for B's guitar lessons)	A takes gift, subject to equitable charge in B's favour	A must pay for B's guitar lessons, but can keep any surplus
\$1000 left to A but not for the benefit of A	For the benefit of B	A holds as T on B's behalf	A = \$0 B = \$1000

**Case examples:**

- *Re Armstrong*: cheques with writing George Armstrong in regards of William Armstrong' and 'George Armstrong in regards of Bernard Armstrong' evidenced sufficient CoI.
- *Paul*: Mr Constance said 'the money is ours to share' 'the money is as much yours as mine' to Ms Paul – this evidenced intention
- *Re Williams*: Dr Williams left estate to wife '... absolutely, in the fullest confidence that she will carry out my wishes...' → No trust, not even obligation just precatory words
- *Dean v Cole*: 'trusting to her that she will...divide in fair just and equal shares between my children...' → precatory words
- *Gill v Gill*: Homestead to son 'that he keep the homestead as a home and provide board and residence for his sisters' if they were unmarried → personal equitable obligation.