

## CREATION OF TRUSTS

- Identify the type of trust.
- Three certainties + formalities must be met to create an express trust (Knight v Knight). See "Consequences" if any certainty fails.
- The trust comes into effect as soon as it is validly created, and is irrevocable unless there is a power of revocation (Mallott v Wilson)
- Mallott: Trustee refused his role. This did not destroy the trust. Settlor then held the property on trust as he had not included a power of revocation

### ✓ Certainty of intention

The settlor must indicate, by words or conduct, an objective intention to create a trust (Byrnes overturning Joliffe). The intention must be for the trust to take effect immediately (Harpur)

- A voluntary promise to create a trust at a future time doesn't create enforceable rights
- However, if *consideration* is given for a declaration of future trust, equity treats the property as held on trust when the future time arrives
  - E.g. Harpur – Deed providing the property be held on trust from the "commencement date" was invalid
- A right of revocation does not undermine intention
- If intention to create a trust is being inferred from a K, it must state there's a trust (Korda)

#### 1) If there is a clear trust deed

- This is an unambiguous declaration of a trust (Byrnes)
  - E.g. Byrnes – Kendle signed an acknowledgment of trust in favour of his wife. When they separated, he unsuccessfully argued he never subjectively intended to create the trust
- Exception: Grounds such as sham, non est factum, equitable grounds to rescind etc. are led

#### 2) If the trust deed is ambiguous/trust is created orally

- Court may look at the surrounding circumstances to assess S's objective intention (Byrnes)
- The settler need not realise that he is actually creating a trust (Herring CJ, Re Armstrong)

##### a) Factors for intention

- Paul v Constance – No need to use the word "trust". Ambiguous words can show intention. *Money not put in a joint account b/c they were de factos, but it was used for both their benefit. C didn't understand trusts, but said "money is as much yours as mine"*
- Hayes v National Heart Foundation – "On the understanding that"
- Chang – "Look after her after I'm gone"
- "Subject to", "provided that"
- Re Armstrong – Communications intended to benefit a third party. *Trust inferred b/c father put sons' names on the accounts & used terms which suggested a trust to the bank manager*
- Close relationship between the parties (Paul v Constance, Chang)

##### b) Factors against intention (Unclear!)

- i. Precatory words (words expressing hope or confidence)

ASK: Was there an intention to create a trust, or some other legal relationship?

Levels of obligation (Countess of Bective per Dixon J, cited in Hayes):

- a) No obligation/moral obligation: No enforceable obligation (it is a gift).
  - Re Williams – Prop left "in fullest confidence" that the wife would deal with it in a certain way. The husband trusted her judgement, so it was a mere moral obligation.