Trusts
Fall Term 2017

Lecture Notes – No. 4

THE CREATION OF AN EXPRESS TRUST: 'THE THREE CERTAINTIES'

An **express trust** must display all of the following features:

(a) *certainty of intention* on the part of the settlor *to settle a trust*;

(b) *certainty of subject matter*; that is, the trust property;

(c) *certainty of objects*; that is, the precise identification of the beneficiaries and their interests in respect of the trust property.

A common theme running through this area is the reluctance of the court to recognise a trust that it cannot enforce. In *Morice v Bishop of Durham* (1804), 9 Ves 399, 405, Sir W Grant held that would the position be otherwise, the court would not know who has what powers, over what, and for whom which would put it in an impossible position in respect of supervision. The same policy holds as true today as it did 200 years ago.

The casebook features an example of the problem in the context of a Will which seems alternatively to create a gift with conditions or possibly a trust:

Re Walker
(1925), 56 OLR 517 (C.A.)

The testator died leaving a Will in which he gave his property to his wife with the added proviso that should she die still possessed of that property, that property should be divided amongst certain people whom he named in the Will. The executors of the estate were uncertain as to their obligations and the widow's interest in the property and applied to the Court for directions.

In the Court of Appeal, it was held that **overall concern of the court is to ensure precision in respect of the disposition of property, both to give intent to the settlor's intention and to ensure that the court can fulfil its supervisory function to the beneficiaries.** In this case, the 'dominant intention' of the testator was to gift (vesting all rights in the wife) and not to create a trust (in which the wife would hold a limited beneficial interest).

(a) Certainty of Intention

1) There is no requirement that technical words must be used to set up a trust, consistent with the maxim *Equity Looks To The Intent Rather Than The Form*.

This maxim is not intended to allow a dispensation with statutory rules but seeks to mitigate the rigid application of common law or procedural rules in respect of effecting certain transactions. For trusts, this means that the particular form by which

the settlor evidences his or her intent to trust is less important than the intention itself.

2) The issue is a question of fact rather than of law - i.e. the private construction of the words used by the settlor of an *inter vivos* trust or the testator setting up a testamentary trust, as the case may be.

Thus, the proper approach is for the court to decide whether the settlor intended to make a gift to the trustee accompanied by a wish, recommendation, hope, etc. (so-called 'mere precatory words' in the instrument setting up the conveyance) or intended to settle a trust. Thus,

- where the testator gave his residuary estate to a parish council 'for the purpose of providing some useful memorial to myself' the words were construed as an intent to trust (but an issue thereafter arose as to whether the trust was a pure 'purpose trust'; that is, an impermissible trust for a non-charitable purpose rather than a person): *Re Endacott* [1960] Ch 232.

- where the testator gave property to his widow 'absolutely, with full power to dispose of the same as she may think fit for the benefit of my family having full confidence that she will do so', there was no trust*; Re Hutchinson and Tenant* (1878), 8 Ch D 540.

- where the testator gave his estate to his widow, her heirs, etc. absolutely 'in full confidence that she would do what was right as to the disposal thereof between his children, either in her lifetime or by will', there was no trust; *Re Adams and Kensington Vestry* (1884), 27 ChD 394*.*

- **where the settlor opened a bank account in his name alone, with his common law spouse having a right to withdraw or deposit such that their joint bingo winnings were paid in and their joint Christmas expenses were withdrawn, there is a trust where settlor said to the common law spouse / beneficiary 'the money is as much yours as mine' - these were simple people who the court found intended a trust obligation; *Paul v Constance* [1977] 1 WLR 54; cb, p.932, fn.22 (which we'll read later).**

- where a company declares itself trustee of customer's money pending an order being shipped there is a trust; *Re Kayford* [1975] 1 All ER 604 [nb: this seems to defeat the insolvency rules].

Johnson v Farney
(1913), 20 OLR 223 (S.C.)

The introduction to the will read:

> 'I leave all my real and personal property to my dear wife.'

Then, towards the end, it read:

> 'I also wish if you [the wife] die soon after me that you will leave all you are possessed of to my people and your people equally divided -- that is to say, your mother and my mother's families.'

In a codicil to the will, the testator referred to real estate purchased after the date of the Will:

> 'Property known as the William McGuire property to go to my wife to do as she sees fit with it ... If she my wife die intestate divide what is left of it equally among my brother and sisters and her brothers and sisters ...'

The testator died; seven years later, his wife died. They had no children. In her will, she left everything to her family.

Per Boyd C.:

> As said in one of the later cases, the husband may have thought that the influence of an express wish would be sufficient to induce the wife to apply the property in the way suggested, but it was not put upon her as a duty, a mandate, or a legal obligation. He did not mean the second stage of the transfer to be under his will, but to be bestowed under the influence of his expressed wish and by the testamentary act of the wife. **His words, taken literally, would cover all the possessions of the wife, however acquired, and this shews that he did not seek to control her free action**, but only to give evidence, as he does in so many other parts of the will and codicil, which need not be quoted.
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> The earlier cases on precatory trusts have been departed from, and a stricter rule now obtains, which may be thus expressed: **an absolute gift is not to be cut down to a life interest merely by an expression of the testator's wish that the donee shall, by will or otherwise, dispose of the property in favour of individuals or families indicated by the testator.**
>
> A wish or desire so expressed is no more than a suggestion, to be accepted or not by the donee, but not amounting to a mandate or an obligatory trust…
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> I, therefore, declare that there is no trust attaching to the provisions of the husband's will, and that the wife held the property absolutely as her own.

There is no hard and fast rule – just the usual rules for the construction of private documents and an inquiry into the meaning of any ambiguous words with reference to

the circumstances of the settlor to determine the meaning of the disposition in question based on the settlor's intention.

FYI only:
Antle v. Canada
2010 FCA 280

This was a sham trust which was never intended to be a real trust and thus failed. **Per Noel J.A.:**

> [3] The assessments in question arise from a sale of shares by the appellant to a Canadian arm's length purchaser. In order to shelter the resulting capital gain from tax, the appellant embarked on a plan known in tax circles as a capital step-up strategy. In summary, the plan was for the appellant to settle a Barbados trust in favour of his wife, to convey the subject shares to the Trust which would then sell the shares to his wife, who in turn would sell them to the arm's length purchaser. This series of transactions was to take place in sequence in the course of the same day so that the proceeds of disposition would find their way back into the appellant's newly incorporated business the next day by way of a loan from his wife. Documents purporting to give effect to this plan were executed on December 14, 1999 and the Trust was said to have come to an end in early 2000 upon payment of the trustee's account.
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> [4] Based on the inter-play between certain provisions of the Act and of the *Canada-Barbados Income Tax Treaty* (the Treaty), both the appellant and the Trust took the position in filing their respective returns that no tax was payable in Canada as a result of these transactions. It is common ground that, but for this plan, a taxable capital gain in the amount of $1,299,821 would have been realized by the appellant on the sale of the shares to the arm's length purchaser.
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> [5] The first assessment issued by the Minister disregards the interim sale of the shares to the Trust on the basis, *inter alia*, that the Trust was not validly constituted, and levies the applicable tax in the appellant's hands on the assumption that the shares were sold directly to the arm's length purchaser. The second assessment was issued on the alternative assumption that the Trust did acquire the shares before they were sold to the arm's length purchaser, and is liable to the applicable tax.
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> [6] The Tax Court judge held that the Trust was not validly constituted because it lacked certainty of intention, certainty of subject-matter, and that in any event no transfer of the shares to the Trust had taken place. He went on to express the view, in *obiter*, that the Trust was not a sham. In the alternative to his conclusion that the Trust was not validly constituted, he went on to find, also in *obiter*, that the result obtained was abusive of the Act and the Treaty and that accordingly, the sale of the shares to the Trust was to be disregarded based on the general anti-avoidance rule (section 245). Having so found, he confirmed the assessment issued against the appellant and vacated the one issued against the Trust.

[7] In support of his appeal, the appellant submits that the Tax Court judge applied the wrong legal test to determine if the Trust had been validly constituted and that he incorrectly determined that there had been an abuse of the Act and the Treaty. The Trust likewise maintains that it was validly constituted and that the assessment issued against it ought to have been vacated solely because it had been dissolved at the time when the assessment was issued, and the Act does not empower the Minister to assess a Trust which no longer exists.

[8] It is not necessary to go beyond the Tax Court judge's conclusion that the Trust was not validly constituted in order to dispose of the appeals. The Tax Court judge said in this regard (Reasons, para. 49):

I reach the inevitable conclusion that [the appellant] did not truly intend to settle shares in trust with [the trustee]. He simply signed documents on the advice of his professional advisers with the expectation the result would avoid tax in Canada. I find that on December 14th, he never intended to lose control of the shares or the money resulting from the sale. He knew when he purported to settle the Trust that nothing could or would derail the steps in the strategy. This is not indicative of an intention to settle a discretionary trust. Frankly, I have not been convinced [the appellant] even fully appreciated the significance of settling a discretionary trust, beyond an appreciation for the result it might provide. I conclude that his actions and the surrounding circumstances cannot support a conclusion that signing the Trust Deed, as worded, reflects any true intention to settle shares in a discretionary trust. I do not find that [the appellant] is saved by the language of the Trust Deed itself, no matter how clear it might be. It does not reflect his intentions. …

[My emphasis]

[9] The appellant does not dispute that he never intended to grant the trustee control of, or discretion over, the shares. Nor does the appellant challenge the factual finding of the Tax Court judge that, when all surrounding circumstances are considered, there was a failure of certainty of intention in this case...

Dynamic Properties Company Ltd. v. Self
2013 NSSC 71

This a sham trust. Rather than avoiding taxation, it was really a fraudulent conveyance to shield assets from creditors and failed.

Robertson J.:

[1] The plaintiff Dynamic Properties Co. Ltd. ("Dynamic") secured a default judgment dated February 22, 2012, against Anton E. Self, Dataville Server Farms Limited and Bastionhost Ltd.

[2] The debt related to the failure of the defendants to honour a promissory note in the amount of $100,000 to which they were joint and several guarantors. The note had become due March 27, 2010.

[3] Dynamic was granted an execution order as against the defendants/judgment debtors on February 22, 2012.

[4] A 1989 Boston Whaler Outrage 18 Boat and a 2005 EZ Loader Trailer (the "Boat and Trailer") purportedly owned by Anton E. Self, were seized by the Sheriff on May 25, 2012. A competing claim to ownership of the Boat has arisen, advanced by Dataville Farms Trust (the "Trust").

[5] The Sheriff now brings a motion for an interpleader order pursuant to *Rule* 76.03 (1)(c). The Sheriff has complied with *Rule*76.03(2) and filed an affidavit with the Court explaining the circumstances of the seizure and notice of the competing claim.

[6] The plaintiff Dynamic says the Trust is a sham and asks that the Court allow the interpleader order directing the Sheriff to sell the Boat and Trailer and pay the proceeds to the plaintiff.

[7] My task is to determine who has the better interest in this Boat and Trailer, Mr. Self personally or the Trust, which is not a judgment debtor in this proceeding.

[8] The Trust document was executed on January 6, 2010 "as part of a comprehensive estate planning strategy." This document was forwarded to counsel for the plaintiff, William Ryan on July 18, 2012, six days prior to Mr. Self's discovery examination conducted by Mr. Ryan.

[9] The Trust document names David Fraser, Mr. Self's legal counsel as the sole trustee. The consideration for the Trust was a nominal $10 in Singapore dollars.

[10] Mr. Self's discovery evidence was an exercise in avoidance. He did acknowledge that the only Trust property was a 2005 Ford 150 truck and the Boston Whaler and Trailer, conveyed to the Trust by way of an agreement of purchase and sale dated March 17, 2010.

[11] Mr. Self acknowledged that he was personally broke. In explaining the reason for establishing the estate trust he said under oath (line 22 p. 33 discovery transcript, exhibit B - affidavit of Ian J. Breneman).

> A. Well my rationale -- I mean I'm not sure that that need be answered within the scope of this meeting but I'll happily tell you anyway. David Fraser is the executor of my estate and -- to the extent that it exists --

> however, given the state of my estates liquidity over the past several years, he might actually have the unfortunate experience of having to act as executor and not having any liquid assets or anything close to a liquid asset to -- work with, in his capacity as executor. So the spirit of it was multifold but David was named as beneficiary, you know, in the event that something happened to me he had some assets he could quickly liquidate to give himself some working capital, as my executor.
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> [12] In the spring of 2012, Mr. Self's Trust sold the 2005 Ford 150 truck to Dr. Brian Penney. Mr. Self acknowledged in discovery that the proceeds of sale $3000 were used to pay bills some of which were personal, but he refused to specify or identify the accounts paid. He also acknowledged that the sale of the truck to Dr. Penney would (if resold by him) help pay off the additional $10,000 he owed Brian Penney personally. Mr. Self explained (line7 p. 29 of discovery examination) when asked if the proceeds of the truck paid off personal bills:
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> A. They may have been, I mean, I don't recall the specifics. The thing is that, you know, I've personally been carrying the operations at a loss for a company, Bastionhost Ltd., for several years and there are some bills in my personal name, there are some bills in the names of other parties -- I mean, it was three thousand dollars ($3000) in proceeds, I assure you whatever bills they were, it didn't go very far.

[13] The plaintiff relies on the following cases in support of their view that the Trust is a sham: Antle v. R., 2009 TCC 465 (CanLII), 2009 TCC 465; Sangha v. Reliance Investment Group Ltd., 2011 BCSC 1324 (CanLII), 2011 BCSC 1324; Mordo v. Nitting, 2006 BCSC 1761 (CanLII), 2006 BCSC 1761; and Forsyth (Re) 2010 BCSC 1720 (CanLII), 2010 BCSC 1720.

[14] In *Antle* the Court noted at para. 40:

> 40 To establish a valid trust, there must be three certainties: the certainty of intention, the certainty of subject matter, and the certainty of objects. Also, given that a Trust is simply a means of holding property, there must be a transfer of property to the Trust to effectively constitute the Trust. . . .

[15] In *Sangha* at para. 347, the Court cited *Mordo, supra,* in speaking of what constitutes a sham:

Madam Justice Wedge surveyed the law of sham trusts in *Mordo*:

> [295] The issue of sham trusts is treated in different ways by different authors. W.J. Mowbray et al., *Lewin on Trusts*, 17th ed. (London: Sweet & Maxwell, 2000) at paras. 4 - 19 to 4 - 28 [Lewin] considers that whether a trust is invalid as a sham depends primarily on the intention of the settlor at the time the trust is created (citations omitted):

> The sham concept ... would appear to involve a finding of fact akin to, but nevertheless falling short of, actual fraud. In the trust context, a finding will be necessary that, whilst an apparent settlor did not in fact intend to part with the beneficial interest in the trust property, nevertheless he executed documentation with the apparent effect of so parting (*Lewin* at paras. 4 - 21). . . .

[16] Plaintiff counsel also introduced the Facebook page of Mr. Self in which he is seen using the Boston Whaler during the summer months along with family members and friends. The caption reads "Landing the lagoon beach, for a warm water dip."

[17] Also before me as exhibit D to the affidavit of Acting Sheriff Peter Legere dated September 6, 2012, is the affidavit of Anton Self dated June 21, 2012, wherein he provides the agreement of purchase and sale regarding the Boat and Trailer made between himself and the Trust, a berthing agreement between the Trust and the Waterfront Development Corporation for docking the Boat and evidence of a further encumbrance on the Boat, pledged to secure a $12,000 promissory note made between Anton Self personally and the Trust to Intrepid Holdings Limited. However, the personal property Registry System indicates the prior registration of Dynamics judgment before the interest of Intrepid.

[18] Mr. Ryan argues that ten days prior to Mr. Self's default on the promissory note to Dynamics, he conveniently conveyed the only two assets he had, a truck and the Boat and Trailer, to a sham trust.

[19] He argues that the assets were always in the possession of Anton Self for his own use and that remained the case until he sold the truck to pay off personal debt. He says the Boat was continued to be used by him personally, until it was seized by the Sheriff.

[20] Mr. Fraser argues that Mr. Ryan's discovery in aid of execution was inadequate to meet the burden of proving the Trust a sham. I disagree.

[21] It is very apparent on the evidence before me that Mr. Self, in the face of business failure and default of his personal guarantee, transferred the only two assets he owned to the Trust, for the purpose of avoiding an execution order and sale of these assets. It is also clear that he retained personal control of the assets, selling the truck in at least partial payment of personal debt, while keeping the Boston Whaler for his own use and also further encumbering it as security for other personal indebtedness. At the time the Trust was established it is clear that Mr. Self never intended to part with his beneficial interest in these assets.

[22] His conduct in subsequently dealing with these assets, proves the point. The Trust is in my view a sham.

[A case with an opposite conclusion is **Re Hardt, 2013 BCSC 276**].

Sham Trusts – Red Flags:

- There is no commercial logic to using a trust (as opposed to the transfer being a mere gift).
- The trust agreement post-dates the transfer of funds;
- There is no written trust settlement;
- There is no segregation of trust funds;
- Both spouses (trustee and non-trustee) had equal access to the funds allegedly held in trust;
- The trustee fails to keep proper accounts;
- The trust does not file income taxes;
- The trustee mixes the trust funds with other funds;
- The trustee pre-takes compensation;
- The trustee takes compensation and does not declare that amount as income;
- The trustee makes advances (especially to himself or herself) without documentation.

B. CERTAINTY OF SUBJECT-MATTER

The general rule is that the declaration of trust must relate to **specific property**, and that property must be **ascertainable** else the trust is void for uncertainty. Moreover, the beneficial interests in that property must themselves be certain.

Ascertainability and quantification:
The trust will be void where the trust property is divided by quantity and there are no specifics provided about which identifiable property is to go to a certain B.

> **There is no problem where the subject-matter of the trust is to be divided in some specific proportions between different beneficiaries but there is an uncertainty problem where the division is made in reference to a *specific quantity of assets*.** Thus, where the settlor declares a trust in relation to 20 out of 80 cases of wine, there can be no certainty of subject-matter as the transfer of title is prevented by the unascertainability of the goods in particular; ***Re London Wine Company*** **[1986] Palmer's CC 123; cb., p.202.**
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> But, conversely, a declaration of trust in relation to 50 of 950 shares was held to be valid in ***Hunter v Moss*** **[1994] 3 All ER 215; cb, p.203.**

[*Re London Wine Company* was preferred in ***Re Goldcorp*** **[1995] AC 74; cb, p.202,** by the Privy Council. It was held that the problem with *Hunter v Moss* is that the court equated *inter vivos* and testamentary gifts. However, whilst one might be able to Will 50 of 950 shares and all shares pass to the executor in any case for distribution, the settlor still retains equitable ownership of the remaining 900 shares in the *inter vivos* case and thus *Hunter v Moss* seems to have wrongly distinguished *Re London Wine Company*.]

'Anything Left':
Re Walker
(1925), 56 OLR 517 (CA); cb, p.211

Conventionally, one can either gift (with or without conditions) or trust – but not both. Thus, a gift with a gift-over clause is one or the other. Here, it was a gift – thus the trust seemingly intended over that part of the funds given but not yet used at the death of the widow is void. [The better way to produce such a result would have been for a gift to the wife for life (i.e. life-limited interest over income) with an absolute power to encroach on the capital, and a remainder interest to the remainderman.

Beneficiary's Entitlement:
Re Golay's Will Trusts
[1965] 1 WLR 969 (Ch.); cb, p.213

Is there sufficient certainty where S settled a trust to pay "a reasonable income" to B?

The objection taken to the settlement was that S failed to provide guidance as to how the reasonableness of the income was to be determined. Thus, if this was simply a discretionary determination by the trustees, there would be no problem. The question faced by the Court was whether it could determine reasonableness on some articulable standard that would allow it to supervise the trust satisfactorily.

Per Ungoed-Thomas J:

> … the yardstick indicated by the testator is not what he or some other specified person subjectively considers to be reasonable but what he identifies objectively as "reasonable income." **The court is constantly involved in making such objective assessments of what is reasonable and it is not to be deterred from doing so because subjective influences can never be wholly excluded. In my view the testator intended by "reasonable income" the yardstick which the court could and would apply in quantifying the amount so that the direction in the will is not in my view defeated by uncertainty.**

Thus, a concept such as reasonableness may be elastic but it lends itself to supervision of the court when construed objectively.

C. CERTAINTY OF OBJECTS

Fixed Trusts

1) Where there is uncertainty as to objects (Bs), a resulting trust arises.

   This is not the same as the 'beneficiary principle' (every non-charitable trust must have a human beneficiary) described in *Re Astor's Settlements* [1952] Ch 534, though the policy rationale is the same. Similarly, *Leahy v AG for NSW* [1959] AC 457 (where the trust has certain objects, the court can enforce it. Where the trust is charitable, the AG can enforce it. Where the object is not charitable and the B not human, no one can enforce it including the court).

2) Where the trust is a fixed trust, all beneficiaries must be ascertainable or can be ascertainable when the time comes for distribution of the property or income.

Discretionary Trusts

Recall that:

discretionary trust = S trusts to T, with discretion to appoint to B (e.g. protective or 'spendthrift' trust, where S wishes to settle for B without allowing B the power to vary the trust). Sometimes the older cases call this a "trust power".

power of appointment = donor gives 'power' to donee, who may in his or her absolute discretion appoint the donor's property to appointee.

Whilst the beneficiary of a discretionary trust can compel T to comply with the terms of the trust, the putative appointee cannot compel exercise of a power of appointment.

1) For a discretionary trust, the test for ascertainability is <u>not</u> the old test of "list certainty, but the same test as is applied for discretionary trusts; ***McPhail v Doulton*** **[(Re Baden's Deed Trusts (No 1)] [1971] AC 424; cb, p.221.**

2) The class as specified must be conceptually certain, thus *dependants* is permissible, but *relatives* somewhat suspect; ***Re Baden's Deed Trusts (No.2)*** **[1973] Ch 9**; **cb, p.233**. The court can look to outside opinion as provided for in the instrument, i.e. the Chief Rabbi delegated to decide who is Jewish under the terms of the trust; *Re Tuck* [1978] Ch 49.

3) **There is some authority that the class must be administratively workable**; see *McPhail v Doulton* ("all the residents of London" as an example of one that would not be OK). The trustee is under no obligation to ascertain the class to list certainty, but cannot merely choose whomever comes to hand first - "what is required is an appreciation of the width of the field, whether a selection is to be made from a dozen, or instead, from thousands or millions…"; *Re Hay's Settlement Trusts* [1982] 1 WLR 202 (re mere power to appoint anyone in the world except a small class). However, and notwithstanding the modern approach not to interfere with S's wishes and a well drafted discretionary trust, in *R v District Auditor, ex parte west Yorkshire MCC*

[1986] RVR 24 ("all or some of the inhabitants or West Yorkshire"), the trust was void as the court could not frame an order that would fit within the terms of the trust (the trust was also void as a pure purpose trust).

4) **The trustees of a discretionary power may not act capriciously or irrationally**, for example exercising the power based on the fact that the object was tall or a resident of Toronto. Thus, the power itself cannot be capricious in the sense that an exercise within the terms of the power would necessarily be capricious by definition - "a capricious power negatives a sensible consideration by the trustees of the exercise of the power" per Lord Templeman in *Re Manisty's Settlement* [1974] Ch. 17.

CONSTITUTION OF TRUSTS

The trust is generally constituted by:

1) the settlor declaring himself or herself to be trustee in respect of property; or

2) the settlor transfers the property to the trustee directly; or

3) the settlor transfers the property to the trustee indirectly.

In general, a court will not enforce an incompletely constituted trust based on the maxims ***Equity will Not Assist a Volunteer*** and ***Equity Will Not Perfect an Imperfect Gift***. The rationale is the preservation of the proprietary interest of the settlor in the trust property; that is, the law will not disturb ownership without a compelling reason.

Sometimes a court will assist and order the trust be constituted. For example, there was a promise that is enforceable (and, like contract, we look for consideration to bring the beneficiary outside the category of a 'volunteer'). At other times, the court may hold it would be unconscionable not to assist, principally when the settlor has done everything he or she can and something outside his or her control prevents the trust being constituted.

1. Self-Declaration of Trust

The settlor must clearly intend to become a trustee of the property, as a matter of fact.

(a) **Richards v Delbridge (1874) LR 18 Eq 11** (S endorsed a lease on premises 'this deed and all thereto belonging I give to Edward Bennetto Richards from this time forth with all stock in trade' and dies. Held: no trust).

(b) **Jones v Lock (1865) LR 1 Ch App 25** (S produced a cheque for £900 payable to himself, and said 'look you here, I give this to baby; it is for himself, and I am going to put it away for him, and will give him a great deal more along with it.' Held: no trust).

(c) **Paul v Constance [1977] 1 WLR 54 :** S and B lived together. S opened a bank account in his name alone, with his common law spouse having a right to withdraw or deposit such that their joint bingo winnings were paid in and their

joint Christmas expenses were withdrawn, there is a trust where S said to B 'the money is as much yours as mine' - these were simple people who the court found intended a trust obligation.

Carson v Wilson
[1961] OR 113 (CA)

In this case deeds of conveyance were executed by the testator during his lifetime and the deeds were lodged with his solicitor pending the testator's death. As inter vivos gifts, the deeds failed for want of delivery. As testamentary gifts, they failed for non-compliance with formalities of the wills legislation. As trusts, they failed as the testator had not intended that he be obligated as a trustee by virtue of his execution of the deeds.

Per Schroeder JA:

> I refer also to *Richards v. Delbridge* (1874), L.R. 18 Eq. 11. There the owner of leasehold business premises and stock in trade shortly before his death purported to make a voluntary gift in favour of his grandson, who was an infant and who had assisted in the operation of the business, by the following memorandum signed and endorsed on the lease: "This deed and all thereto belonging I give to E. from this time forth, with all the stock-in-trade." The lease was then delivered to the mother of E on his behalf. Holding that there had been no valid declaration of trust of the property in favour of the grandson, Sir G. Jessel, M.R., stated at p. 14:
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> The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. **It is true he need not use the words, "I declare myself a trustee," but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning.**
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> The Master of the Rolls approved the law as laid down by Lord Justice Turner in *Milroy v. Lord, supra*, and at p. 15 he quoted the following extract from the judgment of Lord Justice Turner in that case:
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> The cases, I think, go further, to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a

declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust.

The law laid down in these cases disposes decisively of the alternative contentions advanced on behalf of the respondents, and the gifts cannot be supported on the theory that a valid and effectual trust has been created in their favour.