Trusts Law Can – Fall 2014

Kellan McKeen

# Three Pillars of Trusts

1) Bifurcation of ownership:

* Legal title to trustee
* Equitable title to beneficiary

2) Fiduciary duty of trustee

3) In rem character of trust assets:

* Trustee – same as at law (full rights)
* Beneficiary – same as law – yields to bona fide purchaser for value w/o notice

# Express Trusts

* ET created with intention by S who wishes to gratuitously transfer property to be held by one for the benefit of another
* Accomplished by 2-way transfer – LT must vest w/ trustee & ET must pass to beneficiary
* Can be oral

## Vesting of Trust Property

* Trust must be perfected – to be enforceable
* Mere intention is insufficient – to be valid and enforceable, the LT must “vest with the trustee – needs to be perfected

**Variables:**

* Form of dealing (how trust transacted)
* Type of subject matter of property

How trust created? – *inter-vivos* transferor *per mortis causa* (estate falls to executor as trustee)

Form of dealing:

1. Personal declaration of trust (ex. “I hold X as a trustee for my child”)

* Automatic constitution, can’t be revoked (***Glynn***)
* Mere declaration is sufficient to execute the gift (***Elliot***)

1. Trust Settlement / Deed – 3rd Party Trustee

* LT to property must be transferred from the S to the T – look at type of asset transferred

1. Contractual Agreement

* Settlor and beneficiary agree to appoint a trustee (business arrangements through contract)

1. Incomplete or unperfected gift later perfected

* If title is later given (ex. When executor gets legal title) – the rule in *Strong v Bird*)
* Executor gets title to the property (if executor was objected of imperfected transfer of same property, transmission on death perfect the original transfer
* Donor demonstrates continuing intention to give up gift until time of death (S V B)
* Also *Hilliard* – failed transferree becomes executor of estate and obtains title to property that was subject of the incomplete transfer

#### Milroy v Lord

Facts: Trust in favour of niece, T was never made legal owner of the shares, S held LT until death.

* There was intention to create a trust, but no vesting occurred
* S must do everything necessary to transfer LT - trust never perfected

#### Ratner

Son gifts Mother shares for tax purposes. Years later, has M sign doc transferring shares back. Daughter and mom revoke gift, son argue mom was a trustee the whole time.

* No – didn’t do everything possible to transfer shares. Gift requires intent to give and delivery.

#### Re Rose

Facts: guy transfers shares, dies before transfers were registered

* If S does everything required to transfer property, the transfers will still pass beneficial interest in the shares even pending registration.

#### Mordo v Nitting

Facts: Mom executed transfer of warehouse to T, who didn’t register til after her death.

* Valid – if transferor intends to transfer the property, transfer is complete when transferor relinquishes control and puts transferee in position to complete the transfer

#### Carson v Wilson

Facts: Guy transfers assignments of mortgages while still alive, gives them to lawyer to deliver upon his death. Assignments were valid transfers, but violated wills legislation.

* Invalid – delivery is essential to validity. Can’t become a trust if violates wills legislation

## The Three Certainties

1. Certainty of Words (Intention) – is it sufficiently clear to be a trust?
2. Certainty of Subject Matter – what forms the trust property
3. Certainty of Objects – who are the beneficiaries

### Certainty of Intention

* Issue: the transferee gets legal title, but does he also get equitable title?
* Did the settlor intend for this to be a gift or a trust?
* No certainty = no trust = transferee is out and out owner
* Precatory words do not indicate trust (*Hayman*), but not need for actual word “trust” (*Re Kayford*)
* Imperative quality of words indicate title is held for beneficiary – does it create obligations vs. mere hopes

#### Hayman v Nicholl

Facts: Mom died and left assets to daughter, in full confidence that she would dispose of it according to her wishes. Mom’s heir claim daughter was only holding at trustee.

Outcome:

* “in full confidence” signifies precatory trust
* courts must give effect to testatrix’s intentions gathered from instrument as a whole regardless of any particular language used
* no evidence of secret trust, or that daughter agreed to secret wishes
* where intention is uncertain, courts will prefer out and out gift

#### Royal Bank v Eastern Trust Co

Facts: Guy owed money to Royal Bank, so assigned them rental payments from apt building to settle debt. He later sold the property to his friend and assigned the mortgage in a memo.

Issue: Is there a trust, so the bank is a preferred creditor?

Outcome:

* No - ET can be created w/o technical expressions, but intention to create a trust must be indicated/inferred w/ reasonable certainty
* Court must be satisfied that settlor’s intention can be expressed w/ reasonable certainty

#### Elliot v Elliot Estate

* Can establish certainty of intention through words and conduct (personal declaration of trust)

### Certainty of Subject Matter

Ask – what is the settlor purporting to transfer?

1. Identity of property – need a thing, property that is capable of legal transfer (*PIPSC v Canada*)
2. Clarity of description (“sufficient exactness”) – 2 part test:
   1. Thing in question
   2. Amount of beneficial interest in the thing given to the beneficiary

* Trust assets and amount of beneficial interest must be ascertained or ascertainable at the time T is created, or it will fail *(Beardmore*)
* If division of the assets between B’s in unclear, the trust will fail for lack of certainty (*Sprange)*
* Instructions which may be objectively interpreted by the court may be sufficient (*Golay*)
* Floating trust - At time trust created, there were no subjects – anticipated as happening sometime in future

#### Re Beardmore Trusts

Facts: Guy sets up trust for wife to take effect on his death. Doesn’t comply w/ wills legislation formalities, and vague. She is to receive 3/5’s of his net estate. He later sues to get money back.

Outcome:

* Trust invalid –
* Ratio ; **Trust subject matter must be described with “sufficient exactness” at the time trust created (**not wait and see approach)

#### Re Golay

Facts: Testator wanted B to lives on his property and receive “reasonable income”

Outcome:

* trust not void for lack of certainty of subject matter
* reasonable income was intended to be an objective measurement

#### Sprangle v Barnard

Facts: Wife leaves husband stocks in trust “for his sole use” , at the time of his death remainder that he doesn’t use to kids.

Outcome:

* no certainty at the time trust formed – don’t know what the beneficiaries will get
* Beneficial interests must be certain to raise a trust

**Floating Equity** – trust doesn’t exist yet b/c not vested in T

#### Burke v Hudson’s Bay

Explained constantly fluctuating sum in pension trust fund, the interest of the beneficiary is “floating equity”

* Ok if the equity floats until the actual assets are determined

### Certainty of Objects (Beneficiaries)

Ask: who is getting the equitable interest in the subject?

1. Is at least one B a legal or natural person?
2. Are there signaling words?
3. Fixed trust, trust power, or power simpliciter?

* Certainty of objects necessary b/c the B enforces T’s duty to properly administer the trust (*Century Services*)

Powers:

General power – trustee can name anyone including himself

Special power – trustee have power to appoint only persons in the class of objects

Intermediate/Hybrid Power – trustee can appoint anyone except a person in the proscribed class (*Re Ministy’s)*

**FIXED TRUST** (mandatory identification + mandatory distribution)

* No discretion – T must distribute the specified trust property to the name beneficiaries
* High threshold of certainty – **complete list test** (*Broadway Cottages Trust*)
* T must be able to draw up a complete list of very possible B

**TRUST POWER**  (mandatory distribution + permissive identification) (discretionary trust)

* T must distribute property, but can choose from a defined class who the beneficiaries
* Test: **“individual ascertainability” (is/is not test)** (*Baden 1 –* rejects obiter in *Golbenkian)(T. Eaton* –test in Canada)
* Condition can be broad, but must be evidentiary certainty
* 2 part test: 1) can it be said with certainty whether given individual is member of class 2) whether range of objects not so “hopelessly wide” that trust administratively unworkable (evidential uncertainty)
* test more pragmatic for discretionary trusts (w/ advent of pensions)

**POWER SIMPLICITER** (permissive ID + permissive distribution)

* T need only consider from time to time whether to distribute property to B
* Test - Test: **“individual ascertainability” (is/is not test)** (*Re Gestetner’s)*
* Look for gift-over (testator implies that appointment may never be made, so power)

**POWER OF APPOINTMENT**

* Settlor gives donee (not necessarily T) ability to exercise discretion in appointing B – like a protector or guardian

Evidentiary Uncertainty

* Conceptual meaning in instrument is clear, but class is “so hopelessly wide” that beyond the management capability of trustees (*Baden 1)* **for trusts**
* May be too costly or administrative unworkability
* **Trust power** – Baden 2 approaches:
  1. Stamp: the class description must be sufficiently clear to determine whether any given idnviidual is or is not part of the class (can’t have uncertainty of indivd)
  2. Sachs: if potential B is uncertain under the is/is not test, he is ruled out – don’t need evidentiary certainty (most used)
  3. Megaw: similar to Sachs, but said if too many individuals who could be ruled out for uncertainty, the trust itself may be void. (middle ground)
* TP – T must survey range of objects in responsible manner w/ regard to purpose of the trust, and carry out fiduciary duty (*Hay’s*)
* **Power Simpliciter** Does not apply in a power (*Hay’s*) – conceptual certainty required, but not evidentiary
  + BUT T remains under fiduciary duty to inform himself about options under the trust to consider any appropriate exercise of the power (*Hill*)
  + Difference between trust power and power is matter of degree

# Express Trust: Formalities

* Law imposes formal requirements to enforce the transfer from S to T, to protect the beneficiary’s in rem right in the trust property (*McCormick*)
* While equity follows the law wrt formality requirements, look to intent rather than form
* Rigid adherence to rules of formality in trusts can lead to unjust results

## Inter Vivos Transfers

* No specific formalitites for inter vivos trusts not dealing w/ land
* Legal interest in land must be in writing (*SOF*, s. 59(3) LEA)
* Equitable interest in land – doesn’t require writing in BC(s. 59(1) LEA)
* Transfer of equitable title from a B to third party must be in writing, and notice given to T (s. 36(LEA)

## Per Mortis Causa – Wills

* Intentions must be clear and comply w/ formalities
* WESA – s. 3 – will must be written
* S. 4 – will must be signed and witnessed by ppl not receiving gift
* S. 36 – must be 16 or older to make valid will
* *Mordo* – if S reserved power to collapse trust, doesn’t necessarily mean trust is subverting WESA (trust that takes immediate effect is *inter vivos*)

## Secret and Half-Secret Trusts

* Testator may circumvent formality requirements of wills legislation by secret or half-secret trust
* Emerged to deal w/ issue of mistresses/children born out of wedlock

### Secret Trusts

**Named beneficiary is actually the trustee for a secret, unnamed beneficiary**

1. Testator intends named B to hold for secret B (*Ottaway*)
2. Testator communicates during her lifetime her wishes to named B, who must learn of secret real B’s identity (*Boyes*)
3. The named beneficiary must acquiesce or accept (*Hayman*)

**\*\* If secret trust fails, s. 59 WESA gives broad discretion for court to give effect to testator’s intent**

### Half-Secret Trusts

**Devise says named B is actually a secret testator**

1. Prior to making will, testator tells B about the scheme
2. Prior to making will, testator discloses identity of secret B to named B
3. Named B agrees before will is made (*Blackwell)*

**\*\* s. 59 WESA can intervene**

#### Ottaway

Facts: Father leaves property to Ms. H, for her to leave house to son. After she dies, she gives one half to him and one half to others. Son sues, saying secret trust.

Outcome:

* He can get the property
* **Ratio - For secret trust, must show intention to create primary donee w/ obligation in favour of secondary donee, communication of this intention to PD, and acceptance of that obligation**

#### Re Boyes

Facts: Man makes his lawyer sole legatee, but lawyer didn’t learn who the secret B would be until after man died. Man’s estate sues, saying no trust.

Outcome:

* Man’s family gets property –no secret trust
* **Ratio: if testator doesn’t disclose secret beneficiary’s identity to named beneficiary, named B will hold resulting trust for testator’s estate**

#### Blackwell v Blackwell

Facts: S names 5 trustees in will, “trustees to pay persons indicated by me to them”

Outcome:

* S’s wishes communicated clearly prior to the will – trust is valid
* **Ratio: half-secret trusts will be valid if there is clear promise by T that the trust will be executed**
* Beneficiaries must be communicated to L in T’s lifetime – **before will is made!**

## Settlor’s Revocation of Express Trust

* Settlor falls out of the transaction once the trust is constituted unless he is a beneficiary, or in making the trust, retained the power to amend or revoke the trust
* Only the beneficiary can collapse a trust (*Saunders v Vautier*)

#### Nolan v Kerry

Facts: Pension plan provided defined benefit until it grandfathered in defined contribution. Employer was taking funds from DB plans to make contribution holidays for DC holders. Can he do this?

Outcome:

* No – S can’t interfere w/ trust once declared
* Money is not employer’s money at that point – belongs to employees
* **Ratio: S can’t remove pension contributions in trust unless the settlement says so**

#### Metro Toronto Pension Plan (Trustee) v City of Toronto

Facts: Pension plan – city would pay the administration cost. Tried to make pensioners pay it, and passed legislation saying so. This altered the original trustee

Outcome: as S, can’t change it

# Resulting Trusts

Automatic resulting trust: Surplus assets from a trust that has failed to take, only been partially filled, or surplus assets left over

Presumed resulting trust – gratuitous transfers of property

* Categories created by Megarry in *Vandervell’s*
* Line between them pragmatic rather than doctrinal (*Westdeutsche*)

## Automatic Resulting Trusts (ART)

* ART seeks to fill a “gap” in the ET to property – where otherwise the property would appear “ownerless”
* Law prefers certainty of ownership, thus the jump-back is automatic

### 1) EXPRESS TRUST FAILS

* Legal title transferred to trustee, but trust fails (void) due to non-compliance w/ 3 C’s
* Transferor retains ET, transferee holds LT on resulting trust

#### Broadway Cottages

Facts: Trust w/ large/fluctuating class of objects, failed certainty test.

* Trustees held LT on RT for the settlor

### 2) EQUITABLE INTEREST NOT FULLY DISPOSED OF

* Where LT is transferred to T w/o fully disposing of the ET, surplus is held by the T on a resulting trust for the settlor
* Trustee only holds ET is explicitly granted by trust instrument (fiduciary duty applies)

#### Re: West

Facts: Testatrix left money on trust for sale to pay expenses. Once trust performed, trustees claimed residual amount.

Outcome: No, T’s heirs get to keep.

* The trust for sale in the will indicates the trustees were not beneficiaries – **the ET must be explicitly granted to trustees**

#### Schmidt v Air Products Canada

Facts: Two companies merge, both had defined benefit pension plans. Company dissolves, surplus funds left after plan paid out. Company claimed on RT, employees say they are entitled.

Outcome:

* Court splits decision into each originating plan – DC plan was trust whose assets belonged completely to B’s (stated in terms of trust)
* The DB plan was created under contract, not trust – money at all times belonged to the company – Air Products receives as successor company

### 3) SPECIFIC LIMITATION UNFULFILLED (“QUISTCLOSE TRUSTS”)

* QT offers another means of creditor protection – lender (settlor) retains an equitable interest in the money loan
* If funds are given for a specific purpose and under the guise of a fiduciary duty – this is “trust-like”
* KEY – intention of the parties wrt the borrowed funds
* If specific purpose is uncertain, borrower can’t keep money (*Twinsectra*)
* Just need to make sure that money never makes it to BFPV
* Specific purpose and segregation of the money to further purpose is mandatory requirement of the loan (*Giles*)

PROCESS

* money advanced with the stipulation that it be used for a specific purpose
* upon failure of the primary duty (the requirement to fulfill the purpose) a secondary duty arises in favour of the lender
* secondary duty is **equitable** and functions like an ART
  + lender transferred only LT to the borrower under K
  + upon failure of the primary duty, borrower hold on RT for the lender

#### Barclays v Quistclose (1970 UK)

Facts: Q lent RR money for the specific purpose of paying dividends. Money deposited into separate fund at BBank, who knew about special purpose RR went into receivership before $ paid, BB claimed against overdraft fees.

Outcome:

* Q won money – terms of the loan created a trust in favour of Q
* Q kept ET in the money, so had priority claim over other creditors (in rem rights)

#### Twinsectra v Yardley (2002 UK)

Facts: TS loaned Y $ on the condition it be secured by solicitor’s undertaking. Y used $ for other purposes, solicitor goes bankrupt. TS claims resulting trust.

Outcome:

* **Ratio: a loan to a borrower for a specific purpose gives rise to a fiduciary duty on part of the borrower who has no beneficial interest in the money**
* Lender pays money to borrower, but doesn’t party with the beneficial interest, which is a resulting trust
* Maintains in rem rights – right to tracing of money

#### Westar Mining (2003 BCCA)

Facts: Joint venture in coal mine under proportional ownership. Westar owned 80% and went bankrupt. Poscan didn’t contribute its share of operating expenses. T in bankruptcy sued P. Employees of mine claimed monies from joint venture was purpose trust in their favour.

Issue: Are employees preferred creditors?

Outcome:

* BCCA accepts Quistclose specific purpose loan trust analysis
* $ paid by P into joint venture account to be used exclusively to pay operating expenses – specific purpose, so employees get equitable title
* T in bankruptcy couldn’t ignore QT arrangement by framing as debt claim
* **Ratio: QT can arise even after the borrower is unable to use $ for the specific purpose**

### 4) SURPLUS OF FUNDS AFTER TRUST PURPOSE FULFILLED

* Where trust prupose is fulfilled and surplus funds exist, *may* be RT in favour of settlor

Donations to a Purpose Group

* If possible to track lenders, give them back their money (*Red Cross*) – RT for donors
* Unknown contributors - T can pay money into court and wait for ppl to claim it on RT (*Gillingham Bus Disaster)* – must prove – leftover funds to crown – *bona vacantia*

Unincorporated Clubs

* Absence of contractual provisions of club, should surplus funds be held on RT for existing members?
* Can look at mechanism by which money was contributed (*West Susssex*):
  + Collection boxes – *bona vacantia*
  + Legacies/major donations – excess held on ART
  + Street entertainment – K for entertainment – surplus belongs to club - *bona vacantia*  (not existing members)

One Member Left

* *Hanchett-Stamford* – money given to club according to rules of club
* if no rules, imply from contract law – distribute surplus among remaining members (ie: if one person remains, they get the lot)
* overturned *Bucks Constabulary*, where said needed at least 2 members

## Presumed Resulting Trusts (PRT)

PRT occurs when;

1. No clear evidence about transferor’s intention and
2. A gratuitous transfer of property (ex. Land purchased by one, but put in the name of another)

* Presumption of resulting trust – transferor maintains ET
* Equity presumes bargains, not gifts
* PRT based on notion that ppl don’t give things away gratis
* Ons to rebut presumption is on transferee – show intention of transferor (*Standing)*
* Section 19(3) *Property Law Act* - A voluntary transfer need not be expressed to be for the use or benefit of the transferee to prevent a resulting trust.

**A transfers to B w/o consideration** – law presumes B holds resulting trust for A

* Can be rebutted by evidence that A intended to give absolute title

#### Standing v Bowring

Facts: Lady transfers bonds to herself and godson as JTS, intending he would benefit on her death. She remarried and wanted to revoke the transfer. He didn’t know about it til then.

Outcome:

* **Ratio – actual intention to give legally and beneficially + transferor’s conduct will rebut the presumed resulting trust**
* Formal acceptance of the gift by the transferee not required as long as transferor gave up control – intended to give out and out gift

#### Nishi v Rascal Trucking (SCC, 2013)

Facts: Rascal advanced funds to Nishi for property, “without any conditions or requirements.” Later claimed he maintained beneficial interest under at RT.

Outcome:

* No RT – Rascal didn’t maintain ET
* Purchase money resulting trust is a gratuitous RT where person advances a contribution to the purchase price w/o taking legal title
* R’s contribution was made w/o contribution so presumption of RT arises
* BUT **Ratio – presumption can be rebutted if recipient proves on BOP that person who advanced the funds intended them to be a gift**

#### Niles v Lake

Facts: Older sister had health issues. Younger sibling on join account. N fed the account, her sister withdrew to pay for her living expenses. Sister had legal title to account after N died. Standard bank forms for joint tenancy – right of survivorship applies. Heir to N claimed resulting trust, so N held 100% of beneficial title.

Issue: Is the standard form enough to rebut the presumption?

Outcome:

* Standard form not enough – bank made them sign it as JT’s to protect itself, not actually parties’ intention
* **Ratio: Standard forms not enough evidence to rebut PRT**

#### Russell v Scott

Facts: Lady opens account w/ her nephew and told her lawyer about the account and her intention that nephew could keep whatever remained when she died. Heir disputed.

Issue: can heir claim on basis of RT?

Outcome:

* There was no POA, so there had to be PRT, which was rebutted by evidence that aunt intended nephew to have the money when she died
* Nephew declared joint tenant on joint bank account w/ right of survivorship

#### Young v Sealey

Facts: Same situation of joint bank account w/ nephew. Clear on evidence that he would get beneficial rights, but only when she died. It violated Will Act formalities.

Issue: is it a RT b/c the gift was in violation of wills legislation?

Outcome:

* No – court recognized established practice of honouring these agreements
* The evidence rebutted the intention of PRT

#### Sawden Estate v Watch Tower Bible Tract Society

Facts: Deceased liquefied assets into bank account, made children joint holders w/ right of survivorship. He knew about effects of PRT. Evidecne that he wanted to make sure kids got money. WTB argued they held it on RT.

Outcome:

* Enough evidence to rebut the presumption of advancement
* **Ratio: PRT’s give a measure of certainty and predictability for individuals who put property into joint accounts**

## Presumption of Advancement

1) POA applies to:

1. **Parent to child** – includes both mothers and fathers, but only if child is minor (*Pecore*)
2. **husband to wife** – in most Cnd jurisdictions, this has been removed by leg.

* In BC the POA may still apply to “traditional” style marriages (*Mhetta*)
* Relatively easy to rebut – mere acquiescence may not be enough (*Eisner*)

2) Rebuttable presumption – onus of proof for rebutting the POA is on transferor (*Vinogradoff*)

3) Founded originally on the idea of obligation to support the wife and dependent children (*Murless -* child)

#### Pecore v Pecore (SCC)

Facts: Dad transferred bulk of assets into joint account w/ daughter, who then became entitled to the residue of the estate and got ROS for the accounts. Daughter’s ex-husband claims she held accounts on RT for dad’s estate and they should be distributed as residue (he was residual B)

Issue: PRT or POA?

Outcome:

* PRT rebutted by intention to gift absolutely
* Presumption of advancement not available b/c she is minor
* POA applies equally to moms and ads, but doesn’t apply if child is independent adult

#### Mhetta v Mhetta

Facts: Family dies in Air India crash – dispute between husband and wife’s estates as to where the assets given to the wife by the husband belong

* POA upheld – traditional marriage
* POA from husband to wife no longer operates except in exceptional circumstances

**REBUTTING THE PRESUMPTIONS**

### Timing

* General rule – evidence up to and including the transfer, or so immediately after the transfer that it forms part of the transaction, is admissible by either party (*Shepherd)*
* Once gift is given and presumption is operative, POA triggered (*Shepherd)*

#### Shepherd v Cartwright

Facts: Man registers shares in kids’ names, but they don’t know about it. Years later he has kids transfer their shares back to him. Kids sue estate by claiming the original shares were advancements.

Outcome:

* Kids entitled to shares – while a RT existed in favour of the father, the POA was not rebutted
* Evidence of the father’s intention to regain legal control occurred after advancement
* **Ratio: evidence up to and including the transfer or immediately after is admissible by either party**

### Illegality – admissibility of evidence

* Gratuitous transfers often occur in an attempt to facilitate an illegal scheme or to avoid tax – should the transferor then be able to rely on doctrine of RT to recover ET?
* Can a transferor rebut POA by adducing evidence of the impropriety?
* Ironically, preventing evidence of the illegal motive may secure LT & ET w/ complicit, or equally guilty individual

Different approaches:

**Par delictum** (***Scheurman***) – court refuses to deal w/ tainted transaction and will not look at any evidence that could rebut the presumption

* In cases of equal guilt, Court prefers possessor

**Pontius Pilate** (***Foster, Goodfriend***) – court will acknowledge that there is evidence to rebut, but will not allow it b/c it indicates illegality (ie they wash their hands of the illegal doctrine)

**Side Step**: ***(Szoke, Gorog, Tinsley)*** court will say it doesn’t even need to hear the evidence of tainted transaction

* Court gives effect to plain transaction if there is no evidence explaining why there was gratuitous transfer (then RT in favour of transferor)

**Locus poenitentia**: if fraud is rectified or hasn’t happened and party declares repentance

**Proportionate harm** (***Nelson* (Australia) *-* Not accepted in Canada, flirted w/ it in Tinsley**): court may look at proportionality of harm to determine whether to hear the evidence of tainted transaction (ie how serious was swindling – just a minor infraction?) – may be extraordinary penalty for minor thing

* Pavlich thinks it’s a more nuanced method of dealing with it – so easy to violate regulates, and harsh penalty – this is open for argument

#### Scheuerman v Scheuerman

Facts: Husband put property into wife’s name to evade creditors. Creditors never sued b/c husband paid debts. Wife sold house. Husband sued on basis of RT

Outcome:

* No evidence of illegal intent admissible, so no RT – **par delictum** approach

#### Foster v Foster

Facts: He transfers property to daughter, she wouldn’t return.

Outcome:

* Court doesn’t hear evidence, just give effect to POA
* **Pontius pilate** approach – court lets matters stand, exactly as chips fall

#### Goodfriend v Goodfriend (SCC)

Facts: Wife makes up false cause of action to scare husband. Husband places home in wife’s name to avoid this imaginary consequence. They break up, husband wants house back.

Outcome:

* Husband retained beneficial interest in the property
* **Ratio: evidence of an illegal contract or scheme will not be received to rebut the POA, but if no creditor has been defeated then admissible**
* Evidence of immorality/bad motive will not necessarily be inadmissible – **departure from trend of Pontius Pilate approach**

#### David v Szoke

Facts: GF & BF shared interest in house. He was alcoholic, worried about drinking/driving and losing house. Conveyed his interest to GF, then she left him. Clearly he didn’t intend to give her property. But both parties had bad intent.

Outcome: BF retained his beneficial interest – there were no creditors at time of transfer

* Didn’t based decision on evidence of intent – “**side-stepped**” the evidence issue

#### Tinsley v Milligan (UK HOL)

Facts: Lesbian couple buy house, but only register it in one name so other could get welfare.

Issue: is the evidence of getting welfare admissible?

Outcome:

* Court doesn’t need to consider it – PRT gave her proportion of ET whether or not the illegal purpose was revealed – **side-stepping** approach
* **Ratio: equity may assist recovery through RT despite the existence of an illegal scheme**

#### Tribe v Soiseth

Facts: Father purchased condo for daughter & her husband, puts condo in daughter’s name for tax purposes. Daughter divorces, husband claims condo is part of joint estate (on POA pre-Pecore). He never actually claimed tax exemption.

Issue: Is evidence of the scheme admissible to show Father retained beneficial interest?

Outcome:

* If there is illegal evidence, it can be operational if:
  + No creditors, and illegal purpose not carried out; **AND**
  + Person declares apology to court and repents
* **Locus poenitentiae** approach
* POA rebutted, father keeps interest

# The Beneficiary

## Nature of Equitable Title and Interest

* Beneficiary (cestui que trust) – has ET in property – ius fruendi (enjoyment)
* ET is both in personam (rights enforceable against the trustee) and in rem (ability to trace as remedy) – yet stops w/ a BFPV
* ET doesn’t give the B power to exercise administrative/dispositive power over trust property (*Schalit)*
* B can’t assume the functions of a trustee (*Schalit*) unless allowed to act as agent to reduce expenses to the trust (*Re Bagot’s*)
* B enjoys ET in each individual item comprising the trust assets (*Archer-Shee*)

### Role of Trustee and Beneficiary – Distinguishing / Distinct

Trustee holds utendi/disponendi, B hold fruendi/disponendi

* B can’t manage, control, or administer trust assets

#### Schalit v Joseph Nadler Ltd

Facts: Nadler rented trust property to Schalit. B of property initiated distrainment of property.

Issue: Did B overstep its bounds?

Outcome:

* Yes – B has no right to demand the actual bank notes, but can require T to account
* Distraint is exercise of real “in rem” right that lies w/ legal owner of property (T)

#### In re Bagot’s Settlement

Facts: B wanted to manage the trust property and collect rent less expensively.

Issue: can a B demand possession as of right for the purpose of rent collection?

Outcome:

* There is judicial discretion to allow a B to become a LT of property if it would be convenient and adventitious
* Court allowed pragmatic modification - B to act as T’s agent – to reduce expenses

### Does the Beneficial Title Attach to Each Item of the Trust Fund?

Special fiduciary duty owed to B by T

* B is not concerned about the actual items, but about whether T is behaving properly
* Equitable interest = in personam relationship btw B & T to enforce the trust
* Sometimes trust is bulky w/ many assets. T is constantly transferring property in and out (ex. Pensions) – better to think of property as a whole
* Think of individual assets as in personam string attaches to T that B can pull
  + If B gets too involved, T can tell B to go away or call for title

#### Baker v Archer-Shee

Facts: Lady was B of several properties in NY. Moves to England, becomes sole LT of trust in NY – never entered UK. UK sought to tax based on stocks outside UK. Lady argued income wasn’t really shares from stocks – no dividend from any one stock – just held in trust, income from collective trust fund.

Outcome:

* Court ruled that actually, B held ET to each of the individual items comprising trust fund (“a la carte” vs “set menu” ownership)
* NOTE – later used conflicts of law to use American courts – said trust fund as one single entity (T can change items in fund rapidly, fluctuate) – had a right against the T

## Sub-Trusts and Assignments

Beneficiary disposing of ET to sub-beneficiary (assignment) – in 4 ways (*Timpson’s)*

1. B can assign ET directly to a 3rd party
2. B can direct the T to hold in trust for a 3rd party – *writing required; rule in SvV met*
3. B can contract w/ 3rd party to assign ET for valuable consideration – *writing prudent but not required; vendor holds ET on a CT for the purchaser once contract binding*
4. B can declare himself T for the 3rd party – “sub-trust” B holds “bare ET” and sub-B holds both ET and beneficial title – *writing prudent*

### Assignments of Choses in Action

* B1 can dispose of their beneficial title to B2 as a chose in action
* BC has no formality requirement for *inter vivos* transfer of equitable title
* BUT if the chose in action is to be **enforceable by the new B against the T**, then **section 36 of *Law and Equity Ac****t* applies:

1. Transfer must be in writing; AND
2. Trustee must be notified of the transfer

* Compliance allows the assignee to sue T in their name alone – otherewise assignor is required to be a party to the action due to privity (*Di Guilo)*

### Priority Among Assignees

If the BT is assigned to multiple B2’s, the earlier in disposition is preferred (*Re Wasdale*)

* “he who is first in time is preferred in law”

## Protective Trusts – Restraints on Alienation

**Protective trust** – S/T concerned that a B will be reckless or irresponsible w/ trust assets – *sui juris* B’s can call for the trust

* attempts to prevent alienation by placing a **condition** on a trust is invalid (based on public policy)
* protective trust – special kind of trust where able to get around restraints on alienation
* solution – must give the B a **determinable life interest** (words like “until”, NOT ‘when’)
* determinable life interest defines parameters of interest, but doesn’t restrain it
* ET vests in ppl named in the gift-over, on the happening of determining event
* NOTE – condition subsequent, not good choice – strictly construed, and if struck down, B gets gift outright

Steps:

1. Transfer of assets to trustee
2. Principal beneficiary gets equitable determinable life interest
3. Determining events are : (example) attemtps to alienate/sell ET, collapse the trust, insolvency, etc
4. On happening of determining event, automatic disposition of interest as gift over to secondary beneficiaries (usually children, siblings, etc)

## Termination of the Trust by the Beneficiary

### Rule in Saunders v Vautier (eponymous)

1. The B must be *sui juris* (age of majority + legally capacitated)
2. The interest must be fully vested (B vested in interest – absolutely entitled to gift, only thing postponed is enjoyment)
3. B or B’s are the only ones entitled to the trust property

Can call for the end of the trust.

#### Saunders v Vautier

Facts: B wants to call for collapse of trust, even though condition that he must be 25.

**Ratio: Fund was intended wholly for B’s benefit – was gift of immediate benefit, w/ only relevant intention being postponement of enjoyment**

Vesting

* If B vested in interest – absolutely entitled to the gift, only thing postponed is enjoyment/possession
* Court prefers early vesting and may interpret contingency to enjoyment rather than vesting (*Lysiak*)

#### Re Lysiak

Facts: B’s will only receive the estate when they aren’t living in USSR anymore, and they want to collapse the trust.

Outcome:

* S only specified timing and manner of distribution – so interest was vested

Discretionary Trusts

Many B’s - hard to satisfy absolute interest – where feasible the B’s may combine and call for trust

* All B’s must be identifiable under the trust
* The decision must be unanimous (*Re Smith v Aspinal*)
* This is true even if B’s may be entitled in different amounts (*Re Chodak*)
* If in large class + discretionary trust, can’t collapse (*Baden, Buschau*)
* All *sui juris* Bs can get together and collapse trust, leave balance for non *sui juris* Bs (*Chodak)*

#### Re Chodak

Facts: Discretionary trust – multiple B’s living in USSR, all identified. All agreed to call in trust.

Outcome:

* Court found B’s had immediate vested interest, restriction in form of T’s discretionary powers – just manner and time of payment to B’s

#### Re Smith v Aspinall

Facts: S gives T’s discretion to create amount to pay B’s. Wife and children want mortgage – use Beneficial interest as seucirty – bank wanted payments to come from the trust but T’s didn’t want to.

Outcome:

* Multiple B’s can join together – **objects acting in unison can direct/collapse the trust**

Pension Trusts

* Rule in *SvV* is not properly operational in case of pension (*Buschau)*
* Hard to manage functionally –wrt termination

#### Buschau v Rogers Communications

Facts: DB plan is engineered that it reverts to employer upon termination, want to collapse trust.

Outcome:

* Pension plans do not lend themselves well to SvV b/c it is not a stand alone instrument
* Plan clearly stated that it was employer who could amend/terminate the plan

Division of Trust Assets

* Where property is *divisible* one or more B’s may be able to call for their share of the property
* This is so even if some of B’s are not *sui juris* (*Re Sandeman’s*)
* Can’t result in major reduction in value of remaining assets (*Lloyd’s Bank)* or undue hardship to the other B’s (*Re Marshall)*
* No entitlement to call for division if the property is land (*Re Marshall*)
* In the alternate, the T can elect to sell the trust asset (land, shares) and distribute shares to each B (*Lloyd’s Bank)*

## Variations of Trusts

* To what extent can you ask the court to change the trust?
* Ability of courts to vary a trust is limited to CL exceptions and trust variation legislation (*Chapman)*

**COMMON LAW EXCEPTIONS**

* **Unforeseen emergency**
  + Where there is no provision to cover an event that the S/T did not and could not have foreseen
  + Variation is limited to the trust’s administration terms – not quantum or type of benefits
  + Used to protect trust property and is rarely invoked (*Re New)*
* **Maintenance jurisdiction** – court can direct payments to allow B’s to live in the manner provided for by trust – living conditions, sufficient income
* **Conversion** – convert infant’s property from realty to personalty
* **Compromise** – court acts for beneficiaries who are not *sui juris* in a judicially sanctioned compromise of a litigious dispute
  + if clearly for benefit of all parties, court will validate trust – allow new terms
  + dispute must be real – can’t use pretend dispute to amend (*Chapman*)

**STATUTE**

Trust settlement variation legislation allows variation, but court will protect groups who are unborn, unascertained, or incapacitated

* like compromise (above) – TSVL allows courts to prevent breakdown of trust
* allows courts to vary trusts if all the B’s are in agreement (single adult B in whom entire trust vests can’t apply for variation)
* court consents on behalf of those that can’t

**Section 1 TVSA** – court can also approve any arrangement proposed by any person on behalf of:

1. person not yet *sui juris* (infancy/incapacity)
2. unascertainable B’s - B’s who have only an expectancy or who may become entitled in the future (*Bentall, Buschau,)*

* deals w/ ppl who we know form a group, but we don’t know who will get the interest
* has to be actual interest, not someone who expects to be heir

1. unborn persons
2. persons who interest arises through a discretionary power

**s. 2 –** so long as it appears to be for the benefit of the above

**Benefit** – KEY to trust variation – may include:

1. Advancement of financial interest (*Re Burns)*
2. Tax minimization (*Re Burns)* but not always! (*Re Weston*)
3. Educational and social interests *(Re Weston*)
4. Family cohesion *(Re Remnant’s*) – but not if it causes financial disadvantage to a B (*Re Harris)*

***Financial benefit test*** - = “good bargain” test

* Asks whether a prudent adult, motivated by intelligent self-interest and sustained consideration of risks, is likely to accept the arrangement (*Bentall*)

***Nonfinancial / other benefits test*** = “prudent advisor” (*Russ)*

* Court in not bound to preserve the intention of the S/T (*Russ)*
* But it may if the variation goes too far against what S/T intended (*Re Steeds*)

#### Re Burns

Facts: Settlor and trustees seek consent for variation to minimize tax implications, and B’s agree – ask court for consent for unborns

Outcome: - yes, tax deferral is valid benefit under TSVL

#### Re Westin’s Settlement

Facts: Trustees want to move trust to Channel Islands to avoid tax

Outcome: NO – Denning refuses to consent for B’s not *sui juris* due to social and educational interests of the children

**Ratio – Function of court is to protect those who can’t protect themselves – court should also consider the educational and social benefits to infants/unborn children**

#### Re Remnant’s Settlements

Facts: T/S leaves money for kids/GK’s, so long as Protestants. One sister marries a Catholic and her kids are catholic, so she applies for variation.

Outcome:

* Despite financial loss to protestant GKs, benefit to family equanimity outweighs
* Benefit of a close family, and now being able to marry Catholics

#### Re Harris Estate

Facts: Dad commits suicide leaving widow and 4 kids. Dad was partial to eldest son. Wife applies for variation on basis of family cohesion.

Outcome:

* NO – would cause too much of a financial disadvantage to eldest son
* Must consider T’s intent, however bad or ill-advised intent is

#### Buschau v RCI

Facts: DB pension plan w/ actuarial surplus – members sought to collapse trust under S&V – sought consent from court for missing B’s.

Outcome:

* NO – the B’s are now entitled to an interest (even though it is contingent) – not only an expectancy or a possibility of an interest
* Not appropriate for court to consent on behalf of “missing” *sui juris* B’s

# The Role of the Trustee

Basic duties:

1. Collect the estate – take whatever steps may be required, ex. Registration
2. Maintain the estate in accordance w/ the trust instrument
3. Distribute the benefits/revenues to the beneficiaries

## Appointment, Removal, Retirement

**s. 2 *Trustee Act***: Statute applies to all people acting as T, regardless of appointment date

### Initial Appointment of Trustee

1. S has right and freedom to choose individual(s) w/ full legal capacity to act as Ts

* S falls out of picture after trust is executed, unless he reserved powers

2. S may appoint guardian/protector to hire and fire Ts

* Can also change provisions of trust to make compatible
* If given too many powers, he may become a trustee

3. If more than one T, they hold as JTs with ROS – when last one dies, heir takes over

* Unanimity is required (unless trust instrument says otherwise (like majority))

4. If T refuses appointment, make alternate appointment in will, or court can appoint

### Power to Appoint New Trustees

**s. 27 TA** – If dead, out of country for 12 mos, wish to be discharged, refuses to act, or unfit, person nominated in trust to appoint new trustees (or surviving trustees/heirs/personal rep) can appoint, so long as no contrary intention in trust.

With appointment under statute, trust assets automatically vest (**s. 29 TA)**

### Court Appointments

Court appoints where all else fails – where is it “expedient” and “inexpedient, difficult, impracticable” w/o assistance of court (**s. 31 TA)**

* Factors court should consider when appointing trustees (***Re Tempest***):
  + Wishes of S/T particularly wrt desired characteristics
  + Interests of the Bs (ie: impartial trustees)
  + Efficient execution of the trust (ie: business experience, etc)

### Retirement of Trustees

* To retire, need acquiescence and written notice to other trustees and Bs (**s. 28 TA**)
  + Otherwise, still have fiduciary duty
* T may leave position through retirement, death, or removal – statute fills in gaps
* **S. 27 TA** – if dead, retiring, absent 12 mos, new T appointed by protector, surviving Ts, or heir of last surving T
* **S. 36 TA**  - anyone w/ beneficial interest may apply for court order wrt trustee removal
  + Bs can work together w/ other Ts to make appointment
* **s. 29 TA** – newly appointed T will be vested in trust property through retiring deed
  + new T has all rights of the predecessor (**s. 32 TA**)

### Removal of a Trustee

* usually addressed in trust document – “protector” to hire/fire Ts
* **s. 30 TA** – *sui juris* Bs w/ consent of B majority may apply to court for T removal
* **s. 31 TA –** court can remove T and appoint new one if expedient

**Conroy Test for Court Removal**

Have there been acts and omissions that endanger trust property and has T shown lack of honesty, appropriate capacity, or reasonable fidelity?

* Governing criteria is the welfare of the B – single failure / disagreement b/w T & B insufficient reason to remove T (*Conroy*)
* Trustee misconduct not required (*Re Consiglio Trusts* – 3 Ts bitterly squabbling)
* Court will act where continued administration of trust impossible or improbable (*Consiglio Trusts*)

## Duties of Trustees

T’s powers of administration are restrained by duties proscribed by law, including those set out by the S/T in the trust instrument and statute.

### DUTY TO TAKE CUSTODY AND PERSONALLY MANAGE TRUST ASSETS

Take Custody

* Obtain title to assets upon appointment
* Review document and determine whether to keep, sell, invest

Personally Manage Assets

* T can’t delegate the trusteeship itself, must perform role himself
* Can enlist agents to help in sale, investment, or storage of assets
* Statute gives more leeway to T to hire agents to help administer fund as long as T exercises prudence in the appointment (**s. 7 TA)**
* **S. 95 TA** – T must use proper judgment in selecting a helper, but is indemnified
  + Implied indemnity – if agent liable, can’t hold T liable, unless negligent
* If not in statute, can be appropriate to hire agent if commonly accepted business practice/custom that the activity is done by a specialist

#### Speight v Gaunt

Facts: T hired stockbroker as agent, who misappropriated funds.

Issue: Breach of duty?

Outcome:

* Although T can’t delegate confidence reposed in himself, he can get help from agents like brokers/bankers – T exonerated from duty except for negligence
* SOC is a prudent businessperson managing his own affairs

#### Re Wilson

Facts: Corporate trustee, with 2 pieces of property – 1 making money, 1 not. Board allocated decision to GM, who didn’t sell.

Outcome:

* Unlawful delegation – so breach of trust
* Board’s responsibility to make decisions governing exercise of discretionary powers
* **Ratio – attempted exercise of discretion by any authority other than Board of Directors is ineffective** – NOT practical today- probably doesn’t apply

#### Fales v Wohlleen Estate (SCC)

* Obiter – reject idea that in corporate Ts, only Board can exercise discretionary powers
* When selecting corp. T, S/T is implicitly choosing decision-making structure or mgmt. style w/ overall supervision of the Board/CEO
* Investment decisions can be made by expert manager following policies from Board

### DUTY TO INVEST

* If S restricts any sale, T holds bare trust for B b/c no activity is required
* Need to check trust instrument – is there a requirement to retain?
* Most Ts will have to invest assets, make decisions based on minimum risk and maximum return (ie. not too risky)
  + If T was Uncle Harry, only expected to do his personal best
* Standard for investing property is that of a prudent investor (**s. 15.2 TA, *Whiteley*)** – applies to both professional & non-pro trustees/corporate (***Fales*)**

1. duty to seek advice on matters T doesn’t understand (***Cowan***)
2. receive advice w/ same degree of prudence (***Cowan*)**

* T can invest in accordance w/ ethical beliefts if the TI is silence the standard is still that of a PB **(*Cowan*)**
* Trustee not liable if overall investment strategy consistent w/ standard (**s. 15.3)**
* **S. 15.4** – Ts can set off losses against profits – if T has done good job in one regard, can offset another bad deal or imprudent behaviour
* **S**. 95 – T is not guarantor of investment (implied indemnity
* **S. 96** – court may excuse T from liability if he acted **honestly & reasonably & ought to be fairly excused** – look at factors from *Fales*
* Quality of T’s investing is judged at the time of making investments, not trial (***Nestle***)

#### Cowan v Scargill

Facts: T head of union based trusts – didn’t want trust to invest in companies w/ connection to their union.

Issue: whether or not Ts are in breach of trust if engage in ethical investing (ex. Won’t buy shares b/c don’t agree w/ company like cigarettes

Outcome:

* Investments must be exercised to yield best return in relation to risks / yield prospect
* Ts must put aside personal views when making investments
* Powers must be exercised fairly and honestly for purposes given, not ulterior purpose
* SOC of Ts includes duty to seek advice on matters T doesn’t understand – honesty and sincerity are not the same as prudence and reasonableness

#### Fales v Wohlleben Estate (1977 SCC)

Facts: Wife and CPT as co-trustees. CPT had opportunity to trade sharese in subsidiary – but held for long time. Didn’t try hard to convince wife to sell. It tanks, Bs sue CPT and wife.

Outcome:

* One objective standard test for business person /corporate/ individual
* Both Ts were in breach
* T needs to be aware of changes in assets in portfolio, and consider changes
* Used s. 96 to exonerate wife’s breach – T in good faith, honest mistake
  + Consideration: whether breach technical, minor error in judgment, decline in value was attributable to general economic climate
  + Can be selective w/ relief among group of Ts

#### Nestle v National Westminster Bank

* Ts will be judged by standards of the day (at time of making investments)
* Shouldn’t judge with hindsight – at time of investment (pre1950s), shares seen as risky

### DUTY OF LOYALTY TO BENEFICIARY

* Defining feature of the fiduciary relationship
  + Act in utmost good faith
  + Use all powers for the benefit of B
  + Must not personally profit at expense of B
  + Can’t put personal interests in conflict w/ those of the B
  + Not advance other interest w/o B’s informed consent
  + Only contract w/ B where fair & B is fully informed

##### **CONFLICT OF INTEREST**

* General rule – Ts can’t place their personal interests in possible conflict w/ B’s (***Keech***)
* Relaxed rule – “real sensible possibility of conflict” – liability depends on facts of each case (***Boardman dissent***)
* Due to modern complexities arising from “interlocking, subsidiary & assoc. corps” (***Peso***), fiduciary won’t be in breach of trust if:
  + Beneficial info was obtained outside fiduciary role (***Peso)***
  + Conflict of interest was acted on w/ fully informed consent ((***Canaero***)
* If profit at the expense of B, then breach of trust
* T may have to disgorge profits (***Boardman***)
* Contextual analysis required – factors from ***Canaero***)

#### Keech v Sanford (1726)

Facts: lease w/ income for child B, trustee couldn’t renew b/c child. T leased for himself.

Outcome: strict application of conflict of interest – T only came to property through the T, so can’t benefit (even though child can’t either)

#### Boardman v Phipps (1967, UK)

Facts: B & P (T and lawyer) receive info – deal to buy stocks. Bring info to Ts who turn down offer. Ts allow B & P to purchase instead – they make very profitable.

Outcome:

* Breach of trust – parties obtained knowledge by virtue of FD and can’t escape liability
* **Ratio: non-conflict rule strictly applied even when NO harm to trust resulted**
* Accounting of profits – disgorgement – as punishment

DISSENT – should look at *real and sensible conflicts of interest* – not just possible (may be closer to law in Canada)

#### Peso Silver v Cropper (SCC)

* Relaxation of strict rule to accommodate modern business setting
* Where there is no real possibility of conflict b/w T’s actions and B’s interests

#### Canaero v O’Malley (SCC, 1974)

Facts: directors took contract for aerial photography in Guyana w/ new company.

Outcome:

* Liability doesn’t depend on proof of actual conflict of duty & promotion of self-interest
* BUT, no-conflict rule shouldn’t be absolute- instead use contextual approach
* Laskin’s Factors:

|  |  |
| --- | --- |
| was the opportunity “ripe”? | Offer’s position in company |
| Was the knowledge special/private? | Amount of knowledge possessed |
| Circumstances how info was obtained | Time b/w end of relationship & breach |

##### **SELF-DEALING (Sale of Trust Property)**

**Self dealing** – T on both sides of the deal – almost always void, may be ok in exceptional circumstances (*Holder)*

* Court may be flexible based on facts – look if no bad faith on part of T, gave adequate consideration, sale was in B’s best interest, B was given full disclosure (***Molchan***)
* If transaction is outside exception from Holder/Molchan, it is VOIDABLE

**Fair dealing** – agmt b/w T & B to buy equitable interest – generally ok so long as there’s **full disclosure**

* Onus is on T to disprove any conflict of interest (***Crighton***) – must show every advantage given to B, absence of fraud, obtained independent advice, adequate consideration
* If T fails test, trust survives (unless T has sold to BFPV in interim) and T must disgorge profits b/c transfer was voidable (***Crighton***)

#### Holder v Holder (UK, 1968)

Facts: D was former T, but didn’t assume duties. He bought property from estate. Paid fair price.

Outcome:

* Rule in Keech relaxed – old rule too severe
* No real conflict, and D’s renunciation as T was wells known to all
* Inflexible rule prohibiting all transaction is unnecessary and could lead to injustice

#### Molchan v Omega Oil & Gas (SCC, 1988)

Outcome:

* Relaxed approach to self dealing adopted in Cnd law – support finding in *Holder*
* Deal was in good faith, fair price paid, and sale in best interests of partnership, and full disclosure – would be unjust not to allow the sale

#### Crighton v Roman

Facts: T purchased beneficial interest in trust property.

Outcome:

* Court found this was self-dealing -Lowest duty for T to make full disclosure to B
* No absolute rule against purchasing from B himself, but h as to show there was no fraud or concealment, B obtained independent advice, and valid consideration
* T bears the onus of justifying the transaction – if fails, trust survives

### DUTY TO BE IMPARTIAL

T has fundamental burden to cultivate assets and pass them on to B – explains and justifies existence of good faith duty

* Notion of equality is hardwired unless S/T has indicated otherwise

Questions:

1. Does the T have to sell asset X?
2. What do they have to replace it with?
3. What happens in the meantime?

* Ts have CL duty to act impartially wrt ALL beneficiaries – including those in succession
* Will not apply where there is **evidence to the contrary** – intention of S/T takes primacy

### Steps to Duty:

1. Are there beneficiaries in succession?
2. Did the S/T intend partiality or impartiality?
   1. Does the trust instrument (expliticly or implicitly) prescribe partiality?
      1. Explicit partiality:
         1. Express provisions in the whill to the contrary, such as asserting the rule in *Howe v Dartmouth* doesn’t apply
      2. Implicit partiality:
         1. If it’s an *inter vivos* settlement (although it may – see *Re Smith*)
            1. b/c settlor assumed to intend for the benefit to lay to the person to whom it is given
         2. If it may be implied through directions or authority to:
            1. Keep or retain the residue (trust to retain)
            2. Maintain unauthorized investments despite the duty of prudent investment
            3. Give income *in specie* to the L/T (power to postpone)
      3. Implicit impartiality:
         1. Trust for sale
            1. Realty until sold, LT gets profits *in specie*
            2. Personalty until sold, LT gets 4% property value
      4. Is there a conflict with the testator’s signals (ex. Trust for sale with a power to retain or postpone)
         1. Court should engage in interpretive exercise to determine the **dominant and primary intent** of the testator (***Lauer, Stekl****)*
         2. Is the power permanent or temporary with a requirement to sell eventually when it’s advantageous to do so?
            1. If latter then impartiality (and LT gets 4%, not *in specie* (if personalty) (***Crawford***)
   2. If Not clear from trust instrument, the CL assumes settlor intended impartiality
3. Trustee should assess the types of assets in the trust. Are there any of the following:
   1. **Wasting assets** – lots of income but capital base deteriorates (mortgage, copyright, car, etc)
   2. **Unauthorized assets** – speculative/risky assets w/ high yields in short-term, nothing in long-term (ex. Gold mine shares)
   3. **Reversionary assets** – assets not immediately available and don’t produce income for LT (ex. Future interests in possession, remainders in shares, insurance policy on someone’s life)
4. If duty of impartiality exists:
   1. **With wasting or unauthorized assets**, they should be sold and apportioned under the rule in *Howe v Dartmouth* (4% income to LT and reminder to capital base) if the following is met:
      1. A testator (ie in a will only – exception, *Re Smith*; most *inter vivos* gifts are presumed to benefit the person on whom they fall)
         1. *Re Smith* is explained likely b/c the father’s will (precatory words) led to this *inter vivos* trust, so the latter was quasi-testamentary)
      2. Leaves a residuary (ie: not specifically devised, *Lottman*)
      3. Personalty
         1. *Not* real estate (*Lottman*)
         2. Except circumstances where testator signals realty should be sold + treated like personalty (*Lauer, Stekl)*
      4. To persons by way of succession and
      5. The residue includes a wasting or unauthorized asset
      6. Then the trustee must:
         1. Sell the wasting personalty
         2. Invest the proceeds in authorized investments
         3. The income of which goes to the benefit of the LT, the corpus of which accrues to the remainderperson in the capital base.
   2. **With reversionary assets,** the asset must be sold. Based on the sale price, calculate 4% income per year and give that income to the LT. The rest of the sale price should be ploughed into the capital based + invest in things that will generate a fair income for the LT (**The rule in *Earl of Chesterfield***)
5. Calculating the 4%:
   1. Was there a power of postponement?
      1. Value of goods is taken at date of death
   2. Was the gift in a will?
      1. Was it sold within 1 yr of testator’s death?
         1. Yes – value at date of death
         2. No – value at 1st year anniversary of death
   3. Was in an *inter vivos* gift?
      1. The property value is assessed at the date of the trust

##### **The Rule in Howe v Lord Dartmouth**

Trust assets must be sold and reinvested so that 4% of the income stream may go to the LT, w/ balance augmenting the capital base of the trust fund.

Where:

1. Testator (not settlor)
2. Leaves a residuary
3. Personalty
4. To persons by way of succession and
5. The residue includes a wasting or unauthorized asset

Then the trustee must:

1. Sell the wasting personalty
2. Invest the proceeds in authorized investments
3. The income of which goes to the benefit of the LT, the corpus of the funds accruing for the remainderpersons

##### **Rule in Earl of Chesterfield’s Trusts (Reversionary interests)**

* To correct unequal treatment where LT has been disadvantaged by reversionary trust asset, reversionary assets are sold and apportioned based on 4% from date of inception of trust to the date of sale
* T has a duty to convert reversionary interests into income-producing assets
* Where there is express trust w/ a trust for sale of a reversionary asset, the proceeds must be apportioned amongst the LT and remainderperson
* T must calculate what portion of the sale price, if it had been invested at the date of testator’s death, would’ve produced income of 4% per year and risen to sale price – LT gets the difference in amount

### Powers and Trusts Combined

* Interpretation & construction can become complex when trust for sale combined w/ power to retain/postpone
* Where trust to convert coupled w/ power to postpone – conversion usually considered dominant (*Lauer)*
* KEY to assessing duty to act impartially – is retention of assets a trust or power? (*Royal Trust)*

#### Lottman v Standford

Facts: Widow unsatisfied w/ her income, launches a motion opposed by remaindermen.

Issue: Does Howe v Dartmouth apply to realty?

Outcome:

* SCC upholds principle that HvD doesn’t apply to realty. – wife entitled to income *in specie* from property (in this case $0)
* For personalty, will contained direction to convert personalty and investment of residue – followed directions of will

#### Lauer v Stekl

Facts: Will directed Ts to sell the entire estate, but contained general power to postpone. Mixed personalty and realty.

Outcome:

* Court doesn’t actually apply HvD to realty – instead says that duty of impartiality applied to realty and personalty b/c that is what testator intended on fair construction of words used in the will
* Power to postpone is not indefinite, does not defeat primary trust to convert
* T is under duty to convert and pending conversion he must pay LT a notional income .

#### Royal Trust v Crawford (SCC, 1955)

Facts: Guy leaves large amount of money from stevedoring company – large dividend to wife. Not a lot of capital left for remainders.

Issue: should dividend be treated as income or capital?

Outcome:

* Capital – in absence of clear authorization to prefer one interest over the other, T’s duty is impartial
* T only made it clear that wife should be secure in enjoyment – but the conservation of capital was also important – *in specie* enjoyment didn’t apply, ordered apportionment
* Widow only entitled to interest on estimated value of stock
* Where there is direction to convert w/ power to postpone, LT doesn’t necessarily get actual income pending conversion
* Question is whether power to retain is permanent or only until T’s can sell adventitiously
* In event of temporary power to postpone, court will presume impartiality

#### Re Smith (BCCA, 1953)

Facts: Trust company interpreted settlement as requiring retention of shares – benefited remainderperson more, hurt LT. Power to retain and power to convert.

Outcome:

* Breach of duty of impartiality
* Power to convert may be enough to trigger duty of impartiality and application of HvD
* Ex. Of HvD applied to *inter vivos* trust – seen as quasi-testamentary

### Impartiality With Respect to Settled Shares in a Company

Settled shares – usually from closely held corporations

* If major asset is settled share, income or capital is determined by form of transmission (***Waters***) **“form is substance” rule applies**
  + Governance decides whether to distribute shares as dividentds (income) or preferred shares (capital)
* If company is stripping assets, may send cheque labeled dividends which is profit +sale of assets – these are actually shares (capital)
* Court will give effect to testator’s intention over form in certain circumstances -especially when children of deceased are claiming over strangers (***Re Welsh***)

### DUTY TO APPORTION DEBTS AND OTHER DISBURSEMENTS

Law previously complicated under ***Allhusen***. Previously restricted funds available to pay debts to capital + 1 yr income – delayed payment to LT.

Rule abolished - Now **s. 10 TA**  - T makes debt payments out of capital unless testator says otherwise, or capital insufficient to meet estate’s liabilities

**s. 144 WESA** – same as s. 10

### DUTY TO PROVIDE INFORMATION

* B isn’t entitled to information/documents concerning T’s exercise of discretion – includes minutes (***Londonderry***)
* Today’s legal landscape – more transparency, expanding right to require T to give info
* If T acted in bad faith, disclosure can be compelled ***(Londonderry***)
* T not required to volunteer info
* B entitled to know he is a B, terms of settlement that dictate who can be a B, details of the equitable estate itself
* B doesn’t have an absolute right to disclosure – depends on circumstances (***Rosewood)***

#### Re Londonderry’s Settlement

Facts: B wanted full disclosure from Ts (minutes) about why they made decision.

Outcome:

* **Ts exercising discretionary power not bound to disclose to Bs the reasons**
* In absence of bad faith, minutes/agenda of meeting, correspondence not disclosed

#### Schmidt v Rosewood Trust

* Copying of legal opinion on the trust to beneficiaries allowed when opinion is clearly dealing w/ issues of benefit to both Ts and Bs, ex. Seeking direction on how to proceed based on a construction of a provision in the trust as opposed to opinion on T’s breach of trust
* Rule is not absolute and may depend on facts of the case (*Froese*)

### DUTY TO ACCOUNT

T must give accounts when requested within a reasonable amount of time

T must prepare and provide accounts for the trust (with 2 yrs of appointment (**s. 99 TA)**

T must give B access, but is entitled to a “reasonable time” (***Sanford****) from 1889 – may be different w/ modern technology (but not day to day)*

#### Sanford v Porter

* Duty to account is to have account always ready and make reaonsable facilities for inspection/examination
* Give full info when required
* Not obliged to prepare copies of accounts for parties interested
* T gets reasonable amount of time to prepare accounts

## Rights of the Trustee

### REMUNERATION OF TRUSTEES

Ts are *prima facie* unpaid, but can be remunerated:

1. By trust instruments (S/T makes specific remuneration clause)
2. Under contract w/ *sui juris* Bs (vulnerable to undue influence, so don’t do this)
3. By the court’s inherent jurisdiction

* **S. 88(1)**: Ts entitled to expenses + “fair and reasonable allowance” that doesn’t exceed 5% of gross aggregate value of assets
* **S**. **88(3)**: Ts can apply for additional “care and management fee” of 0.4% of average market value – for superstar Ts (***Pedlar***) – need to show link of success
  + Value of assets, nature of assets, degree of responsibility, time expended, degree of ability exhibited, success, extraordinary service ***(Sproule*** factors)
* All expenses of trust, including remuneration dues form charge/lien on trust assets

#### Re Sproule

* Court will prefer lump sum remuneration over % based remuneration for a care and management fee.
* Court will consider following guidelines in setting the remuneration:
  + Magnitude of the trust, including its value and complexity
  + Care and responsibility arising under #1
  + Time required of the T to perform duties
  + Skill and ability displayed by T
  + T’s success in administering trust assets
* Courts will only award a “care and management fee” for administration that is above and beyond

#### Re Pedlar

Facts: - Ts take additional remuneration. Can they do this?

* Care and management fee should not exceed 0.4% of average market value of assets and involve various factors to consider. Legislature intended fee to be annual allowance

### INDEMNIFICATION OF TRUSTEES

T entitled to indemnity for all debts incurred in executing trust (**s. 95 TA**) only modified if there is a good reason why T should bear the burden (ie: T was only making payment due to poor performance)

* Ts will be liable for liabilities arising from their unique form of administration (*Hardoon)*

#### Re Reid

* B who has full benefit of property should bear its burden unless there is a good reason T should bear the burden
* Right of T to be indemnified out of the whole estate against any liabilities is indisputable
* If sole B is *sui juris*, indemnity extends to personal obligation against B for indemnity

## Powers of Trustees

Powers contained in:

1. Settlement according to S/T’s intentions
2. CL precedents on managerial powers
3. Statute (unless curtailed by S/T)

* S. 5, 6 – form/time of sale
* S. 7 – appoint solicitor/bankers
* S. 8 – insure property
* S. 9 – compound debts
* S. 11 – spend money on repairs/improvements
* S. 15.5 – appoint investors ensuring due diligence
* S. 22 – vary investment decisions
* S. 24 – maintenance/education of infants

## Control of the Trustee

### CONTROL BY THE SETTLOR

S’s intentions in the settlement will take precedence – S can direct T to do things

### CONTROL BY BENEFICIARIES

* Bs can’t compel a T to exercise, or manner or administration of powers (***Brockbank****)*
* *Sui juris* Bs can call for the trust (***Saunders v Vautier***)
* Bs can’t compel Ts to reveal info about company on whose board T sits (***Butt)***
* Bs CAN compel T to vote the shares directed on a trust, or change articles (***Butt)***

#### Re Brockbank

Facts: There were 2 Ts w/ power to appoint professional T. One was going to retire. Bs pushed to continuing T to appoint a bank as prof T, he refused.

Outcome:

* **Ratio: power of Ts to make trustee appointments is not controllable by Bs (and the court shouldn’t interfere w/ it either)**

#### Butt v Kelsen

Facts: Trusts contained shares in private co. Through control of shares, Ts appointed themselves sole directors of company. B was unhappy w/ mgmt. of co and wanted to see docs which were unavailable to all s/h’s. Ts said as directors had duties to company and other s/h’s – couldn’t disclose.

Outcome:

* Ts who are directors of companies can’t be compelled to provide info flow beyond that available to all s/h’s.
* To hold otherwise, Bs would be able to exploit company secrets
* But..Bs may compel Ts to vote for the shares as directed and change articles of company

Opened up slightly w/ ***Martin Estate*** – BC Courts allow more info to go to Bs – goes w/ philosophy of transparency

### CONTROL BY THE COURTS

Advice/Opinion

* **s. 86 TA** – court preserves administrative role to give advice upon application
  + not to be used to get court to judge legitimate exercise of discretion (*Tempest)*
* **s. 87 TA** – if acting under court’s advice, T is absolved of responsibility/liability, unless direction obtained via fraud/concealment
* T can exercise discretion as properly as he sees fit w/o interference (***Wright***)
  + Court will only intervene in case of bad faith
* Court will intervene in situations of serious deadlock (***Billes, Kordyban)***
* If T is attempting to misuse her power/acting outside trust objectives (***Schipper***) or fails to be even-handed (***Fleming***) court will intervene at behest of Bs

#### Re Wright

Facts: Deadlocked Ts make application

Issue: Can court compel Ts to make a decision?

Outcome:

* Court will only intervene where real and absolute deadlock – ex. 3 want to sell and three retain.
* Here just disagreement on adequacy of price
* Only in case of bad faith or refusal to discharge duties should court step in to control exercise of discretion a testator has reposed in the Ts

#### Re Billes

Fact: Deceased directed annual annuities be paid from capital, income to 23 charities.

Outcome:

* Deceased conferred an absolute power on his executors to convert as well as an absolute power to retain – must be unanimous in either course
* This is serious deadlock, so court can intervene – court ordered sale of shares at advantageous and beneficial time – also ended conflict of interest

#### Kordyban v Kordyban

* Appropriate criteria for when court should use in case of deadlock of Ts who are also Bs
* 1) Court should decide what intention of S/T was – if different, then court should intervene
* 2) generally acting in a way that is “just and equitable”

### OUSTING COURT JURISDICTION

Court will not tolerate an attempt to oust its jurisdiction for public policy reasons

* Clauses that exclude rule of impartiality (***Wynn)***
* Clauses preventing judicial review where T was honest (***Boe***)
* Exculpatory clauses – where negligence (***Poche***)
* Clause that precludes B from accounting (***Jones***)

Ousting jurisdiction re: findings of FACT are ok (***Tuck’s***)

#### Re Tuck’s Settlement Trusts

Facts: Guy anxious that his title would only go to Jewish ppl – appoints Chief Rabbi to make jurisdiction. Is this valid?

Outcome:

* Testator can allow third party to resolve any dispute – mechanism partially limits the court’s jurisdiction
* **Ratio: matter can go to arbitrator, but if bad faith in utilizing this procedure, then court will intervene**

#### Boe v Alexander

* Even the broadest language creating discretion can’t displace jurisdiction of the court to review T’s discretion

#### Re Poche

Facts: Will relieves T of any liability not attributable to her dishonesty or knowing breach. She was grossly negligence.

Issue: is exculpatory clause ousting jurisdiction?

Outcome:

* Yes, will can’t fully exonerate T in the area of gross negligence

# Fiduciary Relationships and the Constructive Trust

**Constructive Trusts**

* CT is a trust imposed by law at the discretion of the court – based in necessity and good conscience (*Soulos)*
* Used by the courts as a vehicle by which the holder of LT becomes required to hold the property beneficially for another
* CT, when applied as a remedy, requires assets upon which it can attach
  + Good conscience (not unjust enrichment) lies at the based of the CT (soulos)
* CT’s confer *in rem* rights on the property – right to recover actual item / priority creditor status / capture any increases in value
* NOTE – CTs do not always have certainty of subject
* Successful claimant obtains equitable interest in the asset post judgment
* CT may also be used outside of trust law as a restitutionary remedy for UE
* Mechanics – all remedial b/c court trying to fix something after outcome of trial
* D has right to use property (has legal title), but has FD to P, who can call for legal title

**Fiduciaries**

* Court split fiduciary relationships into two categories: Fiduciaries per se (FPS) and Ad Hoc fiduciaries (AHF)
* FPS – recognized categories of relationships – until 1970s, then expanded to AHF
* AHF – not in category, but still merits fiduciary label
* SCC sought overarching theory connecting all CT’s – moved to organizing theory of the fiduciary –relationship common to ALL trust and trust-like situations
* Look to the nature of the relationship to assess if fiduciary (***Guerin***)

**When Will a Fiduciary Relationship Arise?**

## Fiduciary Per Se (Institutional CT)

Static set of relationships

* Disloyal T (***Keech***), faithless directors (1***Canaero***), delinquent agent, solicitor/client, overreaching partners, bribers, undue influencers, trustees de son tort, doctor, vendor/purchaser
* Intermeddler in trust (trustees de son tort) – treated as a trustee – may be personally liable for trust assets – CT imposes
* Relevant time to assess relationship is **at time of transaction**, not judgment(***Galambos***)

## Ad Hoc Fiduciary

Relationship doesn’t fit into CL categories, but assessment of relationship leads to fiduciary conclusion

**Dissent in *Frame* later forms law** – “vulnerability” of person where act in discretionary way

1. Undertaking (statutory, express/implied, simple) by one party (***Galambos***) to act in best interests of the other party (***Elder)***
2. Fiduciary has scope for exercise of discretion/power (***Elder***)
3. Fiduciary can unilaterally exercise power that affects the practical/legal interests of the B (***Lac***)
4. One party is vulnerable, or at other party’s discretion (***Guerin***)
   1. Vulnerability is indicative, but not conclusive – can establish AHF if there is power-dependency, one party places trust in expertise of another (***Hodgkinson***)
   2. Vulnerability is clear requirement of AHF (***Soulos***)

#### Guerin v The Queen

Facts: Crown leases Musqueum land to golf course and ignores their wishes for minimum amount of money for lease

Issue: M entitled to money for breach of contract?

Outcome (Dickson):

* Crown was under fiduciary duty to M b/c Royal Proclamation disallows ppl from purchasing land directly from M.
* **Where by statute, or unilateral undertaking, one party has an obligation to act for the benefit of another**
* **Obligation carries discretionary power, which makes empowered party fiduciary**
* **Like negligence, categories of fiduciary should not be considered closed**
* Awarded equitable damages – award for recompense that you would have had had the breach of fiduciary duty not occurred

#### Canaero v O’Malley

Facts: Ds were directors at company, splintered and made own successful company.

Outcome:

* General standards of loyalty, good faith, and avoidance of a conflict of duty and self-interest to which the conduct of a director must conform should be tested in each case
* Factors include: position held, nature of opportunity, ripeness, specificness and relation to it, amount of knowledge possessed, circumstances in which it was obtained, whether special/private, factor of time in continuation of FD, how terminated relationship (resignation, retirement, discharge)

#### Hodgkinson v Sims

* Breach of FD arises where someone relies on guidance of another and other is aware of the reliance may obtain a benefit from the transaction
* Nature of the relationship, not specific category that gives rise to FD
* Not just vulnerability (it’s not essential), issue of power dependency relationships
* Depends on the reasonable expectations of the parties – commercial context
* Shouldn’t focus on power or discretion to harm other

#### Lac Minerals v Corona

Facts: Lac huge co, Corona small co. C discovers gold. C tells L the confidential info for a JV – industry standard that confidential. L buys property out from under C, makes huge $. C Sues for land, claims CT.

**Majority** (Sopinka)– vulnerability essential (adopts Wilson’s 3 criteria from *Frame)* – breach of confidence found – CT applied as remedy (didn’t show vulnerability

**Minority** – vulnerability not essential – damages as remedy

Lamer – sides w/ majority, but voted w/ minority on remedy – applied CT

#### MK v Mh

Facts: Child sues father for breach of FD after molesting her.

Outcome: Yes, breach of FD

* Nature of fiduciary obligations will depend on the facts of the case – not confined to economic interests

#### Sun Indalex Finance v United Steelworkers

Facts: Company went insolvent, tried to get arrangement to allow to borrow money from creditors to arrange finances. Pensioners had interest, which was sidelined by orders.

Outcome:

* As company, under statute, owe duty to employees who are vulnerable
* But by entering agmt, avoided undertaking normally under statute
* Fed statute didn’t give right like provincial one – fed won

#### Galambos v Perez

Facts: Lawyer’s accountant uses her own money into firm to prevent insolvency. Lawyer said she could get her money back w/ interest. She also obtained simple legal services from the lawyer. Breach of FD?

Outcome:

* No – **Ratio – Fundamental to AHF that there be an undertaking by the fiduciary (express or implied) that the fiduciary will act in the best interest of the other party**
* Need to have discretionary power to affect other party’s legal/important interests
* FD duties only imposed on those who have undertaken them

#### Soulos v Korkontzilas (SCC, 1997)

Facts: Real estate agent buys property for himself secretly, buyer wanted the property for a special reason. Remedial CT?

Outcome:

* Cnd courts recognize the availability of CT for wrongful acquisition of property and EU.
* CT imposed where **good conscience** requires it – property wrongfully obtained
* Doesn't need to just be unjust enrichment
* “when property acquired in circumstances where holder of LT may not in good conscience retain BI, equity converts him into a trustee” (Bev quotes Beatty)

#### Alberta v Elder Advocates of Alberta Society

Facts: Old people sue government for elevating subsidizing medical expenses.

Outcome:

* no breach of FD
* Definition of ADF – claimant must show, in addition to vulnerability from relationship:
  + 1) Undertaking from fiduciary to act in best interests of B
  + 2) defined person vulnerable to fiduciary’s control
  + 3) legal or substantial practical interest of the B that stands to be adversely affected by the alleged fiduciary’s discretion of control

## Unjust Enrichment – the Remedial CT

**Criteria for unjust enrichment: (*Pettkus*)**

1. Enrichment
2. Corresponding deprivation
3. Asence of juristic reason to let defendant keep the enrichment

Pettkus – situation of UE to be remedied by CT b/c the couple engaged in common enterprise, he was enriches and she was clearly deprived.

* Must be causal connection between plaintiff’s activities and the acquisition of the property
* Difficult to calculate /determine

Kerr/Seguin : looks at more from restitution point of view rather than trust

* Consider unconscionable situation where court should use money to fix problem
* Has there been payment/benefit w/ no reciprocity?
* Think of CL marriages as family partnerships – resist dueling quantum meruit claims
  + Too hard to calculate (based on proportion)
* Look at it as joint family venture
* Restitutionary remedy is preferred to proprietary in rem right

#### Pettkus v Becker

Facts: Common law immigrants break up, he claims he is absolutely entitled to all of the property b/c it is in his name even though she helped procure it.

* Remedial CT imposed – to correct the state of title
* Found to be unjust enrichment: three requirements – enrichment, corresponding deprivation, absence of any juristic reason for enrichment

#### Kerr v Baranow

Facts: Couple separated after CL marriage of 25 yrs, wife lodges claim for support and share of property on basis of UE and RT.

Outcome:

* CT used to prevent dueling AM
* P must demonstrate causal connection of action of claimant to property
* Treat relationships like a joint family venture to look at the accumulation of wealth

Note – largely irrelevant in BC now due to Family Law Act - now common law relationships recognized

# Purpose Trusts

* Issue of the beneficiary principle (Astor): of one three certainties
* There is no real disposition to a B unlikely or unable to enforce the purpose
* Charitable trusts are an exception to this

## Private Purpose Trusts

Equity rule against private purpose trust – must be of nature that can be executed by the court

* If the only B are purposes and are unascertainable persons, who could initiate proceedings – they are invalid (***Astor’s Settlement)*** – no one to enforce the trust
* if purpose trust fails, RT is imposed – ET returns to transferor
* Failure due to: perpetuities, illegal/against public policy, completion of purpose

### EXCEPTIONS

**Horses , Dogs, Graves and Monuments**

* Trusts with the purposes of caring for horses, dogs, graves and monuments allowed
* Anomalous, permissible breaches of the beneficiary principle
* Graves/monuments – valid if the T is prepared to perform the task
* Courts don’t want to just automatically re-characterize as powers (***In re Endacott***), but may do it where appropriate (***Shaw’s Will Trusts****)*

#### Pettingall v Pettingall

Facts: Executor in will can spend 50 pounds / yr for testator’s black mare.

* Valid b/c residuary legatees can supervise performance of the trust
* Perpetuity issues unlikely to arise w/ domestic animals (don’t live past 21 yrs)

**The “Denley” Rule: Indirect Bs**

* Way to circumvent rule against PPT – target through name Bs
* Purpose trust framed in a way with a defined class of objects – in favour of Bs

#### Re Denley’s Trust Deed

Facts: Land invested in Ts to be used as a sports ground (serving rec purposes)for the employees of a company (identified group of objects).

Outcome:

* Valid – framed for Bs
* **Ratio: where the trust, though expressed as a purpose, is directly/indirectly for the benefit of an individual(s), it is a way around the problem of the beneficiary principle**

#### Keewatin Tribal Council Inc. v Thompson (City)

Facts – Council as trustee for bands as beneficiaries – owned land for residences for first nations students in high school. To avoid tax.

* No problem with a charitable purpose trust (enforced by AG) – similarly, no problem with a non-charitable purpose trust where there are a number of person with standing to enforce it

**Unincorporated Associations**

* Whether it’s characterized as invalid PPT depends on make up of the club (members) and on what terms gift made
* May be to “supervisor for the time being” (***Cocks v Manners***) – valid gift to members of convent as JT’s
* Trust as gift to president/secretary of club – money regulated according to rules of club
* To be valid, care should be taken to prevent construction of gift as a trust as primarily framed for private purpose – instead be for the benefit of members (***Russell, Wood*** – failed b/c of this)

#### Re Recher’s Will Trusts

Facts: estate of testatrix to named anti-vivisection society. Before will executed, society didn’t exist – merged w/ other societies.

Outcome:

* Not valid – gift was to members of name society and was actuall a gift to those members
* W.o that, members no longer bound contractually and gift failed as PPT

#### Leahy v AG for New South Wales

Facts: Stiff wanted to give money to nuns in convent, as an endowment with the purpose of “continuing society and for the furtherance of its work”

Outcome:

* Not for specific group of Bs – intention of T was to establish endowment for present and future nuns
* **If the instrument does not confine the application of the trust to the existing members (ie individual Bs), it will fail as a PPT**

#### Re Lipinski’s Will

Facts: Jewish Assoct for sports for Jewish kids. Had trust w/ fund to set up other local Jewish orgs.

Outcome:

* Gift which specifies a purpose within the powers of the Assc and of which members of the Assc are Bs, should be valid
* Bs are the ones that can enforce it

**Private Purposes as Powers**

* Construe trust as power – T use powers to further objective
* Some provinces have statute to make this happen
* If power not exercised, subject of trust held on RT for S
  + S’s heirs can enforce trust/keep an eye on, can call on court

BC – proposed solution – S appoints enforcer w/ authority to enforce PPTs

## Charitable Purpose Trusts

* Major exception to PPTs
* Certainty of purpose – terms of purpose must be clear (***Chichester***)
* CRA – oversees – tax receipts/relief issued to donors; ensures no tax abuse
* Public Trustee / Office of AG does enforcement
* Charity doesn’t need to be constituted as a trust – can use other legal vehicles (ie incorporated society) – but $ that goes through office held in trust-like fashion

#### Chichester Diocesan Fund v Simpson

Facts: Stiff with will “for such charitable institution or benevolent object” as Ts choose.

Outcome (HOL)

* Too vague and void

**Charitable Purpose:**

* Listed in *Statute of Elizabeth,* 1601
* *Pemsel* grouped purposes into 4 categories: (widely accepted in Cdn law)
  1. Relief of Poverty
  2. Advancement of Education
  3. Advancement of Religion
  4. Other purposes beneficial to the community
* *Native Communications Society of BC v MNR –* example of categories accepted in Canada

**2 part test:**

1. Courts look to see that it fits in one of above categories
2. PLUS needs to satisfy Public Benefit Requirement

**Relief of Poverty**

* Relative concept – not destitute, but for the poor
* Sometimes circumscribed by public benefit criteria – need to look at large group of people
* Can’t be ad-hoc, limited to family, etc.
* *Jones* – page 407
  + Trust for “needy” persons (employees and former employees) of Eaton’s - valid
  + Ok for the charitable purpose to be confined or restricted to Bs residing in an area/ community
* *Planned Parenthood v Toronto* – page 408
  + F: Disseminating info on population control. Argument that people who utilized service were poor people.
  + A: No means test for clients who come in 🡪 rich people could still use
  + H: although it would assist poor, it didn’t qualify.
* Narrow threshold for public benefit

**Advancement of Education**

* Broadly interpreted 🡪 Not just academic, can include technological, crafts, law reports
  + But not just any knowledge is enough for charitable status
* *re Pinion*: trust enabling art education. Atrociously bad art (expert evidence). Purpose of self-promotion and family name. Important to note quality of objects to determine whether it’s beneficial to public. Not a public benefit. –atrociously bad art!
* *Vancouver Society of Immigrant and Visible Minority Women* – page 409
  + SCC – Iacobucci endorsed expansive view of this category
  + Can include informal training, teaching life skills, practical training
  + Must just be geared at training of mind, not just promoting particular point of view
* *Incorporated Council of Law Reporting –* page 410
  + Upheld production of law reports – b/c for legal research/eductation
* Public benefit requirement: *Re Compton* – page 411
  + Invalid b/c primary purpose was to benefit only family members: not actually charitable

**Advancement of Religion**

* Depends on current social attitudes
* *Bourne v Keane* – footnote 88 page 411
  + Idea of religion considerably widened – celebrating mass no longer regarded in law as superstitious practice
* **Wide ambit:**
  + *Thornton v Howe –* Court approved charity for printing writing of woman who thought giving birth to next Messiah. Concluded: foolish ignorant woman. Incoherent words but written to extend influence of Christianity. So upheld. Foolishness isn’t bar to religion.
  + *The Church of the New Faith*
    - Recognized Scientology as religion (boo Tom Cruise!)
    - Two criteria: 1) belief in supernatural being/principle + 2) acceptance of canons of conduct correlated to that belief
  + *Re South Place Ethical Society*
    - Found aginst Ethical Society – didn’t worship in traditional sense – not just study of ethical principles
* **Public benefit:**
  + *Re South Place Ethical Society*
  + *Gilmour v Coats*
    - Trust for $ for Carmelit prioery – enclosed order where nuns never left convent
    - Not for public benefit – only for small group of nuns – too remote
  + *Funnell v Stewart,* Australia – followed in numerous cases
    - 2 criteria for what is religious purpose:
      1. If belief in supernatural being or principle
      2. If acceptance of canons of conduct correlated to that belief
  + Anti-religion/indifferent performing community functions of religion, not valid. freemason cases.

**Other Purposes Beneficial to the Community**

* Huge Category
* Very tied to societal values
  + Proper treatment of animals accepted (modern)
  + Concern for environment (modern)
  + Promotion of agriculture
  + May be for local community – “Bridges, ports, havens, causeways”: public works
    - *Lecavalier v Sussex* – page 418
      * Testator left money to Sussex, NB to use for city - valid
* Disputes when people creating charities to get tax relief – has gone to federal courts
* Cultural relativity through the ages
  + *Vancouver Society of Immigrant and Visible Minority Women*
    - To help women w/ employment (non educational)
    - Iacobucci recognized purposes by way of analogy from preamble to SOE
  + *Re Cotton Trust for Rural Beautification*
    - Concerns for environment recognized
* Limits – *Brewer v McCauley* page 419
  + Testatatrix left estate to “charitable, religious, education offer loan flop back purposes”
  + SCC found void

*Chichester* – charitable purposes for England – too broad/ vague

**Public Benefit Requirement**

* Must address appreciable section of society (not too narrow)
* Must not be numerically negligible, and not linked to each other by relationship to common person like relative or common employer
* *Oppenheim –* Purpose: education of employees. # employees serviced by 110,000 🡪 Held: insufficient – didn’t meet public benefit.
* *Gildmore v Coates –* only 20 nuns. Advanced purpose of religion but didn’t meet public benefit.
* *Neville Estates* – also nuns – valid b/c not excluded from the world
* *Re Scarsbrick –* page 405
  + Trust for “such of my relations” as shall be needy – “relations” found to be broad – any potential relative so valid
* *Jones v T Eaton –* Cdn case. CPT even though beneficiaries only members of Toronto chapter.
* *National Anti-vivisection Society,* UK HL
  + R: must promote community benefit
  + Anti-vicisection doesn’t support wide community benefit 🡪 Some eat lots of meat
* *Everywomen’s Health Centre*

Note – there is a rebuttable presumption that charitable trusts for alleviating poor, advancing education, and religion- that they are *prima facie* seen as benefiting public. They won’t be voided simply b/c S/T has expressed preference in favour of specified individuals (although there is a risk).

**Mixed Charitable and Non-Charitable Purpose**

* ***Section 47 of Law and Equity Act:*** charitable purpose saved
  + Court will give effect to the charitable purpose unless totally non-severable
  + Beneficiary: is the general public
* *AG v Mathieson –* page 420
  + Disaster funds given to some holder o the funds (ex. Mayor, other official) can be valid as charitable gifts in trust

***Other Benefits to Charities***

1. RAP doesn’t apply to beneficiary
   * Initial transfer to trustee must satisfy RAP, but that’s it
   * Charities expected to endure, generate income for long time
2. Cy-Pres
   * If charitable purpose flounders, court sends money to comparable charity
   * Attention paid to settlor/testator’s intent
   * *Canada Trust Company v Ontario Human Rights Commission* – page 422: Colonel Leonard case
     1. Scholarship for white Christians – struck down, but still allowed charitable trust w/o this clause
   * *Re Tacon* – page 424: rule summary
     1. Look at the will, find the paramount objective of T – benefit form of charity
   * *Royal Trust Corp.of Canada v Hospital for Sick Children* – page 425
     1. Money left for “crippled hospital” – no such thing (didn’t exist)
     2. Court looked at intention – applied to related charities in the area