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# Law 451 – Trusts – fall 2014 – Rosalyn chan

**WHAT IS A TRUST?** The transfer of legal title to a trustee and the disposition of equitable title in the same item to a beneficiary. The relationship between T and B is a fiduciary (utmost good faith) one.

* Trusts grew out of the Court of Chancery – equity

**WHERE DO WE SEE TRUSTS?** Pensions, family settlements, environment, tax avoidance, corporate structure, incapacity, purpose trusts, investments, estate administration on death

### The three pillars of trusts

1. Bifurcation of ownership – T holds legal title, and B holds equitable title, which are both freely alienable/disposable
2. B has *in rem* rights to the equitable interest in the property, which means that tracing is an available remedy in which B can still claim the benefits of the property, if fraudulently disposed of to a third party – EXCEPT against a BFPVWN
3. T owes B special obligations due to T’s fiduciary duty to B

A trust is a transfer of property where legal title goes to a T and equitable title goes to B. T holds and administers the property for the sole purpose of benefiting B. B has in rem rights in the equitable interest, which allows her to terminate the interest (subject to conditions), dispose of the interest, or reclaim the actual property in the event of trustee insolvency. T owes B special fiduciary duties that require T to demonstrate the utmost good faith in the administration of the trust property, so as to provide the fullest benefit possible for B.

**PROPERTY RULES:**

* The use/management of property (*utendi*) – T has this
* The enjoyment of all benefits from that property (*fruendi*) – B has this
* The ability to lawfully dispose of, transfer, or destroy property (*disponendi*)
  + Both legal and equitable title are freely alienable

## equitable maxims

|  |  |
| --- | --- |
| ***Equity will not permit a wrong without a remedy*** | Pretty self-explanatory – all about fairness |
| ***Equity follows the law*** | Common law will prevail in a conflict with equity |
| ***Those who seek equity must do equity*** | Clean hands! |
| ***Equity will assist the vigilant, not the tardy*** | Be prompt about airing your grievances |
| ***Equity is equality*** | Courts look to proportionality |
| ***Equity looks to intent, rather than form*** | Substance over form |
| ***Equity will not assist a volunteer*** | No assistance unless there is consideration |
| ***A trust will never fail for want of a trustee*** | Courts will strive to find/appoint someone to be the trustee |

# express trusts

**An express trust is the device of equity that enables a settlor to convey to a transferee/trustee the legal title in the property destined to be held in trust for the purpose of administering it for the benefit of the named beneficiary. Title is split to T and B.**

* Common express trusts are:
  + Property held for those without legal capacity
  + Devised under a will
  + Superannuation/pensions
  + Unit trusts that enable small investors to enhance opportunities by pooling funds and participating in larger investment schemes
  + Charitable purposes
  + Tax avoidance

## CREATING A perfected trust – only way to make a trust effective

1. *Inter vivos* or *per mortis causa*?
   * Trusts on death emerge when the estate falls under the control of the executor who is T for legatees/heirs
2. Do the testator and T have capacity/are they *sui juris*?
3. Expression of intention by settlor to create a trust in favour of a B using a named T who is to receive the identified trust assets
   * **Four forms of dealing:**
     + Personal declaration of trust by settlor – becomes T/automatic constitution and can’t be revoked (***Glynn***)
     + Settlor may appoint a 3rd party T – must be a valid transfer to effect trust (***Milroy***) and must have intention to be immediately and unconditionally bound (***Milroy, Mordo***) – can’t revoke once absolute gift is given (***Ratner***)
     + Contractual agreement: settlor and B agree to appoint a T (business arrangement through a contract, where consideration is usually given)
     + An incomplete or unperfected gift (promise) that is later perfected, if and when title is acquired by the donee (ex: when executor gets legal title) – rule in ***Strong v Bird***: in respect of an imperfect or ineffective form of conveyance that is later perfected – doesn’t apply to a promise, without consideration, to give property at a later date (***Freeland***)
4. Handing over that identified trust asset to the T – **TITLE MUST BE VESTED IN T** such that T has control and administration of the thing (***Milroy***)
   * **Land**: transferred in writing and by registration at the LTO – transferor’s intention to be immediately and unconditionally bound (***Zwicker v Dorey***)
   * **Securities**: transferred only by registration in corporation records (***BCA* S111**)
   * **Money**: transfers upon change of possession
   * **Chattels** (chose in possession): transfers upon change of possession
   * **Debt** (chose in action): transfers by assignment
     + ***Trustee* *Act*, s29**: property will vest if the document/deed says it vests in them as joint tenants (if more than one T), without a conveyance or assignment
     + Delivery is essential to validity – must be clear evidence that grantor intended to part with the gifts, and can’t become a trust if it violates wills legislation (***Carson v Wilson***)

An express trust can arise through an *inter vivos* transfer (***Mordo***) or *per mortis causa*(***Di Michele***). ***Elliot*** sets out the criteria to create an express trust: S and T must be sui juris, the three certainties, vesting of the trust property in T, and compliance with the formalities required. A settlor can create an express trust through a personal declaration to hold the property for B and cannot revoke it once it is automatically constituted upon declaration (***Glynn***). The settlor can also appoint a third party T – to effect this, there must be a valid transfer (***Milroy***), and the settlor must have the intention to be immediately and unconditionally bound by the trust (***Milroy, Mordo***). Again, the settlor cannot revoke the trust property once the absolute gift is given (***Ratner***).The settlor and B may contract together to appoint a T, where consideration is usually given. If an incomplete or unperfected gift is later perfected, the law will uphold the transfer and the trust (***Strong***). However, the rule in ***Strong v Bird*** does not apply to a promise, without consideration, to give property at a later date (***Freeland***).As long as the testator does everything required to transfer the property and perfect the gift that they possibly can, the transfer can still pass beneficial title to B – what is important is the *de facto* loss of control over the thing (***Re Rose***). Any transfer attempting to execute an express trust cannot, however, violate wills legislation (***Carson***).

## Personal declaration trust

* Bs don’t need to know about the trust to benefit – intention and holding the asset is all that matters – simple declaration is enough to create the trust (***Glynn v Commissioner of Taxation*** – Australia – dad bought shares issued to him to be held on trust for sons, but company register only had his name and he collected dividends without the sons ever knowing about the trust – taxman claimed it was not a trust, but a life estate – transfer was the valid declaration of the trust with the intention to be legally and unconditionally bound – retention of dividends didn’t negate the declaration, dad may have been in breach of trust)

### ***elliot v elliot estate*** – no actual transfer required to perfect trust, mere declaration is sufficient to execute gift

Facts: Jean Elliott left out her disabled daughter Babs and set up an arrangement whereby her other kids would contribute their inheritance to a trust fund for her.

Issue: Is the separate fund part of the estate or not?

Holding: Babs is beneficially entitled to the trust fund (GIC) because JE declared herself the T and therefore, no transfer was needed as she was already the legal owner.

## Third party as T

* Donation is imperfect or incomplete where there is only the stated promise to make the gift – intention to give without execution of intention by transfer doesn’t create an enforceable express trust – ***equity will not assist a volunteer***
  + Effective conveyance/delivery depends on the rules surrounding the subject of the transfer **(SEE ABOVE [4])**

### ***milroy v lord*** – legal title must be transferred/vested to complete the trust, equity will not perfect an imperfect gift at law

Facts: Settlor created a trust for Eleanor, who married Milroy. Lord was the trustee for the 50 shares, transfer of which requires registration, but the settlor didn’t do this. Lord also had power of attorney, so he administered the arrangement nonetheless.

Issue: Upon the settlor’s death, did Lord hold legal title for the trust property in favour of Eleanor, the B, or as executor in favour of the settlor’s heirs?

Holding: No

Ratio: You have to follow the rules of conveyance for the thing to be transferred to create an effective trust.

#### ***Ratner v LH Construction*** – example of *milroy v lord*

Facts: Son transferred shares to mother because it suited tax planning at that time, with the understanding that, at some point in the future, she would transfer the shares back to him. She used the income from the shares for her own medical shares and eventually the son convinced her to execute documents gifting shares back to him.

Holding: Verbal understand of the regifting was found to be unlawful restraint – regifting of shares in writing was not adequate to complete the gift. The shares actually had to be conveyed by entering the name of the transferee into the Register of Shares of the company.

### ***Re rose*** – but! where the donor has done all they can do to divest ownership and execute transfer, equity will deem conveyance substantially satisfied

Facts: Man transfers shares in company to wife and son for purpose of creating trust – deceased executed the transfer, but the company didn’t register the transfer until 3 months later.

Issue: When was the transfer of shares made effective?

Ratio: Common law rule that for an effective gift to be complete, it is *de facto* loss of control over the thing that is really the matter at stake. Transferor must do everything personally/legally possible in the ordinary course of business for this rule to apply.

## contractual agreement

* Contractual covenants with consideration are outside of the volunteer/gift category – title to property for B becomes enforceable through specific performance of the contract – promisor is declared to be a constructive T holding title for promisee/B
* Complicated where B isn’t privy to the contract
* Trust becomes effective when it can be shown that the settlor is legally obligated and is immediately and unconditionally bound, where B can enforce it – if settlor is bound under enforceable contract to deliver contract, under rules of equity – title is taken to have vested

## perfecting an imperfect gift later on by transfer of title

### ***Strong v Bird*** – if *inter* *vivos* gift imperfect solely due to incomplete transfer to donee, gift will be perfected if/when donee gets title in his capacity as executor

* Applies to both real and personal property
* Where an incomplete *inter vivos* gift is made and the donor appoints the would-be recipient as executor of the estate, the vesting of the property in the donee as executor may be treated as completion of the gift

Facts: Stepmom loans money to Bird in exchange for lower rent and later forgives debt orally, without consideration. Upon stepmom’s death, Bird is named executor of her estate. Legal title vests in Bird – he is now both the creditor and debtor of that same loan. Stepmom’s intention was for Bird to be the recipient.

Issue: Is the debt forgiven, given that the gift was not perfected during the life of the settlor?

Holding: Yes.

Analysis: It was sufficiently clear that the intention of the stepmom was that she voluntarily continued to pay the full rent – that Bird was the trustee was sufficient for the property to be considered vested. It would be ridiculous for the executor/T to sue himself to recover the debt (surprising given restrictions re: self-dealing and conflicts of interest)

#### ***Hilliard v Lostchuk*** – example of *strong v bird*

Facts: Mom sought to give son sub-divided parcel of land – pursued zoning to allow this, but died before it was completed. Son was appointed executor of her estate and the other heirs claimed the gift was imperfect.

Holding: Requires evidence of **continued intention** – here, the ongoing pursuit of the zoning application sufficed and equity will perfect the gift upon the transfer to the son in his capacity as executor.

# The three certainties of an express/implied trust – have these or trust will be void (*Tozer*)

* T will continue to hold legal title, but on an **automatic resulting trust** in favour of the settlor: ***IRC v Broadway Cottages***

## certainty of intention/words – it must be clear the intention was to create a trust

* There must be an obvious intention that T is placed under imperative obligation to hold the property for the benefit of another
* **TEST:** IS THERE A CERTAIN AND IMMEDIATE INTENTION TO CREATE A TRUST?
  + Is it a gift or a trust?
  + The word “trust” doesn’t need to be used to establish a trust: ***Re Kayford Ltd*** – question is whether in substance a sufficient intention to create a trust has been manifested
* Using imperative language (ex: must) is very useful in discerning the intention, precatory language expressing hope that transferee will use property for another is generally insufficient to create a trust (***Kensington***)
* Equity looks to substance, not the form – if precatory language (I wish, I hope, I ask) is used, it will be construed in context of the whole document (***Hayman***) – even if transfer document doesn’t indicate a trust, sufficient extrinsic evidence may demonstrate intention to create a trust (***Bradshaw, Antle***)

THERE IS A PRESUMPTION IN FAVOUR OF A GIFT WITH PRECATORY “TRUSTS”, especially in family-type trusts.

* An intention to benefit someone other than the transferee is too general for a trust to be created – must be an intention to impose an obligation on the transferee

### ***hayman v nicoll*** – words must convey more than mere wish, must be evidence (words/conduct) to bind t to serious obligations

Facts: Lydia Nicoll left money to daughter Ina, who then died 3 years later. Residuary beneficiaries of Lydia’s estate said that Ina had the property in trust rather than a gift. They argued it should now go to them.

Issue: Was the words “I gift money to my daughter in full confidence that she will hold it in accordance with the wishes I have expressed to her” enough to impose a trust on Ina?

Holding: At NSCoA – was a trust. At SCC – the phrase “in full confidence” no longer signalled a trust – no trust!

### ***royal bank v eastern trust co*** – intention to create a trust must be indicated with reasonable certainty or inferred with **reasonable** **certainty** from the context

Facts: Crossman owed money to RBC and assigned the rental income from the property to the bank. C later sold the property and the agreement included the provision: “Stetson is to hold the deed of the property until C raises a mortgage on the property to repay taxes and insurance premiums, also the judgment and indebtedness at the bank”.

Holding: How you pursue your rights in relation to a potential trust is important – the Bank sued *in personam* for a garnishment order on the rent income. This combined with other conduct was enough to show that it wasn’t a trust as the Bank didn’t act in a manner that allowed it to be characterized as a B.

## Certainty of subject matter – certainty as to what is vested in the trustee

* Anything recognized by law as property can form the subject matter as long as it is a thing of value that is legally capable of transfer (ex: right to salary can’t be a trust because it’s not transferable)
* TWO PRONGED TEST FOR CERTAINTY: Both TYPE OF PROPERTY and the AMOUNT/VALUE of the beneficial interest must be identified in sufficient detail AT THE TIME the trust is created: ***Beardmore*** – rationale is that because of the onerous responsibilities of T, they must know what they’re dealing with exactly in order to give effect to the settlor’s intentions
  + Can’t have a wait and see approach to subject matter
* Ascertained = fixed in amount (ex: money) OR a specified piece of property (ex: Z car)
* These must be described with **sufficient exactness** to meet the criterion for certainty, but courts will lean towards finding certainty: ***Beardmore***

HOW TRUSTS MAY FAIL FOR UNCERTAINTY OF SUBJECT MATTER:

* Semantic uncertainty (ex: “reasonable income” – wtf does this even mean?)
  + The trust will also fail if the trust property is certain, but the beneficial interest is not: ***Sprange v Barnard*** (ex: A transfers 10 shares in ABC to T in trust, to provide some shares to B1 and the remainder to B2) – T will hold trust for settlor – resulting trust!
* Evidential uncertainty – no means of adducing evidence for ascertaining – describes how to ascertain in deed, but the method is basically impossible to apply or implement

### ***Re beardmore trusts*** – trust will fail if property is not identified with sufficient clarity at the date of the trust – t will hold legal and beneficial title of property conveyed to him

Facts: Separation agreement required husband to create a trust for children. The drafted deed states, “Transfer 3/5 of my net estate to my kids. The transfer will not take place until I die.” Pops then died.

Issue: Was the subject matter sufficiently certain?

Holding: No – subject matter was unclear, wtf is 3/5 of net estate? Not legally ascertainable! Can’t have a wait and see approach, and here, they were waiting to see how much was left once the dad died. Also didn’t follow *Wills Act* formalities.

Note: 3/5 of the RESIDUE of my estate might have been okay. Residue would have clarified that it’s everything that’s left.

### ***Sprange v barnard*** – beneficial interests must be certain or else resulting trust

Facts: “I desire as my last will and testament, I will to my husband $300, stocks, etc; all that is remaining in stock that he doesn’t have use for to be equally divided between my brothers and sisters.”

Issue: Is there certainty of subject matter for what is to be held on trust for her siblings?

Holding: No – too uncertain to make an effective trusts as the property isn’t sufficiently identifiable by “remaining part of what is left” – husband got legal and beneficial title OF $300 annuity.

Notes: IS THIS REALLY A GOOD REASON TO INVALIDATE THE TRUST? It would be easy enough to see how much of the annuity remains after T/husband’s death. Trusts of income from property are also not ascertainable, though they can be valid.

#### ***re golay*** – “reasonable income” is sufficiently exact – the court can objectively determine this amount

Facts: executors had been directed to let Bossy enjoy one of his flats during her lifetime and receive a reasonable income from his other properties.

Issue: Is reasonable income to uncertain to constitute a trust?

Holding: Not uncertain as long as the settlor has given sufficient indication of his intention to provide an effective determinant of what he intends so that the court can give effect to it. Reasonable income was meant to be an objective measurement. Courts are generally reticent to void a trust based on subject uncertainty alone.

#### ***institute of the public service of canada v canada (ag)***

Facts: Breach of trust of $28B in fed’s pension plan commitments was alleged. Obligation to pay pension was not sourced from a separately create trust fund and the accounts which explained employee entitlement to pension benefits weren’t attributable to a tangible fund with assets to which the employees had equitable interests or property.

Holding: No property/trust assets were involved.

#### Floating trusts – problematic

* Issue is that it is a suspended trust in which a settlor transfer money to T on terms that T may use as much of it as he wants during his lifetime, but upon death, must leave the balance to B.
* Trust property is uncertain and could be used to circumvent wills legislation.

## certainty of objects – gotta be sure who the beneficiaries are – NAMED, DESCRIBED OR MEMBER OF A CLASS

* Is at least one B a legal or natural person?
* Are there signalling words?
* Is it a fixed trust, trust power, or *power* *simpliciter*?

**Fixed Trust – NO DISCRETION:** settlor sets the Bs, as well as the income/benefits they are to receive from T. Objects must be identified by name or if there is more than one, a class description should be precise enough to enable each member to be listed by name. TEST: must be able to draw a complete list of all Bs: ***IRC v Broadway Cottages Trust***

**Trust Power – MANDATORY DISTRIBUTION, DISCRETION TO WHO:** trustee is given a discretion to choose from the class of Bs stated by the settlor to whom in the class he should distribute income generated from the trust. TEST: individual ascertainability OR is/is not: ***Baden No 1***

* Whether the language is clear enough that it can be said of any given individual presented as a B that he is or is not a member of that class
* Whether the range of objects is so hopelessly wide that the trust is administratively unworkable (ex: residents of Whistler)

***Power Simpliciter* – DISCRETION FOR DISTRIBUTION AND TO WHO:** TEST: individual ascertainability: ***Re Gesyetner’s Settlement***. Potential Bs have no interest in the trust until selected. T must make selection on rational and defensible grounds

* Can’t compel donee of power of appointment to act: ***Re Manistry’s Settlement***

**Power of appointment:** a third party may be given the power to choose to whom the trustee will give the funds to amongst the group of people.

* Could have a trust with all three aspects attributed to different pieces of trust property
* **POWER**: authority of discretion to dispose of property that is not his
* **Trust to appoint** – the T must select a B (stricter test), **power to appoint** – T MAY select a B.
* A gift-over in a trust document suggests that the settlor’s intention was to create a power – implies that settlor contemplated an appointment would never be made and the power was clearly intended only to consider appointing a beneficiary from the class to get the trust income
* COURT WILL STRIVE TO FIND CERTAINTY: ***Re Baden’s (No 2)*** – object description that leads to a category of potential Bs of whom the answer to whether they meet the class description or not is “don’t know” is not allowed
  + “my relatives” was valid as the group could be restricted to “next of kin” – legally defined class

Types of uncertainties:

* **Conceptual uncertainty:** words used by the settlor are inexact, making it unclear who was intended to have the equitable estate in the trust
* **Evidential uncertainty/administrative unworkability:** definition of the group/class of potential Bs is clear, but there is insufficient factual info to apply the settlor’s description to those who may fall within the defined group – would make sense to render a trust power invalid, but not a power *simpliciter*: ***Re Hay’s Settlement Trusts***
* IF TRUST INVALID for uncertainty – resulting trust, unless there’s a gift-over, then that person gets both/full title

Types of powers:

* **General power**: donee can appoint anyone including himself
* **Special power:** donee can appoint only persons in or from a named, specified class of objects (***Re Gulbenkian’s Settlements***)
* **Intermediate power**: donee can appoint anyone at all, except a person/class proscribed by the donor in the instrument (*Re Manistry’s Settlement, Re Hay’s Settlement Trusts*)

Certainty is necessary in identification of trusts objects because B enforces T’s duty to properly administer the trust (***Century Services***). The settlor can grant three different things to T: a fixed trust, a trust power, or power simpliciter. If T is to operate under a fixed trust, she has no discretion and must distribute the trust property to a defined B or class of Bs. Under a fixed trust, the certainty of objects is determined by whether T can draw up a complete list of any possible B (***Broadway Cottages***). If T has a trust power, she must distribute the property, but has discretion to choose the object/B(s) from a defined class. The test for certainty of objects for trust powers is whether T can say if the potential B is or is not part of the defined class (***Manistry’s***). For power simpliciters, T need only consider from time to time whether to distribute property to a discretionary B (***Manistry’s***). A power simpliciter allows T to distribute the property, but it is not a mandatory requirement of the settlement. With each type of instruction, the settlement must be conceptually clear to ascertain the settlor’s intentions so that they are sufficiently understandable (***Baden 1***). For a fixed trust, evidential certainty means that the list of objects cannot be so hopelessly wide so as to create administrative unworkability (***Baden 1***). Trust powers share the same characterization for evidential certainty, but because the trust power is discretionary as to who T can distribute to, it is qualified. ***Baden 2*** outlines three different approaches to the issue: Stamp stated that the class description must be sufficiently clear to determine whether any given potential B is or is not part of the class, Sachs held that if a potential B is uncertain under that is/is not test, they cannot be a B, and Megaw’s judgment was similar to Sachs, but added that if there are too many individuals who could be ruled out under that for uncertainty, the trust itself would be entirely void. In the event of a power simpliciter, there is not concept of evidential uncertainty because the entire power is discretionary, from whether to distribute to who to distribute to if T so chooses (***Hay’s***). However, T still had a fiduciary duty to properly inform himself regarding the options under the trust to properly exercise the administration of it and the exercise of the power conferred on him (***Hill***).

### ***re manisty’s settlement*** – power to appoint b not uncertain just because its scope is wide

Facts: Argued that an intermediate power of appointment in a trust settlement was invalid for lack of certainty (“to anyone in the world other than the settlor, his wife, any person or corporation who added property to the settlement and the wife of any such person”). Trustee wanted to add certain people to the class of beneficiaries and the others challenged this appointment.

Holding: Can’t deem a power to be too uncertain merely because its scope is too wide

### ***re hay’s settlement***

* Discretionary trust may be invalidated because of evidential uncertainty rendering the trust administratively unworkable – this will rarely, if ever, happen with a trust containing a power of appointment

# formalities in creating a trust – must be followed for trust to be valid

* Equity will look to intent rather than form!

The law imposes formal requirements to enforce the transfer from settlor to T. Formalities are put in place to protect the B’s in rem right in the trust property (***McCormick***). In an inter vivos settlement, the type of interest determines the formality required. The legal transfer of title from the settlor to T must be written, as per the ***Statute of Frauds*** and **s59*****Law and Equity Act***, but the equitable disposition to B need not be written. If B wishes to assign her equitable interest, she must give written notice to T (***S36 Law and Equity Act***). For gifts per mortis causa, ***WESA*** imposes a series of requirements: a valid will must be written (**S3**), it must be signed by the testator and witnessed by two sui juris adults that are not Bs (**S4**), and the testator must be 16 years or older (**S36**). Any trust must comply with legislation to be considered valid.

## *inter vivos* transfer of trust property – legal title in writing, equitable not needed

* **LAND INTERESTS:** legal interest must be transferred IN WRITING (***Statute of Frauds,* S59 *Law and Equity Act***), equitable interests DO NOT need to be transferred in writing in BC (**S59 *Law and Equity Act***).
  + **S36 *Law and Equity Act*** – absolute assignments of debt and chose in action (right to sue) must be written and notice must be given to T

## per causa mortis gifts – gifts via a will – ***wesa***

* Must comply with ***WESA*** in order to avoid intestacy
  + **S3:**the will must be written
  + **S4:** the will must be signed and witnessed by two people not receiving a gift
  + **S36:** you must be 16 or older to make a valid will
* Even if the settlor reserves the power to collapse the trust, it doesn’t mean the trust is subverting ***WESA***

### EXCEPTIONS TO WILLS FORMALITIES – **SECRET TRUSTS**

* Not as much significance in BC due to remedial powers give to courts by ***WESA***, as well as the need for secret arrangements diminishing over the years with divorce, common law, bastard children, etc, becoming more acceptable
* Will has no mention of trust or Bs – the named B and trust was communicated to and agreed upon between T and the testator prior to death – the “beneficiary” is actually the T in what looks like an out-and-out gift
* Requirements:
  + Testator must intend for the named B-actual-T to hold legacy in trust for real B: ***Ottaway v Norman***
  + Testator must communicate to named B-actual-T this intention prior to death: ***McCormick v Grogan***
    - If communication doesn’t happen before death, B-actual-T keeps property for himself
  + Named b-B-actual-T must accept or acquiesce to the proposal: ***Re Boyes***
  + If there is no will, a secret trust operates on the reliance that the B-actual-T has assured testator that he’ll use inheritance for secret B
  + If secret trust fails, **S59 *WESA*** gives the court broad discretion to give effect to the testator’s intent
* If T dies before the testator, trust fails, since there is no mention of the trust on the face of the will, but actual B dies before testator, still has an effective interest in the property (***Gardner***)

#### ***Ottaway v norman*** – secret trust still subject to three certainties, even if secret trust requirements are met

Facts: Father left house, money and ½ residue of his estate to common law spouse, with a secret trust for his son. Spouse agreed to be “primary donee”, but in her will, she left ½ of her estate to the son (P) and ½ to defendant.

Issue: Did she agree to hold the property for the benefit of the son?

Holding: There was valid intention, acceptance, and communication of a secret trust. However, while court granted the son the house, it didn’t grant him interest in the money (left in her estate). Uncertainty of subjects, unclear whether “everything” was to be held in the trust, or just the house.

#### ***McCormick v grogan*** – instructions must be communicated before death to allow b-actual-t to accept – must bind the conscience of the donee prior to death

Facts: Testator left estate to Grogan. On deathbed, told Grogan that his will/letter was in his desk. The letter named various intended beneficiaries/gifts. “I leave it entirely in your own good judgement to do as you think I would, if living, and as the parties are deserving.” The intended beneficiary sues.

Holding: If the will contains a gift, which appears absolute, the court requires clear evidence to assume the testator intended otherwise.

Note: If you put instructions in sealed envelope and ask legatee to open envelope only after death, it is likely okay so long as legatee accepts those instructions prior to death of donor. Must show that legatee accepted order, and that testator believed the trust would be carried out.

#### ***Re Boyes*** – named b-actual-t must accept/acquiesce to settlor’s proposal – if b didn’t promise to act as t, take beneficial title. if b promises, but doesn’t know real b, resulting trust.

Facts: Testator left property to his solicitor “absolutely”; solicitor had drafted the will, appointed as trustee to provide for a woman and child the testator did not want to mention in the will. Testator failed to give timely communication of the trust (never mailed letters).

Holding: Instructions were never communication, therefore the secret trust is invalid. The solicitor held the property as trustee for “next of kin” as per intestacy rules.

### EXCEPTIONS TO WILLS FORMALITIES – **half-SECRET TRUSTS**

Trust is written in the will, but Bs are not named in the will -

* Requirements:
  + Before will is made, testator must tell B-actual-T that he is to hold property on trust for the real B: ***Re Keen***
  + Before the will is made, testator must tell B-actual-T the identity of the real B: ***Blackwell v Blackwell***
  + The B-actual-T must indicate his acceptance before or at the time the will is made
* Terms of the will could be established orally despite requirement of writing to name heirs – removes this from Wills law into Trusts law
* The beneficial interest vests at the time the ½ secret trust is created: ***In Re Gardener***

#### ***Blackwell v Blackwell*** – parole evidence allowed to identify bs in will, so long as testator ids bs before will is executed

Facts: Disposition in will “for purposes indicated by me to them… to such persons indicated by me as they see fit”. Before the will is drafter, 3 people agree to hold legacy on trust for lady and her child, who testator does not want named in the will.

Holding: Gift was made on trust, but no beneficiaries specified – Court holds that the trust was fully communicated to B-actual-Ts at the time of will’s execution. Parole evidence is allowed to enable proof of the identity of the B in the will – this is allowed because the evidence **does not serve to vary the will**, it simply gives effect to the testator’s wishes.

#### ***In Re Keen*** – instructions and id of b must be told to t before will is made

Facts: Disposition of a will: “to be held upon trust, disposed by legatee among such persons as may be notified by me to them during my lifetime.” Testator later sealed envelope and gave it to the legatee to undertake the trust.

Issue: Did the sealed envelope constitute “communication” regarding the identities of Bs?

Holding: NOOOOPE. Court held because words in will seemed to refer only to something hypothetical, something testator may choose to do, trust for persons named in envelope invalid.

Note: Would probably be okay if testator gave trustee an envelope not to be opened until testator’s death if T knows envelope contains terms of a secret trust and he agreed to carry it out.

#### ***In re rees*** – t of ½ secret trust can’t be a b under that trust if it would heighten the risk of fraud to intolerable levels

Facts: A will was drafted for the testator by the solicitor and stated that the solicitor and a friend were to take the entire estate in trust for certain Bs in a ½ secret trust and the remainder went to solicitor and friend, the Ts, and therefore, also Bs. The estate was very valuable, and there was lots left over.

Holding: The court refused to allow the solicitor to keep the residue. He was the one who drafted the will and is in charge of distribution and what would be the “residue” – chance of fraud is too great.

Despite formality requirements outline in wills legislation, a testator may circumvent the law through creating a secret or half secret trust. The importance of these in society has lessen over the years as tolerance for children born out of wedlock and extra-marital relationships has increased – these devices allow the court to honor the testator’s true intentions. A secret trust occurs when the named B is actually to hold the property on trust for an unnamed B. Several things must occur for a secret trust to be effective: the testator must intend the named B to hold the trust assets for the unnamed B as a T (***Ottaway, Champoise***), he must communicate during his lifetime these wishes to the named B, and the named B must agree. If the named B does not learn the secret B’s identity until after the testator dies, the named B will only hold a resulting trust for the testator’s estate (***Boyes***). These criteria need to be met during the testator’s lifetime. The criteria for half-secret trusts is largely the same, but the timing is off – the requirements must be met BEFORE the will is made (***Blackwell***). In the event that one of these types of trusts fail, the court has inherent jurisdiction to vary a will to give effect to the testator’s clear intention (**S59 *WESA***).

## rectification of a will – eroding need for secret trusts

* **S59 *WESA*** – Court has wide powers to rectify a will due to error from accidental slip or omission, a misunderstanding of the will-maker’s instruction, a failure to carry out the will-maker’s instructions – can fix a will to carry out intention!
* Social norms have changed in more tolerance towards bastard kids and affairs

## revocation of the express trust by the settlor

* A settlor cannot revoke the trust once the property has vested in the T as he is out of the picture once it vests: ***Bill v Cureton, Nolan v Kerry (Canada) Inc***
* A settlor can’t enforce the trust, unless he is a B and does so in that capacity: ***Atco Lumber Ltd v Leech***
* A settlor can include reservation of powers in the express trust for amendment or revocation of this trust – without this, B can terminate trust under rule in ***Saunders v Vautier***.
  + A settlor can reserve whatever right they want, but they have to reserve it and at the time the trust is create: ***Schmidt v Air Products of Canada Ltd*** – reserved rights must be very specific: ***Metropolitan Toronto Pension Plan (Trustees of) v Toronto (City)***

### ***Bill v cureton*** – once trust is executed, settlor can’t undo it

Facts: Settlor gives assets to T for benefit of “husband and children” and the trust was perfected. Settlor never ended up getting married or having children and wanted to undo the trust.

Holding: Too bad – can’t undo the trust and have the money now. If she died without a husband or children, trust assets would revert back to her estate. The interests of her potential husband or children have to be taken into account in her lifetime.

# resulting/implied trusts – t holds trust assets for the Settlor

This is based on the cultural assumption that people just generally don’t give things away for free, so while legal title has been give to T, the grantor is still beneficially entitled to the conveyed thing. Any property a man doesn’t effectually dispose of remains his own: ***Re Vandervell’s Trusts Ltd (No 2)***.

* Presumed Resulting Trusts and Automatic Resulting Trusts: Both categories of resulting trusts are based on the transferor and transferee having a supposed/implied common intention and are both rebuttable!
* A third category had been suggested, but ***Kerr v Baranow*** rejected common intention resulting trusts as part of Canadian law – Canadian approach is to use unjust enrichment in the form of constructive trusts to balance property inequities: ***Pettkus v Becker***
* Presumed resulting trusts exist to avoid unjust enrichment of the gratuitous transferee, but ***Westdeutsche Landesban Girozentrale v Islington London Borough Council*** said unjust enrichment is too wide a framework and unsound policy to use this as the basis for resulting trusts

An automatic resulting trust will arise in four scenarios. If the trust is void for uncertainty of intent, subject, or object matter, or if there was inadequate consideration (***Ames***), the property becomes a resulting trust. “T” will hold legal title, but the transferor retains equitable title, rather than having it pass to the intended B (***Broadway Cottages***). If legal title is transferred to T without full disposal of the equitable interest, the remaining equitable interest is held on resulting trust for the transferor (***West***). Pension surplus may fall under this category, depending on the type of pension plan. A defined benefit pension surplus is held on resulting trust for the employer, but a defined contribution plan does not create a surplus. Employees under a defined contribution plan own the excesss funds, which disbars the employer from any equitable interest in them (***Schmidt***). When property, such as a loan, is transferred subject to a specific purpose, the law will imply a resulting trust in favour of the transferor/lender, who retains a right of reverter (***Quistclose***). The loan for a specific purpose gives rise to a fiduciary duty on the part of the borrower (***Gibert***), who does not obtain beneficial interest in the property (***Twinsectra***). Because the lender never transfers equitable title in the property, he is a preferred creditor in the event of the borrower declaring bankruptcy (***Westar***). The specific purpose and segregation of the money to further this purpose must be a mandatory requirement of the loan (***Giles***). Quistclose trusts may also be imposed in scenarios outside of loans to prevent an injustice (***Newmarket Plaza***). An automatic resulting trust will arise when there are surplus funds after the trust purpose has been achieved. If it is possible to track the lenders, they can reclaim their money on the basis of a resulting trust (***Red Cross***). In the event that there are many donors of small amounts, T may pay the money to the court to enable to donors to come and claim it (***Gillingham***). In ***West Sussex***, the court held that surplus from large donations are held for the donor on resulting trust, money from collection boxes is *bona vacantia* and goes to the Crown, and money collected from street entertainment is residue belonging to the society because the donor was paying for a contract of entertainment. In the event that the society disbands, the surplus is to be distributed according to club rules, but if no such rules exist, the remaining members will received the surplus equally (***Hanchett-Stamford***).

## Automatic resulting trusts – surplus of assets from a failed or partially fulfilled express trust

### transfer of legal title to trustee turns out to be void – failed on 1 or more certainties

* ***IRC v Broadway Cottages Trust*** – wasn’t possible to draw up complete list of Bs – trust failed and T held legal title on resulting trust for settlor
* ***Re Ames Settlement*** – transfer of settlor’s estate to T under void marriage settlement held to be a resulting trust

### transfer of legal title to a t without disposing fully of the equitable interest in it – fills in the gap of equitble title since not all of it was given away

#### ***Re West*** – where the disposition is not an absolute gift, t holds surplus on resulting trust for settlor/’s estate

Facts: Testatrix left property in trust for sale to pay debts, funeral expenses, legacies, etc. Ts performed as directed and tried to claim the surplus as their own.

Holding: Ts don’t get equitable title of surplus unless it has been specifically disposed to them to hold for themselves individually and beneficially – testatrix/heirs/next-of-kin gets the surplus.

#### ***Re Foord*** – if disposition is an absolute gift, t may keep surplus of equitable interest

Facts: Disposition in a will where an amount was given to his sister to hold and pay annuity to his wife and there was a surplus leftover.

Issue: Does the sister hold the surplus beneficially or is she the T for next-of-kin?

Holding: Sister got the property as an absolute gift (not only in trust), so she gets the surplus beneficially and legally.

#### ***Schmidt v Air Products Canada Ltd*** – automatic resulting trust requires an express trust initially – assets will be treated differently depending on the structure of the transfer scheme

Facts: Two companies (SRCL and CE) merged with AP, which then dissolved and had a $9M surplus in a combined pension plan. The company claimed the surplus was held in an automatic resulting trust for it and the Bs claimed the surplus was theirs.

Holding: Court held that the surplus was to be based on each of the original plans because the surplus was attributable to each original plan. CE’s play was created as a trust, and as such, no gap in equitable title and the “surplus” has always belonged to the beneficiaries, but SRCL’s plan was created under contract and so the surplus reverted back to the company.

### 1) transfer of property to another 2) with a specific limitation 3) which has not occurred – quistclose trust

* Usually arises in the context of a loan – if the borrower takes a loan in a specific way and becomes insolvent, the loan goes back to the lender, protecting it form other creditors

#### ***Barclays bank ltd v quistclose investments ltd*** – by placing a condition on the loan, lender has the right of reverter equitable interest to the money

Facts: RB borrowed money subject to a condition. Q paid RR the money in an account at BB, which BB knew was opened just for the loan. When RR went into receivership, before completing the condition, BB claimed it could use the money in the account to pay overdraft fees.

Issue: Was the money to fall into the general estate of RB to pay off creditors, or does it revert back to Q?

Holding: BB couldn’t use it because it was held on an automatic resulting trust for Q – the loan never became part of RR’s general property and so, was easily identifiable by Q. When the borrower fails to fulfill his primary duty (purpose of loan), the borrower holds the property on resulting trust (secondary duty).

#### ***Twinsectra ltd v yardley*** – Quistclose trusts have the ability to grant the lender *in rem* relief as the specific purpose loan creates a default trust

Facts: Y took a loan from T for the purpose of acquiring property. T would only give the loan if backed by a solicitor’s guarantee – Y’s solicitor didn’t want to do it so another one did. The loan was given to the solicitor who promised to only release it to his client for use in purchasing a property. The solicitor released it to Y unconditionally and Y used it for other things and the solicitor went bankrupt. T sues Y on the basis of a quistclose trust.

Holding: The threshold question is whether the parties intended the money to be at the free disposal of the recipient. Three stages of a quistclose trust: 1) when money is advanced for a purpose, lender as equitable right to see it applied only for that purpose, 2) once the money has been applied for that purpose, the lender becomes an ordinary creditor, 3) if the purpose is not carried out, look to the intentions of the parties from the circumstances and the terms of their agreement.

#### ***Re Westar Mining Ltd*** – accepted *Quistclose* analysis into canadian law – court will attach importance to evidence of specific purpose and requirement that funds receive separate treatement helps this purpose

Facts: JV coalmine: W owned 80% and P owned 20%. W also held position as the manager of the mine – to operate, he made occasional cash calls and P&W deposited requisite funds to a special JV account. W went bankrupt and suppliers/employees of the mine said the funds in the account were an express purpose trust for them.

Holding: JV agreement provided that W had two capacities: owner and manager, and received JV funds as manager. This was evidence of mutual intent that money in the JV account was not property of W – the Bank was aware of the special purpose of the JV account and exempted it from monthly sweeps of W’s accounts – confirming it was separate from W’s funds.

### surplus of funds after a trust-purpose has been achieved goes back to t

* Focused on purpose trusts – generally an unincorporated society whose members are designated with carrying out a specific purpose – purpose trusts are limited to those listed in the *Statute of Elizabeth*.
* Unincorporated associations are created when two or more people (***Re Buck***) come together to further a common purpose (sports, politics, social, religious).
  + If the club dissolves, the money could be 1) allocated by contracts through the organization’s constituting documents or 2) the organization can be argued to constitute a trust – could claim the money was put forward in trust for the benefit of the organization’s members, who have merely chosen to use the money for a particular purpose.

#### ***Re gillingham Bus disaster*** – resulting trust imposed in favour of **unknown** contributors, with money payable to the court for administrative simplicity – donors can claim proportionate amount if they could prove they donated

Facts: Funds raised to pay for funeral expense of army cadets killed in a bus crash and surplus resulted.

Issue: How should the surplus be distributed?

Holding: many donors unknown – resulting trust principles applicable, but how to find individual donors? Money paid into Court and anyone can claim proportionate amount if they could prove they donated.

#### ***Re British Columbia Red Cross Balkan Fund*** – resulting trust for **known** donors

Facts: funds were raised for the assistance of the wounded in the Balkan War and surplus resulted at the end of the war.

Issue: How should the surplus be distributed?

Holding: The money is to be held on a resulting trust ratably for all the individual donors, who were known.

#### ***Hatchett-Stamford v AG***

Facts: Unincorporated animal rights group and HS became the last member when her husband died. She wanted to wind-up the association and transfer the funds to another active animal charity. Such an order declaring HS trustee of assets would imply the funds were not *bona vacantia* and to be surrendered to the Crown.

Issue: Who gets the money?

Holding: HS should get the money beneficially – once the association dissolves due to there being only one member left, they are entitled to the assets, barring contractual provisions.

* Gifts to an unincorporated association without a separate legal personality manifest in one of three forms:
  + Gift to members who are joint tenants at time of donation (can sever his share and claim it)
  + Gift to existing members according to contractual rights under governing agreements
  + Gift where the property is to be held in trust for the association and not to be at the disposal of the members for the time being
    - Rare as it is not legally permissible – gift in trust is void as a direct, non-charitable purpose trust

#### ***Re West sussex constabulary fund*** – surplus funds are subject to contractual provisions –emphasis on where the money came from

* Place emphasis on where the money came from – collection boxes, legacies and major donations, contributions from fundraisers (raffles, etc) – money belongs to the Crown as *bona vacantia* as the contributors were just paying, not donating
  + Exposes the intersection of trust law and contracts

#### ***Re Bucks constabulary fund*** – differentiated from ***Re west sussex* –** identifiable contributions held as resulting trust for donors and heirs, surplus to crown

Facts: The fund was registered under the *Friendly Societies Act* which stipulates the remaining funds belonged to the society’s members

Holding: Court held that subsisting members were entitled, on dissolution, to surplus property equally, as per maxim “equity is equality”. Property would not be surrendered to the Crown as *bona vacantia* as the money was essentially acquired and held on an automatic resulting trust for donors and their heirs.

### BC POLICY IMPLICATIONS:

* BC Law Reform Commission has held that surplus from public appeal funds should be subject to cy-pres.
* Trustees of those funds should be able to distribute funds of up to $10,000 to other charities as well.
* In other words, neither ART nor the rules of bona vacantia should apply!

## Presumed Intention Resulting Trusts – creates a rebuttable presumption that people don’t just give shit away for free (meant to keep beneficial title)

* Transferor is presumed to have retained equitable title with bare legal title vested in the transferee (***Dyer v Dyer***)
* Generally occurs when there is: (a) a purchase of property in the name of another (***Eisner v Baker*** – court will give effect to actual intention and not just the presumed resulting trust), OR (b) a voluntary transfer of property to another, AND (c) there is no clear evidence concerning the actual intention of the transferor about who is intended to benefit from the transfer
* Evidence will determine whether the transaction is an outright gift in which full title vests in the done (***Standing v Bowring***) or and express trust – onus on transferee to rebut the presumed resulting trust
* Where a joint bank account is set up to help look after the depositor’s affairs AND there is a declaration by the depositor to give the balance to co-tenant on death, this is NOT avoidance of *Wills Act* – it’s perfectly allowed – however, sometimes Courts will interpret as a “testamentary gift” which is in violation of *Will Act*

### ***Oord v oord*** – evidence of all enjoying property beneficially can rebut resulting trust

Facts: Tina, Wiebe, Bill, and Jackie agreed to combine resources to purchase a property and intended to live on it together. Al four were registered as joint tenants, but the purchase price was paid for by Tina and Wiebe.

Holding: There was a presumed resulting trust for Bill and Jackie, but the evidence that they all intended to live on the property together rebutted the presumption.

### ***Standing v Bowering*** – presumed resulting trust can be rebutted by evidence – actual intention as manifested by conduct is binding

Facts: Plaintiff transfers bonds into joint names of herself and godson, to whom she was not *in loco parentis* (in the place of the parent). She seeks to re-transfer the stock into her own name only.

Holding: There was *prima facie* resulting trust, which was displaced by evidence of intention, which showed she intended to benefit him personally. It was an outright gift.

### ***Re vinogradoff*** – the presumption must be rebutted or resulting trust

Facts: Grandma transferred war loan stocks into a joint account with her 4 year old granddaughter. She got the dividends and gave them to a third party on her death.

Holding: Grandma held the stocks beneficially as well as the presumption wasn’t rebutted.

### ***Nishi v Rascal trucking*** – contribution expressly without condition/requirements is a gift

Facts: R assisted N in acquiring property through funding. R wanted interest in the property and N refused. R still offered funding without any conditions or requirements. After the sale, R brought an action for an interest of 50% of the property based on purchase money resulting trust.

Holding: Purchase money resulting trust – gratuitous transfer resulting trust: occurs when money is advanced towards the purchase price and legal title isn’t take by that same person. To rebut, title holder must show that the transferor intended the money as a gift or intended to retain no beneficial interest. You can take into account evidence subsequent to the transfer, but it is really evidence before or at the time of transfer that counts. The presentation of money along with assertion that had no conditions or requirements constituted a gift.

### ***Niles v Lake*** – joint bank accounts – standard form contract provisions do not rebut the resulting trust – not sufficient evidence – something more is needed

Facts: Mrs. A (deceased) opened a joint bank account with her sister, which had the right of survivorship. When A died, the sister claimed everything in the account. Executor argues that all the money is the property of the estate and the heirs, not the sister.

Issue: Has the presumed resulting trust been rebutted in the sister’s favour? Does the joint account provide the rebuttal?

Holding: The bank used a standard form document for the account creation, which did not rebut the presumption. The form is to protect the bank and enable account holders to deal with the accounts in an unqualified way – doesn’t imply that one depositor gets the residue upon the death of another. The bank agreement does not define the relationship of the bank depositors *inter se* – sister had legal title, but a resulting trust was created for the money put in by the deceased in favour of her estate/heirs.

Note: ***Pecore v Pecore*** – wording of bank document should deemed clear intentions – should have to adduce evidence that joint tenancy was just intended re: access of funds in the account and not the beneficial interest in rights of survivorship.

### ***Russel v Scott*** (Aus) – express declaration of intention by testator is sufficient evidence to rebut the resulting trust

Facts: Testatrix opened joint bank account in her and nephew’s name. She put money into the account, enabling him to withdraw and care for her. Testatrix told the solicitor that the money in the account would belong to the nephew upon her death.

Issue: When she dies, did that account form part of the estate?

Holding: No – nephew obtained present right of survivorship when testatrix declared her intention to the solicitor (reflecting joint ownership of money) – this was a vested future interest and not testamentary.

### ***Young v Sealey*** – express declaration of intention by testator may be sufficient even where the declaration amounts to “avoidance” of the *Wills Act*

Facts: Testatrix opened a joint account with her nephew and evidence showed the she intended to confer no beneficial rights during her lifetime, but that he would get the money in the account upon her death. When she died, executor claimed the money in the account.

Holding: Court found that her joint bank account agreement and declaration that the nephew would have no beneficial rights, amounted to avoidance of *Wills Act*. However, longstanding court practice to recognize such outright transfers of legal and equitable title was too established to change now. WTF?!

A presumed intention resulting trust occurs where someone purchases property and registers it in the name of someone else (***Nishi***), or where there is a gratuitous transfer of the property to a third party. In the absence of clear evidence to suggest the transferor intended an absolute gift, the law will presume the transferor retains equitable title (***Oord***). The onus to rebut is on the transferee to show that the transferor had actual intention to give legally and beneficially (***Standing***). In the event of a joint bank account, mere existence of joint tenancy and rights of survivorship is insufficient to rebut the presumption (***Niles***). The transferor’s intention to give absolutely is paramount (***Russel***). Lack of thought will not constitute clear intention (***Eisener***). Even if the express declaration of intention by the testator amounts to avoidance of wills legislation, a court may still accept it as rebutting evidence due to longstanding court practice to recognize such outright transfers of legal and equitable title (***Young***). If the holder of a joint bank account can draw on the funds for their own benefit, this may rebut the presumed intention resulting trust (***Sawden***). Both the presumed resulting trust and presumption of advancement give a measure of certainty and predictability for individuals who put property in unjoint accounts or make gratuitous transfers (***Madsen***).

## presumption of advancement- situations where a gift is presumed

* The transferee gets full title, without the need to rebut a presumed intention resulting trust.
* **The onus is on the transferor to show they did not intend to give an outright gift.**
* Generally, operates in transfers from parents (mother and father) to minor children (***Pecore, Madsen Estate v Saylor***). Use to apply only from father to children of any age.
  + The general rule of presumed intention resulting trust is subject to an exception where the purchaser is under a species of natural obligation to provide for the [donee]: ***Murles v Franklin***
  + Not extended to adult dependent children because of the difficulty in defining “dependency” (***Young v Young***)
  + Extends to *in loco parentis* – in the place of the parent – such as an executor
* Transfers from husbands to wives are also subject to this, though VERY cautiously today!
  + ***Eisener v Baker*** – presumption of advancement in a marriage requires strong evidence regarding the relationship – it is very easy to rebut and largely usurped by marital property legislation – GF put her name on the bill of sale for the house that BF bought and never intended for that to happen – evidence regarding the functioning of the relationship is admissible – she doesn’t get it beneficially.
  + LEGISLATION HAS RULED THIS OUT IN MOST PLACES, MAYBE NOT BC?

The presumption of advancement comes for an assumption that a father transferring to a child was an absolute gift (***Murles, Bennet***), where there is a natural obligation to provide for the donee. The presumption now extends to both mothers and fathers in gifts to their children, now limited to minor children (***Pecore***). Traditionally, the presumption operated with transfers from husband to wives, but never the opposite (***Re Mailman Estate***). Legislation has eliminated the presumption between husband and wives, but, despite this, the court may still allow the presumption if the marital arrangement was highly traditional (***Mehta***). The onus is on the transferor to rebut the presumption of advancement by providing evidence that the transfer was meant to operate as a resulting trust (***Vinogradoff***). The presumption operates once the gift is given (***Shepherd***). However, the application of the timing rule may be flexible depending on the facts of the case (***Lavalee, Neazor***). To rebut the presumption, the evidence must otherwise be admissible.

### ***Mehta estate v mehta estate*** – strength of presumption of advancement from husband to wife will vary depending on circumstances

Facts: The husband, wife and two children died in the Air India tragedy and a dispute arose between the husband’s estate and the wife’s. The husband left his property to his wife, with the remainder to the children, and the wife died intestate. Most of the wife’s estate consisted of assets purchased with the husband’s money in the wife’s name for tax purposes. The husband’s estate claims half interest in those assets as a presumed intention resulting trust, and the wife’s estate argues that she gets full title under a presumption of advancement.

Holding: The case is not a matrimonial action – the husband was the primary provider for the family and the wife was largely a housewife. Presumption of advancement is upheld as it is normal for a loving husband to put assets aside for his wife.

### ***Re Mailman estate*** – no presumption of advancement when wife transfers to hubby

### ***Warm v Warm*** – presumption of advancement for all joint assets that have resulted in a “common purse”

* Distinguished from *Niles v Lake* and *Russel v Scott*, which didn’t involve a husband/wife relationship

Facts: matrimonial dispute where he owns the house and she wants ½ of the interests in it and all the assets – he wants distribution according to their financial contributions.

Holding: presumption of advancement is applied as the Court established a “common purse”, so she gets ½ the interests in all purchases. Everything came from the joint account, so they owned it equally. He held the house as a T for her ½ of the equitable interest.

## rebutting the presumption of adnvancement – evidentiary rules

* Rules that limit the adducement of evidence to rebut a presumption:
  + **Timing**: once you’ve given a gift, you can’t change your mind – evidence must be prior to or at the same time as the transaction in question (***Shephard v Cartwright***)
  + **Illegality**: transferor conveys property to a complicit transferee in order to pursue some unlawful activity or avoid some lawfully protected third party (ex: creditors) and later, the transferor wishes to get their title back and the transferee says hell no – the transferor will have no recourse where he does not have clean hands (*par delictum* rule), and there is a strict approach under the doctrine of *es turpi causa non action oritur* (can’t pursue action that arises out of an illegal act) (***Scheuerman v Scheureman***)
    - Exceptions to the strict rule: *Locus Poenitentiae* – place of repentance – allows evidence not normally allowed to rebut a presumption of advancement where the parties never actually carried out their illegal scheme, and repent of it (ex: transferor withdraws from the scheme)
    - Where the parties are equally at fault, the courts may simply choose to ignore evidence of wrongful conduct and let the matter be decided by the competing presumptions (***David v Szoke***)

### ***Gorog v Kiss*** – presumed intention resulting trust can’t be rebutted with evidence arising out of a fraudlent or illegal act – no presumed advancement for bro/sis

Facts: Plaintiff owned a farm and transferred title to sister for the purpose of avoiding his creditors. Later, he called on the sister to re-convey the property and she refused, claiming presumption of advancement.

Holding: There is no presumption of advancement for brother/sister relationships and the presumed resulting trust couldn’t be rebutted by evidence of the illegal purpose behind the transfer.

### ***Tinsley v Milligan*** – evidence of illegality is okay if used to show something else, or if not central to the case

Facts: Lesbians purchased a house and the title was registered only in the name of the plaintiff, even though both contributed payment and the common intention was tenancy-in-common. They didn’t jointly register to enable the defendant to fraudulently get social assistance. The defendant repented the fraud and reported the matter to the authorities.

Issue: Did the plaintiff have claim to title, or was it held on trust for both parties in equal shares?

Holding: Held on presumed intention resulting trust – despite illegal motive, defendant could succeed without relying on illegality evidence. D paid half the purchase price, so P held it on resulting trust. **Presumption of advancement does not apply to lesbian couples.**

### ***Foster v Foster*** – refusal to hear tainted evidence works against the transferor with fradulent/deceitful intent to transfer

Facts: Father transferred four properties to daughter to avoid potential creditor (his wife, ha!). The creditor was not thwarted and no harm was done, so pops demanded re-transfer of properties – daughter said nope, stating that presumption of advancement applied and rebutting evidence is inadmissible due to illegality. Father argues presumed intention resulting trust.

Holding: The Court reluctantly didn’t allow evidence to rebut the presumption of advancement, so daughter got it.

### ***Tribe v soiseth***

Facts: T&S met in law school, got married, moved into a condo purchased by T’s parents. The title was in T’s name, granted a second mortgage to parents and an option to purchase that was registered but never exercised. On divorce, T sough an order that the equitable title remained with the parents and adduced evidence that legal title was only with her for tax purposes (pre-*Pecore* so advancement still applied to adult child)

Notes: In all cases where recovery was denied, there were creditors or potential creditors and the illegal purpose was actually carried out (some delay/harm to the creditors). If the person repents before the illegal act is given effect, then evidence is not tainted, but if given partial effect, it’s not available. Actual repentance is not required, just voluntary withdrawal from the scheme. Even if illegality is adduced, it is still possible to rebut the presumed resulting trust or presumption of advancement with other evidence regarding intention.

There have been several approaches dealing with evidence meant to rebut the presumption of advancement when it comes to evidence of illegal activity or suspicious intent. The court in ***Scheurman*** expressed the par delictum approach, where it refused to hear any evidence of a tainted transaction that could rebut the presumption of advancement. While this case has never been overruled, the court has relaxed its rigid standard in some cases. A court may acknowledge the rebutting evidence, but will not give it effect due to its illegality (***Foster***). However, if the fraudulent activity never resulted in any harm, the court may hear the rebutting evidence (***Goodfriend, Krys***). In some cases, the court will choose to side step the illegality entirely and decide the case on other grounds (***Tinsley***). In ***Gorog***, the court took this same approach and made its ruling without relying on the evidence of illegality. In the event that fraud has been rectified, or has not yet occurred, and the party seeking to use the evidence has repented from the illegality, the court may choose to hear the rebutting evidence (***Tribe***). In Australia, the courts have taken a proportionate harm approach, measuring the gravity of the fraudulent activity against the harshness of losing property as punishment (***Nelson***). While this approach is not yet accepted in Canada, it could be open for the parties to argue.

# the beneficiary

B owns in rem rights that avail against the world (***Csak***) – if T goes bankrupt, B can recover property as a preferred creditor. B also has exclusive enjoyment rights – while T administers the property and can dispose of the property in order to benefit B, B holds the bundle of rights to enjoy the property and dispose of the equitable interest. These roles must be kept separately (***Spencer***). B cannot take over T’s duties of managing, controlling, or administering the trust assests (***Schalit***), unless B is acting the capacity of T’s agent in limited circumstances (***Bagot***). B has a right against T to property administer the fund, using the individual assets in which B can use as strings to pull to ensure T’s proper discharge of his fiduciary duty (***Archer-Shee***). In Canada, B’s ownership rights depend on the type of trust. For a large, shifting trust with many Bs, such as a pension, the Bs likely own rights against T, rather than the trust assets themselves (***Garside***). B is able to dispose or assign her interest. The ***Law and Equity Act*** abolished writing requirements for disposal of equitable interest, but **S36** requires B to give T written notice if B chooses to assign debts or choses in action (personalty). No document can effect an assignment unless it vests in interest to the assignee, such that T becomes T for the assignee once notice is given (***Timpson’s***).

NOTE FOR SUB-TRUSTS: It is very important to distinguish between equitable and beneficial title in sub-trust scenarios. This is because not all equitable titles are beneficial entitlements. Sub-trusts occur when B no longer has beneficial title as a sub-B does due to B declaring a trust in favour of sub-B in regards to his equitable title in the trust property. B has a bare beneficial title in relation to a sub-B, who now is entitled to the benefits/enjoyment of the property. T remains the same.

## keep roles of t and b separate and distinct – b can’t do t’s job!

* T holds *utendi/disponendi* and B holds *fruendi/disponendi* – B can’t manage, control, or administer the trust assets

### ***Schalit v Joseph Nadler Ltd*** – b can’t do t’s job

Facts: B attempts to disdrain (seize) for unpaid rents against property in which he had equitable interest.

Holding: Invalid distraint – should have been executed by T or an agent of T’s. B simply has a personal right (*in personam*) to bring an action against T for breach of trust – disdrain is exercise of real right (*in rem*), which only lies with the legal owner.

### ***re bagot’s settlement*** – UNLESS B DOES IT AS T’S AGENT

Facts: P was the B of a farm property in trust for life, remainder to his children. P thought she should manage the property, rather than T, because T was not an expert at farming.

Issue: Would this contradict the nature of a trust, given that legal title is held by T?

Holding: Court has discretion, inherent jurisdiction, to give B an order of possession – usually with terms to ensure the asset is preserved.

## nature and scope of beneficial title: is equitable title interest in the individual trust assets or just the proper administration of the trust?

### ***Baker v archer Shee*** – b has distinct equitable interest in each item of trust property – as in uk

### ***archer-shee v garland*** – b has equitable interest in trust as a whole, especially where trust property changes quickly – as in usa

## sub-trusts and assignments

* If B assigns or declares a trust of his beneficial title for another, he holds bare equitable title and the new B has the beneficial title. Original B must administer their equitable interest for new B, but may not administer the trust assets, which is still T’s job
  + B can assign to third party directly
  + B can direct T to hold the property in trust for third party
  + B can contract for valuable consideration to assign equitable interest to the assignee
  + B can declare himself to be “T” for the new B of such interest

**What type of beneficial is being assigned?**

* Equity follows the law and may need to follow formalities for legal interest – substance trumps form to avoid fraud
* **If land:** must be in writing (**s2 *Statute of Frauds***) BUT ***Law and Equity Act*** abolished writing requirements for equitable interests
* **If personalty:** *Statute of Frauds* doesn’t apply to personalty
  + Chose in action(debt, company shares, copyrights, rights of action found in tort of contract, equitable interest in a trust, etc) require formalities:
  + Was the assignment absolute and in writing, signed by the assignor with notice to T? (**s36 *Law and Equity Act***).
    - **No -**  privity would usually not allow this assignor to be a party in the proceedings (***Di Guilo***). **If in a will** – ***WESA*** will apply flexibility to uphold the settlor’s intent – and if none of this is working, the interest of the assignee won’t be enforceable (***Timpson’s***)
    - **Yes –** the assignor can bring the action

### ***Timpson’s Executor’s v Yerbury*** – if formalities not satisfied, go through assignor or if interest transferred is absolute, appeal to equity

Facts: Property located in NY, created to benefit a UK resident. B tries to transfer beneficial interest to children.

Issue: Was te equitable interest validly assign to the children? What constitutes disposition of equitable interest?

Holding: If equitable interest has been transferred, she wouldn’t have been taxed on it – the income would’ve come from NY and the children would have paid the taxes, but no assignment took place! The letter did not bestow on the so-called beneficiaries any rights against T. Rather, B had given to the so-called “sub-Bs” a revocable mandate in that it only passes if the mandate is acted upon (can be revoked).

## priorities among assignees – first in time is first in right

### ***In re: Wasdale*** – priority is determined by time – the earlier being preferred

Facts: B assigned same beneficial entitlement as two different people – both assignees notified T at the time of their respective dispositions.

Holding: the Court affirmed the principle that priority is determined by time and the earlier is preferred. Even though the first assignee informed T, who later died, his priority is maintained even though the second T didn’t get notice from him. If you only inform some of the Ts, then you could be vulnerable to a claim from a later assignee – if you inform all the Ts, the claim is secure even if all Ts change.

## the protective trust – is there a condition/limitation on the trust?

The common law will generally void anything that restrains alienation, but a settlor can establish a protective trust (sometimes called a spendthrift trust) by using a determinable limitation on B’s interest and providing a gift-over (***Leir***).

* A determinable interest defines the parameters of the interest, but doesn’t restrain it. You can’t have an interest defeasible upon a condition subsequent. The equitable title vests in people named in the gift-over.
* S transfers blackacre to T on trust for A, **until** A goes bankrupt, then to A’s children – A is a spendthrift who gets an equitable estate that will automatically terminate and go to kids once the determining estate happens.
* **Determinable interest language:** until, when, as long as, during, etc
* **Defeasible interest language:** on condition that, but if, subject to, etc

## termination of the trust by b – rule in ***saunders v vautier***

1. Is B sui juris and compos mentis? (age of majority and legally capacitated)
2. Is B vested in interest? – absolutely entitled to the gift, only thing postponed is enjoyment

* The court prefers early vesting and may interpret contingency to enjoyment rather than vesting (***Lysiak***)

1. If there is a class of Bs, they must act collectively/unanimously (***Re Smith***): a large class in a discretionary trust can’t be collapsed (***Baden, Buschau***), or, all sui juris Bs can get together and collapse the trust, leaving the balance for the non sui juris Bs (***Chodak***)
2. If Bs don’t agree, Court has inherent jurisdiction to divide the property if it results only in a minor reduction in value (***Sandman’s***)
3. Can’t collapse the trust if it would cause unfairness (***Lloyd’s Bank***)

* Life tenants and remainder persons, if all sui juris, can combine to call the trust (***Re Smith (Trustee) v Aspinall***)
* If X and Y own equitable interest in real estate jointly, neither can terminate the trust alone, but can do so together.
* It doesn’t matter if property is held in trust for sale, with the power to postpone the sale, T can refuse to terminate the trust if he believes special circumstances would cause undue hardship on other Bs (***Re Marshall***)
* ***Saunders v Vautier*** DOESN’T APPLY TO PENSION TRUSTS – governed by ***Pension Benefits Standards Act, 1985*** regarding termination/distribution of assets – Parliament intended to cover the field (***Buschau v Rogers***)

### ***Re Chodak*** – that T has discretion to fix differing %s of shareholdings doesn’t affect the ability of b to call trust in unison

Facts: Testator gave whole estate to T for entire benefit of various Bs. T was given wide discretion and sought direction re: validity of the discretionary trust – delivery of packages to children in USSR with no gift-over.

Holding: The court held the discretion was invalid; the testator had attempted to bequeath absolutely and then restrict their right to take absolutely via discretionary powers to T.

### ***Lloyds bank v duker*** – division can occur where it results only in a minor deduction in value of the trust property

Facts: All Bs agree to terminate the trust (trust assets = shares in company), but one B stood to get a controlling stake.

Holding: Court held that the reduction in value was too great – as controlling shareholder, his shares would have been worth more than the remaining shares of the other Bs and he could control the company in a way that hurt the minority Bs – shares had to be sold, and the majority B got his share of the money.

### ***Re Sandman*** – Bs should be able to terminate trust re their respective shares only, unless termination of trust would unfairly impact remaining Bs

Holding: Call for shares by sui juris Bs is allowed, even though it meant Ts would no longer have control of company. There was no reason to believe Bs would use voting powers in any way that was *bona fide*. This distinguishes ***Sandman*** from ***Daker*** – in ***Daker***, one B stood to be controlling shareholder, which would result in undue influence over the value of other shares and the company.

## does someone want to vary the trust?

At common law, Courts have no power to authorize a variation of the terms of a trust, even though all adults assented to the change, and the change would obviously benefit the Bs who are minors as well (***Chapman v Chapman***). However, four exceptions exist to this common law rule: administrative terms, maintenance jurisdiction, conversion jurisdiction, and compromise jurisdiction. Administrative terms can be varied if there is an unforeseen emergency such that the trust is threatened and the circumstances were unanticipated by the settlor. The Court’s authority is limited to vary T’s management powers – not authorized to vary quantum or type of B interest. This is not easily invoked and is really done only to effect essential repairs to buildings or reconstruction of capital matter in a company to make it even more realizable (***Re New***). Maintenance jurisdiction allows courts to direct payments to Bs if they need money to live in a manner appropriate to trust expectations. Conversion jurisdiction allows the conversion of an infant’s trust property from realty to personalty and vice versa. Compromise jurisdiction enables a court to give approval for those not sui juris in any judicially sanctioned compromise of a dispute. This is limited to augmenting management powers. Bs usually just terminate the trust under ***Saunders v Vautier*** and resettle it on a new trust with varied terms, so long as Bs are sui juris and have the vested interest. As per the statute, ***Trust and Settlement Variation Act***, the Court will protect groups who are unborn, unascertained, or incapacitated against variation – though the Act allows trust variation.

1. In which circumstances will the court agree to vary the trust?

As per S1 of the ***Trust and Settlement Variation Act***, if the court is satisfied the rearrangement will benefit the unborn, unascertained, or incapacitated, it will approve the variation. S1(b) states that unascertained people may become entitled to the trust at some point in the future and ***Buschau*** states that S1(b) deals with people who we know form a group, but we don’t know who will get the interest (usually referable to a survivor of a group). There has to be an actual interest, it can’t be someone who just expects to be an heir (***Knocker***).

1. What counts as a benefit in the statute?

As per S2 of the ***Trust and Settlement Variation Act***, the variation must be beneficial to the parties interested. The test for whether it is a benefit is the financial good bargain test of whether a prudent, sui juris adult, motivated by intelligent self-interest and sustained consideration of the risks would be likely to accept the variation (***Bentall***). The Court has found tax minimization (***Burns***) and family harmony (***Remnant’s***) are beneficial grounds for variation and has said that the court must consider education and social benefits as well (***Westin***). However, it has rejected tax evasion (***Weston***) and psychological benefits (***Harris***). Whether something is beneficial will depend on the facts of the case. The court reserves the right to vary or revoke any trust, regardless of the settlor’s intentions – the objective standard is the prudent advisor (***Russ***). If all the Bs are sui juris, the court will not grant its consent on their behalf (***Buscheau 2***).

# the trustee – S2 of *trustee act* applies to all those acting as Ts

## initial appointment of t

* The settlor has the right and freedom to choose individuals with full legal capacity to act as Ts and then falls out of the picture after the trust is executed, unless he has reserved powers.
* The settlor may appoint a guardian/protector to hire and fire Ts.
* If there is more than one T, they hold the interests/duties as joint tenants with rights of survivorship – when the last one dies, the heirs take over – requires unanimity unless the trust instrument provides otherwise.
* If T refuses the appointment, make an alternate appointment in the will, or the court can appoint – a trust will not fail for want of T

## retirement, death or absence from jurisdiction

T may leave his position through retirement, death or absence from the jurisdiction. If the settlement doesn’t provide for these occasions, the ***Trustee Act*** fills in the gaps. If T dies, retires, or is absent for more than 12 months, a new T can be appointed by a protector, the surviving Ts, or the heir of the last surviving T (**S27*****Trustee Act***). The Bs may also work together with the other Ts to make an appointment and apply to the court to be named T (**S36**). The Court may appoint new trustees where it “is expedient” to do so, expedient referring to situations where persons designated to appoint in will or instrument cannot do so for whatever reason (**S31)**. ***In Re: Tempest*** describes the guiding principles for the court to consider and include the wishes of the settlor, especially regarding undesirable characteristics, persons who do not have an ulterior motive, either towards the settlor or Bs, and persons who will promote and not impede execution of the trust. If a T retires and there are more than two remaining Ts, the retiring T must notify them I writing of his retirement and the remaining Ts must consent (**S28**). If the retiring T does not fulfill this requirement, he will still be liable for any subsequent breach of trust. A newly appointed T will be vested in the trust property through the retiring deed (**S29**). A new T has all the rights of the predecessor T (**S29**).

## Removing a trustee

Where the settlement does not speak of the circumstances of removal, the parties must turn to statute. A sui juris B with consent of the majority of other Bs may apply to the court for T removal (**S30**). Using its inherent jurisdiction, a court can remove T and appoint a replacement (**S31, *Letterstedt***). The test for court removal is to determine whether there have been acts and omissions on T’s part that endangered the trust property and whether T has shown lack of honesty, appropriate capacity, or reasonable fidelity (***Conroy***). Misconduct is not a necessary requirement for removal (***Consiglio***). The court will intervene if the administration of the trust under the current T regime becomes improbable or impossible because the T’s can’t work together (***Consiglio***). Welfare of the Bs is the utmost consideration in deciding what to do on an application for removal of a T (***Re Newton Trust***).

### ***Conroy v Stokes*** – removing T requires an applicant to point to act/omission that endangered trust property or show want of honesty, appropriate capacity etc

Facts: Trial judge removed Ts on application from 2/5 Bs but did not find misconduct or breach of trust by Ts. Trial judge did find friction between 2 Bs, testator’s widow, and Ts.

Holding: Appeal court set out criteria for removal = WELFARE OF Bs! Here, failure to produce accounts once did not amount to impairing welfare of Bs – persistent failure would. CA overturned removal.

### ***Re consiglio trusts*** – Ts can be removed when administration of trust has become improbable or impossible due to situation between ts

Facts: Official guardian and B brought application which claimed it was impossible for Ts to agree on anything regarding management of trust, but there was no misconduct.

Holding: Court held that misconduct is not a prerequisite – the application must show that, because of the situation between the trustees, continued administration of trust has become impossible.

# duties of t

## the duty to take custody and personally manage trust assets/delegation powers

**Take custody:** obtain title to assets upon appointment and review document, and determine whether to keep, sell, invest, which depends on whether it is a fixed trust, trust power, or power simpliciter.

**Personally manage assets:** T cannot delegate the performance of the trusteeship itself (***Re Wilson***), but he can enlist agents to help in the sale, investment, or storage of the trust assets (***Speight***). These agents cannot exercise authority over the trust (***Wilson***). If a T exercises prudence in appointing the agent, he will not be in violation of the duty to personally manage the assets (**S7**). **S95** indemnifiesT in respect of any agent negligence, provided that T exercised prudent judgement in appointing the agent. The standard of care of T is a prudent businessperson managing his own affairs (***Speight***). The standard of care is the same for both corporate and personal Ts (***Fales***). However, the court may be more lenient towards a personal T in application for exoneration under the statute (***Fales***). The factors for assessing an application for exoneration include whether the breach was technical, whether the breach was a minor error in T’s judgement, and whether the decline in trust asset value was attributable to the general economic climate (***Fales***).

* **S7**: can delegate to bankers and solicitors

### ***Spreight v Gaunt*** – T can’t delegate own duties, but can appoint third parties to execute administration of trust

Facts: T appointed a stockbroker as an agent who misappropriated funds. T had followed standard business practices re: purchase and sale of shares.

Holding: T was not liable as he followed standard business practice.

### ***Re Wilson*** – T can’t delegate away fiduciary duties/responsibility to exercise judgement/authority over the trust

Facts: Testator entrusted the estate to a trust company, in favour of Bs. An offer was made to purchase on property, directed to GM of the trust company, who rejected it and failed to communicate the decision to the Board. The Board had allowed the GM to manage the trust estate as he thought best.

Holding: Board’s failure to consider the offer was a breach of trust. A trust company is personally responsible for exercise of judgement – cannot escape this by delegating to another to exercise that judgement.

Note: Today, corporate board members typically delegate actual investment decisions to specialized experts, so rule from this case should only be seen as extending to fiduciary duties generally, not actual investment decisions.

## The duty to take care of trust assets: investment duties and powers

* If the settlor restricts any sale, T holds a bare trust for B because no activity is required.
* Most Ts will have to invest assets, make a decision based on minimum risk and maximum return.
* **S15.1 *Trustee Act***: T may invest property in any form a prudent investor might invest.
* All Ts, corporate and personal, are subject to prudent businessperson test (***Wohlleben***)
  + **S297**: T exoneration if it was fair and reasonable in the circumstances where the breacher was being honest – Mrs. Wohlleben is exonerated because she was doing her best, Canada Trust is liable because they were not.
* Portfolio management duty: a prudent businessperson invests in a variety of stocks and shares (**S15.3**).
* Ethical considerations can’t be the only reason for not investing (***Scargill***).
* The quality of T’s investing is judged at the time of making the investments rather than at trial (***Nestle***).
* Ts can offset losses againt profits – if T has done a good job in one regard, he can offset another bad deal or imprudent behaviour (**S15.4**)
* T is not the guarantor of the investment (**S95**)

### ***Cowan v Scargill*** – T must put aside their own personal interests and views to make beneficial investments for b

## duty of loyalty to b

**Conflict of Interest:** T must not place himself in a position where his duty and personal interest may conflict with B’s (***Keech***).

1. Did T profit through association with the trust? (***Keech*** – property; ***Boardman*** – knowledge)
2. **Was the profit at the expense of B?**
   1. Yes – breach
   2. Even if No – T cannot benefit from trust for policy reasons (***Keech***). B must give informed consent even where there is no real conflict (***Boardman***). T may have to disgorge profits (***Boardman***), but Canadian courts are more lenient in corporate settings where there is no real conflict (***Peso***).
      1. Assess the position held, nature of opportunity missed, ripeness of opportunity, relation of director to opportunity, amount of knowledge possessed, how knowledge was obtained, private/special opportunity, time frame of breach, and circumstances of termination (***Canaero***)

**Self Dealing:** T can buy trust property, but not in his personal capacity!

* T generally cannot buy trust property for his own use because the court contemplates mischief when he is at both ends of the deal (***Holder***).
  + The court may be flexible based on the facts of the case (ex: no bad faith of T’s part, gave adequate consideration, sale was in B’s best interest, B was given full disclosure – ***Molcan***)
* If transaction is outside the exception from ***Holder/Molcan*** – it’s VOIDABLE
  + Should seek court approval before the transaction, but court could also approve after

**Fair Dealing:** If T purports to purchase the equitable interest from B, T bears the burden of showing every advantage was given to B in the transaction. T must prove there was no fraud, that B obtained independent advice, and that he gave B adequate consideration. If T fails the test for fair dealing, the trust survives unless T has so the equitable interest to a BFPVWN in the interim, and T must disgorge any profits because the transfer was voidable (***Crighton***).

When acting as T, he cannot have a personal conflict of interest when administering the trust property. To determine whether there is a conflict, the Courts will asked whether T has profited from associating with the trust. The profit can be in the form of knowledge (***Boardman***), a business advantage (***Peso***), or property (***Keech***). The court will then determine whether this profit gained was at B’s expense – if so, T will be liable to B for breach of trust. Even if the profit didn’t disadvantage B, the strict standard from ***Keech*** held that T can never profit from association with the trust for policy reasons. T may have to disgorge profits gained through association (***Boardman***). However, Canadian courts have relaxed the standard in corporate settings where there is no real possibility of conflict between T’s actions and B’s interests (***Peso***).

## duty of impartiality

T has the fundamental burden to cultivate the assets and pass them on to B – explains and justifies the existence of the good faith duty. The notion of equality between Bs is hardwired unless the settlor has indicated otherwise. T may have to restructure the investment portfolio of trust assets in order to be impartial – this can be accomplished through conversion (converting assets to more fair assets) and apportionment (directing income into capital funds, or allocating sum of capital funds and using it to generate income).

1. **Are there Bs in succession (life tenant and remainders)?**
2. **Did the settlor intend partiality or impartiality?**
   1. Does the trust instrument (explicitly or implicitly) prescribe partiality?
      1. **Explicit** **partiality**: express provisions in the will to the contrary, such as asserting the rule in ***Howe v Dartmouth*** doesn’t apply
      2. **Implicit partiality**:
         1. An *inter vivos* settlement as the settlor intended for the benefit to lay to the person to whom it is given
         2. It may be implied through director or authority to:
            1. Keep or retain the residue (trust to retain)
            2. Maintain unauthorized investments despite the duty of prudent investing
            3. Give income *in specie* (in it’s actual form without converting to cash) to the life tenant (power to postpone)
      3. **Implicit impartiality**:
         1. Trust for sale
            1. Realty until sold: life tenant gets profits *in specie*
            2. Personalty until sold: life tenant 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 and Stekl***).
         2. Is the power permanent or temporary with a requirement to sell eventually when it’s advantageous to do so?
            1. If it is the latter, then impartiality – the life tenant gets 4%, and not *in specie*, if personalty (***Crawford***)
   2. If not clear from trust instrument, then the common law assumes the settlor intended impartiality.
3. **T should assess the types of assets in the trust**. Are there any of the following?:
   1. Wasting: lots of income, but the capital base deteriorates (cars, mortgage, copyright)
   2. Unauthorized: highly speculative assets which have high yields in short-term and nothing in the long-term (ex: gold mine shares)
   3. Reversionary: assets not immediately available and don’t produce income for life tenant (ex: future interests in possession)
4. **If a 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 the life tenant and the remainder to the capital base), **if the following is met:**
      1. **A testator** (ex: in a will only, exception ***Re Smith***; most *inter vivos* gifts are presumed to benefit the person on whom they fall)
      2. **Leaves a residuary** (ex: not specifically devised, ***Lottman***)
      3. **Personalty** (not real estate, ***Lottman***, EXCEPT circumstances where the testator signals realty should be sold and treated like personalty, ***Lauer and 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 benefit the life tenant, the corps 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 life tenant. The rest of the sale price should be ploughed into the capital based and invest in things that will generate a fair income for the life tenant (rule in ***Earl of Chesterfield***)
5. Calculating the 4%
   1. Was there a power of postponement?
      1. Value of goods taken at date of death
   2. Was the gift in a will?
      1. Was it sold within 1 year of the testator’s death?
         1. Yes – value at date of death
         2. No – value at 1 year anniversary of death
      2. Was it an *inter vivos* gift?
         1. The property value is assessed at the date of the trust

T bears the duty to cultivate the assets and administer them to B. In the event of successive Bs, the law presumes impartiality, unless the settlors has indicated otherwise in the settlement. If the settlor has explicitly prescribed partiality between the successive Bs, this is dominant and T must fulfill these wishes. However, even if the document does not explicitly prescribed partiality, it may still be implicit. If the transfer is inter vivos, the gifts are presumed to benefit the person to whom they are given, implying partiality, unless the transfer was quasi-testamentary (***Smith***). In a will, the testator may imply partiality by including a trust to retain, requiring the retention of unauthorized investments or giving the income in specie to the life tenant with the power to postpone. Impartiality may be implicit where there is a trust for sale. If there are conflicting signals, the court will look to the dominant intention (***Lauer***), and ask whether the power to retain is permanent or temporary with a requirement to sell when it would be most advantageous (***Crawford***). In the event of a temporary power to postpone, the court will presume impartiality. The ability to encroach on capital may imply partiality (***Critchley***), but the court will place greater emphasis on evidence of the testator’s actual intentions (***Fleming***).

If T is to act impartially, he must apply the rules in ***Howe*** and ***Chesterfield*** to any wasting, unauthorized, or reversionary assets of personality in the trust estate. The T must sell and apportion wasting or unauthorized assets, giving 4% of the income to the life tenant, and the remainder to the capital base. The rule in ***Howe*** does not apply to real estate (***Lottman***), unless the testator has signalled that the realty should be treated like personalty (***Lauer***). T must sell any reversionary asset, such as a life insurance policy, calculate 4% of the income per year based on the sale price, and give this amount to the life tenant. The rest of the sale price is though ploughed into the capital based and invested in assets that will generate a fair income for the life tenant (***Chesterfield***).

## impartiality – settled shares in a company

If a major trust asset is settled shares, usually from a closely held corporation, the form of transmission determines whether the revenue becomes income for the life tenant or capital for the remainders (***Waters***). The governance of the company will either issue dividends or preferred shares to the trust, the former being income and the latter compromising capital. Form will generally dictate substance – classification by the company will dictate its nature in the trust (***Waters***). However, the court will give effect to the testator’s intention over form in certain circumstances (***Welsh***). The form is substance rule has been relaxed in favour of an assessment of the surrounding facts of the case (***Fehr***).

## duty to apportion debts and other disbursements

Trustee administration requires estate management, including payment of trust estate debts and disbursements. This may require apportionment of funds as capital and income in assessing payments as legacies, taxes, insurance premiums, costs of repairs, and debts. The common law rule from ***Allhusen*** that required the life tenant, receiving income immediately on establishment of trust, to make a contribution to payments made in administration of the trust – typically, capital + 1 year’s income was seen as the assets available to pay debts. This has been replaced with **S10 *Trustee Act*** due to impossibility – T is to make debt payments out of capital, unless the testator says otherwise. **S144 *WESA*** says the same thing.

## does b want information from T about the trust?

T is the owner with special obligations and does not have to expose everything to Bs.

* Not required to volunteer information
* B is entitled to know he is a b, terms of settlement that dictate who can be a B, and details of the equitable estate itself. B doesn’t have absolute right to disclosure – it will depend on the circumstances (***Rosewood***)
* B on reasonablenotice has the right to see trust accounts, investments, the trust document, and all reasonable information concerning the management of this property

Because T is a legal owner with special obligations, he may have to provide some information to B regarding the trust. However, T is not under an obligation to reveal all information, especially documents concerning the exercise of a discretionary power (***Londonderry***). B is entitled to know she is a B, the terms of the settlement that dictate who can be a B, and the parameters of the equitable estate itself (***Rosewood, Short***). Ts who are directors of companies cannot be compelled to provide information beyond that which is available to all shareholders (***Kelsen***), but Bs could compel Ts to vote for shares as directed and change the articles of the company (***Kelsen***). This will likely only apply if the trust is a sole shareholder (***Martin Estate***). Disclosure of legal opinion on the trust is not automatically available, but this rule is not absolute and may depend on the circumstances and facts of the case (***Froese***). Disclosure of legal opinion given to the trust is allowed when it is clearly dealing with issues of benefit to both Ts and Bs (***Camosun College***).

### ***In Re londonderry’s settlement*** – reasonable information does not include documents concerning T’s exercise of discretion

Facts: B had an interest in the distribution of income among a class of discretionary beneficiaries – wanted the agenda and minutes of the meeting in which the discretion was exercised.

Holding: B not entitled to documents concerning exercise of a discretionary power – why T came to a decision.

Note: Could be enforced by a court order if T is acting in bad faith.

## duty to account

T must provide accounts of the funds within a reasonable amount of time of the request. T is not obliged to prepare copies of the report and can have a reasonable amount of time to prepare the accounts for review. If B lives in a remote location, T may be obliged to mail copies of the accounts (***Sandford***).

# t’s rights

## Does t wanna be paid?

T’s are *prima facie* unpaid, but can be remunerated.

1. By specific settlor instruction in the trust instrument – court will give effect to settlor’s intention
2. Under contract with sui juris Bs (although vulnerable to undue influe, so prob shouldn’t do this)
3. By the court’s inherent jurisdiction:
   1. **S88(1):** T can apply for fair and reasonable allowance that does not exceed 5% of the gross aggregate value of trust
      1. Factors to consider: magnitude of the trust, care and responsibility arising from the trust, the time occupied in performing trust duties, skill and ability displayed by T in managing trust assets, and success which has attended its administration of trust assets (***Sproule***).
   2. **S88(3), *Sproule***: care and management fee – it is only for reaaaaaaally good Ts, and does not exceed .4% of the average market value of the assets and involves various factors to consider (value of assets, nature of assets, degree of responsibility, time expended, degree of ability exhibited, success, extraordinary service) (***Pedlar***)

## has t incurred debt in executing the trust?

T is entitled to indemnity for all debts incurred in executing the trust (**S95**), which is only modified if there is a good reason why T should bear the burden (ex: T is only making payment due to poor performance). If the sole B is sui juris, indemnity extends to a personal obligation against B (***Re Reid***).

# power of T

Powers can be contained in:

1. The settlement accrding to the settlor’s intentions
2. Common law precedents on managerial powers
3. Statute (unless contradicted by the settlor!)
   1. Form of sale (**ss5, 6**), appointing a solicitor/banker (**S7**), insuring the property (**s8**), compounding debts (**s9**), spending money on repairs/improvements (**s11**), appointing investors ensuring due diligence (**s15.5**), vary investment decisions (**s22**), maintenance/education of infants (**s24**)

# control of t

Control by the Settlor: S’s intentions in the settlement will take precedence and can direct T to do things.

Control by the Bs: Bs can collapse the trust under ***Saunders***, combine with Ts to redraft or amend the trust, compel Ts to vote for shares directed or change articles of company (***Butt***), but cannot compel Ts to exercise administrative powers (***Brockbank***). Where Ts are also directors of the company to which the shares are issued, Bs only have the same rights as shareholders and not more (***Butt***).

Guardians/Protectors: Because of the impersonal nature of trust corporations, the settlor will often appoint a protector or guardian, who serves to personalize a corporate trust, or provide for unexpected events and provides a way to indirectly control T, where they can hire/fire Ts.

Control by Courts: The Court can play an administrative role to give advices under **s86** of the ***Trustee Act***, If a T acts under the court’s advice, he is exonerated under **s87**. The court will not force a T to make a decision he thinks is improper (***Tempest***) because T can exercise discretion as properly as he thinks and without fear of interference (***Wright***). Therefore, the Court will only intervene in the case of demonstrable bad faith or incompetence, or in situations of serious deadlock (***Billes, Kordyban***). If T attempts to misuse his power (***Schipper***), or fails to be even-handed (***Fleming***), the court may intervene at B’s request.

Despite the court’s general avoidance to interfere with T’s decisions, it will not tolerate an attempt to oust its inherent jurisdiction for policy reasons. Clauses that wholly exclude the rule of impartiality (***Wynn***), prevent judicial review (***Boe***), fully exculpate (declare not guilty) T (***Poche***) or disbar B from any accounting (***Jones***) have not been upheld. However, ousting jurisdiction regarding findings of fact may pass judicial muster (***Tuck’s***).

# constructive trusts

The Court will imply a constructive trust where circumstances call for such intervention. The court has split fiduciary relationships into two categories: per se fiduciary and ad hoc fiduciary. An ad hoc fudiciary is a relationship that does not fall under per se fiduciary catergories, but still merits a fiduciary label. A successful claimant obtains equitable interest in the asset post judgment. The defendant has the right to use the trust property, but the constructive B to whom he owes a fiduciary duty, can call for legal title and collapse the trust. Constructive trusts may also be used outside of trust law as a restitutionary remedy for unjust enrichment.

A claimant may call for a constructive trust as they will get equitable title in assets post judgement – useful where they have invested in the asset, or if the defendant has violated their unregistered proprietary right to the asset.

## When will a fiduciary relationship arise?

Per se fiduciary:

* A static set of relationships:
  + Disloyal Ts (***Keech***), faithless directors (***Canaero***), delinquent agents, solicitor/client, overreaching partners, bribers, undue influencers, trustee de son tort, doctors, vendor/purchaser
* The relevant time to assess the relationship is at the time of the transaction (***Galambos***)

Ad hoc fiduciary:

Where the relationship doesn’t fit into common law categories, but the assessment of the relationship leads to fiduciary conclusion.

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

There is no functional difference between a PSF and a ADF – the nature of the fiduciary relationship will depend on the facts of the case where the relationship does not fall within traditional PSF categories (***MK v MH***). The law is less concerned with the positions of the parties before they entered into the relationship, and focuses on the imbalance that results from the relationship (***Galambos***). Wilson’s dissent in ***Frame*** sets out three criteria for AHF characterization: the scope of exercise of discretion or power, unilateral exercise of the discretion or power to affect another party’s practical or legal interests, and a extra vulnerability to the exercise of the discretion or power. In ***Guerin***, the Court held that a fiduciary duty arises when one party, by statute or unilateral undertaking, has an obligation to act for the benefit of another party. Vulnerability was emphasized in ***Lac Minerals***, but ***Hodgkinson*** was more in favour of the power-dependency metric. In ***Soulos****,* McLachlin stated that the vulnerability requirement is a primary consideration in the AHF analysis. Finally, in ***Galambos***, the AHF criteria was established, an undertaking that is either statutory (***Sun Indalex***), expressed or implied, by one party to act in the best interest of another (***Elder***) is required for any AHF relationship. Directors and senior officers owe a fiduciary duty to their companies (***Canaero***). The factors to assess in a breach of this duty are: the position held, nature of the opportunity, its ripeness, its specificness and the individual’s relation to it, the amount of knowledge possessed, the circumstances in which the knowledge was obtained, whether the knowledge was special or private, time factors, and circumstances of termination (***Canaero***).

## unjust enrichment: the remedial constructive trust

* Gives rise to an enforceable equitable obligation – the extent to which it operates is up to the courts (***Westdeutsche***)
* The social tolerance and change towards people not getting married, but entering into joint family ventures of common law marriages has led to one individual being seriously disadvantaged when things dissolve.
* Criteria for unjust enrichment: enrichment, **corresponding** deprivation, absence of juristic reason to let the defendant keep the entirchment (***Pettkus***).
* When looking at remedial constructive trusts, consider unconscionable situation where the court should use money to fix the problem (***Kerr/Seguin***).
  + Has there been a payment/benefit with no reciprocity?
  + Think of common law marriages as family partnerships/joint family venture – resist duelling quantum meruit claims – whatever assets survive the dissolution of joint family ventures comprise the corpus of the constructive trust – family legislation has eclipsed these issues in BC – there must be a causal connection between P’s contribution and the property, though indirect contributions may suffice provided there is a connection between deprivation and acquisition.

### ***Menard v Menard*** – equity will regard as done what the parties manifest an intention to do

Facts: Deceased held shares in his name, but then transferred them into the hands of the company for registration. His transferees didn’t have legal title until that registration had been completed.

Holding: Between the application to the company and actual registration, the deceased continued holding his legal title, but as a constructive T.

# purpose trusts

* Private purpose trust: There is no specific individual as the B – the trust has been constituted to meet the desire of the settlor to apply the trust funds to advance a special purpose. The trust instrument must disclose this intention clearly.
* The testator must dispose himself of the property – he can’t just direct executors/Ts to do the business for him (***Chichister***).
* General rule is that the object of a trust must be persons – purposes are generally unascertainable and can’t stand (***Re Astor’s Settlement Trust***), but there are a few exceptions:
  + Outline in the ***Statute of Elizabeth***:Horses (***Pettingall***), dogs, graves, and monuments – perpetuities are not violated because animals almost never live beyond 21 years
* A purpose trust framed in a way to promote a targeted goal through named Bs is okay (***Re Denley’s Trust*** – land given to Ts to be used as a sports ground for the employees of a company)
* Gifts to clubs or unincorporated associations, where assets are transferred to present/future members, besides perpetuity issues, may actually result in the characterization of a gift as a purpose, rather than to members in conformity with the B principle.
  + ***Cocks v Manners*** – testatrix gave some of her estate to the supervisor for the time being of a convent – the trust takes the form of a gift to an official in the association and is paid as an accretion to the funds of the club.
  + ***Re Recher***’***s Wil Trusts*** – gifts to an association that doesn’t exist in the form described by the testator cannot be valid
  + ***Re Russel, Wood v The Queen*** – a legacy was given to the Theosophical Society – the judge couldn’t uphold the private purpose gift because the word trust was used and because the testator specified only some of the purposes for which the society was organized.
  + ***Leahy v AG for New South Wales*** – testator gave land in trust for nuns and the church which T could select. The Court allowed Ts to give to convents who were members of charitable orders.
  + ***Re Lipinski’s Will Trust Gosschalk v Levy*** – Maccabee association was an unincorporated non-charitable association for Jewish youth – on dissolution, the Court held that assets shall be held by Ts as a fund to set up any other local Jewish youth organisation with similar aims. The testator gave the residue of his estate to this society and court held it valid.
* Charitable trusts are a form of express trusts so vesting assets in T, certainty of intention and subject apply (***Chichester***). Clarity of objects is not necessary since there are not people as Bs.
  + ***Chichister*** – testator told executors to apply residue to whatever charity they wanted – court said too vague and so void
* Charities can be set up in two ways:
  + Administration of trust assets take the form of a permanent endowment in which income is generated from investments and used to further the specifically identified charitable purpose
  + Funds may be put in the hands of a named charity constituted primarily to generate funds that are then deployed by the Ts to fund specific foundations
    - They can be private or public foundations
    - CRA requires that a significant percentage of trust income be distributed for charitable purposes for the foundation to qualify for favourable tax treatment – prevents tax avoidance.
* Charities include trusts for relief of poverty, trusts for advancement of education, trusts for the advancement of religion, and trust for other purposes beneficial to the community – not every deserving subject qualifies as a charitable purpose (***Commissioners of Income Tax v Pemsel***)
  + ***Statute of Elizabeth*** reaffirms these four general heads of charities for purpose trusts – also a legal method to monitor and check abuses in the administration of charitable trusts
* Prelimiaries to determine whether a particular purpose can be regarded as charitable (***Native Communications Society of BC v MNR***)
  + The purpose must be beneficial to the community in a way which the law regards as charitable by coming within the spirit and intendment of the preamble to the ***Statute of Elizabeth***, in not within its letter.
  + Whether a purpose would or may operate for the public benefit is to be answered by the court on the basis of the record before it and in exercise of its equitable jurisdiction in matters of charity
    - Public benefit means the charitable trust has to address a good portion of society – Bs can’t be negligible in numbers – must be a truly public and not private benefit (***Oppenheim v Tobacco Securities Trust Co, Gilmour v Coats, Neville Estates***)
    - Relations = relations in any way can be seen as large enough to be charitable – next of kin would be invalid as it would be a private purpose trust – ***Re Scarisbrick***
* Don’t need public policy or public opinion to support it – it is enough for the court to find that the proposed charitable activities do not offend public policy (***Everywomen’s Health Centre Society***)
* Relief of poverty is not confined in its meaning to those that are desperately poor – covers charities that go beyond that (***Re Coulthurst’s Will Trusts***), can also benefit elderly or sickly and gifts to hospitals are seen as charitable
  + ***Planned Parenthood v Toronto***: court held their purpose didn’t qualify as relief from poverty even though their work assisted the poor – it met the public benefit test, but not poverty.
* Advancement of Education doesn’t have to be traditionally recognized subjects of teaching (***Vancouver Society of Immigrant and Visible Minority Women v Canada***) – gifts can be directed at institutions or fields of study so long as they promote dissemination of knowledge
  + Charitable trust with the purpose of advancing education must still meet the public benefit requirement (***Re Pinion***)
* Advancement of Religion means all faiths, provided the purposes aren’t immoral, it can be for advancement of any religion despite opinions being foolish (***Thornton v Howe***)
  + Organized religion is not necessary (***Funnell v Stewart***)
* Other purposes beneficial to the community reflects judicial policy from era to era on what counts as charitable – reflect societal attitudes. Relief from suffering and distress, protection of elderly though nursing homes, concerns for environment, agriculture, assisting sports, protection of animals, improving public spaces, disaster relief
  + **Political purposes do not count, but it doesn’t meant that charities can’t have positions on political matters.**
  + Might not be charitable if the group is a voluntary association in which the assets are to be distributed to the members on dissolution.
* Mixed purpose trusts, with one invalid charity is invalid – but in BC, legislation has severed uncharitable aim and allowed the rest to remain valid (Ex: to Vancouver poor society, Vancouver elderly care society, and Conservative Party of Canada)
* Rule against inalienability doesn’t apply to charitable trusts
* Certainty of objects: trust won’t fail for uncertainty – property identified for charitable trust may be applied *cy pres*(***Re Boyd***) – which Ts do not possess the power of, only Courts do – applies only to charitable trusts and not private trusts
  + Court should determine the substantial, overriding or paramount intention. The Court would have to find that the settlor’s intention was to educate young people and that the discriminatory provisions were just machinery designed to give effect to that intention – discriminatory scheme can’t displace charitable intention if discrimination wasn’t meant (***Canada Trust Co v On HRC***)
  + *Cy pres* order should combine the virtues of proximity, usefulness, and practicability being mindful of intention (***Re Fitzpatrick***)
  + ***Royal Trust Corp v Hospital for Sick Children***: gifts left to named relatives, if they died then to the Crippled Children’s Hospital. This hospital didn’t exist, but there were hospitals for disabled children, so the court ordered the gifts to those.