OVERVIEW

ESSENTIAL CHARACTERISTICS

1. It is a conveyance (legal T – trustee; equitable T – bene)
2. Imposes FD to act in good faith (:. Dependency on acts)
3. both have "in rem" rights *where problems occur

MAXIMS OF EQUITY

- "E follows the law"
- "Those who seek E must do E" (clean hands)
- "E assist vigilant and not tardy" (Laches not rewarded)
- "E if equality" (proportional among contributors)
- "E looks to intent rather than form" (conscience)
- "E looks on that which ought be done as being done"
- "E does not assist volunteer"
- "E acts in personam"
- "E will not permit a wrong w/o remedy"

EXPRESS TRUSTS

REQUIREMENTS TO BE VALID:

1. vested (perfected or complete)
2. 3 certainties
3. settlor requirements
4. Motive for trust must be legal

** Will (testamentary instrument) or inter vivos
see example p 54; p 60 for will example
can be thru contract or gratuitous transfer of LT & ET

VESTING of LT of property in trustee

To be effective, LT must be perfected/ compl constituted/ vested. Concerned w. describing the situation of transfer

Perfected = title in trust asset has been conveyed to the trustee and is under his control/ administration (or he can exact that control by the law: ex. enforcing contract thru specific perform)
*B cannot get ET until LT is first vested in trustee.

Perfecting will depend on vesting variables:

(1) SETTLOR'S FORM OF TRANSACTING

A. **PERSONAL DECLARATION OR AUTO CONSTITUTION**

legal T remains w/ settlor, but equitable T disposed of

Elliot: if deceased made PD of trust on property, **does not pass thru estate**. Only requires declaration.
Glynn: bene **need not know they're bene** (Here, it was in the minutes of directors meeting). **Declaration suffices vesting requirement** (prop already with trustee)
Watt: Simply declared boat owned evenly by him and wife and that if sold, $ divided equally. **Can be both a T and B** (here, 2 B)

**note: this goes beyond the CL rule which requires more than just a mere promise to give a gift; usually requires handing over :. "equity follows the law" doesn't really apply here.

B. **APPOINTS 3RD PART AS TRUSTEE**

Here, stated promise not enough. "Equity will not assist a volunteer" applies – so follow rules of conveyance

**See Nature of Property to determine requirements.
Milroy: **legal title must be transferred to T for trust to be perfected**. Perfection of shares requires registering name in share register. Doesn't matter if **treated like trust prior to death** of settlor OR **clear intention**.
Ratner: RE-gifted shares in writing*; Settlor revoked. **If gift is revoked** before proper conveyance takes effect, no claim.
Re Rose: gifted shares over 5yrs before death. Registration took time led to tax consequences. RULE: **if transferor done everything in pwr to effect transfer & all that remains is registration, gift considered substantially perfected.** Delay in routine operation of process ok. "Equity will assist a volunteer" to a limited extent then
Mordo v Nitting: **for land,** lesser form of control might be sufficient. **Execution of Form A and handing this to Trustee was sufficient** to vest title even w/out form registration in LTO.
Carson v Wilson: **Key: requirement that transferor intended to be immediately and unconditionally bound & had relinquished control of the property by putting the transfee in a position to complete the conveyance. Here, no good as the deeds and assignments were only to take effect on death (no intention to be immediately bound) and sidestepped will requirements.

C. **PARTIES DEAL CONTRACTUALLY W/ EACH OTHER**

Promises between 3 legally enforceable if contract properly constituted

If promise is to transfer property at some future date, **trust is constituted when the B can enforce the contract**. "Equity follows the law"

Less clear area: contract between settlor and trustee and settlor doesn't yet have property (but obliged, under agreement, to acquire it.) Unclear whether B can sue settlor for failure to acquire or sue T for failure to sue S for failure to acquire. Would need to show entitlement to an award of specific performance and that damages would be inappropriate.

D. **INCOMPLETE GIFT OF AN ASSET**

Intention can later be perfected thru some method of conveyance.

Rule in *Strong v Bird:* If an inter vivos gift is imperfect because the transfer is incomplete (**not vested**), the gift can be perfected if/ **when donee acquires title** to the property **in his capacity as** the **executor of the settlor's estate**. Applies to both **real** and **personal property**. **Doesn't apply to a promise to give property at a later date (just imperfect/ ineffective form of conveyancing)
Hilliard v Lostchuk: NOT A TRUST SITUATION. J sought to give H some of her land. Applied for rezoning and severance; approved after her death. H was executor of her estate.

(2) NATURE OF TYPE OF PROPERTY

= appropriate form of delivery depends on nature of asset.

a. REALTY – registration of title in LTO
b. SHARES – entry in share registrar
c. CHATTELS – actual or symbolic delivery
d. CHOSES (ex. units in mutual trust) – in writing
e. MONEY – handing over; delivery

THREE CERTAINTIES – in the document/ undertaking

1. OF INTENTION (words)

- Need direction (not request; no permissible language)
- Intention to make trust not out-and-out gift (w. hopes)
- Flexibility w. gauging intentions – is there impetrative responsibility on holder of LT "equity looks to substance not form"
- Usual way → document w. heading: "Deed of Trust" "Trust Settlement". Or say: "In trust". Or: "Must"
- Even if precatory words are used, court will look to entire document to ascertain and relationship between S & T

RE Kayford: don't need word "trust" – just sufficient intention
Re Adams and Kensignton: "to absolute use of wife, in full confidence she will do what's right" No trust.
Consumer v Coke: deposit $ collected for bottles not held in trust. Must look to conduct (substance) to see if obligation to hold in trust. Statutory basis of obligation did not create trust here.
Hayman v Nicholl: words "in confidence" not enuf to establish T (too precatory). **Must be clear property is to be used for B, not T**.
Royal Bank v Eastern Trust: intention must be indicated or can be **inferred** with reasonable certainty

*if uncertain, no trust. RESULT – person holding LT gets ET too

2. OF SUBJECT MATTER (assets)

- Clear indication/ description of:
  a) Thing in Q (exact enuf to be able to point to it)
  b) Amount (%) of interest in it given to B
- if b) invalid, trustee holds on resulting trust for settlor
- not ok: right to salary; News.
- "residue of my estate" – suff. (remains after debts paid)

Prof. Institute of Pub Servc of Can: federal accounts explaining employee entitlement to pension benefits. Contributions placed in Consolidated Revenue Fund (not separate account). No Trust
RE Golay: "receive a reasonable income from my property" Courts could determine an objectively reasonably income from this.
Re Beardmore: *court tend to find that the subject matter is certain BUT this was an exception. Transfer by way of inter vivos, but to take effect on S's death. T to hold 3/5th of net estate for wife, for life, and remainder to 2 children. Void for failure of WESA requirements AND **description of subject matter not ascertainable when trust created.** The "wait & see" as to assets not ok.
Sprange v Bernard (1789): 300$ to husband for sole use until death and what he does not use, to be divided between B's. Husband gets all
FLOATING TRUSTS – thing will become clear @ later time. "pay off my debt, rest to Ana" valid today. (leaving the balance)
Burke v Hudson: entitlement to surplus of pension funds akin to residuary beneficiary CUZ dependent on: plan terminating; there being a surplus after liabilities paid; employees surviving termination. Another "floating equity"

Note: trusts on income from property also not ascertainable at outset but still valid.

3. OF OBJECT .

only charitable purpose can exist w/o a B. In non-purpose, there must be at least 1 in order to enforce the trust.

Note: bare trust = no substantive duty on T; just holds for B.
Might be: named; described; member of group

level of clarity depends on kind of appointing mechanism granted:

a) **FIXED TRUST**
- fixed B and fixed amount
- ***list-certainty test***: ability to create complete list of B. If class of objects, each member of class needs to be identified

b) **TRUST POWER** (discretionary)
- must decide from class
- ***indiv. Ascertainability test***: clear enuf to say of anyone that he "is or is not" a member of the class.
- **MUST NOT** be too hopelessly wide that it is **administratively unworkable** such that the court can't supervise cuz **evidential uncertainty**.
- "trust" sufficient to show MUST perform task

Baden 1: abandons list cert. test; adopts ^ test. Power void if administrative unworkability.
T Eaton: adopts test in Canada

Baden 2: is the is/ is not test, Majority said: you can't have "don't know if it is an "is not""; DISSENT said treat these as no's. "relative" was fine since it could be construed to mean "next of kin" see p 107/08 for another judge's opinion.

**If large trust, court likely appoint new T to enforce trust; if class is small though, likely order equal division among B
**these dispositive powers are different from administrative powers (power to invest in land, shares, etc…)
**need not be the same person each time T distributes
**the criteria for who to choose will be set out in instrument

c) **POWER (SIMPLICITER)**
- may appoint but from class (if don't, resulting trust); must consider – cant say never.
- Might simply be a power to dispose of income coming in
- A gift-over is a hint at a power
- Potential B's have no interest in property until selected BUT they can call on T to consider them (just not enforce)
- ***indiv. Ascertainability test***: clear enuf to say of anyone that he "is or is not" a member of the class.
- *evidential uncertainty less important since don't have to choose
- **the power to appoint may be given to someone else – **"donee of the power of appointment" (also called "friend" "guardian" "protector")** ex. widow can choose which child

Re Gestetner: rejected list test.
Hay settlement: A power will likely not fail for administrative unworkability.

malfeasance = exercise discretion improperly
nonfeasance = fail to make appointment

conceptual uncertainty = category too fuzzily described to know who falls within
evidential uncertainty = evidence required to identify individuals too great rendering it administratively unworkable

FORMALITY REQUIREMENTS

DISPOSITION OF EQTUITABLE INTEREST FROM S → B .
- Formalities Required by the "statute of frauds" to prevent person with LT asserting they have ET. So some prov. Require transfer of ET to be in writing (land) (NOT BC)
- "equity follows the law" but it also "looks to intent rather than form" so even if not complied w. court's might favour finding ET with B.

ON DEALTH THROUGH WILL - *WESA*: .
s 37 – to be valid, a will must: (a) in writing (b) signed at end by will-maker in presence of 2+ witnesses (c) signed by 2+ witnesses in front of will-makers
s 40(1) – witness must be 19+
s 40(2) – witness can receive gift
s 40(3) – not invalid merely cuz witness is/ becomes incapable of proving the will.

Re Gardner: secret trust in will w. undisclosed beneficiary. B2 dies before testator. Court said interested vested at date B1 and T agreed. However, this means secret trust made effective before death w/out need of vesting title. :. Likely decided wrong (164). T needs to have title in assets to perfect gift :. Not vested.

FULLY SECRET TRUSTS .
a) name a beneficiary in will
b) during testator's life, B must
   I. know he is receiving bequest in the capacity of trustee, OR
   II. acquiesce in this state of affairs
c) named B must know who the real B is ***Re Boyes:*** didn't tell B1 who B2 was. Papers found after death indicating. Still failed. B1 held on resulting trust for next of kin of testator

**note: this can work if there is no will as well so long as the steps are complied with to person who receives property on intestacy.

HALF SECRET TRUSTS .

Here, disclosure in will that named B1 is trustee; no real B2 named though

Before the Will is made:
a) communicate w/ named B; ask if he will act in that capacity
b) must name identity of real B2
c) trustee-beneficiary must indicate his acceptance before/ at time will is made.

CHALLENGING A WILL under WESA .
s 59(1) – see insert. s 59(2) - s 59(3) –

CONTINGENT EQUITABLE INTERESTS

VESTED EQUITABLE FUTURE INTEREST .
- = entitlement to future enjoyment (ex. equitable remainder; equitable reversion
- this interest is still property presently held, but enjoyment in future
- gives holder in rem rights

VESTED IF:
- person entitled is ascertained (or born)
- interest ready to take effect; may only be prevented from doing so due to a a prior legal interest (life tenant) – and not a fulfillment of a condition/ event to occur/ not occur
- trust property identified and LT vested

**if either 1 or 2 not met – interest is contingent
** if third not met, trust is imperfect

CONTINGENT EQUITABLE FUTURE INTEREST .
- = not vested until condition met OR event occurs. Subject to perpetuities

CONTINGENT AND NOT VESTED IF:
- asset not identified, or
- identity of grantee cannot be established (un-born person is contingent on coming into existence)
- right to interest depends on occurrence of an event
- for class gifts → when each member not ascertained ("grandchildren")

CONTENT OF CONTINGENT EVENT MUST NOT:
- bar alienation
- be vague/ unclear ("good Jew" – what makes one so?); must be obvious when this event/ condition occurs
- contravene public policy (race, gender, sexual orien)
- be illegal (must commit a crime)

** see p 185/86 for what happens to asset it it fails.

CONTINGENT v VESTED .

A) Vesting on the happening of condition precedents
"if she turns 19"
- **Vests when** she turns 19

B) Vested w. Right of Entry
"on condition that she doesn't marry Todd; if she does, to Basil"
- her interest is **vested but defeasible upon a condition subsequent**.
- Basil's interest is also vested.
- language → "but if" "subject to" "provided that"

C) Vested w. possibility of reverter (limitation)
"to B until she marries; then to C"
- B has a **fee simple determinable**.
- C has a **future interest that is vested**
- language → "when" "during" "as long as"

**not contingent.

REVOCATION

Settlor falls out of transaction once trust is constituted ***UNLESS:***
(a) he is a B (b) he retained pwr to amend/ revoke

Bill v Cureton: women gave property to trustee for her life, then her husband's life, then her child's. Never married/ child. **Couldn't revoke cuz needed other beneficiaries**. If had other B's Saunders v Vautier would have applied.

Nolan v Kerry: Settlor (employer) wanted to use pension surplus to fund its pension contributions. Need power of revocation to remove $; employer no longer in control otherwise.

Schmidt v Air Products: settlor **can reserve any power**: appoint T's; change B's; withdraw property.

Metro Toron. Pension Plan (Trustee) v City of Toron: if you don't have the powers to amend/ revoke, cant. **NEEDS TO BE CLEAR.**

Can have: only the power to **amend** OR only the power to **revoke**.

3RD CERTAINTY - PURPOSE TRUSTS

PRIVATE PURPOSE TRUSTS

Why prohibit: need someone 2 enforce (***Re Astor***) ***"Astor Princip"***
- Trust for grandchildren 4 education is not a purpose trust
- if invalid, held as resulting trust for donor

Exceptions to the prohibition:

a) HORSES, DOGS, GRAVES, & MONUMENTS
- graves/ monuments valid so long as T is prepared to do task.
- Can't go on beyond **21 years** though

Pettingall: Executor spend 50$/ year on horse. Valid cuz residuary legatee could enforce. And animals rarely live beyond 21 yrs.

Endacott/ Re Shaw's Will: rejected expansion of category. In SHAW, "trust for 40-letter alpha" not a valid purpose trust BUT **upheld as a power to spend $ for that purpose**.

b) THE DENLEY RULE "Indirect B rule"
- ie. strongly associate purpose w/ people involved; purpose wont be compellable tho.
- Has to be direct enough for one to be able to apply to court to enforce.

Re Denley's Trust: land used for sports ground for employees.

Kweewatin Tribal Council: Band declared selves T over land for students; claiming bands as B; done to avoid taxes. Could be enforced by band council members

c) UNINCORPORATED ASSOCIATIONS or CLUBS
- ie. give it to members who achieve your purpose;
- gift to **members of club** as **governed by the contract** that sets/ defines association. Usually lists rules for: purpose, organization, termination, and splitting surplus $ after.
- Must be more than a changing group whose membership constantly changes (ex. political parties)
- Should avoid giving it to future members

categorization might effect gift:
a) joint tenancy – if left to supervisor or members
b) **Gift to official, according to club rules – $ regulated according to club rules; if resign, likely don't get $
c) Gift, in trust for, club purposes – invalid.

Re Recher's Will: residuary given to named club. Club then merged w/ other societies. Given to those specific members of that specific club; can't use purpose to uphold. If club ceases to exist, private purpose trust fails; held on resulting trust for estate.

Re Russel Estate: testator specified only some purposes of the society. Not valid purpose trust. Held as valid charitable trust tho

Leahy: left land for certain nuns (those who pray/ contemplate). Not valid charitable trust cuz selection of nuns wasn't for charitable orders. This was private purpose and didn't confine application to existing members :. Failed.

Cf Lipinki's Will: $ left by 1st organization to set up Jewish organization w. similar objects as 1st. Construed as $ for the benefit of ascertainable person beneficiaries (members of the association for the time being) :. Not purpose.

MIXED CHARITABLE AND NON-CHARITABLE PURPOSE TRUSTS:
**where the main purpose of the gift is charitable, minor/ incidental non-charity elements will not invalidate it.
Law and Equity Act, s 47 → charitable purpose linked with non is not void but operates solely for benefit of charitable

PERFORMANCE OF PRIVATE PURPOSE AS CONDITION IN GIFT TO CHARTY:

Re Coxen: "Residue of estate for charitable purposes so long as they honour my name"

OR → give $ to charity **determinable** if instruction to maintain non-charitable purpose is not complied w. Gift over to another charity on determination. (Don't couch it as a condition tho)

Re Dalziel: amount for non-charitable purpose must be small or invalid.

**Can also frame the trust as a power. Since there is no duty to exercise power don't need someone to enforce. AND injunctions against wrongful acts can be enforced. Ontario courts do sometimes lean this way; allowing settlor to prohibit seeing it as a power though.
** BC is considering permitting the settlor to appoint a 3rd party enforcer with power to enforce private purpose trust

CHARITABLE PURPOSE TRUSTS

* have the advantage of **CY-PRES** rules "trust will not fail for want of trustees" :. Court can appoint T

Note: for purpose trusts, rules still apply: must be vested, must be intention, certainty of subject.
Chichester: "residue to charities in England" the **purpose MUST be clear.** Here, it failed.

Charities can take a number of forms:

1. a trust, where assets held by T for charitable purpose
2. corporation, with articles precluding distribution of dividends
3. non-profit incorporated society, objects of charity identified.

Charities may be set up functionally in 2 ways:

1. permanent endowment; income from investment used for identified purpose
2. funds given to named charity to generate funds that T funds to specific purpose charities

*for tax purposes, significant amount of income must be spent on charitable purpose.

PUBLIC BENEFIT REQUIREMENT

- potential B's cannot be linked by a relationship to a common person (family; employer)
- must exude a public element

Native Communications Society of BC: *must meet* PB; court's decide

A) PUBLIC ASPECT:

Gilmour v Coats: 20 nuns failed. Secluded from world.
Neville Estates: Nuns of Catford did as spent lives in world
Re Scarisbrick: "$ for such of my relations in needy circumstances" Held valid, as relations interpreted broadly to include relations in any degree.
T Eaton: $ held by officers of Eaton as trust for any needy Toronto member of the Eaton Club. Held as valid charitable purpose.
usually a **rebuttable presumption that they benefit public. :. Wont be voided if expressed preference for specified individuals; tho there is a risk in doing so.

B) BENEFIT ASPECT:

Anti-Vivisection: if **illegal or against public policy**, invalid. Court's decide. Must promote public weal
Everywomen's Health Centre: might be enuf to find the purpose doesn't offend public policy.
Re Pinion: trust for museum of testator's art. Invalid as art so bad.

- political objectives no good (no means of judging if it will be a benefit

Statute of Elizabeth of 1601 → what types of charities?

(1) RELIEF OF POVERTY

- need not be destitute; can give the needy luxury
- aged; sick persons (:. To hospital who help wealthy); disability; impotent

Jones: "needy people"
Planned Parenthood v Toronto: didn't qualify; no means test :. Could assist wealthy too. *might qualify today.
PB → narrow threshold; **usually assumed** unless contrary shown

(2) ADVANCEMENT OF EDUCATION

broadly interpreted: research/ scholarship/ teaching/ sports/ chess
Van society of Immigrant & Vis Minority Wmn: introductory level educ. Ok. (ESL)
Incorporated Council of Law Reporting: non-profit production of law reports ok.
PB → cultural values relevance:
Re Compton: permissible for a preference towards certain members, but can't be confined to certain group
Royal Trust Corp: scholarship w. restrictions based on race, gender invalid. Note: Cy-pres not available at the time.

(3) ADVANCEMENT OF RELIGION

- choir; bell ringing; Sunday school prizes; support of clergy

Bourne v Keane: mass was ok
Thornton v Howe: sacred writing of woman believed to eventually give birth to next messiah ok
Church of the New Faith: scientology ok
RE South Place Ethical Society: philosophy (ethical principle and cultivation of rational religion) w/out worship no good.
United Grand Lodge: free masons to regulate selves no good.
PB →
Gilmour v Coats: secluded nuns not a benefit to public; public benefit too remote.
Funnell v Stewart: small circle that laid hands and prayed for many ok.

(4) OTHER PURPOSES BENEFICIAL TO COMMUNITY

culturally relevant; court decides; ex. hospitals, nursing homes, protection of animals, disaster relief
Van society of Immigrant & Vis Minority Wmn: employment facilitation ok
RE Cotton Trust for Rural Beautification: environment ok
Lacavailler v Sussex: bridges, ports (public works). Here, left it to the city for appropriate purposes. No objects so court assumed charitable and upheld as valid.
Chichester Dioescan Fund: political parties *no good*
PB →
Pubic = general community

AVOID → giving to body who profits; groups who gets assets on dissolution; too wide of parameters (not specific enough)

PERPETUITIES AND INALIENABILITY: useful for other topics too

- usually subject to rule against perpetuities – meaning it must vest before 21 years. BUT if there is a gift-over, that is fine.
- BUT courts tend to favour early vesting anyways. :. May see it as absolute immediate gift to charity w/ mode of execution dependent on future events
- **Not subject to rule against inalienability (can't sell)**. Ex. gift to church for upkeep. Structure of church as capital indefinitely and income used for maintenance.

Certainty of Objects and CY-PRES

Court has inherent jurisdiction to fix trust when requirements become impossible (no income left; charity no longer exists) or contrary to PP (as values change). If no power to change, ask court
Canada Trust Company v Ont HRC: mode of advancing education become culturally wrong (contrary to public policy). Court looked to intention and re-wrote the trust.
Re Taylor: paramount objective test → if paramount objective of testator was to benefit particular form of charity. Then have regard to this in choosing a new one when the old no longer exists
RE Tacon: When **gift for a chartable purpose** (with no named institution): so long as this purpose is not vague, uncertain, impractical at the time of the testator's death, it will not fail
Likewise, if **gift to specific charity**: will not fail so long as charity exists at time of testator's death. **Also not fail if general chartable intention can be found** (say, if charity doesn't exist at death)
Royal Trust Corp of Canada v Hospital for sick Children: HERE, even though the hospital named didn't exist, court found intention was for disabled children.
**Can also be used when the administration provisions are no longer applicable: ex. if lands are changed and no longer require upkeep.
***IN USING CY-PRES → HAVE REGARD TO INTENTION**

RESULTING/ IMPLIED TRUSTS

RE Vandervell's Trus: divided resulting trust into 2 categories
See p 216-20 for arguments of 3rd type (common intention) and reasons for its objection in Canada. An argument for/ against subsuming Resulting Trust under Unjust Enrichment

AUTOMATIC RESULTING TRUST

4 situations:

1. TRUST turns out to be VOID after LT TRANSFERRED .

- when fails 1 of 3 certainties

IRC v Broadway Cottages Trust: discretionary trust failed certainty of objects :. held in RT for settlor.

2. EQUITABLE INTEREST ISN'T FULLY DISPOSED OF .

RE West: assets left for "debts, funeral, legacies". Trustees didn't get remainder (this would conflict with FD and would require clear intention). Held on RT.

King v Denison (1832): where the purpose is exhausted, held on resulting trust for settlor or heirs

Schmidt v Air Products: merger of pension plans. Company dissolves and surplus. Two plans that merged dealt with surplus differently. Court held that surplus would be dealt with according to original plans of each pension.

3. SPECIFIC LIMITATION/ CONDITION DOESN'T OCCUR .

("Quistclose Trust")

Barclays v Quistclose Investments: borrowed $ from Q who stipulated it be used to pay dividends to shareholders. Never made this payment; went bankrupt. Court said **specific purpose loans create fiduciary trust arrangement. If condition not met, $ belongs, in rem, to lender** (lender becomes preferred creditor)

Giles v Westminster Savings credit Union: accepted ^ as BC law. **Said purpose must be specific enough**. Here, developing/ selling land not enuf.

Twinsectra v Yardley: **equitable in rem remedy available for the lender** in these cases; can trace.

Re Westar Mining: When specific purpose identified, its **separated/ segmented for this purpose and doesn't fall into estate**. HERE, money set aside to benefit 2 companies (joint venture) in a specific way. 1 went bankrupt; creditors couldn't claim as $ went to employees (why not other com?)

4. SURPLUS OF FUNDS AFTER PURPOSE ACHIEVED .

Re British Red Cross: large sums from identifiable donors for war.

Gillingham Bus Disaster: lots of contributors. Each allowed to come collect share of remaining relief $ from court if could prove

RE West Sussex Constabulary Fund: police fund for widows no longer necessary as now dealt w/ nationally. Surplus leftover; most $ came from donation boxes. Surplus should **go to Crown (bonacavantia?)**; if large donators that could be pointed to, held on RT for them.

a) Collection boxes → to Crown; givers intended to part with $
b) Major donations → if purpose achieved, RT
c) Street entertainers; raffles → Crown; paid for service

Hanchett-Stanford v AG: unincorporated association whose purpose stop cruelty to animals. Only 1 member left. Have to determine how $ was given (JT?); **look @ contract to determine ownership of assets by members OR rules for surplus.**

Re Bucks Constabulary: If 2 members remain, they can change the contract (to divide surplus). BUT only 1 member cannot do this.

PRESUMBED RESULTING TRUST

No consideration OR buyer transfers to 3rd party
*Presumed means its **rebuttable***

Oord: 4 registered as JT. Only 2 paid though. This led to presumed resulting trust BUT was rebutted by intention to live together harmoniously & no expectation to repay rebutted.

Kerr v Baranow: RT is how you deal w/ unexplained transfers

Eisner v Baker: courts will search for actual intention

REBUTTING THE PRESUMPTION OF RT .

Have to show an intention to give out-and-out gift; not just LT.

RE Vinogradoff: Gram put stocks in joint account w. grandchild. . Grandchild held to have no ET to stocks.

Niles v Lake: A holds JT account with B, her sister. B makes withdrawals to take care of A. Only A deposited money.

Can't ascertain **intentions of deceased** by referencing standard form document's on rules of joint accounts (to protect bank)

Eisner v Baker: GF signs house agreement w/out BF's knowledge after he asks her to fax it. Later, he doesn't intefer. Court decides he only acquiesced because he didn't want to hurt relationship but he never intended her to hold ET. :. She holds on RT

Standing v Bowring: [P] gifted bank stocks to godson, with both their names in Bank Books. Godson unaware. [P] tries to get full LT back. Court found presumption of RT had been rebuttedby clear intention to give ET to godson. **Intention can be manifested thru conduct**

Nishi v Rascal Trucking: "contribution to purchase price made w/out any conditions or requirements" signaled an out-and-out gift intention :. No RT. This also supported by a motivation to offset costs the contributor put on the purchaser's property. COMMERCIAL CONTEXT^^

Russell v Scott: P opens joint bank account w. A; tells lawyer on death, A gets $. **Intention declared :. No RT**. **Didn't violate WESA** because of right of survivorship with JT.

Young v Sealey: 1-time deposit in joint account just prior to death; $ to go to 2nd on death → found to be **violation of WESA**

Sawden Estate v Watch Tower Bible: Will left residuary to charity. Prior to death, put all $ in joint bank account w/ sons. He knew rights of survivorship rules :. Intention

Property Law Act, s 19(3) → don't have to express that a voluntary transfer is for the benefit of the transferee to prevent a resulting trust

PRESEUMPTION OF ADVANCEMENT .

Presumed to be an out-and-out gift, but can be rebutted thru evidence of intention

Husband – wife: in BC, rule not abolished

Mehta: review whether lifestyle is contemporary or traditional to see if presumption applies to marriage.

Pecore: presumption extended to mothers. Only to dependent children tho (not defined) BUT court says financially dependent. It might be on these adult children to prove.

RELEVANCE OF TIME .

What events, from a time POV, can you use to rebut?

Shepherd v Cartwright: dad transfers shares to kids; collects $, but transfers shares back 5 years later. Kids argue presump of advance. Tax man argues rebutted by dad's re-transfer. Evidence excluded. **Intention @ time gift was made** (or just after). Could argue keeping $ = RT

EFFECT OF ILLEGALITY .

What happens when the evidence to rebut is illegal?

PAR DELICTUM RULE – the court will prefer the position of the possessor – operating in: ***Scheuerman:*** PoA. Wont hear evidence cuz husband conveyed house to wife to protect against creditor claims (evidence would have been this). **Doesn't matter that creditors never tried to sue.**

Note: RT, possessor not favoured :. Today, rule doesn't apply as much

Goodfriend: motive that is bad, but not truly illegal wont prevent evidence. HERE, wife made up fake cause of action

LOCUS POENITENTIAE RULE – court will permit evidence if: (1) dreadfully sorry (2) made amends to illegal action.

^^From: ***Tribe v Soiseth***: dad puts apartment in daughter's name to avoid extra tax. BF tries to claim property. Court invites dad to say sorry and pay capital gains tax on sale.

David v Szoke: transfer asset to GF in case drinks/ drives, kills. They split. He argues RT. Court wont hear evidence :. She holds on RT (because presumed; couldn't rebut)
Gorog v Kiss: Transfer to sister to cuz business partner suing him. Debt repaid anyways. Sis holds on RT (couldn't use evidence)
Foster v Foster: dad transfers to kids to avoid creditor. Kid wont transfer back. Court finds PoA; wont hear evidence
Tinsley v Milligan: 2 women contributed to mortgage, only in 1's name though. Other's not to get welfare benefits. Court didn't need to hear illegal evidence since 2nd gave $.
PROPORTIONATE HARM APPROACH – AUSTRAL. ONLY
Nelson: mom transfers to kids to scam welfare. 1 wont transfer back. Court decides harm done by mom > kid. 2 criteria: (1) proportionality of harm (2) statute – see penalty in statute and give effect to that

BENEFICIARY

THEIR ROLE

Fruendi – enjoyment
NOT utendi – management/ control
Schalit v Nadler: beneficiary ordered remedy to sell tenant's property for unpaid rent. Tenant sues. Wins. Beneficiary can't take part in management
Re Bagot's Settlements: beneficiary collected rent from trust property. Court said given her expertize and minor role, ok. BUT she was an **agent for trustee** & he responsible for her actions

EQUITABLE TITLE – anatomy of

Is title in each individual thing or trust as a whole?

Note: the equitable benefit might be simply the proper administration of assets (:. A personal right rather than real). This occurs when there are lots of constantly changing assets.
Baker v Archer-Shee: UK resident, beneficiary of assets (stocks/ shares) in US. UK wanted to tax. She argued isn't owner, only has an interest in them being administered prudently and properly. DISSENT: assets that are constantly change, your interest is more personal; ensure trustees doing job
Archer-Shee v Garland: Under US law, dissent is right ^^
Set-meal WHEN: (a) T has power to exclusive power to dispose (b) ownership in items constantly fluctuates.

- Set meal is more realistic when there are multiple B's too; especially when its discretionary
- BUT set meal is contrary to the rule in Saunders v Vautier where B can terminate and acquire assets
- :. Hard to categorize

Spencer v Riesberry: here, characterized trust as set meal. Interest in proper admin of estate

DISPOSING OF EQUITABLE TITLE

SETTLOR → BENEFICIARY

- WESA (if not complies w. pass according to testation)
- Statute of Frauds for certain provinces (not BC)

BENEFICIARY → NEW B (assignment of chose in action)

a) **Hold equitable benefit for new B**
This simply creates an automatic trust.
b) **Transfer equitable title**
S 36 Law and Equity Act: **Assignment** from B1 to B2 in **writing**. Give trustee **notice in writing**. B1 falls out and B2 takes place. B2 can take actions against Trustee despite no original privity of contract. If no notice, B1 will have to enforce.

Timpson's Executors: 4 ways: (1) assign to 3rd party (2) direct T to hold for 3rd party (3) contract for valuable consideration to assign ET to 3rd party (4) declare self to be T for B2. HERE, b advising T to give her children $/ year until she says is not making them B2's as they could not enforce.
RE Wasdale: If done to more than one B, **1st B takes priority**

THE PROTECTIVE TRUST .

Prevents B from obtaining legal title/ calling the trust or disposing of interest BY creating a strong legal incentive not to.

Ie. if you try to call, it will go to another.
MUST be a **determinable interest** NOT **condition subsequent**.
"as long as" "when" "until" "during" **NOT** "on condition that" "but if" "subject to" (these are *seen as undue restraints on alienation*)
Seen as an **equitable "determinable life interest"**
If determining event occurs, ***automatic disposition of interest as gift-over*** **to** secondary beneficiaries

TERMINATION OF TRUST BY BENEFICIARY

Saunders v Vautier: age condition was for enjoyment not vesting
circumstances and conditions under which the beneficiary can terminate the trust & acquire LT

1. Achieve age of majority (in BC = 19) see p 293
2. Compus mentus (sui juris – capable of acting in law on your own)
3. Absolutely entitled to trust property (can't be contingent, must be vested)

Look to language to see if it is vested (vesting of possession not necessary) CANT BE CONTINGENT. Courts favour vesting unless wording is clear. **Gift-over suggests contingent** & vice versa
Fargey: B1 reached age of majority, B2 didn't. B1 wanted his portion of interest. Court had to considered if it was vested. **"distribute"** the capital implied it was vested already. Courts lean towards vesting.

Re Carlson Estate: In will, assets not to be touched but used to educate and maintain B1, a minor until age 21. B2 was a major and wanted her 45%. Court looks to intentions of testator and finds B2's interest not vested until son turns 21 (when the asset division was to take place). The asset was meant to take care of son and what was left to be distributed. **Where will makes it clear that asset isn't to be divided until all B reach age, cannot terminate**

Can apply to **DISCRETIONARY TRUSTS WHEN all potential and ascertained objects of T's discretion universally agree that LT must be conveyed to them. Can't when class too broad that not all can be ascertained. Can't if new B's might become part of class
RE Chodak: Fixed B's but **T had discretion on how much to give to each**. They could call the trust. Court split it among them equally.

LIMITS: .

a) **PENSIONS**
Bushau: might apply to small pensions w. few beneficiaries (didn't define). Modern Pensions can only be terminated through PBSA

b) **MUST HAVE ABSOLUTE INTEREST**
If multiple, all must agree; even if remainders.

c) **DISCRETIONARY TRUSTS WITH SUCCESSIVE EQUITABLE INTERESTS**
RE Smith v Aspinall: If all the objects entitled to both income and capital (1) act in unison (2) are sui juris THEY can terminate the trust or direct the T in a discretionary T AND can acquire/ deal with property as they please. HERE, assign ET to get a mortgage

d) **DIVISIBLE PROPERTY**
Re Sandeman's Will Trust: if assets are divisible, then divide (and the 1 sui juris can have his share) but not if this division will do something unfair. (value can suffer minor reduction though)
Re Marshal: **land is not regarded as divisible**

e) **CAN'T DIVIDE IF WOULD BRING UNFAIR HARDSHIP**
Llyod Bank v Duker: division would have given unfair advantage to B1 by allowing him to control company. These lesser share holders (other B's) could potentially suffer if B1 chose to exercise this pwr attained from dividing assets
*in Alberta, termination must be approved by court

VARIATION OF THE TRUST

Sometimes circumstances change that the settlor could not anticipate and changes required in order to benefit B

Chapman: court had no power to vary the trust despite it being beneficial to minors/ unborn B and all adults assented to it. **Courts role is very limited in varying the trust**

**only where B's can't exercise Saunders v Vautier rights

EXCEPTIONS:

1) ADMINISTRATIVE TERMS

Unforeseen (by settlor) emergencies such that trust is threatened. Ex. repair building

2) MAINTENANCE JURISDICTION (also legislatively allowed)

Direct money to B's for living conditions to meet trust expectations.

Ex. Order income to be distributed if B inadequately provided for

3) CONVERSION

From realty to property and vice versa

4) COMPROMISE

Court acts for B's who are not jui juris when there is a dispute between T's and B's.

Trust and Settlement Variation Act

(1)(a): approve on behalf of **non-sui juris** who has direct/ indirect interest ***whether vested or contingent***

(b): person who **may become entitled**, directly/ indirectly to an interest (*whether ascertained or not*)

(c) **unborn** persons

(d) person where interest may arise by way of discretion on the failure or determination of an existing interest that has not failed/ determined.

Any arrangement (purposed by anyone) varying, revoking the trusts OR enlarging powers of trustees to manage/ administer trust

(2) must appear to be **for the benefit of the persons** in a,b,c the court in consenting on behalf of.

STATUTORY INTERPRETATION OF ^^

Who can the court consent for?

- Unborn, unascertained, and/ or incapacitated
- (b) is for when there is a group of 4, but only the last survivor gets it. Technically all have a future interest, but don't know which one. ***Bushau:*** it is not for lost people who cant be found (pension case)
- (d) when a discretionary power exists ***Re Stieds Will Trust:*** protective trust to B for life, then to a remainder appointed by T. LT wanted to vary the trust so that she could be the remainder. Court said no: undermined protective trust.

What is a benefit?

Eaton: basic intention of testator should be kept alive. **A prudent adult motivated by self interest would accept the benefit**. Benefit for those incapable of speaking for self.

RE Burns: wanted to enlarge investing pwrs (currently, assets mainly in shares in family business). For tax purposes, shifting around. Court held **tax minimization** and **increasing financial interest** was a benefit

RE Weston's Settlement: during course of trust, tax law changed which burdened the trust. Trustees wanted to move trust to tax haven, but doing so would move the kids there too. **Educational** and **social benefits** important too

Re Remnant's Settlement: allow change as it will help with **family harmony** (all benefit as B1/2 could marry whoever).

RE Harris: mom wants equal split among kids. Court said clearly against intention. And B1 or B2 wont benefit from compromise (had higher % of assets.). Family harmony if all benefit.

Russ v BC: prudent advisor test. Not benefit as intended by testator (this at odds w. other cases). Objectively beneficial

RE Tweedie: unborn's benefit would be minimal anyways.

Bentall Corp: is the proposal a good bargain? Don't need to eliminate risk – use prudent investor standard.

Appointment, Retirement & Removal of Trustees

TYPES:

- can be any person – legal or natural
- might be residency requirements

a) settlor likely to choose: responsible, level headed, business like approach w/ capacity 4 good judgment

b) Public Guardian – legally and physically disabled (Who have a trustee) AND protection of charitable trusts

c) Trustee de son tort – non-appointed intermeddlers in the affairs of an existing trust (deemed to be T)

d) Advisors or protectors (monitors T; appoints objects; can veto) – their supervision needs to be clearly set out in instrument. MIGHT BE A FD if they have a duty to act. P 334

TRUSTEE APPOINTMENT by SETTLOR

- Gains authority thru transfer of asset (vesting) or under a will thru letters of administration
- Where there are several T, appointed as JT (must function within **unanimity** (unless trust instrument says otherwise)
- May need to look to trust deed/ instrument to see type of trustee sought (if needs to be appointed)
- If protector, might require consent on certain decisions

*Uniform Law Conference of Canada advocating for uniform trustee act. See p 331

SUCCESSORS

Trustee Act, s 27

(1) IF: trustee is dead, remains outside BC for > 12mths, wishes to be discharged from any or all of trusts or powers, refuses or is seen unfit to act on them

- Persons nominated in trust instrument to appoint (settlor, guardian, or protector)
- If no mechanism, surviving or continuing trustees (or personal representatives thereof)

May **by writing** appoint another person or persons to replace the trustee

(2) on appointment (a) # of trustees can may be increased (b) can be appointed for only part of the trust (c) don't need to appoint more than 1, unless to begin w. there were 2+ trustees, then there must still be 2+ trustees after appointment (ie. only 1 if only 1 to begin with) (d) must vest the property in the new trustee(s)

(3) once vested, may act as tho always trustee (same pwrs)

(4) these provisions also count for: (a) trustee who dies b4 will takes effect

(5) section applies only if not not contrary to intention expressed in instrument

s 31: if it is expedient (practical) to appoint and inexpedient to do it w/out, **court can appoint**

s 36: if dispute over appoint, can apply to court.

By B agreement under Saunders v Vautier can appoint new T.

RE Tempest: guiding principles to consider when appointing: wishes of settlor (undesirable characteristics); no axe to grind to S or B's; will promote not impede execution.

VESTING OF ASSETS IN NEW TRUSTEES:

- Automatically vested with title precluding any necessary formal conveyance or assignment
- Instrument of appointment acts as vesting instrument

RETIREMENT

Trustee Act, s 28

(1) If 3+ trustees, **declares** wish to be discharged, co-trustees **consent** to discharge & vesting of property in them alone, deemed to be retired w/out appointment of new trustee (note: if only 2 trustees, then a new one will have to be appointed under s 29(2)(c))

(2) things required for **vesting in remaining trustees must be done**.

(3) section only apply if not contrary intention expressed in instrument

- If fails, continues as trustee w/ FD

REMOVAL – Role of protectors, B, courts

- Provisions in trust settlement might give authority to remove
- Often given to protectors and guardians
- Courts: inherent power or when asked by beneficiaries/ guardians

Trustee Act, s 31

If expedient

MUST BE: that the trustee is no longer able to carry out FD in responsible manner (putting trust asset @ risk) ex. inappropriate investment, impartial treatment of B, breach of loyalty

- B or co-trustee can apply here

Trustee Act, s 30

Trustee can be removed by court by application of the beneficiaries (if multiple, majority) who are jui juris

Conroy v Stokes: continuing **friction** between B and T can impair administration of trust

RE Consiglio: serious and enduring **disagreements** between T's meant they couldn't work together.

Critchley: 5 grounds to remove: dishonesty; deception; failure to give proper accounts; failure to file taxes; failure to act as prudent investor.

Radford v Radford Estate: interference with settlor's intentions (to appoint this T) must be **well justified**. **Clearest of evidence** to show this is the most sensible course. Main guide should be the **welfare of B's**; non-removal would likely **prevent proper execution of trust**; Not intended to punish, but to protect assets

Bunn v Gordon: consistent antipathy (**aversion**) to B's

RESIDENCY AND TAXATION

RESIDES → where the T resides; if multiple, where the majority resides; OR where central management occurs. ***(Garron)***

TAX → laws of where the trust resides applies to taxing

- T pays; where assets not sufficient, B must indemnify T

The Trustee

A) DUTY TO TAKE CUSTODY OF THE TRUST ASSETS

Once property is fully vested, have a duty to collect and store assets

DELEGATION:

Sometimes you can delegate BUT otherwise, must act personally

a) Stockbroker for sale of shares
b) Solicitor and bankers
c) Property manager to collect rent

s 95 of Trustee Act

liable only for own faults (not of banker, broker, or other holding securities/ money)

Speight v Gaunt: T will be exonerated from acts of agent unless some N or default led to the result. HERE, Stockbroker lost all $. The method used was standard business practice :. T not liable

- Exercise prudence in selecting agent
- Establish terms and limits of the authority
- Give them investment objectives
- Monitor their performance
- Negligence measurement will take into account standard business practice

RE Wilson: decision to sell trust asset made by managing director and not board is breach of principle of delegation

Fales: found this result impractical. When choosing corporate trustee, settlor should see who makes decisions.

DUTY TO INVEST (protect value)

- Duty to preserve the asset value of the trust
- Check trust instrument – sometimes there is a power to invest but sometimes there is a duty
- Trust instrument can also lay out: type of investments and standard of investment

STANDARD → what would a prudent business person do, reasonably handling their own assets ***(Speight)***

Fales: this standard of care applies to all trustees. EVEN **discretion does not relieve him of this duty.**

Two broad duties:

(1) invest so that capital is preserved from undue risk AND yields reasonable return
(2) invest even-handedly so all B's benefit

Trustee Act

s 15.1: may invest **in any form of property/ security**, subject to inconsistencies w/ trust (even in common trust fund managed by trust company who isn't co-trustee)

s 15.2: in investing, must **exercise care, skill, diligence, and judgment** that a prudent investor would exercise

s 15.3: **not liable for loss** from investment **if plan** for was a **reasonable assessment of risk/ return** that a prudent investor would adopt

s 15.4: abolishes CL rule that assesses decision on investment by investment basis AND good investments can offset bad investments (anti-netting rules)

s 15.5: **can delegate to qualified agents** as "investment specialists" (unless trust prohibits this)

s 17.1: a trustee **must not invest in his own shares**

- may need expert advice
- spread risk using a diversified portfolio

Cowan v Scargill: T's own ethical views don't matter. Still find investment that is most beneficial to B's.

Nestle v National Westminster Bank: Duty of impartiality removed in trust instrument. Invested in bonds instead of stocks (low return, but @ time stocks thought to be risky). Remainder left w/ very little. **Performance of investment can't be assessed on hindsight basis.**

DUTY OF LOYALTY

- To act in good faith; not abuse position (to promote personal benefit beyond payment); actions benefit B

STANDARDS:

Keech v Sanford: lease came to end; wouldn't re-rent to B because minor. Trustee takes for himself. B wants profit. Court said duty is absolute. **Even if not possible for B to benefit anymore**.

Boardman v Phipps: T hires solicitor/ B to investigate company. They advise T to takeover company. T doubts allowed. The 2 gain control; company succeeds; B's benefit (but so do the 2) Majority agrees profits go to B. **Even if breach causes B to succeed, hand over profits**.

DISSENT says only a real conflict.

Peso Silver Mines: Peso rejects claims (lacked $); later, director of Peso pursues one. Didn't obtain interest as D of Peso (or info)

Canadian Aero Services: director/ president/ VP take create a new company that directly competes with old. Takes job that they helped old company pursue. Old company wouldn't have gotten job anyways. Didn't matter that Canero wouldn't have been given job. Court decides not as strict anymore – must look at factors:

position held; nature of opportunity; its ripeness; its specificness; amount of knowledge possessed; time; circumstances of termination of relationship

Holder v Holder (UK): T wanted to buy trust property; made it known to everyone. Retired then purchased for FMV.

Molchan v Omega Gas: adopted ^^ in BC; TEST of sensible possibility of conflict of interest.

SELF DEALING V FAIR DEALING

SELF-DEALING = trustee transfers asset to self personally

- Transaction is voidable at complete discretion of B

Ex parte Bennet: WHY: too hard to tell if T really served best interests of B.

Ex parte Lacey: If he undertakes to act in best interest of B, he can't benefit himself :. Can't sell to self.

Holder v Holder: Here, justified ^^^^

FAIR DEALING = B sells equitable interest to T; should get signatures of both. (Can be void if power imbalance or B ignorant of benefits of transaction) GET them to get legal advice!

- Puts an end to the trust relationship

Denton v Donner: T must show as much as possible was gained from the transaction for B. **Onus on T**

Creighton v Roman: must be full disclosure of what the sale will mean for T. **IF B asserts conflict, T must show**: (1) no fraud/ concealment of advantage (2) B had independent legal advice and the fullest of info (3) consideration was adequate.

DUTY TO BE IMPARTIAL

A requirement to be even-handed. **Presumed**

Ordinary rule – Life tenant receives income (4%; court looks at rate of inflation though – could be 7/9%); capital left for remainder – Settlor may enable encroachment on capital for LT :.

Look at trust instrument 1st for presump rebut

Critchley: "vast discretion to provide wife income and whatever amount of capital" = don't need to be impartial

UNEQUAL TREATMENT CAN RESULT FROM:

a) nature of asset

high yielding assets that depreciates;
Closely held corp. of deceased (risky)
Insurance policy = no income
Royalties
Mortgages; cars; watches; copyrights

Miles v Vince: Two separate trusts: Family trust for children (real estate as primary asset); Proceeds from Insurance policy trust for wife/ children. T used insurance fund as a loan to family trust (using property as security for loan). No income flowed from insurance fund :. Wife didn't get income. T clearly favoured 1st over 2nd :. In breach of duty.

Re Smith: Precatory request by testator for son to put $ aside for mom as LT and him as remainder. He does. Mom only gets 2.5%. She said, sell shares. Court agreed – general principle to be impartial. Despite Dartmouth not applying here because inter vivos.

****Howe v Lord Dartwouth:*** apportionment rule: sell assets creating imbalance (if LT getting more than 4%)

WHERE:

- (A) testator (not settlor)
- (B) leaves a residuary
- (C) of personalty (not realty)
- (D) to persons by way of succession, and
- (E) the residue includes a wasting asset (including **unauthorized** (speculative shares) or **reversionary assets** (property in estate in which possession n/a :. No income; ex: remainders in shares; life insurance; debts payable in future))

THE TRUSTEE MUST

- (1) sell the personalty that is wasting (or ^^)
- (2) invest proceeds in authorized investment, AND
- (3) use income for LT of ; capitol for remainder

Until asset is sold, if surplus of income, give 4-9% to LT. If under-performing, then after property sold, take portion for LT that is roughly equivalent to 4%.

*value of shares assessed at date of sale or 1-year anniversary of death

Earl of Chesterfield: For **reversionary interests** (those making no income) → after sale, **calculate** what portion of the sale price, if it had been invested at the date of the testator's death, would have produced an income of 4%. Ex. 100 000 sold 3 years later = 88 900 :. 88 900 is invested as trust property and other goes to LT

**look at total return of stocks; not individual performance

Lowe v Stetson: if required to sell land for fair treatment must be an explicit provision.

IMPORTANT LANGUAGE/ IMPLICATIONS IN WILL:

a) impartiality suggested:

- "trust for sale" "trust to convert"
- Earl & Howe apply

IF "power to postpone sale**" → value of assets is taken at day of death (for applying the 4% rule)

b) partiality suggested:

- "trust to retain" (income to LT) (note: "Power to retain" is different and doesn't prevent rule in Howe)
- if total discretion
- LT to receive income "in specie"
- T allowed to hold unauthorized investments
- If simply "power to postpone" with nothing indicating "trust for sale": could imply partiality

****If income is from real estate → payment is in specie** :. No duty to convert unless expressly directed** **EVEN if it says "Trust for sale": LT receives in specie income until sale (*Re Oliver*).** Even if another trust asset is stocks (which LT would only receive 4%)

c) What about: **"Trust for sale w/ power to retain/ postpone"**

- Decide which part of clause is more dominant.

Lottman v Stanford: rule doesn't apply to realty even if it says "trust for sale w. power to postpone"

Lauer v Stekl: "trust 4 sale w/ power to postpone"; sale was most dominant part of clause and clause implied **realty to be part of the impartiality** CUZ "**trust to convert" was for all residuary**

Royal trust v Crawford: sale of assets in company which T held shares in led to lots of dividends (income) resulting in reduced value of company by 75%. Wide powers of postponement of conversion and retention. Court decided dividend should be distributed equally (husbands intent was to allow wife to continue to live comfortable). I**f there is power to retain permanently, could be in specie BUT if only power to retain until advantageous to sell, then likely not in specie w/out some further indication**. DISSENT: saw it as in specie for wife who was LT cuz remainder merely cousins.

d) What about **"Power to sell w. power to retain."**

- Here, no duty to convert/ sell
- But power to retain could mean be impartial
- :. This wording could be enough to indicate impartiality BUT look for intentions of testator/ settlor.

e) **Settled Shares** with "power to retain or duty to retain"

Re Waters Estate: profits distributed into preferred shares for SH instead of dividends. "Form is substance". **Take as they come**: income or capital.

Re Welsh: Settled shares into estate, 2nd wife LT and children from 1st wife remainders. Slow winding up, directors sent profit in form of dividends (250 000$). For tax reasons, $ came in phases. 2nd wife dies. His children want money. Testator was clearly against form is substance rule (**intention** implied from facts); would favour own children over her new one :. Taken as capital.

PAYING FOR DEBTS – Testator only – from capitol

WESA, s 144

Unless testator requires otherwise, income not available to pay debts – **payments come from capital** UNLESS insufficient, in which then they can come from income.

DUTY TO PROVIDE INFORMATION

- When B reaches age of majority, he can seek/ obtain info concerning the nature of his equitable interest
- Even contingent and discretionary beneficiaries can seek info to ensure trust is being properly managed.
- Need to give reasonable notice
- Then can see: trust accounts; portfolio of investments; trust document; all reasonable info concerning management
    - NOT ALL INFO THOUGH: agenda; correspondence between T's; minutes of meetings; reasons for exercise of discretion.

Re Londerry's settlement: B wanted minutes from T meeting. Court said no: confidential, might have discussed how to exercise discretion w/ regard to B's and reasons for.

Schmidt v Rosewood Trust: B wanted info about an offshore tax haven. Info should go to B; was personal representative of estate.

Abbot v Cross: no fishing expeditions

LEGAL OPINION: generally. not disclosable unless about B and their rights (not about potential breach of trust) ex. direction on how to proceed based on construction of a provision.

see 399 for Uniform Trustee Act (not adopted) arguments.

DUTY TO ACCOUNT .

Duty to account for assets and B can inspect these records

Sandford v Porter: not necessarily entitled to instantaneous response

Trustee Act, s 99

In a deceased estate, T has 2 years from date of appointment to file accounts

B) RIGHT TO REMUNERATION

Didn't exist at CL; if fee, must be in instrument under "charging clause"

Trustee Act, s 88

Expenses + fair and reasonable allowance not over 5% one-time fee

(3) At discretion of court – 0.4% of FMV can be claimed every so often as a **care and management fee**

Douglas v Hametner: s 88 fees need not be collected each year; wait and claim several years at one time

****RE Sproule Estate:*** wanted fee for maintaining large share asset. B said you're only holding. **Court looked at factors to award fee:** (a) magnitude of trust (b) care/ responsibility that arises (c) time required (d) skill/ ability displayed (e) success as a result of these things.

****Re Pedlar:*** **In order to get care and management fee under (3), T needs to give general summary of:** estate & his services performed, including those listed in ***Sproule.*** Can allow up to 0.4% and to be **applied to income and capital respectively** (here, gave 2/3 from capital and 1/3 from income)

**remuneration forms a charge or lien on the trust assets

DENIED WHEN:

Boardman v Phipps: where T guilty of misconduct &/ or doesn't provide proper accounting

Testa: when evidence is vague

COSTS FOR LEGAL FEES .

Trustee Act, s 85

Court has discretion to grant T remuneration from capitol/ income any expenses/costs from: petitions; orders; directions; conveyances; assignments; transfers

RIGHT TO INDEMNFICATION

Usually $ taken out of trust assets for costs BUT if there isn't enough, B might have to pay (ex. taxes)

Trustee Act. S 95

statutory force of the right to indemnification

*only if there is good reason why T should pay, should he pay

Hardon v Belilios: divided trust up into smaller trusts; **only 1 B was sui juris**. Would be unfair to make only 1 pay.

Re Reid: T in England; B in BC. T paid tax. Court said indemnify. Harden only applies when foreign state actually tries to exert authority over the sovereign in BC

USE v Harden: Foreign state cant sue for taxes under the law of that state

C) POWERS OF TRUSTEE

SOURCES:

1. Trust instrument (can limit powers)
2. CL (limits/ gives some powers – impartiality)
3. Trustee Act (delegation, choose form)

Fox v fox estate: courts don't interfere/ supervise exercise of powers too much – respecting confidence of settlor/ testator. WILL THOUGH IF: **"mala fides"** → undesirable; contrary to public policy/ community standards; influenced by extraneous matters

Trustee Act statutory powers:

- 5/6 – power to choose form in which sale is exercised (auction, contract, etc)
- 7 – can appoint solicitor/ banker to receive & give $ sue to a trust asset
- 23 – can compound debts; refer debt disputes to arbitration
- 9 – discretion around corporate management & reorganization of company to which shares relate
- 11 - Power to spend on repairs/ improvements
- 8 – Power to insure trust assets
- 15.5/ 22 – can delegate investment responsibility to specialist agents. Must exercise due diligence in selecting (15.5) AND vary investment decisions (22)
- 24/25 – can **use trust property for maintenance of persons under age of majority** (including sale of property)

CONTROL OF TRUSTEE BY BENEFICIARIES

Saunders v Vautier: threat to bring trust to an end (more difficult w/ multiple B or is some not sui juris; in latter, need consent from court – only given if B's benefit)

RE Brockbank: trustees can't be compelled though. Have to end trust to enforce. Here, regarded T's power to appoint new T's

CORPORATION INFO:

Butt v Kelsen: B wanted info on company which trustees were directors (as a result of trust). Court said no. **Only get same info the SH have access to**. Can compel share voting in certain way and amending articles.

Konig v Hobza: modern reflection of info sharing^^

Re Martin Estate: **need to balance info. If not harmful to other shareholders and makes sense for B to know** (contrary to ^^)

CONTROL OF TRUSTEE BY COURT

Courts tend to support decisions of T (been given their power by settlor/ testator for a reason)

Tempst v Lord Comoys: B wasn't happy that T wouldn't allow trust property to be mortgaged to buy other property. Court favoured T's decision.

Louis Winkler: courts defer to choice of T

SEEKING ADVICE AND OPINION FROM THE COURT .

Trustee Act

s 86 – Advice on administration/ management

s 87 – Absolves T from breach except in abuse of process/ fraud/ misrepresentation

But Cant Be Used To Overburden The Courts:

- if bad faith or refusal to discharge duties
- or if power to sell and power to retain AND T's split

Re Wright: One trustee wanted to get out of investment, others thought **price was too low** Must be a **deadlock** to weigh in.
RE Billes: Asset giving low income to LT. Trustees split on course of action **(sell or retain).** Court agreed this is a deadlock.
Kordyban: When the court steps in: (1) do what settlor would have done (2) do what is just and equitable AND **only intervene where not doing so would be prejudicial to B's**

INTERVENTION WHEN TRUSTEE ACTS OUT OF TRUST OBJECTIVES

Schipper v Guaranty Trust: T had **"uncontrolled discretion"** to administer/ manage trust for the general welfare/ comfort/ enjoyment of A. A wanted to encroach on capital. 2 T's approved; 1 didn't. Normally, not interfere w/ uncontrolled discretion BUT will when T exercising discretion to **achieve a purpose not intended by terms of trust**. 1 T wanted to preserve capital for potential future B's when intention was clearly to provide for A.

FAILURE TO BE EVEN-HANDED .

Re Fleming: T's were directors of company. Surplus and unsure whether they should dispense as dividends or shares. Normally court wont interfere here, but they did. Said shares cuz: tax consequences for income; future income would be enhanced thru shares; more even handed to LT and remainder

OUTSTING THE COURT'S JURISDICTION? .

Evans v Gonder: courts have broad jurisdiction over trusts to ensure T's act honourable. And can always remove.
Re Wynn: T can be given exclusive power on matters of fact. For example, the meaning of the term "reside" (if normally, semantic uncertainty)
Boe v Alexander: privative clause n/a when: T acts dishonestly OR fails to: exercise discretion; prudence; act impartially
Re Poche: exculpatory clause didn't protect T from N or failure to be even-handed. Here, didn't collect all assets; put her mind to the sale of assets; or act even handedly
Jones v Shipping Federation: can't have clause precluding B from entitlement to an accounting by the T.

CONSTRUCTIVE TRUSTS

To remedy a perceived injustice; once declared: FD; B gets equity claims against world (except BFPV w/o N); in rem rights to call.
Cook v Fountain: first CT judicially recognized. Anytime unconscionable for LT to have full ET

INSITUTIONAL CONSTRUCTIVE TRUSTS:

1. Per Se Fiduciary (FD arises as soon as property is held)
2. Ad Hoc Fiduciary

REMEDIAL CT:

1. Unjust enrichment (only FD if award for CT)

Westdeutsche: difference between the 2:
Institutional → trust arises from date of circumstances; court merely declares this to be so; consequences arising are not discretionary (get a CT)
Remedial → judicial remedy; extent to which it operates retrospectively is in discretion of courts.

"PER SE" FIDUCIARY

From the nature of the activity engaged in, inherent FD

a) **Disloyal Trustees**
b) **Faithless directors/ senior officers** (corporate opport) If LT comes about thru breach of trust
c) **Delinquent agents** (of principles)
d) **Miscreant solicitors** (wronging clients)
e) **Overreaching partners**
f) **Undue influencers** (who acquire property)
g) **Breach of confidence tricksters**
h) **Bribers and corrupt officials**
i) **Intermeddlers in the trust** (trustee de son tort who knowingly receive trust property)

*all have inherent fiduciary component ^^

j) **Vendor** who completes contract of sale has duty w/ respect to property held until conveyed.
Rich v Krause: [P] bought property from K; made monthly payments; K disappeared; court said he holds property in trust "court will give effect to what the parties intended"

*from date of misconduct, holds property in name as T
other examples:

- Informal mortgage by deposit of deed
- Unwritten long lease w. actual occupation + paid
- Unwritten sale of land w. part performance

Mayo v Leitovki: LT mom failed to pay taxes; property had to be sold; son bought then transferred back to mom. Court said LT required to pay taxes :. Remainder interest isn't dissolved. Mom holds a CT.

"AD HOC" FIDUCIARY

Conduct of [D]; misuses his position

Hodgkinson v Simms: before principle, court said there is a legal obligation in search of a principle. Need to establish an actionable reliance/ dependence by claimant on [D] such that a FD exists.
Guerin v the Queen: Gov't had FD because A was vulnerable to their legal power (to enter into terms that would affect A). Time to create category. **Whereby statute, agreement, or unilateral undertaking – one party has obligation to act for benefit of another – and that obligation carries a discretionary power, the party empowered holds a FD**
DISSENT in ***Frame v Smith:*** **"vulnerability" over whom you can act in a discretionary way to alter his interest.**
Three step inquiry: (1) scope to exercise some discretion/ power (2) can unilaterally exercise this power/ discretion so as to effect B's legal/ practical interests (3) B is vulnerable or at the mercy of the one holding this power/ discretion.
Galambos: some undertaking to act w. loyalty
Elder: [P] must be able to point to a legal or vital practical interest that is at stake **Tries to give criteria to establish ad hoc:**

1. Undertaking of alleged fiduciary to act in best interest of alleged B
2. A defined person/ class of persons vulnerable to fiduciary's control
3. a legal or substantial practical interest of B that stands to be adversely affected by F's exercise of discretion

CONTRACTUAL BARGAINING

Lac Minerals v Corona: Lac disclosed location of gold during negotiations. Corona buys behind Lac's back. Lac wants property held on CT.
TEST FOR AD HOC: DEGREE OF VULNERABILITY → Only when there is a dependency/ reliance such that there is truly a vulnerability by [P] on [D] **– [D] has enough power to make [P] vulnerable**. (add to dissent from ***Frame***). Lac could have contracted against this b4 negotiations. NOTE: Likely feared interference w. freedom of contract/ negotiations
DISSENT: vulnerability doesn't have to be that strong. NOTE: Likely preferred to uphold good social behavior and utmost good faith

PROFESSIONAL ADVISOR

Hodgkinson v Simms: Advisor didn't tell Simms he was making a profit from Simms making a certain investment. Test not confined to vulnerability BUT can also include the **parties' reasonable expectations affected by**: "*confidence, complexity of subject matter, community and industry standards, discretion, influence*"
DIFFERS FROM ***Lac*** → advisor relationship can become FD when tainted by self-interest; here, there was reliance on the expertise; accepted advice unreflectively.

UNILATREAL UNDERTAKING BY A PARENT

M(K) v M(K): sued father for damages in incest. Ad hoc not confined to matters only involving economic interest. Being a parent is automatically a unilateral undertaking.

STATUTORY

Statute might set out care/ diligence requirements & no conflict of interest.

Sun Indalex Finance v United Steelworkers: Company goes bankrupt, wants apply for re-arrangement which would change priority of money (going to new creditors instead of to deficiencies in pension). Employees, due to vulnerability. Pension Act forbids conflict of interest. BUT CT not appropriate; **proprietary remedies only rewarded w. respect to property that is directly related to the wrong**.

NOT ESTABLISHED IN:

Galambos: Lawyer's office assistant repeatedly takes on his debts voluntarily. There needs to be an **undertaking** by the person alleged to owe a FD (to act in best interest of [P]) – **that results in vulnerability**. Undertaking can be implied from agreement or statute governing. Not all power dependency relationships are F

UNJUST ENRICHMENT

Soulos v Korkontzilas: good conscience is the unifying theme Here, **title becomes fragmented into ET and LT after court declares UE**. Reads equity backwards.

Usually: cohabitation outside of marriage or kids looking after relatives.

Lac Minerals? Property acquired thru pursuit of one's advantage at unfair expense of another.

Pettkus v Becker: She participated heavily in accumulation of assets. No FD since he made it clear, he was owner **TEST for court intervention:**

1. **enrichment on [D]**
2. **corresponding deprivation by [P] in assets**
3. **causal connection between acts of [P] and property claims**
   Kerr v Baranow: she became severely handicapped and didn't contribute to asset accumulation. Remedies are meant to be restitutionary in nature
4. **absence of juristic reasons to explain/justify enrichment (**ex. contract)

CONSTRUCTIVE TRUST OR DAMAGES?

Restitutionary compensation is the default form of compensation for unjust enrichment. CT only used when appropriate.

Hodgkinson v Simms: property now useless :. Not CT

Guerin: property already in their hands :. Damages

Soulos: Per Se fiduciary (agent) doesn't buy house as client instructed. Buys house for self. Client wanted it for family honour (Bank was tenant). No financial loss. Granted CT.

4 conditions for CT:

1. [D] under equitable obligation
2. assets resulted from deemed/ actual activities of [D] in breach of this equitable obligation
3. [P] must show legitimate reason for seeking proprietary remedy (personal or future deterrence)
4. nothing renders CT unjust (creditors interest)

REMEDIES

PERSONAL REMEDIES

Personal because they are against a person

SPECIFIC PERFORMANCE AND INJUNCTIVE RELIEF .

- awarded to enforce terms of trust
- or to prevent trustee from pursuing course of action which would have (-) impact on trust

COMPENSATION FOR LOSS .

- **fully restorative – same position but-for the breach**
- Not concerned about causation, foreseeability, etc.. is assessing damages (***Canson*** limited causation)

Guerin: At the time, it wasn't known that property would increase substantially. Court ignores foreseeability. **Damages lost assessed @ date of judgment** (lost up until that time). Take into account **what could have been if the breach didn't occur**.

Hodgkinson v Simms: True cause of loss was downturn in market. Majority didn't care since there was still a breach. Dissent said you need some causation.

Canson v Boughton: Lawyer didn't disclose a secret profit on transaction. House caved in. **Need a sensible causation between actions of [D] and the damages that occurred**.

Dhillon v Jaffer: actual loss assessed with full benefit of **hindsight. Only those losses that were caused by the breach though** :. Loss from 3rd parties only recoverable from T if T's breach permitted this loss from these 3rd parties.

Re Deare: You can set off losses in some investments with gains in others. ***Trustee Act, s 15.4 –*** anti-netting rules no longer**.** No longer assess on investment by investment basis AND loss can be off set by gains.

COMPENSATION FOR LOSS WHEN UNJUST ENRICHMENT .

Kerr v Baranow: **Must be a link between** the **co-habitation** and accumulation of **wealth**. Court awards [P] appropriate **percentage of the assets that survived based on the percentage of his efforts**. The first choice is to give **damages**, and only CT sometimes.

In rem can be granted if Soulos factors met.

ACCOUNTING FOR PROFITS .

This arises out of a need to account for breach of FD.

Boardman v Phipps: T received info received by way of trustee position to profit in business.

Warman International v Dwyer: company sells boxes. Didn't want to expand company as requested by box maker so director makes own company to sell. It is not a defence that [P] was **unwilling/ unable to make those profits on their own**. All that is needed is a **reasonable approximation of profits**. If loss exceeds profits**, [P] must elect one remedy** (either profits or equitable compensation)

Macmillan Bloedel v Binstead: disgorge of profits even if no loss to [P]; looked to financial statements to calculate profit.

PROPRIETARY REMEDIES

Useful in insolvency or where asset has increased in value

IN REM CLAIMS (FOLLOWING AND TRACING) .

Foskett v McKeown:

Following = you can follow property as it moves to different custodians. (unless real estate registered by statute; BFPV wo N)

Tracing = chase asset, even as it is sold and put into different forms – follow the new form (even if better)

Conditions for tracing: (1) misappropriation as a result of breach of fiduciary relationship or unjust enrichment (2) trust property in circumstances/ form that equity recognizes as traceable (3) no inequitable result would come from ability to trace. **See notes for case law on this if it comes up.**

PROPORTIONATE SHARE: B entitled to enhanced value of the things once followed and recovered.

Scott v Scott: LT sold house for another. Left it to wife in will. Remainders of first property successful is taking 2nd, better, house.

REMEDIAL CONSTRUCTIVE TRUST .

Soulos: Need to show:

(1) Good conscience
(2) Link between acts and property sought
(3) No interference w. rights of creditors.

*Makes BFPV w. N and Volunteers vulnerable

ACTIONS AGAINST 3RD PARTIES

TRUSTEE DE SON TORT .

Chambers Estate v Chambers: If you intermeddle in the trust property in a way that causes losses, you and the trustee will be liable.

KNOWINGLY RECEIVING .

Nelson v Larholt: Trustee uses estate to pay bookie. Bookie doesn't know for sure if this is a breach of trust but objectively he should be suspicious. Adopts **objective standard of recklessness**. B can recover from Bookie.

CFI Trust: requirements for establishing: (1) properties in question were held in trust (2) properties were takin in breach of trust (3) 3rd party took property for own use/ benefit (4) 3rd party had actual or constructive knowledge of breach of trust

KNOWINGLY ASSISTING .

Factors:

(1) Existence of FD (ex. trustee)
(2) Breach of duty
(3) 3rd party knowingly assists in design

Air Canada v M&L: M&L, travel agency, sells tickets for aircanada. Supposed to hold $ separately, on trust. Didn't do so; $ lost. Sued directors of M&L. Actual knowledge, wilful blindness, or recklessness – **carelessness not enough**.

Carriere Industrial Supply: Bank knew that $ from trustee account could be easily moved into an operating account. Recklessness = knowledge of danger/ risk yet continuing w. conduct. Note: It would have been impossible to get 4 back from bankrupt T so go after the bank.

UK – ***Royal Bruneir Airlines v Tan***: advocated for a more objective-subjective standard (O w. knowledge assistor had). Can't hold these "assistors" to the same standard as T. Overturned by privy council

ALTERNATIVE AND CULMULATIVE REMEDIES

Conjoined Remedies:

- losses (asserted restoratively) resulting from breach
- gains of T obtained thru breach
- 3rd parties who wrongly receive trust
- 3rd parties who dishonestly assist in breach.

BUT need to show conjoining:

- doesn't lead to double recovery
- not mutually inconsistent (ex. accounting for profits and claiming equitable damages)

Citadel: where more than one remedy is available, can choose the most advantageous. Adduce evidence to get remedy

TRUSTEES DEFENCES & RELIEF

EXONERATION .

Free and informed consent given by beneficiaries to T's acts

ex. children forgive parent then change mind later when fallen on hard times.

ex. fair dealing

Trustee Act, s 96:

Court can relieve IF (a) acted honestly (b) acted reasonably (c) and it would be fair to excuse the trustee for their actions.

Fails: mom acted honestly from her background as co-trustee.

LACHES AND ACQUIESCENCE .

If you have not taken steps to remedy the breach of trust, you have basically given free and informed consent.

M(K) v M(H): didn't qualify due to social roles. Need to show that [P], with knowledge, did nothing even though fully able to launch action.

INDEMNITY .

See "Right to Indemnification" under "Trustee"

RIGHT TO SEEK OPINION, ADVICE, DIRECTION .

See under "Control of Trustee by court" under "Trustee"