# Trusts MINI-CAN

## Settlor/Testator

1. Did settlor/testator do his job properly?
2. What did S intend? Absolute gift? Or some sort of trust? (*Hayman v. Nicoll*)
   1. **Fixed trust?** “must” – Requires class ascertainability
   2. **Discretionary trust?** – Today, req only individual ascertainability (*Baden 1; Jones v. Eaton)*
   3. **Powers?** “may” - Are they merely administrative powers? Or, powers of appointment ...
      * General power? Donee can appoint any one including himself
      * Special power? Donee can only appoint from named specified class *(Gulbenkian Settlements*)
      * Hybrid power? Donee can appoint anyone except certain ppl (*Re Manisty, Re Hay’s Settlemnt*)
      * Power will not fail bc of administrative unworkability (*Re Manisty*)
3. Did settlor wish to create secret trust? Half secret trust?
4. **Secret trus**t must be communicated, accepted by T during life of testator (*McCormick; Ottaway*)
   * + Must completely communicate, ie) failing to mail letter – no secret trust (*Re Boyes*)
     + T is vested upon testator’s death (*Re Maddock)*
   1. **Half secret trust** terms must be communicated, accepted, at time of will (*Blackwell*; *ReKeen)*
      * T of half secret trust can’t be B under the trust (*Re Rees*)
      * T is vested w/beneficial interest at time half-secret trust is created (*Re Gardner*)
5. Did settlor intend to create a **protective trust**? ... terminates B’s right to income in certain circumstances
   1. Settlor can grant a determinable life interest in favour of a “principal B”
      * Conditional subsequent that imposes a restraint on alienation will be void
      * Determinable interest is okay if it simply defines scope of limitation on interest
6. Did settlor attempt to include a **privative clause**? ... attempts to oust ct’s jurisdiction are invalid
   1. Provision allowing T to make “conclusive, binding” decisions is contrary to public policy (*Re Wynn*)
   2. Power to adjudicate a matter of fact (whether a condition is met) is permissible (*Re Tuck’s Settlement*)
   3. T’s must act accordng to trust law (fiduciary relationship), are subj to ct supervision (*Boe v. Alexander*)
   4. Exculpatory clauses may shield T’s liability, but may not always protect T (*Re Poche*)
7. Can settlor revoke the trust? ... may include provisions in express trust for revocation, amendment
   * + Can’t revoke once trust is perfected (*Bill v. Cureton*)
     + General amending power won’t endow settlor w/ability to revoke trust (*Schmidt v. Air Prod)*
8. Can will be rectified if it fails to carry out testator’s intentions? (*applic under s.59, Wills, Estates, Succ Act*)

Express Trust ... cts want to find certainty; many techniques for manipulation of trust to help it succeed

1. Properly transferred/vested/**constituted**? (*Milroy v. Lord)*
   1. Did S do everything in his power to divest ownership? (*Re Rose*)
   2. Did S self-declare a trust? (*Glynn*) Intend to be immediately bound? (*Carson v. Wilson*)
   3. Imperfect *inter vivos* gift perfected when donee becomes executor? (*Strong v. Bird*)
2. Certainty of **subject matter**?
   1. Subject (type, amt) must be sufficiently described w/certainty (*Beardmore; Sprange v. Barnard*)
   2. Semantic uncertainty? (ie, “friend”) or, Evidential uncertainty? (ie, “some shares”)
3. Certainty of **words**? ... intention that T placed under imperative obligation?
   1. Must convey more than moral obligation, can’t use just precatory language (*Hayman v. Nicoll*)
   2. Precatory words likely connote an absolute gift, see: *Hayman*
4. Certainty of **objects**?
5. Different trust require different levels of certainty
6. Evidential uncertainty d/not, itself, render trust uncertain (*Re Hay’s Settlements; Baden 2*)
7. Trust must NOT be administratively unworkable (*Re Hay’s Settlements*)
8. Comply w/rule against **perpetuities**? ... capable of vesting within perpetuity period?
   1. Is it an unvested, contingent future interest?
      * Presumption of validity “wait and see” if it will vest within period (*s.8, 9 Perpetuity Act*)
      * Reduction of age contingency? (*s. 3(c)*) Application of cy-pres (*s.3(e))*
9. Comply w/**formalities**?
   1. Inter vivos transfer? D/not need to be in writing (*s.59(1) L&E Act*), unless transfer to subseq B (*s.36*)
   2. Testamentary transfer? Must be in writing (*s.3 Wills Act*)
      * Is there evidence of a secret trust? A half secret trust?
10. Was trust created to further an **illegal purpose**?
11. Does the trust infringe any rules against **inalienability**?

Implied or Resulting Trusts ... can the ct presume an (unexpressed) intention?

1. Is it an express trust that d/not initially exhaust the whole beneficial interest? 🡪 **Automatic RT**

Is it a validly created express trust that somehow fails?

* 1. Transfer turns out to be void; three certainties not complied with (*Broadway Cottages*)
  2. T gains legal title, but surplus EQ interest reverts back to estate (*Re Foord, Re West)*
  3. Transfer of property, but limitation not carried out – RT for creditors (*Quistclose*)
  4. Surplus of funds after trust *purpose* carried out?
     + Identifiable givers get $$ back if purposes have been carried out (*Re Gillingham Bus Disaster*)
     + Fund created via K? Unidentifiable donors? 🡪 Bona vacantia, no ART (*Re West Sussex*)
     + Surplus may be rateably distributed (*Re British Red Cross*)

1. Is it a gratuitous transfer, ct questions that outright gift was NOT intended? 🡪 **Presumed Intention RT**
   1. If destination of EQ interest is unclear, prima facie PIRT
   2. PIRT may be displaced, rebutted w/evidence of intention (*Standing v. Bowring*)
      * Re: joint accounts, standard form bank account inadequate evidence (*Niles v. Lake*)
      * Declaration of testator’s intention IS adequate evidence (*Russell v. Scott*; *Young v. Sealey*)
   3. If husband holds entire interest in house, ct may find ½ EQ interest on RT for wife (*Warm v. Warm*)
2. Is there a situation where one can infer an outright gift? 🡪 **Presumption of Advancement**
   1. Timing of rebuttal evid is important; can only lead evid before/at time of transaction (*Shephard*)
   2. If there’s a “traditional” relationship btwn husband/wife, PA may operate (*Mehta Estate*)
   3. PA re: father-child only applies w/minors now (*Madsen Estate v. Saylor*)
   4. Joint accounts – PA (*Warm v. Warm*)
3. Does an **illegal motive** preclude leading of evidence to rebut a presumption? (PIRT, PA)
   1. Generally strict approach to “ex turpi causa” rule, can’t bring action from illegality (*Scheuerman*)
   2. Conspiring spouses, to avoid consequence
      * If consequence could never really occur, ct may hear evid (*Goodfriend* – rebutted PA)
      * If parties are “in pari delicto,” ct may not hear evid (*David v. Szoke* – couldn’t rebut PIRT)
      * Illegal purpose behind conveyance, ct may not hear evid (*Gorog v. Kiss* – couldn’t rebut PIRT)
4. Can ct hear case without relying on illegality? ... ignore bad parts? (*Tinsley v. Milligan*)
5. Should ct consider “ex turpi causa” rule from modern perspective?
   * + Balance adverse conseq of granting relief w/conseq of refusing to hear evid (*Nelson v. Nelson)*

Charitable Trusts ... does creator wish for the trust to perform some charitable purpose?

1. Did the settlor reveal general charitable intentions, a charitable purpose? (*Oppenheim*)
2. Does the trust fall under a category outlined in *Pemsel*?
   1. Does it seek **relief of poverty**? ... generally broadly interpreted
   2. Does it seek **advancement of religion**? ... construed more narrowly
      * Must extend directly/indirectly to instruction or benefit of community (*Thornton v. Howe*)
3. Does it contribute to **advancement of education**?
   * + Enhancing knowledge, sharing it with the public
     + Improving sum of communicable knowledge (*Re Koettgen)*
     + Focus on charitable purpose, then activities? (*Vancouver Soc of Immigrant Minority Women*)
   1. Final *Pemsel* category? ie) promotion of health, agriculture, recreational activities, etc
   2. SCC notes entire area is in need of legislative overhaul (*Vancouver Soc of Immigr Minority Women*)
4. Does it **benefit society**/a community?
   1. Must be definite community or section of the community, identifiable as such (*Oppenheim*)
   2. B’s must not be numerically negligible (*Oppenheim*)
   3. Population must be integrated part of society
   4. Ct must decide if there’s an advantage to the public (*Everywoman’s Health Centre*)
5. Is it sufficiently **public** in nature?
   1. Must not have a political purpose (*Nat’l Anti-Vivisection Society*)
   2. Personal nexus between settlor and Bs cannot be too close
6. How does it relate to the **rule against perpetuities**? Should *cy-pres* apply? (*Jewish Home for Aged*)

## Beneficiary

1. Who is/are (potential) beneficiaries? SEE: certainty of objects, what ascertainability required?
2. What is **nature** of B’s title and **interest**?
   1. B has a property interest, w/“in rem” characteristics, over the THING of the trust
   2. B has an immediately vested indefeasible EQ interest, w/postponed “enjoyment” (*Saunders v. Vautier*)
      * However, if vesting itself is contingent, B not vested until event occurs
   3. B has “in personam” rights, which can be asserted against the T SEE: removal, control of T; remedies
   4. B shall not exercise administrative, dispositive powers over trust property (*Schalit v. Nadler*)
   5. EQ title sits w/individual trust assets themselves (*Baker v. Archer-Shee*)
   6. Ct has inherent jurisdiction to allow B to take possession of asset, as agent of T (*Re Bagot’s Settlemnt*)
3. Does the B wish to **alienate** the beneficial interests?
   1. Draft, sign a written doc (delivered to T) that absolutely assigns beneficial entitlement (*s.36, L&E Act*)
      * Assignee can assert rights directly against T (*DiGuilo v. Boland)*
   2. Does B only wish to bestow a revocable mandate? (*Timpson’s Executors*)
   3. B can direct T to hold property for benefit of another
   4. B can self-declare a sub-trust of the EQ interest; creating a “sub-B”
   5. Priority among assignees is determined by time (*Re Wasdale*)
4. Does the B wish to **vary** the trust? ... are terms inadequate, present obstacles to B’s best interest?
   1. Cts generally won’t authorize variation of terms of a trust (*Chapman v. Chapman*)
      * Cts may authorize variation of T’s management powers, or if exceptions are met
   2. Ct can approve an order on behalf of certain Bs (*s.1, 2, Trust and Settlement Variation Act*)
   3. Advancing financial interests of Bs is appropriate variation (*Re Burns*)
      * However, financial benefits should not be the only considerations (*Re Weston’s Settlement)*
   4. Other benefits – promoting familial harmony, marital choice – may be appropriate (*Re Remnant’s*)
   5. If benefits to one B outweigh detriments to another, no variation (*Re Harris*)
   6. Ct need not consider whether settlor’s intention is preserved? ... controversial (*Russ v. BC*)
   7. Ct has jurisdiction to consent to variation on behalf of ppl w/contingent interests (*Bentall Corp*)
5. Does the B wish to **terminate** the trust?
   1. B can “call for the trust” provided he’s attained age of maj; is compos mentis; is absolutely entitled
   2. Trust is vested in B at date of gift, can terminate it provided above conditions are met (*Saunders v. V)*
      * Ct tends to avoid postponement of possession if absolutely entitled (*Re Lysiak*)
   3. If it’s discretionary trust, entitled Bs can act in unison to terminate trust (*Re Smith*)
      * Bs still have an immediately vested interest (*Re Chodak*; *Saunders v. Vautier*)

## Trustee

1. Who is the Trustee? ... settlor has wide freedom to choose who, how many
   1. If settlor chooses to use specialized T corporation, might have it be controlled by “protector/guardian”
   2. When a trust is created w/several Ts they hold as joint tenants; unanimity required for all decisions
   3. What if T doesn’t accept **appointment**? T dies?
      * Does the trust instrument have a provision dealing with this?
      * Ct may appoint new T if it dies, becomes incapacitated, leaves the country (*s.27, Trustee Act*)
      * On declaration of new T, ct may order automatic vesting (*s. 29, Trustee Act*)
      * Ct has inherent jurisdiction to appoint Ts where it’s “expedient” (*s.31, Trustee Act*)
      * Ct should consider wishes of settlor, persons who will promote execution of trust (*Re Tempest*)
   4. T may **retire** by declaring desire to be discharged, serving it on other Ts; declaration must be accepted
2. What powers/obligations does he have?
   * + SEE: fixed trust/discretionary trust/powers
   1. Attempts to oust ct jurisdiction (privative clauses) are generally invalid as against public policy
   2. T, as legal owner, has powers to deal w/management, use, administration
      * Must exercise rights and powers, subject to lawful directions in the settlement
      * Ts must act in good faith and advance the interests of the B (**fiduciary responsibility**)
   3. Generally, T has duty to act personally, should not **delegate** but can appoint agents
      * T not liable for negligence of agent if T followed std business practices (*Speight v. Gaunt*)
      * T can employ solicitors, bankers (*s.7, Trustee Act*), not liable unless T is at fault (*s.95*)
      * Not all delegations are okay, depending on T company structure ... (*Re Wilson*)
   4. T must **invest** as an ordinary prudent businesspers managing own affairs (*Speight; s.15.1, s.15.2*)
      * T has duty to invest so capital is preserved from risk, but also yields reasonable return
      * Both T companies and individuals must meet same std, ordinary businessperson (*Fales*)
      * T may have to invest contrary to own beliefs (*Cowan v. Scargill*)
      * Where T invests as “ordinary prudent,” in accordance w/B’s wishes, not liable? (*Nestle*)
3. Has he performed properly?
   1. Has T demonstrated a **duty of loyalty, duty of good faith** to B? (defining obligation of a fiduciary)
      * Must not place selves in position where interests may conflict; strict test (*Keech v. Sanford)*
      * When “agent” enters into conflict, breach of fiduciary obligations? (*Boardman v. Phipps*)
      * “No conflict” principles s/be interpreted in light of modern practice? (*Peso Silver Mines*)
      * Where one can direct affairs of the company, he owes company duty of good faith (*Canero*)
      * T must not sell trust property to self (**self-dealing**), but flexible approach? (*Holder v. Holder*)
      * T must adhere to **fair dealing** criteria when engaging in such transactions (*Crighton*)
   2. T has duty to act **impartially** between the Bs, as well as among Bs in succession
      * Impartiality is assumed, but settlor can direct otherwise ie) discretionary trust
      * T must deal even handedly btnw life tenant and remainder; compels conversion of wasting personalty and re-investment (*Howe v. Lord Dartmouth*)
      * Proceeds of conversion must be apportioned (*Re Earl of Chesterfield’s Trusts*)
      * *Howe v. Lord Dartmouth* does not apply to real estate (*Lottman v. Stanford*)
      * Trust may contain obligation to convert entire estate (realty and personalty) (*Re Lauer*)
      * Intention to displace apportionment must be clear (*Royal Trust v. Crawford*)
      * Does instrument contain trust to retain or power to retain? (*Re Smith*)
      * Generally, dividends go to life tenant, stock goes to remainder (exception: *Re Welsh*)
   3. T must make **disbursements** to pay debts, etc
      * Attempt to strike fair balance btwn LT and remainder in initial admin of estate (*Allhusen*)
      * Unless testator says otherwise, all capital and all income available for pmt of debts (*s.10, TA*)
   4. B has right to require T to **provide information**, T has **duty to account**
      * B only entitled to reasonable info concerning mgmt of trust property (*Re Londonderry’s*)
      * Bs are entitled to inspect accounts, but not an instantaneous response (*Sanford v. Peter*)
4. How may the T be **controlled**?
   1. Ts powers cannot be controlled by Bs, ct won’t interfere (*Re Brockbank*)
   2. Ts can apply to ct for an opinion, advice, directions re: mgmt and administration (*s.86, Trustee Act*)
      * T is absolved of responsibility when acting under ct authority (*s.87*)
      * Ct hesitant to interfere in exercise of T *discretion* (*Re Wright*)
      * Ct will interfere to resolve serious deadlock (*Re Billes*)
      * Ct will interfere where T acts outside of trust purpose (*Schipper v. Guaranty Trust*)
      * Ct will interfere where T fails to be even handed (*Re Fleming*)
5. May the T be remunerated or indemnified?
   1. Ts are allowed expenses plus a “fair reasonable” allowance not exceeding 5% of gross value (*s.88(1)*)
   2. Ts can also apply to the ct for “care and mgmt fee” not exceeding 0.4% of avg mkt value *(s.88(2))*
      * Ct will consider relevant factors in assessing “care and mgmt fee” (*Re Pedlar*)
   3. There are guidelines to help set **remuneration** (see: *Re Sproule*)
   4. Ts are entitled to **indemnity** for debts incurred in executing trust, w/exceptions (*Re Reid; Stringam*)
6. What if T behaves badly, needs to be **removed**?
   1. Sui juris Bs (maj in interest and number) can apply to ct to have T removed (*s. 30, Trustee Act*)
      * Removal requires applicant to show acts/omissions that endanger trust (*Conroy v. Stokes*)
      * Has situation between Ts made continued admin of trust impossible? (*Re Consiglio Trusts*)

Constructive Trust ... circumstance where ct will impose a constructive trust? (arises by operation of law)

Remedies ... what if T **breaches** duty to B? What rights does B have to enforce T’s duty?

1. Ct may award **damages** to compensate for loss, unjust enrichment, etc
   1. Purpose of EQ damages is restitutionary
   2. There are limits on EQ restitution, policy considerations? (*Canson Enterprises v. Boughton*)
   3. St offs likely not considered, but portfolio approach used now? (*Re Deare*)
   4. Ct may order accounting for profit (ongoing, one off, proportionate) if suitable (*Warman*)
   5. If trust assets are mixed w/T’s assets, B is entitled to proportionate interest (*Scott v. Scott*)
   6. Where CT impossible, T must restore monetary equivalent of value of assets (*Guerin v. Queen*)
2. Ct may impose a **remedial constructive trust**
   1. CT should be applied where monetary compensation is inadequate and there’s a link btwn services rendered and trust property (*Peter v. Beblow*)
3. Ct may allow a B to take **action against a 3rd party** for breach of trust ie) intermeddlers, fraudsters, etc
   1. Must show fiduciary duty, breach, dishonest knowing assistance of 3rd party
      * Did 3rd party have notice of fraud? Judged objectively (*Nelson v. Larholt*)
      * Parties must have actual knowledge, recklessness, or wilful blindness (*Air Canada v. M&L*)
4. **Tracing** is available where a personal remedy is insufficient
   1. In EQ, ability to follow and recover the property stops at BFPV (without notice)
   2. B can claim an amt that reflects increases in value of the property (*Scott v. Scott*)
   3. Must be breach of trust/fiduciary relationship; property is traceable; in inequitable results
5. Alternative and cumulative remedies are available provided no double recovery, not mutually inconsistent