

Certainty of Intention (COI)

STEP 1: Is intention immediate?

[X] must have, by words or conduct, indicated that she objectively and immediately (*Harpur*) intended to create a trust (*Byrnes*).

NB. Maxwell J (diss): the commencement date is simply a matter of machinery; the overall intention of the document was to benefit [the beneficiary].

- If this is not contentious, “OTF, intention appears to be immediate (*Harpur*)”

STEP 2: Is the intention irrevocable?

The language is clear and unambiguous, so intention is satisfied (*French CJ, Byrnes*).

OR

The clause does not contain explicit trust language (*Byrnes*). However, this is not fatal (*Paul*)- but the use of “trust” elsewhere may indicate a lack of intention to create a trust (*Re William*).

Discuss the nature of the obligation:

Surrounding Circumstances?

- It is not necessary for the words “on trust” to be used. Imprecise words may still be held to have the effect that property is to be held on trust (*Paul v Constance*). Court tries to **glean the settlor’s intention from surrounding circumstances**.
- When imprecise words are used, particularly in a home-made will, the court will consider the **surrounding context** and the **available options other than trust**.

Best Legal Mechanism?

The court will infer that a settlor intended to create a trust if it is the most appropriate legal mechanism to give effect to the [Settlor’s] wishes. However, the court will not infer a trust merely because it feels it is the most appropriate way to protect Bill’s interest (*Korda*).

(If it is not the best LM): Instead, I will consider the possibilities discussed by *Dixon J in Countess*:

- Moral obligation = not enforceable at law or equity (*Re Williams*)
- Gift with a legal condition = binding
- Gift with an equitable condition
- A Charge

(Cases to help discuss the nature of the obligation and surrounding circumstances):

TRUST	NO TRUST
<p>“Use the money for... if there is any left over, use it for...” per <i>Chang</i>, is considered intention to create a trust. Although the words are informal, there is clear unequivocal and emphatic direction in the letter. + unlikely father would have relied on goodwill for money to be passed on to his illegitimate child.</p> <p>Analogised to <i>Paul v Constance</i>, where there was a de facto r/ship with a joint bank account, which they withdrew from for joint benefit. The “the money is as much yours as mine” sufficed to amount to an express declaration of trust in all surrounding circumstances.</p> <p>“Subject to my son Ivor paying \$1000 to Albert” is a legal condition, despite the trust property (land) not being what is intended to benefit Albert. Per <i>Re Gardiner</i>, the strong language, together with the strict time limit imposed, seems to suggest the trust property</p>	<p>“In fullest confidence” per <i>Re Williams</i>, is considered to be precatory. As it is not an imperative, a trust was not created, but instead a mere moral obligation.</p> <p>“But otherwise on condition” per <i>Cobcroft</i>, is relatively strong language. Nevertheless, this is not enough, since the wife clearly had discretion to deal with the shares as she wanted in her lifetime. The clause is an equitable condition, as a legal condition would require full compliance.</p> <p>Like in <i>Gill v Gill</i>, it would be disproportionate for [X] to lose the benefit of the [TRUST PROPERTY] all together if he/she had not [CONDITION]. However, [S] probably intended for [his daughters] to have an enforceable right in equity (advantage is compensation available as remedy where condition can’t be met).</p>

will only be received, if T performs the requisite condition.
 Per *Byrnes v Kendle*, there is no reason to go behind the words of the settlor. The court will consider what the parties have said, not what they were meant to say. (The settlor's **outward manifestation of intention**).

Although a trust is created for an **improper purpose**, it does not necessarily follow that the trust was not intended to take effect. Per *Lewis v Condon*, the trust will be valid.

Contract: [X] may argue that the contract provided that [E.g., proceeds should be passed onto investors] and therefore a trust has been created. However, [Y] will counter that, whether an express trust exists must always be answered by reference to intention. Where the dealings between the parties reflect contractual obligations rather than the intention to create a trust, a trust will not be imposed as a commercial necessity. Here, the objective intention to create a trust will/will not be satisfied, because [INSERT FACTS] (*Korda*).

There is a **gap between the date the term was constructed** (INSERT DATE) **and the commencement date** (INSERT DATE), so therefore there is no immediate intention to create a trust (*Harpur v Levy*).

NB. Maxwell P diss: commencement date is a matter of machinery; overall intention is to benefit B.

STEP 3: Conclude

Given the language and context from the other clauses, it is most likely the best legal mechanism is...

This is/isn't enforceable at law (or in) equity (cite relevant case).

- If you decide it is not a trust: "If I am wrong and this is a trust, I will continue with my analysis"

CHECKLIST

1. Has the settlor manifested an intention to create a trust? This is to be determined objectively (*Byrnes*)
 - 1.1 If there is no trust instrument, or the words are unclear, then the exception to the rule about having recourse to extrinsic evidence kicks in.
 - A. Consider intention to depart with beneficial interest on the balance of the deed (*Harpur*)
 - B. Look at other documents (*Chang, Re Armstrong*)
 - C. Adduce evidence from conversations (*Paul v Constance*)
 - 1.2 Consider the general principles of interpretation
 - A. The words 'on trust' raise an evidential presumption but aren't necessarily determinative
 - B. Unnecessary to use formal/technical words (*Chang*)
 - C. The agreement must contain imperatival language
 - D. Precatory words are inadequate
2. If there was an intention to create a trust, was it immediate or in the future? (*Harpur*)- Maxwell P diss: matter of machinery.
3. Is the intention a "sham" (appearance of the trust serves as a veneer (*Lewis v Condon*))
4. If not a trust, is there anything else it might be? (*Dixon J in Countess*)- 4 potential categories

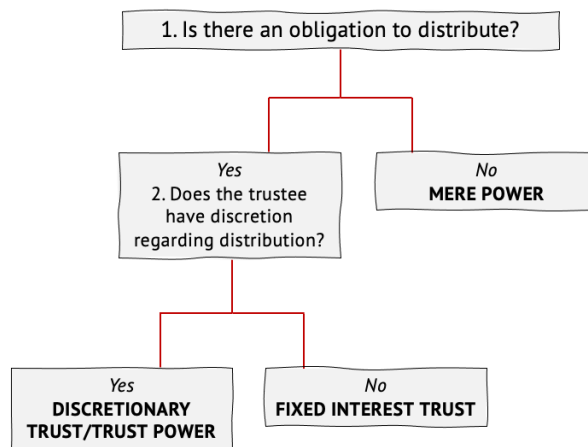
Certainty of Object (COO)

The trust must be in favour of definite beneficiaries, ascertainable or capable of ascertainment by the trustee, unless it is for a recognised charitable purpose (*Morice*).

STEP 1: Identify the trust power

OTF, [INSERT CLAUSE] establishes:

- (1) **Fixed interest trust coupled with a trust power**, as T is obliged to distribute and has no discretion as to the beneficiaries or the shares they should receive.
- (2) **Discretionary trust coupled with a trust power**. While [T] is obliged to distribute, they have discretion regarding its distribution.
- (3) **Mere Power**, as there is no obligation on the [PURPORTED T] to distribute the property.



NB. Sometimes trust clauses combine trust/power types in clauses (default clauses)- split them into 2 sections and then characterise each as if they were two sub-clauses.

STEP 2: Recognise the class of trust/power that we concerned with OTF

- A. General (always certain)
- B. Special (defined by inclusion)
- C. Hybrid (defined by exclusion)

STEP 3: Apply the relevant test/s

Fixed interest trusts	→	List certainty test:	A trustee must be capable of drawing up a list if all the beneficiary's (at the distribution date) if the trust is to be valid (not where, only who)- <i>McPhail</i> .
Discretionary trusts/trust powers	→	Criterion trusts test:	<ol style="list-style-type: none"> 1. Criterion Certainty; & 2. Administrative Unworkability
Mere powers	→	Modified criterion trusts tests:	<ol style="list-style-type: none"> 1. Criterion certainty; & 2. Capriciousness

(i) Special Powers	Inclusionary criteria (are you in the class?)
(ii) General Powers	Always certain (everyone in the world is in the class)
(iii) Hybrid Powers	Exclusionary criteria (is someone in or outside the excluded class?)

List Certainty	<p>To fulfill COO for fixed interest trusts, T must undertake the list certainty test, whereby he must be able to compile a list of objects <i>at the time of distribution</i> (<i>McPhail</i>).</p> <p>Here, T [can/cannot] do this because [INSERT WHY].</p> <ul style="list-style-type: none"> - In <i>Lepens v Reid</i>, conceptual or semantic uncertainty applies just as much to list certainty as it does to criterion certainty. <i>See below</i>. <p>(At the time of distribution explanation): Not necessary that all objects ascertained when trust commences, provided they are described with sufficient certainty for exhaustive list at the date when the beneficiaries are entitled to the property- e.g., trusts for unborn children (<i>McPhail</i>).</p>
Criterion uncertainty	<p>T must be able to determine whether a particular person is within the class of objects defined by the provision or not (<i>McPhail</i>). This requires semantic and evidentiary certainty (<i>Re Gulbenkian</i>).</p> <p>Semantic uncertainty (will invalidate trust)</p> <p>The language used must be sufficiently precise and not too vague.</p> <ul style="list-style-type: none"> - “Residents” (does it include holiday homeowners)- <i>District Auditor</i> - “Relative” can be sufficient but could be too large of a class- <i>McPhail</i> - “My old friends” impossible to distinguish- <i>Gulbenkian per Upjohn LJ</i> <p>Evidentiary uncertainty (will not invalidate the trust- <i>McPhail</i>)</p> <p>T must be able to determine whether someone is within the class (<i>Re Baden</i>). However, the court can always give directions and rule upon what evidence is required- <i>Re Gulbenkian</i>.</p>
Administrative Unworkability	<p>The trust is unworkable if the class is so broad that the trustee has no objective criteria to decide between objects (<i>R v District</i>).</p> <ul style="list-style-type: none"> - Class may be clear but the definition of objects so hopelessly wide, as to be incapable of forming “anything like a class”- <i>R v District</i>. Like a trust for the residents of Greater London- <i>McPhail</i>. - This can be analogised with <i>R v District</i>, whereby the inhabitants of W. Yorkshire of 2.5 mill people were too large and failed for administrative unworkability - Also mention the value of the trust property vs. the number of possible objects, if you have to spend ALL the trust money on administration, the trust will be invalid- <i>R v District</i> - Logically, both general and hybrid classes are far too wide and will both fail for AU, automatically preventing the trust from being valid. <p>NB. Administrative unworkability theories:</p> <ol style="list-style-type: none"> The class is so broad that the trustee has no objective criteria to help decide amongst objects Too many people would have <i>locus standi</i> to complain about the trustee’s actions Having a class this large render the task of exercising power and running the trust practically impossible (cost of administrative investigations would completely diminish the trust assets)- task is practically impossible.
Capriciousness	<p>A trust will be capricious where there is no discernable link with the settlor (per <i>Templeman J in Re Manisty</i>). Only applies to special power.</p> <p>Policy- Interesting that the Court is concerned with there being a link. Seems odd that the court is interfering the settlor’s free choice. However, perhaps they are trying to limit the T from choosing someone who would be ‘irrational, perverse or irrelevant to any sensible expectation of the settlor’.</p>

STEP 4: Conclude

Thus, COO [is/isn’t] satisfied and the trust is [valid/invalid].