**Statutory Formalities**

**Guide to determine what part of *Property Law Act* s 53(1) applies**

1. ***Is it creation of new interest or disposition?***

* Creation – (a) or (b).
* Disposition (i.e. sale/transfer) – (a) or (c)

1. ***What property is involved?***

* Land – all sub-sections apply.
* Chattels – (c) only.

1. ***What does each provision require?***

* (a) and (c) – in writing and signed, or **invalid**.
* (b) – manifested and proved in writing of some form. Until satisfied, **unenforceable**.
* Usually by settlor, but trustee may suffice (*Hagan v Waterhouse*).
* Can be multiple documents such as letters (*Hagan*) or informal (*DSS v James*).

1. ***Is there a possibility of overlap?***

* (a) and (b):
  + If equitable interest (a) may possibly apply (*Adamson v Hayes*).
  + However, if declaration of trust over land will be (b) as per *DSS v James*.
* (a) and (c):
  + Same writing requirements in the end.
  + However, if there’s a disposition (*Howard Smith*) apply (c).
  + If personal property apply (c).
  + Otherwise (a) applies.
* (b) and (c):
  + If sub-trust, (c) likely to apply as it is a disposition (as per Dixon J in *Howard Smith*).
  + If not one of *Howard Smith*’s 3 examples:
    - May be able to extend *DSS v James* and apply (b).
    - However, no HCA authority has resolved this issue – only theories.

1. ***Any policy issues if you pick one provision over another?***
   * s 53 purpose to prevent fraudulent transfers – does complying with (c) allows this?

**From here, decide which sub-section applies.**

**Further Detail if Stuck**

***(a)***

* **Creation/disposal** of land/land interest.
* Must be in writing **signed** by person transacting (or authorised agent).
  + If no writing, trust invalid and fails – property reverts to settlor.
* Applies to **legal and equitable** interests (latter see *Adamson v Hayes*).
* How to dispose of equitable interest (Dixon J in *Howard Smith*):
  + Declaration of trust;
  + Manifestation of immediate intention to give away interest; or
  + Irrevocable direction to trustee – final direction.

***(b)***

* **Declaration of trust** over land only.
* Operates separately from (a), as otherwise no purpose for (b) (*DSS v James*):
* Can be created orally, but unenforceable:
  + Must have written **evidence** that declaration ‘manifested and proved’ (not by agent).
    - Generally only done by settlor.
      * However, **writing by trustee** may suffice if it endorses trust existence (*Hagan v Waterhouse*).
      * Can be **multiple documents** such as letters (ibid) or **informal** (*DSS v James*).
  + If no writing, still valid but **unenforceable** until manifested and proved.
    - If settlor dies before M&P, trust fails and property reverts to settlor’s estate.

***(c)***

* **Disposition** of **subsisting** equitable interest in **land or personal property**.
  + i.e. Already existing interest being transferred from one person to another.
    - Does not apply to creation of new interests.
* Applies to equitable interest in chattel or shares (*Grey v IRC*).
* Must be in writing **signed** by person transacting (or authorised agent).
  + If no writing, trust invalid and fails – property reverts to settlor.

**Overlap**

***(a) and (b)***

* Why a clash?
  + (a) applies to legal AND equitable interests, and when settlor declares trust equitable interest is created (i.e. beneficiary’s title).
  + (b) applies to declarations of trust concerning land interests, as does (a).
  + If (a) always applies, (b) has no purpose.
* Solution?
  + *DSS v James* authority – if a declaration of trust, apply (b), otherwise (a).
    - (a) will apply to creations/disposition of legal interests in land; creations of equitable interests that *aren’t* trusts; dispositions of EI’s in land (though (c) covers this area).

***(a) and (c)***

* Is there a disposition?
  + Give it natural ordinary meaning (*Grey v IRC*).
* If any *Howard Smith* examples present, (c):
  + **Declaration of sub-trust** of equitable interest;
  + Manifestation of **immediate** transfer/assignment of EI;
  + **Final direction** (not revocable mandate) to trustee by equitable owner.
    - *Howard Smith* – Charities were not to take benefit immediately, so could have revoked the mandate to his trustees.
    - *Grey v IRC –* Oral direction final, but not in writing and so invalid.
* If not (i.e. new creation), use (a).
* Either way, same writing requirements!

***(b) and (c)***

* No HCA authority on this issue, only theories:
  + Can extend *DSS v James* so (b) applies; or
  + Require compliance with (c) to create certainty.

**Constitution Issues – Trust by Transfer**

**Legal Property**

1. ***Does the documentation comply with s 53(1)?***

* See above section to confirm.

1. ***Was the transfer completed?***

* Yes – no worries, move on!
* No – Fails unless the settler has ‘done everything ... necessary to be done’ (Turner LJ, *Milroy v Lord*).

1. ***What is ‘necessary’ to be done?***

* Depends on the type of property being transferred:

LAND

* **Three** Torrens System steps: (i) Create instrument of transfer, (ii) Get duplicate certificate of title (DCT); and (iii) Complete registration at the titles office.
* ***Corin v Patton***: Adopted Griffith CJ test in *Anning* – do all that is necessary to do, then transferee can complete the remainder.
  + Mason/McHugh – The gift must be beyond recall. Likely that instructing solicitor to give donee DCT satisfies test.
  + Deane J (min) – Gift must also be separately beyond recall. Means that, if donor could still revoke solicitor’s authority, will fail test.
* What if third party (agent) holds the DCT?
  + If donor’s, can still revoke so will fail. If donee’s equity will intervene.

SHARES

* To assign an instrument must be in company books in prescribed form (*Corps Act* s 1071B).
* **Three** steps to satisfy (*Re Rose*): (i) Transfer instrument in prescribed form, (ii) Delivery to company/donee, (iii) Registered in company books.

CHOSES IN ACTION

* Comply with s 134 *Property Law Act*.
* **Three** steps: (i) Absolute assignment, (ii) in writing signed by **assignor**, and (iii) express written notice by either party to debtor (*Anning*).
  + **NOTE:** Delivery can be actual or constructive (Windeyer J, *Norman*).

CHEQUES

* Several methods (*Cheques Act* s 40).
* If cheque ‘cash’ or made out ‘to bearer’, delivery only.
* If payable in person, must be endorsed (i.e. signed by donor) and then delivered.
  + If not endorsed, transfer will fail (*Jones v Lock*).

1. ***What are the consequences of a failure to complete?***

* Equity will not perfect an imperfect gift, so property returns to settler/settlor’s estate.

**Equitable Property**

1. ***What is equitable property (EP)?***

* Part legal chose in action, beneficiary’s interest under trust, partnership property, equitable mortgage, etc.

1. ***How can you assign EP?***

* Must comply with *PLA* s 53(1)(c).
  + i.e. in writing signed by person transacting (or authorised agent).
* Must be a ‘clear manifest expression of intention to immediately and irrevocably assign the property’ (Windeyer J, *Norman v FCT*).
  + Delivery of a deed the best way to show such intention

CHEQUES

* Not assignable at law, not under s 134 *PLA* in equity!
* Therefore same manifestation of intent as per *Norman* (*Shepherd v FCT*).

**Certainty of Intention**

1. ***Who has the onus of proof to demonstrate trust exists or not?***

* Generally the party arguing that trust **does** exist.
* However, if ambiguous language burden shifts to person proving trust **does not** exist (*Owens v Lofthouse*).
  + Court to consider – clarity of intention; subsequent actions of party arguing trust existence; parol evidence rule.

1. ***Are words of conduct in existence?***

Settlor must indicate through words of conduct that they intend to create a trust – in writing or orally.

* Explicit words (e.g. ‘trustee’) not necessary – can infer intention from circumstances (*Paul v Constance*).
  + In fact, if person found to have had no intention to create trust, then explicit words do not change this view (*Joliffe*).
* Does not have to inform the beneficiaries (*Re Armstrong*).

1. ***Can actual and objective intention be determined?***

Can be identified where relationship between parties would indicate that a trust should be created, or in such circumstances that preclude any other instrument being created.

* *Re Armstrong* – Bank deposits for two sons had their names on them, and were ruled to have the intention of benefiting them.
* Courts can reject seemingly unambiguous words of intention if there is contrary evidence.
  + i.e. Person uses trust assets as their own (*Hyhonie*).

1. ***Is there a subjective intention that proves settlor did not really intend to create trust?***

* If subjectively the settlor did not intend to create a proper trust (e.g. using it to dodge taxes) then no intention present to uphold trust’s existence (*Joliffe*).
* However, if in the context of a contract then objective intent is required (*Shortall v White*).

1. ***If the intention is insufficient, can the courts still intervene?***

* *Gill v Gill* – Not conditions of forfeiture, but equitable condition. Meant that brother’s obligation to allow sisters to stay on farm enforceable, but did not create trust.
  + Judgement debt could be awarded, but property would not be sold if brother refuses.

1. ***Did the settlor intend to create the trust immediately?***

* An intention to create a trust in the future is unenforceable in the ‘absence of consideration’ (*Harpur v Levy*).
  + Basic maxim of equity to not assist a volunteer to complete a trust.
  + Must provide consideration as per common law.

1. ***Can a settlor revoke the trust?***

* Generally no. Can only do so if there’s an expressly reserved power available to take such action (*Mallott v Wilson*).

1. ***Are precatory words present?***

Precatory words do not indicate obligations, only preferences on the part of the settlor.

* If they are present, cannot force a request to be carried out (*Re Williams*).
  + Examples:
    - ‘in the fullest confidence’ (ibid);
    - ‘subject to the right of my son’ (*In Re Smith*);
    - ‘it is my wish…’ (*Re the Will of Logan*).
* Ordinarily and normally used words can indicate charge (or some other obligation – *Pearce v Wright*).
* Consider external evidence when determining if words precatory:
  + Testator’s worldview, relationship with beneficiaries, etc.
  + If written by solicitors, assume testator understood meaning of words used (*Re the Will of Logan*). Home-drawn wills possibly contrary (*Re Fox*).

**Certainty of Subject Matter**

1. ***Is it ‘property’?***

* Basically a ‘thing’ that exists in the real world; OR
* A legally assignable right.

1. ***Is it PRESENT or FUTURE property?***

* Present:
  + Must presently exist to form a trust over property.
  + Contingent or defeasible interests are considered present property.
    - e.g. ‘Daughter receives property on trust, **on condition** that she finishes her studies by age 25.’
* Future:
  + Future expectancies will fail because no property to transfer.
    - e.g. ‘I give Tim the money I earn from winning Lotto next month.’
  + However, can assign future property in two ways:
    - Give **consideration** for the future property, which equity will recognise (*Williams v IRC*).
    - Assign **present contractual rights** to future property – i.e. 50 per cent of future income (*Shepherd*).
      * Assigning defined income not yet accrued – i.e. 25K of projected 50K salary – will fail (*Williams*).
      * If contract can be unilaterally terminated there is no present assignable right (*Norman*).
        + i.e. Interest from loan – if the debtor can repay the loan at any point, there’s no certainty to whether interest will be paid and so will fail.

1. ***Is the subject matter certain/ascertainable?***

* If the trust property cannot be ascertained the trust will fail.
  + *Mussoorie Bank* – Husband requested wife in will to divide property amongst her children when no longer required by her.
    - Not ascertainable, since hubby didn’t specify what property was supposed to go under the trust. Was it *everything*, or one particular portion of land? How much was each child receiving – equal shares or otherwise?
    - Also precatory words meant no obligation by wife to do anything, but even if they weren’t present the trust would still fail.
* If **exact property** not specified, but if a transfer of percentage of property **and** property if of the same class/carry the same rights, then subject matter is certain (*Hunter v Moss;* applied in *Shortall v White*).
  + Applies to shares if they’re all of the same value and type.
    - However, if shares are different (some invested well, others lose value) then this principle may not apply.
  + May also not apply to goods – what if trust for 30 per cent of bananas in storage, and half of them are rotting?

**Certainty of Object**

1. ***Is it a TRUST or MERE power?***

Determine whether obligation to distribute present

* Capricious language:
  + Mandatory language suggests obligation, whilst permissive language indicates discretion.
  + ‘Shall’ means ‘may’ (*Re Gulbenkian*) – **not to impose an obligation**
* Contrast language:
  + Does reference to other language in the deed/will help construe the meaning of the provision?
    - i.e. Even if ‘shall’ is used, does the rest of the will suggest obligation? Would possibly be deemed an obligation by reference.
* Gift over default:
  + i.e. If trustee can’t exercise power of appointment (defaults), goes to a particular person as a gift.
  + Its presence conclusively shows that provision is mere power.
    - However, absence won’t prove provision is trust power.
* Inclusion of a mere power:
  + Including mere power in document creating trust **does not** automatically convert mere power to trust power.

**CONCLUSION**

If clause imposes an obligation to distribute, **trust power**.

If not, **mere power**.

1. ***What class of power does the provision bestow upon the trustee?***

* General Power:
  + Can appoint **anyone in the world**, including holder of power.
    - e.g. ‘I give my house to Tim (trustee) to appoint to whomsoever he chooses.’
* Hybrid Power:
  + Class is defined by **exclusion**.
    - e.g. ‘I give my house to Tim to appoint to whomsoever he chooses, except Jack and Jill.’
* Special Power:
  + Class is defined by **inclusion**.
    - e.g. ‘I give my house to Tim to appoint to John, Fred and Alice as he selects.’

**CONCLUSION**

Trust Power

* **Invalid** unless special power.
  + Other powers’ scope extends to hopelessly wide level, so would be administratively unworkable and inconsistent with fiduciary obligations (*Re Hays*).

Mere Power

* Can be any of the three classes of power.

1. ***Trust Powers only – What type of trust is it?***

To qualify so far, must have **obligation to distribute** and be **special power**.

* Fixed Interest Trust:
  + Trustee has **no discretion** to select amongst beneficiaries.
    - e.g. ‘I give my house to Tim to hold on trust for Jack and Jill.’
* Discretionary Trust:
  + Trustee has **discretion** to select amongst beneficiaries.
    - e.g. ‘I give my house to Tim to hold on trust for whichever of my children he shall select and, if more than one, in such shares as he shall determine.’

1. ***Are there issues of certainty?***

*Mere Power*

* Must satisfy **Criterion Certainty** – whether person within class of objects described in the provision (*McPhail v Doulton*).
* CC has **two** **elements** (*Re Gulbenkian*):
  + Semantic/linguistic Uncertainty – not enough information given, or words are too subjective, for trustee to perform duties.
    - Uncertain examples:
      * ‘my old friends’ (*Re Gulbenkian*), ‘persons to whom a moral obligation is owed’ (*Re Baden*).
    - Certain examples:
      * ‘relatives, dependents, employees, ex-employees’ (*Re Baden* – ‘relative’ held to be ‘blood relative’).
  + Evidential Uncertainty – Cannot list all the members of that class.
    - NOTE: Not invalidated by this uncertainty alone. May not be necessary to list all members of a class, so long as trustee can determine whether or not a person is within the class.
    - *Re Baden*: ‘once the class of persons to be benefited is conceptually certain it then becomes a question of fact to be determined on evidence whether any postulant has on inquiry been proved to be within it.’
* Administrative Workability not relevant for mere powers (*Re Manisty’s Settlement*).

*Discretionary Trust*

* Must satisfy **Criterion Certainty** – see above for details.
* Must not have **Administrative Uncertainty** – is it too large to make a sensible decision as to who receives trust funds (*McPhail v Doulton*)?
  + *R v District Auditor* – Trust for inhabitants of West Yorkshire Country numbered 2.5m, therefore ‘hopelessly wide’.

*Fixed Interest Trust*

* Must satisfy **List Certainty** – Trustee must be able to make a list of names so that trustee can effectively distribute property to them (*McPhail v Doulton*).
  + If unable to make list, trust will fail (*Kinsela v Caldwell*).
  + Must be compiled at time of distribution, not creation:
    - i.e. If trust for ‘my brother’s children’ and a new child is born after death of settlor, unborn children can be beneficiaries (*Re Bowles*).

1. ***What duties does a trustee have in relation to exercising powers?***

*Fixed Interest Trust*

* Normal trustee duties.
* Make distributions in strict accordance with terms of the trust.

*Mere Power*

* No duty by donee to exercise discretion and distribute property (*Re Hays*).
* If power exercised, donee must:
  + Keep within limits of power (no ‘excessive exercise’); and
  + Act in good faith (*Karger v Paul*).

*Mere Power held by Trustee* (i.e. One clause is a mere power, other clauses are trust powers)

* As per standard Mere Power, with following additional duties (*McPhail v Doulton; Karger v Paul*):
  + Consider periodically whether to exercise power;
  + Consider range of objects of power and requests from those within power’s scope; and
  + Consider appropriateness of individual appointments.

*Discretionary Trust*

* Consider (*McPhail v Doulton*):
  + Periodically whether to exercise power.
  + Range of objects of power and requests from those within power’s scope.
* Duty to distribute after making wider/more systematic survey than trustee with mere power (*McPhail*).
* Keep within limits of power (no ‘excessive exercise’).
* When exercising power, act in good faith, upon real and genuine consideration, and in accordance with purpose for which discretion conferred (*Karger v Paul*).

1. ***What rights do objects of trust have?***

* See **Trusts and Powers** class summary sheet.
* An object of a DT has no proprietary interest or proprietary interest capable of assignment (expectancy) in trust property (*Kennon v Spry*).

1. ***What limits exist on the exercise of a trustee’s discretion?***

* A trustee who does not turn his or her mind to the exercise of the power will have failed in that duty (*Turner v Turner*).
  + cf. Non-fiduciaries – only controlled by concept of fraud on a power.
* Court does not enforce exercise of a discretionary power, but will prevent improper exercise of power (*Tempest v Lord Camoys*).
* When exercising power, act in good faith, upon real and genuine consideration, and in accordance with purpose for which discretion conferred (*Karger v Paul*).
  + Superannuation cases – specific applications of *Karger*:
    - *Telstra Super* – Trustees under fiduciary duty to form an opinion as to whether someone was entitled to payment or not. Trustees needed to investigate and ask people appropriate questions.
    - *Dunstone v Irving* – Do not need to know specific terms of trust deed, only that know of general duty to research into beneficiaries.