



## Exam Notes

A Crash Course



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## Today

Why Exam Notes?

They're vital to success in open book exams

Useful for Learning the Course

Show how to pull lectures, seminars and readings together

Don't worry about the substance of the law

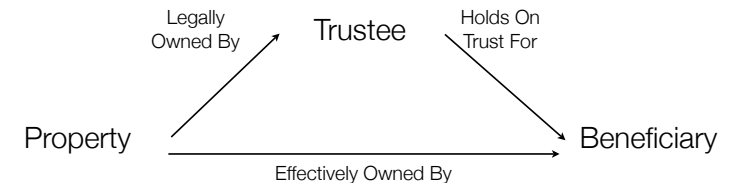
## Trusts - A Simplified Version

A concept relating to property ownership.

One person, the **trustee** holds the legal title to the property.

Another person, the **beneficiary**, is actually entitled to the property.

The Courts effectively view the beneficiary of the owner.



## A Scenario

Bill is well known amongst his friends for his sarcasm. He tells one of his friends, Steve, about his new car.

Steve jokingly asks Bill whether he can borrow it sometime. Bill sarcastically responds 'Sure. In fact, I think you should be the only one to drive it.'

Bill then writes on a piece of paper 'I, Bill McLean, hold my 2010 Porsche Turbo S on trust for Steve Lewis', signs his name, and gives it to Steve.

Bill dies a few days later. His will says all his property is to go to his wife Elizabeth. However, Steve claims that as beneficiary of a trust, he is entitled to the car.

## Who Gets The Car?

I want to know:

what the law would say; and

what you think is morally right thing.

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## Lecture

Equity with Janey Green

Intention must be subjectively real

- *Commissioner of Stamp Duties (Qld) v Joliffe* 1920 HCA
- Mr Joliffe took a sum of money out of his bank account, formed a new account on trust for her
- Never told her
- She dies, they want to tax him on his inheritance
- He claimed it was never a real trust, it was a work around to claim <sup>own</sup> interest
- Joliffe claimed his expression of intention was a lie
- Court believed him, and took his side
- Intention must be subjectively real

~~Carlton~~ *Karlon v Hilton* 1953

- Husband open trust account in wife's name
- Later down the track, saw tax advantage by it not being a trust
- Court dismisses him - says law is the same, but this guy is making it up
- one factor - he gave his wife the proceeds etc, till
- note that you don't have to tell beneficiary, but was an essential factor here.

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## Seminars

The key place to make sure you know the material

Attempt the questions before you get there, so you know if there is something you don't understand

Ask questions if there is something you don't understand

Get to know what cases and rules are the important ones

## Readings

Some lecturers will want you to read them before, some after

If you find cannot get through everything

- Ascertain most important

  - Cases mentioned often

  - Things to be discussed in seminar

- Materials relevant to parts you do not understand

## Exam strategy

To get here, you've all had to know how to do exams

The key points in law exams are efficiency, and making sure you spot the issues

## Exams

Open book

Generally problem questions

Often a rush to finish in the allocated time

Attempting to cover entire course in 2 or 3 hours - will not be able to go into great depth

A large part of the battle will be identifying the legal issues raised by the fact scenarios

## Exam Notes

Material from Lectures, Seminars and Readings will combine to form your Exam Notes

Have your notes fit the exam format - resist the temptation to put too much detail

- Exams - you need to get things down fast

  - Need to have all of the rules and principles in your subject, when they apply, and authority for them

  - Need to be able to distinguish key authorities

Does not apply to assignments, exams with essays!

## A Quick Primer

Cannot say anything without authority

Statutes are 'easy'

E.g. A corporation must not engage in misleading or deceptive conduct in trade or commerce

Why? Section 52 of the *Trade Practices Act* says so

## Case Law

You need authority in the form of a precedent

For precedent you might need

the case that said it first

the most recent case

the most authoritative case

Important to know the principles of a case

E.g. *Cohen v Cohen* (1929) 42 CLR 91 - intention to create legal relations presumed to be absent between family members

## Case Law

The easiest way to get around precedent is to **distinguish** the facts of your case from the facts in the precedent case

So it is important to know the facts of the precedent case

## Statute + Case Law

Statutes aren't read in isolation

How do we know what constitutes 'misleading and deceptive conduct'?

Look to the cases on it!

# Daniel's notes

Intention must be **subjectively real**

*Jolliffe* - Claimed he lied, it was a tax dodge. Court believed this. No trust, he didn't really mean it.

*Kauter v Hilton* - similar facts, but court says there was a trust, as they didn't believe him this time

## Express Trusts

Essentials pg 102

### Creation

Generally, no formalities required  
But to transfer the property to the trustee may require formalities  
Eg Chose requires writing, land requires registration

Exceptions (formalities required)  
Law of Property Act s 29(1)(b)

Any declaration of trust over land requires writing  
Not necessarily extra writing. Written in the Memorandum of Transfer would do

LPA s 29(1)(c)

A disposition of existing equitable property requires writing  
Unsettled as to whether a 'subtrust' is a disposition, and would need writing  
But note that if it involves land it definitely needs writing

### The Three Certainties

1. Certainty of Intention - they meant to create a trust  
2. Certainty of Subject Matter - what is being held  
3. Certainty of Object - for whose benefit or what purpose it exists

### Certainty of Intention

Main Points  
Settlor's intention must be *subjectively real* - *Jolliffe*

The intention of the alleged settlor is all that matters  
(Unless trust formed as the result of a contract, then intention of both parties is relevant, but this is quite rare)

Generally fairly obvious where trust by Settlement, and property is transferred to Trustee for someone or something, but harder in cases of declaration

As no formality requirements, courts are rigorous in determining intention

Can't create a trust where you didn't mean to

Jones v Lock 1865 - £900 cheque for baby, was going to put in will, but didn't get to  
"I'll look after it for him" not sufficient

*Milroy v Lord* - can't give rise to a transaction of one type when another was intended

Contrast Jones to Paul v Constance - "as much mine as it is yours" deemed good enough to prove trust was intended

But a creator is not required to demonstrate that they understand all the legal implications that flow from the creation of a trust for that intention to be found: *Re Armstrong* (1960)

### Intention must be subjectively real

*Jolliffe* - Claimed he lied, it was a tax dodge. Court believed this. No trust, he didn't really mean it.  
*Kauter v Hilton* - similar facts, but court says there was a trust, as they didn't believe him this time

**Precatory Words** are phrases that are only moral - not legally sufficient to create a trust. Eg 'in the hope that', 'request', 'wish', 'desire' and 'with confidence'. These aren't always precatory though.

Daniel Kiley

Equity Semester 1 2008

### Certainty of Subject Matter

#### Main Points

Need to know exactly what's being held, and who's to get what portion

Trusts over 'the bulk of my property' (*Palmer v Simmonds* (1854)) or 'my favourite jewellery' will fail

### Certainty of Object

#### Main Points

Need certain, identifiable parties as beneficiary, or a charitable purpose  
Resulting trust in favour of settlor when uncertainty of object arises

**The Beneficiary Principle** - *Morice v Bishop of Durham* (1804)

\*Need a certain, identifiable beneficiary with standing, so there is someone to enforce the trust  
\*Prevents trusts for purposes, only charitable trusts will do, as A-G has standing to enforce them  
\*Also means a trust must have at least one beneficiary

### Certainty of object in fixed trusts

\*Must be able to draw up an exhaustive list of all potential beneficiaries of the trust  
\*To the Kiley family might be deemed too ambiguous - just P, J, D, A, or Elaine, Deb, Denise too?  
\*Uncertainty as to where the beneficiaries can be located, or if they are still alive, will not defeat a trust as the trustees can apply to a court for direction as to how to proceed - *Re Gulbenkian Settlements Trusts* (1970)

### Certainty of object in discretionary trust (see more on Disc. Trusts below)

\*Criterion Certainty Test - *McPhail v Doulton* (1971)  
\*The trustees must be able to determine with certainty whether any given individual is or is not a potential beneficiary

### Charitable Trusts

\*Four categories

\*Age/Poverty  
\*Advancement of Education  
\*Advancement of Religion

\*Other purposes beneficial to the community

\*Enforceable by A-G

\*If charity no longer exists, cy-près says it goes to nearest possible purpose

### Trusts for Purposes

\*Unless charitable, fail to meet satisfy the Beneficiary Principle from *Morice v Bishop of Durham*

\*Example - trust "for the free press" failed in *Re Astor*

\*Exception (ONLY in England)

\**Re Denby's Trust Deed* (1969)

\*Trust for the creation and maintenance of a sporting ground for company employees and other people permitted by the trustees

\*Clear from trust document that it was intended future members would use it, rebutting presumption that it was a trust for the individual members

\*Deemed to be for the benefit of ascertainable beneficiaries, not just for 'abstract and impersonal purposes', and upheld by Goff J.

\**Strathgully Show Jumping Club Inc v Hayes* (2001)

\**Re Denby's* is NOT law in Australia

### Trusts for Unincorporated Associations

\*Eg sporting clubs, political parties, etc

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### Problems

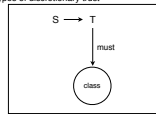
- Lack standing to enforce trust (Beneficiary Principle)
- Can last indefinitely - rule against perpetuities
- old rule - any trust that could maybe last more than 80 years was invalid
- new rule - LPA s62 - court can alter trust only once it runs too long
- Often intended to benefit present and future members - future members are unknown and unascertainable
- Can often be seen as a purpose trust
- Courts will try not to invalidate though, if possible
- May interpret it as a trust for the individual members
- Won't do this in situations where it won't make sense
- Leahy* - trust for order of nuns can't be to them personally as they had a vow of poverty
- Bacon v Pianta* - trust for the Communist Party couldn't be for the individual members as they were too hard to identify and too quickly changing
- Where it is for present and future members, fails the 'draw up a list' test
- Court may have regard to:
  - the terms of the instrument
  - location and number of the members - a small, concentrated group will make the presumption more likely to arise
  - the subject matter of the gift - something like money is easily distributed amongst members
  - rules of the association - including any mechanism for distribution of assets

### Discretionary Trusts

Essentials pg 109

\*Certainty of Object test - Criterion Certainty (see above) - *McPhail v Dalton*

\*Two types of discretionary trust



"Power in the Nature of a Trust"

- Trust Power of Appointment

Trustee must distribute entirety of trust to members of the class, but how much and who is at discretion of the trustee

\*How to tell which you're dealing with  
-look to language used in creating the trust  
-if there is a gift over, it must be "mere"  
-if not, it could potentially be either

\*Even if only a 'mere' trust, the trustee is still a trustee, and must act like a trustee: *Gulbenkian*  
\*Must consider distributing the property into the class of people, in the manner a trustee would (rationally, regularly)

\*Remedies if trustee is not meeting their obligation

-With a 'mere' power, court will replace them

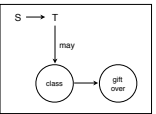
-With a 'must' trust

-*McPhail v Dalton* says can do 1 of 3 things

-replace trustee

-ask the beneficiary class to collectively come up with a distribution scheme

-or court can decide distribution itself



"Mere/Bare Power"

Trustee may distribute members of a class, with any remaining gifted over to nominated parties

# Chong's Notes

For there to be certainty of intention there must be a **subjective intention** (what person really meant) not objective to create a trust. Hence if a person opened an account for their own benefit despite stating it was on trust for another no trust will be created:

*Commissioner of Stamp Duties (Qld) v Jolliffe* (1920) 28 CLR 178

Man opened a bank account in his name as trustee for wife under name "Mrs Hannah Jolliffe-Edwin Alfred Jolliffe", deposited £900. Reason for this was to avoid a prohibition against a person holding more than one account. When wife died Mr Jolliffe took withdrew the money as sole beneficiary. account; tax department wanted to charge inheritance tax. HC agreed with Mr Jolliffe that his subjective intention wasn't to create a trust, so none existed. It found there were also no set words to create a trust. HC recognized it was Mr Jolliffe's money, he only made withdrawals for his use and his wife was unaware of the account.

The question is of substance not form and is resolved on examination of the **circumstances/facts**:

*Kauter v Hilton* (1953) 90 CLR 86

Man promised niece £5,000 in trust account; didn't include her in will saying he intended to put money in trust accounts while alive. He opened a number of accounts in his name & gave her the passbooks (had to be presented to withdraw money). He later bought government bonds (with the money) & wanted to transfer these to niece but died before doing this. HC agreed a trust arose & declared the bonds purchased with the passbook money were hers. The trust arose when the money was deposited; beneficial ownership postponed until man's death. Giving of passbooks supported a trust as he couldn't access the accounts without her consent.

# Scenario Revisited

Bill is well known amongst his friends for his sarcasm. He tells one of his friends, Steve, about his new car.

Steve jokingly asks Bill whether he can borrow it sometime. Bill sarcastically responds 'Sure. In fact, I think you should be the only one to drive it.'

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# My Notes Structure

Divide notes into logical sections - often based on weeks

Start each section with a summary that section, and if there is any broad procedure for addressing questions

Follow underneath with more detail on each point from the summary/process

## Judicial Power (General)

Pink bk pg 60

### Process

- What is the power being conferred?
- Is this power of a judicial nature?
  - Check through Indicia
- Is the body it is being conferred upon (in)capable of exercising that power?
- Exception - *Persona Designata*

### Indicia of Judicial Power (Order as suggested by Brendan)

- Deciding controversies** (only when called upon to take action) : *Huddart Parker* (1909)
- Decide on **existing rights and obligations** (not new ones) : *Precision Data Holdings* (1991), *R v Trade Practices Tribunal; ex parte Tasmanian Brewers* (1970)
- Binding** - *Huddart Parker, Ex parte Tasmanian Brewers*
- Authoritative** - means conclusive determination, though potentially subject to appeal: *Huddart Parker, Shell Co v FCT* (1930), *A-G (Cth) v Breckler* (1999)
- Is the decision maker being asked to apply **pre-existing law**? *Ex parte Tasmanian Brewers*
- The manner** in which it is being exercised: *Polyukhovich, Nicholas*
  - Eg *Nicholas* "power that is exercised in accordance with the judicial process"
- Conclusiveness
- Enforcement
- Determinations made according to legal principles
- Applies the law to the facts in a determinative manner
- Sometimes a power takes character from the body on which it is conferred - "Chameleon Powers" : *Ex parte Tasmanian Brewers*

### Is the body it is being conferred upon (in)capable of exercising that power?

- Boilermakers' Principle** (1956)
    - The judicial power of the Commonwealth cannot be vested in any body other than a Chapter III Court - only a Chapter III court can exercise judicial power
    - A Chapter III court cannot be vested with any power other than judicial power - a court can only exercise judicial power
  - If legislation purports to vest judicial power in anything other than a Ch III court, the law will be invalid: *Nicholas v The Queen* (1998)
  - If legislation purports to vest a non-judicial power in a Ch III court, the law will be invalid: *Chu Kheng Lim v Minister for Immigration* (1992)
- What is a Court?**
- Must be established in accordance with Ch III
  - Can be the High Court, a Federal Court or State courts vested with Federal jurisdiction - s71 with s71 and s77(iii) for State Courts
  - NSW v Cth (Wheat Case)* (1915)
    - interstate Commission is not a Ch III court, therefore cannot exercise judicial power
    - Even though the commission was provided for in the Constitution
  - To be in accordance with Ch III, must satisfy all aspects of Ch III
    - This includes **secure tenure and remuneration** for judges s72 - *Alexander's case* (1918)
    - but if State courts vested with Federal jurisdiction, then judges are appointed according to the rules of that state: see *Le Mesurier v Connor* (1929)

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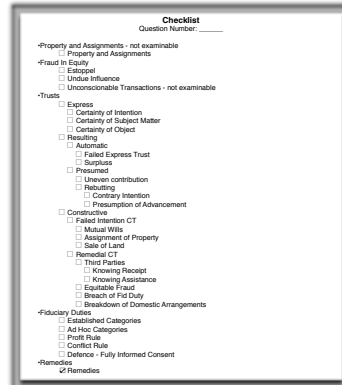
Process

# Checklists

List every possible issue that could come up

Print multiple

While reading each question, get a new checklist, tick any potential issue that comes up



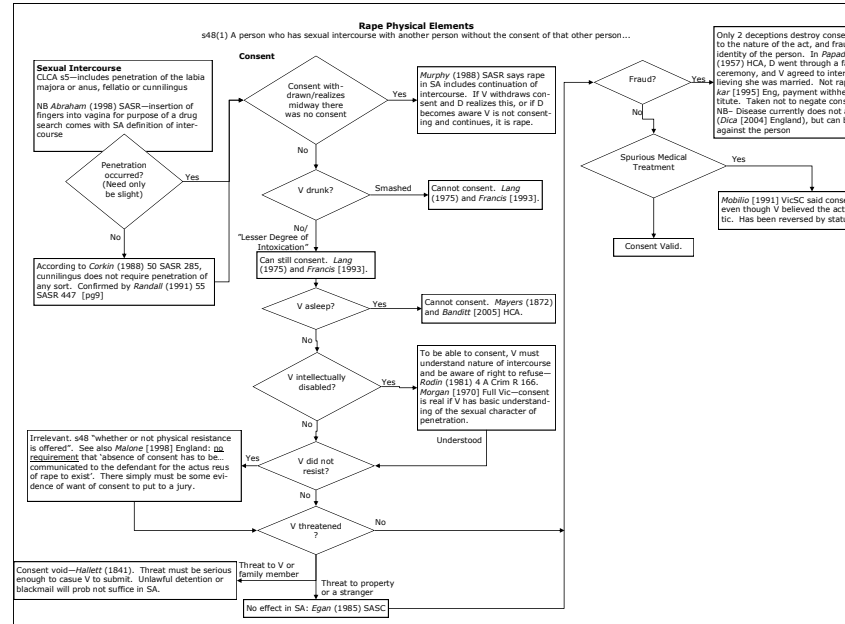
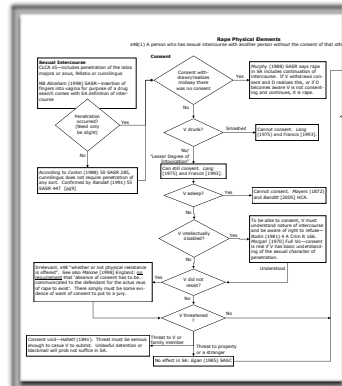
### Checklist

Question Number: \_\_\_\_\_

- Property and Assignments - not examinable
  - Property and Assignments
- Fraud In Equity
  - Estoppel
  - Undue Influence
  - Unconscionable Transactions - not examinable
- Trusts
  - Express
    - Certainty of Intention
    - Certainty of Subject Matter
    - Certainty of Object
  - Resulting
    - Automatic
    - Failed Express Trust
    - Surplus
  - Presumed
    - Uneven contribution
    - Rebutting
    - Contrary Intention
    - Presumption of Advancement
  - Constructive
    - Failed Intention CT
    - Mutual Wills
    - Assignment of Property
    - Sale of Land
  - Remedial CT
    - Third Parties
    - Knowing Receipt
    - Knowing Assistance

# Flowcharts

Don't work for everything, everyone



## Other Resources

Can be useful, but resist the temptation to over rely on them

Case books

Nutshell

Previous students' notes

The Finlaysons [aulss.org.au](http://aulss.org.au) Answer Bank

Value to you will vary

Need to know the material personally to spot the issues

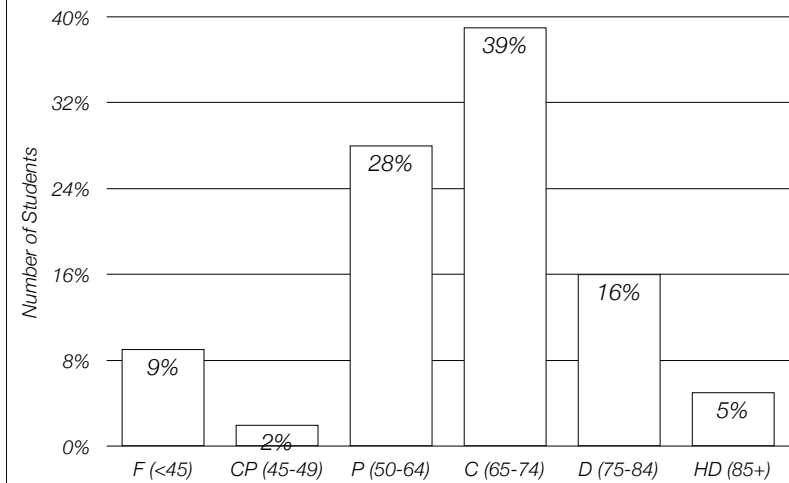
## P's Get Degrees...

But You Could Do So Much Better

## Having Said That...

Don't Be Disappointed

HDs Are Hard To Get



Law of Crime

Class of 2007

Any Questions?

Anything at all!