

- Equity came from the courts of chancellor → acted on conscience of parties
  - Could petition the King, who delegated to the chancellor, to hear your case
  - Law and Equity fused by the *Judicature Act 1873*

#### History of trusts:

- Function of both CL and equity
- Stage 1: rise of the use (1200-1400)
  - “to A (feoffee) for the use of B (cestui que use)” → use = “on behalf of” or “for benefit of”
  - use arose largely to facilitate benefits of ownership without burdens → essentially a dodge for avoidance of creditors, avoidance of forfeiture upon treason or felony, avoidance of feudal burdens associated with inheritance, etc.
  - use refused recognition in courts of Law couldn't enforce the use → enforcement of use initially restricted to moral suasion
- stage 2: the Chancellor's enforcement of uses (1400-1535)
  - Courts of Chancery recognized equitable estate in land → estates in Equity flexibly analogized to estates in Law
    - Chancellor would commit him to jail until you saw things his way and live up to the promise
- stage #3: the Statute of Uses (1535-1634) → legislation aimed at preventing avoidance of feudal burdens
  - Statute generally executed use and provided legal title to B → “to A to use of B” = transfer of whole title to B
- stage #4: the avoidance of *Statute* and the rise of trusts (1634-present)
  - Statute contained various loopholes (eg chattel, corporate trustee, active duty)
    - If you had active duties then the statute of use didn't apply (only applied if just holding it in title for me and kids)
  - effect of Statute eventually avoided by a use upon a use → “to X to the use of A on trust for B” or “unto and to the use of A on trust for B”
    - Statute executed only first use
    - Equity enforced second use and A held for benefit of B

#### Parties to a Trust

- Settlor: party creating trust through provision of property
  - settlor's property may consist of legal or equitable interest
    - Property: rem (real/land) or personam (personal)
      - Why do we call land real property: it's the only property for which I have a right to get the thing back, rem is latin for the thing
      - For any other type of property you have a personal right → can get the value of the assets but not the things themselves
        - Choses-in-possession: something you can enjoy by possessing it, something with tangible existence
        - Choses-in-action: things with no corporeal existence
        - Can put choses in action into trust
    - no settlor in formal sense in resulting or constructive trusts
    - obligations:
      - generally no obligation to establish trust (unless enforceable promise)
      - generally no rights once trust established (unless revocation created)
  - Trustee: party acquiring property for benefit of another
    - settlor may be trustee under express trust → have legal title for the benefit of the beneficiaries
    - trustee may be one or several → Usually more than one trustee want them to keep an eye on each other
    - Obligations:
      - settlor's obligations created by trust instrument: terms or provisions will be set out
      - statutory obligations under Trustees Act
      - fiduciary obligations imposed by law: generally requires to do everything possible to act in best interest of beneficiary
        - situation where trustee has all the power and the beneficiary has all of the risk so fiduciary obligations were imposed
      - a carefully considered appointment for settlor and trustee
    - Beneficiary: party beneficially interested in property, have Equitable title
      - settlor may be beneficiary → would transfer blackacre to you on trust for me and my children
      - trustee may be one of several beneficiaries
      - beneficiary can't be the same person as sole trustee b/c there would be no reason for a trust
      - interests: to sue you have to 'stay within the trust' by either suing the trustee or going after the trust itself as a property
        - personal rights against trustee: go after the trustee → personal right to compel observance of trust obligations
          - Right to account: look at the books, disclosure of information pertaining to trust
          - Right to enforce: can get an order of specific performance
          - Sue for wrongs: trustee has fiduciary obligations and they've misbehaved then you can sue the trustee
            - Two types of remedies:
              - compensation for loss sustained by the breach
              - Disgorge: looks at defendant's gains, if as result of committing the result upon on you the defendant gains something you can get the court to give you that gain
            - no right to direct administration of trust
          - If trust involves a third party where a wrong has been committed (e.g. trustee has given trust property to a friend)
            - Can get a constructive trust → vindicatio: equitable idea that allows you to point to an asset prove your ownership of that thing and since it's yours you take the ownership of that thing → taking property back itself and do this through a constructive trust
            - Wouldn't get rid of the express trust with the constructive trust would just be an instrument to get it back to the express trust (usually removing the trustee who did the wrong thing)
          - proprietary rights against subject of trust
            - right to remove property from estate of insolvent trustee
            - right to recover (traceable) property from trustee in breach
            - right to recover (traceable) property from some others in breach → recoverable if property not acquired for value, or not acquired w/o notice of trust
        - Academic views of beneficiary rights:
          - purely in personam theory
            - beneficiary holds only in personam rights against trustee → trustee personally answerable for administration and own misconduct
          - beneficiary holds no rights in rem
            - beneficiary does not own trust property in any sense

- apparent in rem rights only exercisable in personam against trustee
  - eg rogue misappropriates trust property → trustee sues rogue on beneficiary's behalf OR beneficiary sues trustee for failure to do so
- mixed in personam and in rem theory
  - beneficiary holds in personam rights against trustee
  - trustee personally answerable for administration and own misconduct
    - third party answerable for misconduct (eg constructive trustee)
  - beneficiary holds in rem rights against trust assets
    - exercisable against trustee in possession (eg tracing)
    - exercisable against third party in possession (eg constructive trust)
    - property recoverable by unless BFPV (ie vindicatio)

- fiduciary obligations: one party is in a vulnerable position and the other is in a power position → to maintain this relationship we create a fiduciary relationship owed by the powerful to the vulnerable, have to act in the interests of the weaker party
  - fiduciary's selfless service to principal (beneficiary)
    - Stronger party has to act with: honesty, prudence, diligence, even-handedness
      - avoidance of conflict of interest
      - avoidance of personal profit
    - occasional exemption from strict attitude → consent: full disclosure + independent advice + fair price
  - fiduciary relationships: the traditional approach (outside of CA in other commonwealth countries)
    - good faith exercise of discretion affecting principal's well-being
      1. parasitic and not independent → always attached to another obligation (here attached to the trust)
        - manner of performing existing duty (not new substantive duty)
        - The fiduciary obligation says that you shouldn't be tempted by self interest
      2. proscriptive and not prescriptive → don't tell you what to do specifically, but when you are fulfilling them we can't tell you what to do we are just telling you not to be tempted by self interest
        - do not be self-interested (not do act in best interests)
      3. prophylactic and not merely reactive → concerned not only to do justice on this specific case but to do justice more generally
        - focus on deterrence (not merely sanctioning wrongdoers)
      4. pecuniary and not personal → usually financial or monetary interests
        - discretion affecting financial matters (not personal health)
    - enumerated categories importing obligations of utmost fidelity → if you wanted to bring yourself into a fiduciary relationship you had to be within the historical relationships listed below
      - trustee-beneficiary, agent-principal, director-company, solicitor-client
    - We have all of this in Canada but we also have ad hoc fiduciary relationships
  - the modern Canadian approach (Donoghue's failed cousin)
    - traditional categories retained
    - new categories flexibly recognized → tried to do the same function that Donoghue did for negligence
      - Frame v Smith (1987 per Wilson) → focus on idea of vulnerability; test was:
        - fiduciary has scope for exercise of discretion
        - beneficiary relies upon trust and confidence of fiduciary
        - beneficiary is specially vulnerable to fiduciary's actions
      - Realize that test doesn't work
      - Galambos v Perez (2009 per Cromwell) → focus not on vulnerability but on voluntariness, must voluntarily enter this situation in the first place and also:
        - voluntarily undertaking to act in beneficiaries' best interests
        - defined class of beneficiaries vulnerable to fiduciary's control
        - legal or personal interest vulnerable to fiduciary's discretion
    - So basically can either satisfy traditional approach or you can try to fit in whatever test is going at the time for a new fiduciary relationship
    - Australians courts say we are widening the equitable concept to a point where it is devoid of reasoning
  - scope of fiduciary duty
    - substantive expansion of duty
      - independent—not merely parasitic → can have fiduciary relationship without any other relationship
      - prescriptive—note merely proscriptive (cf B(LK) v British Columbia) → rather than telling you the 1 thing you can't do, the FD tell you the one thing you ought to do (Difficult to come up with standard for this)
      - personal and psychological—not merely pecuniary → can also pertain to personal interest
    - instrumentalism and unpredictability
      - eg Norberg v Wynrib (higher level of disapproval): elderly physician exploited young woman and had an addiction to prescription drugs, tells her he has to have sex w/ him to get the drugs; majority of the court said this is battery (consent was vitiated by the control power of the situation); women of the court says no that's not the wrong that happened here it's that he exploited her vulnerability which sounds like fiduciary obligations → exploitation of vulnerability so called it a breach of FD
      - eg M(K) v M(H) (evading limitation periods): incest, father SA daughter, if she sued for obvious cause of action she would have been stopped by statute of limitations; SCC wanted to find a way around this so wanted an Equitable action because uses laches (no set time period if you delay unreasonably and if D would be unfairly prejudiced then won't hear case but no set time) → said this was a breach of fiduciary duty b/c exploitation of vulnerability
      - Concerned with nature of obligations
  - breach of fiduciary duty or breach of duty by fiduciary? Not everything that goes wrong in a fiduciary relationship is a breach of FD

Szarfer v Chodos	<p>Facts: Paul married to Tara, Dave is the lawyer for a new business venture for Paul (FD b/w Paul and Dave); Paul hired Dave, a lawyer, to advise him regarding the purchase of a business. (1) While driving Paul to a business meeting, Dave carelessly became involved in a car accident. Paul was injured and consequently incurred several expenses. (2) Dave incidentally met Paul's wife, Tara. Dave and Tara entered into a sexual relationship. Dave received "the delights and benefits of the affair." When Paul eventually learned of the affair, he required a costly treatment from a therapist.</p>	<ul style="list-style-type: none"> <li>• The first one is negligence has nothing to do with fiduciary duty</li> <li>• Somehow judge convinced himself that the second was a breach of fiduciary duty → McInnes says this is ridiculous, FR has nothing to do with lawyer and client's wife</li> </ul>
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- overlap between trusts and fiduciary relationships
  - not all fiduciaries are trustees (e.g. lawyer-client, principal-agent) → fiduciary is possible without property but trust is not
  - not all trustees are equally fiduciaries
    - all express trustees are subject to fiduciary duties → you know you are an express trust trustee b/c you entered into that relationship voluntarily
    - some resulting trustees may be subject to fiduciary duties → impose by obligation of Equity so you didn't voluntarily enter into that relationship
    - some constructive trust trustees may be subject to fiduciary duties
      - Again imposed by obligation of Equity
      - question: why are all trustees not equally fiduciaries? b/c of imposition of the trust by Equity
- intersection of fiduciary and trusts
  - breach of fiduciary duty may trigger response of constructive trust
    - eg AG Hong Kong v Reid [discussed later in course]: Reid lawyer for govt. of Hong Kong, had FR w/ govt. of Hong Kong, Reid took bribes in breach of FR, Govt. sues him
      - Analysis for cause of action for every situation in this course
      - This case:
        - Cause of action: breach of fiduciary duty
        - Measure of relief: constructive trust → Reid holds the money on trust for the govt.
          - Means to an end: you hold legal title for the govt. now give it to them, transfer legal title



- Benefits of owning rather than being owed
  - You succeed in event of other party's bankruptcy or insolvency
  - If you own something you own it regardless of where it is geographically
  - The thing you have may be worth more or less
  - Disadvantages: Presupposes the existence of the property → if it's been destroyed, or stolen your ownership has been destroyed as well
- Downsides of being creditor
  - If you've collected a particular asset and those assets have increased in value then you don't get the benefit of that
  - Debt is only as good as the debtor → It's only as good as the debtor because you can't get someone to pay money they don't have even with a judgement

## Debts

Ontario Hydro	ON Hydro sells its product to customers the customers pay the money to Brown and Brown keeps the money in a safe unfortunately a thief broke into the safe and cleared out the money; was the relationship between Brown and Hydro one of trust or one of debt → Does Brown become a trustee the second that customers pay the money to Brown? Or was the relationship simply one of debt	<p>Court said it's a two part <b>test</b>: Turns on the parties intentions (you only get one shot at it and they will succeed on the basis they intended)</p> <ul style="list-style-type: none"> <li>▪ Can discern the nature of the intention by asking what they thought was going to happen with the assets           <ul style="list-style-type: none"> <li>• When Brown collected the money from the customers what was OH's expectation               <ul style="list-style-type: none"> <li>• If they thought it was going to be kept segregated (like in a safe) and not mixed with any other funds that looks like a trust because it looks like an ownership relationship</li> <li>• If OH told Brown to collect but didn't expect the customer's money to be safeguarded &amp; separate from other funds suggests a debt relationship &amp; not ownership relationship (therefore not a trust)</li> </ul> </li> </ul> </li> <li>▪ In this instance they decided it was a debt rather than a trust b/c Brown wasn't required to keep the money from the customers separate           <ul style="list-style-type: none"> <li>• Brown takes the hit for the loss of money</li> <li>• Much better for OH to be a creditor instead of a beneficiary under a trust</li> </ul> </li> </ul> <p>Nature of relationship depends upon their intentions and the nature of the asset</p>
M+L Travel v Air Canada	AC selling seats on airplanes sets up relationship with M+L travel, sells tickets to M+L travel so customers buy tickets from M+L travel and ML put the money in a bank account, ML becomes horribly indebted and suddenly a lot of creditors are banging on ML's door; here AC wants a trust relationship rather than debt b/c want to ignore ML's insolvency problems and just taken the beneficial ownership of the money in the bank account	<p>SCC goes through notionally same test as ON Hydro → intentions</p> <ul style="list-style-type: none"> <li>• Here they intended a trust rather than a debt           <ul style="list-style-type: none"> <li>▪ Problem was that when they set up a relationship with ML travel they specifically said when you collect the money from the customers you can dump it into one bank account that ML can also put other funds in</li> <li>▪ A true trust relationship normally presupposes that money gets put in separate but SCC thought would be a bit much w/ setting up lots of bank accounts which was asking too much</li> <li>▪ The property didn't behave like trust aspects at all despite being called one → McInnes thinks this is wrongly decided               <ul style="list-style-type: none"> <li>• A trust is a property relationship and you have to be able to point to the asset and say that is mine, you have to be able to identify exactly what asset is yours at all points</li> </ul> </li> </ul> </li> </ul>
Re Goldcorp	Goldcorp proports to be selling gold bars, they have 10 customers but only ever had 6 gold bars ; two bars are taken out by buyer 1 and buyer 2; G becomes insolvent and has an enormous number of creditors given that there is only four bars left but still 8 buyers	<p>Buyers argument was that they bought gold bars and have paid for them there's only four at a minimum we should each own half a gold bar</p> <ul style="list-style-type: none"> <li>• Court says you would like a trust relationship, a property relationship, but PC says in this instance that isn't the way the property works unless the gold bar is allocated to a particular individual then its not owned by anyone but G</li> <li>• The buyers simply are owed a debt by G like all the other creditors</li> <li>• Court here says: If you want a property relationship then you have to be able to specifically identify and ask that the problem</li> </ul>

**Bailment:** any situation of property where I have legal title and you have possession

- Legal relationship that only for choses in possession
- differences
  - trust generally irrevocable; bailment usually revocable
    - Once property has been handed over trustee that's the end of it, the settlor can't change their mind
    - Bailment is revocable
  - trustee is a fiduciary; bailee is not a fiduciary
  - trust can apply to any type of property; bailment only to personalty (choses in possessions specifically)
- similarities
  - trustee controls beneficiary's property → bailee controls bailor's property
    - Holding something for somebody else's benefit
    - Some degree of trust involved
  - beneficiary relies upon trustee → bailor relies upon bailee

- trust occurs in Equity; bailment occurs in Law
  - Trust comes about only b/c chancellor recognizes it through Equity
  - Bailment is entirely an operation in law--> relationship historically recognized by the courts of law
- trust vulnerable to BFPV; bailment vulnerable only to *nemo dat* exception
  - Trusts vulnerable bona fide purchaser for value
  - Bailment operates on a *nemo dat*
- Question: Paul in possession of an asset and gives possession over to David and then David improperly sells that asset for \$100k to Xavier
  - Paul is always going to argue *nemo dat* (you can't give what you don't have)
  - Xavier is always going to argue BFPV (bona fide purchase for value)
  - If the relationship was a bailment, explain the cause of action and the measure of relief that may be available against (1) David, and (2) Xavier.
    - More than one person can have legal title to the same asset anytime you create a bailment you have to have at least two people with legal title
      - Paul retains his superior legal title and gives David an inferior legal title
      - *Costello*: costello was a car thief, they found the vehicle all identifying marks had been deleted and in the trunk of the car they found a car theft kit, costello gets off because there isn't actually any proof b/c never found the owner of the car to who he had stolen it; after having been acquitted criminally C asks for the car back the police are like no and C takes it to court and the Court says that if you have possession of the vehicle you have title to the vehicle better than anyone except the person with superior legal title
      - So what David would be selling down to Xavier it would be an inferior legal title he would be selling
    - Cause of action
      - Paul to David: Paul's would be a breach of duty of care (in all bailment relationships) or could sue him in conversion (any situation where one person acts in a way that is inconsistent with the rights of the person with superior legal title)
      - Between Paula and Xavier:
        - They both have the good policy arguments above
        - General answer in law is that we have Paul in *nemo dat* than Xavier with BFPV→ Paul could then sue Xavier in conversion
        - Exception to that in law: money→if the asset is a money then the law will favor Xavier as BFPV
          - This is for purely policy reasons: In nature of the money it is only useful if it can flow easily through the market place
      - If it's a bailment then Paul wins against either party (unless what is given is money then Xavier would win against Paul)
        - Paul wouldn't get the asset itself back unless it's super unique→only gets the value of the asset
    - If the relationship was a trust, explain the cause of action and the measure of relief that may be available against (1) David, and (2) Xavier.
      - Paul had legal title to widget at outset, he transferred legal title to David→ express trust comes into existence, David has legal title and Paul has beneficial title
      - In exchange for the sale of the widget, Xavier pays David 100k
      - When something goes wrong within a trust you have to sue within the trust so you have to sue the trustee or suing within trust property
        - Paul would first sue David as trustee with the fiduciary obligations→shouldn't have sold it
          - Suing him personally for breach of fiduciary duty→equitable wrong would either get his loss of David's gain
        - Paul could also go after David proprietarily→ express trust contained subject matter of widget which was wrongfully sold he can trace the widget into 100k, he can basically retroactively approve that sale and therefore get the 100k
          - Carrying on with the express trust by approving the sale essentially and then can replace the trustee because David clearly can't be trusted
        - Paul against Xavier→ contest b/w two innocents again making the same policy arguments
          - In law we generally favor *nemo dat*, but in Equity BFPV always wins
          - BFPV is 'equity's darling' almost always going to win in Equity
          - If BFPV is for a legal interest then that extinguishes any pre-existing equitable interest
      - In this case, the asset that Paul gives to David is an asset that Paul has equitable rather than legal title; Blackacre is under trust for Paul as a life estate
        - As between Paul and David the story is exactly the same
        - Paul and Xavier is different→ equity always favor BFPV if and only if what they are selling and buying is legal title
          - So here with equitable title and you're dealing with two innocents you don't go with BFPV the new rule is as between equitable interests first in time prevails (order in sequence of when the equitable interest was created)→So here Paul would win since he had equity first

### Express Trusts: trusts arising from unilateral intention of settlor

- cast of characters
  - settlor = party providing property and creating trust (Can also be the beneficiary)
  - trustee = party administratively holding property
  - beneficiary = party beneficially interested in property
- fixed = beneficiaries' interests fixed
  - Trustee has to perform and perform exactly as the settlor says
  - no discretion regarding distribution of benefits
    - interests of beneficiaries' fixed absolutely: eg "\$5000 to each of A and B"
    - interests of beneficiaries fixed proportionately: eg "half of the annual income to each of A and B"
- discretionary = beneficiaries' interests not fixed
  - discretion in trustee regarding distribution of benefits
    - discretion as to which beneficiaries will receive : eg "\$5000 to either A or B as trustee chooses"
    - discretion as to how much each beneficiary will receive: eg "\$5000 split between A and B as trustee chooses"
- A trust is an obligation so even if it's discretionary it's still an obligation→ It has to be performed
  - If not done by the trustee then done by the court
  - If it's a trust it has to be done (key difference between trust and power)

### Power = legal authority to deal with property belonging to another

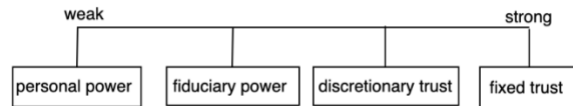
- powers authorize but do not *require* action, simply an authority rather than an obligation
  - powers may authorize any form of action (subject to public policy)
    - administrative = power to manage property
    - dispositive (power of appointment) = power to dispose property
- Powers of Appointment — Cast of Characters
- donor = party owning property and granting authority
  - donee/appointor = party authorized to alienate property
  - appointee/object of appointment = party receiving property

## Powers of Appointment

- general power = authority to select anyone → This could be in favor of yourself as well
- special power = authority to select from certain class: eg "X may dispose of my car to either A or B"
- hybrid power = authority to select anyone except from certain class: eg "X may dispose of my car to anyone except A or B"

## Personal Capacity and Fiduciary Duty

- donee receiving authority in personal capacity
  - May, but don't have to exercise power
  - may — but need not — **consider** exercise of power
  - may release power at will → can walk away at any time
  - power lapses upon death of donee → if person receives power as a personal power it will end when person dies
- donee receiving authority in fiduciary capacity (e.g. trustee)
  - may — but need not — exercise power
  - must diligently **consider** exercise of power
  - may not release power unless authorized by donor
  - power granted ex officio — survives death of holder
- Presumptively a power is a personal power → it becomes a fiduciary power if the person who receives the power is already a fiduciary
- The fiduciary obligation is owed to the people who might receive the property if it is exercised in their favor (to the appointees)
- Fiduciary power doesn't have to be exercised
- b/c discretionary trust is discretionary it has to be performed but there is discretion so they get to choose who gets the money



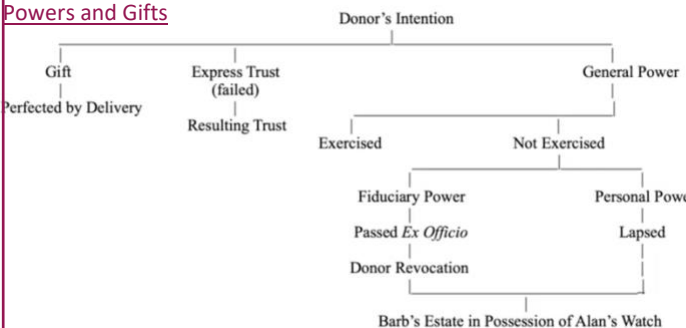
## Discerning Powers and Trusts

- First test is intention
  - Trusts and powers aren't restricted to lawyers they can be used by lay person → they aren't thinking in terms of the specifics or fine distinctions
  - Judge will often make these decisions after the fact
- One conclusive test if we happen to have a case that involves a true 'gift over' → a disposition in default of another disposition
  - E.g. if donor hands property to you, you can give the property to A but if that doesn't happen then it has to go to B
    - Special power but if you decide not to exercise your discretion then property has to go to B (gift over)
  - Has to be a power rather than a trust because if you don't do it then someone else will be appointed trustee or the court will do
    - A trust can't default it has to be performed as stipulated
    - A power however can default because it doesn't have to be exercised
  - What can happen with a trust is successive interest
    - Trust beneficiary described as a life estate and a remainder beneficiary
    - Not a gift over because it's not a disposition
- **power** in personal donee = authority to dispose
  - property need not be disposed of or considered
    - consideration must be honest if it occurs
    - disposition must conform to power terms if it occurs
- **power** in fiduciary (eg trustee) = authority to dispose + duty to consider
  - property need not be disposed but must be considered in good faith
    - donee must consider range of objects → duty arises from fiduciary status
    - disposition must conform to power terms if it occurs
- discretionary **trust** in trustee = duty to dispose + authority to select
  - property must be disposed and disposition must occur → selection in trustee's discretion
    - trustee must consider range of objects
    - trustee (fiduciary) must exercise in good faith
    - presumptively equal distribution if no exercise by trustee
- fixed **trust** in trustee = duty to dispose
  - property must be disposed
  - disposition must occur → actual selection determined by settlor

## Distinguishing Powers, Gifts and Trusts

- positive indicia of power — gift over in default
- generally intention construed from totality of circumstances: eg "you can give my car to A or B — but C gets it if you don't"

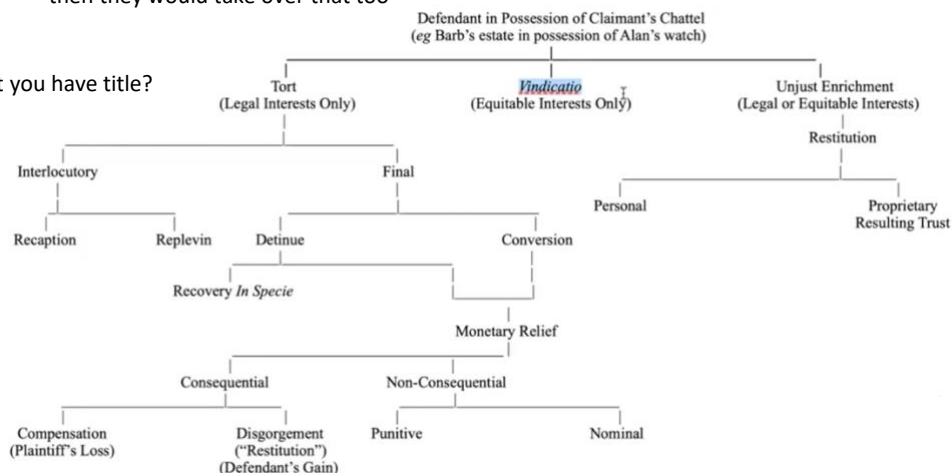
## Powers and Gifts



- Start with gift as possibility
- Then could it be an express trust that failed? (need to have everything for trust)
- Then was it a power?
  - General or special → who could take it then special, or exceptions then hybrid
  - If there is any evidence that power has been exercised in the own person's favor then property can remain theirs
- If it was a fiduciary power then that means the power didn't die with her it passed ex officio → whoever would've taken her job under the trust with respect to other property then they would take over that too

## How do you get property if someone else has physical possession but you have title?

- In law:
  - Can tell unjust enrichment story
  - The measure of relief is always restitution → can either be give it back personally (debt of the value of the watch) or proprietary resulting trust
  - When can you get proprietary resulting trust? SCC has said a number of things but haven't yet come up with a coherent test
- Can go through tort → try and get interlocutory (before the case is heard remedy) or conversion, detinue, monetary relief





## Power of Appointment or Discretionary Trust?

<p>Re Lloyd</p>	<p>Facts: testator has husband and a lot of siblings and many nieces and nephews, when I die I want my estate to go as a life estate to my husband and gives her husband the "power" to pick who gets the remainder and he can choose b/w 3 of my siblings or one specific niece; by the time the testator dies the only one alive is the specific niece</p> <ul style="list-style-type: none"> <li>● Did she mean a real power? A life estate with a special power OR she was using power loosely and it would be a life estate to the husband and a discretionary trust he has to decide             <ul style="list-style-type: none"> <li>○ If it's a power: life estate to husband and then when he's gone he selects from amongst 3 sisters and niece would get the remainder interest                 <ul style="list-style-type: none"> <li>▪ If this was a special power it was a personal power rather than a fiduciary power b/c he wasn't also a trustee</li> <li>▪ But if power is not exercised then the power dies with him, husband predeceased testatrix, which means that it goes back to her estate by way of reversion and it would go out to all of her nieces and nephews</li> </ul> </li> <li>○ If it's a trust: life estate to husband and he holds the remainder interest under a discretionary trust to choose b/w 3 sisters and niece → In this case we would have a life estate with the remainder interest going to the niece (didn't die with him when he died)</li> </ul> </li> </ul>	<p>Ratio 1: decide on testator's intention but that doesn't get you anywhere at all</p> <ul style="list-style-type: none"> <li>○ power and discretionary trust distinguished by intention</li> <li>○ power if gift over — but not necessarily trust if no gift over             <ul style="list-style-type: none"> <li>● contrary purported rule rejected in favour of flexibility</li> </ul> </li> </ul> <p>Court said in deciding b/w power and trust maybe we should ask about with the specificity the object was identified?</p> <ul style="list-style-type: none"> <li>○ If it's just a power it's a fairly watered down idea maybe you don't get very specific</li> <li>○ Maybe if it's a trust, it's an obligation, that suggests we need a high level of specificity</li> <li>○ <b>totality of circumstances reveals testatrix intended trust</b> → greater specificity of objects tends to suggest trust</li> </ul>
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- ^ Doesn't make sense → even if power over a trust you can still have specificity they can have the exact same level of specificity

<p>Re Weekes' Settlement</p>	<p>Facts: testatrix drafts a will life estate to my husband and want him to decide what happens to the property afterwards amongst our children, no gift over, husband didn't otherwise occupy a fiduciary position (so if power its personal), we know there is a residue clause in favor of someone other than the children</p> <ul style="list-style-type: none"> <li>● Power? Life estate to my husband with a special power to decide remainder interest amongst our children, so if he doesn't exercise then the residue clause is enacted and it goes to X</li> <li>● Discretionary trust? Life estate to my husband with an obligation to decide the remainder interest amongst the children as he holds it in discretionary trust → Judge could just decide to split property equally among the children</li> </ul>	<ul style="list-style-type: none"> <li>● Broad proposition: what did she intend? Again same problem she wasn't thinking at level of specificity</li> <li>● object under power has no property rights until appointment → no immediate &amp; indefeasible right (cf Lloyd)</li> <li>● She didn't name the children just told him to decide from all the children that's a low level of specificity which suggests a power which means result is property goes not to the children but through residue clause to someone else             <ul style="list-style-type: none"> <li>○ testatrix' intention construed to support power rather than trust</li> </ul> </li> </ul>
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- **if on exam just come up with a plausible conclusion → don't say it turns on the level of specificity b/c he hates this, basically say the cases but say it doesn't make any sense**

## Donee Obligations

- If personal power you don't have to even think about the power, if it's a fiduciary power then you have to think about
- If you do decide to exercise a power you have to do it within the terms the donor said

<p>Turner v Turner</p>	<p>wealthy person handed over a number of assets to a person, with respect to first part I want you to hold them on trust and these are the terms, with respect to other property the settlor said to trustee you don't have an obligation you simply have an authority to distribute (not concerned w/ trust here just power); settlor would get together with the trustee or donee and have conversations, one time they got together in 1967 the settlor said you should give Blackacre to A and the donee says good idea I'll do that; settlor says oh you should give blueacre to B and donee goes great idea I'll do that; 1976 settlor says hey maybe you should give whiteacre to John and the donee says great idea and does it; John mortgages the property to a bank; settlor and trustee realize the made a hash of the entire affair b/c the person who has the power has to exercise that of their choice no one else's really here in each instance in all dispositions the donee was just signing off on settlor's decisions so it wasn't a valid exercise of the power → what obligations must a trustee w/ a power discharge?</p>	<p>trustee donee of power subject to obligations</p> <ul style="list-style-type: none"> <li>● trustee need not appoint at all</li> <li>● trustee must periodically consider exercise of power</li> <li>● trustee must consider range of objects (possible appointees)</li> <li>● trustee must assess individual appointments</li> <li>● if appointment made — must comply with terms of power</li> </ul> <p>exercise of power set aside — trustees failed to satisfy obligations To fix this they now hold the property on resulting trust so A, B and John hold it in trust for donee</p> <ul style="list-style-type: none"> <li>● effect of defective appointments reversed to extent possible             <ul style="list-style-type: none"> <li>● 1967 and 1971 properties returned to trustees</li> <li>● 1976 appointment set aside except still subject to mortgagee's rights → John holds property on trust for power</li> </ul> </li> <li>● mortgagees of property maintain rights against property → If John doesn't pay 100k back to bank then bank can still foreclose whiteacre b/c BFPV even though transferred back to donee</li> </ul>
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## Appointee Rights

- fixed trust → Even before beneficiaries get possession, equitably it already belongs to them
  - individual beneficiaries have proprietary rights: Even before they have possession they already own it so if they want they can sell it immediately
  - The property can't be given to anyone else, there's no possibility of anyone else getting the property
  - Similar to a gift (perfected gift)
- discretionary trust
  - eg "my house and car to A and B as trustee sees fit" → Neither A nor B can point to any particular asset
  - individual class members have no proprietary rights
  - collective class members have limited proprietary rights → b/w the two of them will come the house and the car
    - complain if power exercised improperly
    - demand property if sui juris and absolutely entitled → if all beneficiaries are above the age of majority and mentally capable and unanimous they can elect under the rule of Saunders v Vautier they can collapse the trust (see \_\_\_\_\_)
    - presumptively equal distribution if discretion not exercised → court has to step in and perform, if judge has to get involve and there is more than one beneficiary the judge will split it equally
- Power: no assurance whatsoever that any objects of the appointment will be getting interest in the property
  - individual class members have no proprietary rights
  - collective class members have no proprietary rights
    - complain if power exercised improperly (*Turner*) → if it exercised outside the class
    - no ability to demand property if sui juris, no obligation on donee to ever appoint

- property returns to donor if power not exercised

Certainty of Objects of Powers

- object = person to whom property is disposed
- certainty of object = certainty of person (potentially) receiving property
- certainty of objects and powers: certainty is always required but not always a problem as long as discernable
  - is certainty required under general power?
    - eg "X may dispose of my \$5000 to anyone she chooses"
    - Really impossible for this to go wrong
  - is certainty required under special power?
    - eg "X may dispose of my \$5000 to A or B"
    - May be certain if we assume A and B are people
    - But often they aren't described as people but as a standard: a law graduate, a person of good moral
      - What is the concern? The Court's interest, if court is asked whether disposition is proper or improper it has to know fairly clearly whether was exercised within or outside its terms
      - Probably an invalid disposition → a law graduate would probably be fine, but a person of good morals wouldn't be b/c morality was so subjective
      - \*Disposition fails if one branch is uncertain\*
  - is certainty required under hybrid power?
    - eg "X may dispose of my \$5000 to anyone except A or B"
    - Same problem arises under this
    - A and B has to be defined clearly enough → Need some test for ascertaining the identity of the individuals
- Powers vs. certainty of objects and trusts (always required)
- is test for certainty of objects invariably the same (powers and trusts)? No

<p>Re Gulbenkian's Settlement Trusts (Test for certainty of power)</p>	<p>G owned 5% of all the oil sold out of the middle east, had a son and spent a bunch of money, G sets up a settlement wants to put fortune into situation where it's going to be good in the future so sets up a bunch of trusts, also sets up this particular power (we know it's a power because there was a gift over attached), gives a huge amount of money over to his trustees saying this a power and you can give this to anyone if you want on this list: anyone who employs my son, anybody who resides with son, anybody who has care and control over son; since there is a gift over there is someone who wants to argue the power is invalid</p>	<p>HoL says</p> <ul style="list-style-type: none"> <li>first you test the certainty of the objects at the time the disposition was created → will either succeed or fail at the outset</li> <li><b>Test is called individual ascertainability:</b> <ul style="list-style-type: none"> <li>**Has to be possible with respect to any individual brought in front of you is either a yes or a no under the conditions**</li> <li>Don't have to classify anyone in the world, but the standard has to be clear enough that you can decide if someone fits into the class or doesn't</li> <li>Don't have to come up with all of the yes</li> <li>As long as you have a reasonable number of people in the yes box then you can exercise it → you have to do a reasonable fiduciary job               <ul style="list-style-type: none"> <li>insufficient that at least one member of class is identifiable</li> <li>power must involve sensible choice (personal or fiduciary)</li> </ul> </li> <li>test requires conceptual test rather than evidentiary test → as long as standard is clear, then you can come to court and hash out difficult cases on the evidence</li> </ul> </li> <li>impugned clause sufficiently certain           <ul style="list-style-type: none"> <li>words given ordinary meaning and read in context</li> <li>donee may apply to court for directions in difficult case</li> </ul> </li> </ul> <p>Court says here there is no difficulty, it's certain enough, it's clear enough</p>
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<p>dicta regarding trusts: difference if dealing with trust</p> <ul style="list-style-type: none"> <li>fixed trust = test of class ascertainability           <ul style="list-style-type: none"> <li>all members of class must be identified (but not located)               <ul style="list-style-type: none"> <li>Have to find everybody in the yes box → exactly the right people in the right number</li> <li>b/c beneficiaries under fixed trust immediately own the property</li> </ul> </li> </ul> </li> <li>discretionary trust (trust power) = test of class ascertainability           <ul style="list-style-type: none"> <li>all members of class must be identified (but not located)               <ul style="list-style-type: none"> <li>b/c even though beneficiaries aren't guaranteed, the settlor has directed trustee to exercise fiduciary obligation to seriously consider each and every member of the discretionary trust</li> <li>Turns out to be not true in later cases</li> </ul> </li> </ul> </li> </ul>		
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<p>Re Hay's Settlement Trust</p>	<p>Woman sets up a fiduciary power and says you can dispose of this money to anyone other than me, my husband, or any present or former trustee</p> <ul style="list-style-type: none"> <li>Clause 4 of a trust deed gave the trustees a power, exercisable for twenty-one years, to distribute trust funds to anyone other than the settlor, her husband, and current or former trustees. In default of appointment, the trust funds were to be distributed equally to the settlor's nieces and nephews.</li> </ul> <p>The court was asked whether a general or hybrid power, held by a fiduciary, is invalid for uncertainty or unworkability.</p> <ul style="list-style-type: none"> <li>b/c you can't really expect a trustee to make a realistic effort to consider anyone in the world except those small amount of people</li> <li>If given in personal capacity then no problem at all, don't have to think about it</li> <li>In contrast, it was argued, a general or hybrid power held by a fiduciary is invalid on the grounds that (1) the fiduciary cannot sensibly consider the potential objects, and (2) the court cannot sensibly intervene in the event of default.</li> </ul>	<p>Megarry (judge) <u>agreed that a discretionary trust, if couched in similarly broad terms, would be invalid.</u> Because a trust must be performed, it must be possible for a court to supervise the trustee's decisions and, if necessary, act in place of the trustee which it couldn't do in this instance, couldn't pick from anyone in the world</p> <ul style="list-style-type: none"> <li>However a fiduciary power was not held to the same high standard. A power need not be exercised.           <ul style="list-style-type: none"> <li>Don't have to consider everyone in the world → think about if you want to give the money away, think about who is reasonably in consideration of it, people within reasonable proximity</li> </ul> </li> <li>The fiduciary's obligations are more limited: (1) <u>"consider periodically whether or not he should exercise the power,"</u> (2) <u>"consider the range of objects of appointment,"</u> and (3) <u>"consider the appropriateness of individual appointments."</u></li> </ul> <p>The disputed clause in the trust deed accordingly was held to be valid.</p>
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<p>SA v Metro Vancouver Housing Corp</p> <p><b>Henson Trusts</b></p>	<ul style="list-style-type: none"> <li>SA had a physical disability; family acts as a settlor, they transfer the property to the trustees (SA and her sister) under this trust we want a life estate to SA and the remainder interest to a charity → when settlors create this life estate they create it as a discretionary trust as long as SA is alive they can draw upon the money in their discretion but once SA is dead it goes to the charity fully</li> <li>The Metro Vancouver Housing Corporation set up a program that would provide housing for people w/ disabilities but only if you have assets worth less than \$25k, for many years she tapped into this → MVHC cut her off when they find out about the trust</li> </ul>	<p>TJ said yes she's one of the beneficiaries so she can't tap into this, BCCA says same thing she's one of two beneficiaries and the trust contains lots of money obviously she has lots of assets</p> <p>SCC (Cote):</p> <ul style="list-style-type: none"> <li>Simply being a beneficiary under a trust doesn't necessarily mean anything, if this was a fixed trust then it would, but it's a life estate under a discretionary trust she might get nothing from the trust we don't know</li> <li>Until the discretionary trust is exercised then she has nothing at all and therefore she has assets less than 25k a year and should continue to receive housing</li> <li>Called the charity's interest under the arrangement a 'gift over' → not right b/c a gift over is a disposition in the place of another disposition</li> <li>trust designed to preclude Saunders v Vautier <ul style="list-style-type: none"> <li>trust collapsed only if all beneficiaries sui juris and unanimous</li> <li>SA alone cannot collapse trust — charity unlikely to agree</li> </ul> </li> </ul>
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### Requirements to Create an Express Trust

- capacitated parties
- sufficient certainty: of intention; of subject matter; of objects
- constitution
- Formalities: written evidence, something under a signature

**Capacity:** it's not about intellectual capacity, do we want them to have the ability to create or hold a trust

- Talking about human beings and corporations
- Capacity isn't an all or nothing situation → you can have capacity for some aspects and not others
  - E.g. Having a problem with capacity with senior citizens → Does have capacity to marry a younger woman, but needs a higher threshold capacity to deal with business and if wants to create a new will that's an even higher threshold
- Settlor:
  - Minority: has an option when they reach majority to avoid the trust or take it on
    - generally unable to create testamentary trust
    - inter vivos trust voidable at minor's option
  - mental incapacity: generally unable to create testamentary or inter vivos trust
  - bankruptcy: if through misadventure or misfortune you find yourself bankrupt, as soon as trustee in bankruptcy has stepped into your shoes then you don't have ability to deal with your own assets → generally unable to create testamentary or inter vivos trust
- trustee
  - minority and mental incapacity: since they generally lack capacity you can rely upon then that individual is replaced as the trustee
    - cannot effect valid transfers
    - incapacitated trustee can be judicially replaced
  - unincorporated associations:
    - doing something that is impossible to do, usually going to revert back to you
    - not a legal entity — incapable of holding property as trustee (Can do this if you make sure you don't give it to the unincorporated entity but the head of the entity instead)
- Beneficiary: still has to be human beings or corporations
  - minority and incapacity: doesn't disqualify them often why they are named in the first place; typically represented by official
  - unincorporated associations: can't do this → incapable of holding equitable title
    - trustee may hold for individual members of association
- Not often an issue in practice
- At common law, an "unincorporated association" is not an entity, has no existence independent of its members, has no capacity to contract, or to take, hold or transfer property, or to sue or be sued and is regarded as a non-existent legal ghost no matter how powerful it may be in reality: *Stafford v Wood* (NC 1951)

### Certainty of Intention:

- test is easy → have to have the idea to give property over to someone who has the obligation to hold on behalf of someone else
  - Again, most people not thinking at this level of specificity (powers vs. trusts)
- purported trustee must be obliged to hold and ultimately distribute
- technical language not required — no magic in words
  - intention may be gleaned from statements and acts
  - "on trust" or "as trustee" are indicative but not determinative
  - Looking at substance rather than form → using word trust doesn't mean anything either way neither does excluding it
- mere wish or imposition of moral obligation insufficient: precatory language
  - eg "I hope that..." "I wish that..." "I am confident that..."
  - discredited historical tendency to interpret as obligation
  - onus of proof on party proposing trust → mere fact that there is precatory language doesn't help or hurt (Position today)
- consequences of failure of certainty of intention
  - intention to benefit "trustee" absolutely = gift
  - intention for power = appointment, gift over or resulting trust
  - absence of intention to benefit "trustee" = resulting trust
  - If a failed express trust will usually end up with a resulting trust

### Certainty of Subject Matter

- any form of property may constitute trust property
- subject matter of trust must be sufficiently certain
  - sufficient certainty in identification of trust property → not perfect certainty, just enough for Court to do its job
  - sufficient certainty in quantum of beneficiaries' interests

**Test:** identification of property must be ascertained or ascertainable



- ascertained = specified property or fixed sum (eg "123 Blackacre Road on inter vivos trust..." OR "\$5000 on testamentary trust...")
- ascertainable = property identifiable through formula → only has to be sufficient certainty (eg "residue of my estate on testamentary trust...")
- types of property
  - any form of property may constitute trust property: tangible or intangible, legal or equitable, personal or real
  - future property is no property at all → can't put future property into trust → mere expectation cannot be subject matter of trust
  - future property may be subject to immediate contract → a way to get around not being able to put future property into trust
  - Property that looks like future property but is actually existing property:
    - Life estate to x and remainder interest to y → remainder interest is still existing property, if y wants y could put her remainder interest immediately into a trust because she automatically gets the remainder interest despite not having possession it's still existing property, it's already vested
- Identification of Property
  - time of assessment: **property must be ascertainable at the time of creation**
  - The fiduciary obligations that the trustee may have can be affected so you need sufficient certainty at creation because even before property is to be distributed it has become special property, subject to obligations
  - Re Kayford (1975 Ch): Kayford: customers pay money to company for Christmas hampers—not held separately; When money comes in from customers, K puts it into a trust account (rather than putting it into the general account); K goes bankrupt → customers argue payments held on trust
    - Since it's a central trust account the money has become comingled → the tracing rules however allow you to reidentify property that was identified at the outset
    - certainty saved by tracing
  - Mac Jordan Construction v Brookmount Reostin (1992 Ch): Property owner hires general contractor and contractor hires sub-contractors; what's supposed to happen: owner pays contractor → contractor to set aside 3% for sub-contractor; but instead set aside not done → all money in general account and the contractor goes bankrupt
    - certainty not saved by tracing: contractor never separated it out, it was all put into the general account → you can use tracing to re-identify property that has now been comingled, but you can't use tracing to identify property in the first place
    - tracing can re-identify but cannot identify anew
  - summary
    - property presumes identified asset
    - mischief: bad may happen to part of property but not remainder
    - tracing can re-identify but not identify for first time
    - Wouldn't work for MNL travel because from the outset they weren't anticipating individual property rights → tracing rule shouldn't come and save you from your own foolishness

Hunter v Moss	Facts: MEL company issues 1000 shares (all identical); D held a share certificate that evidenced 950 shares → said he held 50 of the shares on trust for the P → just kept the one share certificate of the 950 didn't split it to 900 and then 50 (Seems to be not sufficiency of subject matter)	<p>Held: sufficient certainty of subject matter (Mcl does not agree)</p> <ul style="list-style-type: none"> <li>P argues: analogy to testamentary bequest of portion of identical shares → court says sure that seems to work           <ul style="list-style-type: none"> <li>Mcl says: but estate administration provides mechanism to identify specific property when somebody dies b/c they can't do it themselves → not true if inter vivos, you could do it yourself → there is no mechanism provided to split off 50 shares from 950 shares → trust presumes property already identified</li> </ul> </li> <li>D argues: distinguish cases involving tangible property (eg wine, gold)           <ul style="list-style-type: none"> <li>With tangible property there is no property until it has been set aside</li> <li>court rejects: no such problem with intangible property               <ul style="list-style-type: none"> <li>Mcl says: but identification also crucial for intangible property → don't know which is yours                   <ul style="list-style-type: none"> <li>Any good will happen to all and any bad will happen to all</li> <li>intangible may be subject to competing claims (below)</li> </ul> </li> </ul> </li> </ul> </li> </ul>
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- what if M declared self trustee for all shares in 900:50 ratio?
  - Shared ownership → each can own the same asset at the same time but in a different ratio
  - If held up shares and said I hold all of these in trust but 900 for me and 50 for other one then it would be fine
- "Anything Left": trust property said to be "anything left" after earlier disposition
  - sufficient certainty sometimes possible → settlor may create mechanism to ascertain property
    - eg fund of \$100 000—disposition of \$40 000—"anything left" on trust
    - eg life estate + power of appointment—"anything left" upon prior death
  - Re Walker (Ont CA 1925): T left entire estate to widow, but said "any portion of my estate still ... in hands of ... wife at the time of her decease undisposed of by her [during her life] shall be divided" among certain people. Widow held some such property at her death. Was that property held on trust? Is there sufficiency of subject matter?
    - Court must reconcile T's desire to give absolute gift to widow and T's desire to direct disposition of property after widow's death. T cannot both give and retain control. Test requires determination of predominate intention and subordinate intention. Former prevails and latter is repugnant.
      - If give property absolutely, including temporally, to wife then her estate would get to decide what happens to it s
    - Court says: you have to decide what was the dominate wish, and the subordinate wish?
      - Circumstances indicate that T's primary intention was absolute gift to widow. Purported trust of remainder consequently is repugnant & void.
- Quantum of Beneficiaries' Interests
  - beneficiaries' interests must be ascertained or ascertainable
  - seemingly uncertain provision may be saved by ameliorating doctrines
    - eg "\$5000 to be split between A and B"
      - settlor may grant discretion to trustees (generally express)
      - court may hold "Equity is equality" → split it evenly b/w beneficiaries
      - settlor may provide formula

Re Golay's Will Trusts	T gives away a number of specific gifts to his friend and then instructs the trustee to give a reasonable income to his friend →	<p>Court says it's just a question of evidence → There may be no specific answer here but you <b>read trust in context</b></p> <ul style="list-style-type: none"> <li>so take account into how much money was there, the woman's circumstances and simply determine what would be reasonable in the circumstances</li> <li>testator intended objectively determined "reasonable income"           <ul style="list-style-type: none"> <li>What reasonable person would think in these circumstances               <ul style="list-style-type: none"> <li>objective assessment may be performed by trustee or court</li> </ul> </li> </ul> </li> </ul>
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What's a reasonable income?

- possibility of divergent assessments is immaterial
- focus on conceptual certainty — not evidentiary certainty

- what if trust said "an income that I believe is reasonable"? → much bigger problem b/c subjective, can't bring evidence to what reasonable person would think
  - Unless settlor was the sort of person who provided evidence like listing what he thought would be reasonable income this would be insufficient certainty of subject matter
- what if trust said "an income that my trustee believes is reasonable"? → problem that can be overcome, simply settlor's way of saying this is a discretionary trust, income trustee thinks is reasonable → can save disposition

### Certainty of Objects

- significance of requirement of certainty of objects
  - Settlor: want assurance that intention will be satisfied
  - Beneficiary: receipt of property + early termination of trust
    - If fixed they have property rights immediately
    - If discretionary you have collective rights
    - Want to make sure the property comes to you
  - Trustee: proper performance of obligation → you do wrong you're going to be held liable
  - Court: control of trust + execution if default by trustee → might fall upon judge to make that decision, the judge isn't going to guess

### Fixed Trust

- test of **class** ascertainability
  - eg "\$500 000 equally between Alberta law students"
  - must compile list of all beneficiaries and no others
  - difficulty in actual location of beneficiaries irrelevant
- rationale for test of class ascertainability
  - fulfilment of settlor's intentions regarding beneficiaries
  - trustee must distribute to all members and no others

### Discretionary Trust

- Re *Gulbenkian* dicta → test of class ascertainability (eg "\$500 000 amongst Alberta law students as trustee sees fit") (**wrong real test is *McPhail and Baden's***)
- rationale for test of class ascertainability
  - fulfilment of settlor's intentions regarding class of beneficiaries
  - trustee must exercise discretion amongst all members and *no* others → fiduciary must consider all of the recipients
  - court must distribute to all beneficiaries equally if trustee defaults → then would have to know how many people are in the class

<p>McPhail v Doulton</p>	<p>Matthew Hall is a big home depo type store, CEO received large number of shares in the company and he drafts into his will "I want money to be held on trust and respect to the shares I want them to be held for employees, or officers of the company, or ex-employees or ex-officers from the company or dependants or relatives of those people"</p> <ul style="list-style-type: none"> <li>Is this sufficiently certain to say any dependants or relatives of those people?</li> <li>Lower courts called it a power → apply the test of individual ascertainability, if we call this discretionary trust and it's simply impossible for us to come up with a complete list for this</li> </ul>	<p>Lord Wilberforce (majority) → clearly a discretionary trust, but <b>with discretionary trust you just need individual ascertainability</b></p> <ul style="list-style-type: none"> <li>class test said to presume equal distribution by court in default                     <ul style="list-style-type: none"> <li>but no actual rule invariably dictating equal distribution</li> <li>and no reason for equality here — not settlor's wish → the purported rule that the judge has to split it equally makes sense in some cases but not in this case</li> <li>Just need <b>a sufficient number</b>, then the decision can be made amongst them</li> </ul> </li> <li>class test said to presume need to consider all members of class                     <ul style="list-style-type: none"> <li>but settlor could not sensibly have obliged trustees to do so → just way too high a standard</li> <li>sufficient if reasonable fiduciary effort at ascertainment → as long as they address a sufficient number, whatever is reasonable in the circumstances                             <ul style="list-style-type: none"> <li>fiduciary selection between ascertained members</li> <li>no obligation to select from among all members</li> </ul> </li> </ul> </li> <li>fine line between discretionary trusts and powers in trustee → so slight that we shouldn't have dramatically different tests                     <ul style="list-style-type: none"> <li>both subject to fiduciary duty to consider class</li> </ul> </li> <li>test assimilated to individual test under power                     <ul style="list-style-type: none"> <li>Have to make a bit more of an effort than a power</li> <li>But different from power test:                             <ul style="list-style-type: none"> <li>possible to say any person "is or is not" a member</li> <li>Can't have a discretionary trust for anyone in the world → can't be administrability unworkable                                     <ul style="list-style-type: none"> <li>excessive width may negate "anything like a class"</li> <li>excessive width negates sensible exercise of discretion</li> </ul> </li> </ul> </li> </ul> </li> <li>test of conceptual not evidentiary certainty → difficulty in actually locating members irrelevant</li> </ul>
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<p>Re <i>Baden's Dees</i> Trusts</p>	<p>Same as above; How is individual ascertainability to be applied?</p>	<p>relevant phrases interpreted in light of all the circumstances → read the terms in context</p> <ul style="list-style-type: none"> <li>relative is contextually limited to close relations → in this context it is clear enough</li> <li>dependent "conjures up a sufficiently distinct picture" → someone who depends on you day to day</li> </ul> <p>test pertains to conceptual — not evidentiary — certainty</p> <ul style="list-style-type: none"> <li>Not a two box test (either yes or no) → too many dispositions would fail under this test                     <ul style="list-style-type: none"> <li>any disposition dealing with family/relations doesn't admit of proof for yes or no b/c it's almost impossible to prove who you're related to</li> </ul> </li> <li><b>Test of individual ascertainability is a one box test → anyone placed in the yes box definitely belongs in the yes box → *Galbinkians is wrong*</b> <ul style="list-style-type: none"> <li>not necessary to prove a negative → no requirement of saying "X clearly is out"</li> </ul> </li> <li>evidentiary applications can be guided by court if doubt                     <ul style="list-style-type: none"> <li>mere factual resolution of actual person's status required</li> </ul> </li> </ul>
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## Significance of Constitution

- trust created only upon additional element of constitution → trust property must be placed in hands of trustee
- generally no revocation after constitution → settlor cannot retrieve property settled upon trust
- generally no enforcement by beneficiary before constitution → beneficiary cannot compel settlor's mere promise to constitute

## Modes of Constitution

- settlor's transfer to trustee
- third party's transfer to trustee
- settlor's declaration of self as trustee

Carson v Wilson	W owns pieces of lands and has in mind of giving his property to his children, he fills out all the paperwork he needs but instead of handing the paperwork to his children and perfecting the gift and gives it to the lawyer → lawyer is like what are you trying to do? Don't have the formalities for testamentary disposition and not an inter vivos gift → was there some way to give effect to this disposition	Court says looks like he was trying to get some non-trust gift he failed → didn't perfect by handing it to them for inter vivos and didn't do formalities for testamentary gift Kids say well couldn't we say that he was trying to set up some sort of trust → <b>ratio</b> of the case: reiteration of milroy v roy, <b>equity won't perfect an imperfect gift</b> → you only get one shot at it we aren't pretending ○ failed intention to create gift cannot be cured by finding trust → intention to create gift necessarily precludes intention for trust
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- Stands for: you only get one chance at a disposition
  - Think of as a two part test: 1) court has to decide what you are trying to do, 2) figure out if you actually did it

## Transfer of Property to Trustee by Settlor

Re Rose	R owns shares in a company but a company of unlimited liability, existing shareholders were wary about transfers of shares, R tries to create a trust of the shares by transferring legal title to his wife for the benefit of his wife and their children, other shareholders have a complete discretion over whether they will ever except that ○ He can only fill out all the paperwork in March → does everything he could possibly do to transfer title to his wife ○ In June, company accepts the transfer docs, wife has legal title to shares (ET is up and running) ○ R died a short time later, it became critically important to know who had beneficiary shares as of April (taxes) Tax people saying he had legal title up until June therefore he had beneficial interest	Court exercises equitable juris and says no that's no true b/w March and June there is a trust of some sort, even though ET doesn't get approval until June, as soon as R did everything he could do in March a trust immediately arises for benefit of his wife and children ○ Equity will not perfect an imperfedted transfer: Milroy v Lord ○ Equity will treat transfer as perfected once donor does all possible <ul style="list-style-type: none"> <li>▪ If the SH hadn't accepted the transfer than the trust would fall away</li> </ul> Has to be a constructive trust, b/c fails all other options ○ Usually done in the context of wrongdoing ○ <b>Perfectionary constructive trust</b> → perfects the party's intentions → Perfects on the basis that even though equity won't perfect an imperfect gift, once you've done everything you personally can do to impose a gift then Equity will put in a trust <ul style="list-style-type: none"> <li>• subsequent registration by company beyond Rose's power                             <ul style="list-style-type: none"> <li>▪ registration essential to wife's rights against company: donee (trustees) held on trust for wife after registration</li> <li>▪ registration not essential to wife's rights against Rose: donor (Rose) held on trust for wife pending registration</li> </ul> </li> </ul>
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Gany Holdings v Khan	MAR had two children Asif and Zorin, in 1982 he transfers \$100 to trustee, comp. called Gany, to hold on DT for benefit of children, in early 90s he transfers 4 more companies to trustee but doesn't specify a reason for the transfer, w/ one of the companies he does say this is trust property (HK), Asif was put in charge of Gany, Asif exercises discretion as person in charge of Gany in his favor (gets both \$100 and HK), Zorin says this is outrageous, according to A he would get all of the other property as well	Court (PC) says: No evidence that he exercised his fiduciary duty, it's something he could have done but no evidence so that property (100 and HK) go back into the trust, but what about the other three companies? ○ Court says no presumption that also trust property (i.e. Re: Cureis isn't true), but there are the usual equitable presumptions <ul style="list-style-type: none"> <li>• Anytime you have a gratuitous transfer there are two presumptions that could happen: if to infant or spouse than equity will presume that's what you intended, if to anybody else equity raises presumption of resulting trust</li> </ul> ○ Deciding this is a burden of evidence ○ treatment of property subject to three rules <ol style="list-style-type: none"> <li>1. if transferor or transferee declared subject in trust—conclusive evidence</li> <li>2. evidence of common intention regarding beneficial interest                             <ul style="list-style-type: none"> <li>▪ pre-existing trust relationship may support inference of intention (eg Re Curteis: court found likely intention to place in trust)</li> </ul> </li> <li>3. traditional equitable presumptions—ie resulting trust or advancement</li> </ol> ○ conclusions on facts <ul style="list-style-type: none"> <li>• MAR intended Gany to receive three companies on trust</li> <li>• Gany breached fiduciary by disposing of assets to Asif → breach: failed to consider extent of property and possible recipients</li> <li>• Asif received as volunteer—not BFPV</li> <li>• Asif required to return property to Gany as trustee</li> </ul>
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## Transfer of Property to Trustee by a Third Party

Re Ralli's Will Trusts	Rallis sold olive oil from Italy made a fortune, R dies in 1899 and says certain property is held on testamentary trust, son-in-law is trustee: Wife takes LE and the remainder will go to Helen, H is about to marry someone wealthy so in 1924 Helen creates a settlement trust trustee is the brother-in-law (same guy as son-in-law) and beneficiaries are her nieces and nephews, she also creates a self-declared trust that everything I have I hold on benefit for the trustee (and when he gets it, it would be held for nieces and nephews), Helen has also induced to create a covenant in favor of trustee (special kind of contract) anything I acquire in the future will also be given to the trustee for the benefit of the nieces and nephews; Helen dies, wife dies → trustee has talked to the estate and they said that if they give the property to us (the OG property) then we aren't giving it back so you can hold it for nieces and nephews → the husband (trustee of Helen's estate) says well it's a covenant so it's not recognizable in equity so not giving it back <ul style="list-style-type: none"> <li>• Covenant is recognized in law but has no recognition in equity → not possibly enforceable, so trustee knows he can't get it back b/c he didn't suffer any personal loss</li> </ul>	Court says yes: <ul style="list-style-type: none"> <li>• reason #1: in 1924, Helen declared herself as trustee pending transfer to settlement therefore trust enforceable against Helen and her estate → this was already done, everything that she owns includes her remainder interest (b/c that automatically vests)</li> <li>• Ratio: coincidental constitution, the fact that unexpectedly the trustee gets the property from a third party that will count if two things happen:                             <ol style="list-style-type: none"> <li>1. You got your hands on the property in some unexpected way</li> <li>2. There has to be a factor that allows you in good conscience to hang onto it for beneficiary rather than sending it out</li> </ol> </li> </ul>
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	<ul style="list-style-type: none"> <li>Trustee asking if it's possible for him to simply hold the property on trust for nieces and nephews even though he didn't get it from Helen, he got it from the wife a 3rd party case (essentially a step was skipped) → is that good enough for constitution</li> </ul>	The factor that works here was the covenant → even though not positively enforceable, provides some basis in conscience for trustee to hang on to it
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Equity is willing to act on the basis of coincidences (Re Rallis, Strong v Bird)  
**Declaration of Self as Trustee:** hereby declare yourself as trustee, hold on benefit for x

- focus on substance rather than form — clear intention to create trust required
- complication if one settlor but several trustees: when is trust constituted?

Choithram International SA v Pagarani	wealthy businessman, on his deathbed, executed a deed of trust that created charitable trust, w/ himself as one of several trustees. He then orally "gave" all of his property to the trust. However, he died before he could execute the paperwork that would transfer legal title to the trustees jointly.	<p>Is there a good inter vivos trust? If not it goes through the estate</p> <ul style="list-style-type: none"> <li>Precedent suggested that a trust is not constituted unless and until all trustees receive title to trust property</li> <li>Lord Browne-Wilkinson, however, controversially said that while "equity will not aid a volunteer," neither will it "strive officiously to defeat a gift." → if you intend several trustees on board and you declare yourself to be one of them and you declare the property to be there then trust is up and running</li> </ul> <p>If one trustee has the title then the trust is up and running, and it's that trustee's job to make sure title gets in hand of all the trustee</p>
Paul v constance	C married and living w/ P, C wins tort judgement, C goes to bank and says I want to open up bank account with P, and the bank goes no this is your mistress so no, C says fine I'll open up a personal account but understand this is as much hers as it is mine, they both view the bank account as belonging to both of them, C dies and Mrs. C says that's my husband and his bank account and since he didn't leave a will I'm entitled to whatever is left behind	<p>Court says: you don't have to use trust language in order to create a trust</p> <ul style="list-style-type: none"> <li>Before bank account was open C had money absolutely, after death C has legal title but holds it for benefit of C and P → self declared himself to be trustee for benefit of himself and P <ul style="list-style-type: none"> <li>How did they share beneficial interest? <ul style="list-style-type: none"> <li>Jointly would mean that she gets it once he dies (doctrine of survivorship)</li> <li>Presume tenants in common: implication is that when C dies his interest passes by testamentary rules to Mrs. C → so Court splits money equally</li> </ul> </li> </ul> </li> </ul>

**Enforceability of Promises — An Overview**

**Covenants**

- promises generally not enforceable at Law or Equity
    - enforcement generally premised upon satisfaction of two conditions
      - person is non-gratuitous in sense of having given consideration → need consideration
      - person enjoys privity in sense of being party to contract → need privity
    - Third party beneficiaries: beneficiary of the trust is not privity to contract, but a third party beneficiary under the contract therefore not privity and can't sue
  - the situation in Law
    - promise enforceable if supported by consideration and privity
      - consideration = something of value in eyes of Law
        - love and affection are not sufficient consideration
        - seal is sufficient proxy for consideration → sealed contract = covenant or deed
        - nominal consideration sufficient in Law → don't care about size of the value (peppercorn sufficient)
      - volunteer = person not providing consideration
    - remedy for breach = damages only (nominal, compensatory, disgorgement)
  - the situation in Equity
    - promise enforceable if supported by consideration and privity
      - consideration = something of value in eyes of Equity
        - marriage settlement is deemed sufficient consideration
          - extends to husband, wife and "issue" of marriage: entering into marriage settlement about what will be exchanged with marriage → Privity given to children and grandchildren
            - perhaps illegitimate, step, in loco parentis
            - not parties' next-of-kin (volunteers)
          - settlement must precede marriage (marriage otherwise is past consideration)
          - settlement and marriage must exhibit mutuality
            - marriage otherwise is not part of bargain
        - seal is not sufficient proxy for consideration
      - volunteer = person not providing consideration
    - remedy for breach = specific enforcement or damages in lieu
- Terminological Caveat on Cases: notionally add "would-be" prefix if trust unconstituted (eg "would-be settlor")

**Beneficiary is Party to Covenant**

Cannon v Hartley	H enters into covenant (promise under seal) with W and D → H promised that if and when I inherit property from my fam I will place it into trust with a LE for me and remainder for W and D; W died very early, H inherited lots of property and question is whether or not D can sue H and what damage can she get? <ul style="list-style-type: none"> <li>If suing in law there is an enforceable agreement b/c covenant → would award damages equal in value to the value in which she would enjoy if he made the trust</li> <li>Ideally D wants specific performance</li> </ul>	<ul style="list-style-type: none"> <li>no action in Equity because daughter was volunteer <ul style="list-style-type: none"> <li>Equity will not assist a volunteer</li> <li>Equity does not recognize seal as proxy for consideration</li> <li>daughter not entitled to specific performance</li> </ul> </li> <li>action in Law even though daughter technically was volunteer <ul style="list-style-type: none"> <li>Law generally will not assist volunteer: exception if consideration requirement satisfied by seal</li> <li>privity requirement satisfied by daughter's covenantee status</li> <li>daughter entitled to expectation damages for breach</li> </ul> </li> </ul>
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**Trustee is Party to Covenant**

Re Kay's Settlement	Kay makes promise (covenant) to would be trustee that she will give property to the trustee for the benefit of any children she may have in the future <ul style="list-style-type: none"> <li>If children tried to sue the Court of law would say that they have no standing b/c they aren't privity</li> </ul>	<ul style="list-style-type: none"> <li>covenant unenforceable by volunteer non-party beneficiaries</li> <li>trustee cannot compel specific performance in Equity → party but no consideration — no action in Equity</li> <li>trustee enjoys theoretical right to damages at Law → has privity and consideration <ul style="list-style-type: none"> <li>trustee enjoys no actual right to substantive damages at Law</li> </ul> </li> </ul>
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○ Trustee had standing but suffered no loss

- contractual damages fulfil expectation
- trustee suffered no loss from covenantor's breach
- trustee cannot recover damages on behalf of beneficiaries

- Note: cases inconsistent — but generally adopt *Re Kay's* analysis

#### Recharacterization of Subject Matter of Trust: not the law but a way to think

- no trust exists prior to constitution
- mere promise to settle property on trust generally unenforceable
- but any recognized form of property may be subject matter of trust
- trust property may consist of contractual rights (covenanted promise)
- Settlor gives the promise to the trustee immediately on trust for the beneficiaries so when trustee receives this promise then trustee has legal title of this promise but immediately holds it for beneficiaries
  - Once chose of action is created it's a form of property and any form of property can be the subject matter of the trust
  - This means the beneficiaries have a right of enforcement → Courts say they can either get damages or specific performance → it will be enforced through specific performance and through the trustee
    - Really two trusts coming into play: trust 1 = the promise as property, trust 2 = actual property that is put in the trust
  - eg "I covenant with trustee to settle my house on trust for my children"
    - no relief in Law or Equity under orthodox analysis → non-party volunteers (promise unenforceable by beneficiaries); no loss suffered (promise unenforceable by trustee)
    - relief available to beneficiaries under unorthodox analysis
      - covenant = property capable of supporting trust
        - immediately constituted trust of covenant
        - trustee holds promise on trust for children
        - children — may demand performance of promise
    - Shouldn't quite work → Problem is that covenant is only recognizable in law, even if you allow beneficiaries to enforce promise they should never get specific performance → but courts are sort of like if you go to this much effort to get around *Re Kay's* then cases say we'll give you what you want
  - unorthodox analysis presumes intention to settle promise
  - unorthodox analysis — seldom effective in practice
  - If original promise is not covenant but a contract w/ valid consideration then it would be recognizable in law and equity

#### Creation of Testamentary Trusts (Land or Personalty)

- testamentary dispositions must comply with *Wills and Succession Act*: Will has to be written, signed by the testator, and signed by two witnesses
- exception regarding secret trusts
  - *Wills Act* cannot be used as instrument of fraud
  - eg "Blackacre to X to hold on trust" (beneficiaries not named) → only does 1/2 of what a trust needs to do, this is a semi-secret trust (objects not specified) → not a valid disposition → there is no certainty of objects
    - Can be no resulting trust, but equity will put in a constructive trust for you to hold on trust for whoever the secret trust is for

Statutory  
Compliance

#### Statute of Frauds UK 1677, 29 Car II c 3

- legislation intended to prevent perpetration of fraud
  - allegations of trusts and contracts easily fabricated
  - certain acts must be evidenced in writing to be enforceable
  - non-compliance does not result in invalidity (s.7) → non-compliance merely results in unenforceability
  - Only for express trusts need to be in writing → resulting and constructive trusts exempted from statute (s.8)
- writing requirement: agreement must be evidenced in writing and signed by defendant
  - agreement need not be written — merely evidenced in writing → so even if oral express trust, but there is written evidence (like letters) of the trust
    - evidence document must contain essential elements of agreement
    - evidence document need not be contemporaneous with agreement
- Contracts to Create Trusts of Land (s.4): contracts for sale of interest in land must be evidenced in writing
  - provision extends to contracts for creation of trusts of land
- Creation of Inter Vivos Trusts (s.7): must be evidenced in writing (for trusts and for powers if dealing with land)
  - section applicable to interests in land only
  - section applicable to constitution by any of three modes
- Assignment of Trusts (s.9): disposition of interests already held in trust
  - eg re-settlement of trust benefit into a new trust
  - section applicable to interests in land and personal property
  - Need to be satisfied for both dispositions
- If you've satisfied formalities to get blackacre into your hands, but didn't satisfy formalities to get into trust for kids → equity says since there is nothing really wrong with the trust, it imposes a constructive trust at the same terms of the express trust

\*\*Any testamentary  
disposition must follow  
these\*\*

#### General Rules — Subject to Exceptions

- settlor unable to retrieve property settled upon trust
- trust terminates upon disposition of all property
- terms of constituted trust cannot be varied

#### Revocation by Settlor

- settlor generally unable to retrieve property settled upon trust
  - settlor divested of interest after constitution
  - settlor retains no interest capable of being recalled
- however — settlor anomalously may reserve power of revocation
  - power must be reserved expressly — not inferred
  - power must be reserved at time of creation
  - power arises only under inter vivos trust

Termination &  
Alterations



- problems arising from powers of revocation: makes this seldom done
  - intention to create trust → “power of revocation” may suggest no trust truly exists
  - tax problems: power of revocation may expose settlor to tax liability → power entails beneficial interest in income

### Termination by Beneficiary

- rule in *Saunders v Vautier*: **doesn't apply in AB**
  - beneficiaries may unanimously terminate trust immediately if...
    - uniformly sui juris (eg 18 years old and sane)
    - absolutely entitled collectively
      - beneficiaries ascertained and fully entitled to property
        - only if interests vested and indefeasible
        - not if interests are contingent or defeasible
      - rule applicable even if discretionary trust or successive interests
        - presumptively equal division if discretionary trust
    - rationale: owners of beneficial title able to direct property
      - eg “distributed as my trustee chooses among A and B in 2025” → if they collapse, they will share the property equally
      - early termination possible even if contrary to settlor’s desire
- avoiding the rule in *Saunders v Vautier*
  - draft trust so as to preclude satisfaction of one criterion
    - eg “on trust for the Dean only if he turns 65 years of age” → trust subject to condition precedent
    - eg “on trust for the Dean and my son Sam in 2025” → termination not possible until both are sui juris

### Setting Aside a Trust

- trust voidable if induced by fraud, misrepresentation, duress or mistake
  - valid trust premised upon certainty of settlor’s intention
  - intention may be vitiated by circumstance

### Variation of a Trust

- trust generally unalterable once established → subject to 3 exceptions
1. alteration through trust instrument
    - trust terms commonly include power of amendment (eg permissible investments, disposition dates, beneficiaries)
    - alterations must comport with settlor’s intention
  2. alteration at common law (by court order) → but only in narrow situations
    - no general judicial power of variation → no power even if beneficiaries agree or would benefit
    - conversion: personalty to realty (vice versa) for minor’s benefit
      - eg trust directs shares to be held on trust for child
      - trust varied to allow beneficial conversion to land
    - compromise: settlement of true dispute regarding trust terms \*most important\*
      - Legal expenses for trust come out of trust property → dissipating trust property so Court decides to vary terms
      - eg son disputes testamentary trust for daughter alone → trust varied to include son as beneficiary
    - emergency: unforeseen situation threatening trust’s existence
      - eg permissible investments would entail financial ruin → trust varied to permit satisfactory investments
    - maintenance: distribution of income for necessities of life
      - eg trust requires accumulation of income from property → variation to allow distribution to destitute widow
  3. Application under *Trustee Act* → if all beneficiaries agree they can ask to vary trust
    - variation or early termination requires unanimous consent
      - capacitated beneficiaries must consent in writing
      - court consents on behalf of other beneficiaries if incapacitated or unascertained beneficiaries → will give consent if prudent adult would agree to variation
    - variation or termination must be otherwise “justifiable” → variation can’t fly within the face of what the settlor wanted in the first place (in AB)
      - judge has regard to wishes of beneficiaries and settlor → cf other provinces focus exclusively on beneficiaries

### Advantages of Charitable Purpose Trusts

- relaxed rules against perpetuities
  - rule against remoteness of vesting relaxed for charitable trusts → adopt a statutory “wait and see” provision (not void for mere possibility)
  - rule against indefinite duration inapplicable to charitable trusts → not limited by life of particular person, can go on forever
- avoidance of rules regarding certainty of objects → there’s no test for certainty of objects as long as charitable
  - settlor need not identify individuals or class nor even specify charity
    - inherent judicial power to create scheme for charitable intent
    - Court will simply pick a charity (hear submissions)
  - trusts exist for public benefit enforceable by Crown as *parens patriae* → crown will step in to make sure being enforced in the way the settlor intended
- cy-près doctrine (as near as possible): if specific charitable organization/purpose is picked, but they simply don’t need a money or it wouldn’t have an effect → inherent judicial power to substitute one charitable scheme for another
- Taxation: numerous tax concessions available to charitable organizations and donors → most pressing advantage

### The Meaning and Role of Charity

- Two part test of what makes a charity:
  1. Purpose has to be for the public benefit in a way that can be found either directly or by analogy in the preamble of the *Statute of Charitable Uses*, 1601
    - Statute of Charitable Uses 1601 (Statute of Elizabeth)
      - statute to prevent abuses of charitable institutions
      - non-exhaustive source of charitable heads
        - “charitable” purpose if within scope of preamble
        - “charity” traditionally classified under four headings
          1. relief of poverty
          2. advancement of religion

3. advancement of education
4. other purposes of education to community → not enough to say beneficial of the community, it has to be beneficial to the community either found directly in the preamble or by analogy

2. charitable purpose must entail public benefit

- benefit of trust must accrue to the public
  - purpose is not charitable if for benefit of private individuals
    - criteria of personal nexus often traditionally fatal (eg trust for education of the McInnes clan)
    - modern trend toward greater leniency
    - Public becomes more stringent as move through 4 heads above
- the public must benefit from the trust: must be uncontroversially beneficial
  - court must be able to determine that public clearly would benefit
  - political purposes non-charitable because benefit unclear
    - eg trust for abolition of pornography
    - eg trust for reform of vivisection laws
- both requirements are increasingly stringent through four heads

**Heads of Charity: 1) Relief of Poverty**

- poverty = financially straitened circumstances, anyone who hasn't got enough to get by day by day (even if temporarily)
- trust must be for public benefit
  - benefit aspect presumed under relief from poverty
  - Flexible view of public: public aspect easily satisfied under relatively relaxed requirement
    - trust must benefit segment of the community
      - eg non-charitable if poor persons to benefit are named; non-charitable if relief of poverty of “next-of-kin”
    - community anomalously may be defined by personal relations
      - eg “poor relations” trusts valid despite personal nexus; “poor employees” trusts valid despite personal nexus

Jones v T Eaton Co	J made a fortune working for Eatons, wanted to create a charitable trust for the Toronto Eatons Quarter-Century club (anybody who worked for Eatons in Toronto for at least 25 years), terms of trust was that the trustee was supposed to use this money for any needy or deserving member of this group → is it charitable trust? Does the purported trust benefit the public?	<ul style="list-style-type: none"> <li>▪ “needy or deserving” contextually interpreted to pertain to poverty           <ul style="list-style-type: none"> <li>– “needy” = destitution</li> <li>– “deserving” = inability to meet financial needs in exigency</li> <li>– Read in context the settlor clearly meant to someone who needs it</li> </ul> </li> <li>▪ irrelevant that beneficial purpose does not extend to whole community → lenient test of “public” under charitable trust for poverty relief</li> <li>▪ “Toronto members” certain under individual ascertainability test           <ul style="list-style-type: none"> <li>– sufficient if employed in Toronto at time of membership</li> <li>– Don't need certainty of objects for charitable trust → why the question arises is that the Court invoked this to determine not the validity of the charitable person trust but simply to know if when money was paid out to know if it was going to the right people               <ul style="list-style-type: none"> <li>• Once it's up and running you have to have some way to know that it's going to the right people but for charitable trust don't need it to</li> </ul> </li> </ul> </li> </ul>
Credit Counselling Services of Atlantic Canada v Canada	The applicant's goals were to (1) provide financial and debt counselling, and (2) prevent poverty. Pursuant to those goals, it conducted education outreach programs and debt management programs in the community. The Minister of National Revenue revoked the applicant's charitable status on the ground that the applicant's activities dealt primarily with the <i>prevention</i> of poverty rather than the <i>relief</i> from poverty.	<p>The courts upheld that decision. Although the applicant's programs undoubtedly were beneficial to the private individuals who accessed its services, the requisite public benefit was missing. The applicant could not bring itself within the traditional categories of charity.</p> <ul style="list-style-type: none"> <li>▪ Weren't for public benefit in a way that fit in the preamble</li> </ul> <p>the decision also illustrates the persisting reluctance among Canadian judges to expand the categories of charities. The issue is thought to be a proper function for Parliament, which is better positioned to balance competing interests and formulate taxation policy.</p> <ul style="list-style-type: none"> <li>▪ Humane societies don't qualify b/c money went to salaries</li> <li>▪ Interestingly, as part of a general overhaul of the law of charity, The United Kingdom's Parliament chose to include both relief from poverty and prevention of poverty within the heads of charity under the Charities Act 2011.</li> </ul>

**Heads of Charity: 2) Advancement of Religion**

- traditionally limited to promotion of monotheistic belief systems
  - modern trend toward respect for pluralist → any religious system at all can qualify
  - courts remain vigilant against scams and cults (has rejected scientology numerous times)
- public benefit rebuttably presumed if purpose characterized as “religious”
  - religion rebuttably presumed open to entire community
  - promotion of religion rebuttably presumed to entail public benefit

Gilmour v Coats	money given for 20 nuns and the nuns spent every hour in prayer (if not eating or sleeping), belief was that they would save their souls and outsiders as well → was this a valid charitable trust?	<ul style="list-style-type: none"> <li>• test of public benefit assessed objectively           <ul style="list-style-type: none"> <li>○ law presumes religious belief is beneficial to public → but it can be rebutted</li> <li>○ law can't assume the validity of any particular belief system → therefore Roman Catholic belief in public virtue of prayer ^ irrelevant</li> </ul> </li> <li>• private religious practice is not publicly beneficial as being edifying</li> <li>• mere facilitation of private practice is not publicly beneficial</li> </ul>
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**Heads of Charity: 3) Advancement of Education**

Meaning of Education

- “education” defined broadly → element of public advancement of learning
  - Not just the classics of higher education, really any sort of education
  - eg scholarships, vocational training, disseminated research, aesthetics

Incorp Council of Law	Law reporting make the law reports which are	<ul style="list-style-type: none"> <li>• purpose of law reports counts as advancement of education → improvement &amp; dissemination of useful branch of knowledge</li> <li>• profit motive of principal audience does not preclude designation           <ul style="list-style-type: none"> <li>▪ legal education is lifelong pursuit of legal professionals</li> </ul> </li> </ul>
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Reporting v AG	for the benefit of lawyers and the question was whether or not that was charitable	<ul style="list-style-type: none"> <li>purpose distinguished from effects of achievement of purpose</li> <li>Satisfies the idea of a public benefit</li> <li>declaratory theory of judicial activity does not preclude designation → judges don't create law under declaratory theory, the reports are educational <ul style="list-style-type: none"> <li>law reports guide judicial investigation</li> <li>judges do not <i>really</i> know all of the law — reports <i>are</i> educative</li> </ul> </li> </ul>
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**Meaning of Public Benefit**

- charitable designation requires element of public benefit → requirements more stringent than under advancement of religion

Re Pinion	P collected art that was all junk, he wants to use his money to create a museum for everything he has collected	<p>Court says no not charity</p> <ul style="list-style-type: none"> <li>issue of public benefit must be assessed objectively <ul style="list-style-type: none"> <li>public must receive appreciable educational benefit from trust</li> <li>None of his art was beneficial</li> </ul> </li> <li>museums presumed to fulfil advancement of education → presumption forcefully rebutted on facts by expert evidence</li> </ul>
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**Heads of Charity: 4) Other Purposes Beneficial to the Community**

- most stringent requirements of public benefit → "public" must entail whole of the community or very large segment
- traditional approach proceeded by analogy to Statute of Elizabeth preamble
  - mere fact of public benefit insufficient — nature of purpose restricted
  - eg relief of aged, public works, generalized animal welfare

AYSA v Canada	<p>Amateur Youth Soccer Association, trust to operate soccer programs across the country, they wanted charitable status; low tier of charity (non-profit so no income tax) or high tier (charity or RCAA → registered Canadian amateur athletic association: no income tax and tax receipts) can only be an RCAA if you operate at a national level and AYSA wanted to operate in ON, can't be an RCAA so does it qualify as charity?</p> <ul style="list-style-type: none"> <li>Lower courts said no you can't be charity b/c doesn't fit historically you have to fit into RCAA to qualify</li> </ul>	<p>Income Tax Act does not preclude charitable status for other organizations</p> <ul style="list-style-type: none"> <li>RCAAs exist for specific purposes and do not "occupy the field"</li> <li>charitable status requires satisfaction of common law test: 1) organization's purpose must be for public benefit and 2) purpose must analogously fall within Statute of Elizabeth</li> <li>categories are not <i>numerus clausus</i> but developments must be incremental</li> <li>weight of precedent against sport per se as charitable (eg Nottage)</li> <li>compete sport + other charitable purpose (eg McMullen) → sports can be charitable but it's not really the sport it's everything else they were doing</li> <li>compare Re Laidlaw (statutory requirement of public benefit only) → sport in this instance can be classified as charitable, the Court wasn't dealing w/ CL def of charity but w/ a different statute that defined charity as just public benefit</li> <li>Sport simply isn't charitable in traditional view</li> <li>Won't change the status of sports b/c it would have unforeseen consequences → simply not a job for the courts must be for the legislature</li> <li>significant reform through judiciary highly undesirable (VSIVSM v MNR) <ul style="list-style-type: none"> <li>ITA strikes careful legislated balance between competing interests</li> <li>broad recognition of sports as charitable threatens balance → 21% of non-profit organizations are sports-related</li> </ul> </li> </ul> <p>defect not formalistically curable through re-writing purposes → organization substantively must be truly charitable</p>
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**Imperfect Charitable Trusts**

- imperfect charitable trusts generally are void → To be a charitable trust you must be 100% charitable not a mix
  - imperfect = charitable purposes mixed with non-charitable purposes (eg "\$50,000 for worthy purposes"; "\$50,000 for charitable or benevolent purposes")
  - But as long as AND charitable then you're fine → e.g. "\$50,000 for charitable and benevolent purposes"
- exceptions to requirement of charitable exclusivity
  - severability of non-charitable purpose → if portions of subject matter clearly delineated (eg Re Spence)
    - eg half estate to my church and half to other worthy cause → can be saved
    - Compare to "between my church and other causes as trustee chooses" → can't be saved b/c which portion goes towards the charitable bit
  - main and ancillary purpose → valid if main purpose is charitable even if ancillary is not
    - eg fundraising in support of charitably educational purpose → selling girl guide cookies for charity
  - gifts to person in capacity that imports charitable activity → trust property available only for charitable acts of person
    - eg "\$50,000 to my parish priest" (charity — not vacations)
  - Wills Act SA 2000, s 32 + Wills and Succession Act SA 2010, s 35
    - sever and save charitable gift if conjoined with void non-charitable gift (eg "\$5000 for charitable or benevolent purposes")
    - save charitable gift if conjoined with valid non-charitable gift
      - quantum in trustee/executor's discretion (if necessary)
      - eg "\$5000 for charity + for preservation of family mausoleum"

**The Cy-Près Doctrine: inherent judicial scheme-making power**

- scheme judicially created if administrative provisions inadequate → can't give effect to what settlor had in mind, do what's as near as possible → terms of old trusts often ill-suited to modern conditions
  - Re Spott: alter scholarship eligibility to include best candidates
  - cy-près doctrine applied if specified purpose impossible to fulfill → eg "\$5000 to Society for Prevention of Cruelty to Squirrels"
  - cy-près = as near as possible

**Initial Impossibility or Impracticability**

- Initial impossibility: impracticability and impossibility assessed at **effective date of trust** → impracticability and impossibility arises before trust created
  - Can only use cy-près if and only if the settlor advanced a specific and general charitable intention
- applicability of cy-près doctrine dependent upon general charitable intention
  - a question of fact — no conclusive rules
  - general charitable intention (but specific thing never existed) = cy-près doctrine applied
  - no general charitable intention (but specified charitable purpose that used to exist but ceased to before trust existed) = resulting trust to settlor

Re Spence's	T wanted entire estate split equally b/w charitable purposes,	<p>Court had no problem finding charitable intention for Blind home b/c it never existed → she must have had a general charitable intention</p> <ul style="list-style-type: none"> <li>Blind Home at Scott Street saved by cy-près → institution's utter non-existence suggests general charitable intent</li> </ul>
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Will trusts	half to blind home on scots street and the other to old folks home in hillsworth → blind home was never on scots street was never there but there is one in the general area; old folks home used to be there but isn't anymore	<ul style="list-style-type: none"> <li>• settlor did not intend to limit gift to particular institution</li> <li>• settlor intended to extend gift to general purpose</li> </ul> <p>Old Folks Home not saved by cy-près (resulting trust)</p> <ul style="list-style-type: none"> <li>▪ “the specific displaces the general”</li> <li>▪ institution’s prior existence suggests no general charitable intent → settlor did intend to limit gift to specific institution <ul style="list-style-type: none"> <li>• settlor did not intend to extend gift to general purpose</li> </ul> </li> </ul> <p><b>doctrine of “kindred objects”</b> inapplicable: if it had been true that Testatrix had often given money to institutions like the one that was named in the trust, the 'kindred objects' would allow court to decide that evidence more broadly indicates a general charitable intention</p> <ul style="list-style-type: none"> <li>▪ difficult burden if relevant institution has ceased to exist</li> <li>▪ difficult burden if limited number of charities</li> </ul>
<ul style="list-style-type: none"> <li>○ Canadian courts often more lenient on “kindred objects”</li> <li>○ imperfect charitable purpose trust → valid disposition saved through severability</li> </ul>		
Royal Trust of Canada v University of Western ON	<p>Dr Priebe’s will directed that part of his estate would be used for the purpose of educational charitable trusts at the University of Western Ontario. His trustee was given detailed selection criteria: [Recipients shall be determined] in the discretion of my Trustee [from amongst] Caucasian (white) male, single, heterosexual students in scientific studies [based on] academic achievement [and] good character. Extracurricular activities (ie non-academic) ... shall not be taken into consideration [and] no awards to be given to anyone who plays intercollegiate sports. [S]tudents ... not afraid of hard manual work in their selection of summer employment shall be given special consideration.</p> <ul style="list-style-type: none"> <li>• [T]he Ellen O'Donnel Priebe Memorial Award [shall operate under] the same terms ... except this award is to go to a hard-working, single, Caucasian white girl who is not a feminist or lesbian.</li> <li>• In the event that ... the qualifications ... are adjudged ... to be void for public policy, then the provision for such gift shall be deleted.</li> </ul>	<p>Court says impossible /impracticable to give effect to → can't be racist or homophobic or to be a white supremacist</p> <ul style="list-style-type: none"> <li>• further held that “[t]he doctrine of cy-pres can have no application ... because the Will contains an express provision as to the consequences of a declaration [of invalidity].”</li> </ul>
<p>Supervening Impossibility or Impracticability: always use Cy-pres</p> <ul style="list-style-type: none"> <li>• impracticability and impossibility assessed at effective date of trust → impracticability and impossibility arises after trust created</li> <li>• cy-près generally applied regardless of general charitable intent → trust property remains charitable once vested in charity <ul style="list-style-type: none"> <li>○ unless disposition of remainder designated by settlor</li> <li>○ unless trust limited to income (capital not vested in charity)</li> </ul> </li> </ul>		
Re Fitzpatrick	<p>at time T drafted will, there was an institution called St. Joseph's school where music was used to help boys w/ disabilities when she died (and drafted the will), the school was demolished, but nearby another school opened up dealing w/ boys w/ disabilities</p>	<p>Is a general intent required for cy-près for supervening impossibility?</p> <ul style="list-style-type: none"> <li>• property inaccessible to residuary legatee once vested under will</li> <li>• no initial vesting if initial impossibility \ general intent required → cy-près requires basis for vesting property in charity</li> <li>• initial vesting if supervening impossibility \ general intent not required <ul style="list-style-type: none"> <li>▪ cy-près does not require basis for vesting property in charity</li> <li>▪ cy-près merely requires exclusive dedication → property disposed exclusively to charity</li> </ul> </li> <li>• supervening impossibility on facts overcome by cy-près → formulation of alternative charitable scheme ordered</li> </ul>
<p><u>Discriminatory Trusts</u></p> <ul style="list-style-type: none"> <li>• cy-près may be used to save charitable trusts that contravene public policy</li> </ul>		
Canada Trust v ON (HRC)	<p>sets up educational trust for "white, male, British, protestant, preferably w/ military background"; trust gets up and running, in 1980s HRC complained these were clearly discriminatory</p>	<p>Was it improperly discriminatory in 1923?</p> <ul style="list-style-type: none"> <li>• Not a case of initial impossibility → wasn't a problem when created → property vested in trust at outset = initial validity</li> <li>• trust terms now contravene policy therefore it's supervening impracticability</li> <li>• cy-près applied to remove offending trust provisions <ul style="list-style-type: none"> <li>▪ “charity once established does not die — though nature changed”</li> <li>▪ scholarships available regardless of personal characteristics</li> </ul> </li> <li>• freedom of disposition limited by public policy → perpetuity restriction displaced if charitable trust</li> <li>• charity as precondition to exemption from general rule</li> </ul> <p>Mcl's thoughts: Is it appropriate to use the money for exactly the opposite of what intended? If you create a CPT you have to accept that values change throughout time &amp; must accept that cy-pres might be used to change any discriminatory provisions</p> <ul style="list-style-type: none"> <li>• Maybe it should be a resulting trust that comes back</li> </ul>
Re The Esther G Castanera scholarship	<ul style="list-style-type: none"> <li>○ Ms Castanera bequeathed a significant portion of her estate to establish a scholarship fund at the University of Manitoba to benefit “needy and qualified women graduates of the Steinbach Collegiate Institute.” The will was drafted in 1991 and the testatrix died in 1997. At both times, the University’s policy on “Non-acceptance of Discriminatory Scholarships, Bursaries or Fellowships” prohibited the administration of any new scholarship that discriminates on the basis of certain enumerated grounds, including sex. The Faculty of Science proposed an exception on the basis that women have been, and continue to be, underrepresented in academic disciplines in the sciences. That argument was rejected.</li> <li>○ In an attempt to bring the scholarship into compliance with its anti-discrimination policy, the University then brought an application to vary the terms of the scholarship by extending eligibility to “qualified men and women graduates from rural Manitoba.”</li> </ul>	<p>The court rejected that application → “Where a gift can be articulated as promoting a cause or belief with specific reference to a past inequality, there is nothing discriminatory about such a gift.”</p> <ul style="list-style-type: none"> <li>• In this regard, the court recognized that although sex and gender are prohibited grounds of discrimination under the Manitoba Human Rights Code, the Code also contains affirmative action exceptions. One exception pertains to attempts to improve the conditions of disadvantaged individuals or groups, such as women. The court accordingly held that since the scholarship ultimately was not contrary to human rights legislation or public policy, there was no need to vary its terms.</li> </ul>

## Traditional Approach to Non-Charitable Purpose Trusts

- general refusal to recognize non-charitable purpose trusts
- problem #1: impossibility of execution due to uncertainty → hopelessly vague
  - intention of non-charitable purpose trusts often worded broadly
  - difficulty in assessing trustee's compliance with settlor's intent
  - solution: permit trust if sufficiently defined purpose
- problem #2: violation of perpetuities rules → non-charitable purpose trust may be indefinite or vest remotely
  - w/ personal trusts we wait to see if they will vest, w/ charity they can live forever, but not allowed to violate w/ non-charitable purpose trusts
  - solution: limit invalidity to violative trusts
- problem #3: lack of enforceability → enforceability generally presumes beneficiary → there just never will be someone with the power of positive enforcement = can't have non-charitable purpose trusts
  - personal trust involves individual beneficiaries
  - charitable trust involves public as beneficiary → Crown as *parens patriae* enforces trust for public
  - non-charitable trust does not involve recognizable beneficiary
    - Crown's *parens patriae* not invoked because no public benefit
    - settlor (if valid) cannot enforce because no remaining interest

Re Astor's settlement Trusts	Astor's wealthy family, A tried to create a settlement trust to be used for "to maintain good understanding b/w nations and preserving the independence and integrity of the newspapers" → lawyer seeing a problem w/ this says this will only run for perpetuity period and at the end it will be paid to a particular individual	Courts strike it down for two reasons <ul style="list-style-type: none"><li>● issue #1: problem of execution → way too vague → insufficient certainty of purpose, incapable of judicial direction</li><li>● issue #2: problem of enforcement → there's nobody w/ the power of enforcement<ul style="list-style-type: none"><li>▪ trust presumes some person enjoys power of enforcement (personal trusts involve personal beneficiaries, charitable trusts involve Crown as <i>parens patriae</i> for public)</li><li>▪ no apparent mechanism to enforce non-charitable purpose trusts → no person capable of bringing claim for positive enforcement</li></ul></li></ul> <p>limited class of anomalously valid non-charitable purpose trusts → specific animals, graves, monuments, and fox-hunting</p> <ul style="list-style-type: none"><li>● Two criteria: 1) purpose has to be in one of the categories and 2) have to have someone with a power of negative enforcement (have to create the trust and then says who gets the money if it's taken over or the purpose fails)<ul style="list-style-type: none"><li>▪ Categories won't be expanded</li><li>▪ 2) That person who gets the money afterwards will complain if the money isn't spent on any of the categories → a way of making sure trust done correctly</li></ul></li><li>● present purpose not within closed categories</li></ul>
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- Leonna Helmsly: Woman leaves 3 mil for steam cleaning her mausoleum once a year, 12 million to take care of her dog Trebel, the other 4 billion to be used for the purpose of the care of dogs → Last is valid as charitable purpose trusts, but the other two are valid non-charitable purpose trusts → for Trebel fits under hounds, and the steam cleaning fit under the category of graves/monuments

### Solutions to the problems that prohibit non-charitable purpose trusts

- General note: *Milroy v Lord*: disposition succeeds or fails as intended
  - retrospective: court may interpret ambiguous intention favourably → but if already tried there's nothing you can do about it
  - prospective: lawyer may advise client on valid forms of disposition

### Power #1 — Anomalous Cases: A Re-Interpretation

- E.g. \$100k for Millie and Eliot, dogs, for 21 years... then the remainder to the dean → Under *Re Astors* this would be valid
  - Even if the dean wasn't mentioned, the money would simply revert back to estate → there will always be someone with the power of negative reinforcement
  - Not really a non-charitable purpose trust, but a special power → there is no one with the power of positive reinforcement
- special power rather than trust
  - donee ("trustee") authorized (not obligated) to dispose of assets
  - no person with power of positive enforcement → donee cannot be compelled to dispose of assets therefore it's a power b/c it can't be forced to be done
- analysis suggests scope far beyond anomalous categories
  - invariably someone entitled in default of power
  - scope limited only externally (eg illegality, perpetuities)

### Powers #2 — Perpetuities Legislation

- proposal originated in Restatement of the Law of Trusts (restating as power) → adopted BC, Alberta, Ontario and Territories (no other Commonwealth)
- "specific non-charitable purpose trusts construed as power to appoint" → you try to make a NCPT but you fail then we see it as a power
  - non-obligatory power exercisable for 21 years
  - remainder to person entitled if trust declared invalid at outset
  - inapplicable if purpose illegal or contrary to public policy
  - inapplicable if limited duration irreconcilable with settlor's intention
- courts continue to apply traditional rules first
  - non-charitable purpose trust permitted if valid at common law
  - re-characterized as non-obligatory power if invalid at common law
- Perpetuities Act (Section 20): A trust for a specific non-charitable purpose that creates no enforceable equitable interest in a specific person
  - a) shall be construed as a power to appoint the income or the capital, as the case may be, and
  - b) is, unless the trust is created for an illegal purpose or a purpose contrary to public policy, valid so long as and to the extent that it is exercised either by the original trustee or the trustee's successor within a period of 21 years, notwithstanding that the disposition creating the trust manifested an intention, either expressly or by implication, that the trust should or might continue for a period in excess of that period,
  - but, in the case of such a trust that is expressed to be of perpetual duration, the court may declare the disposition to be void if the court is of the opinion that by so doing the result would more closely approximate the intention of the creator of the trust than the period of validity provided by this section.
  - (2) To the extent that the income or capital of a trust for a specific non-charitable purpose is not fully expended (a) within a period of 21 years, or (b) within any annual or other recurring period within which the disposition creating the trust provided for the expenditure of all or a specified portion of the income or the capital, each person or that person's successors, who would have been entitled to the property comprised in the trust if the trust had been invalid from the time of its creation, are entitled to the unexpended income or capital.



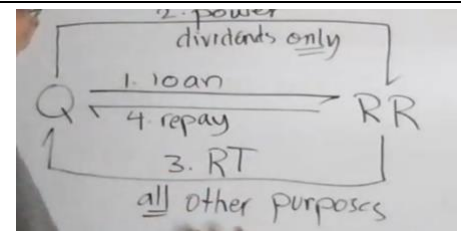
<p>Angus v Port Hope</p>	<p>In 2001, the respondent municipality agreed to provide storage for radioactive materials in exchange for Minister of Natural Resources' payment of \$10,000,000. The Agreement also said that an amount equal to 8% of the fund in the previous calendar year could be used to "defray the lower tier municipal taxes or levies which would otherwise be payable by the ratepayers." The respondent spent income from the fund for a variety of purposes — ie defrayed taxes, but also operating expenses, building and equipment reserves. The applicant, a municipal taxpayer, sought a declaration that the funds were held on trust, as well as an accounting from the respondent.</p>	<p>TC: Tried to create a non-charitable purpose trust, but NCPT are normally void. Under the Perpetuities Act, however, the failed trust can be treated as a special power, for 21 years, to spend the money for the benefit of local taxpayers. Since the respondent did not act in strict accordance with the terms of the trust/power, it is liable for the money improperly spent. CA said no→The court below erred in its interpretation of the parties' original intention. The Minister and the municipality never intended to create a trust or a power. Their relationship was entirely contractual—ie the Minister owed \$10,000,000 to the municipality in exchange for the storage of the radioactive materials. Once the Minister paid that sum, the municipality was not under any obligations to its taxpayers to use the money for any particular purpose.</p>
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**Powers #3 — The Quistclose Trust**

- distinguish: transfer for a purpose vs transfer to be used for a purpose
  - simple \$10,000 bank loan received for the purpose of vacation→borrower may use funds for any purpose—only obligation is debt (Transfer for a purpose)
  - \$10,000 bank loan to be used for the purpose of paying specific debt→borrower not permitted to use funds for any other purpose
    - To be used for a particular purpose→resulting trust would most likely kick in
    - Haven't fully disposed of your interest in the money→by default for all other purposes I still retain the interest in the money

<p>Barclays Bank Ltd. V Quistclose Investments Ltd.</p>	<p>RR manufactured razors and became indebted 500k to Barclays Bank, RR thought if we could get a big bag of cash somewhere we could use it to pay dividends on shares and then the company would come much more attractive to get investors; Q thought that could actually work so lent them certain amount of money but only on the understanding that (1) RR was permitted to use the funds exclusively for the specified purpose, and (2) Q otherwise retained the beneficial interest in the funds→ for all other purposes the money remains Q's; if RR does use it for the payment of dividends then that will defeat QQ's property interest and it accept the payment of the debt</p>
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Anomalous Non-Charitable Purpose	Quistclose
<ul style="list-style-type: none"> <li>• A has power to use for specific purpose</li> <li>• B standing to restrain unauthorized use</li> <li>• unused property owned by B</li> <li>• anomalous purposes only</li> </ul>	<ul style="list-style-type: none"> <li>• A has power to use for specific purpose</li> <li>• B standing to restrain unauthorized use</li> <li>• unused property owned by B</li> <li>• any purpose permissible</li> </ul>
<p>can invalid NCPT be re-formulated as Quistclose trust for any purpose</p>	<p>Have to have that as your purpose from the outset</p>



**\*\*Sometimes trusts can look like purpose trusts but are actually personal trusts→ the language of purposes isn't defining beneficiaries but defining the quantum**

- E.g. In 2008, Sara handed \$100,000 to Tom, along with a document that said: "You must use this money for the purpose of educating my grandchildren — but only on the following conditions. If they attend the University of Alberta, you shall use the money for the purpose of annually paying their tuition, fees, and reasonable living expenses. If any money remains when the youngest of them reaches 25, it shall be paid to me or my estate."
- practical problems for personal trust analysis in other contexts
  - Perpetuities→must vest within perpetuity period ("wait and see" legislation)
  - certainty of objects (large class of persons for broad purpose must satisfy test of class ascertainability)
  - unincorporated associations: beneficiary must be recognized person (association ≠ legal person)
    - trust may be for present members absolutely
    - trust may be for members subject to terms of association
    - Compare trust may be for purposes of association→prima facie invalid but perhaps saved by Quistclose form→trust for donor + power to be used for purposes

**Resulting Trusts**

- Equity acting on principles of personal property and autonomy
- Equity allows you to get your property back yourself when there has been no intention or duress
- Can only dispose of your property by physically delivering it to you and meaning to give it to you

**Essential Elements of RT**

- cast of characters
  - settlor = not formally applicable
  - trustee = party administratively holding title for another's benefit
  - beneficiary = party beneficially entitled to property
- Always a trust where it bounces back
- Capacity: roles under RT not dependent upon capacity→ can be reason for RT

**Species of Resulting Trusts**

- property rights persist until effectively alienated
- RT invariably triggered by absence of beneficial intention
  - absence if incapable of disposing of interest (incapax)→incapacitated
  - absence if fail to address disposition of interest (Quistclose)
  - absence if positively intend to retain interest (Hodgson v Marks)
- historical species of resulting trust
  - failure of express trust →no intention to benefit would-be trustee
  - gratuitous transfer→Equity presumes lack of beneficial intention
    - Direct: beneficiary gratuitously transfers property to trustee
    - Purchase money: beneficiary pays third party to transfer property to trustee
    - If you can prove to the judge that you meant to do it then it won't result in a resulting trust

**The Basic Mechanism of Resulting Trusts**

- beneficial interest "results" (resalire = "jump back") to beneficiary
- resulting trust — a slight misnomer
  - Equitable interest created through occurrence of resulting trust
    - Equitable interest pre-existing creation of resulting trust

- For Equity to intervene there has to be something to start it, such as giving something away gratuitously

Hodgson v Marks	Mrs H has a house, and she has a lodger (Evans), E said worried about nephew getting legal title and kicking him out of the house, E says why don't you transfer legal title to me which she does, when he gets legal title he will hold it on trust for her; H transfers it to him but no paperwork for trust, E sells it immediately to Marks who mortgages the property, E fucks off with the money, so dispute b/w H and M → Legally there is nothing H can do	Resulting trust: either b/c only reason you gave legal title for ET but unenforceable in writing so should jump back to you, but even if not true you also made a GT (she gave something for nothing) <ul style="list-style-type: none"> <li>Contest b/w two innocents b/c Marks was BFPV; H nemo dat (no one can give what they don't have)</li> <li>Statute at time said that if you are actually in occupation then you defeat BFPV <ul style="list-style-type: none"> <li>This wouldn't happen now BFPV would defeat nemo dat</li> </ul> </li> </ul>
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- What if H transferred legal title to E to hold on trust for nephew → E sells down to M is it any different? Resulting trust wouldn't work here b/c it can't go backwards to the first person → Equity here would say ET can't be given effect so they create a constructive trust
  - b/w Nephew and M → M would win b/c N doesn't have occupation to save him in the statute
- ET can fail for a variety of reasons, if ET failed b/c inherently defective then can't send it forward b/c you don't know what you're doing so then you get a resulting trust
  - Different if fails for a different reason → unenforceable → then not ET but constructive trust if possible

### Failed Express Trust to Resulting Trust

- ET can fail for various reasons (uncertainty, illegality, disclaimer, etc.)
- ET can fail in whole or in part
  - Settlor intentionally or unintentionally may fail to dispose of all property → e.g. to A until 2030 and then to B if B is still alive → temporary resulting trust if A dies before 2030 back to the settlor, permanent resulting trust if B dies before 2030 back to settlor
- Won't get a resulting trust if:
  - No resulting trust if alternative → "50k to T for A otherwise for B"
  - No resulting trust if failed trust was self-declared → already where it's supposed to be
  - No resulting trust if express trust failed for lack of constitution → no trust at all just idea
  - No resulting trust if cy-pres under charitable trust → just use cy-pres (near as possible)
  - No resulting trust if property abandoned (bona vacantia to Crown)
    - E.g. 100k in small coins → care of person who subsequently dies → Can fail b/c there is a surplus, there's way too much money → impossible to RT even if could remember what you put in with the small coins wouldn't be worth it so *Public Trustee Act* provides that it's abandoned → in AB after ten years it's declared bona vacantia it's vacated property
  - No resulting trust if illegality in some circumstances

Moffitt v Moffitt	Son and mother put property into a trust where son has legal title to be used for income for mother as she's alive; if son dies before mother than mother will be trustee → mother dies what happens to property now	If failed ET anything the mom gave goes back to her estate but maybe they meant son gets whatever is left over <ul style="list-style-type: none"> <li>Why did ET fail? If inherent defect then it would go back on RT</li> <li>If ET fails simply b/c too much money (left overs) then looks more like parties didn't mention successive interests (the son gets it)</li> </ul> Court says if family and falls into the second category if requires very little evidence to persuade us that it goes to the son
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### Gratuitous Transfer Resulting Trusts

- Presumptions
- If trying to get something back in law → have to prove that you didn't mean to give it and unjust enrichment and you don't get the actual possession back
  - If you sue in Equity:
    - You could go through the same exercise to get resulting trust → proving on the evidence
    - But there are also presumptions in Equity
  - Equity presumes bargains rather than gifts → Equity will presume a resulting trust when something was given for nothing → presumes really didn't mean to do it
  - presumption of resulting trust → transferor lacked intention to confer benefit
  - presumption of advancement (below) → really did intend to give it you, an exception
    - presumption: transferor had intention to confer benefit
    - Hardly ever applies → historically only for child or if husband transferred to wife
      - traditional: father to child or man to wife
      - modern: transfer parent to infant child (maybe not between spouses)
  - role of presumption
    - presumptions are rebuttable by evidence to contrary → nature and strength of evidence determined by circumstances
    - presumptions are rarely determinative → generally merely allocate initial burden of proof
    - 3 situations where presumptions decide the case
      - Tainted evidence → evidence is illegal
      - No evidence at all → presumption must be applied
        - E.g. *Mehta v Mehta*: made financial investments in name of his wife, he died on a plane, court had no evidence so went to presumptions → transfer from H to W we presume advancement (was in the 80s)
      - Perfectly evenly balanced

Jones v Jones	Gets married, H has large amount of money in a bank account, he transfers it into a joint account w/ W, then with no explanation transfers it to a different account just for him <ul style="list-style-type: none"> <li>W's story is that H intended to make this a gift of half the money → if that's true it will go to a resulting trust b/c gratuitous transfer</li> <li>H's estate's story is never intended to make a gift he did it as a matter of convenience but never intended to gift → if true it would be a RT in the joint-account</li> </ul>	Court decides as b/w spouses we don't apply the presumption of advancement we assume the presumption of RT so it bounces back to him
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- Voluntary transfer resulting trusts
  - Resulting trust generally raised if property gratuitously transferred → resulting trust clearly available regardless of nature of property
  - slight debate regarding applicability of presumption of resulting trust
    - presumption does apply with respect to personal property
    - presumption may apply with respect to land

- cf England (probably no presumption) USA (no presumption)
- Canada (presumption regularly applied) → no good reason for the rule so don't apply it

Neazor v Hoyle	Kathleen and John marry but they hate each other ; while alive John says take care of my sis but don't worry I will take care of her when you die, J has one piece of land and gratuitously transfers it to his sister (also didn't want K to claim interest); J dies, S has legal title and K tries to get legal title → K claiming GT triggers RT which would give her the land under the <i>Family Relief Act</i>	historically couldn't have RT if dealing with land Court says this is a presumption but can be rebutted by evidence
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Presumption of Advancement: Transfer to Child

- traditional scope: father to child or any person to in loco parentis
- traditional rationale → reflected historical socio-economic reality → father alone owed duty to support and "advance" children and father generally exclusively held property therefore father more likely to intend gift
- If a mother was to GT transfer we didn't assume a gift we applied presumption of RT → historically woman lost property when married, idea was to protect her

Pecore v Pecore	Parents have bank account but want you on title so you can do banking for them → F has bank account and puts Daughter on title to now be a joint-account, F knew what joint tenancy was (knew it had right of survivorship), his will didn't provide for disposition of this bank account (suggests assumption D will take property), F also said this isn't a gift to D, anytime money was withdrawn from account it was for his benefit (treated like it's entirely his) → D thinks entitled to money but F made a residue clause in favour of son-in-law (they are soon to be divorced)	Court deals with rules first → no distinction b/w mother's and fathers → <b>if presumption of advancement applies if either parent transfers to a child but only if it's an infant child</b> (under 18) <ul style="list-style-type: none"> <li>• What about adult dependent children? Court says too fuzzy category Here F gave her inter vivos legal title and right of survivorship so presumably he didn't mean to do either</li> <li>• Presumption of RT is the right one on the evidence here too for inter vivos</li> <li>• Evidence indicates that he did mean to give her the right of survivorship → he drafted a will after putting his D on account, showing he intended it to take effect So D got the right of survivorship</li> </ul>
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Presumption of Advancement: Transfer to Spouse

- traditional scope
  - husband to wife — man to woman in contemplation of marriage
  - not if wife to husband — between de facto spouses — separated couples
- traditional rationale: reflected historical socio-economic reality → all property vested in husband upon marriage, husband alone owed duty to support wife, husband more likely to intend gift
- distinction based on sex no longer tenable → consistent choice of presumption: gift or trust?
  - Precedent is all over the place → most courts apply RT, but some apply presumption of advancement
  - Argument for presumption of advancement → if married and you GT to spouse very likely you do intend to give a gift, it would be unusual if you didn't actually have a beneficial intention
  - Arguments in favour of presumption of resulting trust
    - consistency and convenience of application → treat married couples and cohabitating couples the same → don't have to find out <sup>when</sup> became more formal relationship, convenience of avoiding issue of permanence of relationship
    - protective device → equity wanted you to hold onto property unless you intended to give it away, if you want something for nothing it wouldn't be hard to prove that you actually got it as a gift
    - consistency with statutory cohabitational property regimes → consistently presume trust unless joint tenancy or joint account → If proceeding under matrimonial property act then there is no presumption of advancement (so assuming didn't intend gifts)

Illegality

- property commonly is transferred pursuant to an illegal purpose
  - eg insolvent debtor transfers property to wife to evade actual creditors → Fraudulent Conveyances Act reverses transfer
  - eg woman transfers property to husband on eve of risky venture → a matter for judicial resolution
- May preclude operation of resulting trust → options of how the court may handle it:
  - Used to be that if there was any whiff of illegality then the court wouldn't help
  - Tainted with illegality but repented in a timely way → before the thing even came to pass then they'll help you in that instance
  - Can't rely upon your own evidence of illegality to make out your cause of action
    - E.g. father transfers half estate to his son (17) and his daughter (19) in order to get out of something, he's cheating people, turns out doesn't go wrong so he goes to his children and says can I have property back and they say no → can the illegality stop him from getting a resulting trust?
      - In this rule then we don't care that he was trying to do something illegal, but we won't allow him to rely upon evidence of his illegality
      - With daughter → presumption of RT b/c GT to adult child → equity will assume RT
      - But with son → not recoverable GT to infant child we presume advancement → so to rebut this he would have to use his illegal evidence
    - Canadian Courts actually do this for really no good reason

Maysels v Maysels	M has risk business ventures coming up in the future, buy a house even though he pays 1/2 the price Mrs. gets 100% of the title; business venture goes well for him but his wife leaves him and in 1974 still applying if H gives to W then presume advancement	Presumption of advancement not rebuttable with evidence of illegality <ul style="list-style-type: none"> <li>• illegality per se is no bar to recovery but can't bring evidence for it</li> </ul>
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- If it was today then there would be a RT (b/c presumption has changed)

Tinsley v Milligan	Two women in marriage, each contribute 1/2 purchase price of the house, P wants it to look like she doesn't have any assets b/c wants social assistance; relationship fails	Majority: unless we have a case of timely repentance than mere mention of illegality → matter of policy not principle; if involved in this scheme you are taking this chance too → b/c weren't married in 1993 treat them as strangers so triggers RT
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Nelson v Nelson (Australia)	Nelson widow of a war veteran which allowed her to get 20% of the purchase price of a house; buys 1 house and pays all of the price and puts it in her daughter's name; buys a second much more expensive one and used that one as her first house for govt program; daughter won't give first house back	Presumption of advancement, to rebut this presumption N would have to rely on her own illegality → Maysels rule is ridiculous so not applying it Barred on basis of illegality only if imposing liability would stultify the prohibition → illegality bars you from recovery only if in imposing liability we would fly in the face of the prohibition of the rule you broke <ul style="list-style-type: none"> <li>• Wouldn't be true here, all we would have to do is get N to pay back govt. the amount she defrauded him</li> </ul>
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<b>Hall v Herbert</b> (SCC)	P's car stalls and D says I'll roll it down the hill and the car goes over a cliff and is horribly damaged, P sues for negligence	Majority: illegality should apply "only in very limited circumstances" → when a court must act to "to preserve the integrity of the legal system." That would be true if, inter alia, the availability of relief would allow the plaintiff to either: (1) profit from a wrong, or (2) evade or reduce a criminal sanction.
<ul style="list-style-type: none"> <li>when, if ever, would that model of illegality defeat a resulting trust? Never → not profiting from your wrong nor are you evading a criminal sanction</li> </ul>		
<b>Kim v Choi</b> (unjust enrichment case)	P fled to CA with her children, she wants permanent status and D says you want to run a business, D sells the restaurant to you and sell you my sauce and I'll run it you just need to pay me a hefty salary and pay the operating costs, P agrees to this deal even though she knows it's fraud b/c she's desperate (complicit in lying to immigration); The restaurant isn't profitable, soy sauce is just what you buy from grocery store, operating costs are 377k; she goes back to Korea but leaves instructions w/ lawyer to sue him for unjust enrichment	<i>Hall</i> talking about private law concept → illegality will only bar you for those two heads (which restitution won't ever do)
<b>Patel v Mirza</b> (UKSC) (UE)	D privy to inside information in govt. which you think govt. is going to sign new deal w/ royal bank of Scotland which will change value of shares, P gives 630k to use the money to make a winning bet, govt. doesn't do that at all, D says no I'm not giving it back to you b/c we were complicit in insider trading	<i>Hall's</i> principle of illegality should apply across private law
<ul style="list-style-type: none"> <li>If on an exam don't apply Maysels, mention it though, apply what McLachlin said in <i>Hall</i> and mention it was applied in UKSC in <i>Patel</i></li> </ul>		

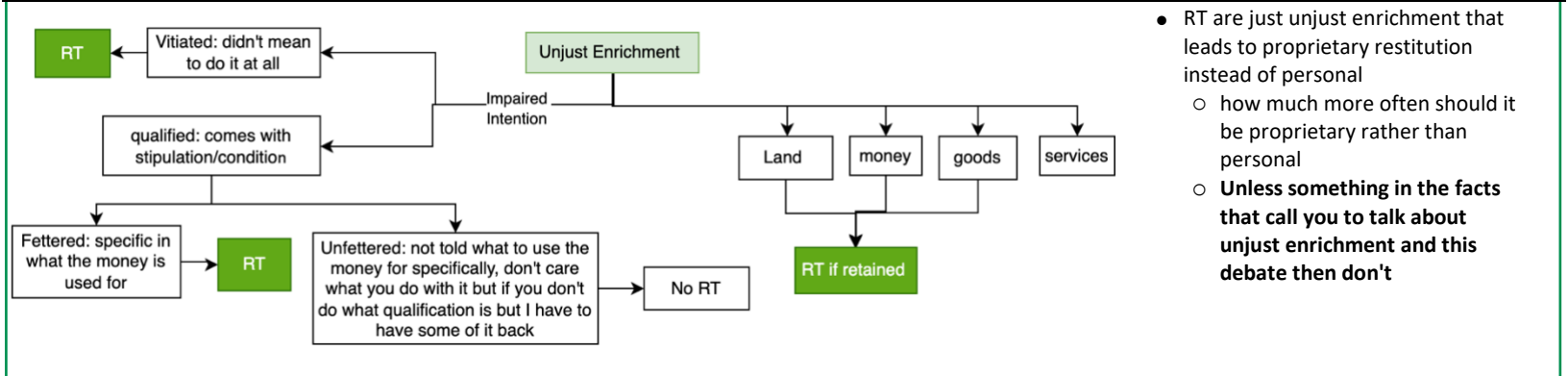
### Resulting Trusts Explanation

- Westdeutsche Landesbank v Islington** → first attempt at unified explanation for RT
  - Get RT because presumably I positively intend to hold the property back for myself
  - Can't be true because there are a whole lot of other types of RT → we need one for all RT
    - Clearest example is incapacity → can't have any intention at all
  - Took a bottom up approach looking at the two categories (failed ET, GT) → Court didn't try to rise above categories (like *Donoghue v Stephenson*)
- RT = Absence of an intention to confer the benefit
  - Give money for specific purpose 1) give watch but the beneficiary says no; 2) give money for pipeline but not necessary → both will result in RT
- Law vs. Equity
  - P mistakenly gives 50k to D, D doesn't know and invests it and it grows to 75k, but D goes bankrupt
    - If P sues in law → unjust enrichment would have to prove 1) D was enrichment, 2) she suffered corresponding deprivation, and 3) absence of intention for gift
      - Restitution in law is capped by value at time received → so 50k
      - If you proceed in law you get a personal judgement which would be a debt you can enforce against D → wouldn't get 50k b/c he's bankrupt
    - If P sues in Equity → just a GT, should end with RT → just has to show GT → gave 50k to D and he gave nothing in exchange and there is a presumption of RT
      - Not asking for value of thing, but asking for the thing itself → entitled to 75k
      - Not an enforcement of debt, it's your 75k started out with legal but am now beneficiary from the RT

<b>Air Jamaica Ltd v Joy Charlton</b> (PC)	RT is absence of intention to confer the benefit which is another way of saying unjust enrichment → sometimes unjust enrichment leads to restitution personally not proprietary
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- Not yet in CA^

<b>Burkett v Burkett</b> (BCSC)	Rhoda mother of Barry, R transfers all property to B b/c she's incapacitated and B inserted undue influence	Proceeds in liability in unjust enrichment, but when gets to remedy treats it as RT
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- RT are just unjust enrichment that leads to proprietary restitution instead of personal
  - how much more often should it be proprietary rather than personal
  - Unless something in the facts that call you to talk about unjust enrichment and this debate then don't**

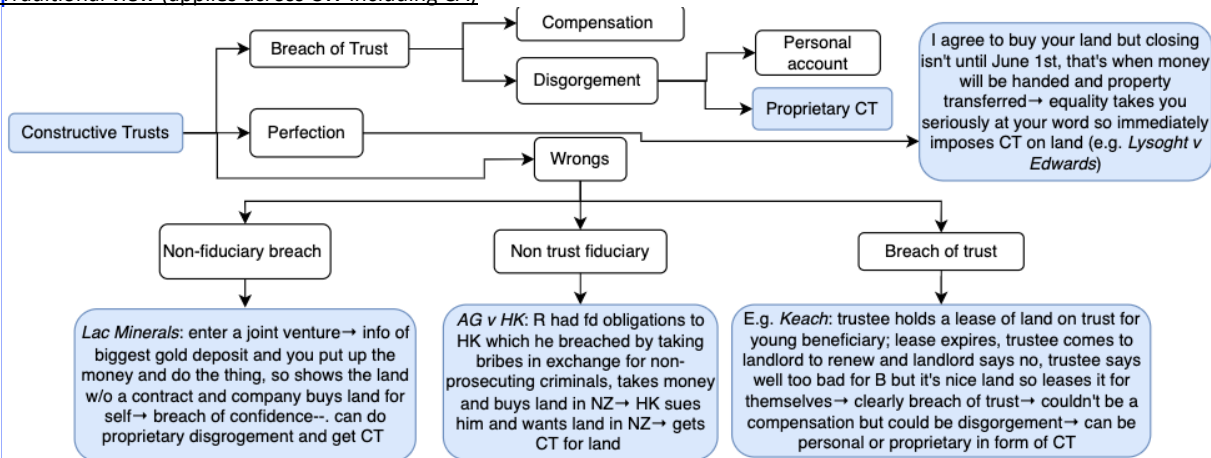
<b>Nishi v Rascal Trucking Ltd</b>	Hans owns Rascal Trucking and Cedralia owns Kismet → they're in love; R wants to lease land owned by K → R brings debris onto land and it becomes public nuisance, city says to R you have to clean it up and H just does nothing, city says fine we'll clean it up at a loss of \$110,679 and puts the loss on the title holder (K/C) → C decides I'm just going to get rid of it the city can sell it to get their money → end of H and C together; C falls in love with Edward Nishi and E wants to buy land for 237,500 → H/R says hey why don't we go halves and share the property and E says no thanks; H/R says you can take 100% of the legal title but we're going to give you 110,679 towards the purchase price → H/R falls on hard time so tries to get the land on RT (beneficial interest of 45% of E's land)	<p>Yes this is a presumption of RT</p> <ul style="list-style-type: none"> <li>Presumably intended to keep benefit for themselves But it's just a presumption of RT → presumption is rebuttal</li> <li>In this scenario H/R did presume a gift → H/R felt so guilty that they cost C 110,679 so gave the exact amount to her new bf</li> </ul> <p>Lawyer for H/R had gotten a hold of Burkett but misread it and thought that should just talk about proprietary restitution → judge doesn't touch this</p>
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## Constructive Trusts

- Not one explanation for CTs: constructive trusts not referable to single coherent theory

Traditional view (applies across CW including CA)



## Canadian addition of remedial constructive trusts

- Unjust enrichment and restitution should work

<i>Degelman v Guaranty Trust</i>	Older woman called up nephew if you take me for drives on Sundays, get my groceries, and provide some company than when I die my will will leave this house to you → nephew lives up to his promise, when she dies her will gives house to somebody else so sues Aunt's estate → what he wants is the house so sues in contract but also sues in UE	SCC says yes you have a contract which we would normally give specific performance → but it was an oral agreement it's a contract but can't enforce it. You do have a good claim in UE → you provided services and now that contract is unenforceable so you got nothing for it → but can only get restitution (just goes backward would just reverse transaction so here paid as hired help)
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- Murdoch* says how about UE to CT → were poorly understood which allowed court to manipulate them and allowed court to apply them poorly → in Dissent Laskin said we should give wife half the property

<i>Pettkus v Becker</i>	P and B get together and P won't marry her → build a successful bee business → B leaves relationship and says I did a whole lot of work even if not the same as dude	SCC says this is a case of UE leading to a CT <ul style="list-style-type: none"> <li>Mistake that SCC made was they didn't treat her as hired help like in <i>Degelman</i></li> <li>Decided to say he has legal title of assets put holds it on CT 50/50 beneficiary interest</li> </ul>
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- Simply not restitution → they fulfilled her expectations
- When *Pettkus* was decided it was a huge story → B never got anything b/c P wouldn't give up assets
- Pettkus v Becker* began a line of cases that said if you want CT you must have UE
  - Pettkus v Becker*: "principle of unjust enrichment lies at the heart of the constructive trust"
  - LAC Minerals v Intl Corona*: constructive trust depends on "whether...unjust enrichment is established"
  - Hunter Engineering v Syncrude Canada*: "no unjust enrichment and therefore no possibility of a constructive trust"
  - Brissette v Westbury*: "requirement of unjust enrichment is fundamental to...the constructive trust"
  - If you're talking about the cause of action UE then no you can't use that for CT → There just isn't a simple rule like this because it's just not true whether you define UE broadly or not, still missing CT that perfect things
  - Atlantic Lottery v Babstock*: wasn't trust case, but now on there is only one type of UE (the cause of action) and one type of restitution (give back)

<i>Soulos v Korkontzilias</i>	Agent who owes fiduciary obligations to client who wants specific land, agent finds the right property and client didn't end up getting it but agent did buy it → client sues and wants the property itself → if you're my agent you breached your fiduciary obligations and since equitable can ask for disgorgement proprietary	TJ turns to SCC cases and says if you want CT you need unjust enrichment which can only apply if there is a transfer from me to you. SCC says that's not what we meant. <ul style="list-style-type: none"> <li>Before <i>Soulos</i> constructive trusts → "unjust enrichment" = unjust enrichment OR wrongs                     <ul style="list-style-type: none"> <li>Unjust enrichment → proprietary restitution</li> <li>Wrongs → proprietary disgorgement</li> </ul> </li> <li>After <i>Soulos</i>: all constructive trust = "good conscience" → unjust enrichment OR wrongful gains                     <ul style="list-style-type: none"> <li>Good conscience either the action in unjust enrichment that will give you proprietary restitution or you have done a wrong and will get proprietary disgorgement</li> </ul> </li> </ul>
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- Basically changes confusing label for another confusing label

## CT and UE

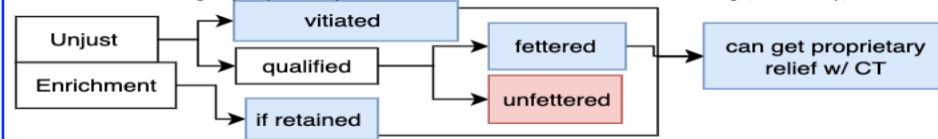
- Almost always a legal cause of action → elements of action: enrichment + corresponding deprivation + reason to reverse
  - Measure of relief → restitution
  - Form of relief either personal or proprietary
    - Why proprietary?
      - Care if defendant is insolvent or going through bankruptcy → judgement wouldn't do much good for the money
      - Sometimes value can change of physical items and if the value changes after the moment of disposition you wouldn't get that change in value
  - Might not want to give proprietary relief if you can otherwise satisfy the judgement you should have the ability to decide what assets to satisfy the judgement with → gives defendant freedom of choice
  - Who cares about difference? The parties; the defendant's unsecured creditors (loss of eligible assets); legislature (statutory schemes for insolvency); society (efficient rules and broadly discourages out-of-court settlements)
  - Test**: damages are inadequate (*Chase Manhattan* ↓)

<i>Chase Manhattan Bank v Israel-British Bank</i>	Two banks, one owes 2 mil and pays the 2 mil, forgets what it's done and pays you an additional 2 mil bc forgot did it → second 2 mil is a mistake; the other bank goes bankrupt → desperately wants the second 2 mil to be a constructive trust and wants proprietary restitution	Judge says if you have UE you always get restitution you can get proprietary restitution if personal would be "inadequate" <ul style="list-style-type: none"> <li>Inadequate if pointless or wouldn't generate the money that they would receive</li> </ul>
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- Problem with this as the test: Inadequacy of damages exists for everyone w/ an insolvent defendant: If someone has an UE claim, a contract claim, and a tort claim all for 1 mil each and goes bankrupt with only 1 mil in assets → UE would get the full mil → why isn't that true for other parties as well? They can say the same thing it would be inadequate for all of them
  - Arguments for it: you gave something proprietary so should get something back proprietary (MCI doesn't love this)

- Birks test: can't get proprietary unless P received and retained the thing (traceably)



- Any time you can say that you can say you never really meant to do it → vitiating
- Intention is qualified only if fettered interest in the matter

- Burrows J.: Principle problem here is about defendant's insolvency → You can take restitution proprietary if you never should have contemplated insolvency → You should be able to get it back proprietary if when telling the story you never come across a part that would lead the P to believe it would go sideways

- E.g. *Harraway* ↓

<p><i>Harraway v Harraway</i></p>	<p>W loans a log of money to son and daughter in law → says at outset this is not a gift → they use the money to buy a house, marriage fails, W wants proprietary interest in the house (house split 3 ways) → even though she loaned the money the loan was invalid</p>	<ul style="list-style-type: none"> <li>• On Birks test since her intention was vitiating and her property remains then it would be proprietary restitution</li> <li>• But CA says this doesn't seem right → even if a valid loan had been created they would just be personal rights not proprietary           <ul style="list-style-type: none"> <li>◦ Basically looking at Burrows idea → can't be in a better situation b/c contract failed if contract had been good in the 1st place</li> </ul> </li> </ul>
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One other possibility: originally equity was all about conscious → maybe the test we should apply that if at the moment you know you shouldn't have received it, you weren't entitled to it, and could never had any right to it, the other creditors shouldn't be able to benefit from new assets → you should have to give it back

- Test: defendant under receipt knew that the money wasn't owed (Not the law in CA today ↓)

<p><i>Neste Oy v Lloyds Bank plc</i></p>	<p>Relationship where you pre-pay for the services → D becomes insolvent but P not yet aware of that so makes another pre-payment but D knows never going to earn it</p>	<p>Court says not just a mistake in payment → D knew at the moment of receipt that wouldn't be able to make that money → that would be unconscionable for you to have on to that and unconscionable for your creditors to have access to it as well</p>
<p><i>Re Farepak Food and Gifts Ltd</i></p>	<p>Each money customers send money to F and they'll send you a catalogue to pick presents from at the end of Dec. → Jan through Sept they make payments, in Oct. F becomes bankrupt but don't tell anyone so customers continue to pay until Dec.</p>	<ul style="list-style-type: none"> <li>• Court says that the payments Customers made from Jan to Sept were paid and received in good faith → personal restitution</li> <li>• But as of Oct. F knew it had no right to the payments → knew they couldn't possibly perform → here get CT           <ul style="list-style-type: none"> <li>◦ And no right to give money to other creditors</li> </ul> </li> </ul>

### Current Canadian Approach

- Just isn't a test in CA where you get proprietary restitution (if proprietary disgorgement = *Soulos* test)
- Catalogue: list of considerations that a judge may or may not consider when deciding if to give proprietary restitution
  - inadequacy of monetary relief *Chase Manhattan Bank v Israel-British Bank*
  - identifiable property *Birks test, Harraway v Harraway*
  - equitable discretion as to existence and extent
  - clear and substantial connection between enrichment and asset
  - reasonable expectations (MCI thinks this has no place in UE)

<p><i>Moore v Sweet</i></p>	<p>Lawrence marries and gets a life insurance property, marriage falls apart and in agreement the Michelle continues to pay premiums for marriage and in exchange will get the beneficiary interest; for 14 yrs M pays premiums, L entered into relationship w/ Risa and he names her as the new beneficiary → they pay the money into court</p>	<p>SCC said that Risa would be unjustly enrichment and M is entitled to restitution proprietary not b/c would be inadequate but b/c personal damages would be inconvenient (would just be easier to get the money from the court bank account then to get chase down Risa for the money)</p> <ul style="list-style-type: none"> <li>• As long as more convenient to impose CT (MCI doesn't like this either)</li> </ul>
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- For exam purposes with restitution you need an asset that remains and you can ask if it's inadequate but hard to examine on

Constructive trustee IS NOT THE SAME as a constructive trust trustee

- If it's a trustee of constructive trust then use that phrasing
- If something goes wrong within a trust beneficiary has to sue within a trust
  - Against trustee: proprietary rights and personal rights (compensate or disgorge)
  - Suing on trust property
    - Suing the stranger proprietary: If trustee did wrong by handing the property over to someone they shouldn't (not BFPV) you can sue that person for proprietary relief
    - Vindication → RT or CT
  - Suing the stranger personally → So simply call them a constructive trustee so we can sue them within the trust → means construed or deemed trustee → you're a pretend trustee so you are within the trust rule
    - The only form in law is breach of contract
    - De son tort: improperly assuming position of trustee
      - situation where someone genuinely thought they had been appointed to particular office so they step in and take control of that situation
      - Almost always innocent, the person almost always says what can I do to make it right → we just apply the rules of trustee to you and as long as you did a proper job then you're all good but if you did wrong you can be held liable as a trustee
    - **Knowing assistance**: equitable tort, wrongfully participated in the trustee's breach of trust
    - **Knowing receipt**: equity speak for the action in unjust enrichment

**Knowing Assistance**: effectively an equitable tort

- Trustee has done something wrong and the stranger somehow participated in that wrong
- Two things the beneficiary can do: sue the trustee (SL) and then sue the stranger but with what test?

<p><i>Air Canada</i></p>	<p>Martin and Valiant are shareholders of company MLT → MLT enter into relationships w/ AC; MLT collects money from customers and put its into a general account; occasionally MLT</p>	<ul style="list-style-type: none"> <li>• This is a case where you are going after stranger who didn't receive any of the property so not UE → you're asking them for compensation and since disruptive have much higher threshold of responsibility</li> </ul>
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<b>v M&amp;L Travel</b>	would send the trustee money to AC and then it would continue again → MLT goes bankrupt there's money in account that beneficiary belongs to AC but owes a lot of money to bank as well → bank just takes money from the general account (had no idea that that money belonged to AC so it is a BFPV) → AC wants trust assets but they're gone so they can sue MLT bc they did wrong putting funds in a general account but no point bc they have no assets; AC could try and sue the bank but the bank is BFPV in exchange for money they took they gave up the debt; so AC wants to sue Martin & Valiant for knowing assistance	<ul style="list-style-type: none"> <li>● <b>Test for knowing assistance:</b> <ul style="list-style-type: none"> <li>○ Have to prove breach of trust that is fraudulent</li> <li>○ And prove strangers had actual knowledge they were participating in a fraudulent breach of trust (actually know what you're doing is wrong, or recklessness or wilful blindness)</li> </ul> </li> <li>● Test satisfied in this instance → MLT fraudulently breached trust by putting funds in general account and M and V at least had wilful blindness</li> <li>● Therefore the strangers are personally liable as constructive trustees → no trust at all, really a debt put pretending we're in the trust relationship</li> </ul>
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- Lets assume the trustee thinks that doing something good by investing money → but asks a stranger, a lawyer, and the lawyer is like this is a breach of trust but chooses to say that it's a great idea
  - Trustee honestly thinks this is a good idea but the stranger knows that it's a terrible idea but dishonestly tells the trustee it's a good idea
  - Beneficiary sues trustee but he doesn't have anything → want to sue the stranger bc knew that he did wrong
  - If you apply MLT there's no liability because even though the stranger has actual knowledge it's not a fraudulent breach of trust by the trustee it's an honest breach
- Should focus on the stranger culpability and surely it should be enough that the stranger *actually knows* that it's a breach of trust → who cares if it's a fraudulent breach of trust (*Royal Brunei Airlines v Tan*)
  - AC v MLT is still the test

**Knowing Receipt**

<b>Citadel General v Lloyds Bank</b>	Citadel hires Drive On who collects money from the customers and they put it into an account and then hand it over as trust property in a particular branch of Lloyds Bank → DO was a subsidiary of larger company IWC → DO and IWC both held general accounts at the same branch of LB w/ same bank manager → IWC convinces bank manager to drain DO's into IWC's account which is then paid to the bank to account for IWC's overdrawn loan → Citadel is out a whole lot of money → Sues DO as trustee but also LB for knowing assistance or knowing receipt	Court decided that manager of LB didn't actually know (Wasn't reckless or wilfully blind) → the most we can say is he was careless which isn't enough Knowing receipt: <ul style="list-style-type: none"> <li>● Here LB got huge repayment of loan which is huge motivation → since D got a benefit we can have lower threshold</li> <li>● We don't need actual knowledge just constructive knowledge → that a reasonable person in that position would have known</li> </ul> Test: <ul style="list-style-type: none"> <li>● Has to be beneficial receipt by D (usually bank gets the money) and took a benefit from receiving the money</li> <li>● Need constructive knowledge (should've known)</li> </ul> Both satisfied here Could have asked for a tracing order
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- Air Canada v ON: liability for UE in law is true strict liability → there is no breach, nothing to do with D's state of mind
  - ON says you knew or should've known that you were entitled to the money → Money that ON collected unlawfully but in good faith doesn't have to be given back → SCC says no true
  - UE is true strict liability → the only thing that matters if they did it because they were mistaken
- In Law you just need to prove you didn't mean to do it; in Equity you have to show that not only did I not mean to do it but also you knew I didn't mean to do it
  - Dave gets genuine gifts from a their and a trustee (money came from Pam) → if we sue Dave in Law then he has to give it all back Pam would win; if we sue in Equity Pam would lose b/c Dave had no idea
- MCI thinks that there shouldn't be a fault element in Equity
  - Problem if it is true strict liability then restitution could hurt the innocent recipient
    - Problem this idea is that strict liability isn't absolute liability → it simply means you're prima facie on the hook but you can have defenses
    - Most important defense in UE is change of position → ensures that restitution never really hurts you
      - Off the hook but only if you spend it on something you wouldn't have normally spent it on (like a vacation) → but if he spends it on something normal (like rent) then he's not worse for ware to give restitution
- Knowing receipt should be the same as UE in law but it currently isn't

**Tracing:** Evidence process that allows us to treat one asset as a substitute for other

- No longer distinguish b/w tracing in law or tracing in equity
- Is not a cause of action or a measure of relief or a form of relief → just an evidentiary process
- Tracing is possible anytime value transfers from one property to another
  - Including between bank accounts
- Sometimes essential to set up transactional nexus b/w parties in order to make out a cause of action or remedy
  - Cause of action example: Almost all knowing receipt claims require tracing of money → showing the enrichment is the same value as the deprivation
  - Remedy example: to get a purchase money resulting trust need to trace the money from your bank account to the cash, to the ring, etc.

**Tracing vs. Following**

- Tracing is a metaphysical exercise → fictional and arbitrary, a policy decision as a way of extending property rights
  - Dave holds 100k on trust for Pam, Dave buys land from Xavier → Pam can follow where the value went but it won't do her good b/c BFPV → Pam can sue Dave personally but on tracing rules we allow Pam to say I initially have trust property of 100k I will simply treat that 100k as the land → pretending the trust is now imposed upon the land
- Following: physical/geographical exercise → talking about the **same physical asset** and it changes hands or locations
  - Conversion allows claim for anyone who acts against the superior legal rights

**Rules of Tracing**

- Tracing in law and equity are the same → no reason to have different rules
- For caselaw separating them b/c precedents were separate
  - Law: always could be used, law could tract into a mixed substitute but couldn't trace out of it
    - Pam steals 50k and gives it to Xavier who puts it in a bank account, Xavier then takes out 50k and gives it to Dave who deposits it → if Xavier's bank account had zero other dollars in it then law can trace it, if the account had even \$1 then law couldn't trace it → for Dave we don't care b/c we're going after him for conversion not what he did with it

- Equity: in order to invoke tracing you had to have a fiduciary → don't have to sue the fiduciary, there just needs to be a fiduciary in the story somewhere
  - Court would often deem people to be fiduciaries who weren't
  - Didn't have any problem with mixtures
  - Just a chose in action → vindicatio usually phrased as a CT

- **Rule today:** We can trace anytime we want and we aren't put off by mixtures (*BMT*)

#### Equitable Tracing and Mixtures of trust property

- Competing claims b/w innocent and guilty parties → innocent parties can assert any version of the events they want that is not contrary to known facts → basically assert the most favorable analysis possible
  - E.g. if money was spent on a painting and money left in account → if painting goes up in value P would want to say that her money was used for painting, if it goes down in value then P would want to say her money was the money in the account
  - can still do substitution with mixed funds, can hold property on trust in a percentage basis
  - Tracing is simply an option its not obligatory → if P wanted can trace but can also sue personally and use a lien (but if couldn't come up with the money could sell the painting and get half the sale b/c that was her contribution to the asset)
- **Intermediate Balance Rule:** if you have contributions to an account, if at some point the account is largely drained then that's the most that can be left behind for someone to get back → you can make up things for tracing but not something that goes against known fact
  - If at some point in the story the money that the wrongdoer had was drained to x and then later more was put in, you aren't entitled to the later amount, you know it was drained to x and your money is gone
- If you have trustee who has done doubly wrong → misappropriate from both beneficiaries → **two innocent parties**
  - Historically was called the rule in **clayton's case** → first in first out → if you have two innocent parties, then you take the first person who deposited then their first to have money withdrawn from the account → so screws over the first deposited person
    - Still sometimes used, but know it's grossly unfair
    - Still apply this rule if all the money would be used up in litigation trying to do proportionate sharing
  - **Proportionate sharing:** share proportionately in the loss or in the gain
    - If there's a 40k loss, the wrongdoers 10k comes off the top, so 30k left over → Pam is responsible for half as much b/c she deposited half as much so she's responsible for 10, Paul is responsible for 20 since he deposited double as much as Pam
      - If the left over amount is 60 → Pam gets 20, and Paul gets 40

#### CT and Wrongdoing

- Overview/summary
  - UE constructive trusts → what test do you use
  - Cohabitation cases → another example of perfectionary CT
  - Wrongdoing CT (most common) → Soulos should apply across the board → If you have a wrong that supports disgorgement and the P wants it proprietary what is the test
- Proprietary Relief:
  - Historically there was a firm line b/w proprietary rights and personal rights
  - What's the justification for requiring one person to give property over to another?
    - Situation where somebody wants property because they used to own it → trying to vindicate property rights
      - If trust property is misappropriated, and not given to BFPV, then beneficiary can vindicate their property rights (*Chase Manhattan*)
      - Trying to get back what was and should be mine
    - P wants property that never previously had but given the nature of the relationship w/ the D then the property should have been acquired with her or for her → not vindicating, if it was to be acquired it certainly should have been mine
    - P didn't have property rights and wouldn't in normal, but provided services within cohabitation relationship
      - Outside CA court is reluctant to give proprietary rights b/c no property was given originally → If want proprietary relief you should start with a proprietary base

Soulos v Korkontzilas	P has money to invest in land but has particular needs including an investment that will make him look good to others, told agent this, A goes out and finds exactly the right property, A buys the property for himself, property goes down in value, but both A and P still want it b/c has banker as tenant, P asks for proprietary relief	TJ says have to show UE (meant cause of action which requires a transfer) so no CT ONCA says you must reward proprietary relief SCC comes up with test: when can you get disgorgement for a wrongful proprietary gain 1. Has to be an equitable relationship b/w the parties 2. P has to show that D got either a deemed or actual agency gain 3. Has to show legitimate reason for wanting proprietary rather than personal disgorgement 4. Has to show awarding CT against D wouldn't create hardship for anybody else (like D's other creditors)
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#### Works for this case but:

- For step 1: but if parties had had a contract then you couldn't apply this because it would be a legal relationship not an equitable one
- For step 2 you would have to show that the property should've been bought for the P
  - Can often not fulfill second element
- For step 3: doesn't have to be financial interest, can be psychological interest
- For step 4: for this one the P had to give the purchase price and any expenses that A incurred → idea that creditors could go after money
- E.g. of problems: Hong Knong v Reid: CT not warranted on facts → PC awarded proprietary disgorgement but SCC wouldn't be able to on the Soulos test
  - Prosecutor required to refrain from receiving bribes
  - But prosecutor did not receive bribe through agency → didn't actually receive bribe on Crown's behalf and shouldn't have received bribes on Crown's behalf

- **\*\*Anytime you're asking for proprietary disgorgement then the test has to be Soulos\*\***

#### Breach of confidence:

- Have to show
  1. There was confidential information → info that isn't generally available
  2. Have to show that you imported secret information in a situation where you made it clear it was secret information
  3. Unauthorized use (Some courts say there has to be detriment to P but that's just unauthorized use)
- If you make out the cause of action then there's lots the courts can do (*Cadbury Schweppes*)
  1. Direct protection (e.g. injunction or destruction or delivery up)

2. Often compensation
3. Disgorgement of gains → personal or proprietary
4. Punitive damages (CA only)

Lac Minerals v International Corona	P small mining company that knew where to find large gold deposit doesn't have finances to exploit it, meets w/ D who is large mining company, P says to D this is a secret let's enter into a joint venture, D says maybe but tell us where the land is, P does and D rushes up to ON and buys the land, P hears about it	SCC says it's breach of confidence, P opts for proprietary disgorgement → at the time SCC had the authority that said that if you wanted CT you need UE as the cause of action <ul style="list-style-type: none"> <li>● Tries to fit the facts in UE b/c can't find corresponding deprivation</li> </ul>
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- Should've been an easy case → simply breach of confidence → applying Soulos they meet all of it → nature of the relationship was that D couldn't buy it for themselves should've been for P → just impose a CT → would've had to share the cost of finding the land and reimburse some expenses (step 4)
- Lower courts in CA will apply Lac Minerals if use action of breach of confidence
  - In Sun Indales (2013) SCC says that's ride no Soulos applies

### Breach of Fiduciary Duty

- Traditional idea of fiduciary duty: fiduciary has to subvert their interests for your interests
  - Parasitic upon non-fiduciary duty → have to satisfy some other obligations but don't be tempted by self interest
  - Proscriptive prohibition on conflict interest → tells you what not to do not what to do
  - prophylactic focus on deterrence → intended not just to govern relationship b/w parties but also to send message to world to deter future wrongdoers
  - pecuniary nature of underlying interests → only to property interests
  - Discrete set of categories → agent and principal, director and company, partners, and solicitor and client
- In CA: we have the above but also
  - Independent not merely parasitic
  - Will treat as prescriptive obligations → one unique way you should go and judge will tell you that after the fact
  - Pertains to personal and/or psychological manners → not merely pecuniary
- If there is a breach of fiduciary obligation:
  - Say can't act in conflict of interest and you can't profit from your position → clearly speaks to a measure of relief → disgorgement

Canadian Aero v O'Malley	Two Ds used to be officers and directors of P corp, came up an opportunity for someone to map a small country, the two Ds thought they should quit and set up another company and bid on the project → Ds new company earned the contract	SCC uses language of UE (which isn't accurate today, would just be cause of action of breach of fiduciary duty) <ul style="list-style-type: none"> <li>● There was no loss to P here b/c P's bid was never going to win → so no compensation</li> <li>● But can get disgorgement b/c FD can't gain → so strip away their profit</li> </ul> There is no trust here
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Boardman v Phipps	Co issues shares, some held by trustees for B1, B2, Tom Phipps; Trust is big enough that hired Boardman to provide for advice who realizes that co doesn't know what he's doing so you should buy up the company to take control of it, trustees say no that goes against the trust; Boardman and Phipps use their own money to buy the shares since it was against the trust and then insert themselves into the co and then run the co → the Bs do well too bc the shares that are held on their behalf are more valuable but B1 thought should have the profit that Boardman and Phipps made → on their own initiative they stepped in and started acting like agents (so had all the rights and obligations of an agent like FD)	FD told you not to profit from your position and that's exactly what you've done <ul style="list-style-type: none"> <li>● Profited only bc of info you required</li> <li>● Doesn't matter that you put up your own money and risk to buy the company</li> </ul> HoL: <ul style="list-style-type: none"> <li>● idea that fiduciary can't profit from relationship is almost an absolute obligation → if you profit as a result from being a FD then you have to gift it up</li> <li>● Exception to rule that you can act after getting unanimous consent from the beneficiaries</li> <li>● Normally would strip away all of the profits but since you acted in good faith and honorable (were genuinely trying to help the beneficiaries) we'll give disgorgement not for gross profits but for net (allowing them to take off the money they spent and their time)</li> <li>● Ds are liable as constructive trustees → thought this as a trustee of CT, thought could only do disgorgement proprietarily through CT</li> </ul>
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- ^ would've been fine if boardman and Phipps had learned of the info in a personal capacity; would also have been fine if they received unanimous consent from the beneficiaries

### Bribes and secret commissions

- Lister v Stubbs: if you took a bribe in the form of property rather than money then you hold it proprietarily on CT; but if you were my agent and you took a bribe that's money then it's personal relief not proprietary
  - In earlier case it was decided

HK v Reid	R is director of prosecutions for HK, R took bribes and uses the money to buy land in NZ, HK finds out and sues him for the property	PC applied equitable maxim → we deem as done that which ought to be done <ul style="list-style-type: none"> <li>● Doesn't make much sense applied here (you shouldn't take bribes in the first place)</li> <li>● Court does impose CT and provide proprietary disgorgement</li> </ul>
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MCI is 95% certain that this^ would be applied in CA but 2 problems:

1. Can't apply Soulos wouldn't make any sense
2. As a matter of policy it's hard to justify proprietary disgorgement → it's almost always a windfall
  - But on the exam apply Soulos

### Wrongful Acquisition through Death

- The death is proper but the acquisition isn't
  - Duress for redrafting the will → Court will either:
    - If we can strike down the gift entirely to stop the mischief we'll do that
    - If we can't (because it's a will for example that would need to be stricken down) we'll just impose a CT
- Proper acquisition but improper death
  - Wrongfully caused death → Murder for life insurance, murder for remainder interest
  - Equity doesn't create a forfeiture → you don't lose what you would otherwise be entitled to, what Equity does is try to stop you from profiting more than you did wrong
    - So if LE → try to figure out how long the LE would have lived and then you don't get your remainder until then by imposing CT for the estate

Rosenfeldt v Olson	O abducted and murdered 11 children in BC, families didn't know where bodies were, RCMP says we'll pay you 100k if you tell us where the bodies are, families sued O for UE (when UE was fucked up)	UE doesn't fit, yes O was enriched, yes families suffered a deprivation but wasn't <i>corresponding</i> → O got money from RCMP
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- Usually financial torts that allow you to get disgorgement → hard to get disgorgement in law
- Case just showing if you use same terminology you're inviting confusion

**Perfecting:** Enter into a contract that works for specific performance → if the contract isn't completed then equity can order CT

- Equitable analysis culminates in constructive trust
  1. unique property supports specific performance (land, great-grandmother's wedding ring, particular piece of art, etc.)
  2. specific performance triggers doctrine of conversion
  3. doctrine of conversion views obligation as performed
  4. performance of obligation entails beneficial interest passing
  5. interest passing creates between vendor and purchaser a trust
- Equity deems to be done what ought to be done → immediately imposes a CT
- Can register a caveat on title b/c you already have equitable interest
- Not a response to wrongdoing, not a response to UE → a response to perfecting a goal
  - Purchaser's detrimental reliance (contract formed) supports trust

Bannister v Bannister	P has two properties and enters into agreement with D, sells both but she says you will hold one of them on ET for me → need evidence in writing for both of these, the collateral agreement (ET) was only an oral arrangement	<p>Court says there's no ET but we'll send the property back to the P → open question of whether RT or CT</p> <ul style="list-style-type: none"> <li>• RT argument would be if there is a failed ET then it happens with RT           <ul style="list-style-type: none"> <li>○ Prefer not to use RT b/c can only go in one direction</li> <li>○ If failed ET fails for some inherent defect then have to send it back → here simply informal</li> </ul> </li> <li>• CT → Court seemed to say it's a CT in form of proprietary disgorgement for a wrong (fraud), but could also be perfecting CT</li> </ul>
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- If P transfers two pieces of land to D and D promises to hold the land on trust for P's sister → can't be a RT here can't move back to P; so has to be CT but not of proprietary disgorgement b/c there is no wrong here, then this has to be perfectionary CT

### Secret Trusts

- Seems to be a happy family life, tells lawyer that wants to split the estate b/w mistress and a group of neo-nazis → want's to come up with some way of leaving this in will but don't want to have to explain it to anyone
  - Fully secret trust: if passage in will is to you, with no other name or explanation
  - Semi Secret Trust: more particular you say blackacre to you on trust
  - When you make a will you sign at the very end of the last page to signify your assent everything that went before → including things that happened outside the will
    - So if you have a secret trust it won't be valid as an ET → disposition would need to be fully explained in the will
  - So if we have a secret trust, and the will gives it to you, then the mistress tries to get it the Court can't enforce the ET so equity gives effect to it through CT
- 3 requirements
  1. Communicate desire: precatory language is enough
  2. Agreement: oral agreement or silent acquiescence → as long as explained plan and you haven't disinclined to get involved
  3. Timely: depends on if fully or semi secret
    - As long as satisfied three requirements equity imposes CT so when you receive blackacre you must hold it on trust
- Fully Secret Trusts → Two special rules to add to 3 requirements:
  - If for some reason we can't give effect to FST then recipient (want to be trustee) gets to keep the property absolutely
  - Simply have to have her agreement in place before testator's death → don't have to get agreement to plan before will is executed

Ottaway v Norman	T died giving property to Mrs. H with secret trust to hold on behalf of x but Mrs. H also named a beneficiary in her will → so who gets it? Is the FST valid?	<ul style="list-style-type: none"> <li>• fully secret trust arose on Ottaway's death in plaintiff's favor → Ottaway communicated wish to Hodges; Ottaway communicated wish to Hodges before his death; Hodges accepted Ottaway's proposed trust</li> <li>• fully secret trust did not extend to money received under Ottaway's will → no evidence of Ottaway-Hodges agreement on money; money no longer identifiable as potential trust property</li> </ul>
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### Semi Secret Trusts

- Defining features:
  - If you don't agree to the plan but I don't change the will before I die you don't get to keep the property → can't keep it b/c trust is mentioned
  - Have to get your agreement before I finalize my will
    - Incorporation by reference → two separate documents, the will that refers to the document that can be found as a separate doc but the doc isn't in the will → must identify it in the will and the doc must exist before will is in existence (b/c then it will be captured by the signature at the end b/c it went before)
    - If talking about SST they aren't given effect by force of wills legislation, it's given effect through equity and CT → so the incorporation by reference doesn't make sense to be applied but it is and that's the rule

Re Mihalopoulos	On trust but doesn't describe so SST → so can we give effect to ET to fulfill the SST	<p>Court says:</p> <ul style="list-style-type: none"> <li>• No proof outside doc existed before will was signed (error)</li> <li>• Executor came to court saying idk what to do → judge thought if they weren't trying to defraud then we can't impose CT (error)</li> <li>• No evidence of agreement b/w testator and intended trustee</li> <li>• No proof that the doc that was found was the one referenced in the will</li> </ul>
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### Incomplete Gifts

Re Rose	shares in limiting company, directors had to sign off on transfer of shares, P did all the work to have this done (full facts in constiutions)	As soon as everything was done that P could do, Equity imposes a CT immediately
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**Cohabitation Property Disputes** → perfectionary CT, had joint-family venture, intuitively agreed to share whether expressly said or not

Pettkus v Becker	all assets went into his name, she has nothing to show for her efforts	impose CT on his legal assets and split benefit equally b/w them can't be restitution b/c not UE
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