**Topic 2  Formalities**

**STEP 1: Identify the type of disposition and the necessary declaration**

Disposition is any act by which a person ceases to own the item of property in question. This could include sale, gift, assignment or declaration of trust.

<table>
<thead>
<tr>
<th>Type of Disposition</th>
<th>Declaration</th>
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<tbody>
<tr>
<td>Gift</td>
<td>The three certainties – see previous topic</td>
</tr>
</tbody>
</table>
| Trust with self as trustee | 1) **Three Certainties**  
As above except for Intention: There must be a binding obligation on trustee  
- Intention is ascertained by words or conduct (*Paul v Constance*)  
- Merely precatory words will not suffice (*Re Adams & Kensington Vestry*)  
2) **Beneficiary principle:** There must be identifiable human beneficiaries who can enforce the trust  
3) **Rules against perpetuity:**  
   - For discretionaty trusts: Rule against remoteness of vesting – max 125 years  
   - For Non-charitable purpose trusts: Rule against alienability – limited to 21 years, or allow trustees to spend all trust capital on the purpose  
4) **Formalities for declaration:**  
   - Land: Evidenced in writing; signed by the transferor (*s.53(1)(b)*)  
   - Other: None needed (writing desired) |
| Trust with someone else/others as trustee(s)? | 1) Three certainties  
2) Beneficiary principle  
3) Rules against perpetuity  
4) Formalities for declaration  
5) **[AND] Transfer of property in correct manner – see STEP 2** |
STEP 2: Is this a new declaration of trust?

1) **Formalities (testamentary trust)**
   - s.9, Wills Act 1837
     - In writing and signed by the testator
     - Signature must be made or acknowledged in the presence of two witnesses present at the same time (i.e. all three in the room at the same time)
     - Each witness must attest and sign the will or acknowledge their signature in testator’s presence

2) **Formalities (inter vivos trusts = life trusts)**
   - Generally no formalities (Paul v Constance); personal property: no formalities
   - Exception: land
     - s.53(1)(b) – a declaration of trust for land
       - Must be manifested and proved (or evidenced) by some writing, otherwise unenforceable.
       - Must be signed by person declaring the trust
   
   Exception – s.53(2): If one can establish that an implied trust (resulting or constructed trust) was constructed, then it suspends the formalities of s.53(1)(b).

STEP 3: Is this a disposition of an already existing equitable interest?

1) **Method of disposition**
   - Timpson’s Executors v Yerbury – methods of disposing of an equitable interest:
     - You as the beneficiary can assign it directly to third party
     - You as the beneficiary can tell the Trustee to hold the interest for someone else, third party.
     - Contract (or sell it) for valuable consideration.
     - Declare himself trustee of it for third party

2) **Does s.53(1)(c), LPA 1925 apply?**
   - s.53(1)(c) LPA 1925 applies to all dispositions of subsisting equitable interests, which requires that the disposition be in writing and signed by the person disposing or by his agent with written authorisation to do so. Non-compliance with s.53(1)(c) will render the disposition void.
<table>
<thead>
<tr>
<th>Disposition</th>
<th>Application of s.53(1)(c), LPA 1925</th>
</tr>
</thead>
<tbody>
<tr>
<td>Direct assignment to third party</td>
<td>Apply s.53(1)(c)</td>
</tr>
<tr>
<td>Asking the trustee to hold property for third party</td>
<td>Apply s.53(1)(c)</td>
</tr>
<tr>
<td>• Must be in writing (<em>Grey v IRC</em>)</td>
<td></td>
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<tr>
<td>• But could be oral if absolutely entitled beneficiary instructs trustee to transfer legal title with the intention of also transferring the equitable title (<em>Vandervell v IRC</em>)</td>
<td></td>
</tr>
<tr>
<td>Beneficiary contracts for valuable consideration</td>
<td>Apply s.53(1)(c) unless the contract is capable of specific performance</td>
</tr>
<tr>
<td>Declaration of sub-trusts</td>
<td>• Doesn’t apply: If “To C for life, remainder for D”, you would be remaining in active duty to administer income to C and ensure there is asset left for D. So in this case, one would really be creating a brand new trust. Hence, no need for s.53(1)(c).</td>
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<tr>
<td>• Does apply: If “To C” because this is resembles an assignment.</td>
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<td>• HOWEVER: Green’s Theory (1984) says this distinction is artificial, as both situations are an act of “ridding of the beneficiary’s disposition”; therefore duly requiring s.53(1)(c).</td>
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</table>

**STEP 2: Where there is a transfer i.e. Gifts and Trust with someone else/others as trustee, identify the correct formalities (state: “there must also be a proper constitution”)**

The formality depends on the item being transferred

- **Chattels:** simply physical delivery (*Re Cole*) or by deed (*Jaffa v Taylor*)

- **Shares:** Governed by s.1 Stock Transfer Act (1) Complete and sign stock transfer form; (2) Send STF and share certificate to transferee; (3) Transferee must send documents to company to register new owner

- **Land:**
  - Must be done by deed. Send deed to land registry and notify as new legal owner (s.52(1) LPA 1925).
  - Deed must say it’s a deed, be in writing, and be signed, witnessed and delivered as a deed (s.1 LP(MP)A 1989)
• **Equitable interests**: s.53(1)(c) LPA 1925:
  - In writing ([Grey v IRC](#))
  - Signed by person disposing of the interest/Authorised agent or in will
    Exceptions:
    - Resulting trusts
    - Constructive trusts
    - Proprietary estoppels

**STEP 3: Where transfer (i.e. NOT declaration) has been defective, consider whether equity will perfect any imperfection.**

**Starting point**: There is no equity in this court to protect an imperfect gift; equity will not benefit a volunteer; equity will not construe a trust from an invalid gift ([Milroy v Lord](#)).

Exceptions:

1) Rule in **Strong v Bird**: on death of donor, donee can claim legal title if:
   - (a) Transfer fails due to not satisfying formalities;
   - (b) Intention to make immediate gift by donor ([Re Freeland](#));
   - (c) Intention continues until death ([Re Gonin](#)); and
   - (d) Donor becomes executor/PR/administrator of donor.

2) Every Effort Test ([Re Rose](#)): gift complete in equity if donor has done everything he can

FACTS: Once STF and share certificate handed over, the gift is complete in equity

3) Unconscionable? ([Pennington v Waine](#)) – applies to very specific situation only. Extends Re Rose to gifts even when incomplete. Must be unconscionable to invalidate disposition.

FACTS: woman told auditor she wanted to transfer shares to nephew; woman signed STF and sent to auditor; auditor told nephew that woman wanted to transfer shares to him and that he didn’t have to do anything; auditor did not register nephew; woman tried to go back on her word and not transfer the shares – this was UNCONSCIONABLE, even though every effort had not been made
4) **Choithram v Pagarani**: if transfer defective, equity will not strive officiously to defeat a gift – rather, may interpret gift as trust.
   - Trustee appointed himself and 6 others as trustees
   - He orally stated that he was giving his shares to the trust without completing the STF; therefore failure to follow the correct formalities
   - Court of equity requires less from the transferor than demanded in *Re: Rose* as it is enough that if the transferor’s conscious is effected- important that the settlor becomes a trustee
   - Oral declaration is sufficient in intangible assets if settlor remains the trustee

5) **Donatio Mortis Causa (DMC): Cain v Moon**: A gift made in contemplation of death can be perfected despite not having followed formalities for lifetime gifts or drafting of a will.

6) Exception for transfer of equitable interests: If interest is under a bare trust, and beneficiary directs trustee to transfer legal estate with the intention of transferring the equitable estate as well, s.53(1)(c) LPA will not apply, and an oral instruction will be sufficient (*Vandervell*). However, this rule only applies if the legal estate is being transferred (*Zeital v Kaye*).