Is There Any Present Property or Future Property Capable of Assignment? (If no go to future property)

1. If future property – do you have consideration? If no consideration = fails
   a. If the letter was not signed but sought to apply all of the statutory requirements
      - could then apply because the letter is not signed. [Norman]

2. If legal chose in action (s199) by statute or not by statute.
   a. If not compiled with s 199 – go to 1
   b. If conditional or part of legal chose in action and does not comply with s199

3. If equitable chose in action – By statute (not mandatory) [NB 1] OR go to 2
   a. Must comply with that – s 11(1)(c) + intention

4. Has the Assignor Purposed to Assign Rights in the Property or the Property Itself? (if property go to future property)
   a. Voluntary

5. What Rights Are We Purporting to Assign? (legal or equitable?)
   a. Effective at Law?
   b. Effective at Equity?

6. Effective at Law?
   a. NB: rights can be assigned but not obligations.
   b. NB: Say when not effective in law or equity.
   c. NB: wording: “hereby” = intention, manifested, immediate.

7. Effective at Equity?
   a. NB: rights can be assigned but not obligations.
   b. NB: Say when not effective in law or equity.

IS IT ASSIGNABLE?

Tree: equitable chose in action

Fruit: future property requiring consideration

Contractual right or repayable at will?

Norman Facts N wrote & signed deed which sought to assign right, title and interest to dividends on shares and interest on a loan from partnership. Issue: right or future property?
   a. Dividends: not effective assignment because of lack of certainty. Once a dividend is declared it becomes a debt (chose in action), up until that point it is merely future property (a contractual right).
   b. Interest: Not assignable property because lack of set dates of repayment. It was at debtor’s will and “at any stage may cease to exist”. [Joachim]

Shepherd Facts Assigned by deed right, title & interest to an amount equal of 90% of income from royalties on the sale/manufacturer of certain castors. Voluntary. Issue: right or future property? Commissioner argued As the manufacturer was no obliged to produce any castors at all, it could not be said with certainty that any royalties would be paid under the agreement. Held Va’d for assignee because the contractual right to receive income from royalties. This income was fixed, no uncertainty.

1. Language deconstruction ➔ Shepherd per Barwick: The task in construing the deed is to find the meaning intended by the taxpayer as expressed. No form of words is required for an assignable assignment but it is necessary to find the expression of an intention to assign.

2. Part of the royalty?: NO (Norman) ➔ Part of the right to royalties: YES
   a. Shepherd

IS IT AN EQUITABLE OR LEGAL CHOICE?

LEGAL CHOICE designated by CL/Statute (ie, Rights under K, cmpy shares, etc)

EQUITABLE CHOICE beneficiaries interest under trust, mortgagor equity of redemption under legal mtg, legatee’s right in unadministered estate, partner’s interest in ptnship assets on winding up, etc

1. UNABLE TO BE ASSIGNED

BARE RIGHT TO SUE: not assignable because of public policy reasons.

Distinguishable from future property arising out of court case

Glegg v Bromley: wife assigned by deed, for consideration, future winnings from lawsuit to husband (the fruit) ‘all that interest, sum of money, or premises to which she is or may become entitled under or by virtue of any verdict, compromise, or agreement which she may obtain’.

Issue: could she assign possible future winnings? Held it was a valid assignment. This was not a present existing chose in action but future property identified by reference to an existing chose in action (the right to litigate). Equity will regard the assignment of future property as valid so long as there is consideration.

Note: Delolitte Touche [2007] seems to support the idea that the assignment of bare rights of action is now, in light of the Fostill decision, less forbidden than in the past (seemingly casting some doubt on Glegg and Credit Suisse on this point). However, the High Court declined leave to appeal in this case which suggests unwillingness to open the floodgates.

RIGHT TO RESCIND FOR MISREPRESENTATION:

Gross v Lewis Hillman: Principle the right to rescind for misrepresentation is purely a personal right. There is no property-characteristics (similar to bare rights) (contract with undue influence)

ABLE TO BE ASSIGNED

RIGHT TO HAVE THE WILL ADMINISTERED:

Schultz Facts S bequeathed with remainder interest in house. At time of testator’s death, S was an Undischarged bankrupt. After becoming discharged, the will was administered and S argued the property was theirs. Issue: What right arose at the time of death? Held At the time of death, S received a chose in action: the right to have the will administered properly. When the remainder interest in the house took effect it vested in the Receiver, not Schultz, even though S had by then been discharged from bankruptcy. This was so because what vested in the Receiver at the date of the testator’s death was the chose in action and ‘the expected fruits of that chose in action’ (Receiver got the ‘right to have the will administered’ which resulted in getting the property)

Don’t forget: are they assigning the fruit or the tree? The right to have the will administered is the tree, the right to the car under the will is the fruit (and thus unassignable)

RIGHT TO RESCIND FOR UNDUE INFLUENCE IS TRANSFERABLE IF:

Incidental to property Acts of property Dickinson: Principle assignable because it was incidental to the real property assigned to the assignee. Facts: A signed for undue influence on father which resulted in him receiving less property.

Legal Chose in Action

“This is a legal chose in action because [insert why]"

Assignable under Statute [law]

SECTION 199 PLA.

1. Absolute & not conditional or apportionments
   a. If it is conditional then it is merely a promise: Hazard Systems PTY LTD v Car Tech Services 2013 NSWCA. Must say “hereby assign” not “will assign”

   1. in writing
   2. signed by the assignor
   3. with express notice to the debtor

   Assignable in Equity, [equity]

FAILURE TO COMPLY WITH STATUTE:

1. Consideration + Clear intention

Holroyd v Marshall: Deemed to be holding chose in action on CT for assignee because the consideration essentially binds your conscience.

2. Voluntary Gift:

   a. Notice: must categorically lay out clearly how an assignment is to take place. The notice must do so expressly, by a direct and definite statement of that fact rather than by supplying materials from which the existence of [that fact] was to be inferred. [Showa Shoji Australia Pty Ltd v Oceanic Life Ltd (1994)]

   → no consideration needed → effective at law if elements satisfied

CANNOT BE ASSIGNED UNDER STATUTE


2. Voluntary

Rule: If assignment is not assignable under statute then Milroy will not apply because the question to be asked is whether equity will recognize the assignment and not have you sufficiently completed the legal requirements.


   • If unsigned letter: Obiter in Shepherd indicates formalities are not necessary. [Valid]
   • If the letter was not signed but sought to apply all of the rights: Could then apply Milroy, have they done everything possible? The donee is not in a position to complete the assignment because the letter is not signed. [Invalid]
   • Signed and all rights assigned: still does not satisfy notifying the bank, but it is satisfied because the assignee can notify the bank. [Valid]

NON-COMPLIANCE WITH STATUTORY REQUIREMENTS:

1. Cannot be assignable under statute or;

2. Unable to comply with statutory requirements
Equitable Chose in Action [equity]

Equitable property means property recognised only in, or rights only enforceable in equity, such as the interest of a beneficiary under a trust, the rights of a partner in the assets of a partnership or any other equitable chose in action, that is, a ‘thing’ provable in an action in equity.

This is an equitable chose in action because [insert why]

**THEORY OF ASSIGNMENTS**

**RULE/DEFINITION** *An assignment is the immediate transfer of an existing proprietary right, vested or contingent, from the assignor to the assignee*. Norman v FCT (1963) at 26, per Windeyer J. An equitable assignment simply means the recognition in equity of the transfer of property — a recognition that may be granted even though some prescribed method of assignment at law, such as registration, has not been completed. In this sense, a court of equity will overlook statutory requirements, provided the equitable rules are satisfied. The principles governing the recognition of assignments in equity illustrate the operation of some of the maxims of equity; in particular, the doctrine regards as done that which ought to be done; that equity will not perfect an imperfect gift; and, that equity will not assist a volunteer.

**KEY PRINCIPLES in MILROY v LORD**

1. In order to render a voluntary settlement valid and effectual, the settlor may have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him; and
2. If a settlement is intended to be effected by a particular mode or form (ie, direct assignment, declaration of trust, direction to trustee and so forth), the Court will not give effect to it by applying another form. An imperfect assignment will not, for example, be held to be a declaration of trust.

**ANALYSIS OF NORMAN v SHEPHERD**

Considering the results of these two cases, the issue may simply turn on the drafting of any document in question, although the wording of the assignments in Shepherd and Norman was very similar. Kitch J distinguished the position in Norman’s case from that in Shepherd’s, pointing out, in Norman, the contractual relationship of borrower and lender could be terminated at any time during the relevant year by the borrower, thus making it an expectancy. In Shepherd, on the other hand, the contractual licence to manufacture castors would continue for three years, whether any castors were produced or not. With respect, that enquiry seems misconceived and the reasoning of Windeyer J in Norman must be preferred as a matter of logic and equity will not perfect an imperfect assignment. Nor does it appear necessary that the intention to pass the equitable property shall be communicated to the assignee. What is necessary is that there shall be an expression of intention then and there to set over the equitable interest, and, perhaps, it should be communicated to someone who does not receive the communication under confidence or in the capacity only of an agent for the donee.

1. [Settlement] The intending donor for whom property is held upon trust may give to his trustee a direction requiring him thenceforth to hold the property upon trust for the intended donee.

**TYPES OF TRUSTS**

1. Fixed Trust - EXPRESS
   a. Where the settlor has specified the property to be held.
2. Discretionary Trust - EXPRESS
   a. The settlor has specified the property to be held, but the legal personal property
   b. Charitable Trusts (ie.)
3. Trusts for a purpose
4. Resulting Trust

**FORMALITIES**

- Partial or Interspousal
- Declaration of Trust

**LEGAL PERSONAL PROPERTY**

Need to comply with s11(1)(c):
1. Disposition Marcella
   a. Disposition ‘points to a wide concept, extending to any form of assumption, disclaimer or release of property’. A disposition of property can thus be broadly defined as including any acts taken by an owner of property that breathed notice to the person to whom the disposition was being made that he was ceasing to be the owner of the property. According to Giles J, a critical aspect of such a definition is the intention and the terms of the disposition by which the intention is fulfilled’
2. Chose in action (existing right)
3. Manifested and proved by writing
4. Signed by person with authority.

**LAND**

S11(1)(b)
1. Manifested and proved by writing
2. Signed by person with authority.
3. James - the view is declaring trusts of land you only have to comply with 11(b).

Requirements of 11(b) will vary depending on the wording of the statement. 

3.1. date of writing is irrelevant, it can be done after oral declaration of trust.

NOT BY TRUST (EQUITABLE MORTGAGE)

S11(1)(a) Proved with writing and signed by person with authority.

WILL (Trusts) - AS IF DECLARATORY FORMALITIES TO HAVE BEEN MET

WHEN A TRUST WILL NOT BE ENFORCED

Deeds: where a trust is created as part of an illegal scheme to defraud it will affect the right holder.

Acts: are the terms of the trust either

1. Began?

2. Contrary to public policy (on trust to such bike members...)

Illlegality

Perpetual Executors and Trustees Association of Australia Ltd v Wright (1917) 23 CLR 185 Facts: Husband transferred property to his wife on trust for herself. This was because he started a business and was worried he would lose everything. The wife died and he said it was all his. They argued that it was part of an illegal scheme to defraud his creditors Held: whilst that is the general rule, you have to give effect to the illegal scheme. Issue: Did you carry it out? Had he no creditors, therefore he was not defaulting any creditors. They said in order to defraud he would have had to be insolvent (i.e. he could have even had creditors and it still would not have been illegal activity).


Public Policy

Evbeek (1990) 104 CLR 394; Facts: Man left property to wife then: to each of my sons on the condition that he and his wife shall at the death of my wife protest the

Public Policy

and it still would not have been illegal activity).

No creditors

have to give effect to the illegal scheme.

an illegal scheme to defraud his creditors

was intended: Walsh Bay Developments Pty Ltd v FCT (1995)

The test is one of construction of the relevant instrument as a whole to determine the settlor's intention: Dean v Cole; Stephena Travel

For a trust to be intended, the words so construed must bear an imperative or mandatory, not a permissive, meaning:

A disposition expressing the "hope, confidence, wish or belief" is

unlawful, in the absence of contrary intention derived from the trust instrument, to bear an imperative meaning: Hayes v National Heart Foundation

A court can infer the existence of a trust where this reflects the relationship the parties are likely to have intended: Bahr v Nicolay

1. A trust occurs where we split the ownership from benefit: Re Armstrong

2. Language: mandatory or precatory?

Business:

1. Was their intention to lend the money for a purpose? Unconditionally (Re Elizabethan) or expressly (Quistclose)

2. Was it money paid into a partnership? (Rauf Fishy Bites).

3. Was it a bailment/trust clause?

4. Can the property be identified?

1. Just as the absence of the words "On Trust" do not prevent a trust from arising:

• The use of the words "in trust for" in a deed do not necessarily create a trust, since the circumstances may displace the inference that a trust was intended: Walsh Bay Developments Pty Ltd v FCT (1995)

2. For a trust to be intended, the words so construed must bear an imperative or mandatory, not a permissive, meaning:

A disposition expressing the "hope, confidence, wish or belief" is unlawful, in the absence of contrary intention derived from the trust instrument, to bear an imperative meaning: Hayes v National Heart Foundation

3. A court can infer the existence of a trust where this reflects the relationship the parties are likely to have intended: Bahr v Nicolay

TRUST RELATIONSHIP v DEBTOR CREDITOR RELATIONSHIP

Beneficiary?: Quistclose

Mandate purpose?: Elizabethan.

If [X] can successfully argue a Quistclose trust instead of a debtor relationship, [X] will take priority over unsecured creditors because the chosen in action will be seen to have resulted back to [X].

"ISSUE: whether the debtor-creditor relationship is additionally intended to create a Quistclose trust?

1. Was the money given for a specific purpose? Was it conditional? (beneficiary or mandate)

2. Is it no longer possible, in the ordinary course of business, to fulfill that condition?

3. Once the condition is no longer possible it reverts back (Quistclose)

Quistclose Facts: Q lented $ to R so that R could pay its declared dividends. Before paying shareholders, R went bankrupt. Q stipulated that it had to be: 1. In a separate account. 2. For the purpose of paying the dividends Issue: was the court able to enforce that Q was entitled to the money? Held: A T can be a B, BUT THEY cannot be a sole beneficiary. Therefore the trust arose immediately and the father was merely a trustee the whole time.

'mine as yours': Paul v Constance Facts: Husband said "money as much yours as mine" to mistress. Issue: on his death, because there was no will did wife get the money in the account or was it a trust for the mistress? Held: valid. No writing needed b/c personal property. Q was: did he have the intention to separate out the beneficial interest from the legal title?

Do all that can be done: Jones v Locke Facts: Father waived 900 pound cheque in baby’s face stating “look here I give this to baby”. Then he died, right up until his death he was trying to arrange for provision for the child. Issue: Was the cheque belonging to the child or was it part of his estate? Held: not the child’s because this cheque hadn’t been endorsed towards the child (not named and signed). Whilst he intended to make a gift to the baby, he didn’t satisfy the requirements of Milroy, so the court could not enforce a Trust. YOU CAN ENFORCE A CHEQUE ADDRESSED TO YOU OVER TO SOMEONE ELSE.

PRECATORY OR MANDATORY

2. absolute disposal & 'trusting to her' Dean v Cole

Facts: Testator left his property to his wife. Earlier on in the will he had left about 1300 pounds to her "absolute disposal", but this provision in relation to the children expressed himself as "trusting to her" that she will divide such part and portion of his estate, which included the 1300 pounds. Held: The true effect is to make the precatory words apply to such property as the widow has chosen to retain, and is actually in the use and enjoyment of at the time when she proceeds to make the division. Such a trust would not be enforceable. LE: She had a lot of discretion, there was no mandatory wording used." Dissent: thought the words trusting her to divide meant in trust to divide. Really a question of language: What did the testator mean? Objective: "what did those words mean to the ordinary objective person?"

(did not specify how to use money)

'used as' & 'to be sold and divided equally' Hayes v National Heart Foundation Facts: Testator left shares to daughter. Wording was: “retained by her as a source of income on the understanding that she write into her Will, that there are to be sold and the capital received and divided into equal parts” between 3 named charities. Held: in the understanding that is a restrictive direction. The testator spoke in words of legal restriction, (specified how the money would be used until trust carried out).