INTENTION TO CREATE A TRUST

Anyone who has the capacity to undertake contractual obligations or to make a Will may create a trust. In addition, trusts may be set up by the court by statute, or on statutory authority. In each case however an intention to create a trust must be present, since a trust imposes a burden on the trust property and freedom from burdens is presumed.

A distinction should be drawn between the intention to create a trust in the strict sense and the intention to impose on a donee, legatee or other transferee of property personally an obligation to administer the property otherwise than for him-or herself. With trusts in the strict sense, the founder intends that the transferee should hold an office by virtue of which duties attaching to the office will descend to a successor in office rather than to the deceased trustee's executor. Such a person is to hold the property in a purely administrative capacity. In the latter the transferor does not intend that anyone other than the transferee should be burdened with the obligation. A mere modus is created, the transferee being an ordinary owner subject to an obligation. The intention to create a trust in the strict sense may also fail because the founder fails to confer sufficient independence on the supposed trustee and makes the trustee instead a mere agent, or because the intention to vest property in the 'trustee' was lacking.

The intention to create a trust between living persons (inter vivos) must be shared by the founder and the prospective trustee. When a beneficiary under a testamentary trust agreed to take over a hotel, the main asset in the estate, as a going concern and be responsible for paying the annuities provided for in the will, it was held that his undertaking was personal. He did not become a trustee. Intention is inferred from the circumstances and depends on what words are used, how formal the arrangement is, what the normal practice is in the context, and other factors which are difficult to list.

Words such as 'trust' and 'administrator' point to the creation of a trust but are not conclusive, since they may have been employed by mistake, or may denote trusts or trust-like arrangements only in a wide sense. Thus in Conze v Masterbond Participation Trust Managers investors advanced money to a company against the issue of debentures secured by a debenture mortgage bond over immovable property and executed in favour of Masterbond as trustee for the debenture holders. Masterbond was referred to throughout the trust deed as 'the trustee' in accordance with the deed's interpretation clause. The full bench of the Cape Provincial Division observed that this usage applied even where, in terms of the trust deed, Masterbond was patently acting as agent for the company to which the moneys invested were advanced. The argument that the use of the word 'trustee' in the trust deed with reference to Masterbond indicated that a trust in the strict sense had been created thus had no merit. When a testator appointed H 'sole and universal administrator of

my estate and effects' with no further directions and appointed J executor it was held that he intended not to create a trust but to appoint H sole heir.

Conversely the intention to create a trust may be inferred even though no words referring to a 'trust' appear at all. In Coetzee NO v Universiteit Stellenbosch the testator had after the happening of certain events willed 'the yearly yield' of a capital sum 'as a bursary for the best student in physiology at the University of Stellenbosch'. The residual heir sought the nullification of this bequest on the ground of vagueness, pointing out that no trustee had been appointed or named. The court upheld the bequest as a peculiar form of trust, observing that ' [t] he testator is entitled to rely on the machinery of the law, which exists precisely to remedy such an omission.

One important group of cases arises from the use of words such as wish or 'desire' (precatory words). These words may be imperative, since a testator sometimes wants to impose an obligation without using peremptory language. But not everything in a Will need be intended to have legal effect. For instance, a testator may tell his children to make their mother's example their ideal of conduct throughout life without intending to disinherit them if they do not.

There are two possible approaches to such problems of interpretation, whether of Wills or Trust instruments concluded between living persons. They were delineated by Schreiner JA as follows: interpretation 'usually proceeds on the lines that what must be ascertained is what the words mean as used by the testator, or what the testator meant by using the words. Which form of expression is selected depends perhaps on whether the interpreter is disposed in relation to the will under consideration to adhere closely to the ordinary meaning of individual words and phrases or is inclined to look rather at the general scope of the Will and the circumstances which the testator may be taken to have had in mind when he executed it. The first approach would usually lead to the conclusion that precatory words do not create a trust. The second approach, which on the whole the South African courts have followed, is preferable. Precatory words may or may not create a trust according to the circumstances.

Bibliography
As Extracted from Honorés South African Law of Trusts