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Secret trusts: troublesome relic or helpful tool?

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What are secret trusts?

- A secret trust arises when X dies leaving property to Y, but Y has undertaken that he will hold the property on trust for Z.
- Two kinds of secret trust:
 - Fully secret: (will or intestacy) no reference to the trust on the face of the will.
 - Half or semi-secret trust: will refers on its face to the trust's existence, but does not indicate its terms or the beneficiaries identity e.g. property is left *"to Y on the trusts which he knows about"*.
- Enforceable notwithstanding failure to comply with the formal requirements contained in the Wills Act 1837.

Justification for enforcing secret trusts

- Fully secret trusts were upheld from late 17th century (e.g. *Thynn v Thynn* (1684) 1 Vern 296). Half-secret from *Blackwell v Blackwell* [1929] AC 318
- Theories:
 - Original justification was pursuant to the maxim that equity will not allow a statute to be used as an instrument of fraud: *McCormick v Grogan*
 - Secret trusts operate outside (*dehors*) the Will? (*Lewin, Snell's Equity*)
 - Secret trusts operate “outside the Wills Act”?

Basic elements required to establish a secret trust

- An intention by the testator to create a trust
- The communication of the trust to the intended trustee
- Acceptance of the trust by the intended trustee, either expressly or by implication
- Compliance with the three certainties

Half-secret trust: additional factors?

- Must be communicated to and accepted by the trustee before, or when, the will is made – not any time up to the settlor's death as with a fully secret trust
- Communication of the trust must be consistent with the will's description of it
- *Re Keen* [1937] Ch. 316

***Re Freud, Rawstron v Freud* [2014] EWHC 2577 (Ch)**

- £42 million residuary estate – Lucian Freud
- Paragraph 6 of the will gave the residue of the estate to the claimants (who were the executors and solicitor and one of his daughter) jointly.
- Previous will had created a half secret trust
- As a matter of construction, question as to whether a secret trust was created on the face of the Will. Cs accepted it was held on half secret trust. D, Deceased's son, said fully secret trust.
- If fully secret it was valid. If a half-secret trust, then only enforceable if T had told the beneficiaries about the trust before or when he executed the will.,
- If half-secret, then the clause could be held invalid, and residue would be distributed under the intestacy rules.

Proving a secret trust

- Burden of proof is on the party alleging the secret trust.
- In the absence of fraud or special circumstances, the standard is the balance of probabilities (*Re Snowden* [1979] Ch. 528)
- But arguable that a donee who receives property subject to a trust and then claims it for himself could be said to be acting fraudulently.

Proving intention in fully-secret trusts

- Has testator intended the sanction for non-compliance wishes to be the authority of the court, or simply the conscience of the donee?
- *“the more uncertain the terms of the obligation, the more likely it is to be a moral obligation rather than a trust: many a moral obligation is far too definite to be enforceable as a trust”*: *Re Snowden*
- Changing mind? Needs settled intention: *Kasperbauer v Griffith* [2000]
WTLR

***Titcombe v Ison* [2021] WTLR 1101**

- Claim by T's niece for a secret trust over a collection of jewellery which had been valued at approx. £150,000 - £200,000.
- Alternative plea of proprietary estoppel
- Party alleging existence of the secret must plead with specificity the date on which the secret trust is said to have been created, by words, in writing or otherwise.

***Mattingley v Bugeja* [2021] EWHC 3353 (Ch)**

- Anabel, the Deceased's daughter, alleged that Karen, the Deceased sister, had agreed and promised that on the Deceased's death, D would hold a 26.625% interest in the Property on trust for C.
- D denied that any such agreement or promise was made.
- Judge considered on the evidence no secret trust existed.
Deceased merely trusted Karen to ensure that Anabel was provided for.

What happens if the secret trustee dies before the testator?

- Usually:
 - If gift is beneficial, and Y predeceases, the gift lapses.
 - If gift is left on express trust, the trust does not fail because “equity will not allow a trust to fail for want of a trustee” and a trustee will be appointed in deceased trustee’s place.
- Secret trust?
 - *Re Maddock* [1902] 2 Ch. 220: fully secret trust gift fails, half-secret trust gift would survive, but no authority

Trustee witnesses Will?

s. 15 Wills Act 1837 states that any beneficial devise, legacy or gift by will to an attesting witness or to the husband or wife of a witness shall be “utterly null and void”

- *Re Young* [1951] Ch. 344 where a **beneficiary** under a half-secret trust attests a will he will not forfeit his interest because his rights are derived not from the will but from the trust.
- A non-secret trustee witnessing a will does not void the gift.
- Half secret trust does not void the gift (*Lewin* citing *Cresswell v Cresswell* (1868) LR 6 Eq 69)
- Fully-secret trust?

Do secret trusts have a future?

- Survey published in 2003 in Conveyancer and Property Lawyer indicated that of a survey of 86 respondent solicitors specialising in wills and probate:
 - 35% of respondents had a client who had asked them about making a secret testamentary behest
 - 16% had been involved in the creation of fully secret trusts
 - 20% had been involved in the creation of semi-secret trusts

Need for secret gifts?

- 77% of respondents thought there might be circumstances in which a client may wish to make a secret gift
- Diverse variety of circumstances in which a secret bequest may be necessary, or at least desirable:
 - Making gifts to people not approved of by the surviving family e.g, benefit a mistress or illegitimate child
 - Less likely for gift to secret beneficiary to be challenged?
 - Conceal the nature and extent of trustees' powers from beneficiaries
 - Avoidance of loss of state benefits?!
 - Secret trust to avoid inheritance tax - *Kasperbauer v Griffith* [2000] WTLR 333 – can primary donee give effect to T's intention without making a transfer for value for IHT purposes and without complying with the time limits and other constraints of IHTA 1984 ss. 142 and 143?

Solutions?

- General need for a tool capable of effecting secret behests
- If a testator does wish to create a secret trust a practitioner should preserve evidence of:
 - The beneficial interests to arise under it
 - Compliance with the conditions for such trusts
- *Re Rees Will Trust*: Evershed MR commented that in the general public interest it is desirable that if a testator wishes their property to go to their solicitor and the solicitor prepares the Will, that intention should be plainly expressed in the Will, and should not be arrived at by the more oblique method of a secret trust.
- Discretionary trust with private letter of wishes?

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Thank you.
Any questions, please email
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