SECRET TRUSTS – A SHORT PRACTICAL GUIDE

1. This is a short guide to secret trusts.
2. A secret trust is trust of assets left by will where either the beneficial interests are undisclosed in the will or both the beneficial interests and the existence of the trust are undisclosed by the will. The first of these situations is commonly called a half-secret trust; the second a fully secret, or simply a secret, trust.

**Historical Background**

1. The secret trust has its origins in the differing social and legal conditions of the 18th and 19th Century. This is worth bearing in mind when considering some of the older cases.
2. For example, from 1736 to 1891 testamentary (and in some cases *inter vivos*) trusts of land or including land for charity were void – subject to some exceptions. This led to the situation (removed from modern practice) of heirs-at-law arguing for the existence of a secret trust that would be void (leading to them taking on intestacy), while the alleged secret trustees denied the existence of the trust not in order really to take the assets for themselves but in fact to carry out the charitable wishes of the testator as a matter of honour: *Wallgrave v Tebbs* (1855) 2 K & J 313. In *Rowbotham v Dunnett* the beneficiary in the will was the solicitor who had previously advised that a trust for charitable purposes would be void. It was successfully argued that there was no secret trust. This is a rather surprising result but can perhaps be explained by the wish to avoid where possible the finding of an illegal trust.
3. So far as social origins go, secret trusts enabled testators to provide for persons after their death in a manner that – they would have hoped – would not become known. While this may seem a very C19th preoccupation, it still exists today: see *Re Freud* where the painter Lucian Freud left his estate to a child and his solicitor on secret trusts presumably for his large and complicated family – we do not know.

**Legal rational**

1. While it is clear that a secret trust is a creature of equity, a more precise analysis of its legal basis is difficult (and a full account is not given here). One view is that a secret trust arises to prevent fraud by the (apparent) donee. The Court of Appeal have, relatively recently, taken this approach and further considered such trusts as a type of constructive trust.[[1]](#footnote-1) While this may be true in many cases, fraud by the donee is not a pre-requisite of a secret trust. Another view is that a secret trust is an express trust which takes effect *dehors* – that is separate from – the will. The only function of the will is to vest the property in the donee. In such a case the secret trust appears to be an express trust.
2. Does any of this really matter, when the existence of half-secret and secret trusts is not in doubt? Possibly. The issue is the extent to which secret trusts must comply with the formalities of s. 53(1) of the LPA 1925. At first sight there is no reason why secret trusts should be exempt, if there are express trusts. If they are constructive trusts, however, then s. 53(2) would apply and writing in respect of land and equitable interests would not be required.
3. The authorities on this point are a little unsatisfactory:
   1. There can be a half secret trust of land without the terms of the trust being in writing: *Re Baillie* (1886) 2 TLR 660.
   2. A fully secret trust of land was held to exist in *Ottaway v Norman* [1972] Ch 698 – but in that case the lack of formality was not argued.
   3. Very recently in *Re Mattingley* [2021] EWHC 3353 the point was not taken in respect of a claim to an interest in a property in Kent under a secret trust (the claim failed for lack of intention to create a trust, *inter alia*).
4. Lack of compliance with s. 53(1) of the LPA 1925 is thus a point that could be taken in litigation involving a secret trust. But the answer to it is that the LPA 1925 itself cannot be used as an instrument of fraud in order to defeat an otherwise proven express trust (compare *Rochfoucaild v Boustead* [1898] 1 Ch 196 for an express trust which failed to comply with the Statute of Frauds).

**Requirements**

1. A secret trust must:
   1. Be intended – in that the settlor must intend to create a trust binding the donee and not merely some moral obligation
   2. Be communicated to the donee; and
   3. Be accepted by the donee.
2. In the case of a half secret trust the communication must occur not later than the date of the will and in accordance with any requirements in the will.

**Intention**

1. There is a helpful and reasonably recent summary of the law in *Kasperbaur v Griffith* [2000] WTLR 333. The key point is that the ‘three certainties’ must be found. That is there must be certainty of (a) intention; (b) subject matter and (c) objects.

**Communication**

1. There are three issues here: (a) when; (b) what and (c) to whom.
2. Timing of communication is straightforward for fully secret trusts – it must occur before death. For half secret trusts the communication must be not later than the will: *Blackwell v Blackwell* [1929] AC 318.
3. The things to be communicated are (i) the existence of the trust and (ii) its terms. If (in the case of a secret trust) only the existence of a trust is communicated, then the donee will still take on trust but for the residuary beneficiaries.[[2]](#footnote-2) It is enough in theory for the terms of the trust to be contained in a sealed envelope to be opened on death: *Re Keen* [1937] Ch 236.
4. Communication is particularly complicated in the case of half-secret trusts. Communications of the terms of the trust at the time of or before the will in an envelope to be opened on death is sufficient: *Re Keen* [1937] Ch 236. But creative attempts of this sort are risky and may well fail where the communication is not itself strictly in accordance with the terms of the will: e.g. *Re Spence* [1949] WN 237 and nb. the trust in *Re Keen* itself failed. The issue in the authorities is that the court have been (entirely understandably) unwilling to permit testators to avoid the requirements of the Wills Act 1837 by creating trusts which they reserve a right to vary by a non-testamentary document postdating the will.
5. The communication must be to the trustee. Difficulties arise where there are more than one donee and the state of the authorities here is not satisfactory as noted in Re Stead [1900] 1 Ch. 237. There is a distinction between donees who are tenants in common and donees who are joint tenants. Tenants in common – as might be expected – are bound by the trust or not in respect of their shares depending on whether they actually knew of the trust. With joint tenants it appears to be the case that it depends whether the testator communicated the trust to one joint tenant before or after the will.

**Acceptance**

1. Acceptance need not be in writing and it can be tacit. Tacit acceptance is readily inferred in the absence of protest: *Moss v Cooper* (1861) 1 John & H. 352 (a successful claim brought alleging a void secret trust of a type noted above) But it must occur during the lifetime of the testator.

**Some general observations**

1. It is perhaps helpful to think about two types of secret trust cases. The first is where it is clear that the testator intended with some formality to create a trust. This obviously applies to half secret trusts. But may well apply to fully secret trusts – see *Re Freud*. In such a case the issues are likely to concern communication and acceptance and the terms of the trust.
2. But a deliberately created secret trust may be a fairly rare thing: for many testators a discretionary trust (potentially including a power to add beneficiaries) coupled with a letter of wishes may well offer the required level of privacy and flexibility without may of the technicalities of half secret and secret trusts – although of course such arrangements have their own possible risks and difficulties.
3. The second class of case is where the existence of the trust itself is in issue and it is alleged that the testator created the trust though a series of more or less informal statements and/or conversations with the alleged trustees. Most of the recent cases (eg. *Re Snowdon* [1979] Ch 528; *Kasperbaur v Griffith* [2000] WTLR 333; *Re Margulies* (2000) [2008] WTLR 1853; *Titcombe v Ison* [2021] WTLR 1101; *Re Mattingley* [2021] EWHC 3353) are of this sort.
4. In such a case the most important issue is likely to be whether the testator really intended to create a trust enforceable by action in Court.
5. Whether such an intention existed (or perhaps more realistically) whether such an intention can now be proved at trial will depend on all the facts but the follow suggestions may assist in evaluating a case:
   1. Intention is to some extent interlinked with certainty of subject matter. If the subject matter of the trust is unclear that may well weigh against the testator having the necessary intention to create a trust: ; *Re Mattingley* [2021] EWHC 3353 at [122];
   2. If the testator had the benefit of legal advice (and in particular if the will was professionally drafted) it may well be important to ask whether there was any reason for secrecy. If no such reason can be identified that points against the existence of a trust: *Re Margulies* (2000) [2008] WTLR 1853
   3. Is there any other evidence of a trust: if there is – what is its real probative value. For example in *Titcombe v Ison* the defendant had described himself in other proceedings as a ‘custodian’ of the property said to be held on trust but this was not, in the circumstances, enough to establish a trust.
   4. The ultimate question is whether the testator intended to impose a legally binding obligation or simply a morally binding one: *McCormick v. Grogan* (1867) 1 I.R. Eq. 313.
   5. The most natural analysis of most informal family arrangements is that the testator will not have intended to create a trust. In all of the cases named above in paragraph 21 the claim failed.
   6. But there are always exceptions: *Ottaway v. Norman* [1972] Ch. 698 – a case in which there appears to have been particularly strong evidence of the testator’s informally expressed intentions regarding the property in question.

1. *De Bruyne v De Bruyne* [2010] EWCA Civ 519 – although that case was not a secret trust case. [↑](#footnote-ref-1)
2. *Re Boyes* (1884) 26 Ch.D 531 [↑](#footnote-ref-2)