

CHAPTER FIVE

Types of Trust: Secret Trusts

Introduction

“Where a person either expressly promises, or by his silence implies, that he will carry out the testator’s intentions into effect, and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust” (per Lord Wood V.C.).¹

[5:01] The secret trust evolved as a response to the Wills Act 1837, which was the precursor of the Succession Act 1965, and its precursor, the Statute of Frauds 1695. These Acts imposed certain formal requirements for the creation of a valid will.

[5:02] All valid wills must be:

- (1) executed in writing;
- (2) signed by the testator or some other person in his presence or by his direction; and
- (3) the signature must be attested by two witnesses at the same time and in the presence of the testator.

[5:03] The function of the secret trust is to keep the identity of the object or beneficiaries under the trust a secret. A will is a public document. A testator may wish to make provision for a mistress, non-marital child, etc, to ensure they are provided for after his death. However, on death, the will is submitted to the public Probate Office. If the Probate Office deems the will to be valid, it will then be “admitted to probate”. At this point, it can be inspected by any member of the public at the Probate Registry Office.

[5:04] The secret trust attempts to keep the object of the trust from the eyes of the world and the other beneficiaries. The usual method is to leave property to a friend under the will, having extracted a promise from him that he will hold the property for the benefit of the secret beneficiary. The person who, on the face of the will receives the property is called the secret trustee (in fully secret trusts, he is termed the “ostensible beneficiary”). The person who is to receive the benefit under the trust is called the true beneficiary.

[5:05] Problems arise when the secret trustee, that is, the person receiving the gift on the face of the will seeks to take the property given to him under the trust beneficially by arguing non-compliance with the terms of the Succession Act 1965. A court, when faced with this situation may abide by the Act and allow the secret trustee to take the property beneficially. Alternatively, it may force the secret trustee to hold the property on resulting trust for the testator’s estate. Finally, the court may decide to give full effect to the testator’s wishes and enforce the secret trust, notwithstanding the terms of the Succession Act. This final alternative is adopted when courts recognise the existence of a secret trust.

¹ *McCormick v. Grogan*, 1868.

Requirements for a Valid Secret Trust

[5:06] There are two types of secret trusts, the fully secret trust and the half secret trust. In a fully secret trust, the donee (legatee) appears, from the face of the will, to be taking the property beneficially under the will. There is no indication that a trust obligation has been imposed on him, for example a bequest of £100,000 “to John”. In a half secret trust, it is clear from the face of the will that the donee has received the property on trust. However, the object of the trust is not revealed on the face of the will. In a half secret trust, one might have a bequest of “£100,000 to John to hold for such persons as I have communicated to him”.

[5:07] Although there are no cases directly on this point, the doctrine of the secret trust is thought to be not limited to testate succession. It is similarly relevant to cases of intestacy where the deceased had refrained from making a will on the strength of a promise by a kinsman (who would receive the property under the intestate succession rules) that he would apply it for the benefit of a third party. In this situation, a secret trust may bind such person, and equity will force them to hold the property in question as trustee for the benefit of the intended beneficiary.

[5:08] In *McCormick v. Grogan*² (1869), Lord Westbury stated that:

“The courts of equity have from an early period decided that an Act of Parliament shall not be used as an instrument for fraud and if in the machinery of the attempted fraud an Act of Parliament intervenes, the courts of equity, it is true, do not set aside the Act but equity fastens on the individual who gets a title under that Act and imposes on him personal obligations to prevent an application of the Act as an instrument for accomplishing a fraud. In this way the court of equity has dealt with the Statute of Frauds, and in this manner also it deals with the Wills Act”.

[5:09] In *McCormick*, the donor, on his death bed, sent for Grogan and told him of a letter containing his will. The testator did not expressly ask Grogan to comply with the letter in question. The letter named certain named beneficiaries but also provided:

“I do not wish you to act strictly to the forgoing sections but leave it entirely in your good judgement to do with as you think I would if living and if the parties are deserving”.

[5:10] The House of Lords held that the testator had not intended to impose a trust obligation on Grogan. McCormick was named beneficiary in the letter but received nothing. He sued Grogan, but his action failed since there was no legally binding obligation on Grogan to hold any property for McCormick’s benefit; McCormick was not a secret beneficiary.

[5:11] Lord Westbury noted three requirements for the creation of valid secret trusts;

- (1) There must be an intention to create a trust.³
- (2) There must be communication of the donor’s intention to create a trust to the donee, during the lifetime of the donor (this rule is modified for half secret trusts in English law).
- (3) There must be acceptance by the legatee/secret trustee of the trust obligation.⁴

Intention and Communication

[5:12] In *Walgrave v. Tebbs*⁵ (1855), the testator left £12,000 and certain lands to two persons apparently beneficially as joint tenants. Shortly before his death, he asked the executor to write

² (1869) 17 WR 961.

³ One of the three certainties.

⁴ *McCormick v. Grogan*.

⁵ [1855] 25 L.J.Ch 241 .

to the donees telling them of the objects to which the trust fund was to be applied. The executor wrote the letter but never sent it. It was held that the donees were entitled to the property beneficially on the testator's death because the secret trust obligation was not communicated to them.

[5:13] If some of the terms are not communicated to the donee, or are communicated after the death of the testator, then the trust will fail. In *Re Boyes*⁶ (1884), the testator made a will leaving his estate to his solicitor who was the executor of his estate. The solicitor had drawn up the will and gave oral evidence that the testator had intended him to hold the property as trustee for objects to be subsequently indicated to him. The testator never indicated to him these objects during his lifetime, but after his death, a letter from the testator, addressed to his solicitor but never handed to him, was found in the testator's bureau. It indicated the objects which were to benefit under the secret trust. The solicitor accepted that he held the property as a secret trustee and wished to carry out its terms. Kay J. held that, in order for there to be a valid fully secret trust, the terms must be communicated to the trustee in the testator's lifetime, and the trustee must accept the trust. It was held that there was a resulting trust in favour of the testator's next of kin. The fully secret trust could not be enforced. However, the learned trial judge did go on to state that:

"It may possibly be that the legatee would be bound if the trust was put in writing and placed in his hands in a sealed envelope, and he had engaged that he would hold the property given to him by the will upon the trust so declared although he did not know the actual terms of the trust".

[5:14] So, in *Re Keen's Estate*⁷ (1937), £10,000 was left to A and B to be held on trust and to be disposed of by them " ...among such persons or charities as may be notified by me to them or either of them during my lifetime". Before making his will, the testator handed a sealed envelope to B indicating that it not be opened until after his death. When the testator died, the envelope was opened and a woman's name was found within. On the facts, this was found to be an invalid attempt to create a half secret trust. Purporting as it did to reserve to the testator the power to make future testamentary dispositions, this part of the will was inconsistent with s. 9 of the Wills Act. Significantly though, Lord Wright M.R. considered that regardless of this fact, the trust failed for inconsistency. The phrasing of the will indicated an intent to define the remit of the trust at a future date, and yet ostensibly the details of this trust had been communicated to and accepted by the trustees already, when the sealed envelope was handed over.

Acceptance of the Secret Trust Obligation by the Donee

[5:15] If the donee does not accept the trust obligation, he will hold the property on resulting trust for the testator's estate. There can be no question of the donees taking beneficially once they have been aware of the existence of the trust. Acceptance for the trust obligation can be implied. In *Ottaway v. Norman*⁸ (1971), the testator left his bungalow and its contents to his housekeeper. He mentioned to one of his sons in her presence that he intended the house to be hers for her life and after her death, it was to pass to his sons. The housekeeper later received the property under her late employer's will. She, in turn, made a will leaving the house to the sons. However, she later changed her will and purported to leave the property to a friend. It was held that the house was the subject of a secret trust. There was strong evidence that the housekeeper understood and implicitly accepted the trust obligation at all times.

⁶ (1884) 32 WR 630. Also *Re Hawksleys Settlement* [1934] 103 L.J.Ch.259.

⁷ [1937] 1 All ER 452.

⁸ [1971] 3 All ER 1325.

[5:16] If the testator wishes to make any addition to the trust property, again, he must comply with the three requirements set out above. In *Re Colin Cooper*⁹ (1939), the testator made a will leaving £5,000 on secret trust to two persons jointly. Communication was made to both at the time the will was made. The legacy was then increased by a further £5,000 and a term was included in the will which provided: "They, knowing my wishes, regarding that sum ...". However, no mention of the increase was ever made to the donees during the testator's lifetime. The Court of Appeal held there was a valid secret trust of the first £5,000, but not of the second. The court reiterated that all the terms of the trust must be communicated to, and accepted by, the donees.

[5:17] It is submitted that a decrease in the trust fund does not require further communication to, or acceptance by, the donees. A will is ambulatory, ie it can be changed at any time up to the testator's death, therefore no one has any vested rights under a will until the testator dies, when his last will becomes effective.

[5:18] Problems have arisen, on admittedly rare occasions, when multiple trustees are appointed, but one or more of them has not received communication about or accepted the secret trust obligation. A (somewhat unconvincing) distinction is said to exist between trustees who hold as joint tenants and those who hold the trust property as tenants in common (the rule in *Re Stead*)¹⁰ (1903).

- (1) Where property is transferred to trustees as tenants in common, the secret trust will only bind those donees who have received communication of, and accepted the trust obligation. The others will take beneficially if they do not have notice of the trust.
- (2) Where property is transferred to trustees as joint tenants:
 - (a) the trust obligation will bind only the "accepting" trustee if the will was made before his acceptance, the other donee will be permitted to take beneficially;
 - (b) the trust obligation will bind both if the settlor/testator made his will after the "accepting" trustee's acceptance.

Holmes L.J. said;

"I think it is settled that where a gift is given to two persons as joint tenants, a secret trust imparted to one of them will affect the whole gift; but that this arises from the peculiar nature of the joint estate is shown by repeated decisions that this rule does not apply to tenants in common".

[5:19] It may be noted that this distinction was criticised by Walker L.J. in *Geddis v. Semple*¹¹ (1903).

⁹ [1939] 3 All ER 586. Here the testator made a will leaving £5,000 to two persons jointly. The secret trust was communicated to both of them before the will was made. Lord Greene M.R.: "In order that a secret trust be made effective with regard to that added sum ...the same factors are necessary to validate, namely communication, acceptance and the making of a will on the faith of such acceptance."

¹⁰ In *Re Stead* [1903] 1 IR 73, a House of Lords decision on an appeal from the Irish Court of Appeal, Farwell J. said: "If A induces B either to make, or to leave unrevoked a will leaving property to A and C as tenants in common by expressly promising or tacitly consenting that A and C will carry out the testator's wishes and C knows nothing of the matter until after B's death, A is bound but C is not [he cites *Tee v. Ferris* in support of this]. ... The reason stated there was that to hold otherwise would enable one beneficiary to deprive the rest of their benefit by setting up a secret trust. If however the gift was to A and C as joint tenants, the authorities have established a distinction between those cases: in which the will is made on the faith of an antecedent promise by A and, those in which the will is left unrevoked on the faith of a subsequent promise. In the former case the trust is deemed to bind both A and C because no person can claim an interest under a fraud committed by another. In the latter case, A, but not C, is bound". The reason for this is that the gift to the non accepting donee is not tainted by any fraud in procuring the execution of the will.

¹¹ Walker L.J. emphasised that the tenant in common who was not told of the secret trust could only take free from it if the gift to him could be treated as an independent one, and that he would have got it regardless of the undertaking given by the other tenant in common (following *Huquenin v. Baseley* (1807)).

[5:20] As noted earlier, a further distinction is made between tenants in common who know of the trust, but haven't accepted trust obligation, and those who know nothing at all about the trust. If the donee tenant in common knew of the trust, or agreed to be trustee before the testator's death, then a resulting trust will arise on the failure of the secret trust. If the donee knew nothing of the trust, he will take absolutely.

Half Secret Trusts

[5:21] A half secret trust arises where there has been a testamentary disposition of property, yet it is clear from the terms of the will that the donee is to take as a trustee and not beneficially. Due to their very nature, the scope for breaches of trust is considerably reduced in half secret trusts. In *Blackwell v. Blackwell*¹² (1929), the testator left a sum of money to certain persons who were to hold it for the purposes "indicated by me to them". One of the legatees was informed in detail. The others were informed in outline before the execution of the will. The legatee who was informed in detail wrote out a memorandum of instructions on the same day. The objects of the secret trusts were to be his mistress and their son. Following his death, his wife sought to have the trust declared invalid. It was held that a valid half secret trust had been created. However Viscount Sumner noted, obiter, that the requirement for communication of the trust obligation in half secret trusts is stricter than for fully secret trusts (under English law). In half secret trusts, the communication of the trust obligation must take place before or at the time the will was made. There is much academic comment declaring this distinction to be illogical. The only possible justification for it is that the whole *raison d'être* for recognising secret trusts (which contravene the Wills Act/Succession Act) is to prevent fraud. The possibility of fraud is drastically curtailed when the trust is half secret, therefore "the historical justification for non-compliance with the statutory formalities [is removed]" (Delany).¹³

[5:22] In the Irish case of *Riordan v. Banon*¹⁴ (1876), however, Chatterton V.C. adopted a different test to that utilised in *Blackwell v. Blackwell*. While acknowledging that "the same kind of fraud cannot operate" in relation to half secret trusts, nonetheless a refusal to enforce such trusts would be a fraud on the intentions of the settlor. To be valid (in this jurisdiction) a half secret trust, like a fully secret trust, must be communicated to and accepted by the legatee prior to the testator's death. In *Riordan v. Banon*, the testator's will directed that a legacy be disposed by the legatee "in a manner of which he alone should be cognizant, and as contained in a memorandum which I shall leave with him". Prior to executing his will, the testator had verbally informed the legatee that he intended to leave the legacy for a named person whom he did not wish to identify in his will, and it was accepted that the legatee had accepted this obligation. Chatterton V.C. held that a valid secret trust had been created. Further confirmation that communication and acceptance of a half secret trust may validly occur after execution of a testator's will provided this is done during his lifetime can be found in the judgment of Overend J. in *Re Browne*¹⁵ (1944), a 1944 decision.

[5:23] In *Prendiville v. Prendiville*¹⁶ (1990), the High Court (Barron J.) reasserted the *Riordan* authority, holding a half secret trust valid where there had been communication by the testator and acceptance by his wife of its terms during his lifetime. He refused to follow the earlier English decisions in *Blackwell* and *Re Keen*.

¹² [1929] AC 318. See Viscount Sumner's speech on this point.

¹³ Equity and the Law of Trusts in Ireland, at p.92.

¹⁴ (1876) IR 10Eq 469.

¹⁵ [1944] IR 90.

¹⁶ December 5, 1990.

Extract: Delany on the Prendiville Decision

[5:24] The opportunity to possibly resolve this question once and for all in an Irish context was presented to the High Court in the case of *Prendiville v. Prendiville*. There, the testator left his estate to his wife for life ‘to be used by her according to my wishes-as she has been advised’. Before he died the testator had told one of his sons that he had written out his wishes as to the passing of his estate after his wife’s death and had shown him a document containing these instructions which included the provision that a named residence and lands were to be offered for sale to another son at a reasonable valuation. Following the testator’s death, his wife made a statutory declaration acknowledging that her husband’s instructions had been communicated to and accepted by her. After her death a dispute arose between the next of kin of the testator and the son in whose favour the option to purchase had been made as to whether an enforceable secret or half secret trust existed. Barron J said that *Re Keen*¹⁷ (1937) had been relied on as an authority for the proposition that a half secret trust could not be established unless its terms were communicated and accepted prior to the execution of the will. He felt that this proposition could not be taken from that case, which, in his opinion, turned on the construction of the particular clause in the will and the issue of inconsistency. Barron J concluded that the principles of law to be applied to secret and half secret trusts are the same and were those as set by Monroe J in *Re King’s Estate*¹⁸ (1888). He held that in the case before him, a trust existed on the face of the will and found there was sufficient evidence that the terms of the trust in relation to the option to purchase the house had been communicated by the testator to his wife and accepted by her during his lifetime.

[5:25] Although this judgment would appear to confirm the correctness of the obiter views on the timing of communication and acceptance of a half secret trust obligation referred to above, *Prendiville* is not an entirely satisfactory authority for a number of reasons. Barron J failed to identify precisely the time at which communication and acceptance of the trust occurred although he did hold that this had taken place at some stage during the testator’s lifetime.

[5:26] The use of the words ‘as she has been advised’ would suggest that such communication was intended to take place either before or at the time of execution of the will and yet one must ask why Barron J took the trouble to refute the suggestion that *Re Keen* was authority for the proposition that communication must occur prior to the will, unless on the facts of the case before him, communication did not take place until after its execution. Because of his failure to be more specific about the timing of these events, it is therefore still not clear whether Barron J.’s rejection of the need for prior communication forms part of the ratio of the case’.

[5:27] In Australia, the distinction between half and fully secret trusts, with regard to communication in the case of the former, has been abolished.

[5:28] The Rule in *Re Stead* and *Half-Secret Trusts*.

Where a half-secret trust is created, the intended trustees will usually hold as joint-tenants, since it is clear from the face of the will that they are not intended to take beneficially, and the law prefers the joint tenancy.

In a half-secret trust, the consequence of failure to communicate the trust obligation to all intended trustees will depend on the wording used by the testator in his will. Where the testator’s words indicate that he intended to communicate the trust obligation to each intended secret trustee (e.g. ‘to be held on such terms as I have made known *to them*’), then failure to do

¹⁷ [1937] Ch 236.

¹⁸ (1888) 21 LR Ir 273.

so will cause a resulting trust to arise over the share held by those who did receive communication, and a gift in favour of those who didn't.

On the other hand, if the words used by the testator make it clear that he envisages communication to some, rather than all of the intended secret trustees (e.g. 'to be held on such terms as I have made known to any one or more of them') then failure to communicate to some will invoke the Rule in *Re Stead*. As a result, if the communication which did occur pre-dated the making of the will, all joint tenants will be bound (probably based on the theory of inducement), if it occurred afterwards, then only those who received communication will be bound. So long as the other intended trustees knew nothing of the trust obligation, they will take beneficially.

[5:29] Inducement has been relied on to justify the Rule in *Re Stead*, in other words, when the will is made subsequent to the communication and acceptance by some, but not all, of the intended secret trustees, the testator will be deemed to have been induced into doing as he did by the agreement of those accepting secret trustees. Breen notes that a theory of inducement "was developed by Perrins (1972) 88 LQR 225 who has suggested that the only question to which the court should address itself in such circumstances is whether the gift to the legatee who was unaware of the testator's intention to create a secret trust was induced by the promise of the legatee who knew of his intentions in this regard to carry out his wishes. If this approach is accepted, issues such as whether the legatees take as joint tenants or tenants in common and whether the promise was made prior to or after the execution of the will are merely matters of evidence which may be of assistance to the court in deciding on the question of inducement but will not of themselves determine the issue - although clearly if there is a promise made before the will an inducement is likely." Consequently, Perrins' approach goes significantly further than Irish law on this particular point.

On the question of onus of proof, Breen suggests that "the onus lies on the person seeking to show the existence of a secret trust to establish this on the balance of probabilities. While earlier authorities suggested that a higher standard of proof would be required, it was established in *Re Snowden* (1979) that the ordinary civil standard of proof applies. In this case, Megarry VC suggested *obiter* that this standard might be higher if any question of fraud arose, although in *Banco Ambrosiano v. Ansbacher & Co* (1987) the Supreme Court rejected the suggestion that any higher burden of proof should be placed on a plaintiff where an allegation of fraud is made in a civil case."

Recent Decisions from Other Jurisdictions

Glasspool v. Everett (1998), 53 B.C.L.R. (3d) 371 (S.C.), *aff'd* 1999 BCCA 31, is a Canadian decision in which a son successfully claimed a beneficial interest in certain mineral rights in circumstances where his grandmother originally gifted the rights to her son, the plaintiff's father (Lawrence Glasspool), in return for the latter's promise to transfer them to the plaintiff son on his death. Instead, the father left the property to his companion (Pansy Everett) in his will.

Chinn v. Hanrieder (2009) BCSC 635, another Canadian case, is slightly unusual in that the alleged secret trustee (the widow) did not hold the property in question pursuant to a disposition by the alleged settlor (Hugo Hanrieder). Once again, the property involved concerned mineral rights, but in this case they were settled on trust in the first instance by the alleged settlor's mother. Under the settlement, the property passed to his spouse on his death. He told each of his children in his wife's presence of his intention that they, his children, would receive the mineral rights on his death. His wife replied "I have no interest in them. I have money of my own." She later has a change of heart and claimed the property. The children successfully claimed the existence of a secret trust in their favour.

In *the Estate of Lucien Freud* (2014), the High Court (UK) upheld a fully secret trust created by the testator in respect of a large part (£42 million) of his £96 million estate. The testator, who was obsessively secretive, had at least 14 children, one of whom was the claimant, and none of whom were provided for under his will.

Special Problems Which May Arise in Connection with Secret Trusts

Where a Beneficiary Attests the Will

[5:30] Can a (true) beneficiary under a secret trust validly attest the will? Under s.8 of the Succession Act 1965 (previously s.15 of the Wills Act 1837), a beneficiary (legatee) cannot attest the will. In *Re Young*¹⁹ (1951), a testator left his estate to his widow; “leaving such legacies as she knows I wish to be made”. Before his death, he directed his wife to give his chauffeur £2,000. However the chauffeur had attested the will. Nevertheless, Danckwert L.J. upheld the secret trust on the basis that: “[T]he whole theory of the formation of a secret trust is that the Wills Act has nothing to do with the matter because the forms required by that act are entirely disregarded”. *Re Young* is authority for the proposition that a secret trust takes place *dehors* the will.

[5:31] In the Irish case *O’Brien v. Condon*²⁰ (1905), it was held that a witness to a will was not precluded from benefiting from a secret trust on the grounds that “what she takes under the trust is something not under the will, but solely by virtue of the secret trust, not disclosed on the will”. This is further authority for the *dehors* the will theory.

Where the Legatee Attests the Will

[5:32] Can a legatee to a secret trust attest the will? There is no case directly on this point, but, applying first principles, Underhill and Hayton are of the opinion that such secret trusts should fail. However, the rule in this regard could operate independently as between fully secret and half secret trusts, as in a half secret trust it is clear that the legatee does not take beneficially. Therefore there is no question of him taking a beneficial interest in the trust property. There is Canadian authority for this proposition in *Re Armstrong*²¹ (1893). Here a half secret trust was upheld where the legatee attested the will.

Where a Beneficiary Predeceases the Testator

[5:33] What happens if the secret beneficiary predeceases the testator? Under the Succession Act 1965, a beneficiary must survive the testator to benefit under the will. The rationale here is that the will is ambulatory. However, it was held in *Re Gardner*²² (1923) that the beneficiary receives his interest as soon as the will is made and the trust created rather than when the testator dies. This decision although not expressly overruled is of dubious standing. Underhill and Hayton comment that it is very difficult to understand Roemer J.’s decision since no complete constitution of the trust could have arisen until after the testator has died without having revoked the will or becoming insolvent.

¹⁹ [1951] 2 All ER 1245.

²⁰ [1905] 1 IR 51.

²¹ (1893) 31 IR 154.

²² [1923] 92 L.J.Ch.569. The testatrix left all her estate to her husband “knowing that he will carry out my wishes”. The wishes were that at the husband’s death the property was to be divided among three named persons. The husband died five days after the testatrix and it was then discovered that one of the named beneficiaries had died before the testatrix. The question arose whether the beneficiary’s share had lapsed. Roemer J. held that as the beneficiary’s share arose under the trust and not under the will, it was not affected by the doctrine of lapse.

Beneficial Legatees

[5:34] Can a legatee be a beneficiary under a secret trust? There is nothing explicit in the Succession Act to prevent this from happening. However, the courts take a cautious view in this regard, so, for example, if a trustee/legatee purports to be the sole beneficiary, his claim will most likely be refused.

[5:35] In the case of *Re Pughs Wills Trust*²³ (1887), the testator, in his will, appointed his solicitor as his executor and trustee leaving £1,500 to each of his brothers. He left the residue to his solicitor, “to dispose in accordance with any letters of memorandum I may leave with this will and otherwise in such manner as you may in your absolute discretion think fit”. The testator died without leaving any such letters or memorandum. The solicitor sought a declaration whether he held the residue beneficially or for the testator’s next of kin. It was held that the direction to apply the residual estate in accordance with letters or memoranda imposed a fiduciary obligation of the solicitor in the nature of a trust. As the trust had no objects, it was void for uncertainty. Therefore the residuary estate went to the next of kin. Pennycuik J. held that such a claim by a legatee, especially a claim of entitlement to the whole beneficial ownership, would raise the suspicion of the court as there would be no useful purpose in creating such a trust.

[5:36] In *Re Rees*²⁴ (1920), a testator told a legatee under a half secret trust to apply certain sums of money to certain objects and keep any surplus for himself. The Court of Appeal held that the surplus was the subject of a resulting trust back to the testator’s estate. In the end, the decision came down to a question of evidence. The legatee was unable to prove that the settler intended him to benefit from any surplus that may arise.

Where the Legatee Predeceases the Testator

[5:37] In a fully secret trust, the legatee’s death prior to the death of the testator causes the secret trust to fail.²⁵ However, it seems that in a half secret trust, the death of the legatee will not affect the gift to the secret beneficiary. The secret trust will be enforced so long as the purpose of the half secret trust is known. Equity will not allow a trust to fail for lack of a trustee.

The English Distinction Between Fully and Half Secret Trusts in Terms of Time for Communication of the Trust Obligation

[5:38] The principal justification put forward for the distinction drawn by the English courts in this area is that the scope for fraud is far greater when property is settled in a fully secret trust, and therefore fully secret trusts accord with the historical justification for recognising secret trusts; half secret trusts do not. As a result, the English rules for communication are more strictly applied to half secret trusts. Communication of the trust obligation must occur before, or at the time of making the will.

[5:39] In *Walgrave v. Tebbs*²⁶ (1855), it was held that a legatee under a half secret trust may take beneficially if the terms of the trust were never communicated to him, even where he did know a secret trust was intended by the settlor after the settlor’s death. It is said that there is

²³ [1887] WN 143.

²⁴ [1920] 2 Ch 59; *Williams v. Hopkins* [1950] 2 All ER 1003.

²⁵ *Re Maddock* (1902) 50 WR 598. This can be supported on the ground that the legacy must be valid under the will before the secret trust operates on it. *Re Smithwaite* (1871) LR 11 Eq 251, so long as the purpose of the half secret trust is known it should be enforced.

²⁶ (1855) 2 K & J 313.

little difficulty in justifying this decision, since, if the intended trustee knew nothing about the trust until after the testator's death then there could be no fraud in the procuring of the bequest and this is no reason for the court to compel the intended trustee to do anything in particular with what is now his own property; a bequest should not be snatched back after it has been made. In *Re Boyes*²⁷ (1884), (discussed above), a legacy was given to the testator's solicitor who had undertaken to hold it according to instructions he would receive by letter. However, this letter was only found amongst the testator's possessions after his death and therefore, it was held that no valid secret trust was formed. However, this seems to be a classic case of where a fraud on the testator's true intentions was allowed to occur. In his judgment, Kay J. said:

"The essence of the early cases in secret trusts is that the donee/legatee accepts a particular trust which thereupon becomes binding on him and which it would be a fraud on him not to carry into effect".

[5:40] Here the legatee/solicitor was willing to carry out the trust, so why did the court, following strict rules of communication, deny the validity of the secret trust? Surely this denial in itself amounted to a denial of the testator's wishes. It has been said that *Re Boyes* can be justified on the floodgates principle, ie the scope of any possible fraud was limited by denying the existence of the trust.

Rationale for Recognising Secret Trusts

Fraud Theory

[5:41] However, there is nothing in the fraud basis of enforcement which would require that an intended trustee know the terms of the trust by the time the will is enacted. There is no real difference between making a bequest on the strength of the intended trustee's promise, and leaving that bequest unrevoked on the basis of his letter of assurance, so there is no reason to refuse to enforce the trust where the intended trustee becomes aware of its terms only after the execution of the will. All that is necessary is that he should be aware of them or where they are to be found before the bequest takes effect, ie before the testator's death.

[5:42] There are other justifications for *Re Keen*. It is argued that the fraud theory ought to draw a distinction between fully and half secret trusts on the ground that the intended trustee of a half secret trust cannot claim the property for himself, since the very fact of the trust is plain from the face of the will. However, this may be an argument against enforcing half secret trusts at all, but it is no justification for the differing rule regarding time of communication. To impose a resulting trust would be the same thing as refusing to enforce the trust, as a resulting trust would arise in every case where a testamentary bequest failed for whatever reason. But it is clear that the courts do enforce half secret trusts provided the terms are communicated prior to or contemporaneously with the making of the will. Consequently, there is no compelling reason for the English courts' practice of treating fully and half secret trusts differently.

[5:43] The most common justification for the recognition of secret trusts is that to do otherwise would amount to allowing a statute to be used as an engine of fraud. However as we have seen, in some circumstances the court will recognise a secret trust where there are no circumstances involving actual or threatened fraud. But surely it would be enough to refuse to allow the intended secret trustee to benefit in such situations? A resulting trust could be held to have arisen, rather than actually enforcing the secret trust in contravention of the statute. The

²⁷ [1884] 26 Ch D 531.

response to this argument has been that a refusal to enforce the testator's wishes permits another form of fraud, a fraud on the testator's intentions. Therefore, it is hardly surprising that another basis for recognition has emerged, that is, the dehors the will theory.

The Dehors the Will Theory

[5:44] The theory provides that, because the secret trust is not a term in the will but rather an inter vivos creature which becomes activated on the death of the testator, therefore the trust's obligation takes effect outside the terms of the will, and is not governed by the provisions of the Succession Act 1965.

[5:45] The dehors the will theory seems necessary to justify the recognition of half secret trusts because there is not the same scope for fraud. The trust obligation is clear on the face of the will. Of course, the dehors the will theory is needed to explain away the additional requirement in English law that for half secret trusts, communication must occur before or at the time the will was made. *Re Young* is authority for the proposition that all secret trusts take effect dehors the will.

[5:46] In relation to fully secret trusts the fraud theorists have a stronger case because of the inherent possibility of unjust enrichment due to the fact that the trust does not appear on the face of the will.

Exam Focus

The KEY to achieving high marks in Secret Trusts questions is to have a thorough understanding of, as well as an ability to apply, the rule in *Re Stead*. For these purposes, understanding the distinction between trusteeship under a tenancy in common as opposed to a joint tenancy is imperative. The rules on communication and acceptance (of the secret trust obligation) frequently appear in problem questions. The theoretical basis for the English distinction between fully and half secret trusts in terms of the timing for acceptance is more likely to be the subject of an essay question.

Other key issues include silence as acceptance (*Ottaway v. Norman* (1971)), additions to the trust property (*Re Colin Cooper* (1939)), Irish adherence to the same rule of communication for fully and half secret trusts (*Prendiville v. Prendiville* (1990)), situations where a beneficiary attests the will (*Re Young* (1951), *O'Brien v. Condon* (1905)), where the legatee attests the will (*Re Armstrong* (1893), where a beneficiary predeceases the testator (*Re Gardner* (1923), beneficial legatees (*Re Pughs Wills Trust* (1887), *Re Rees* (1920)), and where the legatee predeceases the testator.

Past Examination Questions

Question 2, October 2000

Write a note on any two of the following three topics;

- (a) An outline of the law relating to half secret trusts.

Question 6, April 2001

Roger died in 1999. In January 1998, he executed a will in which he bequeathed his interest in Blackacre House to his wife, Elsie, "to be used by her in the manner in which she has been advised".

After Roger's death, Elsie wrote a letter to their mutual friend Jane, recounting a conversation that she had had with Roger in which he had told her of his wish that, while the legal interest to Blackacre House would be bequeathed to Elsie, the Cats and Dogs Home would enjoy the benefit of Blackacre House after his death and for the duration of his interest therein. Elsie wrote that while she had been surprised at Roger's wishes when he related them to her, she had not objected to holding the property for the benefit of the Cats and Dogs Home. Elsie told her friend Jane in the letter that her memory was hazy as to the date of that conversation but knows that it took place in either 1997 or 1998. Jane has passed this letter on to you seeking your advice as to the interest if any which the Cats and Dogs Home enjoys in Blackacre House. Elsie is very elderly and suffers from a severe loss of memory.

Jane also informs you that Roger fathered a child, William, outside of marriage, and that anxious to provide for William after his death, he told Jane that he wished to transfer the fee simple in his holiday villa to Jane and her husband James as tenants in common on the understanding that they would permit William to enjoy the benefits thereof. In a fit of generosity, he also told Jane that he proposed to confer his interest in a city centre apartment to Jane and James, albeit in this instance as joint tenants, on the understanding that William would enjoy the benefit thereof. Jane indicated to Roger that she would do as he directed, but believing that her husband, James, would not approve of these gifts never informed him of her conversation with Roger. Roger never mentioned the proposed gifts to James either.

Roger bequeathed his interest in the villa and the apartment to Jane and James as tenants in common and joint tenants respectively. There is no mention of William in the will.

Answer (a) and (b)

- (a) Indicate, giving reasons for your answer, whether the Cats and Dogs Home enjoys any rights in Blackacre House and
- (b) Indicate, giving reasons for your answer, whether Jane and her husband enjoy the beneficial interest in the villa and the apartment.

Question 7, March 2003

Kathleen died last year. She left behind her husband, Rory, and her sister, Sarah, to whom she was very close. Prior to her marriage to Rory, Kathleen had a child, Brian, who was subsequently adopted. She never told Rory about the birth of her child. Some months before her death, during a conversation with Sarah, Kathleen told Sarah that she had always wanted to make financial provision for Brian. She told Sarah that Rory was not aware of the fact that she had given birth before her marriage, and therefore indicated that she proposed to bequeath a legal interest in her family home to Sarah on the understanding that Brian would enjoy the benefit thereof. Sarah indicated that she had been surprised at Kathleen's wishes when she relayed them to her. Sarah's memory is not what is used to be and she cannot recall the exact date of the conversation. Kathleen executed a Will in which she bequeathed her holiday home to Sarah "to be used by her in the manner in which she had been advised". She died soon after making the will.

Kathleen's will also contained another bequest of interest. She bequeathed her interest in an apartment in Dublin to Sarah and her husband, Sean, as joint tenants. When Sarah sees the terms of the will, she recalls a conversation approximately ten years ago with Kathleen in the course of which Kathleen had relayed to Sarah her intention to transfer the property in the manner described above. She also recalls, however, that Kathleen was adamant that Sean should derive the benefit of the apartment. Sarah had put this conversation out of her head at the time and never mentioned it to her husband, Sean.

Indicate, giving reasons for your answer:

- (a) Whether Brian enjoys any rights in relation to Kathleen's holiday home. (10 Marks)
- (b) Whether Sarah and Sean enjoy the beneficial interest in the apartment in Dublin. (6 Marks)
- (c) Whether your answer to (b) would be different if Sarah and Sean held the apartments as tenants in common. (4 Marks)

Question 8, April 2006

James, a solicitor, was unmarried and had been having a relationship for many years with Aoife. While he wished to make provision for her in the event of his death, he did not wish to do so in a manner which would disclose the said relationship on the face of his Will. Thus, when executing his Will some three years ago, he devised his leasehold interest in an apartment "to Jack and Mary as tenants in common in full confidence that they will use it for the purpose as disclosed by me to them". Some weeks later, James, in the course of a conversation with his friend Jack, said to Jack that "I am only leaving that apartment to Mary and yourself on the understanding that you will hold it for Aoife's benefit". Jack assured James that he would comply with his wishes but failed to ever mention the matter to Mary. James died some weeks ago.

Mary is now claiming entitlement to half the apartment. Advise Aoife.

Question 1, October 2008

Alan, a wealthy bachelor, died recently. He died testate. During his life, he fathered a son, Sean, for whom he wished to make provision upon his death, although he did not wish to make specific reference to him on the face of the Will for fear of upsetting the older members of his extended family. He wished to devise his title in a holiday villa and in a city centre apartment to Sean. To that end, he stated in his Will that he left the villa to Jane and Rita, "as tenants in common for the purpose as disclosed by me to them". The Will also stated that the apartment was left to Jane and Rita for the same purpose as disclosed by Alan to them, albeit in this instance as joint tenants. Some weeks before he died, Alan had a conversation with Jane in which he told her that he had set out his wishes as far as the villa and the apartment were concerned in a sealed envelope which he then handed to her and indicated that it was not to be opened until after his death. Jane agreed during that conversation to abide by Alan's wishes as set out in the letter contained in the envelope, whatever those wishes might be.

Neither she nor Alan ever mentioned this conversation to Rita nor mentioned the existence of the sealed envelope to her. After Alan's death, Jane opened the letter and learnt that Alan had stated clearly that he intended that Sean should enjoy the benefit of both the villa and the apartment.

Sean had a close relationship with his father and met him frequently. Indeed he was with his father when Alan was writing his Will and witnessed that instrument.

Advise Sean on his entitlements, if any, in relation to the villa and the apartment.

Question 8, October 2012

Question 3, March 2015

James, a solicitor, had been in a loving relationship for many years with Graham. While James wished to make provision for Graham in the event of his death, he did not wish to do so in a manner which would disclose the relationship on the face of his Will. Thus, when executing his Will some three years ago, he devised his leasehold interest in an apartment "to Jack and Angela as tenants in common on the understanding that they will use it for the purpose as disclosed by me to them." Some weeks later, James in the course of a conversation with his friend Jack, said to Jack that "I am only leaving the apartment to Angela and yourself on the understanding that you will hold it for Grahams benefit." Jack assured James that he would comply with his wishes but failed to ever mention the matter to Angela. James died some weeks ago. Angela is now claiming entitlement to half the apartment.

Advise Graham.