

Secrets and Lies – the fully secret trust

"The only secrets are the secrets that keep themselves" George Bernard Shaw

Even in the rather arcane world of the trust lawyer, secret and half-secret trusts are rare animals. They belong to a different age, redolent of lace and lavender and sepia photographs, when the long arm of Victorian propriety stretched beyond the grave and the middle-class bastions of society did not wish the world to know about their secret infidelities.

But are they simply creatures of a bygone age? This paper examines some of the features of these curiosities and their place in the modern-day trust draftsman's armoury.

The fully secret trust arises when instructions to create a trust are given outside the Will by a testator to the person he/she selects as the Trustee. On the face of the Will, this person appears to be a beneficiary. Outside the Will, the Trustee charges the pseudo-beneficiary with the obligation to hold the fund or assets on trust for another secret beneficiary, the true object of the gift. The trust comes into existence with the death of the testator and from that point the Trustee assumes his secret fiduciary role. The terms of the trust will have been communicated to the Trustee and should be in writing (although, in practice, the cases show that this is often not the case).

A half-secret trust is disclosed in the Will, but the terms of the trust are "behind the curtain", as are the beneficiaries. They are known only to the Trustee. Again, they should ideally be written by the Trustee to provide clarity.

From an evidential point of view, the half-secret trust is much easier to establish. It will be clear to all reading the Will that the testator intended to create a trust and that the Trustee is not the beneficial owner. Therefore, the person seeking to establish that trust (usually the beneficiary) will merely have to prove that the trust was made in their favour.

Secret trusts are problematic structures. They are open to fraud and they rely on the scrupulous honesty of the person elected to carry out the trust. They do not comply with the formalities prescribed by the Wills Act 1987 or the Law of Property Act 1925, but they fall within the equitable jurisdiction.

The burden on the intended recipient is great, particularly in the case of the fully secret trust. He or she must show that:

- (a) the testator had intended to create a trust;
- (b) this was communicated to the Trustee; and
- (c) the Trustee acquiesced.

In the case of a fully secret trust, the trust may be communicated before or after the execution of the Will. In the case of the half-secret trust, it is essential that communication is made at the same time or prior to the execution of the Will, for instance, by handing a sealed envelope to be opened only after the death of the testator.

Due to the fact that the trust operates outside the Will, it is not necessary for the beneficiary to survive the testator to be eligible for the gift. PRs can take the gift on behalf of the Trustee. Following the same logic, a beneficiary under a secret trust can still be a witness to the Will.

However, if the Trustee dies in the lifetime of the testator, the secret trust will only be binding upon the heirs of the Trustee if there is sufficient evidence to establish the acceptance and terms of the secret trust by the Trustee. This will, of course, be difficult to establish unless the communication to the Trustee was in writing.

Given the difficult evidential burden, it is not surprising that many of the reported attempts to establish secret or half-secret trusts in recent years have been unsuccessful. However, in the 1999 case of *Gold and Gilbert v Hill*, a secret trust was established and this case illustrates all the principles outlined above. The Deceased (Mr. Gilbert) nominated a solicitor, Mr Gold as a beneficiary in respect of his life insurance policy and told him separately to "look after Carol and the kids", Carol being his cohabitee. Mr. Gilbert had separated, but not divorced his wife. In his Will, the deceased named another solicitor, a Mr Hill as his Executor and left all his estate to his wife. It was held that a secret trust has been adequately communicated to Mr Gold and that he had accepted that duty.

Classically, the secret trust has been used in cases where the deceased has had secret relationships during his or her lifetime and wishes to preserve that secrecy after death. The beneficiaries may be the other party to an affair or the offspring of that relationship. The desire for secrecy may spring from a reluctance to cause suffering to the deceased's family or to protect the anonymity of the other parties. It may also come from a desire to protect the reputation of the deceased. Whatever the motivation, it is clear that since the lives and relationships of human beings are complex, an element of secrecy will often be a feature of our dealings.

It is the nature of the law to search out the truth and to throw light into the dark corners where secrets lurk. For this reason, the creation of secret trusts cannot be recommended. Testators are advised to make clear provisions in their Wills. The inclusion of secret or half-secret gifts leads to suspicion and is likely to give rise to a costly and time-consuming challenge to the Will. In this matter, honesty must be the best policy. However, as long as human beings have secrets, there will probably be a place in equity for the secret trust.