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The Impact of Secret Trusts on Wills and Testamentary Gifts

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Gift-giving is often perceived as an act of generosity, or even altruism, but sometimes gifts come with "strings attached" – meaning that the gift, if accepted, "involves special demands or limits."[1] Perhaps there is no greater string to attach to a gift, at least a testamentary bequest, than a secret trust. Under this doctrine, a testator appears to leave property in his will to one beneficiary, when in fact the parties have made a separate arrangement to have the beneficiary hold the property for the benefit of a third party – an ultimate beneficiary. As long as the beneficiary named in the will agrees to act as trustee, or simply acquiesces to the arrangement, a secret trust may be made out and enforced.[2]

Secret trusts may seem confounding, as they are counterintuitive to the overarching law that otherwise governs wills and estates. Testators can use secret trusts to make bequests that need not be included in any will, and which can be upheld despite failing to comply with statutory will formalities.[3]

Creating a Secret Trust

Secret trusts are not a recent legal innovation, despite having been addressed numerous times by appellate courts over the last decade – this doctrine dates back to the 1700s.[4] Like other express trusts, secret trusts must satisfy three certainties. Language of intention is needed to form the trust, plus the trust property and the beneficiaries or objects must be certain.[5] These certainties must be exhibited at the time the trust is created.[6]

Additional requirements must also be satisfied to establish a secret trust, namely:

- the deceased must intend to impose a trust obligation on the beneficiary;
- the deceased must communicate his or her intention to the beneficiary that: (1) the property be held in trust by the beneficiary, and (2) the beneficiary transfer that property to the ultimate beneficiary after the death of the donor; and

[1] *Cambridge Dictionary*, sub verbo "strings attached": online *Cambridge Dictionary*, retrieved 6 July 2022 from https://dictionary.cambridge.org/us/dictionary/english/strings-attached.
[2] See C. A.W., J. Finkelman and John Willis, "Case and Comment" (1937) 15:2 *Canadian Bar Review* 101 at 101, online: 1937 CanLIIDocs 71 <https://canlii.ca/t/t83v> [1937 Case Comment].
[3] *Ibid.*
[4] According to Alastair Hudson, "[t]he case law in this area can be traced back at least to *Sellack v Harris* (1708), 2 Eq Ca Ab 46 (Eng) through *McCormick v Grogan* (1869), LR 4 HL 82." See Alastair Hudson, "Conscience as the Organising Concept of Equity" (2016) 2:1 *Canadian Journal of Comparative and Contemporary Law* 261 at 286, fn 86: online: 2016 CanLIIDocs 48 <https://canlii.ca/t/q7>.
[5] *Peters v. Peters Estate*, 2015 ABCA 301 at para 18 [*Peters*].
[6] *Gefen Estate v Gefen*, 2022 ONCA 174 at para 49 [*Gefen*], citing *Champoise v Prost*, 2000 BCCA 426 at para 16.

- the beneficiary must either agree to act as trustee and hold the property in trust for the ultimate beneficiary, or acquiesce to the arrangement.[7] On this point, the British Columbia Court of Appeal recently confirmed that acceptance of a secret trust can be "spelled out of silence", as the law imposes an obligation on a trustee-beneficiary to be forthright and actually advise the donor if he or she will not uphold the donor's intentions.[8]

A secret trust may take the form of either oral or written instructions to hold the donor's property in trust.[9] If a written agreement is utilized, the agreement ought to be signed by both the donor and the beneficiary-trustee who will receive legal title to the trust property upon the donor's death.[10] To give rise to a secret trust, there must also be an actual transfer or grant of property between the parties to the agreement.[11] It further warrants noting that a written agreement giving rise to a secret trust is not a testamentary instrument, meaning that if the donor subsequently creates a new will, the agreement will not be revoked by that will.[12]

In addition to secret trusts, there are also half-secret trusts, in which the donor's will indicates that the property is to be held in trust but does not disclose the identity of the ultimate beneficiary.[13] In comparison, with a secret trust, the deceased's will will not disclose the existence of either the trust or the name of the ultimate beneficiary. While secret trusts often arise in the context of wills, a bequest inherited on intestacy can also be subject to a secret trust.[14]

A Moral Obligation Is Not Enough

Even though secret trusts are an equitable remedy, a moral obligation "intended to guide the recipient's conscience" cannot, on its own, be the basis of a secret trust.[15] This was a live issue in *Gefen Estate v Gefen*,[16] a case in which the testator signed an agreement with one of his sons, who ultimately received a significant portion of the testator's estate. The testator's other sons argued that the agreement gave rise to a secret trust, which compelled the son to share the property he had received with his siblings. However, no secret trust was found, both at trial and on appeal. One of the reasons for this decision was that the document only spoke of the father's intentions and did not give rise to a binding obligation. There was no evidence that the son who signed the agreement agreed to receive assets in trust for his siblings.

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[7] *Peters*, *supra* note 5 at para 20.
[8] *Bergler v Odenthal*, 2020 BCCA 175 at para 29 [*Bergler*].
[9] *Peters*, *supra* note 5 at para 19.
[10] See *Gefen*, *supra* note 6 at paras 54-56.
[11] *Ibid*.
[12] See *Gough v Leslie Estate*, 2022 NSCA 25 at para 56 [*Gough*].
[13] *Gefen*, *supra* note 6 at para 46, citing A. H. Oosterhoff, "Secret and Half-secret Trusts," Ontario Bar Association Continuing Legal Education, Trusts, Trustees, Trusteeships – All You Need to Know and More …, September 18, 2006 at 3.
[14] See *Bergler*, *supra* note 8.
[15] *Gefen*, *supra* note 6 at para. 50.
[16] *Ibid*.

Enforcing a Secret Trust

In order to enforce a secret trust, it would be advisable to establish detrimental reliance. In *Gough v Leslie Estate*,[17] the Nova Scotia Court of Appeal confirmed that secret trusts function because "legal title [is] granted in reliance on the undertaking to hold title for the benefit of others."[18] Legal commentary also notes that one reason equity can be used to enforce a secret trust is because the donor is unable to perfect the trust and ensure that the intended beneficiary receives the trust property him or herself – the deceased has no choice but to rely on the secret trustee's promise to carry out the trust.[19]

Inequitable conduct should also be established when enforcing a secret trust. Often the primary reason for enforcing a secret trust is "to avoid fraud, as absent intervention by equity, the trustee who received property might keep it, rather than [abide] by the terms of the trust."[20] Typically, a secret trust will be enforced to prevent unjust enrichment, or as restitution of a wrong committed by the trustee.[21]

Like all civil matters, the burden of proof is the balance of probabilities. There must be evidence available to prove that the deceased donor advised the beneficiary-trustee of an intention to have property held in trust, and that the donor advised who was to be the ultimate beneficiary of the trust. The evidence must also establish that the beneficiary of the estate either agreed to hold the property in trust or acquiesced to the testator's request. Without such evidence, a secret trust will not be recognized, let alone enforced.[22] As a secret trust operates outside a will, it may be proven by extrinsic oral or written evidence.[23]

On an interesting note, a secret trust does not need to be secret in order to be enforceable. According to the Nova Scotia Court of Appeal, "[t]he secrecy of the trust simply means that the obligations described do not appear in the testator's will."[24]

However, if a secret trust is truly secret, proceedings to enforce it, or alternatively prove that the trust was not performed, ought to be pursued during the lifetime of the beneficiary-trustee. If the terms of the trust are not disclosed by the beneficiary-trustee prior to death, there may be insufficient evidence to subsequently prove that a secret trust was established, as was the case in *Hayman v. Nicholl*.[25] The testatrix's codicil in this case stated that she was leaving funds to her beneficiary "in full confidence that she [would] dispose of the same in accordance with the wishes which [the testatrix] expressed to her." The beneficiary used some of the funds for

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[17] *Gough*, *supra* note 12.
[18] *Ibid* at para 43, emphasis added.
[19] Robert Chambers, "Constructive Trusts in Canada" (1999) 37:1 *Alta LR* 173 at 191, online: 1999 CanLIIDocs 188, <https://cttanlii.ca/t/skt4> [Chambers article]. See also 1937 Case Comment, *supra* note 2 at 104: "it is the promise notion, with its resulting reliance (often invoked by the courts as a substitute for consideration), that the courts fastened on as creating a 'duty'."
[20] *Gefen*, *supra* note 6 at para 47.
[21] Chambers article, *supra* note 19 at 189-190.
[22] See *Peters*, *supra* note 5.
[23] *Spylo v. Spylo*, 2014 ONSC 3843 at para. 55, aff'd 2016 ONCA 151.
[24] *Gough*, *supra* note 12 at para 50.
[25] *Hayman v. Nicholl*, 1944 CanLII 70, [1944] SCR 253 (S.C.C.).

her own benefit before passing away, but took no steps to distribute the funds to any other party and did not tell any third party about how the testatrix had wanted the funds to be disposed of. The residuary beneficiaries of the estate argued that the unused funds were subject to a secret trust and ought to go into the residue of the estate, as the funds had not been disposed of in accordance with the testatrix's wishes. The Supreme Court of Canada dismissed the residuary beneficiaries' claim on several bases, including that a secret trust had not been proven. Without evidence of how the testatrix intended the funds to be used, or evidence from the beneficiary-trustee about what the testatrix's wishes were, there was no basis to find a secret trust. Justice Rand did acknowledge, however, that in some cases such circumstances might give rise to an inference that a trust was intended, depending on the evidence before the court.[26]

Closing

While equity provides a way to dispose of an estate outside the confines of a will or other testamentary instruments, relying on the courts to enforce a secret trust (should a trustee go rogue and refuse to fulfill the donor's wishes) is fraught with risk. Appellate courts have confirmed in a number of cases that secret trusts are still enforceable,[27] but the outcome in cases like *Gefen Estate v. Gefen*[28] demonstrate that even with a written agreement in hand, a secret trust may not be established. The surest way to control the administration of an estate remains the same – recording all instructions for the distribution of the testator's estate in a valid will.

[26] *Ibid* at 259.
[27] See *Bergler*, *supra* note 8; *Gough*, *supra* note 12.
[28] *Gefen*, *supra* note 6.