

LECTURE NOTES NO. 5

III. FORMALITIES OF EXPRESS TRUSTS

'Formalities' refers to compliance with any procedural aspects of a given transactions; for example, purchase of real estate in Ontario requires suitable registration of title to the land in the local registry office.

The sequence of the establishment of a trust:

1. Settlor (who is legally capable of so doing) makes a declaration of trust (evidencing intent) in respect of specific property (the subject of the trust) in favour of a specific beneficiary (or class of beneficiaries). The trust may be gratuitous or as part of a larger arrangement involving consideration (and thus a contract).
2. The trust is constituted when the property vests in the trustee. **Writing may be required to give effect to the transaction.** If the trust is based on contract and valuable consideration passes to the settlor, the court may order the trust to be fully constituted when the transaction is not yet complete. When the settlor acts gratuitously, the court will only rarely make an Order to allow the trust to be completed.
3. Once constituted, the trustee holds the property under a valid trust for the beneficiary (the object of the trust).

General Considerations

Very little is required to formalise the trust, but in some cases writing of some kind is required as an attempt to control fraud. This is especially true of transactions involving land. The governing statute, the **Statute of Frauds, RSO 1990, c.S.19** has traditionally been regarded as having twin goals:

- (1) *To Protect Trustees:* **to ensure that the trustees know the identities of beneficiaries, and the precise nature of their obligations under the trust settlement.** Memories fade and disputes naturally arise and trustees must themselves be in a position to discharge their duties.
- (2) *To Protect Beneficiaries:* **to prevent fraud** by oral agreement to the harm of the real beneficial owners.

One must look to the statute itself to determine whether its provisions apply and for the consequences of non-compliance.

The Statute of Frauds, RSO 1990, c. S.19, cb, p. 294

Selected Provisions:

Writing required for certain contracts

4. No action shall be brought to charge any executor or administrator upon any special promise to answer damages out of the executor's or administrator's own estate, or to charge any person upon any special promise to answer for the debt, default or miscarriage of any other person, or to charge any person **upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which the action is brought, or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some person thereunto lawfully authorized by the party.** R.S.O. 1980, c. 481, s. 4; S.O. 1994, c. 27, s. 55, in force December 9, 1994 (R.A.)

Declarations or creations of trusts of land to be in writing

9. Subject to section 10, **all declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by a writing signed by the party who is by law enabled to declare such trust, or by his or her last will in writing, or else they are void** and of no effect. R.S.O. 1980, c. 481, s. 9.

Exception of trusts arising, transferred, or extinguished by implication of law

10. Where a conveyance is made of lands or tenements by which a trust or confidence arises or results by implication or construction of law, or is transferred or extinguished by act or operation of law, then and in every such case the trust or confidence is of the like force and effect as it would have been if this Act had not been passed. R.S.O. 1980, c. 481, s. 10.

Assignments of trusts to be in writing

11. **All grants and assignments of a trust or confidence shall be in writing signed by the party granting or assigning the same, or by his or her last will or devise**, or else are void and of no effect. R.S.O. 1980, c. 481, s. 11.

Thus, the writing requirement attaches to:

- contracts creating a trust of land (s.4)
- creation of an interest in land (s.9)
- and assignments of equitable interests (s.11). Section 10 excepts trusts that arise by operation of law, such as a resulting or constructive trust, as there is no prospect of fraud and the judicial order itself will always be sufficiently certain to inform trustees as to their duties (or else directions may be sought from the Court).

'Equity Will Not Allow a Statute to be Used as an Instrument of Fraud'

The principle is a simple one: **where one party uses non-compliance with the statute to act unfairly towards a vulnerable party, the court may intervene to allow for the transaction to complete notwithstanding non-compliance** with the statute through the mechanism of a constructive trust.

A note on *equitable fraud*:

While courts of equity and law have for some time had concurrent jurisdiction to deal with actual fraud in the sense of dishonest acts, the equitable jurisdiction to deal with fraud both pre-dates the common law jurisdiction and is a wider concept.

The concept of *equitable fraud* or *constructive fraud* allowed a court of equity to relieve against an act that was **neither intended as dishonest or committed recklessly**. Lord Haldane LC said in *Nocton v Lord Ashburton* [1914] AC 932, 954 (HL):

... it is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a court of Equity imposes upon him. His fault is that he has violated however innocently because of his ignorance, an obligation which he must be taken by the court to have known, and his conduct has in that sense always been called fraudulent...

Thus the concept of equitable fraud is rooted in a pragmatic view of equity as being able to respond to an infinite variety of offensive acts and has accordingly been left as a fluid rather than rigidly defined concept as a matter of judicial policy. Lord Macnaghten once said that "[f]raud is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it;" *Reddaway v Banham* [1896] AC 199, 221. At the same time, equitable fraud can be a doctrine bound up with some degree of fault. **The difficulty is in assessing the degree of fault that speaks, to some extent, to moral standards of conduct.**

A technical issue arises in respect of an abuse of the statute that may yield an unconscionable result - that is, a reliance on non-compliance with the statute by a trustee already vested with ownership as a means of retaining the beneficial interest in the property personally. Is the better approach to construe the trust as an enforceable express trust, or, to recognise a constructive trust and thus dispense with the problem of writing? In *Rochefoucauld v. Boustead* [1897] 1 Ch 196, referenced at §4:42 of the cb,

it was held that the trustee cannot retain the legal title and claim the property as his own where the trust fails on the basis that it is not in writing, and in such a case the court

accepted that parol evidence was sufficient to evidence the trust. In other words, where the trustee relies on the statute to retain beneficially, the court may still allow the trust to be effective notwithstanding non-compliance with the writing requirements to prevent the fraudulent enrichment of the trustee.

In *Bannister v. Bannister* [1948] 2 All ER 133, referenced at §4:42 of the cb, the plaintiff sold some cottages to her brother-in-law for less than full market value on the basis of the oral promise that she would be allowed to live in one of the cottages for the remainder of her life without having to pay rent. The issue thus was whether the purchaser held on trust for the vendor for her life with a reversionary interest in the cottage. Scott LJ held that the insistence on the letter of the conveyance by the defendant was a fraud and a constructive trust arose which need not be in writing.

The latter approach seems more intellectually pleasing and is the contemporary practice.

SECRET AND HALF-SECRET TRUSTS

Formalities of Testamentary Trusts: **Succession Law Reform Act, R.S.O. 1990, c. S.26**

3. A will is valid only when it is in writing.

4.--(1) Subject to sections 5 and 6, a will is not valid unless,

- (a) at its end it is signed by the testator or by some other person in his or her presence and by his or her direction;
- (b) the testator makes or acknowledges the signature in the presence of two or more attesting witnesses present at the same time; and
- (c) two or more of the attesting witnesses subscribe the will in the presence of the testator.

(2) Where witnesses are required by this section, no form of attestation is necessary.

6. A testator may make a valid will wholly by his or her own handwriting and signature, without formality, and without the presence, attestation or signature of a witness.

7.--(1) In so far as the position of the signature is concerned, a will, whether holograph or not, is valid if the signature of the testator made either by him or her or the person signing for him or her is placed at, after, following, under or beside or opposite to the end of the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his or her will.

A secret trust is one where:

T(estator) devises to the Primary Donee (PD), who has agreed to be bound by a trust obligation during the life of T. Thus, if T makes a gift of property to PD without stating in the will that he is to hold it on trust, and either before or after making his will tells PD directly or through an authorised agent that he wishes him to hold the property on trust for a Secondary Donee (SD), or to make a will in SD's favour, PD (or his personal representatives) will be compelled to carry out the trust *if PD either expressly promises that he will do so, or by silence implies it*. Why? There are different explanations but it is most often argued that the agreement between T and PD has induced T to leave the property to PD (thus an argument rooted in reliance but where that promise is enforceable in equity rather than through estoppel in law).

A half-secret or semi-secret trust is one where:

T devises to PD on trust, explicitly, but the terms of the trust are not disclosed in the will. This is very difficult to justify. One common explanation is that the trust then operates completely outside the will ('*dehors* the will') and the provisions of the estates legislation are inapplicable; *Re Snowden* [1979] 2 All ER 172.

Requirements for Secret Trusts

Four elements are required in respect of fully secret trusts per *Ottaway v. Norman* [1971] 3 All ER 1325, 1332; **cb, p.894**:

- 1) an intent by S to subject the primary donee (PD) to an obligation in favour of the secondary donee (SD);
- 2) communication of that intent to the PD;
- 3) acceptance of the obligation by the PD, either expressly or implicitly; and
- 4) the above conditions are satisfied before or after the execution of the will (i.e. during the life of T). If the trust fails, the PD will be entitled absolutely as devisee with no obligation to the SD based on the validity of the will.

What if the beneficiary pre-deceases the testator? Is the gift still binding on the trustee?

Re Gardner

[1920] 2 Ch 523 (CA), referenced at §12:12, 12:15 of the cb

Where the testatrix left the property to her husband "to carry out my wishes" and that the husband knew that those wishes were to the benefit of B1-B3 and B2 predeceases T, the estate of B2 receives the property as the trust operates outside the will. Thus the death of the B before the T does not invalidate the trust as it operates wholly outside the will. The text writers doubt the validity of this case in that the trust property did not pass to the PD and thus the trust was not fully constituted and that there was a continuing power of revocation by T during her life; see Hodge, "Secret Trusts: The Fraud Theory Revisited" [1980] Conv 341; Perrins, "Secret Trusts: The Key to the *Dehors*" [1985] Conv 248.

Requirements for Half-Secret Trusts

The main distinction between fully and half-secret trusts, is that T must communicate, and the PD must accept the obligation, before or at the time of the execution of the will. Remember that for a fully-secret trust, the obligation can be communicated and accepted anytime prior to the testator's death regardless of the date upon which the will is executed.

A second difference between the two types of secret trusts is the consequence of failure – the failed half-secret trust gives rise to an automatic resulting trust in favour of the T's estate (as the PD is explicitly held out to have no beneficial interest and the beneficial interest is thereafter not adequately disposed of – it must attach to someone and thus it automatically reverts to the estate). For example, *Re Pugh's Will Trusts* [1967] 1 WLR 1262 (Ch), where the solicitor as executor was given no instructions.

Blackwell v. Blackwell [1929] AC 318; referenced at §12:11, 12:12, 12:24 of the cb

T gave a legacy of £12,000 to 5 persons on trust "for the purposes indicated by me to them." T had told one of the 5 in detail of his intentions, and the others in less detail. The trustee to whom the detailed instructions (respecting his mistress and his illegitimate son) were given made a memo of them on the same day (but after the execution of the will). The issue was whether the memo and parol evidence was admissible to prove the half-secret trust.

Held: the memo and the parol evidence were admissible to prove the half-secret trust. Viscount Sumner said that where fraud is alleged and proven, equity can act on its normal principles. Thus, **the ability to prove a half-secret trust against a fraudulent trustee does not conflict with the Wills Act; that is, the trust has nothing to do with the will, but the exercise of the equitable jurisdiction of the court to prevent fraud on the part of the secret trustee. Where the trust is a fully secret trust in the sense that the will does provide for the trust expressly, equity sees no difference between giving effect to the testator's intention when fully secreted and when partially secreted -** "why should equity forbid an honest trustee to give effect to his promise, made to the deceased testator, and pay another legatee"... The terms of the half-secret trust need not be written expressly into the will as it operates outside the will - but only where the testator communicates the intention to the trustee and the trustee accepts the obligation, else the testator could use this to get around the Wills Act and present the possibility of fraud.

Re Keen, Evershed & Griffiths [1937] Ch 236 (cited in *Re Mihalopoulos*)

The full details of the trust must be communicated to the trustee. Here the testator left £10,000 to executors in a half-secret trust. T gave the executors a sealed envelope at some time before the date of the will with the name of the beneficiary and the instructions not to open the envelope until after his death. The executors were not told of the contents of the envelope. Held: The half-secret trust failed on 2 grounds - first, the testator did not comply with the terms of the will as he had drafted it (communication to executors during his lifetime; it would have been different if he had told the executors of the nature of the contents of the envelope); and second, **the general power to give and rescind**

instructions to the executors was against the policy Wills Act in preventing future unattested-to disposition after the making of the will. Thus *Blackwell* was not directly on par as there the trust had been clearly communicated and there was no wording in the will that was not complied with. It was held further that parol evidence is not admissible to show that the testator intended something inconsistent with the express terms of the will.

Re Mihalopoulos
(1956), 5 D.L.R. (2d) 628 (Alta SC – TD); cb, p.900

This was an interesting case involving the analogy to, and the complementary use of, 'the doctrine of incorporation of documents by reference' in the law of succession. Thus, where the will makes reference to a specific document in existence, and that document before the court is proved to be that document, it is implicitly part of the will and its terms can be enforced in the normal way. Here, T left instructions to donate to charities with the specific instructions to be found in a documents "among my papers". The court held that the document adduced was unsigned and thus outside the wills legislation as a will of itself, and, there was doubt as to whether it was indeed the document referred to in the Will. It could not be incorporated by reference. At the same time, it could not be a half-secret trust. As in *Re Keen*, T was attempting to make unattested-to future dispositions of his assets after the execution of his will and the gift ought not be enforced and parol evidence was not admissible to contradict the will.

Per Egbert J:

There is another ground on which it was suggested that effect could be given to the document, namely, that it created a valid and effective trust. The Courts have on occasion invoked the doctrine of trusts in order to prevent the provisions of the *Wills Act* from protecting a fraud, e.g., where a testator leaves property absolutely to a legatee on a secret trust communicated to and accepted by the legatee. No such situation arises here; there is no suggestion that anyone is attempting to perpetrate a fraud; nor is there any evidence that the terms of the document in question were ever communicated to or accepted by anyone. Certainly they were not communicated to the Canadian executors nor to the witnesses to the will, and there is no evidence that they were communicated to the Greek trustees. In *Johnson v. Ball* (1851), 5 De G. & Sm. 85, 64 E.R. 1029, it was attempted to create certain trusts by a letter signed subsequent to the execution of the will. The Vice-Chancellor pointed out that it was impossible to give effect to the letter as a declaration of trust since that would admit the document as part of the will. He pointed out the difference between these circumstances and the case where the will refers to a trust created by the testator by communication with the legatee antecedent to or contemporaneously with the will. In *Blackwell v. Blackwell*, [1929] A.C. at p. 339, Viscount Sumner reviewed the authorities and stated: "A testator cannot reserve to himself a power of making future unwitnessed dispositions by merely naming a trustee and leaving the purposes of the trust to be supplied afterwards, nor can a legatee give testamentary validity to an unexecuted codicil by accepting an indefinite trust, never communicated to him in the testator's lifetime To hold otherwise would indeed be to enable the testator to 'give the go-by' to the requirements of the Wills Act, because he did not choose to comply with them. It is communication of the purpose to the legatee,

coupled with acquiescence or promise on his part, that removes the matter from the provision of the Wills Act and brings it within the law of trusts."

In my view it is clear from the evidence that the document in question was written by the testator after the execution of the will. It is argued, however, that despite this the trust attempted to be set up by the document may, in fact, have been set up in some other way by the testator prior to the execution of the will, and have at that time been communicated to and accepted by the trustees, and that accordingly an opportunity should be given to the Greek trustees to establish this if it is the fact.

Not only do I doubt very much if the Greek trustees could furnish such evidence, but in the light of the decision in *Re Keen*, [1937] Ch. 236, I am of the opinion that the evidence would not, in any event, be helpful. In that case a testator by his will gave to his trustees the sum of [pounds]10,000 "to be held upon trust and disposed of by them among such person, persons, or charities as may be notified by me to them or either of them during my lifetime". The testator had on the execution of an earlier will containing a similar clause told one of his trustees that he desired to provide for a person whose name was to be kept secret, and that he had written the name and address of the proposed beneficiary on a sheet of paper enclosed in a sealed envelope which he handed to the trustee to be kept with his will and not opened until after his death. No further communication was ever made regarding the envelope by the testator. After his death it was opened and found to contain a paper bearing the words "[pounds] 10,000 to G". The Court of Appeal held that on the true construction of the will it reserved power to the testator to dispose of his property by a future unattested disposition contrary to the provisions of the *Wills Act* and that the trust sought to be established by parol evidence was one inconsistent with the terms of the will, the notification of it to the trustee being anterior to the will. The trust therefore failed and the legacy fell into residue. Lord Wright M.R. in the course of his judgment, and after having referred to the conditions on which parol evidence is admissible to supplement the terms of a will, pointed out that in this case the trust sought to be established by parol evidence would be inconsistent with the express terms of the will. "In the present case, while clause 5 refers solely to a future definition or to future definitions of the trust subsequent to the date of the will, the sealed letter relied on as notifying the trust was communicated ... before the date of the will the notification sought to be put in evidence was anterior to the will and hence not within the language of clause 5, and inadmissible simply on that ground as being inconsistent with what the will prescribed", [p. 248]

In this case, as in the *Keen* case, the will, in my opinion clearly contemplates a future notification of the trust. Reading the will as a whole, and reading it in the light of the evidence as to the non-existence of the designation of trust at the time of execution of the will, there seems no doubt that the will contemplated a future designation and so as in the *Keen* case, was an attempt to reserve to the testator a power to make future disposition of his property by unattested and unsigned instruments, contrary to the provisions of the *Wills Act*. Moreover since the will contemplates some future designation of the trust, and the parol evidence suggested would be of an anterior designation, as in the *Keen* case, such

evidence must be excluded as being inconsistent with what the will provides.

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[over]

RULES IN RELATION TO INTER VIVOS TRUSTS

1. A sale or conveyance of land must be in writing.
2. An express trust in relation to an interest in land must be in writing; non-compliance will not necessarily invalidate, consistent with the maxim *Equity Will Not Allow A Statute To Be Used As An Instrument Of Fraud*. The court might order a constructive trust.
3. An oral declaration is sufficient to create a trust of pure personality by a person legally and beneficially entitled.
4. Disposition of an equitable interest could occur in 4 ways and must be in writing: (i) direct assignment (in writing or else void); (ii) direction to the trustee (whose consent is required) by the beneficiary to hold for the benefit of the third party; (iii) a contract for valuable consideration between the beneficial owner and the third party; (iv) sub-trust (the beneficiary holds his or her interest in trust for the third party as a trustee).

RULES IN RELATION TO TESTAMENTARY TRUSTS

1. The equitable maxim *Equity Will Not Allow A Statute To Be Used As An Instrument Of Fraud* applies in relation to testamentary as well as inter vivos trusts; thus, equity can relieve against the provisions of the Succession Law Reform Act.
2. Parol evidence is not normally allowed to vary the will, on the general reasoning that not to do so will encourage testators not to comply with the statute. The rule has no application in the case of fully secret trusts. In such a case the evidential standard is the normal proof on a balance of probabilities, except where fraud is alleged and then the standard is higher. In the case of a half-secret trust, the trustee cannot bring parol evidence to show that he is beneficially entitled.
3. *For a fully secret trust*, there are 4 requirements: (i) an intent by S to subject the primary donee (PD) to an obligation in favour of the secondary donee (SD); (ii) communication of that intent to the PD; (iii) acceptance of the obligation by the PD, either expressly or implicitly; and (iv) the above conditions are satisfied during S's lifetime. If the trust fails, the PD will be entitled absolutely as devisee.

For a half-secret trust, the terms of the will avert to the fact that T takes as a trustee. The main distinction between fully and half-secret trusts, is that (i) the communication must conform strictly to the terms of the will, and (ii) communication must be prior to, or at the same time as, the execution of the will. The communication to T cannot take place after execution as that would encourage testators not to comply with the estates legislation. Many argue that there is no good reason to disallow the trust where the communication takes place after execution of the will, but during T's lifetime - that is, the point of the obligation is one that equity recognises and enforces on the T's conscience.