Secret trusts: dehors the Wills Act (not the will)

Article

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Secret Trusts: Dehors the Wills Act (Not the Will)

It is regularly asserted that the modern explanation for the enforcement of secret trusts – both fully secret and semi-secret – is that they operate "dehors" (outside) the will. The proposition is put forward in academic texts;[1] and in practitioner works.[2] (Although there is scepticism or rejection in other academic texts;[3] and practitioner works.)[4] The assertion is repeated even though the inadequacy of the "dehors the will" approach has been well demonstrated.[5] Since criticism of the approach has obviously so far not convinced, this article will briefly attempt to restate and clarify the critique. However, the main focus here will be different: to challenge the *foundation* of the dehors the will idea. It is usually attributed to the judgment of Viscount Sumner in the leading secret trusts case, *Blackwell v Blackwell*.[6] The argument here is that his judgment has been misunderstood. It offers no real support for the dehors the will theory – and,

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[1] Jamie Glister and James Lee (eds), *Hanbury and Martin Modern Equity*, 21st edn (Sweet & Maxwell 2018), paras 6.035-40; Philip H. Pettit, *Equity and the Law of Trusts*, 12th edn (OUP 2012), 131-32; A.J. Oakley (ed.), *Parker and Mellows: The Modern Law of Trusts*, 9th edn, (Sweet & Maxwell 2008), paras 4.050-77; J.G. Riddall, *The Law of Trusts*, 6th edn (Butterworths 2002), 69-70; and Graham Virgo, *The Principles of Equity and Trusts*, 3rd edn (OUP 2018), 111-12 endorses the dehors the will explanation, while acknowledging it is "not perfect" (but also gives some support to the traditional explanation: cf. 115-17, 122). (Similarly, Paul S. Davies and Graham Virgo, *Equity and Trusts: Text, Cases and Materials*, 3rd edn (OUP 2019), 127-8; but cf. 130-33, 136, 144.)

[2] Lynton Tucker, Nicholas le Poidevin and James Brightwell (eds), *Lewin on Trusts*, 19th edn (Sweet & Maxwell 2015), para. 3-077; and John McGee and Stephen Elliott (eds), *Snell's Equity*, 34th edn (Sweet & Maxwell 2019), para. 24-030 (although para. 24-031 casts some doubt on what is meant by this).

[3] Charlie Webb and Tim Akkouh, *Trusts Law*, 5th edn (Palgrave 2017), para. 6.5.4; J.E. Penner, *The Law of Trusts*, 11th edn (OUP 2019), paras 6.61-63; Ben McFarlane and Charles Mitchell (eds), *Hayton and Mitchell: Text, Cases and Materials on the Law of Trusts and Equitable Remedies*, 14th edn (Sweet & Maxwell 2015), para. 3-16; Jonathan Garton, Graham Moffat and Gerry Bean (eds), *Moffat's Trusts Law: Text and Materials*, 6th edn (CUP 2015), 178; Michael Haley and Lara McMurtry, *Equity and Trusts*, 4th edn (Sweet & Maxwell 2014), para. 5.36; Simon Gardner, *An Introduction to the Law of Trusts*, 3rd edn (OUP 2011), para. 5.6; Jeffrey Hackney, *Understanding Equity and Trusts* (Fontana 1987), 105-6.

[4] David Hayton, Paul Matthews and Charles Mitchell (eds), *Underhill and Hayton Law Relating to Trusts and Trustees*, 19th edn (LexisNexis 2016), paras 12.80-81 and 12.105 to 12.112; and Geraint Thomas and Alastair Hudson, *The Law of Trusts*, 2nd edn (OUP 2010), paras 28.60-64 appears to reject it.

[5] David R. Hodge, "Secret Trusts: the Fraud Theory Revisited" [1980] Conv. 341; Patricia Critchley, "Instruments of Fraud, Testamentary Dispositions, and the Secret Trusts Doctrine" (1999) 115 L.Q.R. 631.

[6] [1929] A.C. 318 (H.L.).

equally, nor do later cases. He did not say, or imply, that secret trusts operate dehors the will. The novel contribution his judgment made was, instead, rather different: to suggest that secret trusts operate dehors the Wills Act; or, more precisely, dehors the formality rules in the Wills Act 1837. That is, Parliament's intention was that the formality rules prescribed in the Wills Act should not apply to secret trusts: the trusts are an implied exception to those rules, when the Act is correctly interpreted. The implications of accepting this novel – and overlooked – explanation of secret trusts will be explored.

An outline of secret trusts

The formal requirements for a will

The formalities for making a will are laid down in Wills Act 1837, s. 9: basically, a will is invalid unless in writing, signed and witnessed.[7]

Fully secret trusts

A fully secret trust arises when a settlor leaves somone to inherit their property, apparently as absolute owner, under a will or under the intestacy rules; but they have promised the settlor to hold it on trust when they receive it. The trust is secret in the sense that it is not mentioned in a formal will; although a testamentary trust – one to take effect at death – ought to be, on the face of the Wills Act. In the leading case of *McCormick v Grogan*,[8] the House of Lords said fully secret trusts will be enforced, despite not complying with the Wills Act, under the maxim that "Equity will not allow a statute to be used as an instrument of fraud". It would be a fraud for the trustee to keep the property, ignoring the trust, relying on the Wills Act. Dicta in the case required proof of fraud that was premeditated and actually attempted: in the sense that the trustee lied when making their promise and had then tried to keep the property.[9] But *Re Gardner*[10] later showed clearly that this was not necessary. The maxim applied to prevent any possibility of later fraud. So, even if the trustee was willing throughout to carry out their promise, there was a trust immediately on inheritance: to preclude the possibility they might seek to keep the property beneficially in breach of their promise. We will see shortly that this

[7] Wills become public documents: Senior Courts Act 1981, s. 124.

[8] (1869) L.R. 4 H.L. 82 (H.L.).

[9] (1869) L.R. 4 H.L. 82 at 97-98 (Lord Westbury, making the clearest statement of principle in the case).

[10] [1920] 2 Ch. 523 (C.A.).

idea of fraud through personal gain was subsequently revisited with respect to both fully secret and semi-secret trusts.

A fully secret trust must be communicated by the settlor to, and accepted by, the trustee before the settlor's death; communication of an intended trust after the settlor's death is too late – the person inheriting is then absolute owner, as they made no promise to hold on trust.[11] If someone agrees during the settlor's life to be a secret trustee, but the details of the trust – its beneficiary (or other objects) – are only communicated to them after the settlor's death, this belated declaration of the terms of the trust fails; but the intended trustee cannot keep the property beneficially – having agreed to be a trustee, there is a resulting trust for the settlor's estate.[12]

Semi-secret trusts

A semi-secret trust arises when a settlor leaves property to a trustee under a will, which states it is on trust but does not disclose the trust's terms – the beneficiary (or other objects) – although, before the will was made, the settlor communicated the trust's terms to the trustee, who promised to carry them out. The trust is semi-secret in the sense that the trust's existence is revealed in a formal will, but its terms are not; although the terms of a testamentary trust – one to take effect at death – ought to be, on a straightforward reading of the Wills Act. In the leading case of *Blackwell v Blackwell*,[13] the House of Lords said semi-secret trusts will be enforced, despite not complying with the Wills Act, under the maxim that "Equity will not allow a statute to be used as an instrument of fraud". The court recognised that, if a semi-secret trust failed, the trustee could not claim to keep the property beneficially: designated a trustee in the will they would hold on a resulting trust for the settlor's estate. Therefore, there is no possibility of "fraud" by personal gain (unless the trustee happened to be the person entitled to the estate). But, they said, regardless of personal gain, the trustee using the Wills Act to defeat the trust would still be a "fraud" on the settlor and intended beneficiary – the trustee breaking their promise. The maxim applies to prevent any possibility of this fraud. So, even if the trustee

[11] *Wallgrave v Tebbs* (1855) 2 K. & J. 313, 69 E.R. 800. A recipient under a will was held outright owner; despite a letter indicating a trust found only after the testator's death.

[12] *Re Boyes* (1884) 26 Ch. D. 531 (Ch.).

[13] [1929] A.C. 318 (H.L.).

is willing throughout to carry out their promise, there is a trust immediately on inheritance: to preclude the possibility they might seek to break their promise.[14]

A series of special rules for semi-secret trusts, regarding the communication and acceptance of the trust, was established in *Re Keen*.[15] For a semi-secret trust to be valid: (1) it must be communicated to and accepted by the trustee before, or when, the will is made – not any time up to the settlor's death as with a fully secret trust; (2) the will must say this happened, and not contemplate the possibility of some later communication of trust terms (that is, after making the will); (3) communication of the trust must be consistent with the will's description of it (for example, if the will mentions a letter in January, it must not have been a phone call in June).

If a semi-secret trust fails, the trustee holds on resulting trust for the settlor's estate: designated a trustee by the will, they cannot simply keep the property beneficially.

The traditional "instrument of fraud" explanation of secret trusts

As we have seen, the leading House of Lords cases on secret trusts give the traditional explanation for enforcing them, despite the fact that they appear not to comply with the Wills Act: that "Equity will not allow a statute to be used as an instrument of fraud". In *Blackwell v Blackwell* Lord Buckmaster's leading speech defines the relevant fraud.[16] Not dishonest gain to the trustee; but potential "fraud" on the settlor and intended beneficiary by not carrying out the promised trust. He said this about semi-secret trusts, where the trustee cannot gain from defeating the settlor's declared trust (usually), because – given trustee status is mentioned in the will – that produces a resulting trust for the settlor's estate. But he extended the proposition to fully secret trusts, saying, even there the trustee would not always gain from defeating the trust: for example, if the trustee disclaimed the inheritance. So, "fraud" *in the sense of betraying the promise made to the settlor for the intended beneficiary* is now a general explanation of all fully and semi-secret trusts. And this explanation still enjoys some academic support: in

[14] Supporting this summary of the reasoning, see in particular: at 328-29 (Lord Buckmaster, delivering the leading judgment) and at 334-35 (Viscount Sumner, delivering another major judgment).

[15] [1937] Ch. 236 (C.A.).

[16] [1929] A.C. 318 (H.L.) at 328-29.

particular, Hodge strongly supports this fraud explanation;[17] and Critchley sees it as still the best explanation available, although involving a stretched meaning for "fraud" – because the word usually involves dishonesty for gain.[18]

But there has been other criticism – beyond the strained use of the word "fraud". The standard attack – from both Sheridan[19] and Oakley[20] – is that the instrument of fraud reasoning is circular. The Wills Act says there is no trust; yet the trust is used as the reason to disregard the Act. However, is this correct? The real reasoning is, "A trust was *intended*; and, despite the Wills Act, we see a reason to prevent betrayal" – which is not circular. Gardner emphasises another criticism: it is constitutionally improper for judges to disapply statutes.[21]

The "dehors the will" explanation of secret trusts

The alleged inadequacies of the instrument of fraud explanation have led to the so-called modern explanation of why secret trusts are enforced. That is, they arise "dehors the will". And because they operate outside the will, the Wills Act formality rules do not apply.

The meaning of a "will"

When analysing this dehors the will approach, it is important to be clear about what a "will" is. Because there is often an understandable preconception that the word "will" simply means a document leaving property at death. But, legally, this is not the whole story.

By Wills Act 1837, s. 1, a "will" – to which the Act's rules apply – is "any … testamentary disposition". Basically, any instructions for the disposal of one's property held at death.[22] So, if I orally instruct, "At my death, all of my property is to go to my sister", I have just made a "will": a disposition of my property for my death. It is an *invalid* will, because, as

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[17] David R. Hodge, "Secret Trusts: the Fraud Theory Revisited" [1980] Conv. 341.

[18] Patricia Critchley, "Instruments of Fraud, Testamentary Dispositions, and the Secret Trusts Doctrine" (1999) 115 L.Q.R. 631.

[19] L.A. Sheridan, "English and Irish Secret Trusts" (1951) 67 L.Q.R. 314, 324.

[20] AJ Oakley, *Constructive Trusts*, 3rd edn (Sweet & Maxell 1997), 248.

[21] Simon Gardner, *An Introduction to the Law of Trusts*, 3rd edn (OUP 2011), 96-97. Although he gets over this by saying the statute *is applied*, to invalidate the express trust, then equity imposes a constructive trust – on the same terms. Simon Gardner, "Reliance-Based Constructive Trusts" in Charles Mitchell (ed.), *Constructive and Resulting Trusts* (Hart 2010) sets out more fully his justification for a constructive trust.

[22] For technical detail see Roger Kerridge (ed.), *Parry & Kerridge The Law of Succession*, 13th edn (Sweet & Maxwell 2016), ch. 3.

mere spoken words, it does not comply with the formality requirements in Wills Act 1837, s. 9. But it is nevertheless a "will" within the meaning of the Act. Historically, oral and other informal wills were common. Legislation – now the Wills Act 1837 – required formality: now wills must be in writing, signed and witnessed to be valid. Because there is general compliance, we think of wills as this type of instrument. But, legally, a "will" is any property disposal for death.

A person often gives *several* separate sets of instructions for disposal of their property at death: for example, they may make a will with their solicitor, then later a codicil, then later a further codicil. It is possible to call each separate set of instructions a will – as the Wills Act does in its definition. But the courts usually prefer to say that a person only leaves one "will", which is *the overall composite of these various sets of instructions*.[23] This is called here "the overall will" for clarity. Within this overall will, only those instructions – if any – that complied with the Wills Act formality requirements are valid and effective, on a straightforward reading of the legislation. These instructions are called here "the formal will".

With this much clear, a settlor's secret trust arrangement – a set of instructions for the disposal of their property at death – appears to be a "will" within the meaning of the Wills Act. Or, if the courts' preferred way of putting it is adopted, the arrangement appears to be part of the settlor's *overall will*.[24] But the arrangement is not within the *formal will*;[25] apparently making the secret trust arrangement *invalid*, unless rescued in some way.

The meaning of "dehors the will"

So, it is odd to hear secret trust arrangements described as "outside wills". Legally, *they are wills* – albeit apparently *invalid wills*, for lack of formality. How, then, are these trusts valid because dehors the will? Everyone agrees they are outside *the formal will*: but that looks to be *the problem* for their validity, not some sort of *solution*. In what way, therefore, is being dehors the formal will a solution, rather than the essential problem?

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[23] *Douglas-Menzies v Umphelby* [1908] A.C. 224 (P.C.). Lord Robertson, delivering the judgment, said at 233: "Whether a man leaves one testamentary writing or several testamentary writings, it is the aggregate or the net result that constitutes his will … In this sense it is inaccurate to speak of a man leaving two wills; he does leave, and can leave, but one will."

[24] Although, where there is a fully secret trust over property inherited under the intestacy rules, the secret trust may be the settlor's *only* will.

[25] If any exists – see the previous note.

There appear to be at least two versions of the dehors the will approach. A simplistic version, which seems to underly some statements, assumes that a "will" is a document leaving property at death. And the Wills Act requires this to be signed and witnessed. But since secret trusts are not declared in such an instrument, the Act's formality rules do not apply to them. However, this simplistic version clearly misunderstands what a "will" is and when the Wills Act formality rules apply.

But Maudsley provided a more sophisticated version of the dehors the will approach.[26] He argued that secret trusts involve an inter vivos (lifetime) declaration of trust: so the lifetime formality rules apply – which generally allow declarations without satisfying any formal requirements.[27] The settlor's death then merely constitutes the declared trust; by transferring the property to the trustee.

However, this argument is untenable. Secret trusts are not inter vivos declarations. They are clearly "When I die" instructions. As Sir James Wilde – later Lord Penzance – said in *Cock v Cooke*,[28] "It is undoubted law that … if the person executing [a provision by way of gift] intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary." And as Peter Gibson L.J. said about secret trusts, delivering the leading judgment in the Court of Appeal in *Kasperbauer v Griffith*,[29] "[I]t is open to the testator … to change his mind before the gift takes effect on the death." Secret trusts must be testamentary gifts: the trust is not intended to operate until death and the settlor is free abandon the arrangement until then. If Maudlsey's view were correct, logically *every trust in a formal will* would also be an inter vivos trust: the settlor *equally* declares it during their lifetime, by executing the will; and the operation of the will at death then would *equally*

[26] R.H. Maudsley, "Incompletely Constituted Trusts" in Roscoe Pound, Erwin N. Griswold and Arthur E. Sutherland (eds), *Perspectives of Law* (Little, Brown 1964). This argument is adopted into Jamie Glister and James Lee (eds), *Hanbury and Martin Modern Equity*, 21st edn (Sweet & Maxwell 2018), para. 6-037 – a text previously edited by Maudsley.

[27] The only formal requirement affecting lifetime declarations is Law of Property Act 1925, s. 53(1)(b): any declaration of trust over land, or an interest in it, is only enforceable if there is signed writing.

[28] (1866) L.R. 1 P. & D. 241 (P.) at 243.

[29] [2000] W.T.L.R. 333 (C.A.) at 343.

merely constitute the trust. This is patently nonsensical. Therefore, the Wills Act appears to apply to secret trusts – saying the declaration needs to be in a formal will.[30]

There are also, arguably, three technical flaws in the inter vivos declaration analysis. (1) On one view of the law, a settlor cannot make a lifetime declaration over property not yet owned[31] – but secret trusts can include property acquired by the settlor between the trust agreement and death.[32] (2) A typical secret trust of a sum of money, without a specific fund of money being identified,[33] arguably lacks the certainty of subject matter required for a lifetime declaration.[34] (3) If secret trusts were simply lifetime declarations, communication to and acceptance by the trustee would not be required.[35] Lifetime declarations do not require this (nor those in a will); a trustee who declines a trust on finding out about it is simply replaced – "A trust does not fail for lack of a trustee".[36] Communication and acceptance are required only for

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[30] See David R. Hodge, "Secret Trusts: the Fraud Theory Revisited" [1980] Conv. 341, 346-47; Patricia Critchley, "Instruments of Fraud, Testamentary Dispositions, and the Secret Trusts Doctrine" (1999) 115 L.Q.R. 631, 633-41.

[31] *Re Ellenborough* [1903] 1 Ch. 697 (Ch.) is usually cited for this proposition.

[32] Patricia Critchley, "Instruments of Fraud, Testamentary Dispositions, and the Secret Trusts Doctrine" (1999) 115 L.Q.R. 631, 634. However, the better view is that *Re Bowden* [1936] Ch. 71 (Ch.) shows it *is possible* for a settlor to make a valid lifetime declaration that a trustee is to receive on trust described property not currently owned by the settlor, and to then constitute the trust by getting title to the property to the trustee once it is owned, without the need for any further declaration. (See Simon Gardner, *An Introduction to the Law of Trusts*, 3rd edn (OUP 2011), para. 4.1; and David Wilde, "Valid trust declarations over property not owned by the settlor or over unascertainable property" (2020) 26 T. & T. 168.) But if constitution is only planned for the settlor's death, with the settlor free to resile until then, as in a secret trust, we are back to the point that this is very clearly a testamentary trust.

[33] See *Hemmens v Wilson Browne* [1995] Ch. 223 (Ch.).

[34] J.E. Penner, *The Law of Trusts*, 11th edn (OUP 2019), para. 6.63. However, again, the better view is that *Re Bowden* (above fn. 32) shows a valid lifetime declaration *is possible* over described but currently unascertained property – in the same manner as over property not currently owned – subject to ascertainment by the point of constitution. But, once again, with the identical caveat that in the case of a secret trust this is manifestly a testamentary trust: if the money is simply to be ascertained out of the settlor's general estate at death, this gives the game away.

[35] Jonathan Garton, Graham Moffat and Gerry Bean (eds), *Moffat's Trusts Law: Text and Materials*, 6th edn (CUP 2015), 171.

[36] *Mallott v Wilson* [1903] 2 Ch. 494 (Ch.), inter vivos trusts; *Re Smirthwaite's Trusts* (1871) L.R. 11 Eq. 251 (Ct Ch.), trusts by will. There is an exception where the settlor intended participation of the nominated trustee to be essential: *Re Lysaght* [1966] Ch. 191 (Ch.).

secret trusts. In other words, the inter vivos declaration analysis proves too much – if correct, it would follow that communication and acceptance are not required for the validity of secret trusts; whereas they plainly are required.

Status of the rival explanations

To sum up, the instrument of fraud explanation of why secret trusts are enforced stretches the meaning of the word "fraud"; and some argue its reasoning is circular, or constitutionally improper. While the dehors the will explanation is fashionable; but unconvincing. If these two rival explanations *are* judged inadequate, it might appear reasonable to conclude that these trusts are just an unprincipled convenience.[37]

Yet, the dehors the will approach is still regularly presented as the modern explanation of why secret trusts are enforced, despite the array of arguments against it. Those arguments will be taken further here with an attempt to undermine the supposed foundation of the dehors the will approach in case law. In the course of this, a new *possible* explanation for why secret trusts are enforced emerges.

The case-law foundation of "dehors the will"

The expression "dehors the will" traces back to Lord Westbury in *Cullen v A.-G. for Ireland*.[38] But he was not giving an explanation of *why* secret trusts are enforced. He was simply making the point, in the context of a tax dispute, that the beneficiary of a fully secret trust does not derive their equitable title from the settlor's formal will: they derive it instead from a trust that is not mentioned in that formal will – dehors the will.[39]

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[37] Charlie Webb and Tim Akkouh, *Trusts Law*, 5th edn, (Palgrave 2017), para. 6.5.5.

[38] (1866) L.R. 1 H.L. 190 (H.L.; I.) at 198.

[39] Lord Westbury said at 198, "[T]he title of the party claiming under [a] secret trust … is a title *dehors* the will, and which cannot be correctly termed testamentary." He was concurring in the House of Lords' decision of an Irish appeal: that an exemption from legacy duty for charitable legacies did not exempt a legacy *subject to a fully secret trust for charity*. A legacy was statutorily defined as a "gift by any will or testamentary instrument of any deceased person, which, by virtue of any such will or testamentary instrument, shall have effect or be satisfied out of the personal estate".

In *Blackwell v Blackwell*,[40] Viscount Sumner did attempt to explain *why* secret trusts are enforced. His judgment was not the leading one in the case.[41] While Viscount Sumner did use the expression "dehors the will", it was not as an explanatory proposition – only to speak of "the admission of evidence dehors the will".[42] Nevertheless, his judgment has been – inappropriately – represented later as supporting the dehors the will theory. This passage of his judgment, in particular, has been seized on by proponents of the theory as support for it:[43]

> "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, as applied in this instance to trustees, who happen also to be legatees … [T]here is no contradiction of the Wills Act in applying the same rule, whether the trustee is or is not so described in the will, and the whole topic is detached from the enforcement of the Wills Act itself …"

It is clear that Viscount Sumner is saying here that the Wills Act does not invalidate secret trusts. However, he is not at this point saying *why* this is so: and there is no reason to understand him as saying that these trusts operate dehors the will. In fact, if we look at what precedes this passage in his judgment we find another explanation of why secret trusts are enforced.

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[40] [1929] A.C. 318 (H.L.).

[41] The leading judgment, based squarely on the instrument of fraud explanation of secret trusts, was given by Lord Buckmaster, with the concurrence of Lord Hailsham L.C. and Lord Carson. Lord Warrington delivered a separate judgment to the same effect. (However, insofar as Viscount Sumner added anything distinctive, Lord Carson can be taken as supporting him: as the final judge, he agreed with all of the judges preceding him.)

[42] [1929] A.C. 318 at 338.

[43] [1929] A.C. 318 at 339-40.

Dehors the Wills Act formality rules

Viscount Sumner's judgment is unclear.[44] He starts out by appearing to say that he, personally, sees no conflict between the Wills Act and the enforcement of secret trust arrangements.[45] But he does not give any explanation that takes account of the definition of a "will" in section 1. Later he says that other eminent judges have declared there to be a conflict between the Wills Act and the enforcement of secret trusts; with their enforcement therefore only being possible because the formality rules in the Act are disapplied under the instrument of fraud maxim.[46] He then *appears* to accept this as the law.[47] Finally, he gives a particular reason why secret trusts should be enforceable despite the Wills Act. He said Parliament's intention was that the formalities rules it laid down in the Wills Act should not apply to secret trusts: they are an implied exception to those rules. Because, when the legislature passed the Wills Act, it knew about the secret trusts doctrine (applied in relation to the earlier statutory formalities for wills) and did not intend to interfere with it. That is, secret trusts are not covered by formality rules in the Act, when it is correctly interpreted. Viscount Sumner said:[48]

> "The Wills Act is an amending Act, of which it may be said in no merely theoretical sense that the Legislature was acquainted with the existing state of the law, as enacted and decided, to which it proceeded to apply amendments, for two Royal Commissions - the Real Property Commission of 1828 and the Ecclesiastical Commission of 1830 - after inquiring (inter alia) into the subject of wills of real and personal property had reported before the Wills Act came before Parliament as a Bill. The extent to which parol evidence was admissible under existing practice for various purposes and the evils

[44] He did not come from a chancery background. "Though he practised only in commercial law, he deprecated a popular impression that he knew all there was to know about marine insurance, and nothing else. 'Neither', he said, 'is true'." A. Lentin, "Hamilton, John Andrew, Viscount Sumner (1859–1934)" in *Oxford Dictionary of National Biography* (2004), vol. 24, 873 at p.874.

[45] [1929] A.C. 318 at 334: "In itself the doctrine of equity, by which parol evidence is admissible to prove what is called 'fraud' in connection with secret trusts, and effect is given to such trusts when established, would not seem to conflict with any of the Acts under which from time to time the Legislature has regulated the right of testamentary disposition."

[46] [1929] A.C. 318 at 336: "Great authorities seem to have expressed an opinion, that this equitable principle, as a whole, conflicts with s. 9 of the Wills Act."

[47] [1929] A.C. 318 at 336-37: throughout.

[48] [1929] A.C. 318 at 338-39.

> thereout arising were known … Accordingly I think the conclusion is confirmed, which the frame of s. 9 of the Wills Act seems to me to carry on its face, that the legislation did not purport to interfere with the exercise of a general equitable jurisdiction, even in connection with secret dispositions of a testator, except in so far as reinforcement of the formalities required for a valid will might indirectly limit it. The effect, therefore, of a bequest being made in terms on trust, without any statement in the will to show what the trust is, remains to be decided by the law as laid down by the Courts before and since the Act and does not depend on the Act itself."

This was an application of the general principle later stated by Lord Wilberforce, delivering the leading judgment in the House of Lords in *Shiloh Spinners Ltd v Harding*:[49]

> "In my opinion where the courts have established a general principle of law or equity, and the legislature steps in with particular legislation in a particular area, it must, unless showing a contrary intention, be taken to have left cases outside that area where they were under the influence of the general law."[50]

So, Viscount Sumner did offer a novel explanation of why secret trusts are enforced in *Blackwell v Blackwell*; but it was not the dehors the will approach. It could be called a "dehors the Wills Act" approach. Or more correctly a "dehors the Wills Act *formality rules*" approach.

However, this formulation – "dehors the Wills Act *formality rules*" – raises a question. Why say that Parliament intended *only* the formality rules in section 9 of the Wills Act not to apply to secret trusts; why not go further and say that Parliament intended the definition of a will in section 1 not to apply to them? This latter proposition would *validate* the dehors the will theory: secret trusts would no longer be "wills" at all within the meaning of the Wills Act. But

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[49] [1973] A.C. 691 (H.L.) at 725.

[50] Diggory Bailey and Luke Norbury (eds), *Bennion on Statutory Interpretation*, 7th edn (LexisNexis 2017) at sect. 25.1 explains: "An Act must be read and applied in the context of the general body of law into which it is assimilated. Ordinary rules and principles of the common law will generally apply to, and may impliedly qualify, the express statutory provisions …" And at sect. 25.4: "Where an Act is silent on an issue the existing law is taken to apply unless excluded expressly or by implication. The existing law is therefore available to supplement a legislative scheme … [E]quitable principles are particularly likely to be used in this way because of their tendency to be flexible or adaptable in nature."

there are three reasons for understanding Viscount Sumner as saying Parliament intended *only*, specifically, the formality rules in section 9 not to apply to secret trusts. First, he made direct reference to section 9 in the passage quoted. Secondly, it would be counter-intuitive to interpret Parliament as deviating from the long-understood meaning of a will when enacting section 1. Thirdly, it would also be inconsistent with the scheme of the Act, which was to accept that any testamentary disposition is a will within section 1, but to then provide individual exemption, where desirable, from the formality rules laid down in section 9.[51]

Other case-law support for "dehors the will"

Apart from Viscount Sumner's judgment in *Blackwell v Blackwell*, there is little other case-law authority supposedly supporting the dehors the will approach. The case most often relied on is *Re Snowden*.[52] But this reliance again involves taking parts of a judgment out of context. The passage usually cited is Sir Robert Megarry V.-C.'s statement that:[53] "[T]he whole basis of secret trusts, as I understand it, is that they operate outside the will, changing nothing that is written in it, and allowing it to operate according to its tenor, but then fastening a trust on to the property in the hands of the recipient." Although this sentence contains the expression "outside the will", it is, in context, no endorsement of a dehors the will theory. The Vice-Chancellor was discussing the standard of proof required for a secret trust, and was here rejecting an analogy with the standard of proof required to rectify an instrument: he was simply making the point that a secret trust does not involve *changing* the terms of the settlor's formal will – it involves instead superimposing a trust on the property left in the formal will under an arrangement that (everyone agrees) is separate from and outside the formal will. The Vice-Chancellor went on to say a little later:[54] "[I]t is right to say that the law on the subject has not stood still since 1869, and that it is now clear that secret trusts may be established in cases where there is no possibility of fraud." But, again, this is not – or at least not clearly – a rejection of the instrument of fraud justification: because he was, in context, specifically talking about *fraud by personal gain*.[55] Supporters of the instrument of fraud justification would *agree* that

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[51] See the rule for privileged wills in Wills Act 1837, s. 11.

[52] [1979] Ch. 528 (Ch.).

[53] [1979] Ch. 528 at 535.

[54] [1979] Ch. 528 at 535.

[55] As he put it, [1979] Ch. 528 at 536: "[F]raud is … involved … where for the legatee to assert that he is a beneficial owner, free from any trust, would be a fraud on his part."

secret trusts no longer depend on fraud *in this sense*: the fraud that is seen as crucial since *Blackwell v Blackwell* is instead *betraying the promise made to the settlor for the intended beneficiary*. And the Vice-Chancellor's very next sentence suggests this may have been exactly what he had in mind:[56] "*McCormick v. Grogan*, L.R. 4 H.L. 82 has to be read in the light both of earlier cases that were not cited, and also of subsequent cases, in particular *Blackwell v. Blackwell* [1929] A.C. 318." Likewise, the Vice-Chancellor's immediately following comments, about fraud as merely the "historical explanation" of secret trusts, are explicable in exactly the same way: he was clearly talking specifically about *fraud by personal gain*.[57] Overall, there is nothing in the judgment that *clearly* endorses a dehors the will theory.

One more authority is commonly cited. *Re Young*[58] is represented as a case where the decision turns on acceptance of the dehors the will approach, as its ratio decidendi. But on examination the support offered to a dehors the will theory is equally weak. The beneficiary of a semi-secret trust was a witness to the formal will of the settlor mentioning the trust. By Wills Act 1837, s. 15, a gift under a will to a witness is void. But the trust in favour of the beneficiary was held valid: it was decided that section 15 did not apply. In the passage cited as proof of a dehors the will approach, Danckwerts J. said:[59] "The 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 the Wills Act are entirely disregarded, since the persons do not take by virtue of the gift in the will, but by virtue of the secret trusts imposed upon the beneficiary [i.e., the trustee], who does in fact take under the will." But, notably, the judge does not say here that the Wills Act is "irrelevant", which would support a dehors the will theory; he says instead that the Wills Act is "disregarded", which is more suggestive of the instrument of fraud maxim disapplying the statute. And the actual ground of decision was the point that the declaration of the beneficiary's interest was not in the formal will he had witnessed: a point that *both* the instrument of fraud view and the dehors the will view agree on.

The case-law support for the so-called modern explanation of secret trusts – that they operate dehors the will – is therefore negligible.[60]

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[56] [1979] Ch. 528 at 535.

[57] [1979] Ch. 528 at 535-36.

[58] [1951] Ch. 344 (Ch.).

[59] [1951] Ch. 344 at 350.

[60] Also sometimes cited is *Re Gardner* [1923] 2 Ch. 230 (Ch.) (usually called *Re Gardner (No. 2)*, following on from the separate *Re Gardner* decision mentioned previously, fn. 10). But the reasoning in this judgment is widely

Implications of accepting this "dehors the wills act formality rules" approach

Viscount Sumner's reasoning in *Blackwell v Blackwell* was that, before the Will Act 1837, the courts enforced secret trusts under instrument of fraud reasoning, despite the statutory formalities for wills. And when the Wills Act replaced earlier legislation, Parliament's implied intention was that secret trusts should be exempt from the formality rules in section 9 of the new Act, so as to remain enforceable. There are two possible ways of interpreting this "dehors the Wills Act formalities rules" reasoning.

A conservative alternative is to see secret trusts as continuing to be based on the instrument of fraud justification: taking the view Parliament was simply recognising and accepting the continuing operation of that maxim. In other words, when section 9 of the Wills Act imposes formal requirements for a valid will, it should be read as if it said, "except, of course, for secret trusts, which will be immune from the effect of this section under the ongoing instrument of fraud maxim". This would at least overcome the usual objections to the instrument of fraud justification for secret trusts. If Parliament has impliedly given its blessing, the stretched use of the word "fraud" matters little, while alleged circularity of reasoning (using the trust as a reason to disapply the Act) and constitutional objections (that judges cannot properly disapply statutes) disappear.

A more radical alternative would be to see Parliament's inferred exclusion of secret trusts from the formality rules in section 9 of the Wills Act as, instead, now a free-standing reason that secret trusts are enforceable: divorced from the historical – and to some, unsatisfactory – baggage of the instrument of fraud doctrine. In other words, when section 9 of the Wills Act imposes formal requirements for a valid will, it should be read instead as if it said, "except, of course, for secret trusts, which are not within the intended scope of this section" (simpliciter). The argument in favour of this radical alternative would be the desirability of rational development in legal rules; rather than treating equity as a prisoner of its history.[61]

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regarded as wrong and does not in any case support a dehors the will theory: Jamie Glister and James Lee (eds), *Hanbury and Martin Modern Equity*, 21st edn (Sweet & Maxwell 2018), para. 6-038.

[61] Patricia Critchley, "Taking Formalities Seriously" in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* (OUP 1998) sets a framework for the rational discussion of formalities rules.

This radical alternative would have a wider effect, giving scope for potentially different outcomes to legal problems. For example, where the trustee of a secret trust dies before the settlor. If we continue with the instrument of fraud justification, the better view is that its logic would dictate the trust must fail: there is no possibility of appointing a replacement trustee to carry out the declared trust under the usual principle that, "A trust does not fail for lack of a trustee". Because, at the settlor's death, there is no risk of fraud by the now-deceased named trustee, so there is no reason to enforce the declared informal trust (and, in the case of a semi-secret trust, although a trust is mentioned in the will, without the risk of fraud by the trustee, the trust on the face of the will, without any statement of its terms, is a resulting trust for the settlor's estate).[62] But some commentators would like to see the declared trust upheld, to carry out the settlor's intention:[63] which is possible if we see the enforcement of secret trusts as now free-standing and divorced from the instrument of fraud justification.

Presumably, even accepting the radical alternative, well-established secret trust rules would have to stay: in particular the need for communication to, and acceptance by, the trustee – although the special rules for semi-secret trusts established in *Re Keen*[64] have always been vulnerable to review in the higher courts, in light of long-standing and well-known criticism[65] (and rejection in other jurisdictions).[66]

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[62] *Re Maddock* [1902] 2 Ch. 220 (C.A.) at 231. Cozens-Hardy L.J. said (in the context of a fully secret trust) obiter: "… the so-called trust does not affect the property except by reason of a personal obligation binding the individual [trustee]. If he … dies in the lifetime of the testator, the [intended beneficiaries] can take nothing …" See further David Wilde, "Secret and Semi-Secret Trusts: Justifying Distinctions Between the Two" [1995] Conv. 366, at p. 373 fn. 22; and Ben McFarlane and Charles Mitchell (eds), *Hayton and Mitchell: Text, Cases and Materials on the Law of Trusts and Equitable Remedies*, 14th edn (Sweet & Maxwell 2015), paras 3.157-159.

[63] See Diana Kincaid, "The Tangled Web: the Relationship Between a Secret Trust and the Will" [2000] Conv. 420, 439-40.

[64] Text at fn. 15 above.

[65] W.S. Holdsworth, "Secret Trusts" (1937) 53 L.Q.R. 501; J.G. Fleming, "Secret Trusts" (1947) Conv. 28.

[66] See Jamie Glister and James Lee (eds), *Hanbury and Martin Modern Equity*, 21st edn (Sweet & Maxwell 2018), para. 6-033.

Express or constructive trusts?

If a "dehors the Wills Act formality rules" explanation of secret trusts is accepted, what are the implications for the tortuous debate about whether these are express or constructive trusts? This issue has produced a diversity of (at times bewildering) views.[67]

Of course, the basic idea of an "express trust" is one declared by a settlor; and of a "constructive trust" is one imposed by equity to achieve justice. It is doubtless dangerous to assume so, given the range of views expressed, but perhaps the fundamentals of the debate about which category secret trusts fall into can be simply stated. Some see them as obviously express trusts: the settlor is choosing to declare a trust and sets its terms, and that is enough to categorise it as an express trust, regardless of the reasoning by which the trust is upheld.[68] Others argue that this express declaration of trust *on its own* is invalid, under the Wills Act; and a special equitable intervention is needed for any trust to exist.[69] Equity has to replace the failed express trust with a constructive trust, albeit on the terms declared by the settlor. The enforced trust is therefore a constructive trust. And they are able to cite authority that this is how the instrument of fraud maxim, in particular, works: creating constructive trusts.[70] However, others maintain that, while there is admittedly an important special equitable intervention, the specific technique equity uses, under the instrument of fraud maxim, is to *disapply* the Wills Act, leaving no obstacle to the validity of the trust declaration: so it is the express trust itself that is enforced. Therefore, it was, and remains, an express trust. And they are able to cite authority that this is how the instrument of fraud maxim works: leaving express trusts intact.[71]

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[67] The two leading modern monographs on constructive trusts reach opposite conclusions. A.J. Oakley, *Constructive Trusts*, 3rd edn (Sweet & Maxwell 1997), ch. 5, sees them as express trusts. Ying Khai Liew, *Rationalising Constructive Trusts* (Hart 2017), ch. 5, sees them as constructive trusts.

[68] For example, C.E.F. Rickett, "Secret Trust or Moral Obligation? – A Question of Evidence" (1979) 38 C.L.J. 260 and "Thoughts on Secret Trusts from New Zealand" [1996] Conv. 302.

[69] Above and beyond the *normal* equitable intervention needed to validate any expressly declared trust: all declarations of trust would be invalid at common law – only equity's general enforcement of trusts saves them.

[70] *Bannister v Bannister* [1948] 2 All E.R. 133 (C.A.) at 136. This appears to be the most widespread view today.

[71] *Rochefoucauld v Boustead* [1897] 1 Ch. 196 (C.A.) at 208; analysed in William Swadling, "The Nature of the Trust in *Rochefoucauld v Boustead*" in Charles Mitchell (ed.), *Constructive and Resulting Trusts* (Hart 2009) – and regarding secret trusts specifically, William Swadling, "The Fiction of the Constructive Trust" (2011) 64 C.L.P. 399, 417-18.

If a "dehors the Wills Act formality rules" approach is accepted, again we have to separate out the conservative and radical understandings of it to see the implications for the "express or constructive" debate. On the conservative understanding, there has been no real change. However, on the radical understanding, the case for secret trusts being express is considerably strengthened: the declared trust appears to be upheld, because there is no obstacle in the Wills Act, correctly interpreted, to its validity.

The practical significance of the "express or constructive" debate is perhaps vanishingly small. By Law of Property Act 1925, s. 53(1)(b), signed writing is required to enforce an expressly declared trust over land or an interest in it. Whereas by Law of Property Act 1925, s. 53(2), this not needed to enforce a constructive trust. However, even if secret trusts of land are categorised as express trusts, the statutory requirement of signed writing in section 53(1)(b) would very probably be negated by the courts, using instrument of fraud reasoning parallel to that with which they negated the statutory formalities for wills.[72] So, in practice, even in the case of land, it may not matter to the outcome whether a secret trust is classed as express or constructive: the trust is likely to be enforced either way – although the reasoning may differ.

Conclusion

Viscount Sumner did not – as is often claimed – say in *Blackwell v Blackwell* that secret trusts arise "dehors the will". Nor is there any other significant case-law support for that proposition. "Dehors the will" is anyway an unsatisfactory explanation for the enforcement of secret trusts. What Viscount Sumner *did* say in *Blackwell v Blackwell* is a more promising explanation: that secret trusts are an implied exception from the formalities rules laid down in Wills Act 1837, s. 9 – because Parliament knew about the enforcement of secret trusts, despite previous will formalities legislation, and had a considered intention not to interfere with their operation. On a conservative interpretation, this view at least removes the objections to the traditional justification for the validity of secret trusts under the maxim that "Equity will not allow a statute to be used as an instrument of fraud". On a more radical interpretation, it provides a free-standing justification of the validity of secret trusts, detached from its history of instrument of fraud reasoning; *arguably* allowing for a more rational development of the law.

[72] But cf. *Webster v Ashcroft* [2011] EWHC 3848 (Ch), [2012] 1 W.L.R. 1309 at [16]: Nicholas Strauss Q.C., sitting as a Deputy High Court Judge, believed that a (fully) secret trust of land would probably fail in the absence of signed writing to satisfy Law of Property Act, s. 53(1)(b).

We should perhaps get used to saying that secret trusts operate “dehors the Wills Act formality rules” rather than “dehors the will”?