

Secret trusts in blackwell v blackwell



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“ For the prevention of fraud equity fastens on the conscience of the legatee a trust which would otherwise be inoperative: in other words, it makes him do what the will has nothing to do with, it lets him take what the will gives him, and then makes him apply it as the Court of Conscience directs, and it does so in order to give effect to the wishes of the testator, which would not otherwise be effectual” per Viscount Sumner in Blackwell v Blackwell [1929] A. C. 318, 335. Discuss this view explaining the practical and legal problems the approach creates, the nature of the fraud, and whether it is a sufficient justification for the acknowledgment of both fully secret and half secret trusts.

Let us commence with a brief examination of the factual circumstances which occurred in this case: A testator, by a codicil, bequeathed a legacy of £12, 000 to five persons ‘ to apply for the purposes indicated by me to them. Prior to the execution of this codicil, the terms of the trust were communicated to the legatees and the trust was accepted by them. The beneficiaries were the testator’s mistress and her illegitimate son. The plaintiff sought from the courts a declaration that no such valid trust in favour of the objects had been created on the ground that parole evidence was inadmissible to establish such a trust.

Approaching this factual situation as a probate lawyer, one would not be criticised for suggesting that the trusts in question were invalid for failure to comply with the formality requirements of s9 of the Wills Act 1837, which require a will, “ or any other testamentary disposition”, to be in writing, signed by the testator and two witnesses. Viscount Sumner in Blackwell v

Blackwell ^[1] however did find that these trusts were valid, in spite of this statute:

The above excerpt, from the dicta of Viscount Sumner in *Blackwell v Blackwell*, argues that the enforcement of a semi-secret trust does not in fact contravene the aforesaid statutory provision. Viscount Sumner reasons that the trust in question is in fact created *inter vivos*, and as such operates outside of the will; the testator communicated the trust to the proposed trustees who accepted it, the trust becoming fully constituted upon execution of the will and transfer of the trust property to these trustees. In this way, he argues that enforcement of the trust is not due to the will document itself, rather the previous agreement made between the trustees and testator; secret trusts therefore operate outside of the will itself and as such are not subject to the formality requirements contained in s9 of the Wills Act 1837: “ the 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. ^[2] ” Viscount Sumner therefore argues that the enforcement of semi-secret trusts should be governed by trust law and not through the rules of probate.

This conclusion is certainly neat, and *prima facie*, does seem to satisfy the concerns of the probate lawyer, but if Viscount Sumner’s argument is to be accepted, and we are to submit to the notion that the applicable principles to be applied to the above facts lie within the sole jurisdiction of trust law, then surely we could expect that there would be a vast body of case law which we could rely upon to support his argument. The truth however is that, despite <https://assignbuster.com/secret-trusts-in-blackwell-v-blackwell/>

its beautiful simplicity, there are real legal problems in reconciling this theory with our orthodox principles of trust law; the permission of a trust, which purports to bind after-acquired property, is irreconcilable with the established trust law rule that it is impossible to declare an immediate trust of future property^[3], or a trust which binds such property whenever it is received^[4]. These are not minor concerns, nor the only concerns:

Critchley^[5] argues that this viewpoint is also flawed in that Viscount Sumner has confused the notions of “outside the will” with “outside the Wills Act”, incorrectly relying on the reasoning in the case of *Cullen v Attorney General for Northern Ireland*^[6], which was a decision relating to tax statutes rather than to the formal requirements of the Wills Act, and was as such within an entirely different legal context

On top of this, Pearce and Stevens^[7] convincingly argue that the case of *Re Maddock*^[8] is wholly inconsistent with Viscount Sumner’s view: In this case, a testatrix, by her will, left her residuary estate ‘absolutely’ to X whom she appointed one of her executors. By a subsequent memorandum communicated to X during her lifetime, she directed X to hold part of the residue upon trust for named beneficiaries. There were insufficient assets to pay the debts of the estate. The legal issue was whether or not the secret beneficiaries took their interest subject to the payment of the debts. Cozens-Hardy LJ argued that “...the so called trust does not affect property except by reason of a personal obligation binding the individual devisee or legatee. If he renounces or disclaims, or dies in the lifetime of the testator, the persons claiming under memorandum can take nothing against the heir at

law or next of kin or residuary devisee or legatee.” Viscount Sumner’s reasoning however suggests that since the trustee takes as trustee on the face of the will, the trust should not fail in the ways suggested by Cozens-Hardy in the above dicta.

The legal problems and inconsistencies with Viscount Sumner’s justification must lead us to the conclusion that such trusts cannot be accounted for under the rules of inter vivos trusts; we must therefore accept that their existence does in fact mark a departure from the Wills Act 1837.

This does not mean that such a view is necessarily unjustified and outside the scope of Equity’s jurisdiction; after all, Equity is the ‘ court of conscience’, and as the age old maxim states ‘ Equity will not allow a statute to be used as an engine of fraud’. Therefore, if it can be demonstrated that the permission of semi-secret trusts is preventing such fraud, then, despite the legal problems and inconsistencies discussed above, we may still be able to find adequate justification for the existence of such trusts. As Vaughan Williams L. J. asserted, in the case of *Re Pit Rivers* [1902] ^[9], “...the court will never give the go-by to the provisions of the Wills Act by enforcing any one testamentary disposition not expressed in the shape and form required by the Act, except in the prevention of fraud.”

Clearly therefore, whether or not this justification will apply to any given case depends upon which definition of ‘ fraud’ is subscribed to in that case. In *McCormick v Grogan* ^[10], the ‘ fraud’ being protected was that of the secret trustee: “ it is only in clear cases of fraud that this doctrine has been applied—cases in which the Court has been persuaded that there has been a

fraudulent inducement held out on the part of the apparent beneficiary in order to lead the testator to confide to him the duty which he so undertook to perform.” The protection of this type of fraud has been held out, and confirmed in subsequent cases, to be the traditional justification for the existence of the doctrine of secret trusts. However, in the case of semi-secret trusts [such as the type of trust at issue in the case of Blackwell v Blackwell] such fraud is not possible; the face of the will makes it quite clear that the secret trustee is not to take the property beneficially, and should the contents of the trust be denied by that trustee, the property would return to the estate by way of resulting trust. And yet in cases involving half-secret trusts, we can still see the courts employing justification-arguments based on fraud. In such cases, a wider conception of ‘ fraud’ has been employed; “ it is not the personal fraud of the purported legatee, but a general fraud committed upon the testator and the beneficiaries by reason of the failure to observe the intentions of the former and of the destruction of the beneficial interests of the latter.”

It was this argument put forward in the case of Riordan v Banon ^[11]: “ it appears that it would also be a fraud though the result would be to defeat the expressed intention for the benefit of the heir, next of kin or residuary donee,” and it was this passage which was cited by Hall V. C. in the case of Re Fleetwood ^[12], a case which was relied upon by Viscount Sumner in the formulation of his judgement: “ It seems to me that, apart from legislation, the application of the principle of Equity in Fleetwood’s case... was logical, and was justified by the same considerations as in cases of fraud and absolute gifts. Why should equity forbid an honest trustee to give effect to

his promise, made to a deceased testator, and compel him to pay another legatee, about whom it is quite certain that the testator did not mean to make him the object of his bounty?”

Challinor ^[13] argues that the ‘ fraud theory’ has been extended in an artificial way in order to encompass a justification of half-secret trusts and the modern case law. A huge flaw exists in making such an extension; she argues that equity’s willingness to respect a testator’s wishes where that testator has not met the formality requirements as stipulated by s9 of the Wills Act is inconsistent with its approach to other commonplace situations in which a testator’s wishes are not respected by Equity in the same way: for example, “ purported beneficiaries under ineffective wills are routinely deprived of property which testators or settlers would desire them to have, simply because wills and trusts have not been put into effect in the proper manner.” She argues that the traditional equitable maxim that “ equity will not permit a statute to be used as an engine of fraud” must be adapted to something more like “ equity will not allow a statute to be used so as to renege on a promise” if it is to fit within the situations envisaged in Blackwell v Blackwell. The effect of such a mild form of fraud theory is to shift the focus “ onto potential, rather than actual, wrongdoing... the policy aim underlying it is thus proactive (or preventative) rather than reactive (or curative).”

In conclusion therefore, Viscount Sumner’s view as to the enforcement of secret and semi-secret trusts is one which creates a number of practical problems. It gives testators a valid reason for not observing the statutory formalities normally applicable in making a will. These statutory formalities

are in place for the very purpose of preventing personal fraud, and in light of this, it seems odd that Viscount Sumner should support a view which in itself gives testators the option of bypassing these precautions and thus increasing their risks to such fraud, especially in light of the fact that the underlying justification in his viewpoint is one of ensuring that the testator's true intentions are honoured. I must therefore conclude that in light of its legal problems and inconsistencies, the artificial nature of the 'fraud' it seeks to prevent, the practical problems which arise as a result of acknowledging such trusts, the view expressed by Viscount Sumner in the case of Blackwell v Blackwell does not provide a sufficient justification for the acknowledgment of both fully secret and half secret trusts.

Bibliography

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Footnotes

[1] [1929] A. C. 318, 335

[2] Megarry V. C in Snowden, Re [1979] 2 All E. R. 172 at 177, expressing the same viewpoint as Viscount Sumner in Blackwell case

[3] Williams v C. I. R. [1965] N. Z. L. R. 395

[4] Permanent Trustee Co v Scales (1930) 30 S. R. (N. S. W.) 391

[5] Critchley, “ Instruments of Fraud, Testamentary Dispositions, and the Doctrine of Secret Trusts” (1999) 115 L. Q. R. 631 at 635 and 641

[6] Cullen v Attorney-General for Ireland (1866) L. R. 1 H. L. 190 at 198, per Lord Westbury.

[7] Pearce & Stevens, The Law of Trusts and Equitable Obligations (2nd ed., London, 1998), p. 222

[8] Maddock, Re [1902] 2 Ch. 220

[9] Pit Rivers, Re [1902] 1 Ch. 403

[10] McCormick v Grogan (1869) L. R 4 H. L. 82 at 89

[11] (1876) 10 Ir. Eq. 469

[12] (188) 15 Ch. D. 594 at 606-607

[13] Conveyancer and Property Lawyer 2005. “ DEBUNKING THE MYTH OF SECRET TRUSTS” Emma Challinor