The role of equity in developing secret trusts law equity essay

Law

Alp. Have the relevance and utility of the doctrine of secret trusts diminished in contemporary society?

Secret Trusts – Definition

To begin the tale of secret trusts, we must first look at the formality requirements of the Wills Act 1837. Section 9 of the Wills Act states that a will (and by extension any testamentary gift or trust) will not be valid unless it is in writing, signed by the testator and attested by the testator and at least two witnesses. The Act is framed in such a way as to prevent fraud and to encourage certainty and clarity of testamentary dispositions. Penner (2010) says of the Act that " the formal requirement of wills, principally that a will be signed by the testator and attested by two witnesses, are prescribed to ensure that the will truly represents the testator’s intentions." It is important to appreciate that the testator, being dead, cannot come forward to clarify his intentions or refute false claims. 1The doctrine of secret trusts however provides for trusts which take effect upon the death of the testator through his will (or uncommonly, on the operation on the laws of intestacy) yet are not in accordance with the requirements of S. 9. 2

Secret Trusts – Distinction: Fully & Half Secret Trusts

Secret trusts are separated into two categories: Fully Secret and Half Secret Trusts. Generally, a fully secret trust arises where a testator appears to give another person a gift absolutely under his will, but that person has agreed to hold the gift on trust for another. Fully secret trusts may also arise, though less frequently, where one’s intestate successor agrees to hold property he is to receive under the laws of intestacy on trust for another (as in Sellack v

Harris)A half secret trust arises where it is evident on the face of the will that a trust exists, but its terms are not revealed in the will (as in the case of Re Keen)

Establishing Secret Trusts – Intention, communication acceptance

Proving a secret trust involves crossing three hurdles. There must be evidence showing that:-The testator intended to create a trust; There was timely communication of that intention to the intended trustee; andThere was acceptance of the trust obligation by the trustee. All three requirements have to be satisfied in proving the existence of both fully and half-secret trusts. However, while acceptance on the part of the trustee may be done at any point in time before the testator’s death where a fully secret trust is alleged, in the case where a half-secret trust is to be proved, acceptance must occur at or before the execution of the will. 3

Secret Trusts – Early Uses

The following are examples of situations in which secret trusts have arisen over the years: Testator is induced by deceitful Trustee to gift him a legacy, convincing him that his wishes for said property will be put into fruition – (Thynn v Thynn (1684), Oldham v. Litchford); Testator wishes to benefit an unnamed or potentially embarrassing object ; Testator is indecisive or those wishes to easily change provisions of his will(Reech v Kennegal, Re Snowden)GW Allan’s (Senior Lecturer, University of Wolverhampton) impressive article " The Secret is Out There: Searching for the Legal Justification for the Doctrine of Secret Trusts through Analysis of the Case Law", CLWR 40 4 (311)) reviewed secret trust cases and revealed the

following statistics: 60 reported cases6-8 with provision for illegitimate children or mistresses; 19 dealing with the Statutes of Mortmain, under which it was impossible to leave land by will for charitable purposes; Some with deceit on part of secret trusteeFew arising as a result of Legal advicePoor draftingAvoidance of taxBulk referencing prevention of fraud as reason for upholding

The role of equity in developing secret trusts

4The role of the Courts of Equity, sometimes referred to as the Court of Conscience is important in the development of secret trusts. Equity was faced with a peculiar problem in many secret trust cases. The problem was as follows. To uphold the secret trust would circumvent the strict formality requirements of the Wills Act. On the other hand, enforcing the formality requirements would be in effect using the statute to defraud the testator’s intentions. Citing the equitable maxim of " Equity will not permit a statute to be used as an instrument of fraud", the Courts chose to uphold secret trusts, viewing it as the lesser of two evils. In the absence of any discernible alternative or remedy, the Courts of Equity found it reasonable not to apply strictly the formality rules in order to meet the demands of justice. A rich body of case law followed this line of thinking through the years, Wallgrave v Tebbs (1855), Cullen v Attorney General for Ireland, Ottaway v Norman, Blackwell v Blackwell and Re Fleetwood being chief among them5. While not all of these cases actually upheld secret trusts, the judges’ reasoning in delivering their judgments make it apparent that the prevention of fraud is uppermost in their minds when doing so. Hall VC in Re Fleetwood instructs that " The testator, at least when his purpose is communicated to and

accepted by the proposed legatee, makes the disposition to him on the faith of his carrying out his promise, and it would be a fraud on him to refuse to perform that promise"

Secret Trusts – Today

6In recent times there has been a paucity of secret trust cases before the courts. In light of this, the following questions must be asked. Have factors such as the development of other branches of the law, public perception regarding children born outside of wedlock, the frequency of divorce, the abolition of the Acts of Mortmain and the ease in which gifts may be made inter vivos removed the need for the doctrine of secret trusts? Do the existence of other avenues to make secret bequests render this doctrine irrelevant? In a recent study presented by Rowena Meager and published in the journal Conveyancer and Property Lawyer, legal practitioners in the UK specializing in wills and probate revealed that quite a number of practitioners had been posed questions regarding ways in which they could dispose of property secretly (35% of respondents to survey). 16% and 20% of them had been involved in the creation of fully secret and half secret trusts respectively. Furthermore, 13% and 23% of them had advocated that the use of fully secret or half secret trusts would have been a suitable instrument for fulfilling their client’s objectives. The study shows that there are a sizable amount of testators who feel the need to make secret bequests. One may also conclude that, in the minds of the practitioners and clients involved, more attractive measures existed than secret trusts (making gifts while alive, for example, or setting up a bank account in another’s name). Of the relatively small amount of practitioners who had

discussed the use of a secret trust along with other competing instruments with their clients, more than half of the clients chose other instruments (52%) with 29% choosing the secret trust and the remaining 19% choosing neither.

The study reveals that while there is yet a demand for making secret bequests, depending on the degree of secrecy desired, a testator has other options for completing such bequests. While said options may not necessarily be as discreet as a secret trust, they are certainly more reliable.

7

ConclusionGifts by will for charitable purposes no longer require the secrecy needed when statutes related to Mortmain were in effect. A lesser need exists for secrecy with respect to provision for illegitimate children and mistresses, as a result of the changes in perception to such categories of people and also the ability of a dependent to apply for provision out of one's estate under the Inheritance (Provision for Family and Dependants) Act 1975. Elimination of the above two categories of secret trust alone accounts for a great deal of case law and as a result one is forced to concede that the relevance of the doctrine has diminished over time. The statistics given by Meager tells a different story however. The large amount of requests for information by clients on making secret testamentary bequests along with their lawyers' admission of being involved in the creation of secret trusts show that the doctrine is still being utilized. On reflection, what a testator chooses to be secretive or embarrassed about depends entirely on him, and from this point of view, the situations in which he may decide to make a secret trust is quite expansive. I am of the opinion that it would be incorrect

to condemn the doctrine as being totally irrelevant or having no utility, despite the changes in society and in law as they provide a testator with a useful and discreet option for disposing one’s property. Moving forward, it is for the Courts ultimately to decide whether secret trusts are still a justified departure from the formality requirements of the Wills Act, in light of the social and legal changes that have occurred over time.