

b. Secret Trusts

There's one problematical situation which arises from time to time and that's the situation where a testator leaves a legacy to somebody and on the face of the will that legacy seems to be an absolute gift, it's not expressed to be held on trust for anyone; but even though it's not expressed in the will, the testator had an intention that that legate hold on trust for someone. That intention's not expressed in the will, but the testator communicated it to someone prior to the testator's death. So here we have a situation where the testator intended to create a trust but the requirements of form have not been complied with in relation to that particular trust. The 'secret trust' doctrine can overcome this problem in some situations.

So we're now talking about secret trusts. The name 'secret trust' is derived from the fact that there is an intention to create a trust but that intention is a secret one. That intention hasn't been expressed to the world through the terms of the will. So that's the first thing to note about secret trusts. It's a doctrine which is confined to wills, it's confined to the situation where the testator intended to create a trust after his death, but the will doesn't express the trust, the will doesn't express the intention to create a trust. There are actually two types of secret trust. There's a 'fully secret trust' and a 'half secret trust'.

A fully secret trust relates to the situation where the gift in the will, on the face of it is an absolute gift. So the intention to create a trust is totally secret. A half secret trust refers to the situation where the will says the gift to this legate is subject to a trust, but the objects of the trust are not specified. The will says the gift is subject to a trust, but the objects of the trust are not specified. An example of that might be if the will says "I give this to X to be applied in accordance with my instructions". That indicates an intention to create a trust, but the objects aren't specified. In either case, a person who claims to be a beneficiary under a secret trust must show three things and those three things are listed towards the bottom of p12 in the study guide.

The first is that the testator had an intention that the property be used in a particular way. You have to show an intention that the property be used in a particular way. The second is that that intention has been communicated to the person who is to receive the legacy. The testator has told the [legate], who is the intended trustee of his intention. The third and final thing is that the legate, the intended trustee, has accepted that obligation or at least acquiesced in that obligation. So there's at least some acknowledgment, some acceptance by the legate that the gift is being received subject to a trust.

The leading Australian case is **Voges v. Monaghan**. What happened here is that the testator left his entire estate to Mrs Voges. Mrs Voges was a friend of the testator and she was a lady who had been very helpful to the testator in the management of his business and household affairs. So she is somebody who he relied upon during his life for the management of his financial affairs if you like. There were another two characters in this drama that we need to become familiar with. First of all there's Mrs Answerth. Mrs Answerth was a niece by marriage to the testator. She was the testator's niece by marriage. The other person we need to know about is Miss Monaghan. She was a servant in the testator's household.

The testator died in June 1946. Some months before he died, in August 1945, the testator said to Mrs Voges that he had made his will and he asked Mrs Voges to look after his wife after his death. So in August 1945 he said to Mrs Voges, "please look after my wife after my death" and Mrs Voges assented to that. Then in October 1945 the testator again spoke to Mrs Voges and suggested to her that she might give to each of Mrs Answerth and Miss Monaghan three pounds per week. Three pounds per week for life. In the proceedings, Mrs Voges gave evidence that the testator had said that was to be subject to her discretion, "subject to your discretion Mrs Voges,

you are to give three pounds per week to each of Mrs Answerth and Miss Monaghan". That was disputed by the other parties.

When the testator died in June 1946, he was survived by his wife and Mrs Answerth and Miss Monaghan and Mrs Voges. Miss Monaghan gave evidence that after the testator's death, Mrs Voges came to see her and Mrs Voges produced a piece of paper. As she produced the piece of paper she said this is what the testator wished me to do for you, then Mrs Voges read out that Miss Monaghan was to get three pounds per week. So Mrs Voges had said to Miss Monaghan, "this is what the testator wants me to do for you" and she said, "you are to get three pounds per week for life". That was the basis upon which Mrs Answerth and Miss Monaghan were disputing Mrs Voges' suggestion that the three pounds per week was subject to Mrs Voges' discretion. Mrs Voges did pay the three pounds per week to both Miss Monaghan and Mrs Answerth until September 1950. The payment ceased after that time. So Miss Monaghan and Mrs Answerth claimed that Mrs Voges held the estate, Mrs Voges was the beneficiary of the entire estate; that Mrs Voges held the estate on trust to make the weekly payment three pounds and Mrs Voges denied that, she was saying, "Well, I was just given a discretion to pay three pounds per week if I saw fit.

The trial judge disbelieved Mrs Voges' evidence as to whether the payments were discretionary and made a declaration that there was a secret trust. Note that this would be a fully secret trust because this is a situation where the will, on its face just made an absolute gift to Mrs Voges. If we read the will we would have the impression that there was an absolute gift in favour of Mrs Voges. In so far as there was an intention to create a trust, it was known only to the testator and to Mrs Voges. That decision was ultimately upheld by the High Court (by a majority). You should have a look in particular at the judgement of McTiernan J at pp235 and 236. He adopted what the trial judge said about the credibility of the various witnesses and said that here the three requirements are met.

First of all there was evidence of the testator's intention to confer a benefit upon his wife, Miss Monaghan and Mrs Answerth. The trial judge had believed Miss Monaghan rather than Mrs Voges so it was accepted that the testator had expressed an intention that Mrs Voges have an obligation to pay three pounds per week to Miss Monaghan and Mrs Answerth for their lives. The testator had communicated this to Mrs Voges and Mrs Voges had assured the testator that she would give effect to this intention. The really key passage in the judgement is this. At 235 he says that it was on the faith of her assurance that the testator left unrevoked his will. It was on the faith of Mrs Voges assurance that she would do what he'd asked her to do, that the testator left unrevoked the will, which made the absolute gift of property to Mrs Voges. That seems to be the underlying rationale of a secret trust. That the testator has sought an assurance from the legatee that the legatee would confer certain benefits upon people and the testator has relied upon that assurance. The testator has relied upon that assurance and as a result of that reliance has just left his will as it is, containing an absolute gift to the legatee. I think this case does demonstrate that when pleading a secret trust as in the case of any doctrine which depends upon oral evidence, a lot can turn upon the credibility of the witnesses. It was crucial to the outcome in this case that the trial judge had believed Miss Monaghan rather than Mrs Voges. Note also in relation to this case that the secret trust was proved by way of evidence a communication by the testator which occurred after the execution of his will. The communication to Mrs Voges occurred after the execution of his will. With a fully secret trust that's fine, you can rely upon evidence of communication of the intention which occurred after the execution of the will.

It's different with a half secret trust. If you have one of these situations where the will does refer to an intention to create a trust, but it doesn't specify the objects of the trust, that's a half secret

trust. If it's a half secret trust, if that's what you're alleging the communication has to have occurred before or at the time of the execution of the will. So if it's a fully secret trust, you can rely upon a communication which occurred after the execution of the will, if you're alleging a half secret trust then the communication must have occurred before or at the time of the execution of the will.

The case on half secret trusts is **Re Jeffrey**. What happened here is that the testator left the residue of his estate to four people. The gift in favour of these four people said that it was to be applied in "accordance with my wishes". Only one of those four people survived the testator. The one person who did survive had no recollection of the testator having ever communicated his wishes regarding the residuary estate. Nothing had ever been said to that particular legatee, that particular beneficiary as far as he could recall concerning how the estate was to be dealt with. A letter had been found among the personal papers of the testator's sister. The testator's sister was one of the four people named in the will, but she had predeceased the testator. So there was a letter among her papers and that letter did indicate the testator's wishes. So if this letter was admissible, if we could Rely upon this letter, this letter would prove who the objects of the trust were to be and we would then be able to prove a half secret trust. The problem was that the letter had been written after the execution of the will and accordingly the letter was not admissible. So in other words you can't name a trustee in a will and then supply the objects of the trust later on by way of an unwitnessed document. If you're naming a person as trustee in your will then you have to have communicated your intention as regards the objects of the trust at or before that time (the execution of the will).

Compare **Re Jeffrey** with **Blackwell v. Blackwell**. This was also a case of a half secret trust. However, in this case the will said that the income of the estate was to be applied for the purposes indicated by me. So there was a gift to certain persons to be applied for the purposes indicated by me. There was evidence that the testator had communicated what those purposes were prior to executing the will. He had indicated what those purposes were to the legacies prior to executing the will. So in that case it was possible to prove a half secret trust. So remember that secret trusts are concerned only with wills and they're concerned with the situation where the will doesn't create the trust fully, nevertheless it's possible to lead evidence that the testator intended to create a trust and we need to demonstrate from the evidence those three things; intention; communication; and acceptance or acquiescence by the intended trustee

Now the name secret trust comes from the fact that the intention that the legatee take as a trustee is secret. It hasn't been made known to the world. It is only known to a certain number of people. It is not expressed in the will. Now the secret trust doctrine actually embraces two distinct situations. The first situation is what we call the fully secret trust and in that situation if you look at the will on its face it says this is an absolute gift. The will on its face indicates that the gift to the legatee is an absolute gift. So the intention to create the trust is a secret. The other situation rather surprisingly is called the half secret trust. Now in this case a gift to the legatee is stated to be subject to a trust. The will does contain words which indicate that the legatee is to take as a trustee. But the objects of the trusts have not been specified in the will. So for example, the will might say to X on trust but there is no mention of who it is on trust for. Or it might say to X to be applied in accordance with my instructions. The instructions are to be found somewhere else. That is a half secret trust. Now in either case there are three basic requirements for reliance upon the secret trusts doctrine and they are set out towards the bottom of p.9 in the study guide. They are that the testator has an intention that the property be used in a particular way, the testator intends that the legatee use the property in a particular way. The second is that the testator has

told the legatee of this intention, so there is communication of that intention to the legatee, and the third thing is that the legatee, the intended trustee has accepted the obligation. So in response to the communication of the intention, the legatee has if you like assented to the fulfillment of that obligation, done something to indicate to the testator that it was assenting to the carrying out of the testator's instructions.

The leading Australian case is **Vogues & Monahan**. This is a High Court decision. Now what happened here was the testator died in 1946 and he left his entire estate to Mrs. Vogues. Mrs. Vogues was described as a person who had been very helpful to the testator during his life in the management of his personal and business affairs. Mrs. Vogues was a person who had been of great assistance to the testator during his life. She was somebody who he had relied upon. Now in the proceedings, Mrs. Vogues gave evidence and this is what she said in the witness box. She said that she had had two conversations with the testator which were relevant to the matters at hand. The first one was in August 1945. Now I emphasize that this is what Mrs. Vogues said in the witness box. It is not necessarily the truth. This is just what she said. She said in August 1945 the testator had told her that he had made his will and he asked her to look after his wife and Mrs. Vogues said yes, I will do that. The second conversation that Mrs. Vogues referred to in her evidence occurred in October 1945. On this occasion the testator suggested to her that she might subject to her discretion, and those were Mrs. Vogues words, subject to her discretion, she might give to each of two people, Mrs. Answorth, and Ms. Monahan 3 pounds per week. So subject to your discretion, give to each of Mrs Answorth and Monahan 3 pounds per week. Mrs Answorth was the testator's niece by marriage and Ms. Monahan was the housemaid. Now none of the matters referred to in these conversations were referred to in the will. So in order for any of these matters to be the subject of a trust we would need to rely upon the secret trust option. So that was Mrs. Vogue's evidence.

Ms. Monohan, the housemaid, also gave evidence in the proceedings and Ms Monohan was actually one of the plaintiff's. The plaintiffs were Ms. Monohan and Mrs. Answorth. Now Ms. Monohan gave evidence that after the testator's death Mrs. Vogues called her in, sat her down and produced a piece of paper. Mrs. Vogues said to Ms. Monohan this is what the deceased testator wanted me to do for you. Then Mrs. Vogues proceeded to read out that Ms. Monohan was to get 3 pounds per week for life. There was no mention of Mrs. Vogues having any discretion in relation to the matter. Mrs. Vogues just read out, according to Ms. Monohan, you are to get 3 pounds per week for life. So at this point you have a conflict in evidence. You have Mrs. Vogues saying that the obligation to pay 3 pounds per week for life was discretionary on her part and you have Ms. Monohan saying well, no, that is inconsistent with what she told me. She told me that I was to get 3 pounds per week for life. There was no discretion on her part at all. Now I said that Ms. Monohan and Ms. Answorth were the plaintiffs. They were claiming that Mrs. Vogues held the estate on trust to pay them 3 pounds per week for life. They were alleging that there was no discretion at all. It was held on trust by Mrs. Vogues to pay 3 pounds per week for life.

Now when the matter came before the trial judge he said that he didn't believe Mrs. Vogues evidence, suggested that maybe Mrs. Vogues wasn't lying, but at least she was being a little bit imaginative. In particular he didn't believe that Mrs. Vogues assertion that the payments were intended to be discretionary. So he made a declaration that there was a secret trust, that Mrs. Vogues held on trust to pay 3 pounds per week to each of Mrs. Answorth and Ms. Monohan for life. Now note that this is a fully secret trust because the will contained no mention of the trust. If you looked at the will alone you would have been left with the impression that this was an absolute gift to Mrs. Vogues. The trial judge's decision was ultimately upheld by the High Court. I suggest you have a look at the judgment of Mr. Justice McTiernan at p.235 and p.236. He

adopted what the trial judge said about the credibility of the various witnesses. He adopted the trial judge's finding that the evidence of Ms. Monohan was to be preferred to that of Mrs. Vogues, and explained how the three requirements were met. Now in a sense, I suppose you could say that there was no dispute in this case that the testator had expressed some intention. Mrs. Vogues conceded that the testator had expressed some intention to her so she had also conceded that there had been communication of that intention to her. She did that by giving evidence of the two conversations and she had also conceded that she had accepted those obligations.

The only difference between Mrs. Vogues and Ms. Monohan was as to the nature of the testator's intention. Mrs. Vogues was asserting that the testator intended that she would have a discretion. Ms. Monohan was asserting that she didn't have that discretion. So given that that was really the only issue once it had been decided that it was Ms. Monohan's evidence that was to be believed concerning the nature of the testator's intention, then it was pretty clear what the answer should be. This was a case where the court ought to recognise a secret trust. Now there are two things to note about this case. The first thing that should be obvious to you is that when you are pleading a secret trust, a lot can turn upon the credibility of the witnesses. So here really the whole case turned upon the fact that the trial judge believed Ms. Monohan rather than Mrs. Vogues. As well as that, a lot can depend upon the precision of the evidence of the terms; whether the witnesses can give fairly clear evidence as to what the testator intended for the terms of the trust, or whether the evidence is somewhat more vague. If you have vague evidence as to the terms, then you are less likely to recognise a secret trust.

The second thing we should note about this case is that here the secret trust was proved by evidence of a communication that occurred after the execution of the will. Remember that Mrs. Vogues gave evidence that in August 1945 the testator said to her I have made my will and this is what I want you to do. So the relevant communications occurred after the execution of the will and that is okay if you are pleading a fully secret trust. Now I make that point because the situation is slightly different if you are pleading a half secret trust. With a fully secret trust it doesn't matter when the communication occurs. It can occur before, after or during the execution of the will. Now let's look at a half secret trust. The case on point is **Re: Jeffrey**. Here the testator left the residue of his estate to four named individuals in the will and he said that his estate was to be applied in accordance with my wishes. So he left it to them to be applied in accordance with my wishes. Unfortunately, only one of the four people named in the will survived the testator. And that one person who survived the testator could not recall the testator ever having said anything about his wishes as to the distribution of his estate. So that person was unable to give any evidence of a communication of intention by the testator. So that was our first problem.

Can we get the evidence from somewhere else? Well, a letter had been found among the personal papers of the testator's sister. The testator's sister was one of the four people named in the will but she was one of the three who had pre-deceased the testator. So this letter was found among her personal papers, and sure enough this letter contained the testator's wishes as regards the distribution of his estate. The letter had been written after the date of the execution of the will. It was dated at a date after the date of the execution of the will. So the question in this case was whether that letter was admissible as evidence of the terms of the trust. Evidence of the terms of this alleged half secret trust. It was held not to be admissible. The court said that the rule is this; that where a half secret trust is being pleaded it must be shown that the communication of the terms took place before or at the same time as the execution of the will. Now what the court seemed to be saying here is that you can't name a trustee in your will and then supply the objects of the trust later on. Rather, you can't supply the object of the trust later on in an unwitnessed

document. If you do supply the objects of the trust at a later date, then you have to do so by way of what we call a codicil. Now a codicil is simply a document which amends a will. A codicil has to be executed in the same way as a will, so a codicil has to comply with s.9 of the Succession Act. So if you want to supply the objects later on, you have to execute a codicil which has to comply with the Succession Act requirements. You can't supply the objects later on by way of an unwitnessed document.

Now the case of **Blackwell & Blackwell** was also an example of a half secret trust. In this case the will said that the income of the estate was to be applied for the purposes indicated by the testator. But here there wasn't a problem. The court could recognise a half secret trust here because there was evidence that the testator had communicated the objects of the trust to the intended trustee prior to executing the will. If it is done prior to executing the will, then it is not a problem. So remember, if it is a fully secret trust, if the intention to create a trust has not been expressed at all in writing, then you can supply the evidence of the communication of intention by something said before after or during, but there is no limit in time. But if you are alleging a half secret trust, then the evidence of the communication of intention has to be supplied prior to or at the same time as the execution of the will.