# Equity & Trusts Secret trusts

Secret and half-secret trusts are testamentary trusts which fail to comply with the Wills Act because they are not disclosed or disclosed fully in a valid will. Secret trusts represent a rare exception to the rule that any disposition on death must be by way of a will (or a document incorporated by reference into a will).



A Fully Secet Trust (FST) arises when:

T appears to take and absolute gift under A's will, but T has informally agreed with A to hold the property on trust for B.

Communication and Acceptance requirements:

Must be communicated to and accepted by the secret trustee before or after the execution of the will but before the testator's death (Moss v Cooper)

The existence of the trust is apparent on the face of the will, but the terms of the trust are not disclosed.

Evidence must show:

- 1. the intention of the testator to create a trust.
- 2. timely communication of that intention to the intended trustee
- 3. timely acceptance by the intended trustee of the trust obligation.

The standard of proof for establishing a secret trust is the same ordinary civil standard of proof.

#### **Half Secret Trust**

Arises when:

The existence of the trust is apparent on the face of the will, but the terms of the trust are not disclosed.

Unlike FST there is no position to deny the trust and so the property cannot be fraudulently taken because there will be a clear trustee.

# Communication and Acceptance

This must be communicated before or at the same time as the making of the will

The 'dehors the will' theory of HSTs

Under this theory, secret trusts are regarded as inter vivos declarations of trust by the testator.

Secret trusts operate outside the will and therefore the Wills Act has no application.

# Further Notes on Communication and Acceptance

Evidence must show:

- 1. the intention of the testator to create a trust.
- 2. timely communication of that intention to the intended trustee
- 3. timely acceptance by the intended trustee of the trust obligation.

Moss v Coopper Re Boyes

Note communication and acceptance differs for FST and HST

## **Leading Cases:**

Re Keen [1937] – like a ship sailing "under sealed orders".

Re Bateman's Will Trusts
[1970] – rule was applied as
if no doubt could be
entertained about it.

Requires evidence of:

- 1. the intention of the testator to create a trust.
- 2. timely communication of that intention to the intended trustee
- 3. timely acceptance by the intended trustee of the trust obligation.

Moss v Cooper Re Boyes

Note communication and acceptance differs for FST and HST

## **Leading Cases:**

Re Keen [1937] – "like a ship blindily sailing".

Re Bateman's Will Trusts
[1970] – rule was applied as if
to doubt could be entertained
about it.

## **Other Key Cases**

Re Snowden [1979] – The standard of proof for establishing a secret trust is the same ordinary civil standard of proof.

Blackwell v Blackwell [1929] -The trust must be communicated to the half-secret trustee before the testator's will is made.

Re Gardner (No. 2) [1923]where the beneficiary under a secret trust predeceases the testator, his estate may nonetheless benefit under the trust