Equity and Trusts Concentrate: Law Revision and Study Guide (8th edn)
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8. Secret trusts

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Abstract

Each Concentrate revision guide is packed with essential information, key cases, revision tips, exam Q&As, and more. Concentrates show you what to expect in a law exam, what examiners are looking for, and how to achieve extra marks. This chapter discusses secret trusts. Secret trusts allow property to be left to someone in a will without explicitly naming that person. This is achieved by a bequest to a person who has previously promised to hold that property as trustee for the intended recipient. The anonymity provided by a secret trust is important, as all wills are public documents and therefore open to scrutiny. Secret trusts can be either fully secret or half secret. To establish a valid secret trust there must be: an intention to create a trust; communication of that intention; and acceptance of the trust obligation.

Keywords: secret trust, bequest, property, communication, acceptance, intention

Key facts

- Secret trusts are testamentary trusts which operate outside the requirements of the **Wills Act 1837**.
- Secret trusts can be either fully secret or half secret.
- All secret trusts have requirements as to communication, acceptance, and reliance.
- There are time differences in the need for communication for the two types of trust.
- Secret trusts of land can operate but it is unclear if these are express or constructive.
- There are theoretical problems in justifying the operation of trusts which are unresolved.

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Introduction

Wills are public documents, which enables effective taxation and fraud on potential legatees. However, some testators wish to be more discreet in who they leave property to; historically, illegitimate children are given as a reason. Additionally, early statutes (since repealed) prevented bequests to women or leaving land on trust to a charity, so a secret trust was a vehicle to avoid this: ***Katherine, Duchess of Suffolk v Herenden (1560)***. These historical justifications are arguably less relevant now. Secret trusts are a method used to avoid this publicity.

The secret trust also continues to be of use to indecisive testators who can defer the final decision about who is to benefit without having to rewrite their existing will.

Section 9 Wills Act 1837 imposes the requirements for the creation of a valid will:

- the will must be in writing;
- it must be signed by the testator; and
- it must be witnessed by two persons.

The requirements imposed by this Act are designed to ensure that a will contains a clear, complete, and formalized record of how a testator's estate should be distributed. Therefore, if the statute were to be strictly applied, secret trusts could not be enforced.

Justifications for secret trusts

Fraud theory

In ***Katherine, Duchess of Suffolk v Herenden (1560)***, the court held that Herenden was bound by his promise to take ownership of the estate for the Duchess of Suffolk. To enforce the statute strictly would have allowed Herenden to avoid the obligations of his promise: 'Equity will not allow a statute to be an instrument of fraud.'

In the case of ***McCormick v Grogan (1869)***, Lord Hatherley LC confirmed that secret trusts are imposed to prevent, in this case, a secret trustee from defrauding a testator, who only left property to the secret trustee in reliance on his promise to carry out the testator's wishes.

Who is defrauded?

- The testator? It would be difficult to prove that the testator is defrauded since he or she is dead. The *intention* of the testator is defeated, but since this was an attempt to avoid the requirements of the **Wills Act 1837**, perhaps the testator should not be protected.
- The secret beneficiaries? If the secret beneficiary is denied his or her benefit, this is only because the testator failed to comply with the formalities required by the **Wills Act 1837**. Again, the argument can be seen as circular as there are no beneficiaries if there is no valid trust.

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Who commits the fraud?

- The secret trustee by denying the existence of the trust?
- The testator, who left property in a way that contravenes the policy of the **Wills Act 1837**?
- The secret beneficiary is only entitled to assert his or her claim over the property insofar as it is acceptable for the testator to avoid the legal requirements set out in the **Wills Act 1837**.

Looking for extra marks?

Read the judgments in ***Blackwell v Blackwell [1925]*** for the different views taken by the judges in approaching the fraud theory. In essence, if the fraud theory applies then really the secret trust is a form of constructive trust. See the online resources for further commentary.

Dehors the will

The alternative justification for the enforcement of secret trusts avoids the problem of the **Wills Act 1837**. It can be argued that the trust is declared *inter vivos* (in the testator's lifetime and not through the will) and the will merely constitutes the transfer. If this were the case, the trust would arise ***dehors*** (outside) the will and therefore would not be contrary to the **Wills Act 1837**.

While this argument may appear attractive initially, there are a number of significant problems which flow from this approach. As soon as the trust is created, the *beneficial interest* in the property would be transferred to the secret beneficiary. As such, the testator would no longer be able to change his or her mind, or that part of the will which relates to the property to be held on trust. This goes against the principle that wills are ambulatory (meaning that they can be revoked or amended up until the testator's death).

The testator would no longer be able to do anything with the property as he or she no longer owns the beneficial interest. It is extremely unlikely that this would have been the testator's intention as the whole idea is that the property is the testator's until he or she dies! If the '*dehors* the will' theory was correct, then, in effect, creating a secret trust would be like locking property in a safe to which only the beneficiary has the key.

Looking for extra marks?

There are problems with this analysis. One is that it appears to allow a trust of future property, or expectancy. This means that at the time the trust is declared, there is no way of knowing whether the property will still be part of the testator's estate when he or she dies. Such trusts of future property are generally considered to be impossible: ***Re Ellenborough [1903]***. Second, if the trust is *inter vivos* then a secret trust of land would require compliance with **s 53(1)(b) Law of Property Act 1925 (LPA)**.

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However, this generally has not occurred. One way to explain this is to make the link between the fraud theory and '*dehors* the will', ie that when the secret trustee/testator agrees to create the trust his or her conscience is affected by the agreement, creating a constructive trust of the land; this links with the fraud theory. In this case, **s 53(2) LPA** states that **s 53(1)(b) LPA** will not apply. See the discussion of such a principle (although not in relation to secret trusts) in ***Ottaway v Norman [1972]***.

Neither justification for secret trusts is entirely satisfactory. Contrary to the **Wills Act**, equity has sought to enforce secret trusts in order to give effect to the testator's final intentions. This may be taken to reflect the original purpose of equity—to do justice where a strict application of the legal rules would lead to an unfair result.

While the debate over how secret trusts may be justified persists, the courts have continued to enforce such trusts, and despite arguments that they are no longer required, surveys of lawyers have proved that they are alive and well.

Categories of secret trusts

There are two types of secret trust: *fully secret trusts* and *half secret trusts*. A fully secret trust will appear to be a gift on the face of the will. The testator will appear to have left the property as an outright gift: for example, 'To Bijal I leave my house'.

In a half secret trust the will contains reference to the existence of a trust, but the beneficiaries and the terms of the trust remain secret.

The case of ***Ottaway v Norman [1972]*** clearly sets out that to establish a valid secret trust there must be:

- an intention to create a trust;
- communication of that intention; and
- acceptance of the trust obligation.

In ***Blackwell v Blackwell [1929]***, the House of Lords held that a half secret trust must satisfy the same basic requirements as a fully secret trust. An interesting recent decision on this is ***Rawstron (Executors of the Estate of Lucien Freud) v Freud [2014]***, although note there are some differences, discussed in 'Standard of proof' at p.

Intention

In ***Kasperbauer v Griffith (2000)***, Peter Gibson LJ clarified that in order to create a valid secret trust, a testator must have intended to create a trust, complying with all of the three certainties (see chapter 3). In ***Marley v Rawlings [2014]***, it was stated that a will should be interpreted in the same way as a contract, looking at the natural meaning of the relevant words and the overall purpose of the will in fulfilling the intention of the testator.

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Communication

What must be communicated?

The case of ***Re Boyes (1884)*** establishes that the testator must communicate to the trustee *both* his intention to establish the secret trust and the terms on which that property is to be held. If the trustee only knows of the testator's intention to create a secret trust but not its terms, the trust will fail. However, it is possible for the details to be contained in a sealed document, only to be opened after the testator's death ***Re Keen [1937]***, Lord Wright comparing this to a ship sailing under sealed orders (constructive delivery). In this situation the secret trustee should know that the sealed document contains the details required for a valid trust. This is a logical result because a trustee must know what he or she is meant to do with the property received (see chapter 3 and the three certainties). The intention and terms of a trust may be communicated either orally or in writing by the testator or their agent: ***Moss v Cooper (1861)***.

Fully secret trusts

When must this communication take place?

Fully secret trusts can be communicated at any time before the death of the testator, when the will comes into effect. In ***Wallgrave v Tebbs (1855)*** the secret trustees only found the request to use it for charitable purposes in the testator's papers after his death. The failure to inform them of the trust before the will came into effect meant that they took as a gift.

Who must be told of the trust?

In a fully secret trust, if communication is not made to all of the intended secret trustees, the question of whether they will *all* be bound depends on two things:

- *how* the trustees were intended to hold the property; and
- the *timing* of the communication.

You will know that *all* property can be held as either joint tenants or tenants in common. In ***Re Stead [1900]*** the testator only informed one secret trustee, Mrs Witham, of her intention before the will was executed. Farwell J held that only Mrs Witham was bound by the trust; Mrs Andrew (the other intended secret trustee) took free of the obligation.

This case establishes a complicated set of rules for deciding when communication to only some of the trustees will bind the others. It is pointless to try to justify this set of rules as even the trial judge was not entirely convinced that they made sense!

Revision tip

Warning: it is a common mistake for students to confuse the ordinary use of the term 'tenancy' as referring to the occupation of land with the legal use of this term, which includes the ability to hold any type of property, from a bank account to a palace, in a form of co-ownership. Do not fall into this trap! Look for words such as 'to hold in equal parts', which may mean that the tenants are tenants in common, as these are words which indicate that separate interests are being created.

To try to make this clearer, have a look at Figure 8.1.

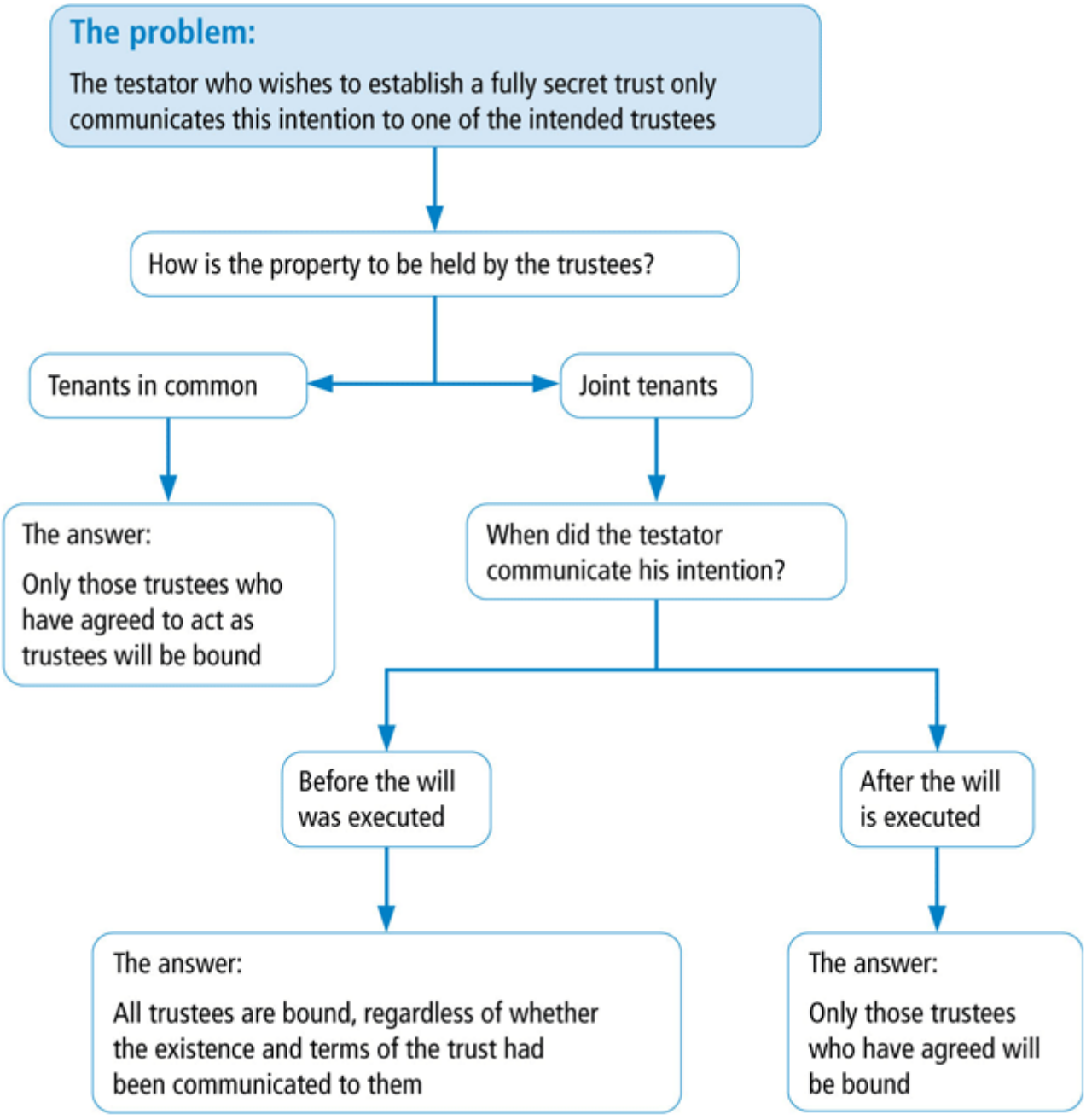

Figure 8.1 Communication

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Half secret trusts

The major difference between fully secret and half secret trusts relates to *when* the communication must take place. In a half secret trust, communication should take place before or at the time that the will is **executed** (when the formalities of **s 9 Wills Act 1837** are met). The basis of this rule was *obiter* comments by Lord Sumner in ***Blackwell v Blackwell [1929]***, which were later applied in the cases of ***Re Keen [1937]*** and ***Re Bateman's WT [1970]***.

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The communication must be consistent with the will

In ***Re Keen [1937]***, before the execution of his will the testator had given one of his trustees instructions contained in a sealed envelope to be opened on his death. However, after he died the relevant bequest in his will stated that the property was left to the trustees for purposes that *would be communicated* to them in his lifetime. The Court of Appeal held that this did not create a valid half secret trust as saying that he *would* instruct the trustees he suggested that he would give his instructions *after* the will had been executed. In other words, the will suggested that instructions would be given in the future when they had in fact already been handed to the secret trustee. Therefore, the only logical construction of the will was that the instructions the trustees had received were *not* the instructions referred to in the testator's will. On this basis, the half secret trust failed as the trustees did not know the true intentions of the testator.

The reason given by the court may seem harsh, but you can see its logic. A will is a formal legal record of the testator's intentions and therefore its interpretation is taken very seriously by the courts to make sure those wishes are fulfilled; ***Marley v Rawlings [2014]***. Therefore, it is vital that the words in the will and the actual communication correspond. Any inconsistency will be fatal to the trust.

All secret trusts offend against the policy behind the **Wills Act 1837**. However, as a half secret trust, with unknown object, is referred to in the will, the attempt to avoid the **Wills Act** is clear. (Other jurisdictions, such as the Republic of Ireland, have the same rules on communication for half secret trusts as for fully secret trusts.)

Looking for extra marks?

It can be argued that the comments in ***Re Keen*** as to the timing of the communication are *obiter* and therefore the different rules on communication are not absolute. A strong candidate may argue that the rules are not, in fact, different but also go on to explain that this line of argument may be doubtful since the acceptance of the rule in ***Re Bateman's WT***. It may be worth noting the different approaches in Australia, where there is no need for communication before the execution of the will: ***Ledgerwood v Perpetual Trustee Co Ltd (1997)***.

Revision tip

Remember to check for consistency between the will and the actual instructions.

Who must be told of the trust?

All trustees of a half secret trust should be told of the testator's intentions. What will happen if communication only takes place to one of the trustees? Unlike a fully secret trust, half secret trustees *cannot* claim the property as their own. This is because the will makes it clear that the property is not intended as an outright gift but is to be held on trust. Instead, the property will be held on resulting trust back to the estate.

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Revision tip

This is one of the areas where there are different rules. A *fully* secret trust must be communicated before death, while for half secret trusts it is debatable if the communication needs to be before the execution of the will.

Acceptance

The final requirement for the creation of a valid secret trust is that the trustee must accept the terms of the trust. The case of ***Ottaway v Norman [1972]*** states that this can be either:

- expressly; or
- by **acquiescence** (silence).

Moss v Cooper (1861) 4 LT 790

The secret trustee who had been informed of the testator's intentions told the other two intended trustees; one expressly accepted but the other remained silent. The court held that having learned of the trust, his silence amounted to acceptance. The key point here is that he knew of the trust but failed to object.

What happens to property in the event that a secret trust cannot be established?

The decision in ***Rawstron v Freud [2014]*** has discussed the differences between fully and half secret trusts and the consequences of the failure of each, the issue of communication being central.

Fully secret trust

If the three requirements of intention, communication, and acceptance are not satisfied, the fully secret trust will fail. However, what will happen to the property?

There are two possibilities:

1. If the person who was intended to be a secret trustee had no knowledge of the trust, that person will be able to take the property for him or herself; ***Wallgrave v Tebbs (1855)***.
2. If the person knew that property was being left to him or her to hold on trust but had no idea what the purpose of that trust was to be, that person cannot keep the property for him or herself. Instead, the legatee will hold the property on trust back to the estate. There are two reasons for this:
   - Because the testator has failed to communicate the three certainties required for all trusts, hence the secret trust will fail and therefore the legatee is not bound to pass the property on to the person the testator wanted to benefit.
   - Because the legatee also knew that the testator never intended the legatee to have that property for him or herself, the legatee's conscience is affected and he or she cannot keep the property for him or herself. As it has not been proven that the property must be passed to the intended beneficiary of the secret trust, it must go back to the testator's estate. It is said that this is held on resulting trust but as it seems to be based on the conscience of the trustee it is arguably constructive.

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Re Boyes (1884) 26 Ch D 531

The testator left the residue of his estate to his solicitor, who had been told that he was to hold it on trust and that he would be informed of the terms of that trust by letter. However, the solicitor did not learn of the terms of the trust until after the testator's death. Despite the solicitor's willingness to carry out the terms of the trust, it was held that he held the property on resulting trust for the estate.

Half secret trust

Unlike a fully secret trust it is clear in a half secret trust that there was an intention to create a trust, so the secret trustee cannot claim the property as a gift. The trust will fail, and the property will be held for the testator's estate.

Proving the existence of a secret trust

The burden of proof

The burden of proof lies on the person trying to establish that the trust exists. Remember, in this respect the same rules apply to fully secret and half secret trusts.

Standard of proof

Although originally the standard of proof was very high (that required to rectify a written instrument: ***Ottaway v Norman [1972]***), over the years, it has become less stringent. ***Re Snowden [1979]*** states that the standard of proof required is the 'ordinary civil standard of proof'. Table 8.1 recaps the general rules applicable to the creation of fully secret and half secret trusts.

Table 8.1 Summary

	FULLY SECRET TRUST	HALF SECRET TRUST
Appearance	Appears as gift on the face of the will	Appears as trust on the face of the will (purpose and beneficiaries unknown)
Intention	Must intend to create a trust and satisfy the three certainties (***Kasperbauer v Griffith [2000]***)	Must intend to create a trust and satisfy the three certainties (***Kasperbauer v Griffith [2000]***)
Communication	What? Existence of the trust and its terms (***Wallgrave v Tebbs (1855)***) How? Orally or in writing •Terms of the trust can be in a sealed envelope if the trustee knows it contains the existence and terms of the secret trust (***Re Keen [1937]***) When? Before death of testator (***Wallgrave v Tebbs (1855)***) If communication not to all trustees? • Tenants in common: only those who accept the trust are bound Joint tenants:	What? Existence of the trust and its terms (***Blackwell v Blackwell [1929]***) How? Orally or in writing •Terms of the trust can be in a sealed envelope if the trustee knows it contains the terms (***Re Keen [1937]***) as long as the letter is given before the will is executed • Communication must be consistent with the will—not a future communication (***Re Bateman's WT [1970]***) • Sealed instructions must be delivered before the will is executed. When? Before or at the time of the execution of the will (***Blackwell v Blackwell [1929]***) If communication not to all trustees?

	FULLY SECRET TRUST	HALF SECRET TRUST
	(a)If communication before the will executed, all bound (b)If communication after the will is executed, only those who accept are bound (***Re Stead [1900]***)	• Trustees cannot claim property as their own • If will allows communication to some trustees, all bound if communication before will is executed If will says all trustees know, if this is not the case, the entire trust fails (***Re Keen [1937]***)
Acceptance	Express or inferred by acquiescence (***Moss v Cooper (1861)***)	Express or inferred by acquiescence (***Moss v Cooper (1861)***)
Failure	• If trustee has no knowledge of trust, he takes beneficially If the trustee knows a trust was intended but not its terms, trustee holds on resulting trust (***Re Boyes (1884)***)	• Trustee cannot claim property as his own—holds on resulting trust

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Developing understanding

These issues have been kept separate to help you focus on the core requirements for secret trusts before considering some of the more unusual questions that arise in this area.

Can the secret trustee change his mind?

During the lifetime of the testator this causes no problems; the secret trustee merely informs the testator, who can simply amend the will. However, there may be problems if the secret trustee has a change of mind after the death of the testator or on finding that he or she will ↵ not or cannot perform the instructions contained in a sealed envelope. A valid trust has been created and as the trustee knows there is no intention of an outright gift, he or she cannot claim it. There are two contrary views on the result:

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- ***Re Maddock [1902]*** suggests *obiter* that the trust will fail (to be held on resulting trust to the estate).
- In ***Blackwell v Blackwell [1929]*** *obiter* comments by Lords Buckmaster and Warrington suggest that as equity will not allow a trust to fail for want of a trustee, the courts can appoint a replacement—willing—trustee.

The possibility of the trustee claiming the property as a gift increases in fully secret trusts, but the principle should still apply.

Can the testator change the terms of the secret trust?

This issue was considered in the context of a half secret trust in the case of ***Re Colin Cooper [1939]***. The testator left £5,000 on a half secret trust, the purposes of which had been communicated to trustees before his will was executed. The testator later added a codicil to his will which increased the amount to £10,000. However, he failed to communicate this to the secret trustees before his death. The Court of Appeal held that only the original £5,000 was subject to the obligations of the trust. The remainder was held on resulting trust to the estate.

As this was a half secret trust, the trustees could not claim the additional amount as their own property. It is unclear if the same reasoning would apply to a fully secret trust. As the trustees know that the property is subject to a trust, ***Re Boyes (1884)*** would presumably apply; additional property would be held on resulting trust for the estate.

If the amount to be held on secret trust was reduced, Sir Wilfred Greene MR argued, *obiter*, that the greater sum would be considered to cover any lesser sum that was substituted.

Problems caused by the 'dehors the will' explanation of secret trusts

As the trust is created outside the will there are several consequences.

- A witness to a will can benefit from a secret trust:

Re Young [1951] Ch 344

Mr Young left his estate to his wife; before his death he told her that their chauffeur should receive £2,000. This established a fully secret trust, with his wife as the secret trustee. However, the chauffeur was a witness to the will and **s 15 Wills Act 1837** prohibits witnesses from benefiting from a will. Therefore, if the benefit passed by the will it would be void. The court held that the trust was established when the terms were communicated to Mrs Young.

- A beneficiary of a secret trust who dies before the testator may still benefit from the trust:

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Re Gardner (No 2) [1923] 2 Ch 230

A testatrix left all her property to her husband for life, the remainder to be split by way of a fully secret trust among her nephew and nieces. One of the nieces died *two years before* the testatrix. **Section 25 Wills Act 1837** establishes the doctrine of lapse; if a beneficiary under a will dies before the testatrix, the bequest fails and lapses back into the residue of the estate. If the niece took under the Act, her

share would lapse. However, Romer J held that the secret trust took effect *dehors* the will and had come into existence as soon as the husband had accepted. Therefore, the trust took effect free of the **Wills Act** and the deceased niece's estate was held to be entitled to her share.

If this decision is correct, a testator would not be able to change his or her will. This is because when the secret trustee accepted the trust, an *inter vivos* trust would be established over all her property. This is contrary to the ambulatory nature of a will and therefore can be changed or revoked at any time until the testatrix's death.

Looking for extra marks?

Re Gardner [1923] illustrates all the problems with the '*dehors* the will' theory and is arguably incorrect. While it remains an authority, the weight of academic opinion suggests that it should not be followed. See 'Key debates' at the end of the chapter.

Can there be a secret trust of land?

Section 53(1)(b) LPA requires an enforceable declaration of a trust of land to be manifested or evidenced in writing. As the communication of the terms of a secret trust or half secret trust may be made orally, this merely indicates the trust's existence. Thus, it appears not to comply with **s 53(1)(b) LPA**. There are conflicting views to this problem:

- ***Re Baillie (1886)***: a half secret trust of land was held to fail because it was not evidenced in writing.
- ***Ottaway v Norman [1972]***: the oral communication of a fully secret trust of a bungalow was accepted (although the formalities question was not explicitly raised).

This has led a number of commentators to speculate on whether secret trusts are express trusts or constructive trusts. It is arguable that secret trusts of land are acceptable on the basis of the rule in ***Rochefoucauld v Boustead [1897]***, which states that legal formalities will not be insisted on if they are being used to perpetrate a fraud (equity will not allow a statute to be an instrument of fraud). In other words, a legatee who is using the requirement of **s 53(1)(b) LPA** to make the trust fail so that he or she can claim the property for him or herself will not be allowed to succeed.

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Conclusion

Secret trusts are characterized by conceptual uncertainty and inconsistency and are therefore a topic ripe for examination. The development of secret trusts aims to give effect to the final intentions of the testator. (See the online resources for a discussion of mutual wills, which is a further issue with testamentary dispositions.)

The development of secret trusts echoes, perhaps, the decision in ***Choithram v Pagarani [2001]***, in which Lord Browne-Wilkinson stated that equity will not 'strive officiously to defeat the intention of the testator'. While the origins of secret trusts lie many years in the past, they still appear to be in use, reflecting their continuing usefulness in today's society.

Key cases

CASE	FACTS	PRINCIPLE
Blackwell v Blackwell [1929] AC 318	The testator gave legacies to five people to apply the income 'for the purposes indicated by me to them'. Instructions to the trustees were made orally, to benefit the testator's mistress and their illegitimate son.	The House of Lords established the validity of a half secret trust, satisfying the same basic requirements as a fully secret trust. Additionally, *obiter*, that should the secret trustee refuse to carry out the trust, this would not defeat the trust and a willing replacement would be appointed.
McCormick v Grogan (1869) LR 4 HL 82	The testator left property to Grogan and as he lay dying instructed Grogan that there was a letter instructing Grogan as to what to do with the property after the testator's death. The terms of the instructions were not obligatory: 'I do not wish you to act strictly on the foregoing instructions, but leave it entirely to your own good judgement to do as you think I would, if living, and as the parties are deserving.' Grogan complied with some of the wishes but not all.	• The wording of the letter was properly constructed as imposing merely a moral obligation upon Grogan. This was not sufficient to create a secret trust and therefore the claimant's action failed. • Secret trusts are imposed to prevent a secret trustee from defrauding a testator, who only left property to the secret trustee in reliance on his promise to carry out the testator's wishes.
Moss v Cooper (1861) 4 LT 790	The testator left property to three secret trustees: G, S, and O. The will and details of trust were drawn up by one of the secret trustees, who then communicated the details of the trust to the other two secret trustees, who neither expressly rejected nor accepted. S did accept eventually but O remained silent on the issue.	• It will be sufficient if the intention and terms of a secret trust are communicated to the trustees by an agent of the testator. • Silence can also amount to acceptance; knowing of the trust, he failed to object.
p. 123 ↵ ***Ottaway v Norman [1972] 2 WLR 50***	The testator left property to his housekeeper on the understanding that on her death she would leave the property to O. She died and left the property to N.	• Sets out the requirements for a valid secret trust. • Land can be the subject matter of a secret trust.

CASE	FACTS	PRINCIPLE
Re Keen [1937] Ch 236	The testator had given one of his trustees instructions contained in a sealed envelope to be opened on his death. He did this before his will was executed. However, after he died the relevant bequest in his will stated that the property was left to the trustees for purposes that *would be communicated* to them in his lifetime.	• Details of the secret trust could be in a closed envelope if, before the testator's death, the trustee knew of the testator's intention to create a trust and where he could find the terms of this trust (constructive communication). • The will must be consistent with the communication. The testator had already informed the trustees of his wishes, while the will referred to future communication.

Key debates

Topic	**Fraud as a justification**
Academic/ author	Critchley
Viewpoint	That the argument for *dehors* is implausible and that fraud is the justification.
Source	Critchley, 'Instruments of Fraud, Testamentary Dispositions and the Doctrine of Secret Trusts' (1999) 115 LQR 631.
Topic	**Secret trusts as *dehors* the will**
Academic/ author	Kincaid
Viewpoint	The relationship between the will and the secret trust and the justifications evaluated.
Source	Kincaid, 'The Tangled Web: The Relationship Between the Secret Trust and the Will' [2000] Conv 420.
Academic/ author	Pawlowski and Brown
Topic	**Secret trusts operate outside the will**
Viewpoint	That the secret trust is an express trust which is created outside the will and may be justified on the basis of estoppel.

Topic	Fraud as a justification
Source	Pawlowski and Brown, ‘Constituting a Secret Trust by Estoppel’ [2004] Conv 388.

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Exam questions

Problem question

Jasper recently died; his will makes the following bequests:

- To Kamjit and Hamid I leave my home, Bushmills.
- To Jessica I leave my shares in Badgers Bridges Ltd to be held on trust, on terms of which they are aware.

The will is dated 12 December 2003. The same day, Jasper called Jessica and asked her to be his secret trustee. He also told her that the details of the trust were locked in his safe. Jessica accepted. Two days before his death Jasper met Kamjit and said that he had left his home to Kamjit, but it was to be for the benefit of their love child, Hector. Kamjit broke down and cried and said nothing.

Advise Jessica, Hamid, and Kamjit.

See the Outline answers section in the end matter for help with this question.

Essay question

The fraud theory cannot justify a secret trust as it is in itself a fraud on the requirements of the **Wills Act 1837**.

Discuss.

Online resources

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- An outline answer *<https://iws.oupsupport.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-8-outline-answers-to-essay-questions?options=showName>* to the essay question
- Bonus material *<https://iws.oupsupport.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-8-bonus-material?options=showName>*
- Further reading *<https://iws.oupsupport.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-8-further-reading?options=showName>*

- Interactive key cases *<https://iws.oupsupport.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-8-interactive-key-cases?options=showName>*
- Looking for extra marks quiz *<https://iws.oupsupport.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-8-looking-for-extra-marks?options=showName>*
- Multiple choice questions *<https://iws.oupsupport.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-8-multiple-choice-questions?options=showName>*