Debunking the myth of secret trusts?

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*Conv. 492 **Introduction**

The aim of this article is to assert the unpalatable fact, unpalatable at least in the eyes of positivist lawyers, that secret trusts are a covert device by which the courts avoid the statutory formalities of theWills Act 1837 and, therefore, subvert the underlying policy of the Wills Act. That is the reason why no logical rationale may be discerned as to the reasons for upholding secret trusts.

The background

Under the Wills Act 1837 a will, or "any other testamentary disposition", [1] must be in writing and signed by the testator and two witnesses, who are all present at the same time. [2] Thus Parliament has felt it necessary to provide strict and mandatory rules under which certain formalities have to be observed when property is disposed upon death. Therefore, it may seem puzzling that English courts charged, as they purportedly are, with giving effect to the intentions of Parliament have at times upheld certain trustswhich attempt to leave property after death, butwhich have not complied with the required formalities. If a testator leaves his property by his will [3] to someone absolutely and beneficially but, while alive, has informed this other party [4] that the property is to be held on specified trusts then, provided this party accepts the trust, [5] it is enforceable. [6] Alternatively the testator may leave *Conv. 493 property to another party with a direction in the will that it is to be held on trust, and details of the trusts are not contained in the will but have been communicated to this party before or at the time of the will, [7] and here the trust will also be enforceable. [8] Aware that in upholding these "secret" and "half-secret" trusts the courts could be accused of subverting the policy of the Wills Act, as the above, introductory contention maintains, the judiciary and commentators have sought to provide justifications for the existence of these trusts. However, this article will argue that neither of the two principal arguments which have emerged effectively refute the contention made above. My submission is that the doctrine of secret trusts was first applied as a valid use of the courts equitable jurisdiction, but its continued existence, divorced from its original function and context, can no longer be justified.

Before we can examine whether the existence of secret trusts subverts the policy of the Wills Act, we must determinewhat that policy is. The law of succession, by its very nature, necessarily demands stringent rules. The possibility of false claims being generated after a testator's death, when he is in no position to refute them, would lead to an unsatisfactory situation in which the need for effective transfer of property after death would be seriously compromised. Friedman observes that in this context the formalities proscribed under the Wills Act perform a number of functions, all of which uphold the main policy of the act of ensuring this effective transfer of property:

"They impress the testator with the solemnity of his acts; they ensure a standard written document; they eliminate most of the dangers of forgery and fraud; they encourage the use of middlemen (lawyers) who can help plan a rational, trouble-free disposition of assets." [9]

The Theories?

Many modern commentators refute the contention that the courts, in upholding secret trusts, are deviating from this policy, by arguing that secret trusts operate outside of this act. The Wills *Conv. 494 Act, as we have seen, applies to testamentary dispositions, and some have argued that it does not apply to secret trusts, for these are in fact *inter vivos* trusts. The theory postulates two distinct stages in the creation of a valid secret trust; with the trust being created by the communication of the trust to the proposed trustee and his acceptance of it, but the trust remains incompletely constituted until the property is vested in the trustee upon the death of the testator. [10] The trust is enforced not under the will, but because of the previous agreement. [11]

Judicial support for this modern theory that secret trusts operate *en dehors* of the will can be, and has been, found. In *Blackwell v Blackwell,* Viscount Sumner said "I do not see how the statute-law relating to the form of a valid will is concerned at all", [12] and so these trusts are governed not by the rules of probate but by the rules of the law of trusts. This notion had already been referred to in *Cullen v Attorney-General for Ireland,* [13] and later in *Snowden, Re per* Megarry V.C.:

"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." [14]

Decisions following *Blackwell v Blackwell* do seem to have taken this analysis as being the true nature of secret trusts. The decision in *Young, Re,* [15] for example, that a beneficial interest under a secret trust could be upheld even though the beneficiary was a witness to that will, was upheld on the ground that gifts under secret trusts were not taken under wills. Otherwise the normal rule that a witness to a will forfeits any beneficial interest arising under it would have applied. [16]

However I submit that a closer analysis of this temptingly neat theory reveals it to be flawed. The theory claims that secret trusts are governed by the law of trusts and not that of probate, and yet these trusts involve a departure from the usual rules pertaining to trusts. For in upholding secret trusts, the courts are allowing ***Conv. 495*** trusts to bind after-acquired property, and under the normal rules of trusts it is impossible to declare an immediate trust of future property, [17] or a trust which binds such property as and when it is received. [18] Critchley has refuted this argument on the basis of what she sees as a much bigger problem; that, in asserting that secret trusts are *inter vivos* rather than testamentary dispositions, the *dehors* theory is using the terms without fully recognising their correct legal meanings, and has confused "outside the will" with "outside the Wills Act". [19] She points out that *Cullen v Attorney-General for Northern Ireland* [20] was a decision relating to tax statutes, and claims that it was a mistake to apply the reasoning of this case to the different legal context of the formal requirements of the Wills Act. [21] Furthermore, as Pearce and Stevens have pointed out, the decision in *Maddock, Re* [22] is inconsistent with this view, whereby a gift by way of a secret trusts was treated as if it had been made by will. [23] It is also worth pointing out that later cases often rely on the reasoning of Lord Sumner in *Blackwell v Blackwell,* but on a close analysis of his speech, his argument is often inconsistent. [24]

If we cannot agree with the idea of secret trusts as being accounted for under the rules of *inter vivos* trusts, we must then accept that their existence does mark a departure from the Wills Act, as the following quotation suggests. Lord Hatherley L.C. admits that the doctrine "involves a wide departure from the policy which induced the Legislature to pass the Statute of Frauds" [25], but finds this departure justified by equity's jurisdiction as the "court of conscience". The earliest judicial explanation for the existence of secret trust doctrine is that it exists to prevent fraud by the secret trustee [26]; and this idea is explained most fully by the House of Lords in *McCormick v Grogan*:

Conv. 496 "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." [27]

Lord Westbury concurred, finding that the court must see that "a fraud, a *malus animus,* is proved by the clearest and most indisputable evidence" before applying the doctrine. [28] Similar arguments were advanced in *Pit Rivers, Re,* where Vaughan Williams L.J. said that the court never "gave the go-by" to the provisions of the Wills Act by enforcing upon any one testamentary dispositions not expressed in the shape and form required by the act, except in prevention of fraud. [29] In fully-secret trusts, unless evidence of the trust is admitted contrary to the provisions of the Wills Act, the intended trustee will be able to take the property beneficially and will profit from his own misconduct, so this justification for the enforcement of these trusts on this basis does seem valid. Here equity would be acting in a way with which we are familiar in other areas of the law, such as in *Rochefouchauld v Boustead.* [30]

However, this original and narrow conception of the "fraud theory" does not explain the existence of half-secret trusts. In such a trust, the intended trustee takes the property as trustee on the face of the will, and there is no possibility of him taking beneficially even if the court declined to admit evidence of the terms of the trust. He would hold the property on resulting trust for residue or next of kin. [31] Moreover, even in cases of fully-secret trusts, the case law exhibits examples of where any justification on the basis of a "*malus animus*" is no longer valid. The "fraud theory" has been extended in an attempt to encompass a justification of half-secret trusts and the modern case law. Hodge argues that 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, which secret trusts seek to avoid. [32] This argument emerged as early as 1748 in *Reech v Kennegal* [33] where evidence ***Conv. 497*** was admitted contrary to the Statute of Frauds "in respect of the promise and of the fraud upon the testator in not performing it", and in a passage in *Riordan v Banon,* [34] an Irish case which was cited with approval in *Fleetwood, Re* by Hall V.C.: "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 donees." [35]

In *Blackwell v Blackwell,* Lord Buckmaster also adopted this wider version of the fraud argument (Lord Hailsham L.C. concurring), claiming that "the personal benefit of the legatee cannot be the sole determining factor in considering the admissibility of the evidence" that if a clear promise is made by the intended trustee, inducing a gift to be made in his will, "the trustee is not at liberty to suppress the evidence of the trust and thus destroy the whole object of its creation, in fraud on the beneficiaries." [36] While *Blackwell v Blackwell* was a case concerning a half-secret trust, it is clear that this reasoning was intended to apply equally to fully-secret trusts.

However, there does exist a huge flaw in extending the theory this far; it amounts to no more than a bald assertion that a testator's wishes should be respected even if he has put them into effect in a manner that is not acceptable (that is, not in compliance with s.9 of the Wills Act). In many cases the true intention of the testator cannot be put into place, and purported beneficiaries under ineffective wills are routinely deprived of property which testators or settlors would desire them to have, simply because trusts and wills have not been put into effect in the proper manner. The tradition equitable maxim that "equity will not permit a statute to be used as an instrument 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 with the situations envisaged in *Blackwell v Blackwell.* As Critchley has pointed out, this widening of the fraud theory focuses "on potential, rather than actual, wrongdoing … the policy aim underlying (it) is thus proactive (or preventative) rather than reactive (or curative)." [37] The very mild form of fraud which it envisages does not justify equitable intervention in the face of strict statutory provisions in the same way that a *malus animus* does.

Conv. 498 In order to recap, the two principal arguments which have been advanced in order to justify and explain the existence of secret trusts do not seem to give the all-embracing and logical explanations which they purport to provide. It seems that the doctrine developed organically, changing on a case to case basis in order to suit the particular situations which arose.

The Historical Origins

If we turn to the origin of the doctrine we find sound policy and social reasonswhich justified equity's intervention in the law. For example, in *Thynn v Thynn* the court was faced with a situation in which the enforcement of a secret trust was the only way in which they could prevent a fraudulent son taking all his fathers estate as residuary legatee. [38] Similarly, secret trustswere enforced where the courts felt that there was a clear need for certain testators to avoid such formalities. The historical explanation for the existence of these trusts, as their name implies, is that they allowed for a testator's desire to keep the true objects of his legacies secret. For a will admitted to probate is open to public inspection, allowing anyone to scrutinise its terms in order to avoid fraud and abuse. [39] This desire for secrecy was traditionally to provide formistresses and illegitimate children, [40] or to conceal testamentary gifts of land in favour of charities at a time when these were void. [41]

In order to understand equity's intervention in such cases, we must look to the nature of this type of law-making. Lord Ellesmere justified the existence of the Court of Chancery (the initial *locus* of equitable intervention in the law) by explaining that:

"Men's actions are so diverse and infinite that it is impossible to make any general law which may aptly meet with every particular act, and not fail in some circumstances." [42]

Statutory and common law rules must be uniformly applied and precise in order to conform to the rule of law's requirements of certainty and uniformity. Thus it is equity which must step in ***Conv. 499*** to dispense justice where the strictures of the common law and statutes may be seen to bring inequality in individual cases.

The doctrine thus emerged as an equitable recognition of a valid reason for not observing the formalities proscribed by statute, and in order to prevent a serious risk of personal fraud. However, the fact that the doctrine remains is not so easy to justify. Glass J. in *Allen v Snyder* has noted that it is inevitable that judge made law will alter with changes in society, but argues that "it is essential that new rules should be related to fundamental doctrine". [43] Here, the continued existence of secret trusts seems to be divorced from the initial contexts in which it first operated. Changes in society have rendered the need for secrecy largely obsolete. Gifts for charity no longer require it, and a desire to provide for objects which someone would not wish to reveal can be achieved more efficiently by other means. [44]

We must admit, with Moffatt, that: "today it is more likely that a secret trust will be used by the indecisive rather than secretive testator" [45] such as was with the testatrix in *Snowden, Re*; allowing such testators to avoid the expensive and tiresome process

required under the Wills Act. However, as Watkin has pointed out, this is obviously no valid justification for the departure from a clear legislative intent. [46] The role of equity seems, in this area, to have been expanded too far. The present situation is much more like that described in the contention made in this question; the trusts are used as a covert device to avoid formalities. Secret trusts, then, are a relic of older days and their continued existence seems an anomaly. Even commentators who argue that there are no sound justifications for the existence of secret trusts, tend to argue that the doctrine is "too well established to be disturbed" [47] or they reassure us that "we should not be too alarmed" for, "the probability is that few testatorswish to rely on them and hence they do not constitute a serious threat to the practice of formal will making." [48]

因此，秘密信託是舊時代的遺物，它們的持續存在似乎是一種反常現象

Conclusion

I would disagree, arguing that these reasons are not sufficient to demand the continued existence of secret trusts. There ismuch to ***Conv. 500*** be said for an abolition, or at least a fundamental revision, of the law relating to them, as the law is confused, and justifications for the distinctions between the two types of secret trusts are difficult to find. They serve a very limited social purpose and fraud would be better prevented by an insistence upon compliance with the requirements of the Wills Act.

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Footnotes

1 s.1.
2 The Wills Act 1837, s.9, as amended by the Administration of Justice Act 1982, s.17.
3 Note that secret trusts can also arise in the case of intestacy (*Stickland v Aldridge* (1804) 9 Ves. 516.).
4 *Wallgrave v Tebbs* (1855) 2 K.& J. 313.
5 Acceptance can be by an express promise or silent acquiescence, *Moss v Cooper* (1861)1 John & H. 352.
6 An example of the enforcement of this type of trust: *Ottaway v Norman* [1971] 3 All E.R. 1325.
7 A stricter requirement than in fully secret trusts: *Bateman's Wills Trusts, Re* [1970] 3 All E.R. 817.
8 An example of the enforcement of this type of trust: *Blackwell v Blackwell* [1929] A.C. 318.
9 Friedman, "The Law of the Living, the Law of the Dead: Property, Succession and Society" [1966] Wisconsin L.R. 340 at 367.
10 This view is articulated by Maudsley, "Incompletely Constituted Trusts" in Pound (ed.), *Perspectives of Law* (1964), pp.257-258; Oakley (ed.), *Parker & Mellows; The Modern Law of Trusts* (8th ed.,London, 2003), pp.118-122; P. H. Pettit, *Equity and the Law of Trusts* (9th ed., London, 2001), ch.7.
11 Similarly to the rule in *Strong v Bird* (1874) L.R. 18 Eq. 315.
12 Cited above n.8, at 335, n.10.
13 *Cullen v Attorney-General for Ireland* (1866) L.R. 1 H.L. 190 at 198, *per* Lord Westbury.
14 *Snowden, Re* [1979] 2 All E.R. 172 at 177.
15 *Young, Re* [1951] Ch. 344.
16 Wills Act 1837, s.15.
17 *Williams v C.I.R.* [1965] N.Z.L.R. 395.
18 *Permanent Trustee Co. Ltd. v Scales* (1930) 30 S.R. (N.S.W.) 391.
19 Critchley, "Instruments of Fraud, Testamentary Dispositions, and the Doctrine of Secret Trusts" (1999) 115 L.Q.R. 631 at 635 and 641.
20 Above n.13, at n.15.
21 *ibid.* at 641, n.21.
22 *Maddock, Re* [1902] 2 Ch. 220.
23 Pearce & Stevens, *The Law of Trusts and Equitable Obligations* (2nd ed., London, 1998), p.222.
24 Moffat, *Trusts Law: Text and Materials* (3rd ed., London, 1999), Ch.4.
25 *McCormick v Grogan* (1869) L.R 4 H.L. 82 at 89. It is worth noting at this point that, prior to the Wills Act 1837, the formal requirements for wills were contained in the Statute of Frauds 1677.

26 *Thynn v Thynn* (1684) 1 Vern. 196; *Devenish v Baines* (1689) Prec. Ch. 3.
27 *McCormick v Grogan,* n.25 above, p.89, n.27.
28 *ibid.* at 97.
29 *Pit Rivers, Re* [1902] 1 Ch. 403.
30 [1897] 1 Ch. 196.
31 *Pugh's Wills Trust, Re* [1967] 1 W.L.R. 1262.
32 Hodge, "Secret Trusts: The Fraud Theory Revisited" [1981] Conv. 341.
33 (1748) 1 Ves. 123.
34 (1876) 10 Ir. Eq. 469.
35 (188) 15 Ch.D. 594 at 606-607.
36 *Blackwell v Blackwell,* above n.8, at 328-329, n.9.
37 At 651, n.21.
38 *Thynn v Thynn,* n.26 above.
39 This is currently governed by the Supreme Court Act 1981, s.124.
40 See the case in *McCormick v Grogan,* n.25 above, at n.27.
41 Under the Statutes of Mortmain, which operated between 1736-1891.
42 *Earl of Oxford's Case* (1615) 1 Ch.R. 1 at 6.
43 *Allen v Snyder* [1977] 2 N.S.W.L.R. 685 at 689.
44 Such as setting up a bank account in the beneficiary's name.
45 Moffat, *op. cit.,* at 114, n.26.
46 Watkin [1981] Conv. 335.
47 Pearce & Stevens, *op.cit.,* at 222, n.25.
48 Moffat, *op.cit.,* at 123, n.26.

The author argues against the existence of secret trusts, contending that they undermine the formal requirements established by the Wills Act 1837.

Secret Trusts as Covert Devices: The author argues that secret trusts enable individuals to circumvent the formalities required by the Wills Act, thus subverting its underlying policy. This is problematic for positivist lawyers who value adherence to statutory provisions.

Legal Framework of the Wills Act:
The Wills Act establishes strict formal requirements to prevent fraud and ensure the testator's intentions are clearly documented and honored. It seeks to eliminate uncertainty in the disposition of property after death, which is crucial since the testator cannot refute any claims made after their passing. The article highlights the importance of these formalities in creating a reliable system for property transfer and in safeguarding against forgery and abuse.

Inter Vivos Trust Theory:
Some commentators argue that secret trusts operate outside the Wills Act because they are classified as inter vivos trusts (trusts created during the lifetime of the settlor). This perspective suggests that the trust is created by the communication of terms to the trustee, and it only becomes enforceable when the property is vested in the trustee upon the testator's death.
However, the author critiques this theory by stating that it conflates the concepts of operating outside the will with operating outside the Wills Act. Moreover, it allows for trusts to bind future property, which contradicts the usual rules governing trusts.

Fraud Theory:
This theory suggests that the existence of secret trusts is justified because they prevent fraud against the testator or the beneficiaries. In fully-secret trusts, if the trustee suppresses evidence of the trust, they could benefit from wrongdoing, which the courts aim to prevent.
However, this theory fails to provide a valid justification for half-secret trusts, where the trustee is explicitly named in the will and thus cannot take beneficially. The article points out that extending the fraud theory to justify half-secret trusts is problematic, as it merely asserts a need to respect the testator's wishes without adequately addressing the legal requirements imposed by the Wills Act.

Historical Context:
The article discusses the origins of secret trusts, noting that they initially served a legitimate purpose by allowing testators to keep certain aspects of their legacies confidential. In earlier legal contexts, there were valid reasons for such secrecy, such as protecting the rights of illegitimate children or mistresses.
However, the author argues that the need for such secrecy is largely obsolete today, as legal frameworks have evolved. Many modern methods exist to ensure privacy without resorting to secret trusts, diminishing their relevance.

Call for Reform:
The author ultimately argues for the abolition or substantial reform of secret trusts. They contend that the existing framework is confusing, lacks a coherent rationale, and fails to serve a significant social purpose.
Instead, a strict adherence to the requirements of the Wills Act would better prevent fraud and ensure that the intentions of the testator are honored in a manner consistent with statutory law.

