ENFORCEMENT OF SECRET AND SEMI-SECRET TRUSTS

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> In both cases the testator's wishes are incompletely expressed in his will. Why should equity, over a mere matter of words, give effect to them in one case and frustrate them in another?
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> —*Blackwell v. Blackwell*[1]

I. INTRODUCTION

The general recognition and enforcement of secret trusts is deeply rooted in the Anglo-American legal tradition. Courts on both sides of the Atlantic have heralded the notion that equitable intervention in these cases is essential to promote justice between the parties, despite clear statutory authority which ordinarily would prohibit such intervention. While the English courts have extended the same treatment to semi-secret trusts, the majority of American jurisdictions have distinguished semi-secret trusts and concluded that they do not require the same treatment. The American courts have reached this curious conclusion despite the fact that the semi-secret trust represents a less flagrant assault on the statutory framework than its more favorably received twin.

The disparate treatment accorded secret and semi-secret trusts is unjustified and can work a pronounced hardship on a deserving beneficiary while frustrating the clear intent of the testator. After reviewing the general subject of secret and semi-secret trusts, this Article will suggest that the enforceability of these trusts should not turn on a "mere matter of words" but rather should depend on the same prerequisites and standard of proof.

II. SECRET TRUSTS

There are numerous reported cases where the testator bequeaths his property in reliance upon an oral agreement with the legatee that the latter will hold it for the benefit of a third person. Since the bequest is absolute on its face and makes no mention of a trust, courts refer to the oral agreement as a "secret trust." The oral agreement cannot, of course, be enforced as an express trust since the requisite formalities of the Statute of Wills have not

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[1] [1929] A.C. 318, 335; Annot., 67 A.L.R. 336, 345 (1930).

been satisfied.[2] To avoid the unjust enrichment of the legatee, however, the great majority of courts have been willing to impress a constructive trust on the property in favor of the intended beneficiary.[3] Such a result will obtain "not only in the case of personal property but also in the case of land."[4]

While the oral agreement which secures a bequest is the most common form of the secret trust, a number of variations exist.[5] For example, if the oral promise "induces the testator to refrain from revoking a will which he has previously made it is as effective as if it had induced the testator to make the will."[6] Another variation, where a person who would otherwise execute a will dies intestate in reliance upon assurance from his heir that the property would be held for a third person, is illustrated by the Minnesota case of *Barret v. Thielen*.[7] In that case, the decedent Hornung became critically ill and advised his heir that he would call in a notary and have a will made unless she would promise to transfer to another a portion of the estate which would descend to her by intestate succession.

> Plaintiff assured him that a will or other legal document was unnecessary, and that she would fully comply with his wishes and set over to defendant one-half of the property at the proper time. Upon this promise being made Hornung made no further effort to execute a will, and he relied wholly upon plaintiff to carry out his request, which she subsequently failed to do.[8]

In such instances, the courts have recognized that intestacy induced by a promise is merely the other side to the secret trust coin and have erected a constructive trust for the benefit of the intended beneficiary.[9]

A. *Prerequisites to Enforcement*

Before equity will intercede to enforce a secret trust in opposition to the express language of the will, three necessary elements must be satisfactorily proved.[10] First, it must be evident that it was the testator's intention to impose a legal, as opposed to moral, obligation on the legatee.[11] "The real

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[2] *See* discussion *infra* pp. 11-12.

[3] G. BOGERT, TRUSTS AND TRUSTEES § 499 (rev. 2d ed. 1978); RESTATEMENT (SECOND) OF TRUSTS § 55(1) (1959).

[4] A. SCOTT, THE LAW OF TRUSTS § 55.1 (3d ed. 1967).

[5] G. BOGERT, *supra* note 3, § 498.

[6] A. SCOTT, *supra* note 4, § 55.2. *See also* De Laurencel v. De Boom, 48 Cal. 581 (1874); Olsen v. First National Bank, 76 S.D. 605, 83 N.W.2d 842 (1957); Brook v. Chappell, 34 Wis. 405 (1874).

[7] 140 Minn. 266, 167 N.W. 1030 (1918).

[8] *Id.* at 269, 167 N.W. at 1031.

[9] *See* Bailey v. Wood, 211 Mass. 37, 97 N.E. 902 (1912); Thurn v. McAra, 374 Mich. 22, 130 N.W.2d 887 (1964).

[10] Nash v. Bremner, 84 N.J. Eq. 131, 131, 92 A. 938, 939 (1915).

[11] A. SCOTT, *supra* note 4, § 55.1.

question is, what did he intend should be the *sanction?* Was it to be the authority of a court of justice, or the conscience of the devisee?"[12] In *Housman v. Commissioner,*[13] the Court of Appeals for the Second Circuit held that a conversation between the decedent and his wife, in which she agreed to do "the right thing by the boys," was too "casual and indefinite" to suggest that he had intended to impose an enforceable trust in favor of his sons.[14] Similarly, if the testator merely "desired," "wanted," or "requested" that the devisee hold for others,[15] "without showing an intent that such holding be imperative, these precatory expressions are not sufficient to create a constructive trust. . . ."[16] Thus, in *Orth v. Orth,*[17] where the testator offered "expressions of hope, of confidence and of request"[18] to his wife that the estate would be used to "help his children from time to time,"[19] the Indiana court found that there was no intention to charge the property with a trust and that the language raised only a moral obligation on the part of the legatee.[20]

Second, there must be a promise or agreement by the legatee that he will "carry the testator's intention into effect."[21] The promise "may be implied as well as expressed."[22] The leading secret trust case of *Trustees of Amherst College v. Ritch*[23] supports this view.

> While a promise is essential it need not be expressly made, for active co-operation or silent acquiescence may have the same effect as an express promise. If a legatee knows what the testator expects of him, and, having an opportunity to speak, says nothing, it may be equivalent to a promise . . . .[24]

The silent legatee, then, may have to communicate his refusal to hold the property for another since "[n]ot to speak, in such circumstances, would be encouraging and inviting the trust"[25] of the testator. If he fails to discharge the "duty to speak," a promise will be inferred from his silence.[26] Thus, in

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[12] M'Cormick v. Grogan, [1867] 1 I.R. Eq. 313, 328, *as quoted in In re* Snowden, [1979] Ch. 528, 537.

[13] 105 F.2d 973 (2d Cir. 1939), *cert. denied,* 309 U.S. 656 (1940).

[14] *Id.* at 975.

[15] *See* McDaniel v. McDaniel, 220 Ark. 614, 249 S.W.2d 125 (1952).

[16] G. BOGERT, *supra* note 3, § 499, at 526.

[17] 145 Ind. 184, 42 N.E. 277 (1895).

[18] *Id.* at 192, 42 N.E. at 279.

[19] *Id.* at 193, 42 N.E. at 279.

[20] The problem of distinguishing between precatory language and language intended to create a legal obligation exists for ordinary express trusts as well. *See* Comford v. Cantrill, 177 Tenn. 553, 151 S.W.2d 1076 (1941).

[21] Wallgrave v. Tebbs, [1855] 2 Kay & J. 313, 321.

[22] Brook v. Chappell, 34 Wis. 405, 414 (1874).

[23] 151 N.Y. 282, 45 N.E. 876 (1897).

[24] *Id.* at 324, 45 N.E. at 887.

[25] Mead v. Robertson, 131 Mo. App. 185, 195-96, 110 S.W. 1095, 1097 (1908).

[26] G. BOGERT, *supra* note 3, § 499, at 526.

the Wisconsin case of *Brook v. Chappell,*[27] where the residuary legatee was directed by the testator to give legacies to various individuals, the court held that his silence while receiving the instructions was tantamount to an express promise to make the payments. On the other hand, if the legatee rejects the request that he hold for a third person, but the testator bequeaths him the property anyway, no constructive trust will be imposed.[28]

Third, it must be demonstrated that the testator made the bequest in reliance upon the promise of the legatee. A passage from *Whitehouse v. Bolster*[29] indicates the importance of this requirement.

> [T]here is one principle that runs through all the cases, and which, in our view of this case, must be decisive here. It must always appear that the decedent relied upon the promise of the heir or devisee as an effective arrangement for the future disposition of his property. This principle is fundamental and universal.[30]

The reliance element has been articulated by the courts in a variety of ways. Some provide that the bequest must be "induced"[31] by the promise or that the agreement must have been the "cause"[32] of the disposition. Other courts, however, favor a simple "but for" test as a means of resolving the reliance issue. "In order to establish such a trust, it must appear that the devisee or legatee took under the will property which he would not have received, but for his promise, express or implied, to take it for a third person."[33] Despite the differing expressions of this third requirement, it is uniformly true that the failure to prove reliance "eliminates a necessary element of the factual base on which a constructive trust would have to rest."[34] For example, in *Bennett v. Littlefield,*[35] the Massachusetts court in dismissing the bill to establish a trust noted that the alleged promise was made two months after the execution of the will and thus could not have served to induce the bequest.

B. *Reasons for Constructive Trust*

The secret trust is not enforceable as an express trust but rather gives rise to the imposition of a constructive trust. The constructive trust is a device "through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of legal title may not

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[27] 34 Wis. 405 (1874).

[28] *Cf.* Ives v. Pillsbury, 204 Minn. 142, 283 N.W. 140 (1938).

[29] 95 Me. 458, 50 A. 240 (1901).

[30] *Id.* at 464, 50 A. at 243.

[31] Barron v. Stuart, 136 Ark. 481, 491, 207 S.W. 22, 25 (1918).

[32] Mead v. Robertson, 131 Mo. App. at 193, 110 S.W. at 1096.

[33] Suman v. Harvey, 114 Md. 241, 257, 79 A. 197, 203 (1911).

[34] *In re* Estate of Land, 99 N.J. Super. 500, 510, 240 A.2d 453, 459 (1968).

[35] 177 Mass. 294, 299, 58 N.E. 1011, 1012 (1901). There was no claim that the testator relied on the alleged promise in failing to revoke the bequest.

in good conscience retain the beneficial interest, equity converts him into a trustee."[36]

In the secret trust case, the courts have invoked this extraordinary remedy on the basis of fraud. "It is the element of fraud appearing in the case that gives the court jurisdiction to inquire into it, not with a view of enforcing a parol trust, but to relieve against the fraud by raising a constructive trust."[37]

In some decisions, the court finds fraud because the legatee holds the property "against conscience,"[38] suggesting a quasi-moral underpinning to the offense. "The fraud consists in holding, or attempting to hold, the estate free from the effect or obligation of a promise, subject to which it was intended to be devised and received, and which it is obligatory in conscience to carry out."[39]

More often, the courts have simply declared that the refusal to honor the oral agreement constitutes a "fraud on the testator"[40] or the intended beneficiary which "equity will not endure."[41] The cases make clear that it is unnecessary to show actual, intentional fraud by the legatee at the time of the promise since "constructive" fraud will be imputed whenever the legatee fails to perform as he had promised.[42] The concept of fraud, then, has been expanded to allow judicial access to secret trusts.

C. *Statutory Considerations*

While most courts have not hesitated to enforce the secret trust when sufficiently proved, it is true that in substance such a trust effects a testamentary disposition that runs counter to the provisions of the Statute of Wills.[43] To pass property at death, the typical statute requires a written will signed by the testator and duly attested. Courts have usually offered two explanations for their position that equitable relief is not precluded by such statutory authority.

First, it is urged that the statutory formalities may be safely disregarded on the basis of the principle that "statutes to prevent frauds are not to be used as instruments of fraud."[44] Second, the more widely shared view is that

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[36] Crites v. Sanford, 609 S.W.2d 244, 246 (Mo. App. 1980).

[37] Blick v. Cockins, 234 Pa. 261, 265, 83 A. 196, 197 (1912).

[38] Powell v. Yearance, 73 N.J. Eq. 117, 126, 67 A. 892, 896 (1907).

[39] *Id.*

[40] Caldwell v. Caldwell, 79 Ky. (7 Bush) 515, 518 (1871).

[41] Matter of O'Hara, 95 N.Y. 403, 413 (1884).

[42] Wiseman v. Guernsey, 107 Neb. 647, 656, 187 N.W. 55, 58 (1922).

[43] A. SCOTT, *supra* note 4, § 55.1, at 423.

[44] Powell v. Yearance, 73 N.J. Eq. at 128, 67 A. at 897; *cf.* Reech v. Kennegal, [1748] 1 Ves. Sr. 123, dealing with the related concern over the application of the parol evidence rule: "[T]he statute should never be understood to protect fraud; and therefore whenever a case is infected with fraud . . . the court will not suffer the statute to protect it, so as that any one should run away with a benefit not intended." *Reech* at 124.

secret trusts do not conflict with the Statute of Wills since "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."[45] The most complete discussion of this explanation appears in the *Amherst College* case.

> The trust does not act directly upon the will by modifying the gift, for the law requires wills to be wholly in writing, but it acts upon the gift itself as it reaches the possession of the legatee, or as soon as he is entitled to receive it. The theory is that the will has full effect, by passing an absolute legacy to the legatee, and that then equity, in order to defeat fraud, raises a trust in favor of those intended to be benefited by the testator, and compels the legatee, as a trustee ex maleficio to turn over the gift to them. The law, not the will, fastens the trust upon the fund, by requiring the legatee to act in accordance with the instructions of the testator and his own promise. Neither the statute of frauds nor the statute of wills applies, because the will takes effect as written and proved; but, to promote justice and prevent wrong, the courts compel the legatee to dispose of his gift in accordance with equity and good conscience.[46]

Thus, the secret trust arises independently of the will and, as a Pennsylvania case states, "owes its validity, not to the will or the declaration of the testator, but to the fraud of the devisee."[47]

Despite these rationales, criticism persists that the secret trust represents an impermissible evasion of the express provisions of the Statute of Wills. One commentator, however, notes that "such a statute has as its only purpose insuring the genuineness of alleged dispositions to take effect at death, and that object is assured by the application of the 'clear and convincing' evidence rule with regard to the establishment of constructive trusts."[48] In attempting to carry out the true intent of the testator, courts insist on high standards of proof.

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[45] *In re* Snowden, [1979] Ch. 528, 535.

[46] Trustees of Amherst College v. Ritch, 151 N.Y. 282, 324-25, 45 N.E. 876, 887 (1897).

[47] Hoge v. Hoge, 1 Watts & Ser. 163, 214 (Pa. 1832). *See* Church v. Ruland, 64 Pa. 432, 442 (1870), where it was said:

> It is not affected by the statutory provisions on the subject of wills. The proof offered is not of any alteration, revocation or cancellation, which must be evidenced in a particular manner. It gives full effect to the will and every word of it, and to the conclusiveness of the probate, where it is conclusive. It fastens upon the conscience of the party, having thus procured a will, and then fraudulently refusing or neglecting to fulfill the promise on the faith of which it was executed, a trust or confidence, which a court of equity will enforce by compelling a conveyance when the proper time for it has arrived; and with us in Pennsylvania such a conveyance will be considered as having actually been made, whenever it ought to have been made. The cestui que trust will be entitled to recover in ejectment against the trustee, and all in privity with him.

[48] G. BOGERT, HANDBOOK OF THE LAW OF TRUSTS § 85, at 313 (5th ed. 1973).

D. *Standard of Proof*

Although most courts will not hesitate to enforce a secret trust in appropriate circumstances, there is a "heavy burden of proof imposed by law upon one who seeks to establish a trust by parol."[49] Courts require proof of the "highest probative value"[50] in the secret trust case and exhibit a marked "reluctance to interfere if there be any doubt or ambiguity in the evidence."[51] Judicial unwillingness to "interpose between the complainant and the command of the statute"[52] is understandable where the proof offered is uncertain. "The ease with which designing relatives and friends might fabricate a case of an oral promise to hold for another, and the possibility of the misunderstanding of loose and benevolent expressions by the testator, make courts very cautious in accepting cases of this type."[53]

Similar reservations are voiced in *Wall's Appeal*.[54] "Claims of this nature against dead men's estates, resting entirely in parol, based largely upon loose declarations . . . and when the lips of the party principally interested are closed in death, require the closest and most careful scrutiny to prevent injustice being done."[55]

In weighing the evidence, courts have repeatedly stated that a mere preponderance of the evidence will be insufficient to establish a constructive trust.[56] This decision is based, in part, on the underlying presumption that the will represents the true expression of the testator's intent.

> The presumption that an instrument executed with the formality of a deed, or a contract deliberately entered into, expresses on its face its true intent or purpose, is so persuasive that he who would establish the contrary must go far beyond the ordinary rule of preponderance. To demand less would be to lose sight of this presumption, which is one of the strongest disputable presumptions known to the law.[57]

Therefore, courts demand a "clear and convincing" standard of proof.[58] Though a convenient benchmark, this standard has been articulated in various ways and has often been adopted with additional directives. An Illinois court states that the proof must be clear and convincing "and so

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[49] Danner v. Danner, 366 Pa. 178, 181, 77 A.2d 217, 218 (1950).

[50] Sechler v. Sechler, 403 Pa. 1, 7, 169 A.2d 78, 81 (1961).

[51] Gaither v. Gaither, 3 Md. Ch. 158, 161 (1851).

[52] Mead v. Robertson, 131 Mo. App. 185, 196, 110 S.W. 1095, 1098 (1908).

[53] G. BOGERT, *supra* note 3, § 499, at 522-24.

[54] 111 Pa. 460, 5 A. 220 (1886).

[55] *Id.* at 471, 5 A. at 224.

[56] Strype v. Lewis, 352 Mo. 1004, 1012, 180 S.W.2d 688, 692 (1944).

[57] Jasper v. Hazen, 4 N.D. 1, 6, 58 N.W. 454, 456 (1894) (while *Jasper* involved an attack on a deed, the underlying principle would apply to an attack on a will as well).

[58] *See* G. BOGERT, *supra* note 3, § 499, where he states: "The usual rule applied to all constructive trust cases should govern; the proof must be 'clear and convincing.' "

strong, unequivocal and unmistakable as to lead to but one conclusion."[59] And a Pennsylvania decision concludes that the evidence to "support a parol trust must be direct, positive, express, unambiguous and convincing."[60] This stringent standard of proof, extending to "every essential element"[61] of the proposed trust, guards against spurious claims.

III. SEMI-SECRET TRUSTS

The semi-secret trust case arises where the "intention to create a trust, but not the identity of the intended beneficiary, appears on the face of the will."[62] The will discloses that the donee takes as trustee but does not reveal the person for whom he holds. Thus, the trust is considered "half" or "semi" secret. As in the case of the fully secret trust, proof of a semi-secret trust requires a showing of the testator's intention to impose a legal obligation as well as his reliance upon the legatee's promise to hold the property for a third party. Even where these elements are satisfactorily proved, the majority of jurisdictions in this country hold that the heirs or residuary legatees of the testator, not the intended trust beneficiary, are entitled to the property on the theory that there is a resulting trust arising out of the invalid express trust which appears in the will.[63] Under this theory, the express trust is invalid because the will fails to name a beneficiary of the trust, even though extrinsic evidence of the beneficiary's identity is available. These jurisdictions, then, distinguish between the case in which the will on its face shows an absolute legacy and the one in which the trust appears in the will.[64]

In one of the leading cases invoking the resulting trust remedy, *Olliffe v. Wells*,[65] the testatrix bequeathed the residue of her estate to her minister "to distribute the same in such manner as in his discretion shall appear best calculated to carry out wishes which I have expressed to him or may express to him." The court acknowledged that had the bequest been absolute on its face, in other words a secret trust, extrinsic evidence of the oral agreement would have been admissible to prevent the unjust enrichment of the legatee and to vest the property in the trust beneficiaries selected by the testatrix. In this case, however, the minister was clearly not entitled, on the face of the will, to take the beneficial interest in the property and thus extrinsic evidence, the court reasoned, need not be admitted to prevent an injustice. Since the express trust was invalid, a resulting trust arose in favor of the heirs of the testatrix.

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[59] Henrichs v. Sundmaker, 405 Ill. 62, 66, 89 N.E.2d 732, 734 (1950).
[60] *In re* Brenneman's Estate, 360 Pa. 558, 63 A.2d 59, 61 (1949).
[61] Mead v. Robertson, 131 Mo. App. at 196, 110 S.W. at 1098.
[62] A. SCOTT, *supra* note 4, § 55.8.
[63] G. BOGERT, *supra* note 48, § 85, at 314.
[64] A. SCOTT, *supra* note 4, § 55.8.
[65] 130 Mass. 221 (1881).

The result in *Olliffe* is unduly harsh and is clearly "inconsistent with the result reached by the same courts when the devise or bequest is absolute."[66] A semi-secret trust presents a stronger case for the imposition of a constructive trust in favor of the intended beneficiary because it is (1) a less flagrant violation of the Statute of Wills[67] and (2) less prone to fraudulent attack[68] since the face of the will shows that the will beneficiary is not to take outright but as trustee. Despite these considerations, the majority of American decisions subscribe to the *Olliffe* position.

The English courts, however, as well as a minority of American jurisdictions, reach the opposite result and impress a constructive trust on the property for the benefit of the intended trust beneficiary. These decisions view the distinction made between secret and semi-secret trusts as artificial and thus accord the same treatment in both instances.[69] In *Blackwell v. Blackwell*,[70] it was argued that the same result should follow since the "real beneficiaries are equally defrauded in both cases, and the faith on which the testator relied is equally betrayed."[71] And Lord Warrington, in the same case, observed that the semi-secret trust owes its existence not to the creation of an express trust, but rather to the conduct of the legatee.

> I think the solution is to be found by bearing in mind that what is enforced is not a trust imposed by the will, but one arising from the acceptance by the legatee of a trust, communicated to him by the testator, on the faith of which acceptance the will was made or left unrevoked, as the case might be.[72]

In *Linney v. Cleveland Trust Co.*,[73] the motivating factor for the Ohio court's decision to enforce the semi-secret trust was the clear intention of the testator. The court noted that the resulting trust remedy was particularly ill-considered in light of the underlying principle that should govern in such cases.

> It must be remembered . . . that the doctrine of a resulting trust is based upon the presumed intention of the testator, and such trust is never permitted to arise when it is manifestly against the intention of the testator. Reading the entire will, and regarding its four corners, as our guide, we are led to but one conclusion, namely, that, no matter what

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[66] A. SCOTT, *supra* note 4, § 55.8.

[67] *Id.*

[68] *Id.* § 55.9.

[69] In Linney v. Cleveland Trust Co., 30 Ohio App. 345, 364-65, 165 N.E. 101, 107 (1928), for example, the court said:

> If a trust shall be engrafted upon an absolute legacy in a will by oral testimony, we see no reason why such oral testimony, under the same principles, could not be used to determine the beneficiaries and the amount they are to receive, where it appears from the will that the legacy was given in trust.

[70] [1929] A.C. 318, 67 A.L.R. 336 (1930).

[71] *Id.* at 328, 67 A.L.R. at 341.

[72] *Id.* at 342, 67 A.L.R. at 349.

[73] 30 Ohio App. 345, 165 N.E. 101 (1928).

> the testator may have intended, he did not intend that his heirs at law and next of kin should be the beneficiaries under the trust arrangement.[74]

Thus, it is suggested that the minority position imposing a constructive trust for the intended beneficiaries is the preferable view since it not only avoids the unjust enrichment of the trustee but also carries out the intention of the testator.

IV. Conclusion

The semi-secret trust case clearly enjoys an advantage in sustaining the heavy burden of proof imposed by courts. Since words of trust appear on the face of the will, the first of the three elements essential to the enforcement of such a trust is confirmed. The legatee's oral agreement and the testator's reliance are also integral elements that must necessarily be proved before equity will intervene. The advantage, then, that the semi-secret trust case enjoys does not consist of a lower standard of proof but rather is reflected in the fewer elements that extrinsic evidence must establish.

The false dichotomy invoked by some courts that leads to the dissimilar treatment of secret and semi-secret trusts only obscures the real issue. The result in such cases should not turn on whether words of trust appear on the face of the will but rather should be determined solely by the sufficiency of the proof. If a contestant can meet the stringent standard of proof insisted upon by the courts (e.g., "so strong, unequivocal and unmistakable as to lead to but one conclusion"), then the imposition of a constructive trust is likely to give effect to the testator's wishes and do justice between the parties. A jurisdiction which will enforce a secret trust should a fortiori carry out a semi-secret trust proved to the same high standard.

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[74] *Id.* at 362, 165 N.E. at 106.