The basis on which the courts enforce secret and half secret trusts has been changed over the years. In 1929 in Blackwell v Blackwell Lord Buckmaster observed that the doctrine of secret trusts has over 200 years been the subject of controversy after the statute of Fraud 1677 which imposed formality requirements on oral wills and also on declaration of trust of land. The present law on the formal requirements for a will is contained in S.9 of the Wills Act 1837. Secret trusts appear to operate in breach of this rule. The first reported case is Thynn v Thynn. Therefore, academic’s debates have been focused mainly on how and why secret trusts are enforced by avoiding clear statutory provisions.

Theories on Secret Trusts

Hence most discussions regarding secret trusts focus on two theories; the “fraud theory” and the “dehors the will theory”. These two theories are normally presented as competing theories, although they have been proposed as being complementary.

The Fraud Theory

The fraud theory escapes from the statement that as equity will not permit a secret trustee to make a fraud by relying on Wills formality as in S.9 of the Wills Act 1837, in order to avoid the performance of a secret trust, it will be enforced, notwithstanding the statute. This is clearly seen in the judgment of the case of Thynn v Thynn. The generally accepted view is that fraud must involve personal gain by secret trustee (McCormick v Grogan). If fraud is understood and justified in this way then this would be difficult to justify the half secret trusts as a half secret trustee, being identified on the face of the wikk as a trustee, cannot take the property for himself.

Probate Doctrine of Incorporation

However, those advocating this view have held that half secret trusts are enforced because they are incorporated into the testator’s will under the probate doctrine of incorporation by reference. Unfortunately, this doctrine does not match with the requirements that the secret trusts must be communicated and accepted.

Beyond Fraudulent Enrichment

An alternative position is that the concept of fraud in equity extends beyond fraudulent enrichment that the secret trusts constitute a fraud on the testators and secret beneficiary. The minority who supports this view argue that the fraud theory can explain the enforcement of both secret trusts because equitable fraud need not involve any element of personal gain.
Is Fraud relevant to all Secret Trusts?

In re Snowden, Megarry VC dismissed fraud as being merely “the historical origin of the doctrine”, explaining that nowadays, secret trusts may be established in cases where there is no possibility of fraud. However, 42 cases, surveying over 326 years (from Thynn to De Bruyne) have been identified where the fraud theory has been referred to as the underlying justification of the doctrine, including both fully (McCormick v Grogan) and half secret trusts (Blackwell v Blackwell). It is therefore can be submitted that any assertions that fraud is no longer relevant to the enforcement of secret trusts can be debunked immediately by reference to the above authority.

Dehors the will theory

The dehors the will theory is the most widely accepted justification for the doctrine. This theory is based on the idea that WA 1837 is irrelevant to the enforcement of secret trusts. However, there is a conflict of opinion regarding how and why a secret trust should face outside the Wills Act 1837. The favored standing point is that a secret trust is an express inter vivos trust, not testamentary, therefore not within the ambit of the Wills Act 1837. Thus, Lord Warrington in Blackwell v Blackwell said 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.

Trust of Land by Will

Questions regarding secret trusts of land ought to comply with S.53 (1) (b) of the LPA 1925 have been raised. We know that dehors the will theory only works for personality. However, Rouchefoucauld v Boustead applied that statute cannot be used as an instrument of fraud. Ironically we are faced with fraud theory again. Moreover in Ottaway v Norman, an oral full secret trust of land was found to be valid where no formality points were raised.

Resulting Trust issue

However, the theory does not account for not imposing a resulting trust because the effect of this would be that the testator’s family received the property which would run counter to the obligations imposed on the legatee where the testator intended to give benefit to the beneficiary.

Critics

Critics argue that dehors theory is contrary to S.1 if the WA 1837 and said that in such case dehors theory is wrong. She also concludes that the fraud theory is still a possible justification for the enforcement of fully secret trusts if certain conditions are met but does not explain half secret trusts.
Remedial Constructive Trust

In the New Zealand case of Brown, it was held that the old fraud theory should no longer be used as a justification of secret trusts. Instead, it should be based on the remedial constructive trust with the result that the legatee will hold the property on a remedial constructive trust to give effect to the (secret) trust placed on him.