PRACTICE MADE PERFECT CLE BC

ESTATE LITIGATION—2009 UPDATE
PAPER 4.1

Secret Trusts

These materials were prepared by Stanley T. Rule of Tinker, Churchill, Rule, Kelowna, BC, for the Continuing Legal Education Society of British Columbia, November 2009.

SECRET TRUSTS

I. What are Secret Trusts?

> A secret trust arises where a person gives property to another, communicating to that person an intention that the property be dealt with in a specific way upon the happening of an event, and the donee accepts the obligation.
>
> Per Madam Justice Saunders in *Champoise v. Prost*, 2000 BCCA 426 at para. 15

The trust is secret because the donee's obligations are not apparent on the face of the instrument under which the property is given: the donee *appears* to take the property beneficially.

A related concept is a half-secret trust: the instrument indicates that the donee has obligations, but does not name the beneficiaries or other objects of those obligations.

II. The Principles

Many of the cases arise out of dispositions in wills. As I will discuss below, secret trusts are not confined to wills. But for convenience I will discuss the principles in the context of wills.

The testator makes a will leaving property to X. In making the will, he complies with the formal requirements of the *Wills Act*. The gift of property to X appears to be absolute. On what basis may a court say that on the testator's death X holds the property for the benefit of Y? If the will makes no reference to a trust for Y, how can the court give effect to a trust for the benefit of Y, without offending the writing, witnessing and signing requirements of the *Wills Act*?

The courts have applied the principle that it would be against good conscience to allow the named beneficiary to keep the property if he or she accepted the obligation to hold it for someone else. This was articulated by Viscount Sumner in *Blackwell v. Blackwell*, [1929] A.C. 318 (H.L.) at 334:

> In itself the doctrine of equity, by which parol evidence is admissible to prove what is called 'fraud' in connection with secret trusts, and effect is given to such trusts when established, would not seem to conflict with any of the Acts under which from time to time the Legislature has regulated the right of testamentary disposition. A Court of conscience finds a man in the position of an absolute legal owner of a sum of money, which has been bequeathed to him under a valid will, and it declares that, on proof of certain facts relating to the motives and actions of the testator, it will not allow the legal owner to exercise his legal right to do what he will with his own. This seems to be a perfectly normal exercise of the general equitable jurisdiction. The facts commonly but not necessarily involve some immoral and selfish conduct on the part of the legal owner. The necessary elements, on which the question turns, are intention, communication, and acquiescence. The testator intends his absolute gift to be employed as he and not as the donee desires; he tells the proposed donee of this intention and, either by express promise or by the tacit promise, which is signified by acquiescence, the proposed donee encourages him to bequeath the money in the faith that his intentions will be carried out.

The trust may be said to arise outside of the will (at least in the case of the fully secret trust). Under this theory, when the court enforces the secret trust, the court is not allowing parol evidence to vary the will itself, but finding that the beneficiary has obligations that arose from communications with the testator not expressed in the will.

To prove a secret trust, the proponent must establish the following:

a. the testator communicated the trust to the trustee (the named beneficiary in the will) during the testator's lifetime;

b. the trustee accepted the trusts. The acceptance may be implied if the trustee remains silent;

c. the three certainties of a trust must be present, that is to say:

1. the certainty of the testator's intention to create the trust;

2. the certainty of the subject matter (the property); and

3. the certainty of the objects (the beneficiaries of the trust).

In many of the cases, the most contentious and difficult issue may be the certainty of intention to create a trust.

For example, in *Hayman v. Nicoll*, [1944] 3 D.L.R. 551 (S.C.C.), the testator in her codicil gave some funds to her daughter "in full confidence that she will dispose of the same in accordance with the wishes which I have expressed to her." The testator's daughter outlived the testator, but died about three years later. There was some evidence that the daughter considered that the funds were not hers, but the beneficiaries of the alleged trust were not known. The testator's residual beneficiaries argued that the daughter had held the funds in trust, and that because the daughter did not carry out the trust, the funds result back to the testator's estate for the benefit of the residual beneficiaries. They argued that either the words of the codicil proved an intention to create a trust (a half-secret trust) or that the trust was created by oral communications between the testator and her daughter (a fully-secret trust).

The Supreme Court of Canada held that the evidence both of the terms of the codicil itself, and of any communications between the testator and her daughter were insufficient to show an intention to create a trust. With respect to whether the testator intended to create a trust, Rand J. at pages 557-58 put the issue this way:

> Do the words of the codicil, then, create a trust or are they merely precatory, expressive of the wish of the testatrix but not intended to impose upon the legatee an imperative direction? During the past fifty years a marked change has taken place in the attitude of the Courts toward dispositions of this character. The earlier tendency was to treat such expressions as placing a bond upon the person taking, the performance of which Courts of Equity would enforce. But this has given way to an opposite leaning and the present rule is that confirmed in the case of *Re Atkinson, Atkinson v. Atkinson* (1911), 80 L. J. Ch. 370: to give effect to the real intention of the testator, as that is to be gathered from the testamentary instrument as a whole, regardless of any particular words used or of any rule related to them. So construed, I agree with Archibald and Doull JJ [in the Supreme Court of Nova Scotia]. That the words in question were not intended to do more than to indicate the desire rather than to impose the will of the testatrix.

For a more in depth discussion of the principles, see Donovan W.M. Waters, Mark Gillen, Lionel Smith, *Waters Law of Trusts in Canada, 3rd Edition* (Carswell, 2005) at 267-294.

III. British Columbia Case Law

Over the last decade there have been several secret trust decisions in BC. I am going to summarize five cases from 1999 through 2009, including two decisions of the Court of Appeal. I will deal with them chronologically.

A. Glasspool v. Everett

The issue in *Glasspool v. Everett* (1998), 53 B.C.L.R. (3d) 371 (S.C.), aff'd 1999 BCCA 31, was whether the plaintiff's father, Lawrence Glasspool, held certain mineral rights in Saskatchewan on a secret trust for the plaintiff. The plaintiff's grandmother had left the mineral rights to Lawrence Glasspool in her will.

When he was a child, the plaintiff had lived at various times with his grandmother Ethel McKillop, his uncle John Glasspool, Sr. and other families. As an adult he had little contact with his family.

Lawrence Glasspool died in 1996, leaving his estate by his will to his companion Pansy Everett.

The evidence of the secret trust came from the plaintiff's uncle John Glasspool, Sr., who testified that Ethel McKillop had a will that left all of her mineral rights to the plaintiff. But she changed her will to divide her mineral rights in four shares, with one going to Lawrence Glasspool, one to John Glasspool Sr. and one to each of John Glasspool Sr.'s two children. John Glasspool Sr. testified that before Ethel McKillip changed her will, Lawrence Glasspool agreed to leave his share to the plaintiff.

Ms. Everett and the executor of Lawrence Glasspool's will argued that the evidence of John Glasspool Sr. that Ethel McKillop said she "wanted" Lawrence Glasspool to leave the mineral rights to the plaintiff was insufficient to prove a trust. The words were merely precatory, and John Glasspool Sr.'s evidence was uncorroborated.

In finding that there was a secret trust, Madam Justice Satanove placed emphasis on Ethel McKillop's intent, rather than on the particular words used to create a trust. She also found that John Glasspool Sr.'s evidence was sufficiently trustworthy that it did not require corroboration. She wrote at paras. 31 through 33:

> 31. As I stated earlier I accept John Glasspool, Sr.'s evidence without further corroboration because he is an independent witness in that he stands to gain nothing from the trust and cannot be said to be biased in favour of the plaintiff with whom he has had no relationship for 30 years. Counsel for the defendant interviewed John Glasspool, Sr. before trial and it appears that he was cooperative and forthcoming.

> 32. In the case at bar, the exact words used by Ethel McKillop when she extracted the agreement of Lawrence Glasspool were not in evidence. John Glasspool, Sr. testified in chief and twice on cross-examination that Ethel McKillop "wanted" Lawrence Glasspool to leave his share of the "oil rights" to the plaintiff. Lawrence Glasspool "agreed."
>
> 33. In his testimony John Glasspool, Sr. used the word "wanted" as opposed to "requested" or "demanded" or some other word suggestive of a requirement imposed by Ethel McKillop. I do not rely heavily on the exact words used by John Glasspool, Sr. because he was not trying to relay the conversation verbatim. He testified as to its gist which I take to be the extraction of a promise from Lawrence Glasspool to bequeath his share of the Mineral Rights to his son on his death. John Glasspool, Sr. was unequivocal that Lawrence Glasspool agreed to this arrangement and that it was only after he had done so that Ethel McKillop had changed her will to remove the plaintiff as beneficiary and substitute John Glasspool, Sr., his two children and Lawrence Glasspool instead.

B. Champoise v. Prost

Both a son of the deceased and the deceased's husband alleged that the husband held assets on a secret trust for the son in *Champoise v. Prost*, 2000 BCCA 426. Yet the Court of Appeal ultimately held that there was no secret trust.

When Carmen Irene Champoise-Prost died she left surviving her two sons, Parris Champoise and Richard Champoise, from her first marriage, and her second husband, Barry Prost. She held most of her assets, including two parcels of real property, in a joint tenancy with her husband. The real properties in issue were the matrimonial home on Buckley Road on Shuswap Lake, and a house on Holt Street in Kamloops. Her half-interest the jointures was worth $511,000. The value of her gross estate was $93,000, all of which she left in her will to her husband.

After his wife's death, Barry Prost transferred the Holt Street property to Parris Champoise, subject to a mortgage. The value of the benefit was between $125,000 and $130,000.

Parris Champoise and his brother Richard brought a *Wills Variation Act* claim. A secret trust was first raised by Barry Prost in his statement of defence to the *Wills Variation Act* claim. He alleged that he had agreed with his wife to set aside the cash equivalent of half of the assessed value of their home on Buckley Road for Parris Champoise, which he could pay out at his discretion, unless he sold Buckley Road, at which time he would have to pay out Parris Champoise. Barry Prost pleaded that this secret trust satisfied any claims Parris Champoise might otherwise have under the *Wills Variation Act*.

Parris Champoise then amended his pleadings to allege that Barry Prost held a one-half interest in the Buckley Road property in trust for him on a secret trust. At trial, the trial judge dismissed the *Wills Variation Act* claims, but found that Barry Prost had held a one-half interest in both the Holt Street and the Buckley Road properties in trust for Parris Champoise.

On appeal the Court of Appeal held that there was no secret trust with respect to either of the properties or to half of the value of the Buckley Road property. Madam Justice Saunders found that there was no evidence that Barry Prost accepted a trust obligation to hold a half-interest in the Buckley Road property or in the Holt Street Property.

Even the trust alleged by Barry Prost was not an enforceable trust obligation. There was no certainty of subject matter. From the time Carmen Champoise-Prost transferred the property into a joint tenancy with Barry Prost to her death, the sum that would be impressed by a trust was variable. At her death, there was no sum of money available to satisfy the alleged trust obligation.

The Court of Appeal characterized the transfer of the Buckley Road property as a gift from Barry Prost, and did vary the will to award Parris Champoise the sum of $65,000.

C. Milsom v. Holien

Milsom v. Holien, 2001 BCSC 868 is another example of the court finding that the testator's expression of his wishes were precatory only, and did not create a trust obligation. As in *Champoise*, the secret trust was pleaded in the statement of defence to a claim brought by a child of the deceased.

In January 1999, Frank Canas-Prats knew he was dying of cancer. He transferred his GICs at the Bank of Nova Scotia into joint accounts with right of survivorship with his common law spouse, Elsie Holien. He designated her as the beneficiary of his RRIF, and he transferred his apartment into a joint tenancy with her.

Mr. Canas-Prats also made a new will, drafted by a solicitor, appointing Ms. Holien as executrix and leaving her his estate. In his previous will he had left some funds to his daughters and to relatives in Spain.

On February 6, 1999, Ms. Holien, who knew she was the beneficiary of his will, and that he wanted her to have the apartment on his death, asked what she wanted him to do with his money. He told her that she wanted her to pay his debts, and divide the rest up among family members in Spain. She deposed that he used his revoked will as a guide, and told her how much to give each relative.

In finding that there was no secret trust, Madam Justice Ross noted that Mr. Canas-Prats was astute, and had advice from professionals. If he had wanted to create a legally enforceable obligation to distribute funds to relatives in Spain he would have done so in his will or another formal document.

Furthermore, when Mr. Canas-Prats transferred his GICs into jointures with Ms. Holien, he intended to make a gift to Ms. Holien which he completed with the transfer. He could not later impose a trust obligation on her over those assets.

D. Bellinger v. Nuytten Estate

In *Bellinger v. Nuytten Estate*, 2002 BCSC 571, Mr. Justice Hood found that evidence that the testator had made a "solemn promise" to her husband to divide her estate equally among each her two children and his son on her death was insufficient to prove a trust obligation. Her son and her step-son argued that she and her husband made mutual wills, or in the alternative that she held assets in a secret trust for them.

Mr. Justice Hood also questioned, without deciding, whether a secret trust could exist if the husband left his assets to his wife to deal with as an absolute owner during her lifetime, but with a trust obligation affecting her testamentary gifts.

The testator, Dorothy Nuytten survived her second husband, Rene Nuytten, by 19 years. They had made mirror image wills leaving everything to each other. Each provided that if the other predeceased, his or her estate would be divided equally among the three children. (Dorothy Nuytten's mirror image will could not be found, but the decision proceeded on the assumption that she had made one contemporaneously with her husband.)

Dorothy Nuytten's daughter, Beverly Porter, lived with her, and provided substantial care through Dorothy Nuytten's years of ill health. Dorothy Nuytten left her most substantial asset, her house, to Beverly Porter. She left her son, Roy Bellinger, $40,000, and her step-son Theophil Nuytten another property, with the residue divided in three equal shares among her children and step-son.

Mr. Justice Hood found that although Dorothy Nuytten retained title to her house, she held it in trust for Beverly Porter. Dorothy Nuytten had made two agreements with her daughter. She promised her daughter the house if Beverly Porter took care of her. She also made an unregistered agreement for sale, pursuant to which Beverly Porter made a down payment, and monthly payments, until Dorothy Nuytten told her she did not have to make more payments.

The secret trust allegation failed for several reasons:

1. Mr. Justice Hood did not accept the uncorroborated evidence of the plaintiff, and of the testator's stepson and his wife, of a secret trust;
2. there may have been some agreement between the testator and her husband on their estate plans, but it did not create a legally binding obligation. The use of the words "solemn promise" did not create a trust;
3. even if there were a secret trust, Dorothy Nuytten did not breach it. She was entitled to deal with the assets during her lifetime, which included making an agreement to give her daughter the house in exchange for care or for money.

This case highlights the theoretical problems with alleging a secret trust allowing the beneficiary spouse to use the assets as she chooses during her lifetime, while requiring her to leave assets to the secret trust beneficiaries on her death. When does the obligation arise? What assets are impressed by the trust? Can there be a "floating" trust obligation that "crystallizes" on the surviving spouse's death?

E. Chinn v. Hanrieder

In *Chinn v. Hanrieder*, 2009 BCSC 635, Madam Justice Loo held that the Hugo Hanrieder's widow, Ingrid Hanrieder, held some mineral rights in Saskatchewan on a secret trust for his children.

What makes this case unique is that Ingrid's Hanrieder's interest in the mineral rights did not arise out of any disposition of the mineral rights to her by Hugo Hanrieder. The mineral rights were held by him as a trustee of a trust settled by his mother in 1973 for his benefit and the benefit of his siblings. The terms of the trust provided that on his death, his interest in the mineral rights would go to his spouse.

Hugo Hanrieder had instructed his solicitor to draft a will leaving the mineral rights to his children, but the solicitor advised Mr. Hanrieder that he could not do so under the terms of the trust.

After he found out that he could not leave the mineral rights to his children, Hugo Hanrieder told each of them in his wife's presence of his intention that they, his children, would receive the mineral rights on his death. According to his son, Dennis Hanrieder, when Hugo Hanrieder told him about what he wanted to do with the mineral rights, Ingrid Hanrieder said "I have no interest in them. I have money of my own." His daughter, Bette Chinn said that after her father told her of his intentions concerning the mineral rights, she asked Ingrid Hanrieder if that was okay. Ingrid Hanrieder said it was.

Following Hugo Hanrieder's death, Ingrid Hanrieder found out that the condominium she and Hugo Hanrieder owned had been mistakenly registered in their names as tenants in common, instead of joint tenants as they intended. Hugo Hanrieder's children agreed to disclaim any interest they might have as beneficiaries of their father's estate to an interest in the condominium. She, in turn, agreed to transfer her interest in the mineral rights, which did not then appear to have any significant value, to the children.

Later Ingrid Hanrieder received a letter from Chevron Canada Resources advising that the mineral rights were now producing. Chevron advised that they would be paying back royalties of $43,500. She denied that she had agreed with her husband to transfer the interest in the mineral rights to his children. She also denied that she agreed with his children to do so following his death in return for their agreement to disclaim any interest in the condominium.

Madam Justice Loo found that she had breached both the agreement she made with her husband, and the later agreement with the children to transfer the interest in the mineral rights to his children. She ordered Ingrid Hanrieder to account for all of the funds she received from the mineral rights.

In the other secret trust cases, the courts are arguably protecting a reliance interest of the testator or donor of the property subject to a secret trust. For example, if the named beneficiary of a will tells the testator that he will not accept the trust, the testator can change the will. The testator is relying on the named beneficiary's promise, express or implied, that the named beneficiary will carry out the trust in making (or not changing) the will.

In contrast, in *Chinn v. Hanrieder*, Hugo Hanrieder could not unilaterally change his mother's trust to leave the interest in the mineral rights to anyone other than his spouse. It would be difficult to show that Hugo Hanrieder relied on his wife's promise.

IV. How Might Secret Trusts Apply to Your Clients' Cases?

A. Wills

When acting for someone who might have a secret trust claim in a will, perhaps the first question to consider is: why would the testator employ a secret trust? Why not make the intended beneficiary a beneficiary on the face of the will? Short of an outright admission from the named beneficiary that she has agreed to receive the gift as a trustee for the secret trust beneficiary, the person asserting the secret trust is going to need some explanation.

There are some circumstances where the testator might have reason to employ a secret trust. Here are a couple of examples:

1. Disabled Beneficiary

The testator may make a gift to someone who has agreed to use the funds for a person who is not capable of managing the funds, or who is receiving means tested disability benefits. An estate planning solicitor will suggest a discretionary trust in these circumstances, but not all testators are well advised.

Secret trusts for disabled beneficiaries may be more common in home made wills, and wills drawn by notaries or lawyers who are not experienced in drafting trusts for disabled beneficiaries.

Even if a testator is well advised, he or she might employ a secret trust or half-secret trust for a disabled beneficiary if the gift is relatively small, and the testator does not want the formality of an express trust.

2. A Desire for Secrecy

The testator may want to benefit someone secretly. Perhaps the testator is in a clandestine relationship. Or perhaps the relationship is known, but the intended beneficiary is unpopular with the testator's children or other family members. The testator might leave the gift to a trusted friend or relative with secret trust instructions.

Or the testator might want to benefit an unpopular cause. Although I don't know if secrecy was the motivation, the testator in *Re d'Amico*, [1974] 2 W.W.R. 559, employed a half-secret trust to benefit the Provincial Committee of the Communist Party of Canada.

B. Inter vivos Transfers, Jointures and Beneficiary Designations

A secret trust may apply to an *inter vivos* transfer, including a transfer into a joint account or joint tenancy, and to the owner's designation of a beneficiary in a life insurance policy or RRSP.

One reason the transferor may transfer assets to another to hold as a secret trustee is to avoid probate fees. Consider the mother who transfers her investments into a joint account with her daughter. The mother has two other children. If, after her mother's death, the daughter claims the funds for herself as the surviving joint account holder, the other two children may contest this. The court may be asked to decide whether the transfer was a gift to the survivor, or if the survivor holds the funds on a resulting trust for the transferor's estate. But there is a third alternative—if the facts support it—that the surviving joint account holder is holding the funds as a secret trustee for herself and her siblings. I suspect it is not uncommon for a parent to set up joint accounts with a child to avoid probate fees, but on the understanding that the child will share with the other children.

An example of a secret trust to avoid probate fees is provided by an unreported decision, *Young v. Baker* (September 30, 2004), BCSC Victoria Registry 03-3213. After being diagnosed with cancer, Nancy Firth transferred assets into a joint tenancy with her sister Shelley Baker to avoid probate fees. She also had made Ms. Baker the sole beneficiary of her life insurance. The Court found that the Ms. Firth had intended to also benefit her sister Sandra Young as well as the Ms. Firth's nieces and nephews, but was concerned about Ms. Young's marriage. On finding all of the elements of a secret trust established, the Court held that Ms. Baker held one-half of the assets on a secret trust for herself and her children, and the other half for Ms. Young and Ms. Young's children.

Timing is important when considering whether there is a secret trust over *inter vivos* transfers. If the court finds that at the time the transfer was made the transferor made a gift, the transferor cannot later impose a secret trust on the beneficiary of the gift. This is one of the reasons the secret trust argument failed in *Milsom v. Holien.*

C. Secret Trust as a Shield

One might think of secret trust as a plaintiff's tool, but it can also be pleaded as a defence. For example, in a *Wills Variation Act* claim, a defendant might plead that the testator held certain assets for him as a secret trustee. If the testator was in fact the trustee of the assets, those assets would not form part of his estate, and would not be available to satisfy the plaintiff's claim.

In *Saugestad v. Saugestad*, 2006 BCSC 1839, varied 2008 BCCA 38, the testator's widow applied to vary his will, which made provision for only his two sons. One of the issues was whether funds remaining in a bank account were part of his estate. The funds had come from the testator's mother. The testator had written an email stating that although the account was in his name, his mother wanted the funds split equally among her four grandchildren. He sent half to his nephews. The Court of Appeal upheld the trial judge's decision that the funds remaining in the account were held by the testator for his sons, and were not part of his estate. Mr. Justice Mackenzie in the Court of Appeal wrote at para. 26:

> The appellant contends that the evidence did not support the finding of a trust and that an email from the testator to his solicitor referencing the trust is insufficient in law to create a trust. In my view, this submission misapprehends the nature of the trust. The trust arises from the intention of the testator's mother to benefit the respondents and not the testator; no beneficial interest passed to the testator. His email to his solicitor is simply an acknowledgement of the existing trust: it did not create it. The transfer by the testator of one-half of the first distribution from the Hjordis estate to his two nephews (the grandsons of Hjordis) is circumstantial confirmation of the acknowledgement in the testator's email that he was not the intended beneficiary of that distribution. The trust is properly characterized as a secret trust, in the sense that no reference is made to it explicitly in Hjordis' testamentary documents but it is enforceable outside her will.

V. Conclusion

Allegations of secret trusts are likely to be met with some skepticism. Yet secret trust is well embedded in our jurisprudence, and secret trusts are provable.

Consider the context of the allegation in each case. Does it make sense for the testator or transferor to have employed a secret trust? Is there independent evidence of the trust? Does the alleged trust meet the criteria of a trust, including the three certainties?