

Equity and Trusts

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because both parties are free to revoke their will, albeit, that such revocation will amount to a breach of contract. If one of the parties does revoke their will, the other party will have a claim for breach of contract, although the loss suffered will be nominal at this stage and, therefore, the level of damages will also be nominal. One leading treatise on trusts explains that:

if the other party discovers such a unilateral revocation before either party has died, he is entitled to recover damages for breach of contract. However, since the only possible loss is the loss of the right to receive an unascertained amount at an unascertained time in the future and since the other party still has unrestricted powers to dispose of his own property, it is relatively unlikely that any substantial damages could be recovered.⁹⁶

A second possible date at which the constructive trust could arise in favour of the ultimate beneficiary entitled under a mutual will is the death of the surviving testator who executed a mutual will. Again, this is not the stage at which the constructive trust arises because it has been held in *Re Hagger*⁹⁷ that once the first testator dies, the interest of a beneficiary entitled under a mutual will does not lapse should that beneficiary predecease the surviving testator. It is for this reason that a constructive trust arises as soon as the first testator dies. For example, in *Re Hagger*⁹⁸ a husband and wife made mutual wills leaving property to three named beneficiaries. The three beneficiaries survived the wife's death but predeceased the husband. Clauson J held that the interests of the beneficiaries had not lapsed. In the course of his judgment, Clauson J explained that 'from the death of the wife the husband held the property, according to the tenor of the will, subject to the trusts thereby imposed upon it, at all events if he took advantage of the provisions of the will. In my view he did take advantage of those provisions.'⁹⁹

More recently, in *Legg v Burton*,¹⁰⁰ Matthews J explained that the constructive trust arose at the death of the ultimate survivor of the mutual wills. In the course of his judgment, he explained that:

it is clear that the idea of not changing or revoking your will carries with it the notion that everything that you leave at your death shall pass to the ultimate beneficiaries. So the subject matter of this trust is everything which is left at the death of the survivor. And that is the point at which usually the constructive trust is imposed, to the extent that the provision then made by the will of the survivor, or the intestacy rules so far as they are applicable, or a combination of both, is or are inconsistent with the original agreement.¹⁰¹

The extent of the beneficial interest

Although it is clear that a constructive trust arises as soon as the death of the first testator making a mutual will occurs, the more problematic question relates to the subject matter of the constructive trust. In other words, over what property does the trust attach? It will be appreciated that when the first testator dies, the surviving testator will be at liberty to deal with his own property. Given the fact that the surviving testator's property will be subject to a constructive trust, and that he will be in a position to not only dissipate his own property, but also acquire new property, quantifying the beneficial interest under a constructive trust arising in the case of mutual wills becomes problematic. The ultimate

⁹⁶ A.J. Oakley, *The Modern Law of Trusts* (9th edn., 2009) at p. 476.

⁹⁷ [1930] 2 Ch 190.

⁹⁸ [1930] 2 Ch 190.

⁹⁹ [1930] 2 Ch 190 at 195.

¹⁰⁰ [2017] EWHC 2088 Ch.

¹⁰¹ [2017] EWHC 2088 Ch at para. 68.

beneficiary under a mutual will certainly does not have conventional equitable rights in the trust property during the lifetime of the surviving testator. The beneficiary cannot compel the surviving testator to transfer the property to him simply because the surviving testator is at liberty to use the property for his own benefit.

Quantification of the beneficial interest under a mutual will is extremely problematic and raises doctrinal problems. To suggest that a constructive trust arises as soon as the first testator dies presupposes that the trust meets all the requirements of trust law, including certainty of subject matter. However, the problem is that, while the surviving testator is alive and in a position to deal with the trust property for his own benefit, there can be no certainty of subject matter. The significance of imposing a constructive trust is to allow the ultimate beneficiary to acquire everything that belongs to the surviving testator on his death. Given the fact that the trust arises as soon as the first testator dies, but has significance at the time of the surviving testator's death, one view which seems to have been accepted by the courts is that the constructive trust imposed in the context of mutual wills is a kind of 'floating trust', which crystallises on the death of the second testator. This view was first suggested by Dixon J in the Australian case *Birmingham v Renfrew*,¹⁰² where the judge explained that:

it is only by the special doctrines of equity that such a floating obligation, suspended, so to speak, during the lifetime of the survivor can descend upon the assets at his death and crystallise into a trust. No doubt gifts and settlements, inter vivos, if calculated to defeat the intention of the compact, could not be made by the survivor and his right of disposition, inter vivos, is, therefore, not unqualified. But, substantially, the purpose of the arrangement will often be to allow full enjoyment for the survivor's own benefit and advantage upon condition that at his death the residue shall pass as arranged.¹⁰³

The floating trust argument was accepted by Carnwath J in *Re Goodchild (deceased)*¹⁰⁴ where the judge explained that the:

enforceability of the mutual agreement depends, not on the continued existence of the former will as such, but on a species of trust which is held binding in equity, notwithstanding the revocation of the will. It is an unusual form of trust, since it does not prevent the surviving testator using the assets during his lifetime. It is 'a kind of floating trust' which finally attaches to such property as he leaves upon his death.¹⁰⁵

Although the idea of a 'floating trust' in the context of mutual wills seems to have been accepted by the English courts, the concept is not without problems. Firstly, what is there to stop the surviving testator from dissipating or otherwise dealing with his property and that acquired from the first testator during his lifetime, thereby defeating the purpose of the mutual wills? The imposition of the constructive trust is only to prevent the surviving testator from leaving his property on his death to some other third party. The question arises as to whether a court could restrain the surviving testator from dealing with his property during his lifetime, and if so, on what legal basis? A second limitation of the 'floating trust' concept is highlighted by Professor Martin, who writes 'if it is correct that the survivor becomes a trustee of all the property he owns or acquires before his death, the consequence of the doctrine could be draconian for the survivor, for example, if he acquires new dependents after the death of the first testator, or wins the lottery; similarly, if the agreed beneficiary acquires a fortune elsewhere or is guilty of misconduct . . .'¹⁰⁶

¹⁰² (1936) 57 CLR 666.

¹⁰³ (1936) 57 CLR 666 at 675.

¹⁰⁴ [1996] 1 WLR 694.

¹⁰⁵ [1996] 1 WLR 694 at 700.

¹⁰⁶ J. Martin *Hanbury and Martin: Modern Equity* (18th edn., 2009) at p. 353.

Conclusion



This chapter has examined the equitable doctrines and principles relating to secret trusts and mutual wills. Secret trusts have played an important role in providing for beneficiaries whose identity the testator wishes to keep secret. There are number of reasons why the testator might want to keep the identity of the beneficiaries hidden from the rest of the world. A majority of the cases have concerned provisions for illegitimate children and mistresses. However, it would be wrong to assume that secret trusts only concern such matters; the cases have also shown that a testator may wish to provide for some charitable purposes without wanting his family to know. The real problem with secret trusts relates to the justification for their enforcement. These trusts are said to lie at the boundaries between the laws of succession and the laws of trusts.

The person creating a secret trust intends the trust to come into effect on his death. Given the fact that the trust is intended to take effect on his death, the trust should be created in the will. However, it is obvious why the trust is not declared in the will as this would defeat the purpose of keeping the trust secret. On the other hand, the property left to a legatee in the will, who nevertheless may well have agreed to hold it on trust for a secret beneficiary, should take the property absolutely because under the laws of succession he has been duly made a gift in the will. Equity compels enforcement of the secret trust against the form of the will because not to do so would allow a legatee who has agreed to hold the property on trust to benefit from his own fraud. However, more importantly, secret trusts are said to arise independently of the will and are *inter vivos* trusts. They are declared during the lifetime of the testator and his will has only one effect, that is, to constitute the incompletely constituted trusts. Seen in this way, secret trusts do not fly in the face of the Wills Act 1837. However, despite this, as this chapter has illustrated, the apparent demarcation between the laws of succession and the laws of trusts has not always been maintained in some of the decisions which have been made in relation to secret trusts.

Although the doctrine of mutual wills is enforced to prevent the fraud of a surviving testator who has agreed to deal with the property of the first testator and his own property in a particular way, the operation of the doctrine is not without problems. Principally, the imposition of a constructive trust over property which remains uncertain until the death of the surviving testator is problematic. One solution to the problem may be more careful drafting of mutual wills with more certainty as to which property the trust attaches to and what rights and duties are imposed on the surviving testator with regards to the property which is ultimately intended for the beneficiary.

Case study

Read and analyse the following case study and answer the specific question set below.

Harriet, who died earlier this year, had made a will in which she had made the following dispositions of her property:

My freehold property to be sold and the proceeds to be held by Derek on trust.

£60,000 to Jenny, Jill and Fiona.

The remainder of my estate to be divided equally amongst my children.

A few weeks before her death, Harriet visited Derek and handed him a briefcase with the instructions that the contents of the briefcase were important and that should anything happen to her he should follow the instructions in that briefcase. Harriet explained that the key to the briefcase could be obtained from her executor. When Derek opened the briefcase, he found a letter instructing him that the proceeds of the sale of Harriet's freehold property should be given to a named charity.

Two months before Harriet's death, Harriet visited Jenny, Jill and Fiona. Fiona was not at home as she had gone to work in Spain for a six-month period. Nevertheless, Harriet told Jenny and Jill that she was leaving £60,000 to them and Fiona and that such money was to be given to Harriet's love child, Natasha. Both Jenny and Jill agreed that they would give the money to Natasha. Fiona was never aware of this arrangement.

Fiona has recently arrived back from Spain and has been made aware that she is entitled to some money under Harriet's will. Jenny and Jill have told Fiona that she, along with them, must hand the money over to Natasha. Fiona is refusing to do so. Furthermore, it has also come to light that Natasha died six months before Harriet but is survived by a three-year-old daughter.

Advise Derek, Jenny, Jill and Fiona.

● ● Moot points

- 1 The contemporary justification for the enforcement of secret trusts is that they 'dehors the will': see the judgment of Lord Sumner in *Blackwell v Blackwell* [1929] 2 AC 318. What do you understand by the term 'dehors the will' and how far is it true to say that a secret trust is an *inter vivos* trust?
- 2 In a fully secret trust, communication of the secret trust can be made any time up till the testator's death. It does not matter whether the communication is before or after the execution of the will. However, in the case of a half-secret trust, communication must be made before or at the same time as the execution of the will. In the words of Lord Sumner, 'a testator cannot reserve to himself a power of making future unwitnessed dispositions by merely naming a trustee and leaving the purposes of the trust to be supplied afterwards . . . ' [1929] 2 AC 318 at 339. What does Lord Sumner mean in this statement, and is a different rule of communication justified in the context of a half-secret trust?
- 3 The decision of Romer J in *Re Gardner (No. 2)* [1923] 2 Ch 230 suggests that if a secret beneficiary predeceases the testator his interest under the secret trust can pass to his personal representatives. This rule is in contradiction to the normal rule of succession which states if a person receiving under a will predeceases the testator then his gift is said to lapse. Until such time as the testator dies, does a secret beneficiary acquire any interest in the secret trust? Do you think that there may have been something in the facts of *Re Gardner (No. 2)* which led to Romer J's decision, a decision which has been widely criticised?
- 4 Does it really make any difference whether secret trusts are classified as express trusts or constructive trusts?
- 5 Critically evaluate how effective it is to employ the concept of a 'floating trust' in the context of a constructive trust imposed in mutual will cases.
- 6 At what stage does a constructive trust arise in the case of mutual wills and to what property does the trust attach?
- 7 Read the decision of the Court of Appeal in *Fry v Densham-Smith* [2010] EWCA Civ 1410 and explain on what basis the court came to the conclusion that mutual wills had been executed in favour of the contending beneficiary.

Further reading

Critchley, P. 'Instruments of Fraud, Testamentary Dispositions and the Doctrine of Secret Trusts' (1999) 115 *LQR* 631. Examines the contemporary force of the fraud justification for secret trusts and provides an excellent discussion of secret trusts.

Gerwyn L. H. Griffiths, 'At Best Inconvenient and at Worst Little Short of Disastrous? Recent Considerations on Mutual Wills' [2011] *Conv.* 511. Examines recent decisions in the context of mutual wills.

Mathews, P. 'The True Basis of the Half-Secret Trust' [1979] *Conv.* 360. Examines the nature of half-secret trusts and examines the basis for the enforcement of a half-secret trust.

Meager, R. 'Secret Trusts: Do They Have a Future?' [1995] *Conv.* 402. Examines the contemporary use of secret trusts.

Perrins, B. 'Secret Trusts: The Key to the Dehors?' [1985] *Conv.* 248. Examines the 'dehors' theory of secret trusts and explains how the theory works.

Richardson, N. 'Floating Trusts and Mutual Wills' (1996) 10 *Trust LI* 88. Examines the decision in *Goodchild v Goodchild* and the effect of remarriage on mutual wills.

Sheridan, L.A. 'English and Irish Secret Trusts' (1951) 67 *LQR* 314. Examines some of the different rules governing secrets in England and Ireland and examines whether the different rules of communication for fully secret trusts and half-secret trusts is justified.

Wilde, D. 'Secret and Semi-Secret Trusts: Justifying Distinctions Between the Two' [1995] *Conv.* 366. Examines the reason for the distinction between fully secret trusts and half-secret trusts.

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The beneficiary principle

Learning objectives

After reading this chapter, you should be able to:

- understand the rationale behind the beneficiary principle
- explain the principal objections to private purpose trusts
- distinguish between private trusts and purpose trusts
- understand the principle in *Re Denley's Trust Deed* and its extent
- distinguish between charitable and non-charitable trusts
- explain the exceptions to the beneficiary principle and their rationale
- understand how gifts are made to unincorporated associations.