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Trusts and Estates Law Section Newsletter

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A Message from the Section Chair

Philip L. Burke

It is a privilege and an honor to be able to represent this Section in the coming year. I would like to thank and commend my predecessor, Colleen Carew, for a tremendous job during her tenure. Not only was the Fall Meeting in Philadelphia a smashing success, but under her leadership the Section was able to have five of its legislative proposals approved by the State Bar for submission to the Legislature (more on these below). While those individuals that sacrificed substantial amounts of "blood, sweat and tears" in preparing the legislation and various reports also deserve our thanks and gratitude (these individuals were thanked in the e-mail that the Section sent to all of its members back on January 30th), I am sure that Colleen's leadership had a great deal to do with the overall success of these proposals.

I would also like to thank and congratulate Ronni Davidowitz for an excellent Annual Meeting Program in New York City on January 24th. The presentations and the materials were first class from start to finish and the materials will continue to provide a valuable resource for those of us working in the charitable giving arenas.

There are still a great number of things that need to be done in the coming year. There are many legislative proposals that the Section is actively working on, several of which will be addressed with the Legislature at "Lobbying Day" in Albany. This should take place in the next month or two. We will report on the progress of these and other proposals in the coming months.

As indicated above, five of our legislative proposals were approved by the Executive Committee of the State Bar and/or the House of Delegates. These bills will now be presented to the Legislature for review and, hopefully, passage. To reiterate, these bills are as follows:

1. An Amendment to SCPA 2211 to provide for disclosure of documents prior to the pre-objection examination of an accounting fiduciary;

Inside

Use of the "Secret Trust" Doctrine to Effectuate a Decedent's Intent

By Eric W. Penzer and Frank T. Santoro

This article discusses cases in which courts have analyzed the doctrine of "secret trusts." A "secret trust" is, in essence, nothing more than a species of constructive trust that may be imposed where a testator is induced either to make a will, not make a will, or not change an existing will, by a legatee's promise to use the legacy for a particular purpose.

A "secret trust," like a constructive trust, is a type of implied trust. As one jurist explained, the difference between express and implied trusts is that "[e]xpress trusts are those which are created in express terms in the deed, writing or will, while implied trusts are those which without being expressed are deducible from the nature of the transaction, as matters of intent; or which are super-induced upon the transaction, by operation of law, as matters of equity, independently of the particular intention of the parties."[1]

Claims seeking the imposition of implied trusts are common in estate litigation. A constructive trust—one type of implied trust—may be imposed where, for example, one either induces a decedent to make a will or prevents a decedent from making a will, and thereby wrongfully acquires property of the decedent's estate.[2] A constructive trust may also be imposed where a decedent breaches a contract to make a will.[3] The commonly cited core elements of a constructive trust are a confidential relationship, a promise made in the context of that relationship, a transfer of property in reliance of the promise, and unjust enrichment.

A "secret trust" has been held to result where a testator "is induced either to make a will or not to change one after it is made, by a promise, express or implied, on the part of a legatee that he will devote his legacy to a certain lawful purpose[.]"[4] That legatee is thereupon treated as a trustee of sorts. Such a trust also results where a decedent is induced not to make a will, in reliance on a promise that his or her assets will be put to a particular use by the legatee.[5] Cases addressing "secret trusts" bring to bear the characteristics of constructive trusts, of which all estate litigators should be aware.

Notable Cases

While not the earliest case in which a court of this State recognized a "secret trust,"[6] *In re O'Hara's Will*,[7] decided in 1884, is a seminal decision. There the testatrix bequeathed her residuary estate to three individuals—her lawyer, her doctor, and her priest—effectively disinheriting her relatives.[8] She executed a letter contemporaneous with the will directing that the legatees apply the estate to certain charitable purposes.[9] The Court held that, under the will, the residuary legacy was an absolute and unconditional gift. However, the testatrix's purpose was not to confer upon the legatees the beneficial use of the property, but instead to devote it to charitable uses, as evidenced by the letter of instructions.[10] The Court held that even in the absence of an express promise on the part of the legatees to abide by the testatrix's instructions, their silent acquiescence in permitting the testator to make a bequest to them to be applied for the benefit of others had all the force and effect of an enforceable, affirmative promise:

> If, therefore, in her letter of instructions, the testatrix had named some certain and definite beneficiary, capable of taking the provision intended, the law would fasten upon the legatee a trust for such beneficiary and enforce it, if needed, on the ground of fraud. Equity acts in such case not because of a trust declared by the testator, but because of the fraud of the legatee. For him not to carry out the promise by which alone he procured the devise and bequest, is to perpetrate a fraud upon the devisor which equity will not endure. The authorities on this point are numerous.[11]

The Court of Appeals again analyzed the elements of the "secret trust" in *Trustees of Amherst College v. Ritch*.[12] There, the decedent died executing a will leaving a substantial portion of his estate to numerous institutions of higher education.[13] On the same day, the decedent executed a letter indicating that he was cognizant of a law existing at the time that prevented his disposition of more than one-half of his assets to charity.[14] In the letter the decedent also requested that his heirs allow his dispositions to be permitted notwithstanding the provisions of the law.[15] The will divided the decedent's residuary estate equally among the educational institutions that received general bequests under previous articles in the will.

Thereafter, the decedent seemed to lose faith in his heirs, and executed four successive codicils, the last of which was executed on the day of his death and which bequeathed the entire residuary estate to his legal advisors.[16] Evidence surrounding the execution of the codicils, including memoranda and letters, evidenced the decedent's intent that the educational institutions ultimately receive the bequests as set forth in his origi-

nal will.[17] Essentially, the testator sought to avoid the then-existing statutory prohibition on excess charitable contributions, by making large bequests to individuals who promised to give their bequests to designated charities.[18] Finding that the promise to distribute the residuary under the terms of the original will appeared so conclusively from the beneficiaries' conduct, letters, and statements to the testator, the Court held that the beneficiaries held their bequests as trustees for the educational institutions.[19]

The Court in *Ritch* provided careful reasoning to support its holding. It began its analysis by stating the obvious, to wit, that "while a testator may make a gift to a legatee solely for the purpose of enabling him, if he sees fit, to dispose of it in a particular way, still if there is no promise by him, either express or implied, to so dispose of it, and the matter is left wholly to his will and discretion, no secret trust is created, and he may, if he chooses, apply the legacy to his own use."[20]

However, the Court explained that a trust may result from the intention of the testator coupled with a promise of the legatee. "[I]f the testator is induced either to make a will or not to change one after it is made, by a promise, express or implied, on the part of a legatee that he will devote his legacy to a certain lawful purpose, a secret trust is created, and equity will compel him to apply property thus obtained in accordance with his promise."[21] The Court clarified that the same rule would apply to legatees who induce a decedent not to make a will by promising to dispose of his or her property in accordance with the decedent's instructions.[22] Finally, it must be noted that the trust was imposed notwithstanding the prohibitive statute at the time, as the decedent's heirs had executed releases; thus, the trust could be deemed "lawful" as required for a secret trust.[23]

The doctrine was again applied—although it was not specifically called a "secret trust"—in *Estate of Campe*.[24] There, the decedent bequeathed part of his residuary estate to two individuals, one a friend and the other an attorney, neither of whom was named an executor of the decedent's estate. The testamentary provision stated that it was the decedent's "wish and desire that the beneficiary of the bequest . . . shall follow the instructions to be contained in a letter to be signed by me giving instructions with reference to the disposition of said bequest."[25] In a proceeding brought for the judicial settlement of the account of the sole surviving executor, a determination was sought regarding the validity and effect of the provision. The named legatees had made two payments to the individual named in the letter of instruction, but ceased making such payments when an issue arose concerning the validity of the testamentary provision.[26]

The *Campe* court began its analysis by stating that the initial issue for determination was whether the language of the bequest was "expressive of an intention to make an absolute gift to the legatees named in the will," in which case inquiry could then be made as to the operative effect of the decedent's letter of instruction.[27] On the other hand, if the testamentary provision constituted a mandatory direction that the legacy be disposed of in accordance with the letter of direction, the provision would be invalid "for the obvious reason that the true legatee is neither named nor identified in the will[.]"[28]

The court determined that the language constituted an outright bequest to the named legatees.[29] However, relying on *O'Hara*, the court stated that the letter of instruction constituted "evidence of testator's reliance upon the legatees named in the sixth article to comply with his request upon receipt of the legacy."[30] Thus, the court held that the named legatees were to receive the legacy as trustees of a constructive trust for the benefit of the individual named in the letter of instruction.[31]

Relatively recently—in 1976—the secret trust doctrine was raised by a litigant, in a unique litigation position. In *Will of Frank*,[32] the testator created an *inter vivos* revocable trust which upon his death split into two separate trusts, "A" and "B," both of which provided income for life to the testator's wife. The testator's wife had a power of appointment over trust "B," and the principal of trust "A" was payable upon her death to several charities.[33] The testator's will bequeathed the residue of his estate to the revocable trust.[34] The testator's son unsuccessfully challenged the trust in an effort to invoke former EPTL 5-3.3, which limited charitable bequests to one-half of a testator's estate, but which placed no limit on *inter vivos* gifts.[35]

The testator's son attempted to invoke the secret trust doctrine by alleging the existence of a trust that was void as violative of the law. The son alleged that the testator's wife promised the testator that she would exercise her testamentary power of appointment of trust assets entirely in favor of trust "B," in order to avoid the prohibition of EPTL 5-3.3.[36] The court rejected the son's challenge, but did not reject the concept of the secret trust. The court rather found that the revocable trust, even if executed in the context of a secret agreement between the husband and wife, was a permissible method of circumventing EPTL 5-3.3.[37]

Finally, in one of the more recent cases imposing a secret trust, *Estate of Naima*,[38] the testator executed a will leaving his entire estate to his sister, and made no provision for his twelve-year-old son. The will specifically stated that the bequest of his estate to his sister to the exclusion of his son was "for personal reasons and because he [was] otherwise provided for."[39] The *guardian ad litem* for the testator's minor son questioned the attorney-draftsman and the attorney-draftsman's law clerk, who acted as a witness to the will. The *guardian*

ad litem testified that both the attorney-draftsman and the witness told the *guardian ad litem* that there was an agreement that decedent's estate would be held in trust by his sister for the benefit of the decedent's son until his son reached the age of eighteen years old.[40]

However, the witness denied ever having told the *guardian ad litem* of such an agreement, and the attorney-draftsman appeared to some degree to recant his statements to the *guardian ad litem* concerning such agreement.[41] However, the attorney-draftsman testified that immediately prior to the will execution ceremony, conversations occurred between the witness and the testator which led him to believe that there was a secret agreement whereby the testator's sister would hold his estate in trust for his son until the boy reached the age of eighteen.[42] Based on the testimony of the attorney-draftsman, the testator had terminal cancer and feared that if his estate were to go to his son, his ex-wife would control it. While the testator's sister did not testify at trial, the court discussed her examination before trial, during which she was unresponsive and evasive as to the existence of an agreement, and during which she testified that the testator wanted her to hold the estate in trust for her parents.[43] Under these circumstances, citing the principles set forth in *Trustees of Amherst College v. Ritch*, the court imposed a secret trust on the assets of the decedent's estate passing to the decedent's sister for the benefit of the decedent's son.[44]

Practical Considerations

From a practical standpoint, certain evidentiary hurdles may present a challenge to a litigator attempting to establish this type of trust for the benefit of his client. However, at the outset, the Statute of Frauds has no application to a claim for a constructive trust.[45] Moreover, a court may be persuaded, through an appeal to its powers of equity, to disregard what, in another case, might be an obstacle to justice. There is ample authority for the courts using equity to cut away the strictures of statutory prohibitions to effectuate the intent of the decedent.

For example, in *Tebin v. Moldock*,[46] the court disregarded a will of the decedent, a conveyance of property by the decedent and the establishment of bank accounts by the decedent to impose what it described as a constructive trust based on a secret arrangement. Reiterating the general principle set forth in a long line of cases, the court stated as follows:

> In dealing with the problem of a secret trust or the breach of a confidential relationship the ordinary rules imposed by the Statute of Frauds, the Statute of Wills, the parol evidence rule, and that governing statements in derogation of title, are not applicable. Equity in this area has always reached beyond the facade of formal documents, absolute transfers, and even limiting statutes on the law side.[47]

In another illustrative case, *Estate of Blake*,[48] the Court invoked its equitable power to avoid the application of EPTL 13-2.1[a][2]. There, life partners executed wills wherein they left their respective estates to each other.[49] On the death of the survivor the estate was to be divided among all of their respective nieces and nephews.[50] However, the survivor, who received all of his companion's assets, subsequently executed a will excluding the nieces and nephews of his predeceased companion.[51] The court acknowledged that the nieces and nephews of the predeceased companion were without recourse to challenge the revocation of the prior will of the surviving companion pursuant to the provisions of EPTL 13-2.1[a][2], which provides, *inter alia*, that a contract not to revoke a joint will can only be established by an "express statement in the will that the instrument is a joint will and that the provisions thereof are intended to constitute a contract between the parties."[52] However, the court invoked its equitable powers, and despite the requirements of EPTL 13-2.1[a][2], held that the allegations supported a cause of action for the imposition of a constructive trust resulting in the same result as if the companions' joint wills had been construed as a contract for non-revocation between the parties.[53]

The practitioner should also take heed of the Dead Man's Statute; alleged statements of a decedent as to the existence of an implied trust may not be admissible.[54] But it is important to remember in this regard that the element of "promise" need not be shown by an express statement.[55] A promise may be implied or inferred from the confidential relationship and the transfer of assets.[56] As Justice Cardozo wrote in *Wood v. Duff-Gordon*, when considering whether there a promise could be inferred without an express statement "[t]hough a promise in words was lacking, the whole transaction, it might be found, was 'instinct with an obligation' imperfectly expressed."[57] Thus, where there is no direct evidence of a promise, except that which would be barred by the Dead Man's Statute, an advocate must be able to make a presentation of the surrounding circumstances as cumulatively evidencing a promise sufficient to impose a constructive or secret trust.

Aside from a "promise," the remaining elements of the usual claim for the imposition of a constructive or secret trust—a confidential relationship, the transfer of assets in reliance on the promise and resultant unjust enrichment[58]—will often be supported by documentary evidence. For example, a confidential relationship between a testator and an attorney can be shown through a retainer letter, or as between a caregiver and patient,

through medical records. Moreover, the transfer of assets can be shown in the case of real property by a deed, or in the case of cash or securities by an account statement.

Conclusion

A court with equitable power can impose a secret trust where a testator is induced either to make a will, not make a will, or not change an existing will, by a legatee's promise to use the legacy for a particular purpose. The cases discussed herein illustrate the kinds of facts and circumstances that can be seized upon to pursue a claim for a secret trust and should be noted by practitioners.

Endnotes

1. *Brown v. Cherry*, 56 Barb 635 (Sup. Ct., N.Y. Co. 1868).
2. *See, e.g., Latham v. Father Divine*, 299 N.Y. 22 (1949); *see generally* N.Y. Jur. 2d Trusts § 171 (discussing availability of constructive trust remedy).
3. *See, e.g., Mofsky v. Goldman*, 3 A.D.2d 311 (4th Dep't 1957).
4. *Trustees of Amherst College v. Ritch*, 5 E.H. Smith 282, 323, 45 N.E. 876, 887 (1897).
5. *Id.*
6. The Court in *In re O'Hara's Will*, 50 Sickels 403, 95 N.Y. 403 (1884), noted that this particular species of trust doctrine had twice previously been applied in New York State. *Id.* at 413.
7. *Id.* 95 N.Y. at 403.
8. *Id.* 95 N.Y. at 410. It is also of interest that "(w)hile the testatrix was shown to have been superstitious, whimsical, blindly devoted to her church and its ecclesiastics, habitually under the influence of stimulants, and seriously dependent upon the advice of those who became her residuary legatees," the Court noted that "it is yet certain that there was no want of testamentary capacity." *Id.*
9. *Id.* 95 N.Y. at 404.
10. *Id.* 95 N.Y. at 404.
11. *Id.* 95 N.Y. at 413.
12. 5 E.H. Smith 282, 45 N.E. 876 (1897).
13. *Id.* 45 N.E. at 888.
14. *Id.* 45 N.E. at 888.
15. *Id.* 45 N.E. at 888.
16. *Id.* 45 N.E. at 888.
17. *Id.* 45 N.E. at 888.
18. *Id.* 45 N.E. at 888.
19. *Id.* 45 N.E. at 888.
20. *Id.* 45 N.E. at 887.
21. *Id.* 45 N.E. at 887.
22. Id. 45 N.E. at 887.
23. *Id.* 45 N.E. at 887.
24. 1 Misc. 2d 194 (Sur. Ct., N.Y. Co. 1955).
25. *Id.* at 195.
26. *Id.* at 195.
27. *Id.* at 196.
28. *Id.* at 196.
29. *Id.* at 200-201.
30. *Id.* at 199.
31. *Id.* at 201.
32. 52 A.D.2d 335 (4th Dep't 1976).
33. *Id.* at 337-338.
34. *Id.* at 337.
35. *Id.* at 338.
36. *Id.* at 339.
37. *Id.* at 340.
38. 3/29/89 N.Y.L.J. 27 (col. 5) (Sur. Ct., Nassau Co.).
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Latham v. Father Divine*, 299 N.Y. 22 (1949); *Estate of Weisman*, 8/22/2002 N.Y.L.J. 19 (col. 2) (Sur. Ct., Westchester Co.); *In re Will of O'Rourke*. 160 Misc. 2d 640 (Sur. Ct., Nassau Co. 1994).
46. *Tebin v. Moldock*, 19 A.D.2d 275 (1st Dep't 1963).
47. *Id.* at 284-285 (*see also Bastien v. Bastien*, 84 A.D.2d 800, 801 (1st Dep't. 1981); *Estate of Blake*, 3/7/2000 N.Y.L.J. 27 (col. 3) (Sur. Ct., N.Y. Co.) .
48. 3/7/2000 N.Y.L.J. 27 (col. 3) (Sur. Ct., N.Y. Co.).
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. CPLR 4519; *Fischer v. Fischer*, 202 A.D.2d 331 (1st Dep't 1994); *Estate of Kaczyprk*, 7/19/2002 N.Y.L.J. 23 (col. 4) (Sur. Ct., Suffolk Co.).
55. *Wood v. Duff-Gordon*, 222 N.Y. 88 (1917); *Sharp v. Kosmalski*, 40 N.Y.2d 119 (1976); *see also O'Hara's Will*, 50 Sickels 403, 95 N.Y. 403 (1884).
56. *Sharp v. Kosmalski*, 40 N.Y.2d 119 (1976).
57. *Wood v. Duff-Gordon*, 222 N.Y. 88, 91 (1917); *see also Estate of Naima*, 3/29/89 N.Y.L.J. 27 (col. 5) (Sur. Ct., Nassau Co.), wherein the court expressly stated that "The law is clear that no express promise need be made. (citation omitted) In fact, when the testator notifies a named legatee of his desire that the bequest to the legatee be held in trust for another, the legatee is under a duty to speak up if he is unwilling to so hold for the benefit of the other and his silence will be deemed to give consent to a holding in accordance with the intention of the testator." (*citing* 5 Bogert, The Law of Trusts and Trustees, sec. 499 (rev. 2d ed.).
58. *Sharp v. Kosmalski*, 40 N.Y.2d 119 (1976); *Estate of Blake*, 3/7/2000 N.Y.L.J. 27 (col. 3) (Sur. Ct., N.Y. Co.).

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