TRUSTS & ADMINISTRATION OF ESTATES

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Tolulope Adeyemi

THE UNSPOKEN GIFT: UNDERSTANDING SECRET TRUSTS IN A NIGERIAN CONTEXT[1]

1. Introduction

1.1. Trust is the most valuable invention of equity, particularly in the way it creates a vehicle by which the management of a property could be reposed in an entity different from the entity for which the enjoyment of the property is meant.[2] By this, "the management of property could be separated from its enjoyment by regarding as owner in equity someone other than the person in whom the legal title is vested."[3] Due to the rigidity of the common law often producing injustice, equity evolved over time to mitigate this harshness through a body of principles designed to achieve fairness. Thus, whenever the strict application of legal rules caused hardship or undermined justice, equity intervened.

1.2. The doctrine of trust has evolved throughout time and is now a fundamental legal principle of law. It represents a unique division between legal ownership and beneficial enjoyment. In **Yonwuren v. Modern Signs Ltd**.,[4] the Court of Appeal held:

> In the first place, trust denotes the right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title. In a broader legal sense, it is a relationship which arises whenever a person called the trustee is compelled in equity to hold

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1 **Tolulope Adeyemi,** Associate, S. P. A. Ajibade & Co., Lagos, Nigeria.
2 See generally, George Keeton and L. A. Sheridan, *Equity* (Professional Books Ltd, 1976).
3 *Ibid* at 4.
4 [2021] 14 NWLR (Pt. 1795) 122.

> property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed *cestuis que trust)* or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustee but, to the beneficiaries or other object of the trust.[5]

Therefore, trust is an equitable obligation binding a person (the trustee) to deal with property for the benefit of another person or object permitted by law.

1.3. This article looks into a particular type of trust known as secret trust and its significance in the Nigerian legal sphere. Although it has been extensively developed within English jurisprudence, the concept is enjoying increasing relevance in Nigeria due to cultural views toward inheritance, confidentiality and family dynamics, but remains underdeveloped. The intent of this article is to shed light on the nature, purpose, and potential judicial treatment of secret trusts in Nigeria.

2. Understanding Secret Trusts

2.1. A secret trust is created where property is in law given to a person either absolutely or upon an indefinite trust, but there has been an undertaking by him or an understanding between him and the donor, not clothed with the requisite formalities for the creation of a legal trust, that it shall be applied for the benefit of some other person or object.[6] In simple terms, secret trust arises where a testator gives property to another person to the knowledge of the public, however, the real intention is that the property be held in trust for another person who is not revealed to the public. As an illustration to aid understanding: assume Mr. Ade has a Will in which he states that his new house in Ikeja be given to his good friend, Mr. Zadau. However, during his lifetime, Mr. Ade privately instructs Mr. Zadau to hold the house for his mistress. Although the Will says nothing about a trust, Mr. Zadau is bound in equity to honour the private instructions. Therefore, Mr. Ade has created a secret trust on these facts.

The English case of **Ottaway v. Norman**[7] is relevant in illustrating the concept of secret trust. In that case, a man lived with a woman who cared for him for some years. In his will, he left his house and all its furniture and fittings to the woman outright. However, before his death, he privately told her that she was not to keep the house permanently, rather she was to pass it on to his son and his wife when she eventually dies. She agreed to carry out this wish but when the man died, she failed to follow the instruction

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5 At page 165, para. E, per Ogbuinya, J. C. A.
6 John B. Saunders, *Words and Phrases Legally Defined* (Butterworths,1970) 'Secret trust'.
7 [1972] Ch 698.

given. In her final will, she left the house to another man and his wife and only part of her remaining estate to the testator's son. The intended beneficiaries challenged her will on the basis that a trust existed over the property in their favour and her executor was legally obliged to honour that secret understanding and not the instructions in her will. The court held that there was a secret trust in favour of the claimants (the initial testator's son and his wife) regarding the bungalow and the furniture, fixtures and fittings which passed under the testator's will.[8]

2.2. Secret trusts are used for a variety of reasons which include; to avoid family disputes especially within polygamous or blended families, maintain confidentiality about sensitive relationships, to reward someone without public scrutiny or to honour private commitments.

3. Types of Secret Trust

3.1. In general, there are two types of secret trust, which are:

3.1.1. Full Secret Trust: In this category, there is no reference to a trust over the property or a trust in favour of the unnamed beneficiary made in the testator's will. Rather, it is indicated as a gift from the testator to the trustee. Therefore, the public have no idea that a trust exists over the property devised. For example, in his will, Mr. A devises his mansion to Mr. G, however, Mr. A informs Mr. G that he is to hold the mansion in trust for his illegitimate child. To the general public, Mr. G is the actual beneficiary to receive the right over such property.

3.1.2. Half Secret Trust: Here, the will itself states that the legatee is to hold the property/object on trust, but does not disclose the specific beneficiary of the trust. The actual details of the trust are communicated privately. Taking the same example, under this type, Mr. A will indicate that he is devising the mansion to Mr. G to hold it on trust according to his private instructions.

The major difference between these two categories is what is stated in the will, the amount of extra information provided in the Will, which is up to the discretion of the testator.

4. Requirements for the Validity of Secret Trust

4.1. For a secret trust to be valid, there are certain conditions that have to be existent as laid down in the case of **Ottaway v. Norman**:[9]

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8 See also, *Blackwell v. Blackwell* [1929] AC 318.

9 *Supra*.

4.1.1. Intention: It must have been the intention of the testator to create a trust in favour of the beneficiary/beneficiaries. This intention must convey a trust obligation rather than a mere moral obligation.

4.1.2. Communication: This intention must be communicated to the trustee during the testator's lifetime. This communication may be done orally or in writing.

4.1.3. Acceptance: Whether expressly or impliedly, the trustee must accept the obligation for there to be a secret trust. This acceptance must also be made while the testator is still alive, same with any rejection of the obligation.

4.2. It is important to note that for a secret trust to be valid, the testator's intention must be communicated to the donee during the testator's lifetime for a fully secret trust and for a half secret trust, the intention must be communicated prior to or contemporaneous with the time of making the will.[10]

5. Secret Trust in the Nigerian Context

5.1 In many Nigerian families, property is more than an economic asset, it also serves as an expression of duty, love and obligation. Decisions about inheritance are often influenced by cultural expectations, sensitive personal histories, and the desire to avoid conflict. Due to these factors, a testator may decide to express some wishes publicly through a formal will, and some others privately through instructions shared with a trusted person.

5.2 Also, it is a general knowledge that many Nigerians avoid openly discussing Wills as some consider it uncomfortable or culturally inappropriate. As a result, last-minute instructions, which are usually communicated in confidence, become an obvious alternative. These instructions may be the only way a testator feels comfortable passing certain gifts.[11]

5.3 In countries with extensive case law, such confidential instructions are known as secret trusts, however, in Nigeria, while the social practice is common, the legal framework remains uncertain. Nigerian statutes do not address secret trusts,[12] and Nigerian courts have not yet developed a clear jurisprudence to guide their enforcement. This leaves Nigeria in a legal and practical vacuum where a culturally accepted practice exists but the formal legal framework does not clearly support or reject it. The silence

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10 *Re Boyes* [1884] 32 WR 630; *Re Hawksleys Settlement* [1934] 103 L.J.Ch.259.

11 Confidential instructions given to a trusted person often seems more suitable for matters involving delicate relationships.

12 Neither the Wills Act, the Wills Law of various states nor the Administration of Estates Laws makes mention of it.

creates uncertainty because even if the intentions are genuine, without formal recognition, the beneficiary risks being disinherited, and the trustee may choose to act dishonourably or take advantage of the situation.[13]

5.4 Thus, the enforceability of secret trusts in Nigeria may have to rest solely on how courts might apply broad equitable principles such as 'equity looks to intent rather than form', 'equity imputes an intention to fulfil an obligation', and 'equity will not permit a statute to be used as an engine of fraud'.[14] What then emerges next is a conflict between formality and intention. On one hand, the law requires conformity with the formalities for writing a valid Will and on the other hand, equity aims to prevent fraud and ensure that genuine intentions are respected.[15] The dilemma for Nigeria is determining whether equity should intervene when a testator's informal instructions conflict with statutory requirements.

5.5 Usually, secret trusts lack documentary proof. This creates serious risks like the potential for fraud and abuse,[16] uncertainty of evidence to show its existence,[17] family disputes,[18] etc. There is also the risk of the arrangement being declared invalid, as it is inconsistent with Nigerian legislation governing Wills administration. The absence of clear legal protection means that both the trustee and intended beneficiary may find themselves in a vulnerable position, increasing the likelihood of litigation.

6. Conclusion

6.1. In Nigeria, secret trusts can be seen as a framework which strikes a balance between legal principles and traditional customs. Being solidly based on lived realities such as confidentiality, a desire to avoid conflict and relationship dynamics, its place within the Nigerian legal system remains uncertain. As equity seeks to prevent fraud and honour genuine intentions in the interest of justice, Nigerian courts must decide whether these informal arrangements should be recognised despite their non-compliance with the statutory requirements that govern wills.

6.2. A principled judicial approach, inspired by equitable doctrines and guided by the need to protect vulnerable beneficiaries, may provide the flexibility required to handle the

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13 The burden of proof of its existence rests on the person asserting that a secret trust exists. Where there is no allegation of fraud, the standard of proof to establish secret trust is balance of probabilities. See, *Re Snowden* [1979] All ER 172.

14 These maxims have been generally invoked in Nigerian trust cases.

15 Generally, where the instructions in a Will are in conflict with the private instructions given by the testator, the Will shall prevail. See, the case of *Re Huxtable* [1902] 1 Ch 214.

16 Where a supposed trustee may deny the existence of the agreement.

17 Given that verbal instructions are difficult to prove, especially where the testator is deceased.

18 Other beneficiaries named in the Will may contest the alleged trust as a fraud and this dispute could run for many years.

increasing relevance of secret trusts in modern inheritance dynamics. Eventually, clearer judicial or legislative guidance will be essential to strike a balance between respecting cultural realities and upholding the certainty and security that the law of succession demands.

For further information on this article and the area of law,
please contact **Tolulope Adeyemi**
at S. P. A. Ajibade & Co., Lagos by
Telephone (+234.1.270.3009; +234.1.460.5091),
Fax (+234 1 4605092)
Mobile (+234.908.807.1703, +234.814.624.5054)
Email: tadeyemi@spaajibade.com
www.spaajibade.com