

Blind, Bare, and Secret: The Exciting World of Trusts

Tanya L. Butler, TEP

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Agenda

1. Blind Trusts
2. Bare Trusts
3. Secret Trusts



Blind Trusts

- A personal trust that may be created when an owner of property holds office as:
 - 1) A minister of the Crown
 - 2) A member of a public board; or
 - 3) An executive manager in a public corporation.
- Blind trusts can also be used for those looking to appear impartial (e.g., judges, journalists, media personalities)



History of Increased Use of Blind Trusts

- Rise in popularity in the late 1960s and early 1970s
- Growing concerns re. conflicts of interest in individuals with power
- Wanted to create a scenario where public individuals would not be influenced by their personal financial interests
- Increased case law around conflicts of interest for company directors; duty to act in best interest of company was legislated
- Politicians and public office holders were pressured to follow suit
- Federal and several provincial governments made blind trusts policy

Who must have a blind trust?

Conflict of Interest Act, SC 2006, c 9, s 27(1)

Section 27(1) Divestment on appointment

"... a **reporting public office** holder shall, within 120 days after the day on which he or she is appointed as a reporting public office holder, divest each of his or her **controlled assets** by doing one of the following:

- (a) selling it in an arm's-length transaction; or
- (b) placing it in a blind trust that meets the requirements of subsection (4)."



Who must have a blind trust? cont'd

Conflict of Interest Act, SC 2006, c 9, s 2.

- "reporting public office holder"** means a public office holder who is
- a) a minister of the Crown, minister of state, or parliamentary secretary;
 - a.1) the Chief Electoral Officer;
 - b) a member of ministerial staff who works on average 15 hours or more a week;
 - c) a ministerial worker
 - d) a Governor in Council appointee, or a ministerial appointee whose appointment is approved by the Governor in Council, who exercises his or her official duties and functions on a part-time basis but receives an annual salary and benefits;
 - e) a Governor in Council appointee, or a ministerial appointee whose appointment is approved by the Governor in Council, who exercises his or her official duties and functions on a full-time basis;
 - e.1) the Parliamentary Budget Officer; or
 - f) a person or a member of a class of persons if the person or class of persons is designated under subsection 62.1(2) or 62.2(2)."

Who must have a blind trust? cont'd

Conflict of Interest Act, SC 2006, c 9, s 2.

EXCEPT

- Subsection 27(10) of the *Conflict of Interest Act* provides an exemption for those who are not ministers of the Crown, a minister of state, or a parliamentary secretary and are named in the ss. 2(1) definition of "**reporting public office holder**":

"A reporting public office holder who is not a minister of the Crown, a minister of state or a parliamentary secretary is not required to divest controlled assets if, in the opinion of the Commissioner*, the assets are of such minimal value that they do not constitute any risk of conflict of interest in relation to the reporting public office holder's official duties and responsibilities."

*Conflict of Interest and Ethics Commissioner of Canada appointed under s. 81 of the *Parliament of Canada Act*

What assets go into a blind trust?

Conflict of Interest Act, SC 2006, c 9, s 20

"controlled assets" means assets whose value could be directly or indirectly affected by government decisions or policy including, but not limited to, the following:

- a) publicly traded securities ..., whether held individually or in an investment portfolio account such as, but not limited to, stocks, bonds, stock market indices, trust units, closed-end mutual funds, commercial papers and medium-term notes;
- b) self-administered [RRSPs], self-administered [RESPs] and [RRIFs] composed of at least one asset that would be considered controlled if held outside the plan or fund;
- c) commodities, futures and foreign currencies held or traded for speculative purposes; and
- d) stock options, warrants, rights and similar instruments"

How does a blind trust work?

- Settlor may not have any management or control over the assets, but may view broad financial information (overall net worth, capital gains or losses, income generated, etc.)
- Settlor may provide general instructions for investment policy (i.e., proportions to be invested in different risk categories)
- Trustee may not accept any oral instruction or advice from the settlor
- Terms of trust may direct that all income is paid to the settlor/beneficiary and trustee may have discretion over capital



How does a blind trust work?

- Requirements for an *inter vivos* trust must be met:
 1. Certainty of certainty of intention
 2. certainty of subject matter, and
 3. certainty of objects
- Settlor must constitute the trust, i.e., legal title to assets must be transferred to the trustee



Trustee Selection For Public Office Holders

Conflict of Interest Act, SC 2006, c 9, s. 27(4)(i)

- Subsection 27(4)(i) states that trustee must be at arm's length from the settlor, and the Commissioner must be satisfied that an arm's length relationship exists
- So, no spouses, dependants, relatives, or friends

Trustee Selection For Public Office Holders

Conflict of Interest Act, SC 2006, c 9, s. 27(4)(j)

Trustee must also be:

- (1) A public trustee;
- (2) A public company, including a trust or investment company, that is qualified to perform trustee duties; or
- (3) An individual who may perform trustee duties in the normal course of their work (i.e., possibly a lawyer)

Tax Implications

- Generally accepted that the trust is a taxpayer, and must file returns
- Assets can be contributed on a tax-deferred basis under s. 73(1) the *Income Tax Act* if the trust satisfies 3 conditions of self-benefit trust:
 - 1) the trust terms dictate that the settlor is the only one entitled to receive or use income or capital of the trust during their lifetime;
 - 2) the transfer of property into the trust does not change the beneficial ownership of the property; and
 - 3) the settlor alone has an absolute or contingent right to the transferred property
- If the settlor dies during term of trust, assets form part of settlor's estate

Termination of a Blind Trust

- blind trusts are typically wound up when the beneficiary is no longer a reporting public office holder
- trust must be wound up by way of trustee resolution, and the fund is distributed per the settlor/beneficiary's instructions
- CRA must be notified of the termination of the trust



Audience Participation!

Question: what prominent individual does not have a blind trust?



Frozen Trust

- Similar to a blind trust, but the trustee may not alter the original assets and transfers them back to the office holder on termination of the trust
- A frozen trust prevents the office holder from making a sale but does not protect from conflicts of interest as they dispatch their public duties



Bare Trusts

- A bare trust exists where the legal and beneficial ownership of property are divided, and one party holds the legal interest for the benefit of the beneficial owner(s) without any further duty to perform except to convey it to the beneficiary on demand
- If the trustee has any significant power beyond carrying out the instruction of the principal or if they can refuse the instructions, then a bare trust does not exist
- Why is it bare? The trustee is bare, or naked, of active duties decreed by the settlor



Bare Trustees Do Have Some Duties

- Duty to account for the assets
- Duty to keep the assets secure and unharmed
- Duty to transfer the assets to the beneficiary on demand



Why use a bare trust?

1. To avoid probate
2. To prevent a disposition resulting in capital gains
3. To document beneficial ownership when joint tenancy is used to facilitate financing

How does a bare trust work?

- Transfers legal title of an asset by one person (owner) to another person (bare trustee or nominee), usually in joint tenancy, but retains beneficial interest for the owner alone
- For probate planning, legal title is transferred to the bare trustee, and probate is not triggered upon owner's death
- Bare trustee signs some form of declaration of bare trust, confirming that they hold no beneficial interest in the asset during life or upon death
- The bare trust ensures the asset falls into the estate to be distributed according to the terms of the will, including the ability to fund testamentary trusts

But wait! What's the hitch?

If any asset needs to be probated, then all assets beneficially owned by the deceased need to be probated, by virtue of ss. 87(2) of the *Probate Act*:

"Upon any grant, the following tax on all the assets of the deceased person **that pass by a will or wills** or that are transferred or will be transferred to a trust under a will or wills, whether or not the trust is described in the will as being separate from the estate or that pass upon intestacy is payable by the personal representative of the estate from the assets of the estate to the registrar..."

Documenting a Bare Trust: Three Steps

1. Document transferor's intention in adding transferee to title
2. Document transferee's understanding in being added to title
3. Transfer title

Best Practices in Setting Up a Bare Trust

- Document, document, document
- Ensure bare trustee understands bare trust
- Reporting letter should emphasize importance of not acquiring other assets in client's sole name if goal is probate avoidance
- Assemble all executed documents and store in a secure place in case they are needed

Income Tax Implications: The Past

- The transferor reported income and gains from the asset during their lifetime
- Because there is no transfer of beneficial interest to the bare trustee during the transferor's lifetime, a disposition was not triggered until transferor's death (i.e., a deemed disposition on death, and any capital gains or losses are reported on the transferor's terminal T1 return)
- Historically, a bare trust was not a taxpayer



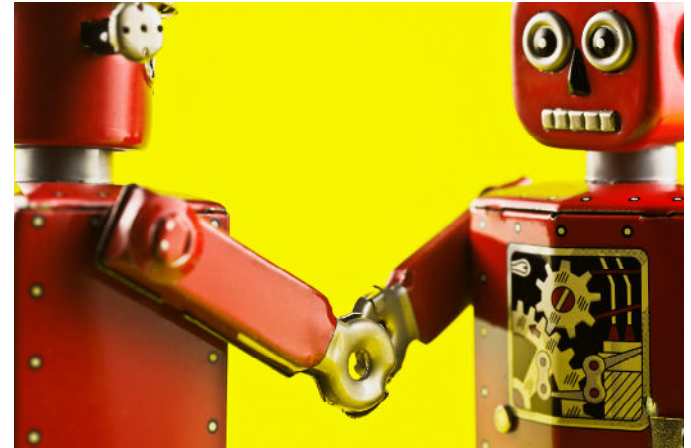
Income Tax Implications: The Present

- In 2022, Federal government introduced new tax reporting rules for trusts, meant to target terrorist financing, tax avoidance, and money laundering (general trend towards transparency of beneficial ownership information)
- New reporting requirement for bare trusts, whether documented or not
- CRA paused reporting requirements for bare trusts for 2023 tax year, and again for the 2024 tax year, unless specifically asked to file by CRA



Income Tax Implications: The Future

- Bare trusts will be included in requirement that all *inter vivos* trusts file T3 returns
- Draft rules, updated as of August 2025, include these exceptions:
 - trustee and beneficiary are individuals and related persons, the FMV of assets in trust does not exceed \$250,000, and assets are those of a prescribed list
 - related persons or spouses holding real or immovable property that would be principal residence of one or more of the legal owners
 - the bare trust has been in existence for less than three months during the tax year



Income Tax Implications: The Future

Taxation of bare trusts is a work
in progress...stay tuned!

Secret Trusts – what are they?

- A surreptitious posthumous gift
- A testamentary gift to a trusted nominee, instructing that nominee to hold the gift in trust for a person or purpose



A scandalous history...

- Historically, secret trusts were often used to provide covertly for dependents such as a mistress or an illegitimate child
- On the face of the will, testator appears to have made a gift to the person who has been secretly instructed to act as trustee



Requirements for a Secret Trust

General consensus is three certainties still required:

- intention
- subject matter
- objects

Requirements for a Secret Trust, cont'd

- settlor must **intend** to create a trust
- settlor must **communicate** that intention to the trustee
- trustee must **agree** to hold the property on trust for the beneficiaries

Fully Secret or Semi-secret

- Will can be drafted to disclose that the nominal donee takes the gift subject to a trust, without naming the beneficiary or the terms of the trust (**half-secret** or **semi-secret** trust)
- Will can also be drafted without disclosing that the nominal donee takes the gift in trust (**fully secret** trust)



Communication by Settlor to Trustee

- Fully secret trust must be communicated by the settlor to trustee and accepted by trustee **before** the settlor's death
- Communication of an intended trust after settlor's death is too late—if communication is post-mortem, donee takes legal and beneficial title because they did not promise to hold the property on trust

So, what's the big deal?





You didn't see
a requirement
for writing
there, did
you?

Dehors the Will

- A secret trust can be formally documented in a private document outside the will (*dehors* the will)
- Often litigated are cases where secret trust not reduced to writing, *i.e.*, based on a parol agreement between settlor and secret trustee

Formalities of Execution and Writing

- Because secret trusts generally viewed as acting *dehors* the will, compliance with formalities of execution not required
- *McCormick v Grogan*: House of Lords upheld decision of Irish Court of Appeal, and said that fully secret trusts will be enforced, despite not complying with the formalities of execution in the *Wills Act*, under the legal maxim "**Equity will not allow a statute to be used as an instrument of fraud**"

McCormick v Grogan, [1869] LR 4 HL 82

"... a person apparently taking property by devise or bequest from a testator **with this knowledge** of the existence of another instrument, which he **actually or impliedly undertakes to carry into effect, will be fixed as trustee with the performance of such instructions and directions as are given** in that other instrument."

Lord Chancellor Lord Hatherley



Chamberlaine v Chamberlaine (1678)

- Father confided to eldest son and heir that he was considering changing will to fund legacies to other children
- Son promised to pay legacies out of his gift (residue)
- After father's death, son reneged
- Court noted that father had **relied** upon son's promise and didn't change his will, "dying in peace upon the said promise"
- Court compelled son personally to pay legacies to his younger brothers and sisters out of his inheritance

Leslie Estate v Gough (2021, 2022)

- Testator made will leaving house to daughter from first marriage and designating common law spouse on registered investments
- On the same date, signed an agreement among himself, daughter, and common law spouse
- Daughter agreed to let common law spouse live in house until age 71
- Common law spouse agreed to take no more than required from RRIF, and to designate daughter as beneficiary on death of common law spouse

Leslie Estate v Gough, cont'd

- Testator and common law spouse had falling out
- Testator made a second will leaving all to daughter and changed beneficiary designation on RRIF to daughter
- Testator and common law spouse later reconciled
- Testator re-designated common law spouse on RRIF (outside will), and made a third will confirming that designation

Leslie Estate v Gough, cont'd

- After death, daughter/executor argued that agreement was testamentary instrument because it relied on death for its vigour and effect
- Agreement was therefore "revoked" by second will
- This argument succeeded at trial
- In obiter, judge remarked that testator tried to do by agreement what he could not do by will (because agreement restricted fee simple in house, and was therefore repugnant to interest granted)

Leslie Estate v Gough on Appeal

- Court of Appeal overturned the decision, on grounds that agreement constituted a secret trust
- Daughter, having had terms of trust communicated to her by her father and accepting them by signing agreement, was arguably bound by secret trust
- Court did not rule on whether the secret trust was enforceable, saving that for another day

Taxation of Secret Trusts

- Have not located specific CRA commentary on taxation of secret trusts, but best approach is to assume they are taxed the same way as non-secret trusts
- Typically, would be a testamentary trust (i.e., a trust that arose on and as a consequence of the death of an individual)
- If ongoing, required to file an annual return if same conditions for other testamentary trusts are met (i.e., having taxable income, made a disposition of trust property, etc.)
- Subject to reporting rules, including disclosure of beneficiaries
- 21-year rule would also apply

Tips & Tricks for Litigators

- Unwritten secret trusts raise issues of hearsay and *Evidence Acts*' requirement for material corroboration (s. 45)
- Must prove settlor's intent to create a trust without records
- Must prove trustee's acceptance of trust obligations potentially without corroboration



Tips & Tricks for Planners

- Create a breadcrumb trail: document existence of secret trust and terms of trust in writing (esp. if land is subject of trust)
- Recommend that beneficiary know about secret trust, to ensure it's enforced
- Consider possibility that secret trustee may predecease or (worse) survive but lose capacity—ensure secret trustee's attorney for property will be informed of existence of trust
- Appoint alternate secret trustees, but consider whether to, for fully secret trust, word the alternate gift to be conditional not just on donee predeceasing but also incapacity of donee

Tips & Tricks for planners, cont'd

- Is secrecy worth the fragility of a secret trust?
- Shifting societal norms may mean secrecy isn't priority
- Consider whether alter ego/joint partner trust will accomplish same goal

And of course... a disclaimer!

- This material is for information purposes only and should not be construed as legal or tax advice. Every effort has been made to ensure its accuracy, but errors and omissions are possible.
- All comments related to taxation are general in nature and are based on current Canadian tax legislation for Canadian residents, which is subject to change. Persons who are not residents in Canada, or who are resident in Canada but are citizens of another country, may be subject to different tax rules in Canada and may also be subject to taxes levied by jurisdictions other than Canada.
- For individual circumstances, consult with legal or tax professionals.
- This information is current as of November 2025

Questions?



Contact Information

Tanya L. Butler, TEP

Touchstone Legal Inc.

Suite 200, 56 Portland Street

Dartmouth, NS B2Y 1H2

Phone/Fax: (902) 418-5549

tbutler@touchstonelegal.ca

Website: www.touchstonelegal.ca