

The Reproduction of Property Through the Production of Personhood: The Role of the Family Trust in the Accumulation of Wealth

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Introduction

In his paper *Power, Property and the Law of Trusts: A Partial Agenda for Critical Legal Scholarship*, Roger Cotterrell describes the concept of property as ideological because it hides the private power that it conveys behind the ideology of equality before the law.¹ According to Cotterrell’s understanding, the concept of property artificially distinguishes between persons and things, but then only concerns itself with equality on one side of the distinction: While persons have an equal right to own things, the actual distribution of things

¹ Roger Cotterrell, ‘Power, Property and the Law of Trusts: A Partial Agenda for Critical Legal Scholarship’ *Journal of Law and Society* 14/1 (1987), 82.

remains unequal.² The trust, Cotterrell then writes, exacerbates the resulting blindness of the property concept to power by allowing the real owner of the things settled on trust, the beneficiary, to hide behind its legal owner, the trustee.³

In what follows I will adopt Cotterrell's understanding of the concept of property as an ideology that draws a distinction between two opposing terms, persons and things. However, I will use Louis Dumont's principle of hierarchy⁴ to show that a reversal takes place at a lower level of the property concept, namely in the specific context of the family trust, where things acquire the control usually ascribed to persons, ultimately producing the personhood of the persons that are said to own them. I will argue that this subverts the property concept, in that it is now about the power of things to ensure their own reproduction. Against this background, the 'hidden' ownership and power of the beneficiary appears as a mere smokescreen that in turn hides the beneficiary's service to things in the continuous accumulation of wealth.

The analysis I present will focus on the concept of autonomy. This is because autonomy, despite its prominent status in the justification of property rights and thus the *access* of persons to things, is also central to claims for *withholding* things from beneficiaries, including knowledge about their own wealth. This withholding of knowledge is justified on the grounds that the development of any children-beneficiaries into autonomous persons would be negatively impacted if they knew how wealthy they really were. In this context,

² Cotterrell, 'Power, Property and the Law of Trusts,' 82-3.

³ Cotterrell, 'Power, Property and the Law of Trusts,' 85.

⁴ Louis Dumont, 'Postface: Towards a Theory of Hierarchy,' in *Homo Hierarchicus* (Chicago: The University of Chicago Press, 1980), 239-45.

however, autonomy favours the trust property,⁵ not its owners, and this weakens both the theoretical and practical relevance of property in the attainment of human interests.

The Trust as a Means of Protecting Property

With his principle of hierarchy, Dumont sought to show how opposing terms employed within a culture stand in a relationship that ‘is inseparable from a reference to the whole that orders them with respect to each other.’⁶ The opposing terms reflect not just a simple opposition, but a value differential or asymmetry (one term attracts a higher value than the other)⁷ which arises from their relation to the whole.⁸ One term may also be identical with the whole, in which case it encompasses the other term.⁹

Applied to the opposition between persons and things within the concept of property (the ‘whole’), the following order emerges: The concept of property consists of the opposition ‘person’ and ‘thing,’ with all agency and control accruing to the person side of the

⁵ I will use the term ‘property’ as referring either to the things settled on trust or the concept/institution of property, as appropriate in the relevant context.

⁶ Michael Houseman, ‘The Hierarchical Relation: A Particular Ideology or a General Model?’ *Hau: Journal of Ethnographic Theory* 5/1 (2015), 252.

⁷ Greg Acciaoli, ‘Distinguishing Hierarchy and Precedence: Comparing Status Distinctions in South Asia and the Austronesian World, with Special Reference to South Sulawesi,’ in *Social Differentiation in the Austronesian World*, ed. Michael P. Vischer (Canberra, ACT, Australia: ANU E Press, 2009), 51-90, 53.

⁸ Houseman, ‘The Hierarchical Relation,’ 253.

⁹ This, however, is not a necessary feature. See Acciaoli, ‘Distinguishing Hierarchy and Precedence,’ 53-4.

distinction, things being seen as merely passive and manipulable. Persons, furthermore, are given a higher value than things, arising from their association with the whole, property. This association is due to the fact that property is what is ‘proper’ only to persons, if not essential to personality.¹⁰ Property is thus always property-of-persons. The term person, then, encompasses its opposite, thing, in a very specific sense; to be a person means to be able to encompass things through possession or consumption, something that is not thought to be possible in reverse. Only those things that are ownable by persons appear in the person-thing opposition; the concept of property simply does not concern itself with things that cannot be owned.

I have previously shown how this one-sided understanding of property (which is particularly reflected in the liberal concept of property) does not hold in the context of the family trust.¹¹ Liberal property theory regards an asymmetry of control between persons and things as the hallmark of the property relationship. For example, James Penner writes: ‘[T]he relationship of property dictates the absolute control of the owner over the thing . . . , and the corresponding absence of any “control” of the thing over the owner.’¹² This asymmetry

¹⁰ This is particularly so in property theories such as that of Georg Wilhelm Friedrich Hegel, who regards private property rights as the recognition of an embodiment of human will in things that is essential to the attainment of freedom (Georg Wilhelm Friedrich Hegel, *Hegel’s Philosophy of Right*, ed. Thomas Malcolm Knox (Oxford: Oxford University Press, 2015), accessed 1 June 2018, <http://www.oxfordscholarlyeditions.com/view/10.1093/actrade/9780198241287.book.1/actrade-9780198241287-book-1>). Dialectics, however, represents in itself an alternative analytic principle to that of hierarchy (Houseman, ‘The Hierarchical Relation,’ 256-7).

¹¹ Johanna Jacques, ‘Property and the Interests of Things: The Case of the Donative Trust,’ [include final citation once confirmed].

¹² James E. Penner, *The Idea of Property in Law* (Oxford: Oxford University Press, 1997) 121.

follows directly from the proposition that property law must work in people's interests, not in the interests of things. The reason for this is that liberal property theory sees the sole purpose of law, including property law and thus the legal institution of property, as the exclusive furthering of our interests ('we' meaning persons subject to the law), a view whose correctness Penner describes as 'obvious.'¹³ While liberal property theory does recognize certain limits to what an owner can do with the things he owns, these are seen as social limits rather than limits arising from the property itself, and thus again reflect the interests of persons, not of things.

The trust form, however, allows for two things that disturb this asymmetry. Firstly, the trust gives a form and stability over time to some 'thing' that in an absolute owner's hands would simply amount to dissipatable wealth. True, most trust property comes in the form of a fund rather than discreet things, but as Penner convincingly argues, Equity treats all trust property, regardless of its form, as akin to a fund, in that the rights of the beneficiary are transferred to the trust property's exchange value as long as that property is moved out of the trust in accordance with the trustee's powers.¹⁴ 'An interest in a fund,' Penner writes, 'is an interest not only in the assets in it at the moment but in those assets to the extent they become realized via exchange. ... There is, in consequence, no difficulty whatsoever in applying all the normal rules which compose the law's treatment of property [to a fund].'¹⁵ Cotterrell similarly sees as one of the advantages of the trust that 'it makes possible the creation of

¹³ Penner, *The Idea of Property in Law*, 12. This claim is widely shared. See, for example, Henry E. Smith, 'Property as the Law of Things,' *Harvard Law Review* 125 (2012), 1693.

¹⁴ James Penner, 'Value, Property, and Unjust Enrichment: Trusts of Traceable Proceeds' in *Philosophical Foundations of the Law of Unjust Enrichment* ed. Robert Chambers, Charles Mitchell, and James Penner (Oxford: Oxford University Press, 2009).

¹⁵ Penner, 'Value, Property, and Unjust Enrichment: Trusts of Traceable Proceeds,' 315.

enduring objects of property (“things”, clusters of value) in the form of funds.’¹⁶ This creation of ‘enduring objects of property’ allows for interests to be attached to what would otherwise be merely passive, manipulable things, and therefore allows for their resistance to being consumed by their ‘owners,’ the beneficiaries.

Secondly, the trust form allows for restrictions of access and obligations of maintenance to be placed around the property. Beneficiaries may thus be able to consume only income but not capital, and trustees may be under an obligation to invest the capital in ways that will grow the fund. Together, these restrictions and obligations ensure that the trust property is maintained and accumulated rather than spent, giving further stability to its status as a ‘thing.’

I therefore suggested that instead of the *generation* of an incident of ownership, the trust should be regarded as involving the *withholding* of ownership, that is, that it should be seen as an arrangement that purposefully keeps property from the person who purportedly becomes its new owner (the beneficiary) in order to further *its* (the property’s) interests in its own continued existence over time. I now want to go further and show how this reversal, which Dumont says identifies a sublevel of the hierarchical order,¹⁷ affects not only the interests promoted through property and the distribution of control necessary to further these interests, but also the distinction between producer and produced commonly associated with the distinction between persons and things.

¹⁶ Cotterrell, ‘Power, Property and the Law of Trusts,’ 85. Cotterrell’s treatment of funds diverges, however, from Penner’s in other respects.

¹⁷ Louis Dumont, *Essays on Individualism: Modern Ideology in Anthropological Perspective* (Chicago and London: The University of Chicago Press, 1986), 253. Also see Houseman, ‘The Hierarchical Relation,’ 255.

The Trust as a Means of Producing Personhood

In a family trust where the current beneficiaries of a trust are children, the trust form offers itself not only as a means of protecting the capital of the trust from potential dissipation but also as a means to shape the beneficiaries' attitude to the property. The concern, as far as 'inherited' wealth is concerned,¹⁸ is how to incentivise (or rather, how not to *disincentivise*) certain behaviour in beneficiaries that is thought to contribute to their well-being and success in life, such as the completion of educational programmes and self-restraint in matters of consumption, and to protect them from the pitfalls of sudden wealth. As Adam Hirsch remarks in relation to the need for spendthrift trusts, 'apart from the psychological considerations already remarked [such as the propensity of beneficiaries to spend given wealth more readily than earned wealth], beneficiaries of sudden infusions of wealth may simply be unpractised money managers, easily victimized, and they may know no better than to terminate a terminable trust.'¹⁹ Or in the words of another commentator: 'Wealth is a problem. ... Lives can be ruined by poverty, but lives can equally be ruined by excess wealth.'²⁰ The interests considered in this respect are thus usually those of the beneficiaries rather than the property.²¹

¹⁸ 'Inherited' in the loose sense of not having been earned. Many family trusts are established during the life time of the settlor. They may also run far beyond either the death of the settlor or the maturity of the beneficiaries.

¹⁹ Adam J. Hirsch, 'Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives,' *Washington University Law Review* 73/1 (1995), 40.

²⁰ Geoffrey Shindler, 'Wealth and Safety' *Trusts and Estates Law & Tax Journal* (2014), 3.

²¹ This is the case in law, law and economics, and economics scholarship. See, for example, Hirsch, 'Spendthrift Trusts and Public Policy,' Gary S. Becker and Kevin M. Murphy, 'The Family and the

However, the question arises whether behind this apparent concern for the beneficiaries there lies not a more fundamental concern for the trust property itself. After all, the negative effects of too much wealth could easily be managed by simply ‘giving’ less. Why go to the length of establishing a trust over property, only then to contain what are the consequences of a voluntary transfer in the first place?

This question leads back to the nature of the family trust. As I have previously argued, the trust is not a gift because gifts are said to further the autonomy of the recipient while the trust seeks to restrict that autonomy.²² A gift is a process by which property gratuitously passes from one person to another. Under liberal property theory, for such a transfer to be justifiably upheld at law, it must have a reason, and this reason must furthermore be rational. Robert Nozick, for example, writes that ‘it must be granted that were people’s reasons for transferring some of their holdings to others always irrational or arbitrary, we would find this disturbing.’²³ According to Penner (who follows the work of Joseph Raz in this respect), this reason must also relate to the donor’s interests rather than his desires. Penner distinguishes interests from desires by saying that only the former are based on a ‘critical understanding of values, i.e. of those things which are truly of worth and those which are not.’²⁴ The particular interest that underpins the institution of property, Penner claims, is our interest in autonomy. This is because ‘the freedom to determine the use of things is an interest of ours in part

State,’ *Journal of Law & Economics* 31 (1988), and Neil Bruce and Michael Waldman, ‘The Rotten-Kid Theorem Meets the Samaritan’s Dilemma,’ *The Quarterly Journal of Economics* 105/1 (1990).

²² Johanna Jacques, ‘Property and the Interests of Things: The Case of the Donative Trust,’ [include final citation once confirmed].

²³ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) 159.

²⁴ Penner, *The Idea of Property in Law*, 10.

because of the freedom it provides to shape our lives.’²⁵ According to Penner, gifts satisfy this criterion of self-interest because they transfer property in such a way that their use by the donee for his own benefit furthers the donor’s interests and can therefore be seen as an instance of his (the donor’s) use even if he has no further control over the property.²⁶ Where the donee does not derive a benefit from the gift, the interests of the donor are equally frustrated.

This view of the interests grounding the legal ability to make a gift entails considerable uncertainty for the donor, who cannot be sure that his interests will ultimately be furthered. However, despite this uncertainty, Penner warns against restricting the use of the gift by the recipient. ‘There is simply no good reason . . . for post-transfer legal restrictions on use,’ he writes, ‘for they would . . . defeat the purpose of the transfer contemplated.’²⁷ This purpose, he explains, is not just the making available of resources and their associated benefits to the donee but the decision-making capacity that comes with the possibility of using these resources in the first place – that is, the autonomy that a property relation enables. This autonomy can be seen as a function of the autonomy of the donor, as furthering his interests by furthering the autonomy of the donee. Penner demonstrates how this works using the example of gifts given to one’s children:

... I regard it as deeply in my interests that they [my children] grow up to be capable, autonomous individuals who have a reasonable facility for managing their own lives. There is no way that I am going to contribute to this development by devising ever more sophisticated

²⁵ Penner, *The Idea of Property in Law*, 49.

²⁶ Penner, *The Idea of Property in Law*, 88-90.

²⁷ Penner, *The Idea of Property in Law*, 90.

ways of manipulating the way they ‘choose’ to act. They must actually choose ... [if they are to] understand what making significant choices is all about.²⁸

This makes it difficult to regard the trust as a species of gift, as it intentionally restricts beneficiaries’ control over the property as a whole, not permitting them to use it for their own purposes. As Jonathan Garton writes, ‘placing property into trust to be invested and managed by trustees obviously reduces the autonomy of beneficiaries as compared with absolute ownership.’²⁹

For this reason, it would be wrong to start with the assumption that it is the welfare of the beneficiaries that is at the forefront of the settlor’s mind when establishing a family trust. If the trust is not a gift, altruism should not be assumed to play a determining role. A better way of looking at the trust would be to say that the trust form allows for the recruitment of ‘owners’ who can now be trusted to further the interests of the property rather than their own. As Richard Posner writes, ‘trusts are based on mistrust.’³⁰

This way of looking at the trust is not incompatible with the professed intention of settlors to prevent in the beneficiaries what Hannah Arendt describes as ‘the apathy and disappearance

²⁸ Penner, *The Idea of Property in Law*, 89-90.

²⁹ Jonathan Garton et al., *Moffat’s Trusts Law: Text and Materials*, 6th ed. (Cambridge: Cambridge University Press, 2015) 296.

³⁰ Richard A. Posner, *Economic Analysis of Law* (New York: Wolters Kluwer Law & Business, 2014), 717. Despite this insight, Posner thinks that trusts are ‘actuated by altruism’ (Posner, *Economic Analysis of Law*, 717).

of initiative which so obviously threatens all overly wealthy.’³¹ After all, if beneficiaries are to be relied upon not only to look after the trust while they are beneficiaries (through, for example, the enforcement of the trust) but also to continually accumulate property once they become its absolute owners, their attitude to wealth will be of primary importance. This is especially so because the law restricts the period in which trust property and income may be withheld from beneficiaries.³² Trusts, in other words, must sooner or later come to an end.

How does the trust form allow for the shaping of this attitude? Here, the trust offers a solution that complements the other restrictions placed on the access of beneficiaries to the trust property: trust privacy. Thus, under normal circumstances there is no requirement for parent-settlors or trustees to inform children-beneficiaries of the wealth settled on trust for them, and the general private nature of the trust means that often little, if any, information about the trust is known by third parties or is in the public domain.³³ However, when settlors or trustees wish to vary a trust that has minor beneficiaries, they have to bring their application before the court, at which point information about the trust may enter the public domain.

Unsurprisingly, settlors often seek to restrict the extent of the information about the trust that becomes known and sometimes ask the court to hear the proposal for variation in private or impose reporting restrictions.

An example of such a case is *V v T*,³⁴ which related to an application for a variation by the settlors of a large family trust.³⁵ The settlors, who were also the parents of the minor

³¹ Hannah Arendt, *The Human Condition* (Chicago and London: The University of Chicago Press, 1998), 70-1.

³² Perpetuities and Accumulations Act 2009; *Saunders v Vautier* [1841] 4 Beav 115.

³³ A fact which has, however, started to change with the introduction of the OECD’s Common Reporting Standard and beneficial ownership registers under European legislation.

³⁴ *V v T, A* [2014] EWHC 3432 (Ch).

beneficiaries (the trust also included a number of adult beneficiaries), anticipated that the variation hearing would necessitate the disclosure of information about the trust assets and wanted to prevent this information from becoming public knowledge. They therefore applied for a private hearing, and the case gives the court's judgment on this application for privacy.

The interest of this case lies in the reasons given by the judge in support of his findings, which reiterate those of the parent-settlors when making the application. The settlors had argued that information about the trust ought to be kept out of the public domain, but other than is usual in applications for privacy where minors' property is concerned, their aim was not to keep the *public* in the dark and thus from interfering with the minors' property or normal life, but to keep this information from the *children themselves*.

In this, *V v T* broke new ground in the law on trust privacy. In previous cases, such as in *JFX*³⁶ and *K v L*,³⁷ the concern with privacy had been strictly about protecting the beneficiaries' entitlement to property or their right to lead a normal life. In *JFX*, which concerned a compromise arrangement between a minor and a NHS Trust following negligence in his hospital treatment, the minor's interests were deemed to lie in the continued availability of funds paid to him for his ongoing care. The payment was substantial, and despite his injuries the minor was expected to reach full legal capacity and thus obtain control over the settlement in the future. The judge considered that this control over a large fund

³⁵ Strictly speaking, the case concerned three related trusts.

³⁶ *JFX (a Child suing by his Mother and Litigation Friend KMF) v York Hospitals NHS Foundation Trust* [2010] EWHC 2800 (QB).

³⁷ *K v L (Ancillary Relief: Inherited Wealth)*, also known as *K v L (Non-Matrimonial Property: Special Contribution)* [2012] 1 WLR 306. *K v L* is not a trusts case, as the wealth concerned was the parents' wealth. However, the issues here are instructive as it similarly concerns keeping information out of the public domain for the purported benefit of children.

would make the minor more vulnerable to ‘those who would wish to profit from his money or deprive him of it,’ in short, ‘fortune hunters and thieves.’³⁸ It was therefore held to be in the minor’s interest that information about his compromise settlement was not made known publicly. The concern here was with the acts of third parties and their potentially negative effects on the beneficiary, and at no point was it suggested that knowledge about the property would need to be kept from the beneficiary himself.

The same concerns about the potential acts of third parties were also determinative in *X (A Child) v Dartford and Gravesham NHS Trust*,³⁹ and they underpin the exemptions from the requirement to disclose beneficial ownership under the 5th Money Laundering Directive. Thus, the main argument against the new disclosure requirements is that they expose individuals to the threat of kidnapping, extortion and violence, particularly where the confidentiality of the information and the integrity of those with access to it cannot be guaranteed.⁴⁰

K v L concerned the privacy arrangements for a hearing determining the division of property at the break-up of a very wealthy family. Here, the parents had striven to keep their wealth hidden not just from their children, but also from their friends. In giving his approval to an

³⁸ *JFX*, [9] and [11] (Tugendhat J).

³⁹ [2015] EWCA Civ 96.

⁴⁰ On the basis of such threats, practitioners working in the trust industry argue that the new disclosure requirements unreasonably expose beneficiaries to risks. See, for example, Kathleen W. Lotmore, ‘The Decline of Financial Privacy and its Costs to Society,’ *Trusts & Trustees* 23/9 (2017), 944-954. The Directive allows for exemptions from access to the beneficial ownership register where this ‘would expose the beneficial owner to disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation, or where the beneficial owner is a minor or otherwise incapable’ (15849/17, 19 December 2017, art 10(e)). [Update once published in official journal]

anonymity order, Wilson LJ considered that making information about this wealth public would destroy the normality in which the children were growing up, for example by necessitating their physical protection. He said: ‘We concluded that, unless we made the order, the normality of the current lives of the children would be forfeit, with results likely to be substantially damaging, perhaps even grossly damaging, to them.’⁴¹ Here the court’s concern was again with the actions of others whose behaviour might necessitate changing the daily routines of the children to protect them from possible harm.

In contrast, *V v T* made the claim that knowledge about their property entitlements could prove harmful to the property ‘owners’ (the beneficiaries) themselves, and on this basis Morgan J was willing to consider ‘appropriate steps to protect the children from the adverse effect on their upbringing and personal development which might well result from an open court hearing generating publicity as to their potential wealth.’⁴² At first, the decision to impose reporting restrictions that prevented any references from being published by which the parties could be identified (a private hearing was ultimately deemed unnecessary) appears to be based on the necessity, in accordance with the Civil Procedure Rules, ‘to protect the interests of any child or protected party.’⁴³ However, the judge then stated:

I was concerned about the special position of the minor beneficiaries. I inquired whether it would be appropriate to impose some restrictions to safeguard the children from *the*

⁴¹ *K v L*, [26].

⁴² *V v T*, [24].

⁴³ CPR 39.2(3)(d).

*adverse consequences of them becoming aware at too early an age of the extent of their likely wealth.*⁴⁴

And later on in the judgement:

There was detailed evidence that the parents had striven to create as normal a life as possible for the children. A modest and low-key unostentatious lifestyle was a core value of the family. The parents were determined that the children *should not know at too young an age of the extent of the family's wealth. It was considered that such knowledge could deter the children from taking full advantage of the educational opportunities open to them. Further, such knowledge at a young age could create a sense of entitlement which might discourage the children from making their own way in life and contributing to society.*⁴⁵

Clearly, the parents were concerned about their children's future autonomy as adults, wanting them to become independent and autonomous ('make their own way in life'), not entitled (avoid 'a sense of entitlement'), educated ('take full advantage of the educational opportunities'), and productive ('contributing to society'). Coupled with a moderate amount of wealth, these wishes would not be surprising. Already in antiquity the necessity to labour for the satisfaction of one's natural needs was regarded as slavish and beneath the proper status of the human.⁴⁶ To settle a moderate amount of wealth on one's children would alleviate this necessity without affecting the children's motivation for becoming autonomous adults. On the contrary, having their basic needs taken care of would leave them free to

⁴⁴ *V v T*, [11], emphasis added.

⁴⁵ *V v T*, [23], emphasis added.

⁴⁶ Arendt, *The Human Condition*, 81-4.

pursue more fulfilling work. Against this background, it is unsurprising that a number of wealthy people, having financed their children's education and conferred some money upon them, nowadays decide against leaving the bulk of their wealth to them. John Langbein thus quotes one multi-millionaire as having said when interviewed by *Forbes* magazine: 'To me, inheritance dilutes the motivation that most young people have to fulfil the best that is in them. I want to give my kids the tremendous satisfaction of making it on their own.'⁴⁷

Not, however, the parent-settlors in *V v T*. What is surprising is that these parents not only wanted their children to be autonomous but *also* wanted them to be very wealthy, even though they knew that mere knowledge about this wealth (not to mention access to it) would prevent the very autonomy and independence they strived to instil: The large amount of wealth settled upon them would inflate their need for consumption and thus create a dependence on that wealth.

The contradiction contained in this double gesture of giving yet withholding, of wishing to create autonomy and yet knowingly creating dependence, has been reflected in the case *MN v OP*,⁴⁸ where an anonymity order in relation to a variation of a trust was refused.⁴⁹ Here, the court distinguished cases relating to personal injury claims such as *X (A Child)* by pointing to the fact that in variation of trust cases, the settlors had *chosen* to include children in the settlement and could therefore not rely on a presumption that anonymity should be granted where children are involved due to their *involuntary* involvement in the transaction. Albeit

⁴⁷ John H. Langbein, 'The Twentieth-Century Revolution in Family Wealth Transmission,' *University of Chicago Law Occasional Paper* No.25 (1989), 15.

⁴⁸ CA, 2 March 2017 (appeal pending).

⁴⁹ Before then, the specific reasons for the anonymity order given in *V v T* had been cited with approval in *Gestrust SA v Sixteen Defendants (Including three minors and one minor who has now attained majority)* [2016] EWHC 3067 (Ch).

indirectly, the court made the parents aware that it was their choice to make their children so wealthy and that they should therefore bear the consequences of this wealth becoming public knowledge.

However, rather than pondering the absurdity of overburdening fragile humans with wealth about which they are then not permitted to know, one could find congruence in this claim to privacy if one recognized that the entire trust is a gesture of withholding, rather than giving, property. Thus, where the aim of a trust is to protect the trust property from dissipation, the associated secrecy can be seen as ensuring two things.

Firstly, it can be seen as ensuring that beneficiaries grow up unaware of their own wealth and therefore do not rely on it for the satisfaction of their needs, or rather, develop inflated needs in the first place. Secondly, it can be seen as ensuring that beneficiaries develop their own independent means of producing wealth, which makes it more likely that trust property will be accumulated and passed on rather than spent. This is what Langbein gets at when he writes that those people who do decide to leave their wealth to their children are ‘hoping to shape the younger generations so that the wealth will be used responsibly.’⁵⁰ The concern with the autonomy of the beneficiaries thus reveals itself as a concern with the precondition for the independent production of property, i.e. the independence of the future absolute owners from the property they have been given, and thus as a concern with the future protection of the trust property at a point when the restrictions of the trust will no longer be operative.

The autonomy aimed at by the settlors therefore cannot be an open freedom to determine one’s life using the resources that one’s wealth provides; it is a freedom that is already predetermined towards production, a freedom where by the time the person begins to think about using the thing for his or her own interests, i.e. as a consumer, the thing has already

⁵⁰ Langbein, ‘The Twentieth-Century Revolution in Family Wealth Transmission,’ 15.

recruited the person for *its* interests, i.e. as a producer. By the time the adult beneficiary receives the trust funds absolutely, he will value his independence from the thing, will want to show that he does not *need* it. And what better way to show this absence of dependence than to increase the value of the property, encourage its growth, and ultimately, ‘give’ it away by settling it on trust once again for his own children?

This shows a reversal of values between person and thing. At the level of the family trust, the concept of property, which overall is property-of-persons, becomes weighted towards things, whose continued existence is now the primary aim. Things thus acquire both legal and real agency, their interests being upheld at law and their value instilled in their future owners. The trust property, through the rights and obligations assigned to it by the settlor and the operation of the law, reaches beyond the duration of the trust and shapes its future owners in a way that is conducive to its continued existence. Beneath the overall concept of property, the family trust enables things to enter a regime of property-as-such.

This understanding also reverses the relationship between ownership and use that the trust is said to enable. If Franciscan monks utilised the distinction between ownership and use⁵¹ to satisfy their ongoing need for consumption under the *appearance* of poverty,⁵² families today utilise the same distinction to satisfy the need of the property for maintenance and growth under the *appearance* of wealth. While the trust then enabled the monks to proclaim their

⁵¹ While the Franciscans did have property conveyed to third parties for their use, this seems to have been a parallel development, rather than a precursor, to the trust (Gilbert Paul Verbit, *The Origins of the Trust* (Xlibris Corporation, 2002), 216).

⁵² ‘It is very possible that the case of the Franciscans did much towards introducing among us ... the desire to discover some expedient which would give the practical benefits of ownership to those who could yet say that they owned nothing’ (F. W. Maitland, ‘The Origin of Uses,’ *Harvard Law Review* 8/3 (1894), 136).

poverty but also ensured their need for consumption was met over time, the trust now enables its beneficiaries to proclaim their wealth (once they know about it) and also ensures that they render services to the property over time. While consumption is limited in both cases, with one, the aim of this limitation is the possibility of continued consumption and thus *the existence of the beneficiaries*, while with the other it is to ensure the possibility of continued service and thus *the existence of the property*. The Franciscans could thus as rightly claim they are poor as today's beneficiaries can claim they are rich; at stake is not how much access and control they have over things but what 'having' or 'ownership' means in the first place: then, the selfish pursuit of ends, now, the selfless service to things.

Conclusion

Roger Cotterrell writes that the “disembodied”, unowned property’ represented by private purpose trusts is not accepted under English law because ‘property necessarily represents in ideological form the attributes of power of someone or some collectivity’ and therefore needs to reflect that power. He concludes that ‘the law cannot comprehend property without any beneficial owner.’⁵³ This view could be questioned in light of the current-day acceptance of private purpose trusts in offshore jurisdictions, but even leaving these aside, there is some doubt about whether property as a concept still represents such power, or whether beneath the ideology of property lies not a different reality.

This doubt is important because, if things are shown to have power over their ‘owners,’ this affects not only the narrative of autonomy with which private property rights are commonly justified (could one still justify property rights if persons were not able to exercise them to

⁵³ Cotterrell, ‘Power, Property and the Law of Trusts,’ 88.

further their own ends?) but also the real existence of personal autonomy, because persons may be controlled by things even when they believe themselves to be autonomous. At its most cynical, it could also show a paradoxical state of affairs where autonomy – the independence of the subject from determining structures and its capacity for self-mastery – is no longer sought for the ultimate human good but for the continuous reproduction of things, that is, has become a tool in structures dominated by the interests of things.

The analysis above has sought to substantiate this doubt by showing how the trust as a property arrangement may be used not only to achieve a ‘disembodiment’ of property through a reversal of the relationship of control between persons and things but also a ‘re-embodiment’ of sorts through ensuring that those who come to ‘own’ property under such a trust develop into certain kinds of persons, namely autonomous persons who will not be dependent on the things they own to fulfil their needs for consumption.

With this, the question of ‘embodiment’ becomes a question that is no longer about ownership but about the way in which the ‘bodies’ to which property is attached are shaped by the legal rules that govern this attachment in the first place. If things can co-opt the legal rules governing their use in such a way as to create themselves a certain kind of owner, then not only does the question of the social power that property ownership is said to convey become secondary (because the persons holding this power should in themselves be regarded as shaped by the property regime in which they partake) but the concept of the social must also itself include the very things that are the ‘objects’ of property law in the first place. This means that even in the law of trusts, where terms such as ‘ownership,’ ‘person,’ and ‘thing’ are still often employed as if they had stable, definite meanings,⁵⁴ law can no longer be seen

⁵⁴ In other areas of property law the meanings of ‘ownership,’ ‘person,’ and ‘thing’ have in themselves been subject to discussion. Alain Pottage thus notes in relation to biotechnological patents

as the means for structuring human power through the production and control of things. Instead, it should be seen as the mesh in which different agents are caught struggling over who can produce and control whom, and who has the better tools to ensure continued existence.

that here ‘property theory’s ontological presuppositions about persons and things, or about nature and artifice, are dissolved, and ... the need for legal operations to coordinate economic, scientific, and political expectations, each of which fabricates different interests and entities, works a profound transformation in the pragmatics of “property”’ (Alain Pottage, ‘Instituting Property,’ *Oxford Journal of Legal Studies* 18/2 (1998), 331-44).