The Reproduction of Property Through the Production of Personhood: The Family Trust and the Power of Things

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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.'[1] Property, in Cotterrell's view, is ideological because it hides the private power that owning things confers and that is unequally distributed throughout society behind the equality of every person before the law. For this, Cotterrell blames the legal distinction between persons and things. The distinction, he writes, allows the law to separate and de-emphasise the side of the distinction associated with inequality—things—from persons when declaring their equality. *How much* a person owns simply does not count towards their legal personhood, which, stripped of all its concrete life aspects, is equal to that of everyone else's. Cotterrell concludes that it is through the legal concept of property that 'it becomes possible to banish almost entirely from the discourse of private law recognition of one of the most dominant features of life in a society of material inequalities—that of *private power*.'[2]

Cotterrell accords the trust a special place within this ideological construct. The trust, he claims, exacerbates the blindness of the property concept to private power by allowing the real owners of trust property, the beneficiaries, to hide behind the legal owners, the trustees.[3] This creates the appearance of non-ownership on the part of the beneficiaries, when in reality they have the trust property at their disposal, which increases their private power. According to this understanding, the trust should be regarded as the private property instrument *par excellence*; it hides the private power of private property behind a shell of legal ownership.

[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.

[2] Cotterrell, 'Power, Property and the Law of Trusts,' 82.

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

In what follows below, I analyse a development in trusts law—paradoxically, a development which concerns another layer of privacy—that turns this understanding on its head so as to expose Cottorrell's own continued prejudice in favour of the person side of the person-thing distinction. I will claim that the trust can be used as a mechanism for providing things with interests and the control usually ascribed to persons, ultimately enabling them to produce the personhood of those who are said to own them. Far from allowing beneficiaries to hide their property ownership, such trusts hide the power of things to ensure, with the help of the beneficiaries, their own reproduction and accumulation. Cotterrell misses this power of things because his argument is based on the assumption that interests, control, and ultimately social power can only ever be the attributes of persons, never of things.

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—the autonomy of owners is furthered by their access *to* things—is in the context of family trusts central to claims for withholding things *from* owners, be it access to the things they are said to own or knowledge about their own wealth. The withholding of knowledge in particular is justified on the grounds that the development of any children-beneficiaries into autonomous adults would be negatively impacted if they knew how wealthy they were. In this context, however, seeking to protect and develop the autonomy of beneficiaries favours the trust property rather than its owners. That this is the intended consequence of these measures and not merely an unintended side effect becomes apparent from recent case law.

V v T and other cases

The case of *V v T*[4] concerned an application for a variation by the settlors of a large family trust.[5] Such applications are commonly made where the law has changed and the current terms of a trust are no longer favourable to the interests of beneficiaries due to tax or personal reasons. Where all the beneficiaries of the trust are *sui juris* and capable of consent, they can agree on a variation without the involvement of the court. However, if there are minor

[4] *V v T, A* [2014] EWHC 3432 (Ch).

[5] Strictly speaking, the case concerned three related trusts.

beneficiaries, only the court can provide consent on their behalf. This may involve a public hearing.

The settlors in *V v T*, who were the parents of the minor beneficiaries (the trust also included a number of adult beneficiaries), anticipated that this hearing would necessitate the disclosure of information about the trust assets. They wanted to prevent this information from becoming public knowledge. They therefore applied for a private hearing, and the case gives the court's judgment in this respect. Privacy was granted, albeit not through a private hearing. Instead, the judge imposed reporting restrictions.

The interest of *V v T* lies in the reasons given by the judge in support of his decision, which reiterate those given by 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. However, 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*[6] and *K v L*,[7] the concern with privacy had been strictly about protecting the beneficiaries from the actions of the public, and the claim was therefore made that knowledge ought to be kept out of the public domain. In *V v T*, on the other hand, the claim was made that it would be harmful for the children to learn of their *own* wealth.

In *JFX*, which concerned a compromise arrangement between a minor and a NHS Trust following negligence in the minor's 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 would make the minor more vulnerable to 'those who would wish to profit

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

[7] *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 case is included here because it also involved the claim that information should be kept out of the public domain for the benefit of children.

from his money or deprive him of it,' in short, 'fortune hunters and thieves.'[8] 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 trust 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,*[9] and they furthermore appear to underpin the exemptions from access to the beneficial ownership register under the 5th Money Laundering Directive,[10] even though the Directive is not entirely clear on what basis access to the information of minor beneficiaries is denied. Article 1(15)(g) allows member states to grant an exception from access to the information on a case-to-case basis 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.'

In *K v L*, which concerned the privacy arrangements for a hearing determining the division of property at the break-up of wealthy parents, 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 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.'[11] Here, the court's concern was again with the acts of others whose behaviour might necessitate changing the daily routines of children to protect them from possible harm (hiring security, restricting activities etc.).

Other than in *K v L*, where the property in question was that of the parents and therefore under their control, the settlors in *V v T* had already given their property to their children by making them the beneficiaries of their family trust. Despite this intentional act, they now

[8] *JFX*, [9] and [11] (Tugendhat J).

[9] [2015] EWCA Civ 96.

[10] DIRECTIVE (EU) 2018/843.

[11] *K v L*, [26].

made the claim that knowledge about their entitlements could prove harmful to their children directly, without the involvement of third parties. It was on this basis that 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.'[12] At first, the decision to impose reporting restrictions appears to have been based on the necessity, in accordance with the Civil Procedure Rules, 'to protect the interests of any child or protected party.'[13] However, Morgan J 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 adverse consequences of them becoming aware at too early an age of the extent of their likely wealth*.[14]

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 *whil*.[15]

Clearly, the parents were concerned about their children's future autonomy, 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').

At first glance, these motivations seem entirely reasonable. After all, the pitfalls of wealth, particularly when it comes to the development of autonomy, have often been remarked

[12] *V v T*, [24].

[13] CPR 39.2(3)(d).

[14] *V v T*, [11], emphasis added.

[15] *V v T*, [23], emphasis added.

upon.[16] Hannah Arendt, for example, writes about 'the apathy and disappearance of initiative which so obviously threatens all overly wealthy,'[17] while Adam Hirsch notes that '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.'[18] Another commentator puts this rather shorter: 'Wealth is a problem. … Lives can be ruined by poverty, but lives can equally be ruined by excess wealth.'[19] It is unsurprising, then, that settlors in America as well as elsewhere have increasingly 'begun to fear something other than the prospect that their children will not have enough: the possibility that they will have too much.'[20]

The reasonable thing to do in response to these concerns about the effects of excess wealth is still to give, but give much less. Thus, the wish to leave *some* wealth to one's children is not 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,[21] and to settle a moderate amount of wealth on one's children would alleviate this necessity without affecting their development into autonomous adults. On the contrary, it would increase their autonomy by putting them into a position where they could pursue their interests without having to worry about their basic needs. Leaving excessive wealth to one's children, on the other hand, would mean risking this autonomy. The realisation of this trade-off manifests itself in some parents paying only for their children's education but not their ongoing maintenance, and can

[16] The negative consequences of wealth feature equally 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 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).

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

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

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

[20] Joshua C. Tate, 'Conditional Love: Incentive Trusts and the Inflexibility Problem,' *Real Property, Probate and Trust Journal* 41 (2006), 446.

[21] Arendt, *The Human Condition*, 81–4.

be summarised as the recognition of the need for children 'to make it on their own,' a recognition which has proved lasting through times of economic change. Already in 1986, *Fortune* magazine quoted multimillionaire Eugene Lang as saying that '"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,"' and Warren Buffett as saying that the right amount to leave one's children is '"enough money so that they would feel they could do anything, but not so much that they could do nothing."'[22] More recently, the entrepreneur Kevin O'Leary said in an interview with *CNBC*: '"I told [my kids] when they finished college, I was going to give them this: nothing . . . Because that is what my mother did to me. You have to go make it on your own, and I think that is a very important lesson."'[23]

The parent-settlors in *V v T*, however, did not adopt this attitude. 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 in them, not least because 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, was recognised in the case *MN v OP*,[24] where an anonymity order in relation to a variation of a trust was refused.[25] 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

[22] Fortune article from 1986, accessed 13 February 2019, http://fortune.com/2012/11/21/should-you-leave-it-all-to-the-children/.

[23] CNBC Make It article, accessed 13 February 2019, https://www.cnbc.com/2018/07/06/why-kevin-oleary-makes-his-kids-fly-coach.html.

[24] [2017] 3 WLUK 80, appeal partially allowed in *MN v OP and ors* [2019] EWCA Civ 679.

[25] 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 settlors aware that it was their choice to make children so wealthy in the first place and that they should therefore bear the consequences of this wealth coming to the public's—and consequently the children's—attention. In the appeal that followed, the settlors stressed that the minor beneficiaries 'should be brought up to appreciate the importance of education and hard work; to establish themselves in worthwhile careers; to make a positive contribution to society and to choose friends who respect them for their personal qualities rather than for the accident of their birth.'[26] That the fact of the children's wealth was no accident at all seemed to have escaped their attention.

The Trust as a Means of Protecting Property

If this is a trend—in an unreported 2018 case in the Cayman courts[27] a similar approach to *V v T* was adopted, with the court indeed commenting on the trend of very wealthy people to raise their children with neither the trappings nor awareness of that wealth[28]—how is it possible to resolve the incongruence at the heart of this trend? This incongruence is the fact that settlors may use a trust to confer wealth that they know will crush the autonomy of its recipients, yet insist on measures that protect the development of this autonomy—and protect this development not in order to enable its recipients to use the property for their own interests, but so that they will have no need to use it. In that case, why not simply give less and thus limit the risk of over-consumption and dependence in the first place?

An answer to this question emerges when one lets go of the view of the family trust as a species of gift and begins to see it as a means of protecting property—not for the beneficiaries or the family, which is the common view,[29] but for its own sake. The trust, as

[26] *MN v OP and ors*.

[27] *In the Matter of a Settlement dated 16 December 2009* FSD 54/18.

[28] Peter Steen and Emilia Piskorz, 'Privacy, Open Justice and the Turning Tide,' *Trusts & Trustees* 24/10 (2018), 1011. This article also mentions a further English case (*A v XYZ & Ors* [2018] EWHC 1633 (Ch)) in which the claimants similarly sought to protect their children from knowledge about their own wealth.

[29] See, for example, John Langbein, 'Burn the Rembrandt? Trust Law's Limits on the Settlor's Power to Direct Investments,' *Boston University Law Review* 90 (2010), 382.

Cotterrell also realises,[30] gives a form and stability over time to something (often a fund) that in an absolute owner's hands would simply amount to dissipatable wealth. Together with the restrictions and obligations that trusts law places on beneficiaries and trustees during the time that the trust is operative, this form ensures that the trust property is maintained and accumulated rather than spent. The trust thus allows things to 'resist' the control and manipulation associated with the ownership of property. This makes it difficult to conceive of the trust as a species of gift, as which it is so often described.[31] Instead, the trust should be seen as a gesture of withholding rather than giving property.[32]

However, this view of the trust faces a difficulty of its own that has to do with the way in which the distinction between persons and things operates at the heart of the legal concept of property. In understanding the dynamic between these terms, Louis Dumont's principle of hierarchy[33] may prove helpful. Dumont sought to show how opposing terms employed within a culture stand in a relationship that, as Michael Houseman phrases it, 'is inseparable from a reference to the whole that orders them with respect to each other.'[34] The opposing terms reflect not just a simple opposition, but a value differential or asymmetry (one term attracts a

[30] Cotterrell, 'Power, Property and the Law of Trusts,' 85.

[31] See, for example, John Langbein, 'The Contractarian Basis of the Law of Trusts,' *Yale Law Journal* 105/3 (1995), 632; *T Choithram International SA v Pagarani* [2001], per Lord Browne-Wilkinson at [11]; F.H. Lawson and Bernard Rudden, *The Law of Property*, 3rd edn. (Oxford: Oxford University Press, 2002), 55.

[32] For an in-depth discussion of this view, see Johanna Jacques, 'Property and the Interests of Things: The Case of the Donative Trust,' *Law and Critique* 30/2 (2019).

[33] Louis Dumont, *Essays on Individualism: Modern Ideology in Anthropological Perspective* (Chicago and London: The University of Chicago Press, 1986), 253. Also see Michael Houseman, 'The Hierarchical Relation: A Particular Ideology or a General Model?' *Hau: Journal of Ethnographic Theory* 5/1 (2015), 255. Neither Dumont nor Houseman refer to trusts.

[34] Houseman, 'The Hierarchical Relation,' 252.

higher value than the other),[35] which arises from their relation to the whole.[36] One term may also be identical with the whole, in which case it encompasses the other term.[37]

Applied to the opposition between persons and things within the concept of property, the following order emerges: The concept of property consists of the opposition 'persons' and 'things,' with all control and power accruing to persons, things being seen as merely passive and manipulable. While persons have interests, things possess neither interests nor the ability to achieve them. Persons, furthermore, have a higher value than things. This higher value arises from the association of persons with the whole, namely property (despite the linguistic use of the word 'property' to denote both the thing and the concept). Persons are associated with property because property, that is, the ability to own things, is what is 'proper' only to persons, if not essential to personality.[38] 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. The higher value given to persons also means that property is an arrangement that must always work for the interests of persons, and may only work for things if an ultimate human interest is at stake. A point in case is the notion of property as stewardship, whereby things are preserved and protected from human use for the ultimate human good. The presumption of human interests when it comes to property is so pervasive that James Penner writes that 'it would indeed be a funny turn of events if the

[35] Greg Acciaioli, '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.

[36] Houseman, 'The Hierarchical Relation,' 253.

[37] This, however, is not a necessary feature. See Acciaioli, 'Distinguishing Hierarchy and Precedence,' 53–4.

[38] 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 19 February 2019, 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).

norms serving our interest in property in essence gave the things a person owned a power over him.'[39]

This means that any view of the trust that regards it as an arrangement that works in the interests of things, not their owners, is difficult to place within the concept of property. Indeed, it may be easier to make sense of the trust by finding a human interest served by the arrangement beyond the immediate access to resources and information that the trust denies. In many cases, such an interest is not hard to come by; Langbein, for example, refers to a number of purposes he classifies as protective but that ultimately serve the interests of the beneficiaries, such as 'to postpone enjoyment until the beneficiaries are more mature [or] to shield potential spendthrifts by restraining their powers of alienation.'[40] However, where settlors entangle themselves in contradictions by settling vast amounts of wealth on their children, supposedly to further the latter's autonomy by providing them with independent means, but then *also* wish to shape these children into individuals who essentially have no need for these means, it becomes difficult to insist that this settlement of wealth upon them still serves the children's interests.

Fortunately, Dumont's principle of hierarchy also accounts for a reversal of the terms that make up a distinction at a lower level of the concept.[41] This reversal affects attributes as well as values, and when applied to the family trust as a sublevel construct of property, it allows for both interests and control to be assigned to the 'thing' side of the distinction. Power is now associated with things, whose interests take precedence over the interests of those who are said to be their owners. Due to the inanimate nature of trust property, however, this reversal requires a further step, namely the recruitment or 'production' of persons who put the property's interests first, thus ensuring its protection.

The Trust as a Means of Producing Personhood

[39] James E. Penner, *The Idea of Property in Law* (Oxford: Oxford University Press, 1997), 79.

[40] Langbein, 'Burn the Rembrandt?,' 382, footnote omitted.

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

In a family trust where the current beneficiaries of the 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,[42] is how to incentivise certain behaviour in beneficiaries. The question is for whose benefit this behaviour is ultimately intended.

Some trusts do not hide their purpose of directing and providing rewards for certain behaviour, as the increasingly popular incentive trust in America shows. Here, the behaviour encouraged through the trust mechanism is generally one that settlors think will contribute to the beneficiaries' well-being and success in life, such as the completion of educational programmes or self-restraint in matters of consumption, although sometimes (for example, where the settlors make any payments to the beneficiaries dependent on the number of offspring they produce[43]) the line between the interests of the settlors and those of the beneficiaries become blurred. Nonetheless, like most protective trusts and trusts for minors, the main purpose of these trusts is to prepare beneficiaries to approach wealth in a way that will be responsible to *themselves* (the person-owners), that is, enable their optimal use of the property in a way that will not lead to unhappiness or ill health.

However, where parent-settlors like those in *V v T* wish for their children to become producers rather than users of wealth while at the same time making them very wealthy, this raises the presumption that the measures they take to prepare their children for this wealth are of a different kind. After all, these measures cannot have been intended to prepare them for the use of the property and the social power it confers. Here, the view offers itself that the responsibility that the settlors seek to instil in the beneficiaries is not to themselves but to *the property*; property which the settlors produced and accumulated over a lifetime and which they do not wish to see dissipated by their heirs in pursuit of their interests or through a lavish lifestyle. If it is the property and *its* interests that the settlors have in mind when establishing the trust, the trust then becomes a means to further these interests. Rather than telling their children what they would like to happen to the property and hoping that their wishes will be

[42] '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.

[43] Tate, 'Conditional Love: Incentive Trusts and the Inflexibility Problem,' 458.

honoured, parents use the trust form to enshrine the interests of the property in law. As Richard Posner writes, trusts are 'based on mistrust.'[44]

While the trust form ensures the successful restriction of the use of property by the beneficiaries during the trust's lifetime, for example through enshrining the property's interests in the trust instrument (houses must be maintained and may not be sold off, money may only be invested in certain stocks etc.) and enforcing these interests through the parties to the trust as well as the courts, settlors have no control over what happens when the trust ends. As the law restricts the period in which trust capital and income may be withheld from beneficiaries,[45] sooner or later the attitude of the beneficiaries to the property will become of paramount importance if the property is to be protected on an ongoing basis.

How does the trust form allow for the shaping of this attitude? Here, the trust offers a solution that complements the other restrictions it already places on the access of beneficiaries to the trust property: 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.[46] It is only when settlors or trustees wish to vary a trust or for other reasons apply to the court that this privacy is threatened and information about the trust may enter the public domain. At this point settlors like those in *V v T* ask for privacy in order to keep knowledge about their wealth secret from their children.

This claim to privacy can be seen as ensuring that beneficiaries do not develop needs of consumption proportionate to their wealth, needs which they may eventually seek to satisfy with trust property. Such consumption would run counter to the intended protection of the trust property envisaged by the settlors. It can also be seen as ensuring that beneficiaries develop independent means of producing wealth so that they add to rather than take from the trust property. The concern with the autonomy of the beneficiaries thus reveals itself as a

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[44] 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).

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

[46] 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, even though these measures remain contested.

concern with the protection of property. Only if beneficiaries become independent in their production of the means they need to attain their interests is the trust property safe from their hands even after the point at which the restrictions of the trust are no longer 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 a thing for his or her own interests, that is, as a consumer, that thing has already recruited the person for *its* interests, that is, as a producer. By the time the adult beneficiaries receive the trust funds absolutely, they will value their independence from the property and will want to show that they do 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 the next generation? In this way, property survives intact over generations, being looked after, added to, and ultimately passed on.

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.'[47] I tried to show above that the family trust subverts this idea of a one-sided ownership relation by effecting a reversal in the hierarchical distinction between persons and things. Under the appearance of wealth, beneficial owners are serving the very things they own by ensuring their protection and continuous reproduction.

This creates precisely a 'disembodiment' in the sense that owning trust property as a beneficiary no longer entails the association of property with the interests of its owners. Instead, property comes to possess its own interests, which are enshrined in the trust instrument and protected and enforced by the mechanisms of the trust. But this is not all. As recent case law shows, settlors seek to use privacy to ensure that beneficiaries develop into persons who will not only have no need for the property they will eventually come to own

[47] Cotterrell, 'Power, Property and the Law of Trusts,' 88.

absolutely, but will also add to this property, thus ensuring its growth over time. This constitutes a 're-embodiment' of persons in line with the interests of things. One way of describing this would be to say that the trust property, through the rights and obligations assigned to it by the settlors and through 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. While in practice the line between a family trust that has the best interests of the beneficiary at heart and a trust which hides behind these interests a concern with the protection of the trust property might be a fine one, the existence of contradictory gestures by the settlors should put one on notice that all is not as it seems. Settlors wanting their children to both be excessively wealthy and to have no need for such wealth are one example of such a contradiction.

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 things are 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 for 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—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 change: Rather than exclude them, it must include the very things that are the 'objects' of property law.

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,[48] law can no longer be seen 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 their own

[48] 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 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).

continued existence. On this reading, the family trust is not only a tool that enables and enhances individual and family existence over time but also a tool for the continued existence of things. The resulting growth in things could be called a growth in wealth if wealth were not always understood as the wealth *of* someone. Paradoxically for the family trust as an arrangement for hyper-private property ownership, it allows property to free itself from the interests of its owners. Beneath the overall concept of property, the family trust thus enables things to enter a regime of property-as-such.

In the final analysis, Cotterrell's critique of the trust is therefore short-sighted—not because it does not realise the private power at work in trusts but because it situates this power exclusively at one end of the person-thing distinction. Perhaps this is not surprising given that he does not question the stability of this distinction. If one accepts that things can be represented at law and that they can thus have control over their own fate, then the assumption that the ownership relation always works for the interests of persons needs to be abandoned. Who really owns whom will on this account need to be established on the facts.

This two-way understanding of property affects not only the narrative of autonomy with which private property rights are commonly justified (could one still justify property rights if persons were no longer able to exercise them to further their own interests?) but also the real existence of personal autonomy, as persons may be controlled by things even when they believe themselves to be in control. 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 to further the interests of things.