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# Policy Considerations: Alienability of the Beneficial Interest in a Trust in New York

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# POLICY CONSIDERATIONS: ALIENABILITY OF THE BENEFICIAL INTEREST IN A TRUST IN NEW YORK*

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IN NEW YORK there exists a sharp contrast between the prevailing attitude toward the free alienability of property in general and the extremely restrictive attitudes toward the alienability of the beneficial interest in a trust. It is the purpose of this paper to inquire into whether or not any such paradox is necessary, and whether or not it is serving any useful purpose. Any reasonable examination of this inconsistency will require us to take a look at the nature of the trust relationship, the manner in which that relationship was developed, and the present rules of law governing the alienability of the beneficiary's interest.

There are people who believe that all trusts are evil, that they should be eliminated wherever feasible, and that where they can't be eliminated they should be regulated and controlled in the most rigid way possible. I am not one of those people. Nothing said herein is to be construed as any disparagement of the trust as an institution. As a legal device for holding and disposing of property, the modern trust is the crowning achievement of the common law. It is a mark of maturity in our legal system. It is as flexible and as elastic as contract or agency, and it serves many functions not reached by either of these relationships. Common law lawyers are justified in the special pride they take in the development of the trust for it is a distinctively unique achievement of the common law. It has no counterpart in the civil law, and civil law lawyers find it one of the most difficult concepts for them to understand when they try to acquaint themselves with the operation of our legal system. But the trust is far more than a unique legal achievement. It is a practical response to the needs and wishes of the members of a highly organized society. The purposes to which it may be put are almost as unlimited as the imagination of the lawyer drafting the trust instrument. Businessmen often find the trust a convenient financing or risk shifting device. The trust can be used in the liquidation of business affairs. It can be used as a security device. Voting trusts are often used in corporate management. Trust receipts are not unfamiliar items in sales transactions. The trust serves all these needs and many others, but probably the most significant purpose of all is that of providing a convenient scheme for handling family settlements.

In a paper such as this, one might be expected to take some troublesome area of trust administration and attempt to analyze the law applicable to that area. I have chosen a different approach. I am going to assume that there is nothing new that I can tell you about the existing rules controlling the alienability of the beneficial interest in a trust. You already know about

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New York Real Property Law Section 103 and New York Personal Property Law Section 15. You know that these statutes affirmatively restrain the alienation of an income beneficiary's interest in a trust. You know as much as I do about how these rules operate. The thing I propose to do is to ask a few questions about why these rules exist and whether or not their present form is endangering the very life of the trust institution. In pursuing this inquiry it will be necessary for us to take a few long steps back through the pages of history for the purpose of recalling to our minds how the trust arose and why it is still with us.

The trust, like every other legal device known to our system of jurisprudence, had its origin in human needs. It arose as a means of satisfying an end which seemed desirable at the time. At first it was not called a trust but was referred to as a use. John Smith wanted to give Blackacre to his son, Sam, without imposing upon Sam the legal obligations incident to property ownership. John accomplished this by giving Blackacre to X to the use of Sam. By this simple transaction John was carrying out what has always been the primary function of a trust. He was separating the benefits of ownership from the burdens of ownership. That same purpose is being fulfilled in 1959 when a husband bequeaths the major portion of his estate to a trustee for the benefit of his wife and children. This separation of the benefits of ownership from the burdens of ownership is not, and never has been, within itself, an improper or antisocial act. It is a means through which worthy goals may be accomplished. Here again it might be added that probably the most worthy, as well as the most common, objective of the trust is that of providing for families.

It is impossible to determine exactly when the use was first employed as a means of handling property dispositions but it appears to have been in operation not long after the Norman Conquest.[1] In its beginnings it depended entirely upon personal honor, honesty, or reliability. It was not recognized by the courts and did not carry with it any rights or obligations capable of being enforced. When John conveyed Blackacre to X to the use of Sam, John's only assurance that X would permit Sam to enjoy the use was the honesty or integrity of X. A relationship resting upon such a precarious foundation was not suited to commercial purposes, but it was employed on a large scale in family settlements and in making provisions for religious orders. If X could be depended upon to permit Sam to enjoy the property, even though Sam had no enforceable rights in or to that property, Sam was given the benefit of a perfect spendthrift trust. He could avoid payment of debts, avoid his feudal obligations, avoid forfeiture of his lands if he committed

1. The earliest available evidence of any extensive utilization of this relationship occurred a little over three hundred years after the Conquest. By that time the use had become such a common scheme for holding title to land that a statute was enacted restraining its employment as a means of avoiding creditors. 50 EDW. III c. 6 (1376). This would seem to indicate that it had been in process of development from a much earlier date.

treason, avoid the strict rules of law regulating property transfers, and obtain many other advantages not otherwise available to him.

It is not surprising that such a handy device as the use was employed extensively even when no tribunal for its enforcement was available. Neither is it surprising that it came to be used for some unworthy purposes. One such purpose was the avoidance of creditors. As early as 1376 the employment of the use to achieve this particular objective was prohibited by statute.[2] But pressures of another kind were building up. The use was becoming such a popular institution that *cestuis que use* were demanding judicial recognition of their rights. Eventually the chancellor extended such recognition by giving the *cestui que use* a remedy against the unfaithful *feoffee to uses*. In modern terminology we would say the beneficiary was given a remedy against the trustee. The earliest known decree of this kind was handed down in 1446.[3] Armed with this kind of official recognition the already popular use became even more popular. That increased popularity and the granting of official recognition by the chancellor made it increasingly important that the use be more specifically identified in the legal system. The nature of the beneficiary's interest was in need of a more precise definition. At first it had the appearance of a mere chose in action. The *feoffee to uses* or the trustee "owned" the property but the chancellor would compel him to hold it in accordance with the terms of the use. But choses in action were not transferable in those days, and long before the law recognized their assignability the *cestui que use* was permitted to assign his interest in the use. This gave the use a status somewhat above that of a chose in action. At least as early as the 16th century, and probably earlier, the *cestui* was recognized as an alienable interest in property.[4] That alienability gave an added flexibility and, therein, an added utility to the use as a means of holding property.

That added utility can be demonstrated in many ways. Almost from its very beginnings the use was resorted to as a means of avoiding feudal dues. In those days feudal dues constituted a major source of revenue to the crown. The feudal obligation operated as a form of inheritance tax. But feudal obligations were governed by the legal title, or rather by the seisin. The obligation could be avoided by placing the seisin or legal title in a *feoffee to uses* or trustee. Avoiding taxes was as popular then as it is now. By the beginning of the 16th century so much of the land of England was held subject to uses that very little revenue was being realized from that source. The result was that the funds available to Henry VIII were in short supply. In his efforts to "plug the loophole" the distinguished monarch had a statute enacted which appeared to abolish the use.[5] It provided that transactions which theretofore created a use would thereafter give the beneficiary the legal

2. 50 EDW. III c. 6 (1376).
3. Myrfyn v. Fallan, 2 Cal. Ch. XXI (1446).
4. ST. GERMAN, DOCTOR AND STUDENT Dial. II, c. 22, pp. 171-172 (17th ed. 1787) (original edition published in 1518).
5. STATUTE OF USES, 1536, 27 HEN. VIII, c. 10.

title or the seisin. On its face this statute appeared to sound the death knell for the use. But the use had become too important a device to property owners and estate planners for them to give it up without a fight. Within a short time ways were discovered by which uses could be created in spite of the statute. In the meantime additional functions for the use were being discovered. It was out of this development that the modern trust emerged. It is no exaggeration to say that the trust grew out of a statute designed to destroy it.

The important point is that the trust did survive. It survived in spite of legislation designed to abolish it. The reason for its survival is that it was responding to an important human need in such a way that the community as a whole refused to let it go. But the fact that it survived that test is no assurance that it can never be destroyed. It endured then, and it will continue to endure so long as it continues as a convenient and efficient means of handling needed property arrangements. When it ceases to be useful or when it refuses to adapt itself to the forces of social and economic growth, it will destroy itself.

In spite of all the useful and socially desirable functions served by the trust, the fact remains that it can be used to frustrate or hinder rather than to promote economic development. It can be used as an instrument through which a past generation reaches out to control the property arrangements of the living. It is well settled that a man cannot make an absolute disposition of his property, and at the same time, impose upon his transferee a prohibition against his ever selling it. Such a restraint upon alienation is void however short the period of the restraint.[6] If it is undertaken, the transfer is valid but the restraint is invalid. If such a restraint is obnoxious to our public policy, is it made any less obnoxious by using a trust as an instrument through which the restraint is imposed? Let's suppose that our friend John Smith has amassed a great fortune but is convinced that his son Sam will be unable to manage that fortune properly. John leaves his fortune to a trustee with direction to pay Sam the income for life or until Sam arrives at a certain age. John expressly prohibits Sam from assigning or transferring his beneficial interest in the trust in any way. Sam has a valuable property interest, but he is restricted in the things he can do with that property interest. He has a right to receive income, but he is prohibited from selling that right. The fact that Sam would like to cash in on his interest and invest the whole thing in the development of a new business makes no difference.

Should this direct restraint on the alienation of property, which would be void if it were applied to a legal interest, be upheld because the property involved is the beneficial interest in a trust? The English courts answered this question in the negative. The trust was upheld but John's direction that the beneficiary, Sam, could not sell his interest was of no effect.[7] It should be noted that in reaching this decision the trust institution was not attacked. The conclusion arrived at was nothing more than a conclusion that any man who is

6. SIMES & SMITH, FUTURE INTERESTS § 1143 (2d ed. 1956).
7. Brandon v. Robinson, 18 Ves. Jun. 429, 34 Eng. Rep. 379 (1811).

*sui juris* is free to transfer his property interests according to his own wishes, and the fact that the interest concerned is the beneficial interest in a trust makes no difference. It preserves the freedom of the present generation to use, dispose, or dissipate its own wealth according to its own desires free from any control by the past. But when the question arose in the United States, a peculiar development occurred. This country which has always prided itself on such things as a dynamic economy and individual freedom, emphasized the freedom of the past at the expense of the present. John, the deceased testator who had amassed a fortune within his lifetime, but who had gone on to his reward, was permitted to issue his private decree from the grave prohibiting Sam from selling such part of that fortune as had been left to Sam. The intention of the testator had to be carried out.[8] Just why it is necessary to carry out the intention of a testator with reference to the alienability of the beneficial interest in a trust when that same intention may be ignored if applied to a legal interest has never been very clear.

But entirely aside from spendthrift trust provisions imposing direct restraints upon the alienation of the beneficiary's interest, other restrictions upon his freedom of action are sometimes attempted. Suppose John had given his fortune to a trustee to pay Sam the income until Sam arrived at age 35 at which time Sam was to receive the principal. Sam is now 25. He wishes to take the principal now, terminate the trust, and use the principal to buy a home or start a new business. Is there any reason why Sam should not be permitted to carry out his wishes? Again the English courts refused to give effect to such a restraint upon Sam's freedom. If he was the sole beneficiary, and if he was *sui juris,* he was permitted to bring the trust to an end regardless of the wishes of the testator.[9] But an American court, in *Claflin v. Claflin,*[10] held that the wishes of the testator were inviolate. The trust had to continue even though by its very terms no one other than Sam could ever benefit from it and Sam desired its termination. Most American courts have accepted both the *Claflin* doctrine and the spendthrift trust doctrine. In doing so they have permitted the dead hand to place a crippling restraint on property transfers in a way considered too antisocial and uneconomic to be tolerated in the 18th century.

It is surprising that such developments should have occurred in a country where heavy emphasis has usually been placed upon the free movement of property of all kinds and upon the maintenance of the free market as the best way of insuring a continually expanding economy. But what has happened in New York is even more surprising. While other states have debated whether testators should be permitted to impose spendthrift trust provisions upon their beneficiaries, New York has long had statutes compelling them to

8. Broadway National Bank v. Adams, 133 Mass. 170 (1882).
9. Saunders v. Vautier, 4 Beav. 115, 49 Eng. Rep. 282 (1841).
10. 149 Mass. 19, 20 N.E. 454 (1889).

do so. Our statutes,[11] enacted more than a hundred years ago, prohibit the beneficiary of an income trust from transferring his interest. The prohibition in New York does not depend upon the intention of the testator. It is a command of the legislature. It is made a part of the nature of the trust itself. In this state inability of the beneficiary of an income trust to transfer his interest in a trust has been so long accepted that most of us have ceased to question it.

The need for reform in the property law of New York is so generally recognized that it has become almost trite to mention it. That our property law is unnecessarily complicated and dangerously uncertain in its operation is well known. As early as 1886 John Chipman Gray declared that "in no civilized country is the making of a will so delicate an operation, and so likely to fail of success, as in New York."[12] That sentiment has been the almost unanimous conclusion of legal scholars from that day to this.[13] Professor Walsh described the law on perpetuities in New York as "a disgrace to the bar of the state."[14] The thing we have too often overlooked is that most of the complexities about which we complain are complexities brought on by the efforts of the legislature or the courts to make our spendthrift trust provisions workable and tolerable in a free economy. Thus, most of our efforts at reform have consisted of attacks upon the symptoms rather than attacks upon the disease itself.

New York Real Property Law Section 103 and New York Personal Property Law Section 15 are express mandates for the spendthrift trust. By implication they establish the *Claflin* doctrine as well. If the beneficiary is unable to transfer his interest in a trust, it would seem to follow that he cannot terminate the trust even though he is the sole beneficiary. A sensible policy consideration supporting this restriction is difficult to find. If Sam is receiving the entire income from a trust and if he, and he alone, is to receive the principal at age 35, what valid reason can anyone give for not permitting Sam to terminate the trust at age 30 if he wants to? By restraining Sam's liberty it seems that we are tying up property unnecessarily and benefiting no one. New York has attempted to give some relief against this situation by providing that the settlor may revoke a trust which he has established provided he obtains the consent of all persons beneficially interested.[15] No reason has been suggested why a settlor who has retained no interest in the subject matter of the trust should be permitted to revoke it but few will oppose the statute since it at least gives some relief against another unreasonable restriction. In fact it has been construed in a way to permit the settlor to revoke a trust without the consent of possible unborn beneficiaries.[16] But if the settlor is dead the trust

11. N.Y. PERS. PROP. LAW § 15; N.Y. REAL PROP. LAW § 103.
12. GRAY, THE RULE AGAINST PERPETUITIES § 750 (1st ed. 1886).
13. See 5 POWELL, REAL PROPERTY ¶ 807 (1956).
14. From the preface to WALSH, FUTURE ESTATES IN NEW YORK (1931).
15. N.Y. PERS. PROP. LAW § 23; N.Y. PERS. PROP. LAW § 118.
16. Smith v. Title Guarantee & Trust Co., 287 N.Y. 500, 41 N.E.2d 72 (1942).

cannot be revoked even after all possible beneficiaries are in being and consenting to its termination. The result is that there is probably no other state in the Union where the termination of a trust is so easy if the settlor is alive and no state where it is more difficult if the settlor is dead. No sound public policy is being furthered by such self-contradictory rules.

Our statutes authorizing a settlor to revoke a trust provided he has the consent of all persons beneficially interested have done more than create contradictions. No New York lawyer needs to be reminded of the flood of litigation that has been spawned by these provisions. The thing of which we do need to be reminded is that the statutory authorization itself would not have been necessary if common law rules had been applied to the alienability of the beneficiary's interest in a trust in this state. Such rules would permit an adult beneficiary to do as he pleases with his own interest, a result not possible under present New York law. They would extend no authority to a beneficiary or anyone else to destroy the interests of other unborn beneficiaries, a result which is possible under present New York law.

There is scarcely any end to the catalogue of technical, complicated, litigation-producing rules in this state that have been designed for the sole purpose of maintaining some degree of free alienability of property without altering the statutory spendthrift trust. Our spendthrift trust statutes have placed the trust into a strait jacket and made it a thing to be feared. One result of that fear was the intolerable two-lives rule which plagued us for so many years in perpetuities cases. In 1958 the period of the Rule Against Perpetuities was extended from two lives to any number of lives.[17] This change is a welcome one but we are still without the flexibility of a 21-year period in gross which is available in most other states.[18] The principal factor delaying this much needed reform for so many years and the principal factor preventing further reforms is the existence of our statutes against the alienation of the beneficial interest in an income trust. Under existing conditions any extension of the permitted period of the Rule Against Perpetuities means an extension of the permitted period for an inalienable, indestructible trust. But we have given entirely too little attention to the questions why should the beneficial interest in a trust remain inalienable, and why should a trust remain indestructible. If we center our attention upon these items, we might find further reforms possible. And until the Rule Against Perpetuities is further modified, the citizens of New York are denied the freedom, the flexibility, and the simplicity available in other parts of the country. It is the inability of a beneficiary to do as he pleases with his interest in a trust, not the trust relationship itself, that makes the idea of long term trusts repulsive to our notions of a free economy. Suppose the beneficiary of a trust is free to transfer his

17. N.Y. SESS. LAWS 1958, c. 152-53.

18. The only minority provisions possible are the two limited types possible before the amendment. In re Trevor, 239 N.Y. 6, 145 N.E. 66 (1924); Manice v. Manice, 43 N.Y. 303 (1871).

interest if he so desires. Suppose further that he, together with all others beneficially interested in the trust, can join in its termination as soon as they are all identified and all over 21 years of age. Under such conditions there would appear little need for a statute restricting the trust's duration.

Another statute which has the effect of discriminating against the citizens of New York, and which is made necessary by our rules against the alienation of the beneficiary's interest in a trust is our statute against accumulations.[19] In the past our rules against accumulations have been so restrictive that it has been unsafe for settlors to make simple provisions for reserves for depreciation, or for authorizing trustees to make decisions as to what is income and what is principal.[20] New York residents have been deprived of the privilege of employing the accumulation trust as a means of saving on their income tax although that privilege was readily available to the citizens of other parts of the country.[21] These are only a few of many reasonable plans that have been prevented in New York by our statutes prohibiting accumulations of income except for the benefit of a minor and then for his minority only.[22] The 1959 amendment extending the permitted period for accumulations to the permitted period for the suspension of the power of alienation gives considerable relief in these cases.[23] Many of the plans heretofore prohibited may be employed after September 1, 1959. But even under the new law, New Yorkers are still denied the freedom and the flexibility available in other states where a limited period in gross is permitted for the accumulation of income. I do not think the period permitted for accumulations should be any different from the period of the Rule Against Perpetuities. The 1959 amendment makes the two periods the same in New York. That much is desirable. But why can't we add a limited period of time unconnected with lives in both instances? If the reason offered is that under such a rule too much property would be tied up in indestructible trusts, it is time we remembered that trusts would not be so indestructible if it were not for our peculiar laws making them that way.

There are numerous other rules of law in this state made necessary by our legislative requirement that trusts be spendthrift. Our statutes making a limited amount of the beneficial interest subject to the claims of creditors[24] would be unnecessary if that interest were freely transferable. If it were freely transferable, there would be no reason why a creditor could not reach it in the way he reaches any other equitable asset owned by the debtor.

There are also situations where these spendthrift trust statutes manifest themselves in a way to bring about results directly opposed to that apparently

19. N.Y. PERS. PROP. LAW § 16; N.Y. PERS. PROP. LAW § 61.

20. For an analysis of the restrictive nature of the New York statutes see 5 POWELL, REAL PROPERTY ¶ 833 (1956). A reserve for depreciation was permitted in *In re Kaplan's Will*, 195 Misc. 132, 88 N.Y.S.2d 851 (Surr. Ct., Kings Co. 1949).

21. Powell, *Changes in the New York Statutes on Perpetuities and Accumulations: A Report and a Proposal*, 58 COL. L. REV. 1196, 1207 (1958).

22. See note 19 *supra*.

23. N.Y. SESS. LAWS 1959, c. 453-454.

24. N.Y. CIV. PRAC. ACT §§ 684, 693; N.Y. REAL PROP. LAW § 98.

intended by the legislature. Suppose John devises his estate to Sam for life remainder to such persons as Sam shall appoint. At common law Sam's creditors could reach Sam's life estate to satisfy their claims, but they could not reach the remainder so long as Sam did not exercise the power.[25] This was on the theory that the power was not property but merely an ability to get property. However, if Sam exercised the power by appointing to a volunteer, the creditor could reach the estate.[26] It was said that Sam would have to be just before he would be permitted to be generous. Statutes were enacted in New York[27] and elsewhere providing that if the power was a general power which Sam could exercise for his own benefit, the appointive property would be subject to the claims of creditors whether the power was exercised or not. It is doubtful if anyone in the legislature or elsewhere anticipated that this statute might curtail rather than extend the rights of creditors in some situations, but that is exactly what happened. In the case of *Cutting v. Cutting*[28] Sam's life estate was in trust. He had a general power of appointment and the power was exercised. At common law this would have made the appointive property available to the claims of creditors. The Court of Appeals held that the creditors' rights statute did not apply and the remainder could not be reached. The reason for this peculiar result was that the language of the statute was construed as applying only in those cases where the donee of the power could appoint an absolute fee in possession within his lifetime. Since Sam's life estate was in trust and therefore inalienable, it failed to qualify under the statutory provision.

The fundamental objection to our spendthrift trust statutes is that they are wholly out of harmony with the public policy of this state as expressed in other statutory and common law rules. The strong policy which this state has favoring the free alienation of property is manifested in a number of ways. The creditors' rights statute just referred to is one such manifestation. It was designed to prevent the withholding of property from the claims of creditors when the debtor has an absolute power to make it his own. Another manifestation of New York's policy against the tying up of property is our statute empowering settlors to revoke existing trusts.[29] These and other statutes could be cited to indicate the extent to which the tying up of property is repulsive to the public policy of New York. On the other hand the New York statutory restraints upon the alienation of the beneficial interest in a trust have converted the trust itself into one of the most pernicious restrictions known to the law.

There is nothing new in the statement that the restrictive type of trust called for by our statutes is repulsive to our own public policy favoring the free movement and the free economic development of property. This fact has long

25. SIMES & SMITH, FUTURE INTERESTS § 944 (2d ed. 1956).
26. *Id.* at § 945.
27. N.Y. REAL PROP. LAW § 149.
28. 86 N.Y. 522 (1881).
29. N.Y. PERS. PROP. LAW § 23; N.Y. REAL PROP. LAW § 118.

been recognized. The difficulty is that in the past we have not attacked the real problem. Instead of centering our attention upon the removal of the obnoxious restrictions we have enacted laws restricting the duration and the utility of the trust. For over a hundred years we have had, and we still have one of the most crippling, restrictive, and rigid rules against perpetuities known to the common law world. We are told that such restrictions are necessary in this state because of our strong policy against tying up property. It is time we realized that it is our effort to put trusts into a strait jacket, not the duration of trusts, that really ties up property.

The 1958 amendment to the Rule Against Perpetuities and the 1959 amendment to the rule against accumulations are both wholesome improvements in the property law of this state. But further reforms are needed. A detailed study and possible overhaul of our property law as a whole is long overdue. The appropriate agency for directing such a study and for achieving the appropriate reforms is the State Bar. Any such study should begin with an examination of our spendthrift trust statutes. Maybe some recognition of protective trusts in very limited situations will be considered desirable. But the wholesale requirement that all income trusts be spendthrift trusts is indefensible.

I don't need to remind you of how our present laws are driving trust business to our sister states where the trust climate is a little more favorable. When New York residents are forced to establish foreign trusts in order to obtain the flexible estate plans they desire, they are placed at a disadvantage in many ways. The inconvenience involved is a high price for them to pay. In addition to that, they have to leave their local trust officers and seek the services of foreign trust companies. This means dealing with strangers. It also means employing legal counsel in the foreign state and leaving the New York lawyers unemployed.

The citizens of New York are entitled to better treatment. They are entitled to the privilege of establishing reasonable estate plans without leaving the state to do it. There is no reason why the Empire State should remain the most difficult place in the civilized world in which to make a testamentary disposition. There is no reason why the wealthiest state in the Union should force its citizens to leave the state in order to make reasonable dispositions of their wealth. The responsibility for establishing a more favorable trust climate is up to the legal profession. The legal profession of New York is being challenged to meet that responsibility. If the profession fails, New York citizens will remain the most discriminated against inhabitants of the United States, and the lawyers themselves can expect to be deprived of more and more business which would otherwise be theirs.