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SECTION 32. Jurisprudence.

BENEFICIARY AS ONE OF THE SUBJECTS OF THE FIDUCIARY MANAGEMENT AGREEMENT

Abstract: The article analyzes the basic concepts of the essence and nature of the beneficiary; primary intents of the beneficiary are revealed; Civil issues for the formation and implementation of contractual obligations on trust administration of property were identified.

Key words: Beneficiary, fiduciary management agreement, the trustor, discretionary manager.

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Fiduciary Management Agreement is an agreement whereby one party (the trustor) transfers the property to the other party (discretionary manager) for a certain period in confidential management, and the other party undertakes to manage this property in the interests of the trustor or the person (beneficiary) specified by him

The essence of the agreement is expressed in the fact that one person (the trustor) transfers to another person (discretionary manager) property for more effective management in his own interests or the interests of another person (beneficiary). The need for such a transfer can be determined by the lack of experience or inability of the owner to effectively use the property belonging to him; the desire to use professionals for this; as well as his desire, without any special care for himself, to provide material assistance to third parties at the expense of his property, while remaining its owner.

Also, the institute of trust administration of property can successfully be used in order to pool capital. In these cases, several persons - trustors transfer their property into confidential management of one person who uses this property in the interests of all trustors.

The purpose of the agreement is to increase income, property, and maintain it in proper condition by transferring the management to the competent person. By concluding an agreement, the trustor is thus free from management.

The transfer of property in confidential management does not entail the transfer of ownership

of it to the discretionary manager. The specificity of the institute of trust is that the property right in this case seems to be split: one part of the owner's credentials, namely, management and disposition of the property, belongs to one person (discretionary manager), and the other part is entitled to receive benefits from the operation of property including income generation, to another person or persons (trustor or beneficiary). This "split" is appeared in the whole structure of relations connected with the trust. [1, p 70].

The Parties of the agreement are:

- *The trustor* is the person transferring the property to the management of the other party. The trustor may be:

- property owner;
- a person who has the right of lifetime inheritable possession of a land plot;
- authorized government body - in relation to government-owned property;
- enterprise based on the right of economic management - with the permission of the owner;
- family and child support departments;
- testamentary executor and other persons specified in the law.

- *Discretionary manager* –the person performing management in the interests of the trustor or beneficiary. The discretionary manager may be an individual entrepreneur or a commercial organization, with the exception of a state enterprise.

In cases if confidential management is established by the Family and Children Support

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Department or the testamentary executor, the discretionary manager may be a citizen who is not an entrepreneur, or a non-commercial organization, with the exception of the institution. The discretionary manager cannot be a government body or local self-government body.

So, there are two subjects in the legal relationship on confidential management: the trustor and the discretionary manager. In some cases there may be three of them (however, the parties to the agreement are only the trustor and the discretionary manager):

- *Beneficiary* –the person in whose interests the property is managed. It can be any subject of civil legal relations, except for the discretionary manager. If there is a beneficiary in the agreement, then this agreement is in a favor of a third party.(art.430 CC) [2, p. 45].

One of the subjects of trust administration of property is the beneficiary. Benefits in confidential management can receive not only the owner of the property transferred in trust administration of property, but also a third party - the beneficiary. The range of possible beneficiaries under a fiduciary management agreement is very wide, since the agreement is concluded on various special grounds. Thus, the beneficiary in the agreement based on the grounds stipulated by the Civil Code of the Kyrgyz Republic can be (art. 851 CC KR): child (art. 63 CC KR), minor aged 14 to 18 years (art. 851 CC KR); AIP (art.64 CC KR), partially incapacitated (art. 65 CC KR), missing person (art.77, 78 CC KR), heirs (art.1125 CC KR) [3, p. 70; 4, p. 372].

Some authors believe that “the beneficiary, if he is not the owner of the transferred property, is not a party to the agreement” [5, p. 77]. For example, it is puzzling that many authors believe that the trustor, who concludes an agreement in his own interests, becomes a beneficiary. So, Yu.V. Romanets writes that “the trustor himself can act as a beneficiary, establishing confidential management in his favor” [6, p. 81]. According to S.P. Grishaev, “the fiduciary management agreement can be both an agreement in favor of its participants, and an agreement in favor of a third party”. In the first case, the trustor becomes the beneficiary under the agreement, in the second case the person appointed by him” [7, p. 11]. Within the framework of this institution, the legislator clearly determines that the beneficiary, only in case if he is not the owner of the property, under the fiduciary management agreement acquires only the right to demand fulfillment of the obligation in his favor, but not obligations.

Thus, the material term is a clear designation in the agreement of the trustor or beneficiary (clause 1 of article 850 of the Civil Code of the Kyrgyz Republic), in addition, the discretionary manager provides a report on its activities to both the trustor and the beneficiary (clause 3 of article 862 of the

civil code Kyrgyz Republic). However in par. 3 of the clause 4 of the art. 857 of the Civil Code of the Kyrgyz Republic stated that “if the beneficiary is not defined in the contract, the beneficiary is the trustor”. In this regard, we believe that since the trustor becomes a beneficiary under this agreement, it is necessary to apply to him all the rules on the beneficiary under the fiduciary management agreement. Consequently, the agreement must also be terminated in the event of the death or liquidation of the trustor, which contradicts the institution of trust administration of property. In this connection, L.Yu. Mikheeva should be supported, who believes that “the trustor becomes a beneficiary in the agreement, but the rules on termination of the agreement for the above reasons should not be applied to it” [8, p. 71]. Indeed, such reservations cannot be recognized as valid by law when the issue of an extended interpretation of a concept is being the subject of decision. It seems that the legislator also does not give grounds for this. As A. B. Babaev noted, “by recognizing as a beneficiary any person who has at least some property interest in the transaction, we will expand the circle of beneficiaries to unknown limits” [9, p. 113]. One more interesting position of M.I. Braginsky and V.V. Vitryansky regarding this issue: “The idea that in the case of concluding a fiduciary management agreement the owner-trustor does not indicate the beneficiary, the right to receive benefits from the trust administration of property belongs directly to its trustor as such (and not to the trustor as beneficiary) and constitute the content of the uniform trust management obligation property, without forming another (separate) legal relationship between the discretionary manager and the beneficiary (represented by the trustor) ” [10, p. 849].

Thus, the analysis allows us to identify several features that characterize the beneficiary. First of all, his interest is related to income generation. As a general rule, confidential management is carried out by an individual entrepreneur or a commercial organization; therefore, confidential management is made for commercial purposes. In addition to the fact that the interest of the beneficiary is related to the income generation, it is also associated with an increase in trusted property or its preservation. This rule is fixed in paragraph 2 of art. 37 of the Civil Code of the Kyrgyz Republic (disposition of the property in the ward) - “the actions of the discretionary manager should not lead to a reduction in the property in the ward, as, indeed, any other beneficiary under the agreement of trust administration of property” [11, p. 263].

Conclusion

From the above mentioned it can be concluded that the concept of the interest of the beneficiary is not broader than the concept of benefit to the

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beneficiary. Because it is different and suitable exactly to the institute of trust administration of property, the meaning of which lies in the honest management of property, i.e. in activities that are very difficult to manage by other parties of the

agreement. But this activity can be made dependent on the interests of the beneficiary by setting criteria for due diligence, non-observance of which may lead to liability of the discretionary manager.

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