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SECTION 32. Jurisprudence.

DISCRETIONARY MANAGERS ONE OF THE SUBJECTS OF THE FIDUCIARY MANAGEMENT AGREEMENT

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

Key words: Discretionary manager, the trustor, beneficiary, the object, the subject, the fiduciary management agreement.

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Introduction

There are two parties in the fiduciary management agreement: the trustor and the discretionary manager. Other subjects of the fiduciary management agreement (for example, beneficiary) are not parties to this agreement. As a general rule, the parties of an agreement may change, while the agreement itself and its content remain unchanged. The main issue is assignment of claims and transfer of debt. It should be noted that these grounds for changing the obligations of persons do not always apply to relations of the confidential management. The reason of this is the special fiduciary nature of the agreement. When the agreement party changes, this may cause the termination of legal relations, if the relationship between new counterparties is not based on trust.

Let's consider in more detail who, in accordance with the current legislation, can participate as a subject of the fiduciary management agreement.

Materials and Methods

First of all, the subjects of these legal relations are its parties: the trustor and the discretionary manager. It should be noted that the trust administration of property can be established on the basis of any form of ownership - state, municipal or private. Therefore, any owner can act as a trustor. E.A. Sukhanov adds that "trustors can also be not

property owners — subjects of executory and exclusionary rights". [1, p. 11].

Since the object is not only an item of property, but also rights that have monetary value, the founders can be holders of these rights. It was established in the Civil Code of the Kyrgyz Republic that "trust administration of property can be established as a consequence of need for permanent management of the property of the ward" (art. 851 Civil Code of the Kyrgyz Republic) [2, p. 372]. In this case in accordance with art. 73 of the Civil Code of the Kyrgyz Republic, if it is necessary, the management of real estate and movable valuables of the ward, the custody and guardianship agency conclude with the manager defined by this body an agreement on the deed trust of such property. In such cases the trustor is the custody and guardianship agency. Further, according to art. 78 of the Civil Code of the Kyrgyz Republic, "the property of a citizen recognized as missing it is transferred to a person on the basis of a court decision, which is determined by the custody and guardianship agency and acts on the basis of a deed of trust concluded with this agency". As we can see, in accordance with civil law in all the above mentioned cases, the fiduciary management agreement must be concluded by the custody and guardianship agency.

However, as noted by L.Yu. Mikheeva, "today it is almost impossible to realize it, because the extraordinary majority of such authorities are not subject to civil law (for example, legal entities) or do

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not have specific authority to conclude such an agreement on behalf of the municipality [3, p. 120].

In accordance with paragraph 1 of art. 858 of the Civil Code of the Kyrgyz Republic “a fiduciary may be an individual entrepreneur or a commercial organization. A unitary enterprise, a government body and an agency of local self-government cannot be discretionary managers, since the purpose of their activity contradicts the essence of the activity of confidential management” [2, p. 375].

Discretionary manager may be an individual or legal person. In our opinion, taking into account the specifics of the activity and the peculiarities of public liability, the discretionary manager must have a certain property fund in order to be able to fulfill all of his obligations. The minimum amount of such a fund is established by civil law. We believe that this fund should be at least 100 times the minimum wage. From time to time the fiduciary must confirm his ability to pay debts. [4, p. 74].

As it was already noted, discretionary manager cannot be government or municipal authorities, because in some cases the manager is responsible for the transferred property by confidential management agreement. In addition, the purpose of confidential management is, as a rule, to gain profit from it, which contradicts the goals of such authorities.

If confidential management is carried out on the grounds provided by law, then “the discretionary manager may be a citizen who is not an entrepreneur or a non-commercial organization, with the exception of an institution” (par. 2 of the part. 1 of the art. 858 of the Civil Code of the Kyrgyz Republic). The rights acquired by the manager in the course of confidential management of the property are included in the transferred property, and the obligations arising from such actions are exercised at the expense of this property.

Thus, the discretionary manager is an individual or legal entity that can carry out property management activities in the interests of the trustor or beneficiary [5, p. 123].

Based on the literal interpretation of this norm, it turns out that confidential management is the management of property in the interests of the trustor or the beneficiary. But based on genuine interpretation, it is impossible to determine which set of actions (minimum and maximum) belongs to the discretionary manager, and what rights and obligations are transferred to him, if he can dispose of the property, or only management covers ownership and use, and perhaps only use or just ownership [3, p 128].

“The actions of the discretionary manager must comply with the “rule of a rational person”- says V.D. Milovidov, [6, p. 11]. In accordance with this rule, the discretionary manager must make decisions wisely and carefully in accordance with the conditions in which the supposed person will manage

his property and conduct his own business in order to effectively distribute capital, expecting to gain a certain profit, while maintaining the original value of the trust capital.

Based on the foregoing, it can be concluded that the discretionary manager is engaged in initiative activities in the exercise of the subjective rights and obligations of others, which may be aimed at preserving, improving, multiplication of the property transferred to the trust administration of property; his activities are aimed at reducing or preventing losses from the use of this property by exercising the credentials of possession, use and disposal in the amount established by the trustor.

The fiduciary management agreement affects not so much the focused structure of the emerging legal relations, but rather the recognition of income and expenditure in implementation of the relevant activity, the resolution of the issue of property liability. The sign "D.U." means a specific activity, but does not individualize the subject who performs this activity. (par. 3 of the art. 858 of the Civil Code of the Kyrgyz Republic).

Thus, the discretionary manager may entrust the other person to carry out property management on his own behalf, but only with the consent of the trustor, which is specifically stipulated in the agreement; or if such consent is obtained in writing; or, as noted in the law, “he is forced to do so due to circumstances in order to ensure the interests of the other party and is unable to receive instructions from the trustor within a reasonable time. In this case, the discretionary manager is responsible for the actions of his chosen attorney as for his own” (art. 862 of the Civil Code of the Kyrgyz Republic). Attorney of the discretionary manager is the person to whom the discretionary manager entrusts the execution on his behalf of the actions necessary to manage the transferred property.

Conclusion

Thus, we can conclude that the discretionary manager is a “formal” owner who can use the tripersonality of the rights of the owner (if the property is provided in the fiduciary management agreement) only in the interests of the trustor or beneficiary under the fiduciary management agreement and in no circumstances in his own interest. In addition, it should be noted that the scope of validity of the discretionary manager are not explicitly provided for by the law, however, there are certain limits and restrictions applicable to the actions of the discretionary manager [7, p. 222].

Separately, it should be paid attention to the discretionary manager in the person of the custody and guardianship. If the purpose of trust administration of property is to gain a profit by a discretionary manager, then in case of concluding a fiduciary management agreement of the ward (minor,

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incapable), the main purpose of discretionary management is to protect his rights and interests. First of all, it is connected with the essence of the institution of guardianship, which the authors refer to as “the way of filling the capacity of citizens” [8, p. 493], “the implementation of state protection of the individual” [9, p. 143], “the arrangement of the person, the arrangement of his fate and property” [10, p. 103]. Based on this, guardianship and custody are created to protect the ward, and confidential management - to protect his property. This statement is not reflected in practice, since most of the guardians and custodies perform both functions.

Thus, in accordance with the law, the purpose of the custody and guardianship agency is not only to protect property rights, but also personal non-property rights of the ward, as well as to protect the rights. There are cases when a minor orphan may have an enterprise or real property, vehicles, securities and other property that has been transferred to him by law. One of the ways to protect the property rights of the ward, if he owns real estate or other movable valuable, is to conclude fiduciary management agreement, aimed at ensuring the safety of the property of the ward.

In accordance with paragraph 29 of the Custody and Guardianship Regulations, guardians, on behalf of the wards and in their interests, manage the property and valuables of the wards. “They alienate, keep and dispose of the sums of money and other valuables belonging to the ward, make all the necessary transactions on their behalf and in their interests in the manner permitted by the legislation of the Kyrgyz Republic. The custodian and the guardian are obliged to take care of the transferred property of the ward as their own, not to allow a decrease in the value of the property of the ward. The execution of these duties by the custodian and the guardian is carried out at the expense of the property of the ward” [11].

The status of the custody and guardianship agency in such legal relations, as correctly indicated by E.S. Pyanyh, “is dual in its nature: on the one hand, the custody and guardianship agency is part of the mechanism with the proper authorization. On the

other hand, it is a party to the fiduciary management agreement, i.e. subject, deprived of credentials, acting on a fifty-fifty basis in civil law relations” [12, p. 14]. This duality of the status of the custody and guardianship agency determines the specificity of the sphere of rights and obligations under the fiduciary management agreement of the ward. For example, as the trustor, the custody and guardianship agency does not have the right to demand compensation for damage caused to the property by the discretionary manager, as well as to receive property after termination of the confidential management. This can be claimed only by the owner of the property in whose interests the agreement has been concluded.

The requirements for the discretionary manager of the ward are much softer, than for the discretionary manager appointed in a general manner. In this case, it is important to focus on the use of the property, which is ensured by a number of restrictions and additional obligations imposed on the discretionary manager. In accordance with art. 73 of the Civil Code of the Kyrgyz Republic “in the case of exercising the authority by the manager to manage the property of the ward, he is subject to the rules provided for by clause. 2 and 3 art. 72 of the Civil Code of the Kyrgyz Republic” [13, p.74].

Thus, the discretionary manager under the fiduciary management agreement of the person in respect of whom custody and guardianship is established does not have the right “without prior permission of the territorial division of the authorized government body to perform, and the guardianship - to agree to the conclusion of transactions on alienation, including exchange or donation of property of the ward, renting it (rent), for uncompensated use or as a pledge, transactions involving the waiver of rights belonging to the ward, the division of his property or the separation of shares from it, as well as any other transactions entailing a reduction in the property of the ward” [13,p.75]. This norm establishes the increased responsibility of the discretionary manager and provides supplementary guarantees for the security of the property of the ward transferred to the confidential management [14, p.265].

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