

# Problems in Japanese Law Concerning Welfare Uses of Trusts

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In Japan, the population is aging rapidly, and there are the large gaps of the financial asset between elderly people and working generation. Under these social conditions, increasing in the use of “Property Management Trusts” and “Property Transfer Trusts” is anticipated. A settlor wishes to protect the Beneficial Interest (or the Trust Property) in neither trust from the risk of alienation nor bankruptcy. This article examines “Restrictions on Alienation” and “Forfeiture Clauses”.

In UK, a settlor may be happy to give a beneficiary a Beneficial Interest, but may like to avoid that Beneficial Interest being paid or delivered to beneficiary’s creditors if that beneficiary becomes bankrupt. However, the settlor’s wish has two overriding fundamental points. First, the proviso or the condition in a trust agreement is not to be subject to the Claims of the beneficiary’s creditors will be void against public policy in the Bankruptcy Act. Secondly, the proviso that Beneficial Interests shall not be alienated will be void.

Therefore, trusts in UK, so called the Protective Trusts, use the device of a terminable vested interest to create the interests which determine in the event of alienation or attempted alienation by the beneficiary, or if other events occur which bring about a disposition of the interest, such an insolvency.

However, the proviso or the condition in the Protective Trust to prevent the beneficiary's creditors from reaching hers interest raises three issues concerning its effective: there are as follows:

(1) Where a person has created a trust with intend to defraud creditors, the court may make such order as it thinks for restoring the position to what it would have been if he has not created such a trust, and protecting the interests of persons who are victims of creating such a trust.

(2) A person cannot protectively settle his own property on the Protective Trust contrary to public policy.

(3) Where the trust has been created for the purpose of putting them beyond the reach of a person who is making or may at some time make a Claim against him, or otherwise prejudging the interests of such a person in relation to the Claim which he is making or may make, the transaction may become void.

Under the Japanese Trust Act, a Beneficial Interest may be assigned; provided, however, that, "the nature thereof does not permit said assignment", or "the provisions of the Terms of Trust provide for the prohibition or the restriction on assignment thereof". Under the Japanese Civil Code, a Claim's "nature does not permit the assignment" is understood as follows:

(1) Due to the nature of payment or delivery by the obligor, that obligor ought to pay or deliver to the original creditor, and that payment or delivery to third parties except the original creditor cannot achieve an original purpose of the Claim.

(2) Due to the social policy, the obligor ought to pay to an authorized creditor.

At the point of the property, the Beneficial Interests are rights

similar to the Claims. Therefore, the principle of the assignment of the Claims apply to the assignment of the Beneficial Interests.

However, because of the trustee is obliged to administer or dispose of the property in accordance with the Purpose of the Trust, the change of beneficiary has a serious influence on the performance of trustees' obligation. Therefore, the concept of "the nature thereof does not permit said assignment" in the Trust Act is the same as the concept in the Civil Code, but, in the case of the Beneficial Interest, whether the Beneficial Interest has "the nature thereof does not permit said assignment" should be justified in the consideration of the Purpose of the Trust.

In the case of the forfeiture of the Beneficial Interest under the Forfeiture Clauses, there is not obligor's act that may be avoided. The Forfeiture Clauses are not contrary to public policy. Because the settlors have intention to prejudice the beneficiary's creditors with the Forfeiture Clauses themselves, and such clauses don't have the principal purposes.

