

Current Status and Issues of Trusts with Family Members as Trustees (Civil Trusts)

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1. Introduction

Under the current Trust Act, there are high expectations for "trusts with family members as trustees (civil trusts)", which have complementary and alternative functions to adult guardianship and wills, as a means of protecting property without limiting the capacity of the individual. Over the past few years, judicial scriveners and other professionals have been actively involved in the formation and contracting of trusts, and financial institutions have begun to offer trust accounts, with the number of trust accounts increasing rapidly since fiscal 2017.

2. current status of civil trusts

In civil trusts, the most common type of trust is a trust that aims to provide property management and livelihood support to "persons who are unable to properly manage their own property, such as the elderly" as beneficiaries (so-called self-benefit welfare-type first party trusts). Of the civil trusts brought to us by qualified professionals, 97% are trusts to supplement or replace guardianship and 87% are trusts⁽¹⁾ to replace (substitute) wills to designate the successor of property. It is characteristic that the trustees (children of the elderly) often play a leading role in the establishment of civil trusts, and qualified professionals mainly provide consulting services to the trustees in

relation to the establishment of trusts and contractual services.

3. challenges of civil trusts

In the case of trustee-led civil trusts,⁽²⁾ there is an inherent problem whether the elderly, who are both trustees and beneficiaries (hereinafter referred to as "beneficiaries"), have lack of will power and trust intentions or do not understand the contents of the trust.

In addition, since trustees are often non-specialists with limited legal knowledge, there is a concern that the fiduciary duties originally required may be relaxed or that the trust affairs may not be performed. In addition, in the case of a testamentary trust, the trustee is usually the holder of the vested rights, which may lead to conflicts of interest with the beneficiaries.

In order to dispel these issues, qualified professionals involved in the formation of trusts are required not only to explain the trust agreement to be executed, but also to have a high level of professional responsibility to explain the fiduciary duties under the Trust Act and the relationship between the trust provisions and the Trust Act in cases where the trust provisions are different from the provisions of the Trust Act. In this case, a high degree of professional accountability is required.

A financial institution providing a trust account would need to have special administrative rules to deal with deposit claims as trust property, which cannot be dealt with by ordinary deposit administrative rules, and would need to be able to deal with such claims upon the death of the trust party, upon termination of the trust, upon seizure, etc. Currently, there are no uniform administrative guidelines among financial institutions, which makes trustees feel uncomfortable.

4. prospects for trusts

The need for "welfare trusts" is expected to increase in the future. In order to promote the healthy spread of trusts with family members as trustees, it is necessary for qualified professionals and financial institutions to use and cooperate with their expertise to protect beneficiaries. To this end, it must be remembered that civil trusts are not a panacea and do not deal with "personal protection", and that they do not have public supervision. We believe that it is necessary to consider collaboration with voluntary guardianship, which does have public supervision, and in the future the use of the registration system⁽³⁾ for supervision work at the Legal Affairs Bureau.

- (1) Leaders in the formation of trusts / 73% judicial scriveners, 9% lawyers, 8% tax accountants, 8% administrative scriveners (our data at the end of February 2021)
- (2) Hiroki Hachiya, 『Trusts with Families as Trustees』 (Yuhikaku, June 2018, Jurist No. 1520), p. 41.
- (3) It explains the utilization of legal registration systems regarding guardianship in Japan to supervision on the property management of guardians. Hiroshi Takahashi (the society for civil law researches, January 2020, Adult Guardianship Practices no.84, p.75)