

The Rights of Beneficiary in Discretionary Trusts in Japan

Tomoko Fukuda
(Ibaraki University)

Trust arrangements have undergone significant changes in England and the United States due to the effects of an ageing society. In the past, settlors typically restricted a trustee's discretion by specifying terms for the distribution of trust assets. However, the increasing longevity of beneficiaries has led settlors to reconsider their approach. Nowadays, settlors often prefer to grant trustees wide discretion to maintain control over beneficiaries, protect trust assets from third parties and adapt to changing circumstances even after the settlors' passing, such as beneficiaries falling on hard times. Discretionary trusts, which provide the trustees with flexibility and control to appropriately manage trust assets in the best interests of the beneficiaries, have gained popularity in England and the United States. Discretionary trusts will become popular in Japan even if settlors rarely set up discretionary trusts yet. This article will consider discretionary trusts in Japan, especially the rights of beneficiary in discretionary trusts.

When a settlor sets up a trust, beneficiaries acquire beneficiary rights, and trustees are obligated to manage or dispose of trust assets and undertake other necessary acts to fulfill the trust's purpose as specified in the trust deed. Beneficiary rights mean that beneficiaries can receive distributions from trust assets and require trustees to fulfill their fiduciary duties according to the trust deed's provisions. In the case of a fixed trust, beneficiaries possess the beneficiary rights. However, this is not the case for beneficiaries under a discretionary

trust (referred to as “potential beneficiaries” hereinafter). This article explains that potential beneficiaries do not possess the beneficiary rights but the potential beneficiary rights and expectancy rights. Potential beneficiary rights represent future interests that entitle beneficiaries to the beneficiary rights when specific conditions are met (e.g., when a trustee determines which potential beneficiaries will receive distributions). Expectancy rights, on the other hand, are present rights that come into effect when settlors enter into a trust agreement with a trustees. Potential beneficiaries cannot receive direct distributions from trust assets, but they can require trustees to fulfill their fiduciary duties as outlined in the trust deed. In a fixed trust, beneficiaries supervise trustees through beneficiary rights, while in a discretionary trust, potential beneficiaries supervise trustees through expectancy rights.

After the amendment of trust law in 2006, the role of supervisor to trustees have shifted from the court to the beneficiaries. As a result, beneficiaries now should supervise the trustees. However, as previously mentioned, the expectancy rights held by potential beneficiaries are quite vulnerable. Therefore, especially in the case of discretionary trusts, it is imperative to enhance the judicial supervision over the trustees.