

Living Trust for Will Substitute

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Living trust is occasionally settled to distribute a settlor's property to his/her heir apparent instead of making his/her testament. In addition, it is settled for the settlor himself/herself to enjoy benefits of trust in some cases. This paper deals with issues arising from settling the trust complying the purposes above mentioned. The issues are :

- (1) whether the benefit of trust enjoyed by the heir, secondary beneficiary, shall be allowed for the settlor's debt or not. (The primary beneficiary is the settlor.)
- (2) in accounting shares in succession whether the benefit of trust shall be deemed the property succeeded to .

These issues could be solved by examining whether the secondary beneficial interest shall be interpreted as "gift *inter vivos*", "gift upon death" or "individual property" in applying Article 931 and Article 903 of the Civil Code.

As disputing over life insurance contract in favor of a third person, this defining should be examined from three viewpoints :

- (a) whether the secondary beneficial interest is inherited or acquired as individual property unrelated to succession.

If it is inherited, the secondary beneficial interest should be judged gift upon death. I think that it is acquired as individual property because Article 7 of the Trust Law provides *ipso jure* enjoyment of a person designated as a beneficiary.

- (b) whether the time of acquiring the secondary beneficial interest is before the settlor's death or after.

If the interest is acquired before the settlor's death, the secondary beneficial interest should be judged gift *inter vivos*, otherwise gift upon death. I think that it depends on the structure of living trust. In the case of the structure adopting the idea of classification of the interest, the interest could be judged gift *inter vivos* at least.

(c) whether the settlor has not lost substantial availability of the trust property or not.

If he/she has not, the secondary beneficial interest should be judged gift upon death, otherwise gift *inter vivos*. In case the settlor scarcely retains the right to change the secondary beneficiary and loses the discretionary powers to demand payment, the secondary beneficial interest could be judged gift *inter vivos*.

Judging from these examinations, I conclude that acquiring the secondary beneficial interest should be interpreted as gift *inter vivos* in applying Article 931 and Article 903 of the Civil Code. In my interpretation, the settlement of living trust dealt in this paper cannot be avoided by the creditors of the settlor, as long as the settlor has transferred or disposed the property right to the trustee with requirement for setting up against before the settlor falls into debt to his/her creditors who intend to exercise the right to avoid provided by Article 12 of the Trust Law.