

Administrative Issues of Trusts with Family Members as Trustees

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It is important for the trustee to administer trust affairs properly in trust in general. Particularly in trusts where the trustee is a member of the settlor's family (known as family trusts), care must be taken to ensure the proper administration of trust affairs because the trustee may not be sufficiently qualified, and the trustee may be able to benefit from the trust property. Below I discuss three of the many issues involved.

Firstly, it is important to clarify the advantages of keeping money in a trust account, i.e. a deposit account in which the bank gives special treatment in some respects as a deposit belonging to the trust property, to properly manage the money belonging to the trust property. One of the most expected advantages is that it prevents the personal creditors of the trustee from seizing deposits belonging to the trust property. However, it is difficult to avoid the seizure because it is not possible to verify that the seizure is not based on a claim relating to a debt that the trustee is obligated to perform using property belonging to the trust property. Rather, the advantage of holding money in a trust account is that if there is a change of trustee due to the trustee's bankruptcy, death, or the onset of severe dementia, the new trustee can easily take over the money in the account. On the other hand, there are disadvantages such as the fact that some financial institutions do not have such an account and that there are

fees and other costs are required to use the account. It is therefore important to decide whether the money belonging to the trust property should be held in a trust account, taking into consideration the amount of money belonging to the trust property, the extent to which the trustee can be changed, and the burdens associated with using the account.

Secondly, regarding the real property that is part of the trust property, the current practice of real property registration is that an application for subsequent registration that is inconsistent with the record of the registration of the trust will be rejected. Accordingly, if the registration of the trust does not state that the trustee may transfer the real property belonging to the trust property, the transfer will not be registered even if the trustee validly transfers the real property to another party. Therefore, usually, no one will try to acquire the property. Therefore, it is said that the disposition of the real property belonging to the trust property can be effectively controlled by making the contents of the record concerning the trustee's authority in the registration of the trust. However, there are problems with this registration practice, such as insufficient legal and theoretical basis, the result of preventing the trustee from disposing of the real property over which he/she has authority, and the violation of the rules in the Trust Act regarding the validity of acts in violation of the trustee's authority. Therefore, it cannot be supported out of the blue.

Thirdly, in a family trust, the decision as to the content of the benefits to the beneficiaries may be left to the discretion of the trustee. In such cases, if the trustee is also one of the beneficiaries, there is a risk that appropriate benefits may not be provided to the other

beneficiaries because of the conflict of interest between the trustee and the other beneficiaries. However, not a few family trusts in Japan lack the provisions to deal with such a risk. If the settlor wishes to ensure that certain benefits are provided to the beneficiaries, it is important to provide the terms of trust that serve as a basis for limiting the discretion of the trustee, or not to include any terms of trust that would prevent termination by agreement between the settlor and the beneficiary to provide a check and balance on the trustee.