



Original Contribution

FIDUCIARY ASSIGNMENT

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ABSTRACT

In trust, there are two parties, the believer and the believed. According to this, the person to transfer a right to a person he trusts believingly is “believer”, the person to whom this right is transferred believingly is “believed”. The reasons of different types of trust can be made in various forms. These are; trusts made for guarantee, trusts made for smuggling goods from creditor, trusts made because of the inconvenient sentences of the law and trusts made because of some requirements of life.

Key Words: The term trust, believer, believed

DEFINITION

In Roman Law, as an equivalent of “fiduciary operation”, the word “fiducia”(1), in German Law “treuhand or salunann”, and in British Law the term; “trust” is used (2). The basics of these terms constitute a relationship of trust (2). When debtor wants to give a real guarantee for his debt, regardless of the value of the claim, it was the rule to transfer the possession of the property to the creditor (3).

Fiduciary assignment on the other hand, which is not particularly described in Turkish-Swiss Law, is considered as a valid legal status by doctrines and jurisprudences (2).

Fiduciary assignment does not have any meaning on its own. By having a meaning together with the relationship obligations law used, it displays one side of the agreement. The element of fudiciary is included in the agreements that are related with the transfer of a claim or right (4).

There are two parties in fiduciary assignments; believer and believed. According to this, the person to transfer a right or property to another person he trusts believingly is “believer”, while the person or people, for whom this right or property is transferred believingly that make the use of those right or property as they are rights belong to him/her or directly or indirectly for his favour is “believed” (5). The

believed party, as he gained the right fully, is able to do whatever he wishes to do about the right; but, because of the trust relationship between believer and him, he is not authorised to do these operations on the right, that he is able to do. This case can be summarised as “*the believed is able to do whatever he wants but he is not authorised to*”(2).

“Fiduciary assignment” means “*the consensus between the person right of whom will be acquired from another person by transfer (believed) and the person who transfer this right (believer,) which makes the believed to use the right according to the determined specific purpose and guarantee to transfer the right to the believer or third parties when necessary and the believer to trust this guarantee and fulfil the transfer of his right to him*” (6).

Özkaya, on the other hand describes fiduciary assignments as; “*the contracts in which believer (person who confides in) undertakes to transfer a right for a certain period or purpose to believed (fiduciary) and the believed undertakes to use the right according to commands and directives of the believer and transfer back the right to the believer when the specific aim is realised or due date arrives*” (7).

As for Öztürk, the definition of fiduciary assignment is as follows: “*They are the operations in which believer transfers a thing or right under his possession to bring in to the believed in order to create a legal status stronger than the ordinary legal operations that pursue a similar goal and include obligation of transfer back afterwards*” (1).

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Fiduciary assignment is described as; “*Believer to bring in a thing or right that is included in his property to the believed believingly for the purpose of forming a guarantee or to be administered in order to create a more powerful status than legal operations*” (2,5,9). The believer transfers the right of the subject in the agreement for being used in a certain purpose and the obligation of the believed to transfer back the subject of the agreement to the believer depends on the notification of the believer (5).

Apart from this, there is a person who “made use of” the fiduciary assignment that comes together both in believed and the same person. The right or substance brought in to the believed believingly by the believer is “fiduciary subject” (9). The relationship between parties is based on fiduciary agreement. According to this agreement, the believer transfers a right or a thing to the believed on condition that he uses it on a certain form and aim and then returns it when the specific aim is realised. In fiduciary assignments, from the side of third parties, the believed should be considered as the sole proprietor or beneficiary and the operations should be carried out according to this. For this reason, the internal relationships have nothing to do with third parties. It is considered as the property of legal beneficiary or person who the real proprietor is. But here, the most important problem is under what guarantees the believer who transferred the right wholly could get his right back (10).

ITS SUBJECTS

The subject of the fiduciary assignment is constituted by all rights that can be transferrable as a rule. Personal rights that are bound to the person strictly and rights arise from family law are not possible to transfer by operation (7). The fiduciary assignments of security and real estates are carried out by transfer acquisition.

REASON WHY THEY ARE CARRIED OUT

The main reason for fiduciary assignments to be carried out is the feasibility it has to be organised as guarantee for debts or credits he will get for the believer. Fiduciary assignment is carried out because of various reasons. We can categorise them in four groups.

A. Fiduciary Assignments That Are Carried Out For Concealing

The desire of concealing in the nature of human beings is a great reason to carry out fiduciary assignment. Concealing can be made by hiding behind another person. The person, back side of whom one hides oneself, are called “puppet” person (2,7). Let’s exemplify the fiduciary assignments made for concealing.

For example: When A transfers his possession’s property believingly to his friend B for a certain period of time in order to be transferred back, there is a relationship of fiduciary assignment.

For example: A can not get along with B. A wants to buy a goods B sells. So, A wants his friend C to buy that goods from B. According to the agreement between A and C, C will transfer the property of the goods he buys from C to A after he bought them on his behalf.

B. Fiduciary assignments Made For The Purpose Of Guarantee

In our law, fiduciary assignments that are made for the purpose of guarantee are common (7). The means of guarantee are divided into two groups as personal and real guarantees. In personal guarantee, a third party is accountable for the creditor for the debt to be fulfilled besides the assets of the debtor. In the bill of guarantee, the case is similar. But in real guarantee, such as the general assets responsibility of the debtor in real estate deposit, it is supported by the creditor’s right of encashment on a certain thing (1,11,12,).

In the deposit like personal guarantees given to a credit taken from the bank, while the creditor could not almost always prevent the damages that can emerge, it is really difficult to find the bondsman economical status of whom gives trust to the creditor (1, 2,7,13).

Today, difficulty is seen in encashment of real guarantees such as pledge or hypothec. For there is no possibility of immediate collection of the claims, the creditor startles the claimants (2). In return to a debt that is taken from a private person, transfer of a claim or a thing as a guarantee is applied generally. For example, while the debtor should make a hypothec on his real estate in return to the credit he has taken, he forms a contract between him and creditor about fiduciary assignment. According to this, the debtor signs a contract with the creditor about fiduciary assignment that includes his real estate to be given back to him as soon as he pays his debt to the creditor (7).

C. Fiduciary Assignments That Are Made To Smuggle Goods From The Creditor

Debtors who have the risk of legal proceeding may wish to have no property if the creditors want to get their claims by attachment. For this reason, they may want to smuggle goods from the creditors. In order to do this, they may choose to use fiduciary assignment. Thus, they may realise their aim of smuggling goods from the creditors. Besides, they transfer their goods to a person they confide in believingly by fiduciary assignment and when the dangerous condition is no more valid, transferred person transfers back the good he get from the believer according to the fiduciary agreement (1). But an opinion in the doctrine asserts that here not fiduciary assignment but fiduciary simulation is present (13).

D. Fiduciary Assignments That Are Made For The Inconvenient Sentences Of The Law

Sentences of some laws serve as a wall before the goal aimed at. Thus, some individual may wish to be free from this arrangement of the law. For this reason, they may chose to use fiduciary assignment. For example; a foreigner, that can not own a real estate in Turkey, signs a contract with a person he/she trusts in Turkey. According to this contract, he can make this person buy a real estate in order to be given back to him in a further date. Even it is thought that there is a deception against law here, in fact there is fiduciary assignment (7). The operation here is valid. But deception against law is not valid. Even in fiduciary assignment it is aimed at being free from the inconvenient sentences of the law of the operation, there is a violation of an imperative provision of the law in deception against law. The operation is invalid in deception against law.

E. Fiduciary Assignments Made For The Reasons Of The Collection Of The Claim, Administration Of An Asset Or Some Requirements Of Life

Let's explain the reason of fiduciary assignment to be carried out in this way with an example.

Example: A who lives abroad, while he should choose a representative and make him buy a real estate on his behalf, sends money to his representative V and make him buy the real estate for the name of his representative in order to get it back in future. In application,

these kinds of operations are more commonly seen (7).

CONCLUSION:

Fiduciary assignment does not make any sense by its own. It gains meaning by the obligations law. The element of trust constitutes the basics of the agreement. Fiduciary assignment generally is present in contracts related with the transfer of a claim or right. There are two parties in fiduciary assignments; the believer and the believed. All transferrable status rights constitute the subject of fiduciary assignments as a rule.

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