

The Mandatory Basis of Trustee Duties

Huiwen Li*

Liaoning Police College, Dalian, 116013, China

*Corresponding author: lihuiwenlili@163.com

Abstract: *The fiduciary relationship essentially involves the trustee exercising discretion to influence the actual interests of the beneficiaries. The fiduciary duties of trustees are mandatory and can be analyzed from the perspective of their origins. In the trust relationship, this involves the unique aspects of trust property ownership and the rights structure of beneficiaries within the trust system. "Public policy" in trusts is closely related to the nature of the trust property and the resultant trust relationships. The concept of trust within the fiduciary relationship abstractly demands that trustee duties be mandatory.*

Keywords: *Fiduciary duties; Trust trustees; Mandatory nature*

Introduction

The trust relationship falls under private law and is based on the autonomy of the parties involved. In the realm of discretionary rules, what constitutes the expression of mandatory requirements? How can the boundaries of such mandatory requirements be defined? Addressing these questions necessitates an exploration of the legitimacy of the mandatory nature of trustee duties. This legitimacy is not singular or isolated but rather multi-layered and multifaceted. Therefore, this paper aims to explore the legitimacy of the mandatory nature of trustee duties from perspectives including the duties of trustees themselves, the trust relationship, and trust factors^[1].

1. Actual Control of Trust Property by Trustees

In common law systems, a classic description of trust property ownership is that "the trustee is the nominal owner of the trust property, but the real or beneficial owner is the beneficiary; in other words, the trustee holds legal title while the beneficiary holds equitable title." This description is commonly referred to by civil law scholars as "dual ownership" (also known as the dual structure of trust property), meaning that under the trust system, the ownership of trust property is divided into legal ownership and equitable ownership, with the former belonging to the trustee and the latter to the beneficiary.

Scholars in Anglo-American law argue that property constitutes a legal relationship formed through the control and distribution of wealth, i.e., property represents relationships between people (relationships), rather than between people and things. The composition of property includes two core elements: first, the rights and obligations between people; and second, the relation to "things" (both tangible and intangible). The former essentially defines the content of property rights, i.e., the specific composition of "a bundle of rights"; the latter refers to the object of property rights, i.e., property existing on a certain "thing." Viewing rights as property (things) involves the reification of rights in common law. Utilizing legal techniques for property planning is quite common in Anglo-American property law. By using these legal tools, property interests on tangible assets are divided in various ways, forming different types of rights, all of which become objects of ownership. Therefore, the "qualitative division, dual (or multiple) ownership" of Anglo-American property rights often results from the use of these abstract tools. Returning to trust property, ownership of trust property is similarly divided, with possession, management, and disposal rights belonging to the trustee, while the income rights belong to the beneficiary. This creates the image of trust property having two owners. However, in essence, both the trustee and the beneficiary have interests in trust property. Thus, "dual ownership" actually refers to the separation of management and income rights: the former is held by the trustee, while the latter is held by the beneficiary. This separation of property rights means that the trustee is not the actual owner of the property but has duties imposed on them for the benefit of the beneficiary, which constitutes the trustee's obligations^[2].

In civil law systems that have adopted the Anglo-American trust system, trust property exhibits

similar characteristics. In the context of civil law, ownership manifests as exclusive rights including possession, use, income, and disposal. This differs from the Anglo-American property law where various types of rights can be divided and the divided rights can become objects of ownership. Under the principles of property law such as statutory ownership and one property one right, the ownership of trust property becomes an issue that needs resolution by civil law scholars. Some scholars summarize different models of trust presented in civil codes as: the "subject model" (e.g., the Ethiopian Civil Code places trusts under "foundations"), the "property (purpose property) model" (e.g., the Quebec Civil Code considers trusts as purpose property managed only by trustees), the "property rights or real rights model" (e.g., Chile and Argentina place trusts under "restrictions on ownership" and "incomplete ownership" in their civil codes), the "debt model" (e.g., the French Civil Code places trusts under "debts"), and the "special system model" (e.g., the Maltese Civil Code places the trust system between "real rights" and "debts").

From the perspective of trust property ownership, there are currently three main legislative models in the civil law tradition. The first is the "trustee model," where the trustee is considered the owner of the trust property. The core of Scottish trust law is the duality of patrimony. The trustee holds two sets of property—personal property and trust property, which are segregated so that creditors of one set cannot claim rights against the other set of property held by the trustee. The beneficiary holds a personal right against the trustee and can enforce the trust as a special property. The second model is the "beneficiary model." The South African Trust Property Control Act of 1989, Section 57, stipulates that a trust's property is defined by the trust document or testamentary arrangements. According to the trust document or testament, the ownership of trust property is transferred from the settlor to either the trustee or the beneficiary. When the beneficiary holds ownership, the trustee is merely a manager of the trust property. The third model is the "ownerless property model." Article 1260 of the Quebec Civil Code states, "A trust refers to the transfer of property by the settlor to a special purpose property established by them, which is controlled and managed by the trustee." For trust property, Article 1261 states, "Trust property, including property transferred to the trust, constitutes a purpose asset, independent and distinct from the assets of the settlor, trustee, or beneficiary, and none of them have real rights over the trust property." This effectively makes the trust a form of "ownerless property"—where the trustee only holds managerial power.

Thus, while the civil law tradition handles the ownership of trust property differently based on local circumstances, this reflects the uniqueness of the trust property structure. Trustees hold, manage, and dispose of trust property based on the trust agreement but with property rights characteristics. The independence, traceability, unity, and bankruptcy isolation functions of trust property all reflect its ability to transcend the domain of debt law. Consequently, trusts represent a unique legal relationship that combines both property law and debt law effects^[3].

In summary, under Anglo-American property law, trustees have rights of possession, management, and disposal due to the separation technique of trust property rights, but these are limited by the beneficiary's rights, imposing obligations on trustees to act for the benefit of the beneficiary. In the civil law tradition, the trust system breaks the dichotomy of property and debt analysis, incorporating characteristics of both property rights and debt law, with trustees having actual control over trust property and obligations that are mandatory and statutory.

2. The Essence of Trust Relationships

The structure of trust property leads to both the trustee and the beneficiary having rights over the trust property. This dispersion of ownership rights has sparked extensive discussions about the nature of trusts, without reaching a unified consensus.

From the perspective of the beneficiary's rights, common law systems show a divergence between "personal rights" and "property rights." Nonetheless, the fact that trustees have duties to act for the benefit of the beneficiary is widely recognized. For instance, Justice Harlan in the United States held that beneficiaries possess only personal rights against trustees, and these rights correspond to the trustee's obligation to hold trust property for the benefit of the beneficiary. Salmonde argued that the ownership of trust property effectively belongs to the beneficiary, with the trustee being merely nominal—inaccurately described as an agent rather than an owner. Thus, the beneficiary not only has personal rights against the trustee but is also the actual owner of the trust property. Professor Pannat believed that although trusts operate with both property and debt aspects, considering the beneficiary's equitable interest in the continuing trust property, and the beneficiary's right to assert their rights against third parties obtaining the trust property (excluding bona fide purchasers), the law treats trusts as pertaining to

the property domain. Specifically, "the beneficiary's right to the benefits of trust property is related not only to the trustee at the time but also varies with changes in the property." The right of the trust beneficiary to demand that the trustee fulfill their duties also reflects the beneficiary's status as the owner of the trust property. Therefore, the structure of trust property ownership and the design of beneficiary rights imply that the trustee does not have the same ownership status as a true owner. This is the essence and foundation of the trust system and a public policy consideration when exempting the trustee from liability or excluding their obligations.

In the civil law tradition, various perspectives have emerged, including the "property-credit theory," "substantive legal entity theory," "concurrent property-credit theory," "conditional legal acts theory," and "independent legal relationship theory."

Regardless of the theoretical framework, these theories attempt to find a balance for the unique structure of trust relationships, satisfying both the settlor's intentions and protecting the beneficiary's interests. This balance is reflected in the regulation of trustee actions. The trustee's special position in a trust relationship means they must bear certain obligations while exercising their powers. If the trustee's obligations were entirely excluded, the trustee would no longer have any burdens associated with the ownership of trust property, thus becoming the actual owner of the trust property and disregarding the beneficiary's interests. This would eliminate the essence of the trust, namely the beneficiary's right to hold the trustee accountable for improper management of the trust^[4].

3. Trust in Trust Relationships

Trust is a crucial concept with research value across multiple disciplines. It is often associated with concepts such as risk, expectation, and uncertainty. Shumpeter defined trust as "the gamble of believing in the potential future actions of others." Fukuyama described it as "the expectation members have of each other within a regular, honest, and cooperative community based on commonly accepted standards, and this expectation is trust." Luhmann categorized trust into interpersonal trust and systemic trust. The former is based on the personal^[5] credibility of the trusted individual, while the latter is established through the continued functionality of various societal systems (such as judicial, economic, political, and corporate systems).

Consider the trust system. Early trust systems relied on interpersonal trust, based on trust in individuals within a certain circle of familiarity. Initially, trusts were created to preserve family wealth, and it was common to entrust land to trusted friends, relatives, or reputable local gentry. At that time, breaches of trust were condemned by communal rules but did not necessarily violate legal norms. However, as the types of trust property evolved and the settlor's demands and objectives changed, mere trustworthiness was no longer the sole criterion for selecting a trustee. Possessing certain professional knowledge or skills to handle specialized trust matters became a new requirement for trustees.^[6] With the deepening of trust legislation, the role of the trustee has transformed into that of a professional institution. The interactions among trust parties are no longer limited to a small circle of family and friends but have expanded to encompass generalized trust beyond personal trust, shifting towards trust in specialization and knowledge. Systemic trust, as opposed to interpersonal trust, has become necessary. As Durkheim noted, "Strictly speaking, no individual can be self-sufficient." As economic and social development progresses, the world has become increasingly interdependent. In every society, the differentiation of roles, functions, and professions has reached a high degree, "inevitably resulting in the 'organic solidarity' of Durkheim." The division of labor has led to increased cooperation, and the risks and role instability associated with cooperation have heightened the importance of trusting others' reliability. Systemic trust relies on the proper functioning of societal systems, with law being a crucial component of systemic trust. Law universally applies to societal individuals, extending beyond interpersonal trust and providing institutional expectations and guarantees, thus constituting what is known as "cognitive trust." However, beyond treating law as an object of trust, there is also a connection between law and trust on an equal footing. Trust can, in certain situations, achieve effects comparable to law and can be more flexible than legal mechanisms, while law plays a vital role in supporting trust mechanisms by providing formal and strong punitive measures, reducing or even eliminating the incentives for breach of trust.^[7]

As a legal relationship, trust also has a foundation of trust. Historically, modern trusts originated from usufruct systems. At that time, many believers, driven by religious fervor, wished to transfer land to the church, but due to legal constraints, they could only transfer it for the church's use in the form of usufruct. "In usufruct cases involving land, the basis for the right of claim is the entrusted trust, credit, and duty of good faith, which has always been a hallmark of Germanic rights and duties and the source of the church's jurisdiction." Therefore, it can be said that trust inherently carries a foundation of trust. A trust

relationship is a typical fiduciary relationship, and trust plays a significant role within this context. In a trust relationship, the existence of the trustee is predicated on the settlor's trust in transferring the trust property to the trustee for management and disposition. This trust is a crucial feature of optimism in the face of risk. In other words, when facing risk, one party maintains an optimistic attitude towards the decisions of the other party, and this optimism stems from the characteristics of trust itself. In fiduciary relationships, trust is a form of relatively 'thick' trust. The thickness of trust can be evaluated by three variables: first, the range of expected choices, second, the importance of these choices to the trustor, and third, the content of what is being trusted. There are variations in the thickness of trust within trust relationships.^[8] However, as defined in fiduciary relationships, a distinguishing feature from non-fiduciary relationships is the "decision reliance" one party has on the other. The trustor relies on the discretion of the trustee, and the trustee's discretion affects the trustor's interests. Fiduciary relationships can be understood as a form of relatively thick trust for two reasons: first, because reliance on trust is inherently close, and second, because, from the nature of discretion, the trustor's trust in the trustee involves factors such as the trustee's good qualities, experience, intelligence, and character, distinguishing it from thin trust. Returning to trust relationships, these relationships serve various functions and purposes: some are for family wealth transfer, others for shareholding, and others for financial management, and so on. Although the thickness of trust varies across different trust relationships, it cannot be denied that trust exists within these relationships.^[9] Furthermore, the presence of relatively thick trust provides a sense of security to both parties in a fiduciary relationship, enhances the credibility of the trustee, and to some extent, encourages trust and reliance on others to achieve personal benefits. Therefore, it can be said that the smooth operation of the trust system requires the involvement of trust, and the effective functioning of the trust system promotes the development of trust within trust relationships.

Conclusion

From the perspective of the trustee's obligations, the legitimacy of the fiduciary duties of a trust trustee is reflected in the altruistic and moral requirements of these obligations. The compulsory nature of the trustee's duties results from the combination of self-interest with altruism and moral obligations. From the perspective of the trust relationship, the compulsory nature of the trustee's duties stems from the trustee's actual control over the trust property. The foundation of a trust lies in the allocation of trust property rights between the trustee and the beneficiary, with the beneficiary being the true owner of the trust property. If the fiduciary duties of the trustee were entirely excluded, denying the compulsory nature of the trustee's fiduciary duties, the trustee's power over the trust property would no longer be constrained, and the trustee would become the owner of the trust property. This would be contrary to the original intention of establishing the trust system. From an abstract level, the compulsory nature of the trustee's duties can advance the establishment of social trust. Trust, as a fiduciary relationship, inherently involves trust requirements. Clarifying the compulsory nature of the trustee's fiduciary duties responds to the need for trust and facilitates the development of the trust system.^[10]

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