

Personal property management in trust: Implications for Vietnam

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ABSTRACT

With the prosperity of the nation, Vietnamese residents are the beneficiaries of more satisfactory legal frameworks regulating relatively all possible social issues. However, the legal component of personal asset management is considered to be refined. In reality, the existence of disputes and litigations over property management in fields of inheritance has placed pressure on legislators and law practitioners. Citizens who are not able to manage property effectively due to the lack of time, incapacity, knowledge deficiency are requesting an effective legal tool for a secure separation between a beneficial interest and a management right over the same property. At the same time, there exists cases where personal desires in the disposition of property upon death, the management of property, inheritance of family property should be respected accordingly. The demand for an effective personal or family asset management tool in Vietnamese current legal framework has become more urgent than ever, rooting in a fact that existing legislation has not satisfied an emerging need in the daily lives of inhabitants even though global cases have proven trusts as a very efficient method to handle all relevant practical matters. This paper focuses on researching the possibilities of adopting trusts in Vietnam to settle family property management through an analysis of practical demands, major characteristics of trusts, and potential obstacles. Results have shown a high potential of introducing trusts into Vietnam as a result of the fact that the Viet Nam Civil Code 2015 implies an appropriate background for such an introduction. The introduction and adoption of trusts into the Vietnamese legal system will possibly offer enormous benefits to the country's civilians.

Key words: trust law, family asset management, inheritance, Viet Nam Civil Code 2015

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INTRODUCTION

Wrongful property management of guardians to minors and wards has resulted in different disputes and litigations over property management in fields of inheritance in Vietnam. Furthermore, it is common for an individual to give property to someone else such as grandchildren, nephews, or children out of marriage, among others to guarantee his/her enjoyable future without the knowledge or control or impacts in any ways of guardians. In addition, the number of Vietnamese super-wealthy individuals is gradually increasing, entailing a demand for effective financial and asset planning to protect a family, children from possible disputes, bankruptcy, divorce, or other issues. They may want to place property into the hand of professionals or a member of the family whose practical money management skills can allow the property to be invested wisely and sustainably with the purpose of providing lifetime and regular payments to inheritors after the death of the owner. One reason could be the owner's relatives have no experience in property management or have no interest in doing so. Alternatively, there exists a demand of entrepreneurs who have established businesses and

are concerned with the development of the companies which the children will continue to control after an unfortunate divorce.

Although international practices have provided different sorts of trusts as an effective solution to the above-mentioned problems, the current Vietnamese legal framework is alien to the notion. The following parts first describe the current situations in Vietnam where demands for a suitable solution are rising, followed by the adoption of trusts to resolve the respective issues. Finally, suggestions are given to facilitate the adoption of trusts in Vietnam.

THE CURRENT SITUATION IN VIETNAM

Numerous articles in Vietnamese daily newspapers have reported different disputes and litigations over property management in fields of inheritance. Wrongful property management of guardians is the first common case. Pursuant to Viet Nam Civil Code 2015, Part 1 Section 4 (Guardianship), especially Point 3 Article 55 and Article 59 and Part 4 (Inheritance), if a person wants to leave property to wards (minors, legally incapacitated persons, and oth-

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ers, as regulated at Article 47), the guardian appointed by the person who makes the will may hold and manage the property on behalf of them (Point 3 Article 55) and the management of such property is set forth in Article 59. The guardian appointed will hold and manage the assets until the minor is eligible at the age ruled by the law. The guardian is usually a close relative of the persons, but if there is no relative, the communal People's Committee will nominate one¹. High-value transactions in relation to the property of the wards also need the consent of the guardianship supervisor². All regulations seem to strictly protect the rights of wards comprehensively. However, in reality, due to the faint role of the guardianship supervisor and loopholes in laws to restrict the rights of guardians in managing the property of wards as well as the lack of legal separation between the property under guardian's management and his/ her property, especially when the guardian is of parental relation to the ward, it is common to find guardians who, because of their lack of professional knowledge on asset management or lack of legal knowledge or because of any other reasons, wrongfully managed the property of the wards, especially the minors, and consequently harms wards' property, even unjustly usurp the property. Another common case is that creditors of the guardian can easily seize the property under guardianship management except for the fact that the guardian is not the real owner. Typical examples are commonly found in reality. My Lien (in Kim Lien, Dong Da, Ha Noi) was first mistreated by her stepmother, also her guardian after her father's death. All property inherited was dissipated by the stepmother, leaving nothing for her future³. Hiếu (in Láng Hạ, Hà Nội) used to be a happy child under the care of the family. However, after his parents' divorce, after living with his mother, he lived with his stepfather after his mother's death. Finally, he lost all property inherited to the hands of the cruel step father and now becomes a naughty street child as he cannot find support from other relatives, including his father⁴. In another case, although the father did promise to give all of his estates after divorce to their children when they grow up, as the property was still under his title when he died without any wills, such assets were divided equally to his heirs, comprising his second wife and her children, and children of the first wife, which is against his original will and negatively influence the rights of the first wife's children.

Additionally, it is common for an individual to give assets to another to guarantee his/ her enjoyable future without the knowledge or control or impacts in any ways of guardians⁵. For example, grandparents may

want to leave property to grandchildren but do not want their son and daughter-in-law (or their daughter and son-in-law) to involve in property management⁶. They may want to put that property into the hands of people they trust or financial professionals so that the grandchildren and even great-grandchildren do not have to worry about any financial issues in the future, no matter whether their descendants know how to operate a business or not. There are questions about the possibilities of leaving property to children out of marriage without the acknowledgment of such a person's current family and the mother of the mentioned children⁷.

An issue in a recent noisy dispute between the Trung Nguyen Coffee King and his wife in divorce reflects the demand of entrepreneurs who have built up businesses and are often concerned to ensure that the businesses continue to their children. In the divorce case between Vu Dang, the Coffee King, and his spouse, it is said that the wife is worried that if she cannot receive property under divorce division in the forms of company shares, she will lose the status of a major shareholder. Due to the predictable influence of her husband's employees, in the future, her children cannot be involved in managing the business that she and her husband used to build with all passion. Meanwhile, because the husband does not agree on the spouse's way to manage the business, he does not want to let her possess shares regardless of her desire to save the shares for the four children⁸. If shares, which the couples intend to preserve for their four children, can be legally transferred to someone else who will only act for the whole benefit of the four children without being affected by both the wife and husband during business management, they will be likely to be more willing to settle the issue more peacefully.

An increasing number of disputes over management on property left by the deceased has given a popular concern on whether it is better to leave inherited property under the management of appointed guardian, transfer the title to the heirs even though the heirs are not mature and competent (in whatever manner: physically or mentally) and have little or no business experience (in case the property left requires a proper business operation) or whether it is advisable to have another solution for a more effective property management method to make the property lucrative and beneficial to the heirs in the future, after the death of the deceased regardless of the heirs' professional area, business experience, mental and physical state, and interest. While the answer cannot be legally found in the current legal context of Viet Nam, it has been practiced popularly in a number of jurisdictions.

TRUST AS A SOLUTION TO PERSONAL ASSET MANAGEMENT ISSUES

Justification of current situations in Vietnam has shown the necessity of an effective personal and family property management instrument. All the mentioned situations are common worldwide and have been solved effectively.

Given a solution to protect the property of those who may be unable to manage affairs such as infant children, minors, the aged, the disabled, or persons suffering from illness, it is apparent that the Anglo-American law applies accumulation trusts or maintenance trusts which are arrangements whereby property is transferred by the deceased to someone else (a trustee) with the intention that it is administered by such person(s) for the wards' benefits with the direction that the specified person gather, accumulate rather than distribute the income of the property and any profits made from the sale of any of the property until the time specified in the document that created the arrangement⁹. Consequently, the transfer of a deceased's estate to his/ her descendants can be well conducted in accordance with his intention.

Likewise, when an individual wishes to ensure that wealth accumulated over a lifetime is not allocated amongst the heirs in favour of being retained as a fund to accumulate further, with provision for payments to members of the family as the need arises while preserving some assets for later generations or in another case, if people do not want their assets to pass outright to their heirs, whether chosen by them or as prescribed by law and prefer to make more complex arrangements, which may involve providing a source of income for a spouse for life, making provision for the education of children but not letting them have access to capital until later in life or providing a fund to protect members of the family in the event of sudden illness or other calamities, the Anglo-American law provides trusts as the most satisfactory and flexible way of making arrangements of this kind¹⁰. At the same time, with trusts, personal assets can be best and most effectively protected as assets, once transferred to a trust, no longer form part of the settlor's property, thus the trust assets cannot be seized if a settlor encounters financial difficulties.

Not only are trusts beneficial in preserving assets for the inferior in a family or in retaining wealth for family future arrangement and in managing assets for an individual, preserving a person's property or increasing them, they are also helpful in cases similar to the divorce case mentioned in the above part. Common

law trust allows the transfer of a couple's shares in the company to trustees who will act only for the benefit of the children (beneficiaries) and act biasedly to neither husband nor wife. Provision for payments will be made to the children from dividend income, with the trustees retaining the shares until the children reach the age of majority. The spouse can also opt for the provision regulating that even when the children grow up, if they do not want to involve in managing a business, they can still earn the dividend income while the trustee continues to hold shares. This solution is particularly advantageous as the four children have little business experience and the spouses are afraid that the person granted guardianship of children may affect the business operation.

The trust with its unique character stipulated by the duality of ownership which considers the participation of three parties (a trustor/ settlor, a trustee, a beneficiary) and requires the separation of the ownership of property between two parties - a trustee receives a legal title while a beneficiary acquires an equitable title has made it internationally popularized. In principle, as the rights of the settlor to the property on trusts stop once the settlor creates the trust, the legal relationship in a trust is between the trustee and the beneficiary¹¹. According to the common law, the trust does not create a simple, only personal relationship between a trustee and beneficiary in favor of including a property dimension. The beneficiary has a legally protected in rem interest in the trust property itself as opposed to being confined to a personal action against the faithless trustee for breach of his/her fiduciary duties. The utmost essential characteristic of common law trusts is the separation of control and benefit ("dual" or "split ownership")¹² that provide the trustee the legal title which enables him/her to control and distribute the trust property and act as an owner in relation to third parties (legal ownership), whereas the beneficiary has an equitable right to the actual or possible benefit of the trust property under the conditions set out by the settlor (beneficiary or equitable ownership)¹³. This distinction between the legal and equitable estate is the most significant feature of the trust¹⁴, resulting in two important consequences as follows:

- The trust property is separated from the trustee's personal property¹⁵, so that the trustee's creditors cannot seize the trust property in case of the trustee's insolvency or bankruptcy (insolvency effect)¹¹. The trust property is available only for the beneficiaries or the purpose of the trust, not for the trustee's creditors¹⁵.

- Moreover, the beneficiaries equitable interest manifests itself in an equitable property claim: Beneficiaries have a right to recover in rem from third-party recipients who have not given value or in rem or in personam from purchasers who gave true value but had actual, constructive or imputed notice of the trust when acquiring the trust property¹¹. Only bona fide purchasers for true value without notice are protected against the beneficiary's claims¹⁵.

In general, the dual ownership of trust functions through the separation of the right to manage trust property (trustee's power and obligations given by his legal title to trust property and his duties to beneficiaries) and the right to its enjoyment (beneficiary rights in his equitable title). That is also the unique characteristic that usefully solves practical issues related to family asset management concerns above-mentioned.

IMPLICATIONS

Dual ownership with a separation of legal and equitable ownership is currently alien to the Vietnamese legal system. Trusts separate the administration and enjoyment of the property by attributing a legal title to the trustee and an equitable title to the beneficiary. However, fragmentation or dismemberment of property into different estates or interests of different values, each belonging to a different person, has not been approved in Vietnam, a civil law jurisdiction. Currently, no legislations provide room for dividing the legal and equitable ownership of property. Indeed, the unitary and indivisible concept of property puts a strong obstacle to the goal of extending trusts into Vietnam. However, the question is whether the split of ownership is of the utmost significance for the adoption of trusts. In fact, the essence of trusts does not lie in the split of ownership into a legal title and equitable title but rather in the split between the enjoyment and administration of trusts. The recodification of Civil Code 2015 with a lot of innovations has initiated the possibility of the introduction of trusts into Vietnamese law.

Viet Nam Civil Code 2015 Chapter XIV regulates "other property rights" which shows positive groundbreaking innovative decisions from Vietnamese legislators during the process of re-codifying the civil code. The Chapter contains a lot of modifications, changes in comparison to the previous two civil codes, reflecting the multi faces and flexibility of civil lives.

In reality, some people do not have a private property to satisfy their needs. Some people have property but find it unnecessary or are incompetent of directly managing such property. There are also people with proficient financial management skills and people who necessarily have others manage property for the benefit of themselves or other persons. Consequently, to economically and effectively exploit all property for social development, persons with property may grant persons without property some rights over their property which are derivatives of the ownership right (major real right) and are classified as other property rights or limited real rights. Servitudes, usufruct, and superficies are listed in Point 2-Article 159 Civil Code 2015 as other property rights. A usufruct right as regulated from Article 257 to Article 266 of Viet Nam Civil Code 2015 which is, in nature, a right of partial enjoyment over an item, can help overcome this obstacle.

The institution of the usufruct is a legal abstraction allowing the co-existence of two different sets of rights over the same thing. Generally, a usufruct is a system in which a person or group of persons uses the real property (often land) of another. The "usufructuary" does not own the property but does have an interest in it, which is sanctioned or allowed by the owner. In a perfect usufruct, the usufructuary is entitled to the use of the property but cannot substantially change it. The imperfect usufruct system gives the usufructuary abilities to modify the property. In short, the holder of usufruct rights enjoys proprietary rights over his right and there is a split of rights between the owner and the usufructuary. According to Hong Hai¹⁶, applying the usufruct right under the 2015 Civil Code, among many other options, the owner of a property can make decisions of (i) not transferring the ownership to his/her children, relatives, or anybody but granting them a usufruct right over the property of the owner so that they can have income for their whole life or during a definite period of time; (ii) transferring the title to the property to his/her children, relatives or somebody else but reserving the usufruct right until the owner passes away; (iii) transferring the title to one child but granting a usufruct right to another child(ren) for whole life or for a definite period of time; and a shareholder can also choose to (iv) grant someone with better business skills than him/her a usufruct right so that the investment can be best beneficial. All those cases are compatible with a trust when the trustor transfers the ownership right and reserves the enjoyment right to himself/ herself or a beneficiary. The implication of separating an enjoyment right out of an ownership right from the current legislation in Vietnam entails a possibility for the codification of another splits

between management right and enjoyment right of a property. Thus, there are sufficient experiences in Viet Nam allowing the “dismembering” and “co-existence” of ownership rights over the same thing, giving a legal ground for trust adoption.

CONCLUSION

All global best practices have shown that the adoption and introduction of trusts have long been solving all current relevant concerns in personal asset management in Vietnam, and yet, in Vietnam, a trust is an alien notion. Apparently, for people who are not able to manage property or to make arrangements, due to the lack of time, mental or other capacities, legal constraints, and the like, or for cases where it is necessary to realize one’s ideas concerning the disposition of one’s property upon death, the management of property, inheritance of family property and the like require an application of trust into Vietnamese society.

The introduction and adoption of trusts into the Vietnamese legal system will possibly offer enormous benefits to the country’s civilians in meeting their daily demands. Nevertheless, it is essential to deeply understand the notion of trusts and carefully analyze potential obstacles in the current Vietnamese legal context as well as simultaneously consider possibilities of overcoming the given difficulties for a successful introduction and adoption.

INTEREST OF CONFLICT

The author declares that she has no conflicts of interest

AUTHORS’ CONTRIBUTION

The author declares that she is the mere author.

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