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KAPITEL 15 / CHAPTER 15.
TYPOLOGY OF APPROACHES TO UNDERSTANDING THE ESSENCE OF TRUST PROPERTY
ТИПОЛОГИЗАЦИЯ ПОДХОДОВ К ПОНИМАНИЮ СУЩНОСТИ ПРАВА ДОВЕРИТЕЛЬНОЙ СОБСТВЕННОСТИ
ТИПОЛОГІЗАЦІЯ ПІДХОДІВ ДО РОЗУМІННЯ СУТНОСТІ ПРАВА ДОВІРЧОЇ ВЛАСНОСТІ

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Introduction.

The institution of trust property, which has a long history of development in foreign countries, for the national legal system is still in its infancy, due to a number of contradictions and difficulties associated with both scientific and theoretical justification, and the possibility of implementing these provisions in practice.

In connection with the improvement of legislative regulation of trust relations in many countries and the actual elimination of dualism in common law countries in our time there is a significant convergence of trust institutions and trust property (trust management), resulting in the property-legal nature of the trust binding legal elements are becoming more and more obvious. All this has an influential effect on the practice of borrowing these institutions from the continental legal system, in which the recently outlined institutions are becoming more widespread.

15.1. Legislative basis and court practice

The largest intervention of trust property rules in the domestic legal field took place in September 2019, when the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Stimulating Investment Activity in Ukraine" № 132-IX [13] amended the Land Code Of Ukraine, Civil Code of Ukraine, Bankruptcy Code of Ukraine, Laws of Ukraine "On Notaries", "On Banks and Banking", "On Securing Creditors' Claims and Registration of Encumbrances", "On Land Valuation", "On the Deposit Guarantee System for Individuals" "," On state registration of real rights to immovable property and their encumbrances "," On enforcement proceedings ", etc.

Unfortunately, the issue of trust property, despite legislative attempts to regulate this institution, cannot be defined as perfectly regulated in Ukraine. Recently, the legislator is trying to adapt the traditional provisions of the classical system of common law ("trust", "strict settlement", "use upon a use", "seisin", "equitable lien", etc.) to domestic realities, which objectively leads to numerous examples.

inconsistencies and inconsistencies in some legal provisions, which we have already written about [8]. Thus, the right of trust property is determined by the legislator with the help of the following mutually exclusive legal categories:

- A special independent type of property rights (Part 2 of Article 316 of the CCU),
- Derived from the contract of property management institute (part 2 of Article 1029).
- The method of fulfillment of the obligation (Part 1 of Article 546 of the CCU)

This issue is regulated differently by Art. 4 of the Law of Ukraine "On State Registration of Real Property Rights and Their Restrictions" № 1952-IV [14], which establishes a dualistic approach to understanding the right of trust property, as it states that the state registration is subject to separately:

1) the right of trust property as a way to ensure the fulfillment of the obligation (paragraph 1), Part 1 of Art. 4 of this Law),

2) the right of trust property as a real right derived from the right of ownership (paragraph 9, item 2) part 1 of Art. 4 of the same Law).

As we can see, in our time there is no single doctrinal understanding of the nature of trust property. And this is by no means a complete list of inconsistent terminological inversions that have the greatest impact on the practice of the subject, without taking into account the theoretical debates on the appropriateness of the concepts of form / types / types of ownership, which were studied in detail and distinguished by I. V. Spasibo-Fateeve back in 2009, which stressed that such cases, when terminologically combine different legal phenomena, many (public property, corporate property, intellectual property) [18, p. 152].

Indirect evidence of this is the practical side of the application of trust property. The analysis of judicial practice also testifies to the fact that the relations we are currently studying are at the stage of their formation, because a few years ago (before the entry into force of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Investment Promotion in Ukraine" № 132-IX from 20.09.2019 [13]) the courts of our state were clogged with cases of disputes between owners with the subjects of financial services, which at the same time were the trustees of the assets received for management in accordance with previous legislation [4; 6 etc].

Instead, recently the number of cases concerning the relationship of trust property, according to the current civil law, is almost zero. Disputes in which trust relations are currently involved are mainly related to the execution of trust transactions [3; 5 etc] or relate to the implementation of the provisions of the Law of Ukraine "On electronic trust services" № 2155-VIII of 05.10.2017 [1], first of all, on

the use of electronic digital signature, which in no case affects the essence of trust property in the sense of Art. . 5971 of the Civil Code of Ukraine.

15.2. Scientific and theoretical research to outline the essence of trust property

Theoretical research and developments of domestic scholars in this context focus mainly on the concept of "trust", which transforms the discussion of the feasibility of introducing the right of trust property into consideration of the controversial issue of "divided" property, proprietary and so on. According to R. A. Maidanyk, the legal nature of the trust relationship is to recognize the legal title of fiduciary as a specific form of property appropriation, which is formed at the junction of property rights and property rights [9, p. 7].

This correlates with the work of leading foreign researchers in this field (Granthem Ross [15], Chris Montville [11] and others).

In general, in the post-Soviet legal community, the practice of studying certain manifestations of trust property from a proprietary point of view is widespread. Among the first thorough study of this issue was conducted by R. B. Shyshka, who convincingly proved that from the standpoint of today there is an urgent need to find another theory that would more accurately reflect the substantive side of these relations [17, p. 315].

A comprehensive analysis of the above issues in the works of Ukrainian researchers of civil law and general theory of law demonstrate the complexity of the research issue, as well as the difficulties of implementing a foreign legal institution in the national civil law. As I. A. Spasibo-Fateeva aptly noted, trust property is not a property right that has a real nature and cannot exist in the regime of trust property known to English law [18, 152].

Currently, all existing scientific and theoretical approaches of civil scientists to determine the nature of trust relations can be conditionally positioned by three main approaches, namely:

1. ***Obligatory scientific-theoretical approach to understanding the essence and legal nature of trust property law*** (*from the Latin "obligatoria" - obligation, provision*), supporters of which (A.O. Ryabchynska [16, p. 56], N. G. Nekit [12, p. 81], etc.) defend the point of view according to which trust relations, as obligatory, are characterized by satisfaction of interests of the authorized person by performance of certain obligatory actions by the obligated person concerning belonging to the

principal. certain property benefits. For such reasons, a fiduciary, such as a creditor, has received the relevant property from the fiduciary for the specific purpose of enforcing the fiduciary's obligation as a debtor. That is, the essence and purpose of such actions is not the fact of transfer of certain property from the debtor to the creditor (as opposed to property relations, where the transfer of property is a kind of end in itself), but to ensure the fulfillment of obligations under the loan agreement or loan agreement. Thus, a fiduciary relationship in this case will be characterized primarily by its binding nature, which at the stage of enforcement will cover a number of obligations (for example, the obligation not to alienate such property, except in cases of foreclosure or redemption for social needs in the manner prescribed by law).

As a legislative confirmation of their conclusions, supporters of the binding legal approach to understanding the essence of the relationship of trust use Part 1 of Art. 546 of the Civil Code of Ukraine, which stipulates that the right of trust ownership ensures the fulfillment of obligations. Moreover, the main justification for the followers of this approach is the fact that the paragraph on trust property is textually enshrined in Chapter 49 of the Civil Code of Ukraine "Ensuring the fulfillment of obligations."

At the same time, the vast majority of supporters of this approach note that the subsequent use of trust property as a way to ensure the fulfillment of obligations must, first, clearly define the essence of this legal phenomenon and improve its legal regulation [12, p. 81].

2. *Respossessive scientific-theoretical approach to understanding the essence and legal nature of trust property law* *(from the Latin "res" - thing, "possessio" - possession)*, whose supporters emphasize the exclusively material nature of trust (in particular, I.V. Spasibo-Fateeva [18, p. 152], R.A. Maidanyk [9, p. 7], etc.), because, according to them, the powers of the trustee, which is opposed by an indefinite number of persons, are designed according to a scheme similar to the powers of the owner and therefore cannot be anything other than limited property rights. As noted by E.A. Sukhanov, "the transfer of the owner of part or even all of its powers to the trustee, in itself does not lead to the loss of ownership" [2, p. 243], as it acts as one of the forms of exercising the powers of the owner and at the same time is a kind of ensuring the fulfillment of obligations.

In other words, connoisseurs of such an understanding of trust legal relations determine the primacy of the material nature of these legal relations and substantiate their allegations by referring to the content of certain provisions of the Central Committee of Ukraine, namely:

- Part 2 of Art. 316 of the Civil Code of Ukraine, which states that the right of trust property is a special type of property right arising as a result of law or contract;

- Part 2 of Art. 5971 (the creditor becomes the trust owner by virtue of receiving the property in the trust property), etc.

3. *Combinatorial scientific-theoretical approach to understanding the essence and legal nature of trust property law* (*from the Latin "combinant" - to combine, combine*), supporters of which (O.V. Kiriiak [8, p. 23], A. A. Goncharuk [7, p. 98-99], etc.) emphasize that the relationship of trust is currently at the junction of obligatory and material relations and therefore all the arguments of connoisseurs of previous trends are proposed to use not as mutually exclusive or contradictory, but , on the contrary, complementary criteria. Thus, according to L. Yu. Mikheeva, the continental legal dogma carries out an exclusive division of all property rights into real and obligatory (where real rights are intended for securing property to the right holder, and obligatory - for its circulation) and therefore it is wrong to try to oppose property relations to binding ones, which together act as two parts of one whole [10, p. 134-135].

A. A. Goncharuk continues these murmurs, which determines that by its legal nature trust property is a real right that belongs to the trust owner, and is burdened with the obligation to act in someone else's interest [7, p. 98].

Adheres to the latter combinatorial approach and the domestic legislator, who in Part 2 of Art. 5971 of the Civil Code of Ukraine enshrines both the binding and material nature of trust in our country. This is clearly traced by analogy with the right of fiduciary property, which determines the emergence, change or termination of fiduciary relationships.

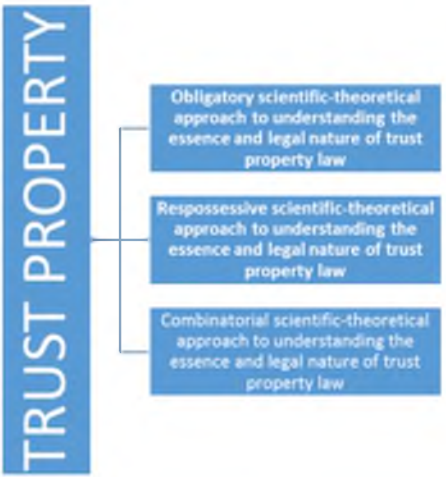
And since for the right of trust property the legislator uses in parallel obligatory-characterizing ("the right of trust property is a way of ensuring fulfillment of obligations") and material-characterizing ("the right of trust property is a kind of property right") components, it is the same can be presumed for a trusting relationship.

It should be noted that our inferences in no way lead to the identification of interrelated, but essentially different concepts of "trust property law" and "trust relationship". Rather, they are characterized by the same features, which in the presence of one of the above concepts with a certain probability will be inherent in the other.

The issue of protection of violated, unrecognized or disputed trusting legal relations is also resolved. On the one hand, the legislator fixes the absolute nature of their protection, which is inherent in property relations (for example, in accordance

with Part 1 of Article 5978 of the Civil Code of Ukraine, foreclosure on the object of trust property is by selling it to any buyer), and on the other hand, it also declares the possibility of applying relative remedies, which is obviously inherent in binding legal relations (in particular, Part 3 of Article 5972 of the Civil Code of Ukraine establishes that the regime of fiduciary property does not apply to fruits, products and income trust property).

Tab. 1.



Conclusions

Summarizing all the above, we consider it appropriate to conclude that the complex legal category of "trust property" is one of those phenomena of civil law, the legislative regulation of which is just beginning to take an orderly nature, which explains numerous examples of regulatory inconsistency and inconsistency. On the other hand, it allows to predict significant scientific-theoretical and practical interest in further research of the outlined issues in order to optimize law enforcement and law enforcement. The main ways to solve the outlined problems are, first of all, the fastest possible unification of the provisions of regulations that directly or indirectly regulate the emergence, change or termination of trust.

We are convinced that our proposed classification of scientific and theoretical approaches to determining the content and legal nature of the institution of trust property can make a significant contribution to the progressive development of domestic science of civil law, as it allows to structure the achievements of leading researchers in this field and optimizes further scientific research.