

BULLETIN

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HOW TO RECOVER A REAL ESTATE TRANSFERRED ON THE BASIS OF MUTUAL TRUST: FIDUCIARY TRANSACTIONS AND PROOFS



Fiduciary Transactions, which are frequently encountered in daily life, are transactions based on trust but carrying significant legal risks. This bulletin provides a comprehensive guide to fiduciary transactions by examining their purpose, types, validity, and risks.

What is a Fiduciary Transfer?

Fiduciary Transaction is a contract whereby a person transfers an item or right they own to another person for a specific purpose, with the intention of getting it back. Although this transfer may appear to be a sale in the land registry or other official records, the parties agree in a confidential agreement between them that the transferee will hold the subject matter or right and return it to the original owner when certain conditions are met.

In settled case law of the Court of Cassation, a fiduciary transfer is defined as *“transactions involving the transfer by the transferor of an asset or right within their property to the transferee for the purpose of creating security or management, and the transferee’s use of the transferred asset in accordance with the terms of the fiduciary agreement, with the asset being returned to the transferee once the purpose has been fulfilled.”*

In Doctrine, it is defined as *“the legal relationship whereby a transferor transfers the value of his or her own property to the transferee for the purpose of management or as security, to be returned to the transferor at the end of a specified period or upon fulfilment of the purpose.”*

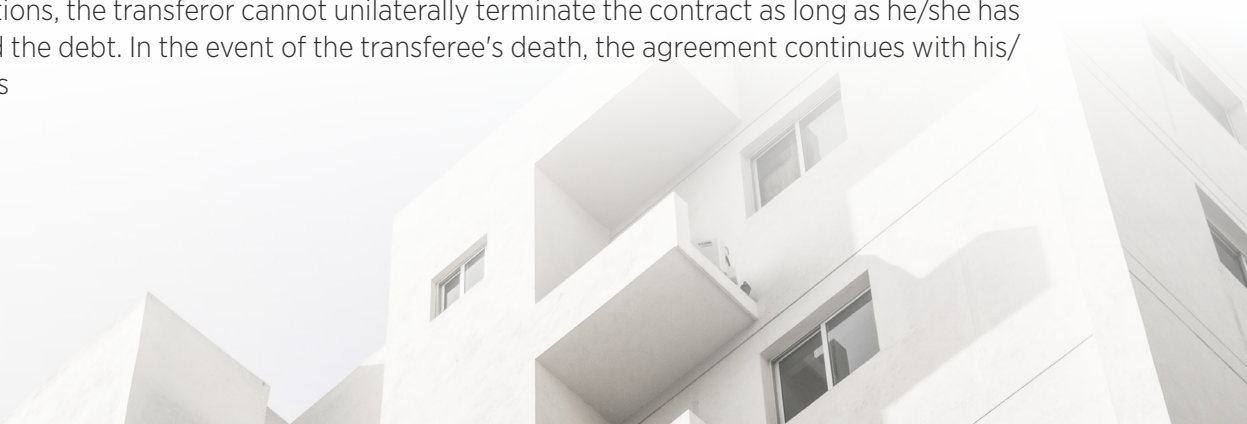
In this context, it should be noted that fiduciary transactions consist of two elements. The first element of a fiduciary transaction is the fiduciary agreement, and the other element is the act of disposal. In other words, there must be an agreement between the parties that the transferred item or right will be returned, and within this scope, the act of disposal must be carried out so that the relevant item or right is transferred. In this way, a fiduciary transaction is completed.

Who Are The Parties To A Fiduciary Transaction? What Are The Types Of Fiduciary Transactions And Which Legal Provisions Are Applicable?

In a fiduciary transaction, there are two parties: the transferor and the transferee. The transferor is the person who transfers property or rights with the intention of reclaiming them, while the transferee is the person who holds the transferred property or rights and undertakes to return them when the necessary conditions are met or the agreed period expires. Fiduciary transactions are divided into two main types according to their characteristics:

- a. **Basic Fiduciary Transactions;** are carried out in the transferor's interest. These are transactions in which the transferee holds the property or right subject to the transfer in the transferor's interest or in the interest of a person designated by the transferor and uses it in accordance with the transferor's instructions. In these transactions, the transferee acts as an mandate and uses the property in accordance with the transferor's instructions. The provisions of the contract of mandate apply by analogy to these transactions. Examples of this situation include the transfer of immovable property to someone for management or the endorsement of a bill of exchange to someone for collection. The transferee, acting as a mandate, collects the endorsed bill of exchange on behalf of the transferor and is obliged to pay the amount collected to the transferor. In such fiduciary transactions, the transferee is obliged to manage the property with care, render accounts to the transferor, and return the thing or right transferred to transferor upon termination of the relationship. The fiduciary agreement may, as a rule, be terminated at any time. Furthermore, the fiduciary agreement shall terminate upon the death, bankruptcy, or incapacitation of the transferee.
- b. **In Mixed Fiduciary Transactions;** the interests of the transferee are more prominent. In these transactions, the transferor transfers ownership to the transferee as security for a debt. The aim is to place the transferee, who is the creditor, in a stronger position compared to other types of security. The transferee has the right to retain the property until the debt is fully repaid and even to sell the transferred item upon expiry of the term to recover the debt. The provisions governing movable and immovable pledges and the provisions relating to mandate agreements apply by analogy to the extent that they are compatible with the fiduciary relationship.

The transferee is obliged to carefully preserve the property and not to dispose of it for purposes other than collateral until the debt is paid. The subject of the agreement is converted into cash if the debt is not paid, and the debt is settled from this amount. In such transactions, the transferor cannot unilaterally terminate the contract as long as he/she has not paid the debt. In the event of the transferee's death, the agreement continues with his/her heirs



For what purposes are fiduciary agreements made?

In practice, the purpose of fiduciary agreements may be to conceal assets, provide collateral, to evade creditors, to circumvent unfavourable legal provisions, to collect a debt, or to manage an asset.

The most common fiduciary transactions encountered in daily life are those carried out for the purpose of providing credit and collateral. In such transactions, a person transfers, for example, a property to another person as collateral for a loan received from that person, by registering the sale in the land registry. Although the visible transaction is the sale of the immovable property in the land registry, the parties agree in their fiduciary agreement that the immovable property will be returned upon repayment of the debt. Thus, the creditor holds the ownership of the immovable property as collateral, which is stronger than a pledge right, to secure their claim.

Under such a fiduciary agreement, the debtor undertakes to repay the creditor, and the creditor undertakes to return the property to the debtor upon repayment of the debt.

In practice, it is frequently observed that fiduciary agreements are entered into for the purpose of concealing assets from creditors. Debtors seeking to conceal assets from their creditors have certain legal transactions carried out in their own account by others. In such cases, a fiduciary agreement exists between the person seeking to conceal the assets and the person carrying out the transaction on their behalf. This gives rise to the concept of a nominee (nam-ı müstear). The nominee is the person acting on behalf of the hidden individual and who is ostensibly the owner of the property or right. At this point, in accordance with case law established by the Court of Cassation, nominee claims are considered as a preliminary issue in annulment of disposition cases.

Are fiduciary transactions legally valid?

In accordance with Court of Cassation judgements, it is undisputed that fiduciary agreements are valid between the parties insofar as they reflect their true intentions and the purpose of the agreement, and that they grant the parties the opportunity to claim their relative rights under the Law of Obligations. Furthermore, there are no validity requirements for fiduciary agreements, and as a rule, these agreements may be made either in writing or verbally.

However, a special situation applies to fiduciary transactions relating to the transfer of immovable property. Essentially, contracts relating to the transfer of immovable property are subject to the requirement of formal validity and must be drawn up in the form of a deed registered with the Land Registry.

Pursuant to Article 16/2 of the Land Registry Regulation (Tapu Sicil Tüzüğü), the registration process cannot be subject to any condition that would invalidate it. Therefore, land registry offices consider the return clause in the fiduciary agreement to be invalidating and do not include such clauses in official contracts. This situation leads individuals who wish to make their immovable property the subject of a fiduciary agreement to transfer the property by presenting it as a sale transaction in the land registry.

In this case, the view arises that contracts formally executed in the land registry are invalid because they do not reflect the true intentions of the parties, and that the hidden fiduciary agreement is invalid because it does not comply with the formal requirements. This view would make trust transfers of immovable property unenforceable.

The Court of Cassation, however, recognises fiduciary agreements not registered in the land registry as valid in order to give effect to the institution of fiduciary transactions; however, it requires that the fiduciary agreement to be proved in writing.

Why are the fiduciary transactions risky?

Although a fiduciary agreement is a contract based on trust between the parties, it carries serious risks in terms of its legal consequences. The greatest and fundamental risk is that the ownership of the right or property transferred by the transferor under the fiduciary agreement actually passes to the transferee.

Therefore, any disposal transactions carried out by the transferee in relation to the transferred property shall be valid. This is because the restrictive provisions in the fiduciary agreement do not bind bona fide third parties. This situation poses serious risks for the transferor.

The first risk is that the transferee may act in breach of the fiduciary agreement and transfer the property to a third party. In this case, if the third party is acting in good faith, the benefit they have obtained by relying on the land registry entry will be protected. In this case, the only recourse for the transferor would be to file a claim for damages against the transferee for breach of contract.

The doctrine, however, argues that, contrary to the Court of Cassation's view, whether the third party acted in good or bad faith makes no difference in terms of the return of the property. According to this view, even if the third party acted in bad faith, the property is acquired. The transferor may only have a claim against the third party under the provisions governing tort.

Another risk is that the transferred property may be subject to compulsory enforcement and seized or converted into cash due to the transferee's debts. This is because, provided that the principle of good faith in Article 2 of the Turkish Civil Code remains reserved, the trust agreement does not bind the transferee's creditors who are third parties.

Another significant risk is the death of the transferee. In Basic Fiduciary Transactions in which the provisions relating to the mandate contract are applicable, the fiduciary agreement automatically terminates upon the death of the transferee. In Mixed Fiduciary Transactions, however, the fiduciary relationship will continue with the legal heirs of the transferee, and the transferred property will pass to the transferee's legal heirs. If the legal heirs are unaware of the fiduciary agreement or refuse to comply with it, it becomes very difficult for the transferor to recover the property. In any legal proceedings, the burden of proof regarding the fiduciary transaction lies with the transferor.

Consequently, although the transferor has transferred the property or right to the transferee for the purpose of its return under the fiduciary agreement, the transferor remains at risk because the transferee acquires ownership of the property or right subject to the agreement.

If the property subject to the transaction is not returned, what can the transferor do?

If you have transferred immovable property under fiduciary agreement and the property is not being transferred back to you, a legal action can be taken. The lawsuit to be filed in this case is a compel registration lawsuit pursuant to Article 716 of the Turkish Civil Code. This case is based on a "personal right" arising from a fiduciary agreement.

In some judgements of the Court of Cassation, it is accepted that a lawsuit for correction of wrongful registration may also be filed. This view is legally controversial as it conflicts with the fact that the fiduciary transaction is valid. This is because wrongful registration arises in cases where the actual legal situation is not reflected in the land registry. Since fiduciary transactions are valid, the registration made in the name of the transferee in the land registry is correct. Therefore, the main lawsuit that should be filed in disputes arising from fiduciary transactions is the compel registration lawsuit.

How to prove a fiduciary transaction?

With regard to disputes arising from fiduciary transactions, the main issue concerns the proof of the fiduciary agreement. The most important basis in this regard is the Court of Cassation's 1947 Decision on the Unification of Conflicting Judgments. According to this decision, a fiduciary relationship can only be proven by written evidence.

Written evidence may be a contract bearing the signatures of the parties, or it may be any document indicating the existence of a fiduciary relationship and originating from the defendant. However, in accordance with case law established by the Court of Cassation, a fiduciary transaction may be proven by any means of evidence, including witness testimony, provided that there is a written evidence within the scope of Article 202 of the Code of Civil Procedure.

It should be noted that there is no special limitation period for claims arising from a fiduciary transaction. Therefore, in accordance with the Law of Obligations, the period for bringing an action is the general limitation period of ten years.

Summary

Although fiduciary transactions may appear to be a practical solution in commercial life and daily life, these transactions involve serious legal risks. It is important to remember that a fiduciary agreement involves a transfer of property. This situation poses a risk for the person who is transferor of an item or right based on a relationship of trust. Considering that written evidence is required to prove fiduciary transactions, verbal agreements should be avoided and a written contract must be drawn up.

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