Studia z zakresu nauka prawnoustrojowych. Miscellanea 2020, tom 10

ESTATE ADMINISTRATION IN THE CZECH REPUBLIC AFTER THE RECODIFICATION OF PRIVATE LAW – DEFINITION OF BASIC INSTITUTIONS

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Summary: The estate administration is without question one of the main issues following the recodification of private law that resulted in the foundation or renewal of traditional institutes. Among these institutions is undoubtedly the trust fund. It is a specific type of trust and was introduced as a renewed institution into the Czech body of law by Act No. 89/2012 Coll. the Civil Code, which has been in effect since 1st January 2014. Following the recodification, the other institutions involved in estate administration also include foundations, endowment funds, associated funds, investment funds or specified gifts. However, uncertainty has emerged in the interpretation of certain legal provisions with regard to the more austere legislation and still absent judicial practice. This article attempts to outline the selected forms of administration *inter vivos*.

Key words: estate administration, trust fund, foundation, endowment fund, associated fund, investment fund, founder, administrator, owner, recodification of private law.

Introduction

The present article examines the current issue of the forms of estate administration in the Czech Republic following the recodification of private law. The many unexamined possibilities that remain insufficiently analysed and still present in our body of law because of the recodification of private law have played a major role in determining the main topic, and many people are unable to distinguish the differences in estate administration. For the purposes of the article in question, we will examine selected forms of estate administration *inter vivos*.

The forms of the estate administration compared below have a wide variety of characteristics. The main unifying criterion is the fact that they are formed *inter vivos*. However, it must be remembered that even the foundation of estate administration in the case of death (*causa mortis*) may be incredibly beneficial for the founder. This kind of administration may be, for example, in the form of life insurance and a trust fund *causa mortis*.

I. Trust fund

A trust fund is among the so-called renewed legal institutions that was re-enshrined in the body of law of the Czech Republic. A *mortis causa* gift, which we may consider, with slight exaggeration an institution that resembles the more recent trust fund, already appeared in the territory of the Czech lands in the 16th century. This form of trust fund was only permitted under the authority of a given king, and its aim was to keep an estate intact. In subsequent years, this institution worked on the basis of testament that appointed one administrator to take care of the estate regardless of its transfer within the scope of further inheritance. The estate, because of this, was then protected against further division, burdening or alienation. On 3rd July 1924, this trust was, as a vestige of the privilege of aristocratic status, abolished and had to wait a full 90 years to be restored[1].

The trust fund, the so-called trust-like institution, appeared in domestic legislation on 1st January 2014 by means of Act. No. 89/2012 Coll. the Civil Code, as amended, (hereinafter referred to as the "CC"). In the past, the institute of the trust fund was primarily regulated by Anglo-American law. It started gradually entering Europe in recent years. If the Czech body of law is a part of the continental legal system and is thus based on the corresponding law, suitable legislation in another body of law that would somewhat fit the Czech legal milieu is sought. The ideal counterpart has proven to be, according to the Explanatory Memoranda to the new Civil Code[2], the Civil Code of Québec from 1994 (hereinafter referred to as the "CCQ")[3]. Given its colonial past, Canadian law is based partially on common law and partially on continental law (French colony, Quebec). The CCQ contains the regulation of trusts in Articles 1260 to 1370. The difference in the scope of the regulation of this institution may seem quite remarkable to us. The Czech legislation contained in 27 paragraphs is, in layman's terms, a "poor cousin" in comparison with the Canadian Civil Code, which regulates trust funds in 110 articles.

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1 More on this topic B. Bednatikova, *Svěřenecké fondy: institut pro uchování a převody rodinného majetku*, aktualiz. vyd. Wolters Kluwer, Praha 2014, p. 184.

2 Důvodová zpráva k NOZ (konsolidovaná verze). Nový občanský zákoník [online]. Ministerstvo spravedlnosti, 2013 – 2015 [cit. 8. 5. 2018], p. 347.

3 Civil Code of Québec. ÉDITIEUR OFFICEL DU QUÉBEC. Publications de Quebéc [online]. 2015, [cit. 8. 5. 2018].

It is possible to agree with the contention of *Kateřina Ronovská*[4], who concluded that the choice of Canadian law was at least very "surprising". The reason for this "*surprise*" is that a component of continental law is also Liechtenstein legislation, which adapted the institution of the Anglo-American trust into European law back in 1926. Thanks to many years of existence, it can be assumed that Liechtenstein already has at its disposal a relatively extensive judicial practice that would be applicable even in the Czech legal milieu.

The regulation of trust funds is also covered in Sec. 148 *et seq.* in Act No. 240/2013 Coll., on Investment Companies and Investment Funds, as amended (hereinafter referred to as the "AICIF"), as one of the forms of the fund of collective investment. The AICIF replaced the earlier Act No. 189/2004 Coll. on Collective Investment. Although, under Sec. 677, the AICIF came into effect on 19th August 2013, it covered many institutions that built on the then still ineffective civil law. The legislator was forced to regulate the relation between the CC and the AICIF in the interim, which meant that Sec. 664 of the AICIF, which stipulated that provisions concerning a trust fund, among others, do not apply until Act No. 89/2013 Coll. of the Civil Code comes into effect, became a part of the legislation.

Under the provisions of Sec. 1449 of the Civil Code, a trust fund may be established not only for private purposes, but also for public benefit. This definition of the purpose is very broad, even though the act in the second paragraph narrows the private purpose only for the benefit of a definite person, in honour of his/her memory, for a business activity or for investment for the purpose of making a profit under the Act on Investment Companies and Investment Funds. The allocation of property into a trust fund to protect a family estate may serve us as an example of a trust fund with a private purpose. This is in fact an allocated estate that will be, for example, in the hands of a professional administrator for the future. Thus the possibility of maintaining property even when the founder's descendant lives a dissolute life and the founder hopes that he/she will lead a more settled life or have further descendants. These could then become beneficiaries of the trust fund in the future. Another relatively ordinary purpose is then to attain profits when the trust fund will develop business activities[5] so that it will attempt to use the trust fund for further enlargement[6].

The purpose of a trust fund must be defined from the outset of its establishment, i.e. in the phase when the founder creates the statutes. A trust fund is then often established to support science, culture, etc. Though there are some similarities

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[4] K. Ronovska, *Nadace (a trusty) v kontinentální Evropě – pohled funkcionální,* „Obchodněprávní revue" 2012, roč. 7, č. 8, s. 202. Dále i RONOVSKÁ, Kateřina. Foundations in the Czech Republic: Yesterday, Today and Tomorrow. In PRELE, Chiara. *Developments in foundation law in Europe*. Vyd. 1. Dordrecht: Springer, 2014, s. 35 – 49.

[5] K pojmu podnikání a podnikatel srov. M. Kohout, *Obchodní právo I. Obecná část. Soutěžní právo. Insolvence. Duševní vlastnictví,* 1. vyd., Univerzita Jana Amose Komenského, Praha 2016, s. 157.

[6] K. Ronovska, *Nadace (a trusty) v kontinentální Evropě – pohled funkcionální*, „Obchodněprávní revue" 2012, roč. 7, č. 8, s. 202.

between a publicly beneficial trust fund and publicly beneficial persons, it cannot be overlooked that trust funds do not have and cannot obtain the status of a public benefit that would or could provide to those funds that would receive the status some advantages in the form of state support, for example.

Trust funds fundamentally differ from foundations and endowment funds in their purpose, which is grounded in the possibility to invest and do business.

II. Foundations and Endowment Funds

Foundations, in contrast to trust funds, and their vague regulation (necessary to mention also in the past) have been found in our body of law for centuries. The legislation for foundations in the Czech lands during the Austrian-Hungarian Monarchy was established by the edict of 21st March 1841 called *Das Hofkanzleidekret* (The Chancellery Edict). Following the dissolution of the monarchy and foundation of the Czechoslovak Republic, Act No. 11/1918 Coll. on the Establishment of the Independent State of Czechoslovakia, as amended, was passed. This act transferred the body of law of the Austria-Hungary to the newly formed body of law of Czechoslovakia. Initially a temporary measure, it was in effect for almost two decades. In addition, the treaty of *Saint Germain*, which contained, among other things, the arrangement of relations between Czechoslovakia and the former monarchy undoubtedly had an impact on foundations. During the communist era, foundation law lost its significance and was for a long time shifted to the periphery of concern. It made its return during the 1990s, especially in 1997 when it became legally regulated by Act No. 227/1997 Coll. on Foundations and Endowment Funds, as amended (hereinafter referred to as the "Foundation and Endowment Fund Act")[7]. The Foundation and Endowment Fund Act was much stricter in comparison with legislation contained in the Civil Code. Since regulation loosened in European countries in the period when the previous act was in effect, there has been a gradual loss of interest by potential founders in establishing foundations in the Czech Republic[8] because of the strong restriction against the will of the founder.

Following the recodification of private law, the Foundation and Endowment Fund Act was repealed. Foundations were thus transferred over to Sec. 306 *et seq.* of the Civil Code and endowment funds to the provisions of Sec. 394 *et seq.* of the same code. Both institutions were then included into the section covering foundations. We may characterise these institutions briefly as "*special - purpose estate associations endowed with legal subjectivity (personality)*"[9].

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[7] K tématu též K. Ronovska, Fundace. In LAVICKÝ, P. a kol. *Občanský zákoník: komentář*, Vyd. 1, C.H. Beck, Praha 2014, s. 1309.

[8] K. Ronovska, *K postavení zakladatelů nadací a nadačních fondů po rekodifikaci soukromého práva*, „Právní rozhledy" roč. 2015, č. 22, s. 767.

[9] B. Havel, K. Ronovska, *Nové fiduciární správy majetku po rekodifikaci soukromého práva v České republice. Fond svěřenský, nadační a přidružený*, [in:] L. Tichy, K. Ronovska, M. Koci, Trust a

Under the provisions of Sec. 3049 of the Civil Code, foundations and endowment funds will be considered established in accordance with the new legislation for foundation and endowment funds that were established in accordance with the Foundation and Endowment Fund Act. In case of the need of regulation of a founding legal transaction, the founder should have the opportunity to adjust them within two years of the Civil Code coming into effect.

Following the recodification of private law, the traditional conception of foundations and their existence only in the public interest were abandoned[10]. At present, the possibility to establish all legal entities, both in the public and private interest, is provided in Sec. 144 para. 1. Recently, the existence of socially and economically useful purposes is thus provided to foundations thanks to the recodification. These purposes are grounded *ex lege* in supporting the general welfare or in supporting a definite range of entities. However, it is not possible to speak of foundations being able to develop business activities in a fully unrestricted manner. They may only be undertaken as a secondary activity, and all their "income" must be used to support the main purpose. Furthermore, the foundation purpose is restricted even by the provisions concerning the provision of endowment contributions that may be provided to its founder without reasons worthy of "special consideration". Thus, a foundation is considerably different from a trust fund, which can be established for commercial and profit-making reasons, which are its main activities. However, foundations are generally formed above all for the purpose of public benefit and philanthropy.

The valid legislation allows for changes in the foundation to the already set purpose. If the purpose is a fundamental feature of the foundation's charter, it is necessary that the founder precisely defines said purposes in it and also set the possibility for potential changes to the purpose(s). How the founder defines the purpose in detail is up to him/her. However, it is important that he/she thinks over the means of decision-making, i.e., whether he/she wants to decide on all matters him/herself, or whether he/she leaves some possible decisions to a third party or the board of directors. The purpose of the foundation may also be changed by a court, if the founder does not stipulate in the foundation charter the right to change the purpose. The purpose of the foundation may be changed by a court decision on the proposal of the foundation itself, which must be approved by the board of directors and the supervisory board.

III. Associated fund

In addition to the trust fund, the associated fund is among the latest changes

srovnatelné instituty v Evropě, Centrum právní komparatistiky Právnické fakulty Univerzity Karlovy v Praze, Praha 2014, s. 142.

[10] D. Misutkova, R. Valach, *Založení a změny v nadaci ve světle nového občanského zákoníku*. *Epravo.cz* [online]. Epravo.cz, publikováno 23.1.2013 [cit. 9. 5. 2018].

brought by the extensive recodification. Since it was introduced in the form of an independent institution by the new Civil Code, it existed already in the previous legislation in the contractual form[11]. The associated fund falls under the legislation concerning foundations, specifically in Sec. 349 *et seq*. of the new code. An associated fund is directly applicable in its nature to the legislation of foundations, and (similarly to a trust fund) it does not have legal personality. The main difference between these two funds can be observed in the fact that, in the case of a trust fund, there is no loss of property on the side of the original owner. (This situation is related to the dissolution of a fund when the beneficiary does not receive the property and it is returned back to the founder of the fund.) This only concerns the property that the foundation already governs and which forms the basis of rights and responsibilities[12].

This type of fund is linked in its function with the foundation. It essentially means property that has been entrusted by it into administration. The election of the purpose is thus determined by the founder at the time when he/she selects the foundation, for which the associated fund forms. However, it must be expected already in the selection period that the associated fund will follow the purpose of the foundation. All discussions about the purpose will thus apply to this fund too.

IV. Investment Fond

Regulation of investment funds is enshrined in the aforementioned Act No. 240/2013 Coll. on Investment Companies and Investment Funds, specifically in the provision of Sec. 92 *et seq*. of this act. It divides investment funds into two groups – funds of collective investment and funds of qualified investors. Funds of collective investment may have the form of a public limited company or mutual fund. The only difference from funds of qualified investors is that only funds obtained from the public are collected in the fund of a collective investment under Sec. 205 of the AICIF. It is not possible to collect money of appreciable things. In contrast to this, the funds of qualified shareholders may gather both funds and money from appreciable items. However, unlike the fund of a collective investment, they do not gather funds from the public, but from qualified investors. The difference is also in the possible form of funds for qualified investors. The act in Sec. 101 provides us with a much wider range of possibilities in the form of a mutual fund, trust fund, limited partnerships, limited liability companies, joint-stock companies, *societas Europaea* and associations than that in the fonds of collective investment. However, we are only considering the mutual fund and the trust fund for the purposes of this article. The regulation of a mutual fund is enshrined in Sec. 102 *et seq.* of the act in question, and the trust fund is regulated by Sec. 148 *et seq*. Both funds are considered

[11] V. Pihera, *Svěřenský fond*, [In:] J. Spacil, a kol., Občanský zákoník: komentář, Vyd. 1., C.H. Beck, Praha 2013, xv, s. 1436.

[12] J. Svejkovsky, *Správa cizího majetku v novém občanském zákoníku: komentář [§ 1400-1474],* Vyd. 1., C.H. Beck, Praha 2015, pp. 64 - 69.

funds without legal personality.
Estate administration in the form of an investment fund is determined for the founders (owners) who are interested in expanding their assets. Therefore, the person of the founder in the majority of cases is the same as the person of the beneficiary.

V. Specified Gift

Since the so-called donation with orders has been known since before the recodification of private law, as one of the possibilities of modality of donation, it has been explicitly regulated in the Civil Code until now[13]. It is known that not only stipulated gifts but also donations for a specific purpose, donations with conditions may qualify among these modalities. However, it is extremely difficult to strictly identify which modality it will concern. Nonetheless, it is necessary to assess these other modalities according to the provisions concerning donations in general. [14] Unlike specified gifts, it often is not possible to enforce fulfilment of the stipulated purposes in donations with a purpose. Generally, it can be said that, where the specified purpose is ignored on the part of the recipient, good morals have often been violated, if not the law[15].

Although it seems that, with the exception of a specified gift, we will not find another directly regulated modality in the legislation, the legislator has also regulated the possibility of a conditional donation. It is directly regulated in Sec. 2063 of the Civil Code, and it is called a gift in the case of death[16].

In accordance with the explanatory memoranda[17] to the new Civil Code, an order is considered any "property obligation" that may also be claimed by the heirs of the donor. It is a possible contingency for the donor to stipulate in the donation agreement different provisions for the possibility of transferring authorisation that concerns enforcing the fulfilment of an order that was a component of the donation. The order generally consists in acts of omission and commission. However, it is obvious to point out the fact that donations with orders may not be grounded in acts that would create a fictitious triangle. It is thus thought that the donor may not bind the recipient to an obligation to pay back the donor.

A specified gift may result in the donor (founder) who provided a gift to a recipient (administrator) requiring that the recipient must use this gift for a specific purpose or in the public financial interest. For this reason, the donation fund may

[13] D. Elischer, *Darování s podmínkou, příkazem a jiné vedlejší doložky při darovací smlouvě*, „*REKODIFIKACE&PRAXE*" 2014, roč. II, č. 8, pp. 5 – 8.
[14] Důvodová zpráva k NOZ (konsolidovaná verze). *Nový občanský zákoník* [online]. Ministerstvo spravedlnosti, 2013 – 2015 [cit. 9. 5. 2018], pp. 478 – 479.
[15] D. Elischer, *Darování s podmínkou, příkazem a jiné vedlejší doložky při darovací smlouvě*, „REKODIFIKACE&PRAXE" 2014, roč. II, č. 8, pp. 5 – 8.
[16] D. Elischer, [In:] Občanský zákoník: komentář, Vyd. 1., Wolters Kluwer, Praha 2014, xxxii, pp. 613 – 665.
[17] Důvodová zpráva k NOZ (konsolidovaná verze). *Nový občanský zákoník* [online]. Ministerstvo spravedlnosti, 2013 – 2015 [cit. 9. 5. 2018], s. 478 – 479.

thus be created when the recipient will be forced to use the estate essentially in compliance with the wishes of the donor.

A specified gift may thus be established similarly to the majority of the other aforementioned and compared institutions in the private and public interest. If it is donated with an order in the public interest, it is necessary to take into account the statutory provisions that broaden the range of participants who may demand the fulfilment of an order even after the death of a donor.

Conclusion

The recodification of the private law considerably broadened the range of forms of estate administration, namely by several important institutions, which are trust funds, associated funds and specified gifts. However, we may thus determine from the aforementioned that foundations are closely followed by endowment funds are among the forms of estate administration with the longest tradition in Czech law. This fact is also definitely linked to the existence of more extensive judicial practice. It may be assumed that the attempt of the legislator to strengthen the will of the founder is also absolutely clear in all these regulations. Trust funds, mutual funds, associated funds and specified gifts do not have, in contrast to foundations and endowment funds, legal personality. This fact results in the forms of administration without legal personality lacking the provided claim to rights and responsibilities *ex lege*.

Every founder must decide in advance what should be the purpose of the his/her established administration of the estate. The specified gift has the freest regulation, where it is only up to the founder for what purpose the property will be donated to the recipient (the administrator). The legislator does not limit the form of estate administration in any way. We may place trust funds that can be established essentially for any purpose and, as such, used for investment purposes in second place. The investment funds that are fundamentally established to enlarge property are related to the issue. Although foundations and endowment funds are in principle allowed to develop business activities, after the new Civil Code came into force, this possibility is still limited in some way. The associated funds then fundamentally follow the purpose of the foundation for which they are created.

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ADMINISTROWANIE NIERUCHOMOŚCIAMI W REPUBLICE CZESKIEJ PO REKODYFIKACJI PRAWA PRYWATNEGO - DEFINICJA PODSTAWOWYCH INSTYTUCJI

Streszczenie: Zarządzanie majątkiem jest bez wątpienia jednym z głównych problemów po zmianie prawa prywatnego, w wyniku której powstały lub zostały odnowione tradycyjne instytucje. Do tych instytucji zaliczany jest fundusz powierniczy. Jest to szczególny rodzaj funduszu. Został on wprowadzony do czeskiego prawa jako odnowiona instytucja - ustawą nr 89/2012 Dz. Kodeks cywilny, który obowiązuje od 1 stycznia 2014 r. Do innych instytucji zajmujących się administrowaniem spadkami zalicza się także fundacje, fundusze dożywotnie, stowarzyszenia, inwestycje czy określone darowizny. Pojawiła się jednak niepewność w interpretacji niektórych przepisów prawnych w odniesieniu do bardziej surowego ustawodawstwa i wciąż nieobecnej praktyki sądowej. W artykule podjęto próbę zarysowania wybranych form administracji inter vivos.

Słowa kluczowe: administracja nieruchomościami, fundusz powierniczy, fundacja, fundusz dożycie, fundusz stowarzyszony, fundusz inwestycyjny, założyciel, zarządca, właściciel, rekodyfikacja prawa prywatnego.