European Proceedings of
Social and Behavioural Sciences
EpSBS

www.europeanproceedings.com
e-ISSN: 2357-1330

DOI: 10.15405/epsbs.2022.01.100

SLCMC 2021
International conference «State and law in the context of modern challenges»

TESTAMENTARY FUND AS THE METHOD OF PROPERTY MANAGEMENT IN RUSSIA AND ABROAD

Zinovij I. Tsybulenko (a), Angelina A. Valevskaya (a), Olga A. Chausskaya (a)*
*Corresponding author

(a) Saratov State Law Academy, 1, Volskaya Str., Saratov, 410056, Russia, k_civil@ssla.ru

Abstract

As a part of the study, the authors carried out a comparative analysis of the models of organizing inheritance: a trust in the states of the Anglo-Saxon legal family, fund in the countries of the continental legal system and a testamentary fund in Russia. The article analyzes the classical and new approaches to determining the legal nature of trust, the peculiarities of fiduciary relations, as well as the role of each subject of the trust, the peculiarities of the property rights of the trustee and the beneficiary to the property transferred to the trust. The characteristic features of the foundation as a model of organizing inheritance in the states of the Romano-Germanic legal family and its differences from the trust are determined. Based on the study, the authors formulate conclusions that provide grounds for rethinking the possibility of using the institution of trust in countries of the continental system of law, particularly in Russia. As a result of the analysis of the legislative provisions governing the creation and functioning of testamentary fund relations in Russia, it can be concluded that the legal nature of such institution and its place in the system of inheritance law is an open question. Therefore, this model of regulation loses its legal certainty and its practical significance decreases. In addition, the legal status of the testamentary fund as a legal entity, taking into account its creation after the death of the testator, also needs to be specified.

Keywords: Beneficial interest, inheritance model, property interest, testamentary fund, trust property, trust owner

https://doi.org/10.15405/epsbs.2022.01.100
Corresponding Author: Olga A. Chausskaya
Selection and peer-review under responsibility of the Organizing Committee of the conference
eISSN: 2357-1330

1. Introduction

Currently, the inheritance law of Russia is undergoing significant changes due to the growing importance of the right to private property of citizens and the procedure for its inheritance in a market economy, the need to develop a legal mechanism that could properly protect citizens' rights and interests.

The dynamic development of social relations contributes to a more active use of tools for the commercialization of inheritance. Modern economic realities, the growth of the well-being of Russian citizens engaged in business activities require appropriate adaptation of most institutions of private law, including the issues of inheritance and legal succession of business. With the transition to a market economy, it became obvious that the business community has formed a request for the creation in Russia of a tool that would take into account the owner's will to manage and use property after his death.

The result of the national modernization of inheritance law was the emergence of testamentary fund institution, designed to mitigate the risks of posthumous split of legator's capital, ensure the flexibility in the continuity of assets ownership, their protection and accumulation in the interests of beneficiaries.

2. Problem Statement

The legislative regulation in testamentary fund functioning in Russia has several disadvantages, furthermore, domestic law did not consider possibilities, given by its analogues (trust and fund), existing in foreign jurisdictions, so the construction of a new tool for inheritance regulation seems to be incomplete. All of the above actualizes the problem of legislative regulation of relations emerging during the process of choosing an inheritance regulation model in Russia (testamentary fund).

The subject of determining the legal nature of trust was investigated by a number of foreign and Russian scientists, including Ch. Vebb, F.U. Maitland, Moffat, O.U. Skott, L. Smith, D, Heiton, V.A. Kanashevskiy, E.P. Putinceva and others. However, quite often the works of Russian authors are based on outdated concepts that already have more scientific and historical than practical significance. Sometimes even the latest research in this area does not take into account new approaches in the science and practice of common law countries and the law of European countries, which have begun to form their own practice on this issue.

3. Research Questions

It is necessary to investigate the issues of similarities and differences in the legal regulation of similar models of organizing inheritance in foreign legal order (trust in the USA, Great Britain, a fund in Germany, Switzerland, Luxembourg) and in Russia (testamentary fund).

4. Purpose of the Study

The purpose of the study is to conduct analysis of inheritance regulation models: trust in the states of the Anglo-Saxon legal family, fund in the countries of the continental legal system and testamentary fund in Russia.

https://doi.org/10.15405/epsbs.2022.01.100
Corresponding Author: Olga A. Chausskaya
Selection and peer-review under responsibility of the Organizing Committee of the conference
eISSN: 2357-1330

5. Research Methods

The authors use comparative legal, technical legal, formal and logical research methods.

6. Findings

6.1. Legal nature of trust

Trust is usually defined as a fiduciary relationship between the settlor, who transfers the property to other person – trust owner or trustee in order to manage it in the interest of third party – beneficiary (Garner, 1999). Trust is valid if it meets three conditions: 1) it reflects the settlor's intention to create it (certainty of intention); 2) its subject is certain, that is, it contains an indication of the specific property transferred to the trust (certainty of the subject); 3) its object is certain, that is, the trust contains an indication of specific beneficiaries or created to achieve a certain goal (certainty of the object) (Parkinson, 2004).

Frequently, trust researchers, while characterizing trust features, rely on four fundamental principles of trust law set forth in the Westdeutsche Landesbank Girozentrale v Isligton BC case (1996) (Moffat et al., 2005): 1) justice is based on the conscience of the proprietary right owner. In a case of trust, the conscience of the legal owner requires him to achieve the goal for which the property was transferred to him; 2) the proprietary rights owner cannot be the trust owner, after his conscience "failed" him; 3) in order to create a trust property, it must be identified; 4) the beneficiary has a property interest in the trust property in accordance with the rules of equity, since the trust establishment. This interest can be protected from other owners, except the party which gets property interest as the result of good faith non-gratuitous agreement.

Trust has several specific features, such as fiduciary nature, the distribution of property powers between the trust owner and the beneficiary, and action in someone else's interest. Trust can be defined as trust relationship that arises between the owner (principal, founder) and the trust owner (trustee) as a result of the property transfer to the trustee to achieve socially useful goal and/or manage it in the interests of predefined persons (beneficiaries) on the principles of good faith, reasonableness, honesty and prudence.

Another feature of trust is the nature of the right (or interest) of the trust owner and beneficiary in the trust property. Trustee is the sole owner before third parties authorized to protect the trust property from the trespasses of other individuals. If a third party intentionally or through negligence damages or destroys the property, it is the trustee who will have to file a claim for damages. This is confirmed by a number of judicial precedents, namely: Leigh and Sillivan Ltd v The Aliakmon Shipping Co Ltd (1986 p.); MCC Proceeds Inc. v Lehman Brothers International (Europe) (1998 p.) (Webb & Akkouh, 2008).

In turn, beneficiary with regard to common law, is not the owner of the property; however, he owns the property right in the trust property by equitable title. In terms of trust, beneficiary is entitled to receive income from property management. Thus, if trustee decides to invest in trust property, he should

https://doi.org/10.15405/epsbs.2022.01.100
Corresponding Author: Olga A. Chausskaya
Selection and peer-review under responsibility of the Organizing Committee of the conference
eISSN: 2357-1330

do this in such a way that beneficiary (not trustee) gets the maximum benefit. Beneficiary has the right to file a lawsuit against trustee, in case of violation his or her responsibilities.

Thus, trustee and beneficiary together have proprietary rights on trust property. However, these proprietary rights can coexist, because they are different in content and legal nature. Each right is a special proprietary right and right of action in case of trustee and beneficiary right violation. Analyzing this situation, Russian scientists note that trust proprietary right is “split” between two persons (Braginskij & Vitryanskij, 2002). It seems that this statement is not entirely correct and lightly distorts the essence of the phenomenon under study. It is noted that the "splitting" of proprietary right is the main (if not the only) reason why trust cannot be introduced into the legal system of the Russian Federation, since this contradicts public order, namely the fundamental principle of the indivisibility of property rights (Braginskij & Vitryanskij, 2002).

Lawyers of the continental legal system got used to the triad of powers of the property owner. At the same time, the countries of the Romano-Germanic legal family are aware of cases when different persons are endowed with the powers to own, use and dispose of property.

The difference in the approaches of theorists of common and civil law consists in how many powers are allocated in property rights and what combinations of such powers are possible. Trust is essentially one of the options for such a combination. It appears that the term “splitting” of property rights was introduced by civil lawyers who tried to explain the phenomenon when two entities have different property rights in common law and in equity.

Let us try to find out the reasons for the emergence of the "splitting" of property rights theory. Historically, trustee was the common law owner of the transferred property, and beneficiary was the equity owner. In practice, this meant that trustee and beneficiary have different rights or, in other words, different powers over the property. Most likely, the theory of "splitting" appeared to explain theoretically, in a simplified form, the situation that takes place in the trust. However, such a simplification led to a distortion of the understanding of the essence of the trust, since, in our opinion, there is no “splitting” of the property ownership in trust; trustee and beneficiary are endowed with different property rights (or powers) to the property transferred to the trust.

World trust popularity lies precisely in the fact that the trustee is the only legal owner, while the beneficiary, having significant powers over the property, is not its owner from the point of view of the law.

6.2. Trust as inheritance regulation model in the countries of the Anglo-Saxon legal family

Trust is widely used for disposal of property in case of the owner death. Trust can be created in settlor's lifetime (inter-vivos trust), when he himself transfers the property to the trust owner and appoints the individuals, who will be the beneficiaries during and after his or her life, or on the basis of testamentary trust transfers the property, remaining after the legator's obligations fulfillment to the trust owner.

A testamentary trust is created in the following cases: 1) if the will provides for the transfer of all or part of the property of the testator to a trust in order to achieve a socially useful goal or to manage it in

https://doi.org/10.15405/epsbs.2022.01.100
Corresponding Author: Olga A. Chausskaya
Selection and peer-review under responsibility of the Organizing Committee of the conference
eISSN: 2357-1330

the interests of predetermined persons; 2) in order to ensure the interests of one or several heirs who do not have the legal capacity necessary for the independent disposal of the inherited property.

The inheritance procedure under a testamentary trust is carried out through letters of administration on the appointment of the executor of the will (estate manager), in which his powers are determined and certified. According to testamentary trust, which is an integral part of the will, the trustee is appointed in the process of executing the will, simultaneously with the implementation of this procedure, testator's corresponding property is transferred to the trust.

There are several differences between the trust owner and executor of the will responsibilities. The will is executed within a certain period of time, while the trust management can be carried out for a long time period and is aimed at preserving and increasing the property of the testator in the interests of the beneficiaries (Steel, 2012).

The use of trust as an inheritance regulation model allows a settlor to exclude the splitting of assets between the heirs, including at the request of the heirs who have the right to a mandatory share.

A feature of testamentary trust relations is that only two parties participate in them – trust owner, who manages and disposes of the property, and the beneficiaries, who are vested with the right to receive income from the use of the property. The relations between trust owner and beneficiaries are built in accordance with the conditions, determined by the deceased.

6.3. Fund as a model for organizing inheritance in the states of the Romano-Germanic legal family

In the states of the continental legal system, the solution of inheritance issues often involves the use of a fund structure (Stiftung). This model has similar features with trust. Fund controls the management of the given property in the interest of beneficiaries.

This model has features similar to a trust. Fund manages the transferred property in the interests of the beneficiaries. Funds can also be created during the life of the testator or after his death. In the first case, a person intending to establish a fund for the transfer of inherited property decides to create a legal entity, acting as its founder, determines the goals of its activities and transfers property into ownership in an amount not lower than that established by national legislation (the minimum amount of property). As a rule, the foundation is headed by its founder, who has a wide range of powers enshrined in the charter, which indicates that the founder maintains control over the activities of the foundation, despite the loss of ownership of the property transferred to the foundation. The fund structure, in case of death, assumes that ownership of the property to be transferred to the fund remains with the founder until death. The decision on the fund foundation is included in the text of the will, which also regulates the issues of the name of the fund, the person responsible for the fund foundation (executor of the will), the list of property transferred to the fund, objectives of legal entity's activity. The charter of the foundation is attached to the text of the will.

Despite the similarities between the fund and trust structures, there are certain differences between them. Thus, fund is created as an independent subject of law, whereas trust does not have the subject of law status. The key feature of trust is, that its settlor has the right to cancel trust, which is stipulated in the trust formation agreement. Title to the remaining property is returned to the settlor. The construction of

https://doi.org/10.15405/epsbs.2022.01.100
Corresponding Author: Olga A. Chausskaya
Selection and peer-review under responsibility of the Organizing Committee of the conference
eISSN: 2357-1330

fund does not provide for this authority of the settlor. Distinctive feature of fund is the freedom in disposal of property, in accordance with the objectives, stipulated by the fund rules. In trust legal relations, the limits of disposal of property are strictly restricted by the formation document and the legal nature of trust. Specific nature of trust is expressed in the ability of its settlor to remain anonymous, while the information of the fund settlor is reflected in the formation documents, and his or her identity becomes known. In addition, it is common for the fund settlor to perform the functions of a project manager, philanthropist, etc. (in the case of an inter vivos fund).

The construction of fund is used during the process of succession creation in Germany, Switzerland and Luxenbourg, however in each state, the legal regulation of these relations is different. This is primarily about tax law, since in most cases funds are created for the purpose of tax optimization in relation to the inheritance procedure. Therefore, fund should be viewed to a greater extent in the context of the tax preferences established for it.

Consequently, testamentary fund and testamentary trust have similarities and differences.

6.4. Problems of using formation of fund as a method of inheritance regulation in Russia

The analysis made it possible to identify the common and distinctive features of such models of inheritance regulation as trust and fund.

Meanwhile, the fund model introduced by the legislator into the inheritance law of the Russian Federation in 2018 has significant differences from the fund model used in the countries of Romano-Germanic law.

Thus, the current Russian legislation does not provide for the creation of a testamentary fund during the settlor's lifetime (clause 2 of article 123.20-1 of the Civil Code of the Russian Federation) (Civil Code of the Russian Federation, 1994), which actualizes the development of a mechanism for solving problems associated, for example, with the need to adjust the fund rules after the death of the legator (during or after the process of fund formation) in order to ensure the possibility of creating such fund or managing it. Considering the inability of creating a testamentary fund during the legator's life, he or she is least likely to make changes to the fund rules, if finds any flaws.

It should be noted that before the adoption of the amendments introducing the institution of testamentary fund, there was discussion of a bill that eliminated this contradiction and specially allocated personal funds. Unlike the current legislation, a personal fund could be created not only after the death of the testator, but also during his or her lifetime, including with the subsequent transformation into testamentary fund (On Amendments to …). The introduction of personal fund institution into Russian legislation was positively assessed by some jurists (Krasheninnikov et al., 2018), but the bill was never considered by the State Duma of the Russian Federation.

So, on the one hand, the institution of testamentary funds, introduced into the native civil legislation, expands the possibilities of disposing of hereditary property and corresponds to the trends of modern civil circulation. It is irrational to deny the advantages of such an instrument in comparison with those previously enshrined in the legislation (especially in relation to large property masses, such as business). On the other hand, the current type of this institution, enshrined in native legislation, appears to

https://doi.org/10.15405/epsbs.2022.01.100
Corresponding Author: Olga A. Chausskaya
Selection and peer-review under responsibility of the Organizing Committee of the conference
eISSN: 2357-1330

be incomplete, requiring revision by making additions that take into account both private and public interests in inheritance.

7. Conclusion

The specific peculiarity of trust is that both the trustee and the beneficiary have rights to property at the same time. Taking into account the above, the statement about the inconsistency of the institution of trust with the public order of Russia, like other countries of civil law, is a deliberate limitation of the possibility of using a universal and practical legal instrument.

References

Braginskij, M. I., & Vitryanskij, V. V. (2002). *Contract law. Contracts for the performance of work and the provision of services.* Statut.

Civil Code of the Russian Federation. (1994). Federal Law of 30 November 1994 (as amended on 03.09.2021). *Collection of Legislation of the Russian Federation, no. 32* (3301 p.).

Garner, B. (Ed.). (1999). *Black's Law Dictionary* (7nd ed.). St. Paul.

Krasheninnikov, P. V., Miheeva, L., Rasskazova, N., & Petrov, E. (2018). Testamentary fund: alternative to trust in Russian law? *Law, 9*, 18–38.

Moffat, G., Garton, J., Bean, G., & Prober, R. (2005). *Trusts Law: Text and Materials (Law in Context).* Cambridge University Press.

On Amendments to Chapter 4 of Part 1 of the Civil Code of the Russian Federation. Draft Federal Law. Legislative Support System. https://sozd.duma.gov.ru/bill/499538-7

Parkinson, M. S. (2004). *Trust Creation: Law and Practice*. Central Law Training.

Steel, G. (2012). *Trust practitioner's handbook* (3rd ed.). Leningrad.

Webb, C., & Akkouh, T. (2008). *Trusts Law.* Palgrave Macmillan.