

Las instituciones de gestión fiduciaria (fideicomiso) y fundaciones testamentarias en Rusia y Alemania: análisis comparativo

The institutions of fiduciary (trust) management and testamentary foundations in Russia and Germany: comparative analysis

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Resumen

El objetivo del estudio es considerar las instituciones existentes de gestión fiduciaria de propiedad hereditaria y fundaciones testamentarias en la legislación rusa y alemana, comparar la institución de fundamentos testamentarios con la gestión fiduciaria de propiedad hereditaria en la legislación de la Federación de Rusia, identificar similitudes y diferencias entre fundamentos testamentarios rusos y alemanes (póstumos). En el estudio realizado se han empleado los métodos de investigación como el análisis legal comparativo, síntesis, análisis, formal-lógico y otros métodos de investigación científica. El artículo presenta los resultados del análisis legal comparativo de las legislaciones rusa y alemana y señala los posibles desafíos en la práctica de aplicación de la ley rusa. El análisis legal comparativo y la comparación de la legislación rusa actual con la experiencia de la regulación legislativa de fundamentos testamentarios (póstumos) en la República Federal de Alemania han permitido revelar una tendencia a adoptar la experiencia positiva de la ley alemana.

Palabras clave: Fideicomiso; fundamentos testamentarios; gestión de propiedad fiduciaria; heredero; herencia comercial.

Abstract

The study was aimed to consider the existing institutions of fiduciary management of hereditary property and testamentary foundations in Russian and German legislation, to compare the institute of testamentary foundations with the fiduciary management of hereditary property in the legislation of the Russian Federation, to identify similarities and differences between Russian testamentary foundations and German (posthumous) testamentary foundations. Such research methods as comparative legal analysis, synthesis, analysis, formal-logical and other methods of scientific research have been employed within the study conducted. The article presents the results of a comparative legal analysis of Russian and German legislations and points out potential challenges in Russian law enforcement practice. Comparative legal analysis and comparison of the current Russian legislation with the experience of legislative regulation of (posthumous) testamentary foundations in the Federal Republic of Germany allowed to reveal a tendency of adopting the positive experience of German law.

Keywords: Trust; testamentary foundations; fiduciary property management; heir; Business inheritance.

INTRODUCTION AND ACTUALITY

Since the collapse of the Soviet Union at the end of the last century, Russia has undergone significant changes in various sectors, spanning from the economy to the legal system. The market economy brought up a whole generation of people, which led to the emergence of a new class in Russia - the class of entrepreneurs. This new generation, which is leaving the working life more and more often these years, has accumulated huge amounts of material values and thus significantly complicated the composition of the hereditary masses compared to what it used to be in the USSR. Increasingly the following questions arise: how to preserve and, better yet, augment the earnings? How can one ensure that a testators' personal views on the management of their property are respected and that the inheritance is not misused or wasted in the long-term? –Fiduciary (trust) management.

Fiduciary management of inherited property helps to avoid loss of inheritance as a result of reckless actions of heirs while they are in a state of grief.

Prior to concluding a fiduciary agreement, an important step is to assess the part of the estate that is transferred to the trustee. All evaluation costs are attributed to the costs of protecting and managing the inheritance. In this case, the beneficiary under the contract of fiduciary management of inherited property is not appointed. Provided that there is a testamentary trust and actions for protection and management towards a certain person, then it is possible to appoint a beneficiary.

The notary who exercises the powers of a trustee under a fiduciary management agreement, controls the performance of obligations and in case of any violations, the notary may unilaterally terminate the fiduciary management agreement and appoint a new trustee.

By virtue of law, the contract of fiduciary management is concluded for a period not exceeding 5 years. Such an agreement is based on the mutual interests of the parties participating in the fiduciary management, provides for the functions of a trustee for the

purposeful use and proper possession of the transferred property. At the same time, an important aspect is the criteria for assessing the performance of a trustee. All criteria must be reflected in the contract of fiduciary management of the inherited property. Such criteria may include the amount of the guaranteed income from the transfer of the property into fiduciary management calculated according to a special methodology. The methodology may provide for calculation of the amount of remuneration and the amount of reimbursement of expenses incurred in managing the property; it is important to distinguish between the right of the manager to remuneration and the right to reimbursement of expenses in the contract (Novikova, 2017).

It is also important to establish the evaluation criteria of the efficiency of the trustee's activity and, when concluding the contract of fiduciary management, to provide for security measures provided for by law and insurance of the risk of damage from the actions of the trustee. The absence of an indication of the term of validity of the contract may lead to various types of abuse of powers of the trustee. The trustee acts at his own risk, he has his own interests, which are conditioned by the receipt of a certain remuneration. Therefore, the contract of fiduciary management should clearly define the purpose and tasks of managing the inherited property, which will ensure less risk of loss or decrease in the efficiency of the use of the inherited property transferred to fiduciary management.

Thus, all actions of the trustee are aimed at the preservation and receipt of profit from the use of the inherited property under the contract of fiduciary management.

However, there is a more promising, long-term and secure option, i.e. the establishment of a testamentary foundation (trust). Through the establishment of a foundation, one's personal intentions and ideas can become immortal, and the assets acquired can be used after death to pursue an important individual mission.

In the Federal Republic of Germany, trust management as well as inheritance funds have existed for over 100 years –since the entry into force of the German Civil Code (Bürgerliches Gesetzbuch,

[BGB, 1896](#)) on January 01, 1900. The successes of the German inheritance funds, as well as the well-established law enforcement practice, inspired Russian legislators to apply working tools in the transformation of domestic inheritance law.

This article focuses on the similarities and differences between fiduciary management of hereditary property and testamentary foundations, as well as a comparative analysis of the German and Russian testamentary foundations.

METHODOLOGY

As the research methodology I used the following principles: comparative legal analysis, synthesis, analysis, formal-logical; the task of the study was to consider the existing institutions of fiduciary management of hereditary property and testamentary foundations in Russian and German legislation, to compare the institute of testamentary foundations with the fiduciary management of hereditary property in the legislation of the Russian Federation (RF), to identify similarities and differences between Russian testamentary foundations and German (posthumous) testamentary foundations. Subject of research: the institutions of fiduciary management and testamentary foundations in Russian and German legislation.

DISCUSSION AND RESULTS

New Statutory Regulation

By virtue of the peculiarities of inheritance law as a sub-sector of civil law, the legislator has established the rules for concluding a contract of fiduciary management of inherited property. Such rules are provided by the Civil Code of the Russian Federation ([ГКРФ, 1994](#), Chap. 53), which implement the legal principle –*lex specialis derogat generale*,—translated from Latin— “special rule abolishes the general rule”. It is also important to note that the regulation of the institute of fiduciary management of inherited property seems limited ([ГКРФ, 2001](#), art. 1173), given the wording to does not

contain an answer to these questions. In this regard, it is necessary to consider legislative changes aimed at improving the institute of fiduciary management of inherited property and judicial practice, which makes it possible to fill the gaps of regulatory regulation. Inefficiency of fiduciary management of inherited property is only one of the problems faced by the participants of inherited legal relations at present. The rules of fiduciary management of inherited property have undergone several changes ([Federal Law No. 259-FZ, 2017](#)), novelties apply to those relations which arose after September 1, 2018 ([Anosov, 2019](#)).

Since September 1, special articles have appeared in the Civil Code, regulating the legal provision and the order of functioning of inheritance funds—a new subject of law. This design of fiduciary management of inherited property provides for regulation under the contract, in the conclusion of which a notary is a party—as a founder of the management. The notary is defined to play an active role in forming the terms and conditions of the agreement. Thus, for example, if fiduciary management of inherited property is required—when the only member of a Limited Liability Company (LLC) dies, such situation is considered the most common, taking into account that if it is an operating LLC, its activity cannot be interrupted (it is necessary to pay wages, prepare reports, etc.), and the necessity to exercise the rights of the participant is determined due to the necessity to continue the activity of the LLC.

The emergence of fiduciary management in Russia is associated with the rejection of the unified state property and corresponding transformations. Protection of the fiduciary inheritance is performed by a notary on behalf of the receivers, executor of the will on his own initiative. A third party may also be appointed to protect and manage the fiduciary estate. In practice, there are various measures and actions to ensure the integrity and safety of the property, in particular: installation of alarms, locks, taking things for storage, maintenance of the security object (house, manor, office, etc.) in functional condition.

Fiduciary Management of Hereditary Property

If the inheritance includes assets that require not only preservation but also management, the notary or will executor (if present) shall establish (Ahmetyanova, 2017) a fiduciary management of these assets (ГКРФ, 2001, art. 1173). This is mainly relevant to entrepreneurs as they have assets at their disposal (e.g. limited liability companies or joint-stock corporations) that need permanent administration, otherwise they may not only lose their value completely, but may also obtain debt.

In 2017, Russian civil law provisions on fiduciary management of hereditary property underwent significant changes. Several novelties have been introduced, including the need for an independent evaluation of hereditary property before its transfer to fiduciary management. Amendments were also made to functions of notary which is now supposed to control and supervise the trustee taking care of the inheritance.

In articles 1173 and 1174 of the Civil Code of the Russian Federation (ГКРФ, 2001) the legislator described the establishment procedure of the agreement on fiduciary management of the inheritance, the conditions of property management, as well as the procedure of expenses reimbursement for these actions. Without going deep into the subtleties of fiduciary management, an essential circumstance is the duration of such an agreement. When the heir receives their certificate of the right to inheritance, he has the right to demand the return of property that was transferred to fiduciary management. In case this doesn't happen such an agreement will be considered prolonged for only five years. Other details of this institution are given in Chapter 53 of the Civil Code of the Russian Federation (ГКРФ, 1994) and will be analysed when comparing it with the institute of the testamentary foundation.

Testamentary Foundations in the Russian Federation

The first of September 2018 was marked not only by the day of knowledge, but also by a historic event in conservative Russian

inheritance law —amendments to the civil law came into force, allowing citizens to write wills with the condition of creation of (post-mortem) testamentary foundations. This institution is absolutely new and has never been applied in Russian legislation before.

The condition for the establishment of a testamentary foundation may be provided for by a citizen (Korop, 2019) at the time of his will (Makarova, 2018; Kirillova, 2019) for the purpose of preservation and management of his property after his death. This is especially true for persons who own expensive assets, both entrepreneurial (e.g. enterprises) and other property (e.g. real estate). The emergence of such an institution will make it possible to manage property more efficiently than it was imagined before their appearance. The foundations will allow citizens to create favourable conditions for heirs and other persons in accordance with their own vision after their death and will also serve as a motivation (Krashennnikov et al., 2018). For example, it would be possible for the foundation to provide conditions for the payment of money to heirs upon the occurrence of certain events, such as the receipt of a degree from a specific university or marriage, or monthly payments upon reaching a certain age. The testator also has the right to direct his or her property for socially useful purposes, perhaps someday in the future there will be a Russian analogue of the Nobel Foundation. However, testamentary foundations in Russia may also be of interest not only to wealthy citizens and entrepreneurs.

*General Provisions on Inheritance
Funds and their Statutory Regulation*

One of the main advantages of Russian testamentary foundations is the fact that there is (almost) no minimal authorized capital. In Russia the amount for testamentary foundations is the same as for limited liability companies, namely 10 000 rubles (~ 156 US dollars at the time of writing). This allows the vast majority of society to benefit from such testamentary foundations.

For example, in some families there is a tradition of passing on certain real estate from generation to generation. The foundation will allow for the permanent preservation of such real estate within the same family, without the possibility of future loss of property, by granting descendants the right to use the property, but without the right to sell it.

The advantages of testamentary foundations will be revealed in further analysis of this institution and its comparison with the fiduciary management of hereditary property.

Next in order. The Civil Code of the Russian Federation was supplemented with three new articles regulating the institution of the testamentary foundation. Article 123.20-1. of the Civil Code of the Russian Federation (ГКРФ, 1994) gives the rules of establishment and liquidation of the testamentary foundation, as well as the requirements to the conditions of its management. Article 123.20-2. of the Civil Code of the Russian Federation (ГКРФ, 1994) describes the internal activities of the foundation and the procedure for its management. Finally, the article 123.20-3. of the Civil Code of the Russian Federation (ГКРФ, 1994) describes the rights of the so-called “beneficiaries” of the foundation. Russian legislation does not define the status of a beneficiary, it should be provided for in the conditions of management of the testamentary foundation (Emelkina, 2018). All the documents listed above are drawn up within the framework of a single act (Ayusheeva, 2018; Povarov, 2018).

Potential Regulatory Issues

Even though not much time has passed since the introduction of the institute of testamentary foundation several questions about its functioning in real life arise.

One of these questions is about the legal nature of such a foundation. Provisions about testamentary foundations are found under paragraph 7 non-commercial (non-profit / non-governmental) unitary organizations of the Civil Code of the Russian Federation (Mikryukov & Mikryukova, 2018). According to Federal Law N 7-FZ (1996) “About non-commercial organizations” a non-commercial (non-profit/

non-governmental) organization is an organization that does not have the primary purpose of making profit and does not distribute profit to its participants. It is difficult to say how regulating authorities will react to the fact that testamentary foundations will inherit businesses and work towards maximizing profits for its beneficiaries.

Another question concerns taxes. There is not a single mention of any kind of special tax regime for testamentary foundations. As a general rule non-commercial organizations are exempt on paying taxes on profits from statutory non-commercial activities. But according to the charter of such a foundation its main purpose can be preserving and increasing assets in the interests of beneficiaries. Let's say a testamentary foundation will invest funds and receive income will it be forced to pay an income tax?

Non-profit organizations pay VAT as ordinary taxpayers ([Goltsblat, 2018](#)). No special VAT benefits have been established for the transfer of property by the testamentary foundation in favor of the beneficiaries. And if this structure has received the real estate at its foundation, and then has decided to sell it or to transfer to the beneficiaries, such transaction is subject to VAT. At the same time, if money and shares are transferred, there is no obligation to pay VAT.

Another question is whether a personal income tax should be paid. A Russian tax resident beneficiary would have to pay a personal income tax when receiving payments or property from the testamentary foundation, but a non-resident does not ([Goltsblat, 2018](#)). Without further ado such a circumstance can serve as motivation for beneficiaries to move abroad. But even then, how will they be taxed in another country?

Much questions arise due to the following. The charter of the testamentary foundation and the conditions of management of the testamentary foundation may not be changed after the establishment of the testamentary foundation, except by a court judgement at the request of any body of the foundation, in cases where the management of the testamentary foundation under the same conditions

has become impossible due to circumstances which could not have been foreseen at the time of the establishment of the foundation, as well as if it is established that the beneficiary is an unworthy heir, unless this fact was known at the time of establishment of the testamentary foundation. There is no other mean of changing the charter or the conditions of management. This can serve as a major disadvantage of testamentary foundations. If for example some mistake occurred when the testator wrote his will and the notary oversaw this mistake. Due to this mistake regulating authorities are refusing to register the testamentary foundation and thus it will not be established. What will happen to the property and who will be held responsible for this mistake? It seems that amendments should be made in order for the notary or will executor to change the charter and / or the conditions of management in case they don't meet the requirement of the law.

Fiduciary Property Management and Testamentary Foundations

The first difference between the fiduciary property management and the testamentary foundation is in the form of management: the testamentary foundation is a legal entity, the founder of which is the testator, while the fiduciary management is carried out under a contract, the founder of which is a notary ([Krasheninnikov, 2018](#)). This results in a difference of ownership of the hereditary property, i.e. in the case of a foundation, the property indicated in the will is transferred to a legal entity (foundation); whereas in the fiduciary management the inheritance is transferred to heirs by will and / or by law, but for a certain period of time it will be managed by a trustee under a contract ([Putintseva, 2016](#)). It turns out that at the opening of the inheritance, the testamentary foundation independently and on an equal basis with other heirs acts as an heir, while under the contract of fiduciary management ownership of the property is not affected. The foundation, just as an heir would, also becomes a certificate of inheritance ([Kartashov, 2017](#)). Consequently, the foundation itself takes measures to preserve and manage the hereditary

property and not the notary or trustee, as in the case of fiduciary management.

The second difference is governance: the internal documents of the testamentary foundation should provide for the conditions of management of the foundation. There can be one or several trustees in the trust management, the requirements to which are fixed in Article 1015 of the Civil Code of the Russian Federation (ГКРФ, 1996). The foundation is managed by the foundation bodies that are formed based on the foundation's internal documents. At the will of the testator the following management bodies of the testamentary foundation are established: a sole or collective executive body, the supreme collective body and the Board of Trustees. The advantage of the foundation is that the testator has the right to give the foundation's body the duty to approve transactions, which will eliminate the possibility of loss of property due to risky transactions.

The third difference concerns beneficiaries. According to Article 1173 of the Civil Code of the Russian Federation (ГКРФ, 2001), “the beneficiary under the contract of fiduciary management of hereditary property is not appointed, except in the case when there is a testamentary trust, which implies its execution in favour of a certain person for the period of actions to preserve and manage the hereditary property. In this case, the beneficiary shall be the beneficiary of the testamentary trust” (par. 3). It follows from the letter of the law that the potential testator has no right to establish separate conditions for each heir, not to mention the conditions, the occurrence of which is unknown.

The situation in the testamentary foundation is different, according to Art. 123.20-3. of the Civil Code of the Russian Federation (ГКРФ, 1994), the testator has the right to determine in advance the beneficiaries, which may be “any participants in relations regulated by civil law, except for commercial organizations”. Moreover, the conditions of the testamentary foundation may provide for the transfer of property to certain categories of persons from an undefined circle of persons. Thus, the Nobel Foundation operates, which

awards the Nobel Prize to outstanding scientists around the world, regardless of the place of scientific discovery.

Separate mention should be made of the duration of the property management in both cases. The contract of fiduciary management of the hereditary property can be extended for a period of 5 years in case the heir receives a certificate of inheritance and in case of his refusal to claim the property (Kirillova, 2016). Whereas a testamentary foundation may act indefinitely or, at the discretion of the testator, until the circumstances specified in the conditions of the management of the testamentary foundation occur.

The form of control over the implementation of property management also differs. From the moment of conclusion of the contract on fiduciary management of hereditary property, the notary by virtue of the law is obliged not less than once in 2 months to “check” the actions of the trustee. A problematic question arises: how should a notary who does not have knowledge in the field of business conduct an audit? However, if the notary becomes aware of the facts of breach of his duties by a trustee, the notary “has the right to unilaterally terminate the fiduciary management agreement, require the trustee to provide a report and appoint a new trustee”. In testamentary foundations, control and supervision functions are assigned to separate bodies of the foundation, most often to the board of trustees. In this case, the notary is not entrusted with any functions that are not typical of him.

In view of the above, it seems possible to be concluded that testamentary foundations are more suitable for those whose hereditary mass consists of different assets and is more difficult to manage. The foundation will also be more attractive to those who want to keep their assets within the same family or who do not want to transfer all their assets to preserve them at once.

Limitations in Inheritance

Freedom in inheritance law is, above all, the freedom of the testator to decide the fate of his property: either for the hour of his death, bequeathing it; or, acting in advance, donate it. It is also the freedom

of the heir to dispose of his inheritance rights: to cede them or to renounce them. But the two institutions of hereditary law may bind these freedoms. First of all, this is the right to a compulsory share of estate, which sets a binding limit on the freedom of the testator to bequeath.

Then there is the prohibition of inheritance contracts in respect of future inheritance, which, on the one hand, prohibits the testator from irrevocably disposing of his or her inheritance in order to preserve the freedom of will, and which, on the other hand, prevents the testator from stipulating in the contract his or her rights to an undisclosed inheritance in order to avoid abuse of possible influence, the existence of which is often suspected in such families. Both these legal institutions—the mandatory share and the inheritance treaty—are not equally accepted in different legal systems: Colombia, Germany and Russia.

The compulsory share of estate is the best-known point of divergence between common law countries that do not know it and civil law countries that recognize it. As for the prohibition of inheritance contracts, it is stricter in France, Belgium and other countries of Latin legal tradition than in Germany and Switzerland, where it is allowed for contracts by which the testator irrevocably determines the fate of his property (which is also due to the low popularity of inheritance by will in the German legal tradition).

In other countries, it is smaller: either the right to a compulsory share of estate is taken away from some heirs, for example, on a rising line (Germany, France); or it is reduced in size; or tools are introduced to successfully circumvent this restriction in practice (for example, life insurance). With regard to the prohibition of inheritance contracts in respect of future inheritance, it has also been weakened in a number of jurisdictions.

States have waived the unconditional prohibition of inheritance contracts, taking into account their utility and convenience in certain cases: for example, as a means of transferring an enterprise (business) or to address specific situations arising from family break-ups and the emergence of new marital unions.

In a number of European States, spouses mutually waive their inheritance rights in favour of their children from a previous marriage. There are a number of reasons for this liberalization of inheritance law, two of which can be highlighted:

The first is the emergence of a new hierarchy of grounds for inheritance. Today, economic grounds have taken precedence over family grounds, which is not surprising, however, in an era in which economic efficiency is paramount everywhere and family values are dwindling—an era in which the European Court of Human Rights (ECHR) more easily describes the contours of property rights guaranteed by Article 1 of Protocol No. 1 than defines a family in Article 8 of the Convention (United Nations Human Rights, [OHCHR, 1949](#)). Therefore, where economic considerations find themselves in the favour, the mandatory share is all the more denied as an obstacle to the free transfer of property, especially business, and as an infringement of the sovereign right of the owner to dispose of his property, at least free of charge and in case of death. A clear example of such an approach is the common law countries, where economic dominance prevails.

Conversely, where family interests are a priority, the compulsory estate share is retained as an expression of family solidarity and intergenerational property.

It is noteworthy that in 1996, the Constitutional Court of Colombia placed this most common family property under constitutional protection, on the grounds that “it is a natural and obvious reflection of the will to establish a family” ([Judgment C-660, 1996](#)).

The second reason relates to a certain vision of the human being. Man in the twenty-first century sees himself as strong in his property and confident in his will. On the one hand, he gains the right to “order” descendants, even when he dies, inspired by this concept, on which, by the way, the will is based: “... nothing is impossible for an energetic man” ([Carbonnier, 2000](#), p 102). On the other hand, he considers himself capable of participating in the definition of rights in the future inheritance, by establishing prohibitions and restrictions from the past which are often useless or even harmful.

However, the liberalization of inheritance law, which is gaining momentum, must also have its limits. The liberal evolution of inheritance should not obscure the fact that bequest freedom is not just economic freedom like everyone else, and that it always remains under a certain control.

The need for such control is linked to the fact that the will of the will of the bequest is the will of the post mortem, realized at a time when we will be gone, and that the living should not be left to the will of the dead. Of course, the will can be wise, mature and peaceful. But it can also be deviant: it can be a will-destroyer, which not only does not heal the family, but injects into it a poisonous enzyme of discord: bequeathing all one son is not the best way to make enemies out of brothers? (Republic Colombia, [Judgment C-660, 1996](#); [Judgment C-641, 2000](#); [Judgment C-101, 2005](#); [Carbonnier, 2000](#); [De La Torre, 2018](#)). It can be a tyrannical will, an instrument of abuse of domestic power, where the freedoms of the younger generation (freedom of choice of occupation, way of life, opinions, etc.) are broken down into the economic power of the older generation; it can be a will that is abused both by the testator himself and by those around him: the evaluation of everyone's virtues, from which the favor of the testator often comes, is subject to errors, both spontaneous and provoked. And here the question of the conditions of such control is natural. The compulsory estate share rule is one of the measures of control. It is not limited to preserving the wealth of the family within it. On the one hand, it guarantees minimum equality between children: it prohibits not only bequeathing everything to an outsider (which does not harm family unity, solidarity in distress), but also bequeathing everything to only one of the children (a boy, for example, or an older child, or a child born in marriage). On the other hand, the compulsory estate share rule limits the possibility of disinheriting someone whose way of life, beliefs or attitudes are not liked. Where there are no compulsory estate share rules, the law uses other means to limit the freedom of the will. Sometimes, the concept of fundamental (natural) human rights can also be used to limit the will of the testator, as in the case where the European

Court for Human Rights has been forced to discriminate against the interpretation of the Court of Andorra, which considered that the rights of an adopted child and a child born of a canonical marriage cannot be assimilated in the inheritance of a will ([ECHR, Pla and Punserno v. Andorra, 2004](#); [Medvedev, 2007](#)). However, from the point of view of legal security, it is not obvious that such control, left in many countries at the discretion of the court, would be preferable to the automatic protection provided by the compulsory estate share rules.

Testamentary Foundations in Germany

There are two types of testamentary foundations in Germany. The first is created during the life of the potential testator, and the other one at his death (posthumous). For the purposes of this article, only the posthumous testamentary foundation will be considered.

The German legislation also provides two subtypes of post mortem testamentary foundation. The “independent” foundation is a legal entity and is regulated by paragraphs 80-89 of the German Civil Code ([BGB, 1896](#)).

Such a foundation is created by testament or hereditary agreement. Notarization of the inheritance contract is prescribed by law ([BGB, 1896](#), art. 1945), but in addition to the notarized will, German law also provides for a “handwritten will” and “will of the spouses”, which do not require an obligatory notarization ([BGB, 1896](#), art. 2247). The foundation may become an heir or recipient of a testamentary trust.

The founder of the foundation is free to choose the purpose of the foundation. In this regard, family and corporate foundations can benefit individuals, for example, to provide for the livelihood of family members. The purpose of the foundation is not subject to review after its establishment.

The founder is obliged to characterize the activities of the foundation in full in a will or inheritance agreement. The charter of the foundation must contain the following: name, location, pur-

pose, property, legal representative of the foundation. Regional (Bundesland) laws on foundations sometimes prescribe additional provisions to be included in the statutes (e.g., provisions concerning the use of assets and their income, the legal status of the beneficiaries of the foundation, the duration and liquidation of the foundation, as well as the use of the foundation's assets after its liquidation) (Förster, 2017). Since the state registration of a foundation depends mainly on its charter, the designated executor should be given the right to amend the charter in accordance with the requirements of the state body. That is the case since there are often cases when there is no requirement in the charter of the testamentary foundation.

The second subtype of the post-mortem foundation is the “dependent (not independent)” foundation. This institution is intended for persons with small assets due to lower administrative costs (Bundesnotarkammer, 2004) and is similar to the Russian fiduciary management of hereditary property. Assets are transferred to another person who, as a trustee, fulfils the purpose specified by the founder. A dependent foundation does not need to be registered with the state but is recognized under German tax law. Thus, the “dependent” foundation is not a party to civil law relations. The trustee of the property may be any natural or legal person.

CONCLUSIONS

The conducted research has shown that there are common grounds between legislation of Russia and Germany. Posthumous inheritance funds exist in both countries. The procedure for their establishment and functioning differs slightly for each country. The situation is similar with the trust management of inherited property. And although in German law this term is called differently, its statutory regulation is also similar to the Russian version.

It is safe to say that domestic lawmakers were inspired by ideas from Germany and tried to apply their positive experience in domestic realities.

But still much has to be done. Unresolved questions about taxing testamentary foundations and their beneficiaries as well as the impossibility to make amendments to the charter and the conditions of management of testamentary foundations make it a risky business to engage in.

Taking the aforementioned unresolved questions into consideration Russian lawyers, notaries, judges and legislator will face challenges in the future in order to better legislation and provide entrepreneurs and others with institutions that work hassle-free.

In conclusion, it should be noted that the institute of testamentary foundation in the Russian Federation has appeared quite recently and it is too early to say how the law enforcement practice will develop.

For this reason, at the moment there are no fundamental works (for example, candidate and doctoral theses), the subject of research of which is hereditary funds in Russia.

Additionally, the State Duma also has draft law No. 499538-7 on amendments to Chapter 4 of Part One of the Civil Code of the Russian Federation (ГКРФ, 1996), namely on the possibility of creating personal funds. Russian lawmakers will have to work hard to draft amendments to the law, as well as to use the experience of resolving problems in current legislation so that new institutions can act as intended.

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REFERENCES

- Ahmetyanova, Z. A. (2017). Fiduciary Management of Inheritable Property. *Inheritance Law*, 1, 30–33. Available from https://repository.kpfu.ru/?p_id=152559

- Anosov, M. (Feb 14, 2019). Testamentary foundations and fiduciary management of inherited property: legislative innovations through the eyes of a notary. *EZh-Layer*, (6)1057. Retrieved from: <https://www.eg-online.ru/article/393827/>
- Ayusheeva, I. Z. (2018). Features of the civil status of the inheritance fund. *Actual Problems of Russian Law*, 8(1), 100–108. <https://doi.org/10.17803/1994-1471.2018.93.8.100-108>
- Bundesnotarkammer. (2004). Stiftung von Todes wegen als Erbfolgeplanung. [Online]. Retrieved from: http://bundesnotarkammer.info/9:670/Pressemitteilungen/2004/pm_quartalskammern_0404_1.html (accessed 21 November 2019)
- Carbonnier, J. (2000). Droit civil 1. [*Thémis Droit privé*]. Paris: Presses Universitaires de France.
- De La Torre, M. (2018). Use of the financial sector for money laundering: a perspective from the Ecuadorian legislation / Utilización del sector financiero para el lavado de dinero: perspectiva desde la legislación ecuatoriana. *Jurídicas CUC*, 14(1), 145–166. <https://doi.org/10.17981/jurid-cuc.14.1.2018.07>
- ECHR. (jul 13, 2004). Case of Pla and Punserno v. Andorra. [*Judgments No. 69498/01*]. Application No. 69498/01. Retrieved from: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-61900%22%5D%7D>
- Emelkina, I. A. (2018). The Legal Status of a Testamentary Foundation Beneficiary. *Inheritance Law*, 2, 29–33.
- Förster, L. (2017). Die Stiftung von Todes wegen. Ein Praxisleitfaden. *Stiftung & Sponsoring*, (05), 1–21. Retrieved from: https://www.erbrecht-stiftungsrecht.de/images/pdf/SuS_2017-05_Foerster.pdf
- German Empire. (18 de agosto de 1896). Germán Civil Code. [Bürgerliches Gesetzbuch, BGB]. *Law Gazette of the German Reich*, 1896(21), 195–603. Available from <http://www.koeblergerhard.de/Fontes/BGBDR18961900.htm>

- Goltsblat, A. A. (nov 6, 2018). Why Can't Testamentary Foundations Replace Foreign Trusts. *forbes.ru*. [Online]. Available: <https://www.forbes.ru/finansy-i-investicii/368805-poche-mu-nasledstvennym-fondam-ne-udastsya-zamenit-in-ostrannye-trasty>
- Kartashov, M. A. (2017). Testamentary Foundation: New Russian Legislation and Foreign Experience. *Modern Law*, 10, 83–90.
- Kirillova, E. A. (2019). The Legal Status of Testamentary Foundations in Russia. *Notary*, 2, 33–36. Available: <https://elibrary.ru/item.asp?id=37112998>
- Kirillova, E. A. (2016). Trust Management of the Inherited Property in the Russian Federation: Legislative Innovations. *Notary*, 3, 33–36. Available: <https://elibrary.ru/item.asp?id=25869112>
- Korop, I. I. (2019). Challenging Issues of the Testamentary Foundation Institution. *Inheritance Law*, 2, 7–10. Available from <https://www.elibrary.ru/item.asp?id=38220637>
- Krasheninnikov, P. V. (2018). *Inheritance Law*. Moscow: Statut.
- Krasheninnikov, P. V., Mikheeva, L., Rasskazova, N., Petrov, E., Kozlova, N., Pavlova, G., Ignatenko, A., Goncharenko, I., Budylin, S., Zimina, I. & Aleshev, I. (2018). Testamentary Foundation: alternative to trusts in the Russian law? *Law*, 9, 18–38.
- Makarova, O. A. (2018). Inheriting “Business-on-the-Go”: How Can a Testamentary Foundation Manage Shares? *Laws of Russia: experience, analysis, practice*, 4, 37–42. Available from: <http://www.bukvoved.ru/anno/anno-4-2018.html#z6>
- Medvedev, I. G. (2007). *Commentary on conventions in the field of property relations between spouses and inheritance*. Moscow: Walters Clover.
- Mikryukov, V. A. & Mikryukova, G. A. (2018). The Civil Law Status of a Testamentary Foundation. *Notary*, 8, 31–34. Available: <https://elibrary.ru/item.asp?id=36499468>

- Novikova, N. A. (2017). Real estate fiduciary management contract under the civil legislation of the Russian Federation. [*PhD thesis in law*]. Volgograd State University, Volgograd, Russian Federation.
- OHCHR. (aug 12, 1949). Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). [*Online*]. Available from <https://www.ohchr.org/en/professionalinterest/pages/protocolii.aspx>
- Povarov, Y. S. (2018). Bases of the System of Testamentary Foundation Management and Control Over its Financial and Economic Activities. *Probate Law*, 2, 34–37.
- Putintseva, E. P. (2016). *Last will and testament in the Russian Federation and the Federal Republic of Germany*. Moscow: Statut.
- Republic of Colombia. Constitutional Court. (feb 8, 2005). Exp. D-5342. [*Judgment C-101*]. RJ: Alfredo Beltrán Sierra. Retrieved from: <http://www.corteconstitucional.gov.co/relatoria/2005/C-101-05.htm>
- Republic of Colombia. Constitutional Court. (may 31, 2000). Exp. D-2684. [*Judgment C-641*]. RJ: Fabio Moron Diaz. Retrieved from: <http://www.corteconstitucional.gov.co/relatoria/2000/C-641-00.htm>
- Republic of Colombia. Constitutional Court. (nov, 28, 1996). Exp. D-1349. [*Judgment C-660*]. RJ: José Alfredo Salamanca Ávila. Retrieved from <http://www.corteconstitucional.gov.co/relatoria/1996/C-660-96.htm>
- R.F. State Duma. (jul 29, 2017). On amendments to parts one, two and three of the Civil Code of the Russian Federation. (*last edition*). Federal Law: No. 259-FZ. Available from <https://www.eg-online.ru/document/law/393824/>
- R.F. State Duma. (jan 12, 1966). On Non-Profit Organisations of the Russian (*as amended on 08.06.2020*). Federation. Federal Law: No. 7-FZ. Available from [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2013\)037-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2013)037-e)

[R.F. State Duma. \(nov 26, 2001\)](#). The Civil Code of the Russian Federation. [ГКРФ]. Part Three: No. 146-FZ. Available from <https://rospatent.gov.ru/en/documents/1-civil-code-of-the-russian-federation-part-one/download>

[R.F. State Duma. \(jan 26, 1996\)](#). The Civil Code of the Russian Federation. [ГКРФ]. Part Two: No. 14-FZ. Available from <https://rospatent.gov.ru/en/documents/1-civil-code-of-the-russian-federation-part-one/download>

[R.F. State Duma. \(nov 13, 1994\)](#). The Civil Code of the Russian Federation. [ГКРФ]. Part One: No. 51-FZ. Available from <https://rospatent.gov.ru/en/documents/1-civil-code-of-the-russian-federation-part-one/download>

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