COMPARATIVE ANALYSIS OF THE LEGAL STATUS OF TESTAMENTARY FOUNDATIONS IN RUSSIA AND FOREIGN COUNTRIES

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ABSTRACT: Legal rules on a testamentary foundation are a novelty for Russian legislation. Since there were no analogues of this legal institution in Russia before, many law enforcement problems arise. Russian testamentary foundations have largely adopted the provisions on the foundations of the continental legal system. For a better understanding of the legal nature of this subject of law and solving law enforcement problems, it is necessary to analyze the legal status of testamentary foundations in the states where they have existed for a long time, and take into account the positive foreign experience.

Keywords: testamentary foundation, testament, heir, trust, transaction for the establishment of a foundation, transaction in the event of death.

INTRODUCTION

On September 1, 2018, Federal Law dated July 29, 2017 No. 259-FZ "On Amendments to Parts One, Two, and Three of the Civil Code of the Russian Federation" entered into force; it introduced a new form of legal entity, or testamentary foundation (On amendments to Parts one, two and three of the Civil Code of the Russian Federation: Federal Law dated July 29, 2017 No. 259-FZ). According to the article 123.20-1 of the Civil Code of the Russian Federation, a testamentary foundation is a foundation created in pursuance of a will of a citizen and on the basis of its property that manages the property

obtained by the way of inheritance of this citizen indefinitely or for a certain period of time in accordance with the terms of the testamentary foundation (Civil Code of the Russian Federation (Part One) dated November 30, 1994 No. 51-FZ (revised on July 18, 2019)).

A testamentary foundation is a non-profit unitary organization and a type of foundation. However, its legal status differs significantly from ordinary foundations.

So, unlike ordinary foundations, the testamentary foundation cannot be created by a legal entity, it is created by a specific subject, or the testator citizen, and after his/her death. In addition, gratuitous transfer of property to the testamentary foundation by other persons, except the testator, is not allowed. It seems that such features of testamentary foundations are associated with the borrowing of legal norms about them from foreign legislation. Therefore, for a better understanding of the legal nature of this subject of law, it is necessary to analyze the legal status of testamentary foundations in states where they have long existed (Saidi & Siew, 2019; Merkibayev, et al 2018; Jenaabadi, & Khosropour 2014) .In the work, general scientific methods of cognition were used: comparison, abstraction, analysis and synthesis, induction and deduction, ascent from the abstract to the concrete, as well as special research methods: comparative-legal, normative-logical, technical-legal, systemic-structural, complex research, sociological, linguistic and others in their various combinations.

RESULTS

Unlike the Russian Federation, in foreign countries, along with posthumous testamentary foundations, there are lifetime testamentary foundations that are established during the life of their testators and continue to operate after their death. Thus, according to § 81 of the German Civil Code, a life-time transaction for the establishment of a foundation must be made in writing and contain a compulsory statement by its founder about the allocation of property to fulfill its purpose, which can also be determined for consumption. The foundation must receive a charter with provisions on the name of the foundation, the headquarters of the foundation, the objectives of the foundation, the assets of the foundation, and the formation of the foundation's board. If the transaction on the establishment of the foundation does not meet the above requirements, and the founder died having not had time to eliminate the shortcomings, then the provisions on the foundation created in case of death are applied. Prior to the recognition of the foundation as eligible, the founder has the right to recall the foundation. If recognition is requested by a competent authority, then recall can only be made by that person. The heir of the founder does not have the right to recall if the founder submitted an application to the competent authority, or in the case of notarization of the constituent case, the heir entrusted the notary to file an application (https://www.gesetze-im-internet.de).

In Spain, according to Article 7 of the Law dated November 24, 1994 No. 30/1994 “On Foundations and Tax Incentives for Private Participation in Activities of General Importance”, a foundation may be established by an inter vivos act on mortis causa (death transaction). Establishment of a foundation by a vital act (inter vivos) takes place by drawing up an open notarial deed. Establishment of a foundation by death (mortis causa) is carried out in accordance with the will. At the same time, the will must contain the following information: first names, surnames, age and civil status of the founders, if they

are individuals, their citizenship and place of residence (location); declaration of will to establish a foundation; contribution, its size and form, as well as the reality of its payment; foundation charter; identification of persons included in the governing body and its approval, if this is done at the time of establishment (Legal regulation of foundations: foreign experience. Collection of materials).

In Denmark, Law No. 300 dated June 6, 1984, "On Foundations and Some Types of Associations" defines restrictions on the will of the founder when creating a lifetime foundation. If the founding act contains provisions that give a certain family or some families an advantage in the distribution of the foundation's assets, they do not have legal force in their content if the right of priority extends further than the generation living at the time of creation and extends to the next generation. This applies to giving members of a certain family or some families a priority right to occupy a certain position or receive remuneration for work, benefits of a foundation or enterprise, in respect of which the foundation is authorized to make decisions. The restriction does not apply to the position of a member of the administrative council (Legal regulation of foundations: foreign experience. Collection of materials). Paragraph 7 of the Law published by the National Council of the Republic of Slovakia dated May 22, 1996 "On Foundations" provides for the creation of a foundation both by an individual during his\her life and after his\her death as an executor by testament. A prerequisite of the latter is that the will must determine all the statutory provisions of the foundation (Legal regulation of foundations: foreign experience. Collection of materials).

The Czech Law dated September 3, 1997, "On Foundations and Support Foundations, on Amendments and Additions to Some Relevant Laws," provides that a foundation is established by a written agreement between the founders, or the articles of incorporation in the case of the sole founder, or by testament. If the foundation is established by will, the charter of the foundation shall be executed in the form of a notarized deed. Members of the first composition of the board of directors are appointed by the founder or executor of the will, if they are not indicated by name in the will (Legal regulation of foundations: foreign experience. Collection of materials). Foundations must be distinguished from a trust, which is not a legal entity, but is also widely used as part of testamentary orders. Trust foundations are based on the idea of "splitting" the property right characteristic of the countries of the Anglo-Saxon system: the right to an object belongs to one person (the founder of the trust), the right to extract income belongs to another (manager or trustee), and the right to receive it belongs to the third (beneficiary) (Krasheninnikov, 2018; Melo, et al, 2017).

The principles of European trust law define the concept of a trust as a legal relationship in which a trustee owns property that is separate from his/her personal property and manages such property (trust foundation) in favor of one or more persons (beneficiaries) or to achieve a specific goal (Hayton et al., 2019). These principles are based on the 1985 Hague Convention on the Law Applicable to a Trust and its Recognition (https://www.hcch.net). The purpose of this convention is to establish a general procedure in which countries that have signed it, regardless of their own trust legislation, will take into account (recognize) trust instruments created in other states. Great Britain was the first to ratify the convention in 1989. The Convention entered into force on January 1, 1992, and is currently applicable between the following countries: Australia, United Kingdom, Canada, Hong Kong, Italy, Luxembourg, Liechtenstein, Malta,

Netherlands, San Marino, and Switzerland. France, Cyprus and the United States have signed the convention, but have not ratified it yet (Merkibayev et al, 2018).

One of the types of trust is a trust which arose as a result of the settlor's order and the transfer of a separate trust foundation to a trustee with the calculation of the trust's action both during the life of the founder and in case of his/her death (express trust) (Garton et al., 2020). In the UK, a trust manager is assigned to the trust foundation; this manager is responsible for the safety and management of the property of the foundation. Moreover, the trust agreement may provide for the appointment of a trustee, or protector, who oversees the activities of the manager. After the death of the founder of the trust, the heirs (as beneficiaries) receive monthly transfers from the manager. This ensures that the property of the testator (usually we are talking about business) does not depend on the actions of the heirs. A trust can be established both during the life of the testator and after his/her death in accordance with a will in favor of members of his/her family (http://www.legislation.gov.uk).

In the United States, trust foundations (trusts) are used for the purpose of descent. The so-called irrevocable trusts (the conditions of existence of which are determined by the will of the testator) can protect the property of future heirs from the requirements of potential creditors, as well as reduce the value of the taxable mass of the succession. Among the most famous posthumous foundations are the Nobel Foundation, the Henry Ford Foundation, and the Charles Stewart Mott Foundation. In countries of continental Europe, the "family foundation" analogue is a trust, in particular, in Liechtenstein and in Switzerland. The most detailed regulation of the activities of various foundations is contained in the legislation of Liechtenstein. The Liechtenstein Law on Foundations defines a foundation (Stiftung) as a legal entity which its founder endows with property for a specific purpose such as: material support for one or more families or the implementation of any socially useful functions. Beneficiaries are appointed by the founder either directly in the agreement on the establishment of the foundation, or in the charter. The Articles of Association are not stored in the Public Register, and therefore information about the beneficiaries may be confidential. The founder can appoint beneficiaries both in vivo and in the event of his/her death. The Public Register reflects information about the members of the foundation council (Wanger).

CONCLUSIONS

Testamentary foundations have a long history, both in America and in Europe. Russian testamentary foundations perceived the characteristic features of the foundations established in accordance with the continental legal system. The legislation of many states provides for the creation of foundations by individuals in case of death (inter vivos foundations) or after death (post-mortem foundations). Some countries have family foundations. Foreign legislation regulates in more detail the procedure for expressing the testator's will, the peculiarities of creating a foundation, the role of an executor, as well as a notary or court in these matters. The legal status of lifetime foundations is characterized by broad powers of the founders, which can provide in the charter many nuances relating to the activities of the foundation, including after the death of the founder. Russian law provides only posthumous testamentary foundations. It seems necessary to take into account foreign experience and supplement the Civil Code of the Russian Federation (first and third parts) with the rules governing the creation and

operation of lifetime testamentary foundations, which continue to exist even after the death of their founder-testators. This will solve the problems that may arise during the creation of posthumous testamentary foundations, in particular, the correction of incorrectly prepared documents necessary for the registration of a testamentary foundation. Since, in accordance with the current Russian legislation, such corrections cannot be made after the death of the testator, and due to the novelty of these rules, the notary certifying the will to establish the testamentary foundation may not know all the nuances of such documents.

REFERENCES

1. On amendments to Parts one, two and three of the Civil Code of the Russian Federation: Federal Law dated July 29, 2017 No. 259-FZ (revised on May 23, 2018) // Collection of legislation of the Russian Federation. - 2017. - No. 31 (Part I). - Art. 4808.
2. Civil Code of the Russian Federation (Part One) dated November 30, 1994 No. 51-FZ (revised on July 18, 2019) // Collection of legislation of the Russian Federation. - 1994. - No. 32. - Art. 3301.
3. German Civil Code (BGB) § 81 // https://www.gesetze-im-internet.de/bgb/__81.html.
4. Legal regulation of foundations: foreign experience. Collection of materials / Compiled by Vsevolod Ovcharenko - Almaty: "LEM Publishing House", 2005 - 240 p.
5. Krasheninnikov P.V. (2018) Inheritance law. 3rd edition. M.: Statute, 288 p.
6. Hayton, D. J., Kortmann, S. C. J. J., & Verhagen, H. L. (Eds.). (1999). Principles of European trust law (Vol. 215). Kluwer Law International.
7. Hague Convention 1985 on the law applicable to a trust // https://www.hcch.net/en/instruments/conventions/full-text/?cid=59.
8. Garton, J., Probert, R., & Bean, G. (2020). Moffat's Trusts Law: Text and Materials. Cambridge University Press.
9. Merkibayev, T., Seisenbayeva, Z., Bekkozhanova, G., Koblanova, A., & Alikhankyzy, G. (2018). Oppositions in the conceptual and linguistic category of time. Opción, 34(85-2), 116-148.
10. Saidi, S. S., & Siew, N. M. (2019). Assessing Students' Understanding of the Measures of Central Tendency and Attitude towards Statistics in Rural Secondary Schools. International Electronic Journal of Mathematics Education, 14(1), 73-86. https://doi.org/10.12973/iejme/3968.
11. Consolidated Foundation Act 2007 // http://www.legislation.gov.uk/ukpga/2007/31/introduction/enacted.
12. Markus H Wanger. Liechtenstein Foundation Law // https://www.uniset.ca/microstates/li_The_New_Foundation_Law_Compendium.pdf.
13. Merkibayev, T., Seisenbayeva, Z., Bekkozhanova, G., Koblanova, A., & Alikhankyzy, G. (2018). Oppositions in the conceptual and linguistic category of time. *Opción*, *34*(85-2), 116-148.
14. Jenaabadi, H., & Khosropour, A. (2014). AN INVESTIGATION ON THE AMOUNT OF EMPLOYING TOTAL QUALITY MANAGEMENT PRINCIPLES BY SCHOOL PRINCIPALS AND ITS'CORRESPONDENCE WITH THEIR AFFECTIVITY, UCT Journal of Social Sciences and Humanities Research, 2(1): 13-17.

15. Melo, R., Bezerra, M. C., Dantas, J., Matos, R., de Melo Filho, I. J., Oliveira, A. S., ... & Maciel, P. R. M. (2017, June). Sensitivity analysis techniques applied in cloud computing environments. In *2017 12th Iberian Conference on Information Systems and Technologies (CISTI)* (pp. 1-7). IEEE.