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Review of Some Aspects of the Russian Legislation on Fiduciary Management of Property and Personal Funds through the Prism of the Law on Trusts in the United States and Canada

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Abstract: Enactment of new provisions of the Civil Code in the spring of 2022 on personal funds has increased the number of legally recognized instruments for management of property of others available in Russia (personal funds, investment funds of closed type and trust management agreements). This article reviews similarities between these three instruments and trusts formed under applicable laws of the United States and Canada. Such similarities suggest that certain legal mechanisms and approaches to legal issues developed in the United States and Canada should be taken into account for further development of the Russian law on personal funds and implementation of the law in practice. The article analyses certain aspects of the Russian legislation on management of property of others (legal status of each instrument, liability of the managers to the beneficiaries and liability of founders of personal funds for the obligations of such funds) and compares provisions of Russian law with relevant laws of the State of New York and the Province of Quebec.

Keywords: trusts; personal funds; fiduciary duties; subsidiary liability; protection of beneficiaries

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Contents

I. Introduction

The legislation on personal funds, which came into force in spring of 2022, caused a rather lively discussion and a mixed reaction among practicing lawyers. On the one hand, many of our colleagues welcomed the novels as the legislators provided the legal basis for another asset management tool for individuals, which many have already dubbed "Russian trusts" and whose analogue is well known and widely used in many countries, including by wealthy Russians for management of their foreign assets. On the other hand, the possibility of creating instruments very similar to trusts has existed in Russian legislation for quite some time, and the new provisions of the Civil Code (hereinafter, the "Code") on personal funds raise many questions, criticism and doubts about the advantages of personal funds in comparison with existing and in many ways similar asset management tools (property trust management agreement (TMA) and closed mutual fund (ZPIF)). The purpose of this article is to identify some issues of legislative regulation of TMA and personal funds using the similarities of trust relations with relations arising under TMA and personal funds and to suggest possible solutions

to these problems considering the experience of the United States and Canada.

We chose these two jurisdictions[1] because, although the legal systems of both countries are traditionally considered as a part of the so-called common law system (where judicial precedent is one of the sources of law along with the codified legislation), the civil law of Quebec is based on the Civil Code of this province which brings Quebec closer to the system of continental law, where the codified legislation is recognized as primary source of law, while the State of New York in particular and the United States at large remain classic representatives of the common law system. Codified fairly recently, in 1991, in the Civil Code of the Quebec Province (hereinafter, the Quebec Code), the key rules on trusts have largely developed under the influence of case law.

In order to proceed to the discussion of some issues of the Russian legislation on personal funds, we consider it necessary to point out some similarities and differences between trusts and personal funds, as well as some similarities and differences between personal funds and existing instruments known to Russian law and already mentioned above (TMA and ZPIF). If similarities exist between trusts, on the one hand, and personal funds and TMA, on the other hand, it is logical to conclude that the similarity of legal relations implies that similar approaches may be used to regulating such relations, so the experience of the United States and Canada may be useful in further work with personal funds and other similar instruments in Russia.

II. Comparison of Trusts with Personal Funds

Trusts and Funds. First, it should be noted that the trusts and personal funds are created with the same purpose: the transfer by the settlor of a trust property to another person (trustee or personal fund) to be managed in the interests of the beneficiary in accordance with

[1] Strictly speaking, the United States and Canada cannot be regarded as uniform jurisdictions in relation to trusts, since the regulation of trusts is carried out at the level of individual states and provinces, not at the federal level.

the terms and conditions set forth the settlor (founder).[2] The settlor of the trust (founder of the personal fund) can be the beneficiary of such the trust (personal fund) during his or her lifetime, as well as any other person or a class of persons may be the beneficiary pursuant to settlor's decision. Second, the settlor of the trust and the founder of personal fund transfers title (right of ownership to the property) to the trustee or the fund, and although the trustee or the fund acquires legal title to the property, they owe an obligation to transfer the results of the management of the property to the beneficiaries. In fact, creation of a trust or fund results is a serious limitation on the powers of the new owner of the property, who fully retains only the right to own such property, while the power to use and the power to dispose the property are significantly limited by the terms of management of the trust or fund, and the power to receive fruits or results in general belongs to the beneficiaries. While the sole manager of personal fund (trustee) can be one of the beneficiaries of the fund or trust, such sole manager cannot be the only beneficiary of the trust or fund. Third, the main participants in legal relations arising from the creation of a trust or personal fund are absolutely the same: the founders (settlors), property managers (trustees or the funds themselves) and beneficiaries. Fourth, the means or ways of regulating the relations that arise upon formation of a trust or personal fund, as well as the respective roles of the main participants. A key role belongs to the settlor or the founder who sets up the trust or fund and provides for the rules to govern them. At the same time, the relations between the founder, on the one hand, and the trustee or managers of the fund, on the other hand, can also be regulated by a contract concluded between them and covering a range of issues not reflected in the rules governing the trust (for example, the amount and procedure for paying the trustee's remuneration, limitation of the trustee's liability to the beneficiaries, *etc.*). If the

[2] Worth noting that trust formation in the US and Canada is usually a part of the so-called estate planning, where the trusts serve as an instrument for avoidance of high taxation on property and inheritance, management of assets to the benefit of the settlor or third parties and protection of assets from creditors. Since there is no inheritance tax in Russia, the creation of personal funds may serve the last two purposes.

arrangements between the settlor and trustee may be stipulated in a contract, which gives the trustee the opportunity to take advance its interests and protect its when concluding it, the beneficiary is usually deprived of the opportunity to participate in the formation of the terms and conditions for the operations of a trust or personal fund, and left with a somewhat passive role in relations with the trustee or personal fund, since the beneficiary has no contractual grounds to participate in the trust's operations and activities or influence the trustee's decision-making related to the activities of the trust or fund. Participation of the beneficiary in the work of a personal fund depends on the will of the founder, who has the right, as one extreme, to fully classify the work of the personal fund from the beneficiaries (who still have the right to receive certain information about the work of the fund under Russian statutory law), or, as the other extreme, to introduce beneficiaries into the supervisory board of the fund, even giving them the authority to approve certain transactions of the fund or make decisions on key issues of fund's activities.[3] Even if the founder of the fund decides not to involve the beneficiaries in the activities of the fund and make it as difficult as possible for them to obtain information about fund's activities, the beneficiaries are not entirely deprived of the opportunity to defend their rights under statutory law. Fifth, even though it is premature to classify Russian personal funds under any criteria, it appears that Russian legislation lays down the prerequisites that, as this instrument of personal asset management develops in Russia, the same types of personal funds will emerge in Russia as the types of trusts known in the US and Canada.

Personal (living) and testamentary. Already, Russian legislation distinguishes between testamentary and living funds, depending on when such funds are created, after the death or during the life of the founder. This distinction dictates significant differences in the creation, functioning and termination of the activities of testamentary funds, which are provided for by Russian legislation (for example, a ban on the

[3] The Civil Code of Russia 1994 (clause 2 of part 3 of Article 123.20-7). Available at: https://internet.garant.ru/#/document/10164072/paragraph/52183716 3:3 [Accessed 19.08.2022].

reorganization of the testamentary fund[4] or the procedure for replacing members of collegial management bodies of testamentary funds.[5] In turn, the trusts are also divided into inter-vivos or living trusts and testamentary trusts (the trusts created pursuant to a will after the death of the settlor).

The Russian legislation provides that a personal fund after the death of its founder can continue its work as a testamentary fund.[6] This kind of trusts are called "pour-over" trusts in the US (literally "iridescent trust", since the property of a living trust in this case shimmers or flows into testamentary trust).

Revocable and irrevocable. In the US, a trust is irrevocable if its founder does not have the right to terminate its activities or change the terms and conditions of its operations. All testamentary trusts are naturally irrevocable. Individual states take two different approaches to whether a trust is revocable or irrevocable. In most jurisdictions, a living trust is irrevocable unless the settlor specifically and unequivocally reserved its right to change the terms and conditions of the trust at the time of its creation. Usually, irrevocable trust allows its settlor to reduce the overall tax burden on the settlor's assets. The Uniform Trust Code[7] and a minority of states take the opposite position — by default, a trust is considered revocable unless its documents specifically provide otherwise.[8]

The Code provides that the Charter of personal fund, the terms and conditions for managing the personal fund and other internal documents of such fund can be changed of modified by the founder

[4] The Civil Code of Russia 1994 (part 10 of Article 123.20-4).

[5] The Civil Code of Russia 1994 (part 4 of Article 123.20-8).

[6] The Civil Code of Russia 1994 (clause 2 of part 2 of Article 123.20-4).

[7] The Uniform Trust Code (or UTC) is not a legislative act, it is a model code developed by leading scholars and practitioners and recommended by them for adoption and implementation by the states. Legislators in each state decide whether to adopt such code in whole or in part or not to adopt at all. The State of New York, for example, has not adopted the UTC as its legislative act.

[8] The Uniform Trust Code 2003 (Section 602(a)) Available at: https://efaidnbmnnnibpcajpcglclefindmkaj/https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=6bae0bb2-00ea-8080-d084-5be9ef7bbc66&forceDialog=0 [Accessed 19.08.2022].

during his/her life.[9] After the death of the founder, the Charter of the personal fund, the terms and conditions for managing the personal fund and other internal documents of such personal fund cannot be changed, except for the situation when the management of the fund on the previous terms becomes impossible due to circumstances that could not have been anticipated at the time of the fund's creation. During the life of the founder, it is also allowed to reorganize the personal fund through a merger, accession, division and separation, provided that as a result of such reorganization one or more personal funds created by the same founder are formed. And although the list of the exhaustive grounds for the liquidation of personal fund[10] does not include the liquidation by founder's decision (which would otherwise have made any personal fund revocable), it seems that providing the founder with the means to indirectly cause the liquidation of his/her fund is a matter of competent preparation of documents of the personal fund since the legislation provides the founder with broad powers to participate in the management of the fund (including participation in collegial management bodies of the fund, appointment and dismissal of the sole executive body of the fund, ability to change the terms and conditions of management of the fund, *etc.*). Thus, it can be argued that a personal fund created in accordance with the legislation of the Russian Federation meets the criteria of a *revocable trust*. Testamentary fund, as mentioned above, because of their nature, can only be irrevocable.

Other types. One of the features common to all trusts formed in the US and Canada is the recognition of the beneficiary's right to alienate and divide its interests in the trust as well as to bequest such interests or pass them through inheritance unless the terms of the trusts specifically provide otherwise. If the settlor limits such powers of beneficiaries in the trust documents and protects the rights of beneficiaries from the claims of their creditors, such trusts are commonly referred to as protective trusts. There are several types of protective trusts such as discretionary trusts, support trusts and spendthrift trusts).

[9] The Civil Code of Russia 1994 (clause 5 of part 8 of Article 123.20-4).

[10] The Civil Code of Russia 1994 (part 11 of Article 123.20-4).

Discretionary trusts. A typical feature of a discretionary trust is the delegation to the trustee of the power to make decisions on whether to make payments from the property of the trust to the beneficiary who needs such payments, as well as decisions on payments in excess of reasonable needs of the beneficiary (for example, for the purchase of items of luxury). Moreover, the documents of the trust can set the guidelines that the trustee must follow when exercising its discretion or provide the trustee with absolute discretion over its decisions. Anyway, the beneficiary has the right to appeal the decisions of the trustee, but the beneficiary bears the burden of proof that trustee abused its power of discretion in rendering respective decisions.

Support trusts. A distinctive feature of a support trust is the existence of the obligation on the part of trustee to make payments to the beneficiary if they are necessary to meet the needs of the beneficiary. Under the trust documents, the needs of the beneficiary may be limited to certain goals, for example — education or healthcare. If the beneficiary provides the manager with evidence of the existence of the need stipulated in the trust documents, the trustee shall make payments to the extent that the property of the trust affords.

Spendthrift trusts. A distinctive feature of a restrictive spendthrift trust is the protection of the beneficiary's funds from the claims of its creditors if these funds are held by the trustee. Thus, the funds of the trust distributable to the beneficiary are essentially inaccessible to the beneficiary's creditors if such funds are spent in the interests of the beneficiary by the trustee by transferring, for example, funds directly to a person who provides the beneficiary with relevant services or performs certain works for the beneficiary. Most of the states in the US would enforce the terms of trust prohibiting the transfer of the interests of beneficiaries to third parties and the foreclosure of the rights of the beneficiary to satisfy its obligations. At the same time, certain exceptions are established from this general rule. For example, for the payment of alimony or funds for the maintenance of the beneficiary's children.

The imperative provisions of the Russian legislation prohibiting the transfer of the rights of the beneficiary of the personal fund to other persons and the foreclosure on the interests of the beneficiary to

satisfy its obligations[11] make Russian personal funds look very much like protective trusts. Since these norms of the legislation are imperative and the founder cannot change or amend them to deprive the beneficiaries of their rights vested under statutory law, it can be concluded that at this stage of development of personal funds, the law does not allow the establishment of funds where the powers of beneficiaries can be alienated, divided or passed to their heirs or assignees.

Here we note that such prohibition creates the risk of transfer by the founder of a personal fund of all of his/her property to a personal fund and, by appointing himself or herself as the sole beneficiary of the fund (which is explicitly allowed by law,[12] in order to significantly complicate the recovery by creditors of property which is essentially used exclusively in the interests of such a beneficiary because such property is transferred and belongs to another person, that is the personal fund. Perhaps, in attempt to address such risk, the Russian legislator has introduced the rule on fund's liability for the debts of founder discussed below. In the U.S., such trusts (self-settled spendthrift trusts) cannot be used by the settlors to protect their assets, in other words — special provisions of such trusts, limiting the rights of creditors of the beneficiary, will not be enforced by the courts.[13]

In Russia, the rights of individual beneficiary (as opposed to beneficiaries that are legal entities) of the testamentary fund do not pass via inheritance.[14] In most jurisdictions in the United States, only those rights and interests of beneficiaries that are specifically limited by the terms of the trust by the life expectancy of the beneficiaries (the so-called life interest) cannot pass via inheritance.

Thus, the unity of the goals of trusts and personal funds (as well as TMA), the same key players with almost identical functions, a very

[11] The Civil Code of Russia 1994 (clause 2 of part 1 of Article 123.20-6).

[12] The Civil Code of Russia 1994 (part 4 of Article 123.20-5).

[13] The Uniform Trust Code 2003 (Section 505(a)), *also* Restatement of the Law, second, trusts 2d, as adopted and promulgated by the American Law Institute at Washington, D.C., 1957 (§ 156); Restatement of the Law, third, trusts 3d, as adopted and promulgated by the American Law Institute at Washington, D.C., 2003 (§ 58(2) and comment "e").

[14] The Civil Code of Russia 1994 (part 2 of Article 123.20-6).

much alike ways of regulating relations among such players, together with similarity of distinctive features typical for certain kinds of trusts and funds, predetermine similarity of the key interests of main players of the trusts and personal funds. The similarity of key interests allows us to assume that personal funds will face the same issues, difficulties, challenges, and contradictions that trusts have faced and resolved, and therefore the relevant experience accumulated in the US and Canada should be of considerable interest to Russian lawyers.

III. Comparison of Trusts and Personal Funds with ZPIF

It appears that, currently, ZPIF is the most common instrument of asset management in the Russian market. TMA as another instrument of asset management (and not just a contract concluded between the management company of ZPIF and its founder(s)) is also used in practice, although not so often. The main similarity of all three instruments is the possibility of implementing the key idea of the trust — transferring the founder's property to a manager in the interests of the founder or third parties. Such similarity predetermines the inevitable comparison of these instruments in order to select the most optimal of them for a specific task that property owners set for themselves. Let us briefly dwell on the comparison of personal funds with these alternative tools to try to assess the prospect of personal funds in competition with them.

It appears that the following differences will play an important role in choosing between the personal fund and ZPIF:

1. ZPIF is not a legal entity,[15] while a personal fund is a unitary non-profit organization, an independent legal entity.[16] Although the rationale for establishment of personal funds as unitary non-profit organization in general and in the form of a fund in particular has been rightfully questioned by Alexandra Yu. Fokina and Svetlana A. Ivanova and (Fokina, Ivanova, 2022, pp. 90–91), it appears that the key consequence of this difference is that the income received from the management of

[15] Federal Law No. 156-FZ of November 29, 2001 "On Investment Funds" (clause 2 of part 1 of Article 10). Available at: https://internet.garant.ru/#/document/12124999/paragraph/137106:4 [Accessed 19.08.2022].

[16] The Civil Code of Russia (part 1 of Article 123.20-4).

the property transferred to ZPIF is not subject to taxation at the level of ZPIF and its shareholders shall pay tax on their personal income only upon redemption of their ZPIF shares in whole or in part or receipt of distributions from ZPIF, while the personal fund will have to pay corporate profit tax and the beneficiaries will pay personal income tax on the distributions made by the fund. Apparently, ZPIF has a rather serious advantage due to its legal status. While it is necessary to note that the beneficiaries of the fund may receive payments from the fund during their life, the ability to receive such payments depends on the founder of the fund and the terms of management of the fund. The shareholders of ZPIF forfeit any distributions once they sell or redeem their shares.

2. By its nature, ZPIF is not an instrument designed by the legislator to provide for management of someone's property in the interests of third-party beneficiaries. ZPIF is an investment fund and is regulated as such. Beneficiaries of ZPIF are the owners of the shares of ZPIF. Therefore, it can be argued that the legal nature of interests of key players of ZPIF, and their respective powers and means to advance their interests differ significantly from the interests of beneficiaries of personal fund. The key participants in legal relations arising from the creation of ZPIF are its founders (shareholders) and a management company acting under a TMA. Since ZPIF is not a legal entity capable of holding title to property, the property of ZPIF remains to be the property of shareholders of ZPIF during the entire period of existence of ZPIF. Upon dissolution of ZPIF, its shareholders cannot regain title to the property contributed to ZPIF, such property must be sold by ZPIF. Also, the rules of ZPIF are established by the managing company, not the shareholders of ZPIF. A share of ZPIF is a registered security certifying its owner's divided interest in the property contributed to ZPIF and managed by the management company.[17] The interest of beneficiary of the personal fund is not of an equitable nature — the beneficiary's rights arise from fiduciary obligations of the trustee and are based on the terms and conditions of management of the fund, which are established by the founder of the personal fund. To receive a share of

[17] Federal Law No. 156-FZ On Investment Funds (part 1 of Article 14).

ZPIF, its founder or shareholder must contribute property to a separate property complex, which is ZPIF, or provide some other consideration for the right to own such a share, which defines the equitable nature of shareholder's interest in ZPIF. To become a beneficiary of a personal fund, one only needs to be so named by the founder of personal fund. For these reasons, the investment like design of ZPIF may not allow to fully realize the opportunities provided to the founder of personal fund in terms of flexibility in the distribution of payments among beneficiaries, determining the composition of beneficiaries, the conditions for making payments. It should probably also be noted that Russian law prohibits transferring a property with attached security interest to ZPIF,[18] while there is no such a restriction in respect of property transferred to a personal fund. Perhaps, ZPIF was utilized as a quasi-trust in the past because Russian statutory law did not provide for creation of personal funds and TMA could not manage monetary funds and securities.

3. Each share of ZPIF provides its owner the same rights and privileges as any other share of ZPIF owned by another person. The shareholders of ZPIF enjoy the same rights as other shareholders pro rata to their respective stocks,[19] while the correlation of interests of beneficiaries of personal fund is determined by the founder of the fund at his/her absolute and sole discretion (in other words, the beneficiaries may have different sets of claims towards personal fund) and can be changed by the founder at any time.

4. Like any security, a share can be transferred by its owner to any third party, and, in the event of the death of the owner of the share, it goes into the estate of the deceased and inherited under law or will. The shares limited in circulation give their owners the right to demand the allotment of property attributable to such upon redemption of the share.[20] The shareholder of ZPIF is not protected from the claims of its creditors and cannot protect the property contributed to ZPIF from the claims of such shareholder's creditors (as the property of ZPIF is common property of all shareholders). The shareholder is free to

[18] Federal Law No. 156-FZ On Investment Funds (part 3 of Article 13).

[19] Federal Law No. 156-FZ On Investment Funds (clauses 7 and 8 of part 1 of Article 14).

[20] Federal Law No. 156-FZ On Investment Funds (clause 6 of part 1 of Article 14).

alienate, divide and bequest its shares to any third person without founder's consent. Beneficiaries of personal fund do not have such flexibility in respect of their interests in the fund.

5. The current Russian legislation and the Central Bank of the Russian Federation, as the regulator of investment funds, impose several requirements on the composition and structure of the assets of ZPIF.[21] The founder of the personal fund has the right to transfer to the fund any property. The only requirement to the contribution of a founder of personal fund is that the value of the property transferred to the fund may not be less than one hundred million Russian rubles or approximately $ 1,2 million.[22] In case of liquidation of ZPIF, its property or proceeds of the sale thereof can be distributed only among the shareholders, while in the liquidation of the personal fund, its property can be transferred to any person in accordance with the terms and conditions of management approved by the founder of the fund.

6. Shareholders of ZPIF have the statutory right to participate in the management of ZPIF by participating in general shareholder meetings.[23] The founder of personal fund may include all or some of the beneficiaries on the supervisory board of the personal fund (such conclusion follows from the prohibition to the beneficiaries to participate in the work of the executive bodies of the personal fund)[24] or may not vest any managerial right in the beneficiaries. The founder of personal fund has an option to make the information on the fund and the terms and conditions of its operation unavailable to the beneficiaries.[25]

From the above differences between ZPIF and personal funds, the following conclusion can be drawn: since ZPIF is not a legal entity and not taxed at the corporate level, its use as an alternative to a personal fund makes sense only in one case — the coincidence of the founder and the sole shareholder (in fact — the beneficiary) in one person (naturally, such founder and shareholder also controls the management company) when the founder ZPIF does not intend to (1) distribute the income from

[21] Federal Law No. 156-FZ On Investment Funds (Articles 33 and 34).
[22] The Civil Code of Russia 1994 (clause 2 of part 4 of Article 123.20-4).
[23] Federal Law No. 156-FZ On Investment Funds (Article 18).
[24] The Civil Code of Russia 1994 (clause 2 of part 2 of Article 123.20-7).
[25] The Civil Code of Russia 1994 (clause 4 of part 8 of Article 123.20-4).

the management of property among multiple beneficiaries; (2) maintain flexibility of redistribution of proceeds from the management of property amount various beneficiaries, (3) have an option of replacing beneficiaries at any time, and (4) protect the property itself and the income from its use from possible claims of creditors. As noted above, courts in the United States usually refuse to enforce self-settled spendthrift trusts, so if the courts in Russia adopt the same approach, then ZPIF as an instrument of management of sole founder's (or several founders') assets exclusively for the benefit of such founder(s) will remain attractive. But such limited use of ZPIF cannot be viewed as a real alternative to opportunities afforded by personal funds and TMA.

IV. Comparison of Trusts and Personal Funds with TMA

Under TMA,[26] one party (aka a founder) transfers the property to the other party (aka a manager of the property) for a certain period, and the manager undertakes to manage such property in the interests of the founder, or any other person(s) (or beneficiary(-ies)) specified by the founder. Once TMA is concluded, it appears that commercial and legal relations that are very similar to those of personal fund arise. In both cases, we have the management of one's property by another person for the benefit of others, non-equitable nature of beneficiaries' interests, and the same key actors (founder, manager, and beneficiaries). The parties to TMA (usually, the founder and manager) are free to set forth practically any contractual terms and conditions to govern their contract, including the terms and conditions of payments to beneficiaries. The Code specifically provides[27] that foreclosure on the property transferred under TMA is not allowed, unless the founder becomes insolvent and goes into bankruptcy, thus affording to the founder's property similar protection against claims of creditors. Currently, the legislation does not provide for any restrictions on the disposal by beneficiaries of their rights and powers arising under TMA.

[26] The Civil Code of Russia 1994 (part 1 of Article 1012).

[27] The Civil Code of Russia 1994 (part 2 of Article 1018).

At the same time, unlike with the personal fund, the income received by the manager from the management of the founder's property is only taxed as personal income of beneficiaries (so no two-layer taxation is applied to TMA), which makes the tax regime of the TMA like ZPIF. Unlike personal funds, TMA does not provide any statutory protection against creditors' claims to beneficiaries.

Interestingly enough, comparing legal relations arising under TMA with the legal relations arising upon creation of personal funds, one can find a lot of similarities, and, considering that the Russian legislation does not limit the powers of beneficiary to alienate or divide its interests arising under TMA and provide any protection of such interests against the creditors, it can be concluded that TMA de facto creates an instrument of management of founder's property practically indistinguishable from a revocable non-protective living trust. Such TMA may be even structured as irrevocable because, even though the Civil Code provides that TMA may be terminated by either party before the expiration of the term of contract, the statute[28] gives the TMA parties an option to agree on a rather lengthy notice period, short of the period for which the TMA is concluded. Since the current Russian legislation practically does not regulate the content of TMA (most of the provisions of the Code relating to the content of TMA are of dispositive nature and can be changed by contract), the terms and conditions of TMA can be structured similarly to trusts.

Sergey Alimirzoev and Ilia Aleshchev expressed the opinion that TMA is not an analogue of English law trust only because Russian law does not recognize the concept of equitable vs. beneficial ownership and the title to managed assets under TMA does not pass to the manager but remains with the founder (Alimirzoev and Aleshchev, 2021). In the United States, when a trust is created, the legal title to the property placed in the trust passes from the settlor to the trustee. Russian law specifically provides[29] that the transfer of property under TMA from the founder to manager does not entail the transfer of title from one to another. This difference, however, does not significantly affect the

[28] The Civil Code of Russia 1994 (part 2 of Article 1024).

[29] The Civil Code of Russia 1994 (clause 2 of part 1 of Article 1012).

relations among key actors of trust and TMA. With or without the transfer of legal title, the powers of title holder are similarly limited under TMA and trust arrangements. Under TMA, the title stays with the founder but, for the entire term of TMA, the founder is essentially deprived of such powers as the right of possession, right of disposal and right to fruits and benefits (if the beneficiary of TMA is not the founder). Additionally, the manager of TMA has the right to demand the property from anybody's illegal possession, including the possession of the founder, the legal title holder to the property.[30] If the split of equitable and beneficial ownership essentially means that some of the powers of title holder are transferred to another person while the benefits from the use of property remain with the transferor (or assigned to another beneficiary) then TMA perfectly serves such purpose which makes it almost indistinguishable from a revocable trust. Upon establishment of revocable trust, the settlor transfers the trust property to the trustee but reserves the right to terminate the trust and regain title to the trust property at any time, and upon formation of TMA its founder reserves the right of termination of the contract, thus regaining all powers of the title holder of the property, so from practical standpoint it is not essential who holds legal title to the property at any given point of time as the powers of title holder are split between the settlor and trustee for the entire duration of TMA or revocable trust. Moreover, with introduction of personal funds to the Russian legal system whereby the title to property is transferred from the founder to the fund, the distinctions between trust and trust management in the form of personal fund tend to be further erased.

In fact, the trusts and TMA are similar in the ways they are created and in terms of conditions[31] that must be met for them to be created:

1. The settlor of trust must have *the intention to create a trust* (i.e., to establish certain relations with the trustee in connection with management of property in the interest of beneficiaries). The conclusion of TMA between the founder and manager satisfies this condition —

[30] The Civil Code of Russia 1994 (part 3 of Article 1020).

[31] The Uniform Trust Code (Section 402).

by signing the contract, the founder expresses his/her intention to hire the services of the manager with respect to specific property.

2. To create a trust, the parties must comply with the necessary *formalities*. Chapter 53 of the Civil Code of the Russian Federation imposes several requirements as to the form and substance of TMA, its state registration (if the object of the TMA is real estate), the activities of the manager, the parties to the contract, *etc*. If all the requirements of the Civil Code of the Russian Federation are satisfied, then the TMA becomes binding and enforceable. When TMA is formed under Russian law, there is no formation of a new legal entity, just as there is no formation of a new entity when a trust is established in the US or Canada.

3. The trust must have *property (the so-called Res*). One of the essential conditions of TMA[32] is the determination of the composition of the property transferred to the manager.

4. *Existence of beneficiaries* that can be established (ascertainable beneficiaries). The name of the legal entity or the name of the individual in whose interests the property is managed for must be indicated in the TMA.[33]

Based on the foregoing, it is reasonable to conclude that the formation of TMA under Russian law creates legal relations that are very close in essence to legal relations arising from the creation of trusts that do not pursue the goal of protecting trust property or the rights of beneficiaries. Thus, a TMA can essentially perform the same role as non-protective trusts in the U.S. or Canada.

At the same time, the following differences between TMA and trusts can be pointed out (although we think that these differences are more of a technical nature as they do not impact the essence of relations among parties):

1. Russian law imposes a limitation as to who can serve as a manager of TMA — only individual entrepreneurs or commercial organizations can serve as managers of TMA.[34] Any person capable of holding title to the property of the trust can be a trustee.

[32] The Civil Code of Russia 1994 (clause 2 of part 1 of Article 1016).

[33] The Civil Code of Russia 1994 (part 3 of Article 1016).

[34] The Civil Code of Russia 1994 (Article 1015).

2. Russian law provides that money cannot be an independent object of the TMA, unless otherwise is specifically provided for by law.[35] For example, Federal Law No. 395-1 of December 2, 1990 "On Banks and Banking Activities" and Federal Law No. 39-FZ of April 22, 1996 "On the Securities Market" granted credit institutions and professional participants of the securities market the right to manage monetary funds under an agreement with individuals and legal entities. Such restrictions are not known to trusts in the United States or Canada. In the aftermath of the era of financial pyramids and money lost by investors with bad faith real estate developers, the intent of the Russian legislator to introduce such restrictions is understandable, but such restrictions are likely to hold off the development of TMA.

3. The term of the TMA is limited by Russian law to 5 years, while the term of trust is only limited by the rule against perpetuity. Noteworthy, the parties to TMA can enter into a new 5-year TMA upon expiration of the original 5-year term agreement.

4. The death, bankruptcy or liquidation of the manager or beneficiary of the TMA may result in termination of the TMA.[36] In the United States and Canada, such circumstances do not entail the termination of the trust if the trust instruments allow to establish a new beneficiary or appoint a new trustee.

5. Russian legislation does not provide neither for the termination of the TMA in the event of the death of its founder, nor for the transformation of the TMA into a testamentary fund, if the TMA is concluded in favor of the beneficiary who survived the founder. In the event of the death of the founder of the TMA, the contract is binding on the estate of the deceased until its expiration or early termination by the manager. In this article, we do not consider a special type of TMA provided for in Article 1173 of the Code (management of estate of deceased arising by operation of law).

[35] The Civil Code of Russia 1994 (part 2 of Article 1013).

[36] The Civil Code of Russia 1994 (part 1 of Article 1024).

V. Some Legal Issues Related to Regulation of Personal Funds and TMA and Possible Ways to Address Them

Starting from spring of 2022, three asset management instruments are available in Russia, in many respects very similar to trusts: TMA (an analogue of non-protective living trust), personal funds (an analogue of revocable protective living trust) and ZPIF (a special case of non-protective living trust). Despite the similarities among these instruments, there are significant differences among them, which will hinder the use and further development of these undoubtedly important asset management tools.

1. Significant differences in the creation, the legal status, the governance and taxation. Personal funds are created by a written decision of their founders, certified by a notary. The founder shall also approve the Charter of the fund and its Terms of management. The decision on the establishment of the fund and its Charter shall be submitted to the territorial office of the Ministry of Justice of Russia for the state registration of the fund as a legal entity. The Ministry of Justice sends documents to the Tax Service of Russia for the introduction of the fund into the Unified State Register of Legal Entities as a taxpayer. After entering the fund into the Unified State Register of Legal Entities, the Ministry of Justice issues a certificate of state registration to the fund, after which the founder can transfer to the fund the property necessary for its work, and the fund can open a bank account and start its activities. We remind you that the value of the property transferred to the fund cannot be less than 100 million rubles. The profit made by the fund is subject to corporate profit tax and the income distributed to beneficiaries of the fund is subject to their respective income tax. After the creation of the fund, changes to the Charter of the fund are subject to registration with the Ministry of Justice. Compare these procedure and requirements with the creation of a TMA by concluding a respective contract in a simple written form between the founder and the manager and transferring the property to the manager. TMA does not create a new legal entity, the profit generated by the manager is taxed only at the beneficiaries' level upon distribution of such profit, and the manager pays tax on the remuneration that he receives for the management of

the property. The property of the founder is separated on the balance sheet of the manager, independent accounting is maintained on it. We remind, however, that money cannot be the object of TMA. The performance of the parties to the TMA is not regulated by any public authority. Finally, for the formation of ZPIF, its manager first agrees on the rules for managing ZPIF with a specialized depository (which will maintain the list of shareholders of ZPIF and through which payments are made to beneficiaries), then registers such rules with the Central Bank of the Russian Federation, and the Central Bank of Russia includes information about the new ZPIF into the Register of Mutual Funds. After the inclusion of ZPIF in such a register, the property of the fund is formed (by transfer by shareholders of their property to ZPIF), and the management company proceeds to manage the fund. The Central Bank of the Russian Federation, as a regulator of the activities of investment funds, imposes several requirements on the composition and structure of the assets of ZPIF. ZPIF is not a legal entity, the profit from its operations is taxed only at the level of shareholders (i.e., the beneficiaries), and the manager pays tax on the remuneration that he receives for the management of the property. In this regard, transactions with the property of ZPIF are carried out by the management company. The management company is required by law to enter into a TMA with each shareholder of ZPIF, but the terms and conditions of such TMA are non-negotiable (the so-called "accession agreement").

Taking into account the position of the Federal Tax Service of Russia, detailed in the Letter No. BV-4-7/3060@ of March 10, 2021 "On the practice of applying Article 54.1 of the Tax Code of the Russian Federation," that the tax authorities consider it possible to exercise their right to change the legal qualification of transactions made by the taxpayer, if the main purpose of the transaction was to reduce its tax liability, it is especially important when deciding on the use of TMA or ZPIF to develop a reasoned position on what purpose is the main one when choosing a particular tool to minimize the risk of requalification of TMA or ZPIF into personal fund (the so called "constructive trust" in the United States and Canada).

Given the earlier conclusion that ZPIF is a rather inconvenient instrument of property management and can be effectively used under

limited circumstances, the person desiring to preserve certain flexibility in managing its property via analog of a living trust in favor of multiple beneficiaries can chose between a personal fund and TMA. Since both instruments can provide the founder with the desired flexibility, the choice in favor of the TMA can be due to the simplicity of its creation, the absence of a requirement for the value of the property transferred to management, and single layer taxation. In favor of the personal fund may be due to the possibility to transform personal fund into a testamentary fund after the death of the founder (to avoid disputes among heirs) and the absence of a ban on the transfer of money to the personal fund.

2. Lack of clarity on trustee's liability to beneficiaries. Fiduciary duty of a trustee to beneficiaries forms the core of trust relations in USA and Canada. The legislation in these countries regard the fiduciary duty as the highest set of obligations that one can owe to another in connection with management of property. In its simplest terms, it means that the fiduciary owes to the beneficiary the highest degree of care and devotion. The fiduciary must always act in the best interests of the beneficiary and can never take any action which harms the beneficiary intentionally and must avoid negligently harming the interests of the beneficiary as well. It also means that the fiduciary cannot place him or herself in a position in which the interests of the fiduciary conflict with the duty to the beneficiary. Full disclosure of any potential conflict of interest must be revealed to the beneficiary if they arise. The responsibility of the parent to the child, the spouses — to each other are classic examples of the standards of fiduciary responsibility. The classification of the relationship between the trustee and the beneficiary of the trust as a fiduciary relationship (because the manager accepts a duty based on the management of property that would not belong to the manager if the trust had not been established) refers to the standard imposed by legal systems in US and Canada on the actions of the trustee. Explaining the meaning of fiduciary liability, the following obligations of the trustee to the beneficiary are usually distinguished: (1) the obligation to manage the property with such a degree of care and diligence and in such a way as is done with respect to one's own property

(so called "duty of care and skill"), while in some US jurisdictions the standard for this obligation of the trustee is even higher — "...as is done with the property of other persons," as one should demonstrate even greater care and discretion in the management of the property of others;[37] some other important obligations of trustee are usually mentioned in this regard, such as the obligation to act in accordance with instructions of the settlor or in the best interests of beneficiaries, the obligation not to comingle the trust property with the personal property of trustee and the obligation to maintain full records on transactions with trust property;[38] (2) the duty to prudently invest,[39] and diversify such investments; (3) the obligation of unconditional loyalty (duty of undivided loyalty),[40] which is generally understood as the impossibility for the trustee to pursue any personal interests in the management of the property of the trust (therefore, transactions with the property of the trust in relation to trustee personally are considered a violation of this obligation without any conditions, a breach *per se,* even if the transaction is concluded on market terms), and it is worth noting that the obligation of unconditional loyalty applies to any relationship between the manager and the beneficiary, not only to their relationship that exists within the framework of the trust; (4) the obligation to act impartially, that is, taking into account the interests of all beneficiaries, without giving preference to the interests of some of them to the detriment of the interests of others (the duty of impartiality);[41] and (5) the duty to protect confidential information (or duty of confidentiality).

With respect to the manager's duties and responsibility to the beneficiaries, the Russian legislation is not sufficiently developed, and lacks consistency when it comes to regulating this matter in the context

[37] See, for example, General Obligations Law of the State of New York (clause 1 of § 5-1505) Available at: https://www.nysenate.gov/legislation/laws/GOB [Accessed 19.08.2022], which provides for the highest standard of liability of fiduciary: the standard of a prudent person dealing with property of another.

[38] General Obligations Law of the State of New York (clause 2 of § 5-1505).

[39] Powers and Trusts Law of New York (Article 11). Available at: https://www.nysenate.gov/legislation/laws/EPT [Accessed 19.08.2022], incorporating § 1 of the Uniform Prudent Investor Act.

[40] Powers and Trusts Law of New York (§ 13-A-4.1).

[41] Restatement (Third) on Trusts §§ 239(a), 232, general comment (c).

of different instruments. In general, it can be argued that it does not properly protect the interests the beneficiaries.

Personal funds. The legislation on personal funds contains the following provisions on the obligations of the fund and its management bodies to beneficiaries: "in case of violation of the terms and conditions for the management of personal fund, which entailed the occurrence of losses of the beneficiary of the personal fund, the latter has the right to demand compensation of such losses, if such a right is provided for by the Charter of the personal fund."[42] Please note that beneficiaries can seek damages from the fund itself, not from the management bodies of the fund, while the fund itself, as a legal entity, can suffer losses from the actions of its management. With respect to the responsibility of the single executive body of the fund, the Civil Code of Russia requires such body to act "in good faith or reasonably in the interests of *the fund and (or) its beneficiaries."*[43] It is unclear from this norm in whose interests shall the executive body of the fund act? What if the interests of fund and the interests of beneficiaries do not coincide? If the executive bodies of the fund breach this duty, the fund's supervisory body may terminate the powers of the relevant executive body. Does it mean that the executive body of the fund is not liable to the fund and its beneficiaries for the caused damages?

Federal Law No. 7-FZ of January 12, 1996 "On Non-Profit Organizations" (which should be applicable to the personal funds as they are regarded as non-profit entities under Russian law) provides for the obligation of all interested persons (which include the management bodies of personal fund and some officials of the fund) to observe the interests of a non-profit organization (that is, a personal fund) primarily with regard to the purposes of its activities, and not to allow the use of the capabilities of a non-profit organization for other purposes.[44] For transactions that result in a conflict of interests, a special procedure for their conclusion is provided by law (they must be approved by authorized

[42] The Civil Code of Russia 1994 (part 5 of Article 123.20-6).

[43] The Civil Code of Russia 1994 (part 2 of Article 123.20-7).

[44] Federal Law No. 7-FZ of January 12, 1996 "On Non-Profit Organizations" (Article 27). Available at: https://internet.garant.ru/#/document/10105879/paragraph/727257/doclist/431/showentries/0/highlight/7-Ф3:6 [Accessed 19.08.2022].

management body or supervisory authority of the fund). The interested person shall be liable to the personal fund in the amount of the losses caused by the conclusion of the transaction in violation of such an order.

It seems proper to suggest for the management bodies of the fund and some of its officers to be liable to the fund and to its beneficiaries not only for a failure to act in the fund's best interests but also for the breach of the Terms of management of the fund. To achieve it, certain amendments to the provisions of the Civil Code shall be introduced.

With respect to responsibility of managers of ZPIF and TMA, it should be noted that provisions of the Civil Code only would be applicable to the manager of TMA, while the provisions of the Civil Code and the Law on Investment Funds would apply to the managers of ZPIF.

TMA. Due care of the interests of the beneficiary is the responsibility of the manager of TMA.[45] The meaning of "due care" or criteria for determining if one is acting with "due care" have not been yet developed by legislators or courts. In case of violation of such an obligation by the manager, he is liable to the beneficiary in the amount of lost profits of the beneficiary for the entire time of the TMA, and to the founder — in the amount of losses arising from the loss or damage to property and lost profits. It appears, however, that the manager of TMA does not owe to beneficiaries or the founder of TMA any other duties other than the duty of care which meaning is yet to be determined. Although such gap can be fixed by including corresponding provisions in the TMA on the duties of the manager, the meaning of such duties and consequences of their breaches, such individual regulation of matters of manager's responsibilities and corresponding liabilities does not address the difference in the regulation of responsibility of the managers of TMA and personal funds to beneficiaries, especially considering that the beneficiaries can be excluded from the discussion of the terms and conditions of the agreement between the sounder and manager.

Since the essence of the relations between the fund and its beneficiaries and between the manager of TMA and its beneficiaries are very much alike, it appears reasonable to suggest that criteria for assessment of performance of obligations of the manager and the fund

[45] The Civil Code of Russia 1994 (Article 1022).

should be the same and reflected in the law. Otherwise, it is hard to explain in rational terms why the personal fund or its executive bodies responsible for management of assets valued at 200 million Rubles (as an example) and the manager of TMA charged with an obligation to manage immovable property of the same value would owe to their beneficiaries different set of duties and not be liable to the same extent for breach their respective obligations.

ZPIF. The Law on Investment Funds provides for the liability of the management company to the shareholders of ZPIF in the amount of actual damages in case of losses resulting from violation of federal laws and rules of management of ZPIF.[46] This Law also provides for the obligation of the management company to act "reasonably and in good faith" while exercising its rights and performing its obligations.[47] The management company can be held liable for losses caused to its clients in connection with the conflict of interests on the part of the management company.[48] As noted above, the question of the responsibility of the management company of ZPIF to the sole shareholder does not usually arise since the management company is usually controlled by such sole shareholder.

Thus, the responsibility of a management company of ZPIF appears to be more comprehensive in comparison with the responsibility of personal funds and managers of TMA. However, the use of ZPIF for purposes for which trusts are created (management of property in the interests of third-party beneficiaries) is limited.

As an example, let us consider the main provisions of the Civil Code of the Quebec Province (the Quebec Civil Code) governing the obligations of trustees. Please note that statutory provisions applicable to trustees are designed for a much broader group of actors. Title 7 of Book 4 of the Quebec Civil Code governs the administration of property of others and Article 1278 of the Quebec Civil Code specifically provides that Chapter 7 shall be applicable to trustees. Thus, the Quebec legislation has the same requirements to all managers of property of

[46] Federal Law No. No. 156-FZ On Investment Funds (Article 16).

[47] Federal Law No. No. 156-FZ On Investment Funds (part 1 of Article 39).

[48] Federal Law No. No. 156-FZ On Investment Funds (part 1.1 of Article 39).

others, regardless of the grounds on which respective relations on management arise.

The Quebec Civil Code provides both the list of specific obligations of a trustee to a beneficiary and the standards for trustee's performance of such obligations, i.e., certain guidelines and criteria for trustee's actions.

Among the specific obligations of the trustee, there are: (1) the duty to inform beneficiaries without delay of any circumstances causing conflict of interests;[49] (2) the duty not to become a party to a contract affecting the property of the trust or acquire any right in the property of the trust or against beneficiaries of the trust;[50] (3) the duty not to mingle the property of the trust with own property of the trustee;[51] (4) the duty not to use the property of the trust or the information obtained by reason of the trust management to personal benefit of the trustee except with the consent of the beneficiary or unless it results from the law or the act constituting administration of property;[52] (5) the duty not to dispose gratuitously of the property entrusted to the trustee unless it is of the very nature of the trust management or the value disposed is very little and it is disposed in the interests of beneficiary;[53] (6) the duty not to renounce any right belonging to the beneficiary or forming part of the administered property (other than for valuable consideration);[54] (7) the duty to comply with the obligations imposed by law and the terms of the trust. Trustee has the right to sue and can be sued with respect to anything connected with the management of the trust, the trustee also may intervene in any action respecting the administered property.[55]

Also, the Quebec Civil Code provides that the trustee (1) is bound to act impartially if there are several beneficiaries of the trust, taking

[49] Civil Code of Quebec (Article 1311). Available at: https://www.legisquebec.gouv.qc.ca/en/document/cs/ccq-1991 [Accessed 19.08.2022].

[50] Civil Code of Quebec (Article 1312).

[51] Civil Code of Quebec (Article 1313).

[52] Civil Code of Quebec (Article 1314).

[53] Civil Code of Quebec (Article 1315).

[54] Civil Code of Quebec (Article 1315).

[55] Civil Code of Quebec (Article 1316).

into account their respective rights;[56] (2) shall act with prudence and diligence, honestly and faithfully in the best interest of beneficiary; (3) may not exercise its powers in its own interest or that of a third person or place itself in a position where its personal interest is in conflict with the obligations of trustee;[57] and (4) shall preserve the property and make its productive, increase the patrimony or secure its appropriation where the interest of the beneficiary or the purpose of the trust requires it.[58]

To address the above-mentioned gaps and inconsistences in regulation of liability of personal funds, TMA and ZPIF and their managers to the beneficiaries, the approach adopted in Quebec may be studied and implemented in Russia via establishing unified rules applicable to responsibility of managers to beneficiaries and codifying such rules in the Civil Code of Russia. Until then, the founder of personal fund can resolve the issues of the responsibility of the personal fund and its management bodies to the beneficiaries in the Terms and Conditions for the management of the personal fund and other internal documents of the fund. If the matter is not address by the founder, the default provision of the Civil Code of the Russian Federation[59] leaves beneficiaries with no remedy against the fund or its executive bodies for breach of the Terms and Conditions.

Similarly, the founder of the TMA should attempt to clarify the definition of "due care" owed by the manager of TMA to beneficiaries in the TMA and provide for other specific duties and corresponding liabilities of the manager.

At the same time, it is rather common for trustees in the US and Columbia to seek limitation of their liability to beneficiaries for performing their duties. Usually, issues related to the standards to be applied to the performance of the trustee's obligations, the exclusion of liability for negligence (limitation of liability for intentional violation is usually not enforceable), permission to the trustee to conclude some

[56] Civil Code of Quebec (Article 1317).

[57] Civil Code of Quebec (Article 1310).

[58] Civil Code of Quebec (Article 1306).

[59] The Civil Code of Russia 1991 (part 5 of Article 123.20-6).

transactions despite conflict of interests, and some other issues are subject to negotiations.

3. Responsibility of the founders for the obligations of personal funds. Since the settlors of trusts and founders of testamentary funds are not liable for the obligations of trusts and testamentary funds, respectively (mainly because the title to the property is transferred from the settlor or founder to trustee or the fund), much criticism has been addressed to the rule that, within 3 years from the date of creation of the personal fund, its founder bears subsidiary liability for the obligations of the personal fund in case of insufficiency of its property, and the personal fund, with the exception of the testamentary fund, bears subsidiary liability for obligations of the fonder, and the courts may further extend the term of such several liability to 5 years.[60] The explicit reservation that testamentary fund is not responsible for the obligations of its founder opens the possibility of interpreting this norm in a way that the founder bears subsidiary liability for the obligations of the testamentary fund with property remaining after his death and not transferred to the testamentary fund.

Considering that personal fund is a separate legal entity under Russian law, and, as a matter of general rule applicable to all unitary non-commercial entities, the fund should not be liable for obligations of its founder(s) (likewise, the founder(s) of the fund shall bear no liability for the obligations of the fund),[61] the above-mentioned exemption from the general rule for the personal funds does not make sense.

In New York, there is a rule that the founder of the trust shall have no advantages whatsoever in respect of the payments made by the trust in favor of such founder vis-à-vis the founder's actual creditors (i.e., the creditors who already have a claim against the founder) or future creditors (i.e., those who may have such claim in the future). This rule applies regardless of the time passed since the establishment of the trust. As the court of appeals stated in its decision in Vanderbilt Credit Corp. v. Chase Manhattan Bank[62] wherein a protective trust was

[60] The Civil Code of Russia 1991 (part 6 of Article 123.20-4).

[61] The Civil Code of Russia 1991 (part 1 of Article 123.18).

[62] Vanderbilt Credit Corp. v. Chase Manhattan Bank 100 AD 2nd 544 (2nd Dept. 1984).

established for the sole benefit of its settlor: "an attempt to use own property in such a way so creditors cannot foreclose on it contradicts public policy."

Perhaps the Russian legislators pursued the similar goal as described above, where the courts refuse to protect against creditors' claims the so-called self-settled spendthrift trusts (protection against abuse by the founder of its right to transfer all property to a personal fund while appointing himself or herself as the sole beneficiary of the personal fund). Oleg V. Gutnikov has expressed an opinion that such subsidiary liability of founders of personal funds would make the funds "trustworthy" in the eyes of other participants of the civil turnover (Gutnikov, 2022). Vera I. Soldatova thinks that the subsidiary liability is designed to protect the interests of creditors of the founder of personal fund and avoid bad faith behavior of the founder (Soldatova, 2021). Alesya V. Demkina shares such point of view (Demkina, 2021). However, assuming that this was exactly the intent of the legislator, a corresponding exception should be made to the general rule that founders and funds are not responsible for each other's obligations in a different way, namely to provide a specific exemption from the general rule only for the cases where the founder of personal fund is the sole beneficiary of such fund and it can be demonstrated that the founder of personal fund acted in bad faith.

Pursuant to today's wording of the statute, personal funds lose one of its key advantages, which is the protection of assets from the claims of founder's creditors and limitation of founder's liability for the obligations of the personal fund, for the terms of 3 to 5 years from the moment of establishment of the personal fund. The rule on the subsidiary liability of the founders for the obligations of the fund in conjunction with a very complex procedure for creating a fund, where the main role will be played by the Ministry of Justice, and the taxation of personal funds as legal entities can make this instrument of asset management unpopular in Russia.

4. Determination of the circle of beneficiaries. Any individual or legal entity can be a shareholder of ZPIF. The shareholders of ZPIF are its beneficiaries. Given that ZPIF was conceived by the

legislator rather than as an asset management instrument, but as an investment vehicle that can accumulate funds of small and medium-sized investors for placement in large assets, the legislation in fact does not make it possible to appoint beneficiaries in the ways usual for trusts.

Russian law as a material condition of the TMA calls "the name of a legal entity or the name of an individual in whose interests the property is managed."[63] That is, the Civil Code of the Russian Federation establishes a very strict rule in relation to those who can be the beneficiary of the TMA: their names must be specified in the TMA. Recall that the failure of the contracting parties to comply with the material conditions entails the recognition of the contract as not concluded.[64] Thus, since the Civil Code of the Russian Federation does not prohibit the founder from amending the TMA, and the founder may reserve the right to replace one, several or all of the beneficiaries after the conclusion of the TMA, when replacing or including new beneficiaries in the TMA, it is necessary to comply with the requirement of the Civil Code of the Russian Federation on a very specific indication of the names of beneficiaries.

In comparison with the rule applicable to TMA, the rules on who can be a beneficiary of a personal fund can be considered as flexible as possible. The Terms and Conditions of a personal fund may include provisions on the transfer to certain persons (beneficiaries of a personal fund) or to *certain categories of persons* from an indefinite circle of persons... all of the property of the fund or part of it...".[65] Moreover, the Terms and Conditions for the management of a personal fund may provide that the beneficiaries of the personal fund or certain categories of persons to whom the property of the personal fund is to be transferred shall be determined by the bodies of the personal fund in accordance with the Terms and Conditions for the management of the personal fund.[66] The only restriction on who cannot be a beneficiary of a personal fund is that it cannot be a commercial legal entity.[67]

[63] The Civil Code of Russia 1991 (part 1 of Article 1016).
[64] The Civil Code of Russia 1991 (part 1 of Article 432).
[65] The Civil Code of Russia (part 1 of Article 123.20-5).
[66] The Civil Code of Russia 1991 (part 2 of Article 123.20-5).
[67] The Civil Code of Russia 1991 (part 4 of Article 123.20-5).

The rules for determining beneficiaries of personal funds under Russian law resemble the rules of most states in the United States, according to which the founder must either identify a specific beneficiary (beneficiaries) or describe the beneficiary so that it can be unambiguously determined, and, if this condition is not met, then the trust is considered "failed" (a failed trust). Thus, the settlor of a trust does not have to specify the names of beneficiaries (although it can be certainly done) but must make sure that the trustee can unequivocally determine who the beneficiaries are. For example, it is permissible to indicate as beneficiaries of the trust a circle of persons, provided that such a circle of persons is described in a way that the beneficiaries can be uniquely defined (as an example: "all my nephews and nieces" or "my children" would be a proper indication of the circle of persons as beneficiaries, while "some of my brothers and sisters," "my friends"[68] or "my two grandchildren" are examples of improper assignment of a circle of persons as beneficiaries). Also, the settlor may give the trustee the power to decide who exactly from a *certain* group of persons to choose to receive the property of the fund (for example — "choose one or more recipients of a scholarship to study at the university from among my grandchildren"), while the founder can give the manager full freedom in making such a decision or establish certain criteria or rules for such a choice in the trust instrument. However, the founder cannot authorize the manager to determine the beneficiary at his sole discretion "from among those whom he deems worthy," for example.

Since it is not entirely clear yet what exactly the Russian legislator meant by "certain categories and persons from an indefinite circle of persons," perhaps we should adhere to the rule that with such a choice of beneficiaries, the founder should take care to avoid uncertainty about the question, whom the founder meant by such a "category of persons."

Admittedly, personal funds provide the founder with a much wider choice of options for the appointment of beneficiaries than TMA or ZPIF.

[68] See, for example, Clark v. Campbell, 133 A. 166 (N.H. 1926).

VI. Conclusion

Russian legislation and court practice will have to address several issues for personal funds to become a viable instrument of management of personal property, capable of playing the same role as trusts play in the United States or Canada. Since personal funds do not have clear and obvious advantages over TMA and ZPIF in terms of managing the assets of the founder, but look clearly less preferable from the point of view of taxation of the fund's profits and complexity of creation and administration of the fund, the absolute and unconditional protection of the property transferred to the fund from the claims of the founder's creditors and strict fiduciary obligations of the fund and its officers to the beneficiaries could become the main factors (along with the ability to convert the personal fund into a testamentary fund later and prevent the beneficiaries from participating in the management of personal and testamentary funds) for the founders' choice in favor of this instrument. The rich traditions and experience of regulating trusts in the United States and Canada (by means of legislation and administration of justice) can be used to advance the use of personal funds in Russia because of similarities between these two instruments.

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