E.I. Chervets

PERSONAL FOUNDATIONS AT THE INTERSECTION OF LAW AND ECONOMICS

MECHANISMS FOR PRIVATE CAPITAL MANAGEMENT

A Monograph

CHERVETS PARTNERS

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Author

Dr Evgeniya Chervets is a scholar of Russian civil law, an international arbitrator and an expert in dispute resolution. She is the managing partner of Chervets.Partners. As both arbitrator and counsel she has accrued extensive experience of domestic and cross-border commercial disputes and is listed as an arbitrator with the Israeli Institute of Commercial Arbitration (IICA), the Tashkent International Arbitration Centre (TIAC) and the Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs (RSPP). Dr Chervets is actively engaged in the international arbitration community as a speaker, moderator and author. She is the founder and editor-in-chief of *Soft Law Almanac*, an international publication that explores the intersection of law, business, culture and international collaboration. She holds an LL.M. from the University of Manchester, graduated with honours from the Russian School of Private Law and holds a PhD in Law. She is the author of numerous publications on private law and dispute resolution.

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This monograph presents for the first time a research-based, original approach to the legal relations that arise in the incorporation and subsequent operation of a private foundation. A comparative analysis of regulations aimed at functionally similar foreign structures, including the Anglo-American trust, the international trust model, the Continental *fiducia* and the German *Treuhand*, is followed by an analysis of Russian-law asset partitioning models. The author proposes various solutions to the personal foundation's outstanding management and liability issues.

The findings of this study can be used to improve the legal regulation of personal foundations and/or to adjust the processes by which that regulation is applied. This study also aims to be of help to students and academic researchers of this area of law.

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To my parents, Tatyana and Igor, my guiding lights
who showed me the world.

To my husband Victor, my soulmate,
whose support gives me strength and confidence.

To our daughter Diana, a source of happiness and inspiration.

FOREWORD BY L.Y. MIKHEEVA

Dear reader

In your hands is a book that considers asset partitioning, familiar to civil-law experts in many countries, in a new light. The author reminds us of the well-known motives that drive entrepreneurs who want to partition off some of their assets, to shelter them from creditors (to the extent possible) while exercising a sort of remote control over their fate. There is no doubt that the mechanisms for such separation have always varied with era, country and socio-economic backdrop and still do so today but, viewed together, the trust, the legal entity, fiduciary management and the other forms of asset partitioning have plenty in common. Those common features are discussed in this book.

A significant part of this work is dedicated to a specific legal form of asset partitioning – the personal foundation under Russian law. The author writes not only about its obvious advantages, which make it so popular with Russian lawyers (who, previously, could only dream of finding a functional analogue of the trust), but also about the challenges that the personal foundation model has posed for domestic civil-law doctrine.

The central question likely to capture the reader's attention is, basically, what the right of ownership in a personal foundation actually is and whether that ownership is absolute in the sense to which we are accustomed. Despite owning its assets, a personal foundation is bound by the intention of its founder. A foundation must abide by the wishes of that founder. Does a personal foundation have any autonomy of will?

The will of a personal foundation is formed and expressed by its bodies and, despite the fact that the people comprising those bodies must act within the limits prescribed for them when carrying out their fiduciary duties, there is a serious risk that their decisions will deviate from the direction set by the founder of the personal foundation. In this monograph, this problem is presented as the agency problem and a number of solutions to it are proposed.

L.Y. Mikheeva
Doctor of Law, Professor, Head of the S.S. Alexeev
Private Law Research Centre
under the President of the
Russian Federation (PLRC)

INTRODUCTION

Rapid changes in socio-economic processes and the economic uncertainty caused by those changes are integral parts of our modern economy and society as they are currently constructed. Accordingly, the demand from economic actors for legal mechanisms that provide albeit relative control over risks and enable them to plan for the future is never-ending, so the legislator will always be expected to go on improving the range and content of such tools, unless, of course, the political system abandons private ownership altogether. Such legal mechanisms include various tools for asset partitioning, which may or may not entail the creation of a legal person separate from the partitioning founder.

One of the goals of owners of private capital (we use this term to mean "property that has clear potential for involvement in business and profit-generation", as we explain in section 1.2) is to make sure that it is well-managed. This goal is more of an interim one; owners' ultimate goals will vary from person to person and can only be known for certain by the individual himself. Any legal order, even one in a state of turbulence, is inevitably forced to make provision for this interest by developing legal forms suitable for managing personal capital. These can include 'remote management', i.e. the management of assets from a distance; management through 'other people's hands', i.e. with the help of professional managers trained in realising the potential of a business, and various other mechanisms. All of this constitutes the distinctive marks of a developed socio-economic system that has moved away from plain capture and appropriation.

Victor Dozortsev wrote that "economic development and the expansion of economic commerce leads to the emergence of numerous completely new relationships that were impossible or unnecessary under the old conditions [... and,] accordingly, there emerges a need to enrich legal regulation and create new institutions"[1].

It is difficult to overstate the importance of being able to protect capital by partitioning off business assets. A mechanism for doing so is capable of, firstly, protecting a working business from abuses by the owner's creditors and, secondly, avoiding negative consequences when an enterprise is transferred to new owners in the form of heirs.

[1] Dozortsev V.A., 'The Fiduciary Management of Property', Chapter 53 in *Commentary on the Civil Code of the Russian Federation (Part Two)*, ed. by O.M. Kozyr, A.L. Makovsky and S.A. Khokhlov (Moscow: International Centre for Financial and Economic Development, 1996), p. 527.

There is demand from economic participants all over the world for legal frameworks that enable asset partitioning. The law meets this need with mechanisms that are acceptable to the legal order in question. Legal structures may be provided by domestic law directly or implemented into it in a way that does not breach local legal principles or invalidate domestic legal institutions[1].

In order to identify the functional similarity of the various legal forms of asset partitioning, it serves us to consult the experience of foreign legal orders. Within them, we find, on the one hand, structures certain aspects of which those framing and applying the law in Russia can permit themselves to integrate and, on the other, structures that are, conceptually, entirely alien to Russian law. The latter include the Anglo-American trust, which can exist in the true sense only in countries where ownership can be split. The organic nature of the trust structure within the Anglo-Saxon legal family is enabled by the duality of the legal system and the consequent possibility of more than one person having rights to the same piece of property.

The parallels drawn in this book between trusts and the functionally similar structures found in Continental law confirm the commonality of the economic and legal nature of these institutions. The ability to 'shield' property is everywhere vital to minimise risks for creditors (addressed by 'affirmative' partitioning, of which, much more here later) and debtors (for whom 'defensive' partitioning is what matters).

As we will see, an 'unsplittable' right of ownership does not preclude asset partitioning. Neither does that unity of ownership prevent stakeholders from achieving similar economic and legal effects by vesting in another person legal powers that are, on the one hand, reasonably necessary for management but, on the other hand, subordinated to pre-established goals or restrictions.

Rejection of the trust structure has paved the way for identifying the key features of Continental legal institutions that are acceptable to Russian law and functionally suitable for asset partitioning. As Lidia Mikheeva notes, "domestic civil law has absorbed the actual idea of managing someone else's property at one's own risk and brought it to fruition in Part Two of the

[1] For example, the *affidamento fiduciario* in San Marino law, see Rudokvas A.D., '*Affidamento fiduciario* in San Marino: Proposal for the Commonwealth of Independent States', *Bulletin of Saint Petersburg University. Law.* (2018) No. 3, pp. 371–380; and, idem, 'About the Model Law for the CIS Member States "On Fiduciary Management of Property and Trust"', *Trusts & Trustees* (Oxford University Press, February-March 2021) Vol. 27, Issue 1–2, pp. 36–43.

RF Civil Code, in the form of the fiduciary {*doveritel'noye*}[*] management agreement"[1].

The Russian legislator's attempt in 1993 to assimilate the trust resulted in the sought-after functions of partitioning instruments being delineated in Russia, too. The quest for and creation of legal solutions for managing partitioned assets had begun. It is one of the resultant novel structures in Russian civil law – the personal foundation – that is investigated in this monograph.

Russian legislation has been supplemented by the relatively recent additions of the testamentary foundation, introduced in 2017[2], the international foundation (2019[3]) and the personal (*inter vivos*) foundation (2021[4]).

The personal foundation structure is in need of academic analysis from the perspective of both its internal relations and liability to third parties. The legislator deliberately has not detailed the structure of the personal foundation's bodies, leaving the founder free to create a suitable management system. In this, the owner can manifest his autonomy of will in respect of his property. There are, however, specific restrictions upon the management of personal foundations that take the form of mandatory rules, which the legislator has set in order to keep these foundations, in their asset partitioning role, fit to achieve the goals for which each of them is established. Solving **the agency problem** that attends not only personal foundations but each instance of asset management for the benefit of another necessitates an understanding of the general patterns that, to varying degrees, characterise all asset partitioning methods.

The issue **of liability to creditors** is of considerable academic interest**.** In the relationships involved in a personal foundation this issue can be

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* { } – translation editor's parentheses.

[1] Mikheeva L.Y., *The Fiduciary Management of Property*, ed. by V.M. Chernov (Moscow: Jurist, 1999), p. 5.

[2] Federal Law No. 259-FZ dated 29 July 2017 On Amendments to Parts One, Two and Three of the Civil Code of the Russian Federation, *Collected RF Legislation* 31 (Part I) (31 July 2017), item 4808.

[3] Federal Law No. 378-FZ dated 26 November 2019 On Amendments to the Federal Law On International Companies and Certain Legislative Acts of the Russian Federation Regarding the Registration of International Foundations, *Rossiyskaya Gazeta* 269 (28 November 2019).

[4] Federal Law No. 287-FZ dated 1 July 2021 On Amendments to Parts One and Three of the Civil Code of the Russian Federation, *Collected RF Legislation* 27 (Part I) (5 July 2021), item 5115.

divided into three parts, depending upon who the 'point of attachment' is for the creditor's claims: the founder, the personal foundation itself or a beneficiary. The liability of parties to the relations that arise through the creation and operation of a personal foundation has its particularities but is still governed by the basic principles of asset partitioning. These principles are orientated towards fairly resolving questions of the liability of those involved in partitioning and striking a balance between their private interests and the interests of civil commerce {*grazhdanskiy oborot*} more broadly.

The foregoing underlies the relevance of the subject of this monograph, which is a comprehensive study of both the general theoretical principles of asset partitioning together with its various implementations and a thorough examination of Russian law's novel personal foundation structure.

Because asset partitioning is the result of socio-economic demand from economic actors, this study is based not solely on legal research but also on seminal works from the fields of economics and sociology, by Friedrich Engels, Frank Knight, Friedrich Hayek, Israel Kirzner, Shalom Schwartz, Yegor Gaidar and Sergey Glazev, as well as publications by Eric Hilt, Natalia Voronina, Dmitry Davydov, Anatoly Zhvitiashvili, Alexandr Abramov, Ze Liu, Leonid Grinin, Sergey Malkov, Anton Grinin and Andrey Korotayev.

The problematics of management have repeatedly been the subject of research delivered by scholars of law and economics, in which areas we have drawn on the works of Dmitry Meyer, Gabriel Shershenevich, Anatoly Venediktov, Alexandr Birman and Mikhail Kulagin, as well as contemporary scholars: Leonid Abalkin, Abel Aganbegyan, Yury Kuznetsov, Lidia Mikheeva, Oleg Zaitsev, Zlata Benevolenskaya and Elena Ostanina.

The concept of 'purposed (subjectless) property' was first formulated by Alois von Brinz. Asset partitioning other than through the lens of the legal personality of a participant in commerce has been the subject of study by Henry Hansmann, Reinier Kraakman and Richard Squire. In the foreign literature, asset partitioning issues are addressed in the works of Henry Manne, Armen Alchian, Harold Demzets, Lynn LoPucki, Douglas Baird, Robert Rasmussen, George Triantis, Gabriel Rauterberg, Andrew Vershtein and others.

Viktoria Podsosonnaya has considered how approaches to asset partitioning (as defined by Hansmann and Kraakman) are refracted through Russian legal institutions.

One of the functional forms of asset partitioning is the legal entity, as a means of limiting the liability of participants in civil commerce and simplifying dealings with assets. However, asset partitioning is not limited to legal entities. This work examines the relative disadvantages of using a legal entity for asset partitioning in the management of private capital. The genesis, development, legal nature, features, administrative structure and liability of the legal entity have been studied by Russian and foreign scholars, such as Friedrich Karl von Savigny, Vasily Elyashevich, Yosif Pokrovsky, Wilhelm Wolf, Samuil Landkof, Victor Dozortsev, Sergei Bratus, Ivan Novitsky, Veniamin Gribanov, Michael Jenson, William Meckling, Oktyabr Krasavchikov, Victor Rakhmilovich, Alexandr Makovsky, Evgeny Sukhanov, Natalia Semilyutina, Natalia Kozlova, Dmitry Lomakin, Andrei Gabov, Irina Shitkina, Ivan Tarasov, Vladimir Laptev, Tatiana Shlykova, Marina Rozhkova, Yury Monastyrsky, Oleg Gutnikov, Andrei Egorov, Rustem Miftakhtudinov, Dmitry Stepanov, Evgeny Suvorov, Oleg Zaitsev, Alexandr Kuznetsov, Elena Tychinskaya and Dmitry Tekutiev.

In order to analyse international experience in the regulation of asset partitioning mechanisms that do not entail the creation of a separate legal person – the Anglo-American trust and its international model, the Continental *fiducia* and the German *Treuhand* – this work draws on research by Eric Huber, Robert Feenstra, R. Tayler, Donovan Waters, Ugo Mattei, Stefan Grundmann, Richard Helmholtz, Reinhard Zimmermann, J. Michael Milo, J. Smith, Maurizio Lupoi, Dmitry Dozhdev, Evgeny Sukhanov, Anton Rudokvas, Vadim Plekhanov, Natalia Sokolova, James Koessler, Mark Leeming, Ming Wai Lau, Robert Sitkoff, Vadim Fogel, Stanislav Schmidt, Tatiana Primak, Ekaterina Galkova, Vladimir Kanashevsky, Ekaterina Papchenkova, Natalia Erpyleva, Alexandra Kasatkina, Markus Puder, Ekaterina Papushina, Mark Bennett, Martin Gelter, Geneviève Helleringer, David Truman, Ilya Zikun and Lyubov Doroshenko.

The preconditions for the emergence of the personal foundation and the purpose of this structure have been elaborated in the works of Lidia Mikheeva, Pavel Krasheninnikov, Alesia Dyomkina and Evgeny Petrov. An important contribution to understanding the personal foundation structure has been made by Dmitry Zaikin, not least in his thesis, which is largely based on an analysis of German law and provides an in-depth discussion of fundamental approaches to asset partitioning. Konstantin Korsik, Elizaveta Timerbulatova, Olga Ternova, Inna Rudik, Elena Kirillova, Evgeny Maslenko, Viktor Vyatkin and Yulia Margulis have also devoted articles to personal foundations. To varying degrees, issues relating to personal foundations are addressed in the works of Vadim Belov, Natalia Raskazova, Ekaterina Putintseva, Kirill Mikhalev, Olga Frik, Irina Bader and Evsey Evseev. However, no academic work has hitherto provided sufficient theoretical analysis of the personal foundation as a generic category.

When approaching questions of will, the subjective right {*sub''ektivnoye pravo*}, contractual freedom and the interest, the author drew upon the works of Rudolf von Jhering and publications by contemporary authors Sergei Tretyakov, Evgeny Krasheninnikov, Yulia Baigusheva and Alexandr Kuznetsov.

Proceeding from all of the above, the aim of this research is to apply the theory of asset partitioning and its patterns to the model of the personal foundation under Russian law.

That process involves: 1) analysing the socio-economic preconditions for the development of legal forms of asset partitioning; 2) conducting a comparative legal analysis of the regulation of functionally similar asset management models in Anglo-American and Continental law; 3) analysing the legal framework for particular forms of asset partitioning under Russian law; 4) identifying features common to the various forms of asset partitioning; and 5) elucidating the peculiarities of the relations that arise when a personal foundation is incorporated *de lege lata* and theorising about and modelling them *de lege ferenda*.

This monograph will examine the civil-law relations involved in the creation and operation of a personal foundation, i.e. between and amongst the founder of the personal foundation, the personal foundation itself, its beneficiaries and those persons and their creditors. In particular, this study will examine: current and historical normative legal acts governing the various forms of asset partitioning in Russia and abroad; how the law has been applied in practice; the charters of a few of the personal foundations set up in Russia from April 2022 to December 2023; and the doctrinal sources of the various approaches to asset partitioning.

This book presents for the first time an evidence-based, original approach according to which the purpose of statutory regulation of personal foundations is to protect the interests of the individual in the partitioning of his property, beginning with an analysis of the socio-economic preconditions for the development of legal forms of asset partitioning. It then, through the lens of shielding theory, presents a comparative analysis of the regulation of, on the one hand, functionally similar foreign structures – the Anglo-American trust, the international trust model, the Continental *fiducia* and German *Treuhand*, and, on the other hand, forms of asset partitioning under Russian law – the simple partnership, investment partnership, fiduciary management agreement, unit investment fund ("UIF") and personal foundation. The legal entity as an asset partitioning structure is analysed within the context of shielding theory. Features common to the various forms of asset partitioning are identified and solutions are proposed for unresolved management and liability issues with regard to the personal foundation.

The findings presented in this study can be used in improving legal regulation, in the process of applying the law (through the approaches offered here being taken account of by the courts, the parties directly involved in personal foundations and their respective counterparties) and in teaching and academic research.

Chapter 1

THE PARTITIONING OF A PERSON'S ASSETS AS A CONSEQUENCE OF INDIVIDUALISM AND A CONDITION FOR ENTREPRENEURSHIP TO DEVELOP

1.1 Socio-economic determinants of asset partitioning

Socio-economic conditions dictate that all legislators must provide legal forms of asset partitioning for parties to civil-law relations. For the purposes of this study, it is important to clarify what lies at the heart of this need.

Firstly, individualism, an implicit part of which is a natural desire for separateness, including separateness for one's property.

Shalom Schwartz, author of the theory of fundamental human values, characterised individualism through the lens of value types such as "self-direction", "hedonism (enjoyment)", "achievement" and "social power", and collectivism through "prosociality", "restrictive conformity", "security" and "tradition"[1]. Despite the convincing criticism of Schwartz's strict dichotomy of "collectivism and individualism", one cannot help but note the antagonism between the characteristics he attributes to individualism and collectivism, as well as the much greater proximity of individual values to what legal scholars usually mean by 'entrepreneurial activity' (3rd paragraph of Article 2(1) of the RF Civil Code[2]).

It is not surprising that young people, the economically active part of the population, predominate amongst adherents of individualism. This thesis is attested to by Natalia Voronina's research, which found that the national factor is not decisive; what we observe is more the "effect of the life cycle"[3]. According to this sociologist, "the greater the satisfaction with the

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1 Schwartz S.H., 'Individualism-Collectivism: Critique and proposed refinements', *Journal of Cross-Cultural Psychology* (1990) Vol. 21, p. 143.

2 Civil Code of the Russian Federation (Part One) No. 51-FZ dated 30 November 1994 (as amended by Decree of the RF Constitutional Court No. 49-P of 31 October 2024), *Collected RF Legislation*, 32 (5 December 1994), item 3301.

3 Voronina N.S., 'Value Mobility: from Collectivism to Individualism', *Multidimensional Social Mobility in Contemporary Russia: A Monograph*, ed. by M.F. Chernysh and Y.B. Epikhina (Moscow: Institute of Sociology, Federal National Research Centre for the Humanities and

state of the country's economy, the less commitment there is to collectivism as a value"[1].

According to Alexandr Abramov and Ze Liu, individualism is a factor that has influenced the value-system commonly called 'Western', along with utilitarianism, pragmatism and liberalism[2]. With each new generation, the meaning of 'individualism' changes. Ronald Inglehart found that survival values (physical and economic security, intolerance of dissent, willingness to accept authoritarianism and submissiveness) are being replaced by post-materialistic values of self-expression[3]. The development of the market economy, its modernisation and, as a consequence, the satisfaction of the basic (material) needs of members of society should, to a large extent, be considered the preconditions for these changes, although some criticise this view. There are also those who criticise the post-materialistic values themselves, as superficial[4].

The desire to separate oneself is inherent in the individual as such and correlates with individualistic tendencies that it benefits society to support. Friedrich Hayek wrote that "[t]he chief concern of the great individualist writers was indeed to find a set of institutions by which man could be induced, by his own choice and from the motives which determined his ordinary conduct, to contribute as much as possible to the need of all others; and their discovery was that the system of private property did provide such inducements to a much greater extent than had yet been understood"[5]. The importance of individualism for the economy was expressed by Frank Knight: "Before the modern industrial era began, as we know, the economic life of Europe was unprogressive, and its organization of control

Social Sciences, 2018), pp. 78–85, https://www.isras.ru/files/File/publ/Mnogomernaya_soc_mobilnost_2018.pdf (accessed on 27 February 2025).

[1] Voronina N.S., 'Value Mobility: from Collectivism to Individualism', *Multidimensional Social Mobility in Contemporary Russia: A Monograph*, ed. by M.F. Chernysh and Y.B. Epikhina (Moscow: Institute of Sociology, Federal National Research Centre for the Humanities and Social Sciences, 2018), pp. 78–85, https://www.isras.ru/files/File/publ/Mnogomernaya_soc_mobilnost_2018.pdf (accessed on 27 February 2025).

[2] Abramov A.P. and Liu Z., 'Modern and Traditional Family Values of Intergenerational Interaction in Russia and China', *Sociological Research* (2022) No. 2, p. 108.

[3] Inglehart R.F., 'Changing Values among Western Publics from 1970 to 2006', *West European Politics* (2008) Nos. 1–2, p. 140.

[4] Davydov D.A., 'Ronald Inglehart's Concept of Post-materialism from a Critical Perspective' *Academic Yearbook of the Institute of Philosophy and Law of the Urals Branch of the Russian Academy of Sciences* (2018) Vol. 18, Issue 3, pp. 86–102.

[5] Hayek F.A., *Individualism and Economic Order* (Chelyabinsk: Socium, 2011), p. 16.

was collectivistic. The establishment of individualism was the result of the desire for improvement"[1].

The development of the theory of partitioning in law can be defined as follows: an ongoing need for legal instruments that allow individuals to realise fundamental individualistic values (to exert relative control over risks whilst participating effectively in economic relations, preserving personal wealth in order to maintain the way of life to which they are accustomed and passing some property on to the next generation within the family) and for the legislator to respond with **legal structures that reconcile the individual interests of the owner and the interests of the indefinite number of actors participating in the economic relations that are regulated by civil law.**

The law's development as described above is similar to the modernisation of society as described by Anatoly Zhvitiashvili, "in terms of 'challenge-response', where the former is a challenge from the past and the latter is the response from the present that given historical conditions allow"[2]. Following Hayek's arguments regarding individualism and economic order, civil legislation is developing in search of an answer to the question of where the borderline should be drawn between allowing the individual to "be guided in his actions by those immediate consequences which he can know and care for" and conditions under which "he ought to be made to do what seems appropriate" in the interests of society as a whole[3].

Secondly, types of asset partitioning develop based on the natural uncertainty of life, which economic actors cannot eliminate but need to reduce.

The current state of the economy is often described as 'in crisis', as being characterised by a high degree of uncertainty and a transition to a qualitatively new footing. However, we should take into account that, in the modern world, modernisation, often associated with upheavals, "is becoming a permanent structural process rather than a point of converging forces of social renewal limited to a specific historical period"[4].

Frank Knight argued that "[i]t is fluctuation after all which is the true cause of the uncertainty, fluctuation in progress. In fact some changes are fairly 'constant' in their operation and do not give rise to uncertainties"[5]. The specialised function of adaptation to uncertainty is nothing more than

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1 Knight F.H., *Risk, Uncertainty and Profit* (Moscow: Delo, 2003), pp. 349–350.

2 Zhvitiashvili A.S., 'Modernisation Problems in Russian Society: Methodological Aspects', *Theory and Practice of Social Development* 7 (2018), p. 37.

3 Hayek F.A., op. cit., p. 16.

4 Zhvitiashvili A.S., op. cit., pp. 36–43.

5 Knight F.H., op. cit., p. 299.

a sign of free entrepreneurship, which has replaced simple production for the market (handicraft production); entrepreneurs or businessmen come to fulfil this business function[1].

As mentioned above in relation to the sociological characteristics of the individual, economic phenomena are also rarely linked or predominantly linked to the national criterion. Yegor Gaidar noted that, “when studying the mechanisms of social destruction, similarities and even commonalities can be found between countries with different traditions and levels of development”[2]. Consequently, the legal order as such is searching for structures and solutions that mitigate the consequences of uncertainty, which is variable but always present, and such structures include instruments for partitioning assets. Without an adequate range of these tools, civil commerce is inconceivable.

The transformation of the economy is accompanied by the emergence of factors such as the destabilisation of business management, the erosion of property rights and a high degree of merger between business and the State, due to the former’s dependence on the latter. During the systemic crises of the past decade, there was a shift in the model for regulating socio-economic processes, leading to a disbalance in the operation of business, despite the appearance of expanded freedom to manage wealth during the wave of privatization.

Economists highlight the need to separate ownership from management, which assumes that legal structures are available to do this. As we show below, legal entities are not the only solution in this functional category. Knight wrote that “private property in material goods [...] is closely connected with the acute form of the problem of management which arises from the highly ‘dynamic’ character of the society we live in and the extreme degree of uncertainty connected with change”[3]. He also distinguished between “the functions of making decisions and taking the ‘risk’ of error in decisions”[4]. To a certain extent, in our view, these are manifestations of the same phenomenon.

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[1] Knight F.H., op. cit., pp. 235–236.

[2] Gaidar Y.T., *Power and Property: Times of Trouble and the Institution. The State and Evolution* (St. Petersburg: Norma, 2009), p. 13.

[3] Knight F.H., op. cit., p. 349.

[4] Knight gives as an example the hired manager of a corporation, who makes decisions and receives a fixed salary, i.e. does not bear the consequences of his decisions, and the shareholders, whose income depends on profits, i.e. on management decisions, but who exercise no control, ibid., p. 279.

In economic terms, ownership is not the same thing as entrepreneurship, which is constitutionally linked to management (decision-making) and the risk of error. Israel Kirzner writes that "one of the important loci of decision-making in the market economy is within 'the firm' [...]. It is from this point of view that such problems are discussed as the effect of the 'separation of ownership from control' upon the decisions of the corporate firm"[1]. When reviewing the approaches taken by academic economists, Kirzner refers to R. Gordon, who "identifies entrepreneurship as the 'guiding, integrating and initiating force' – in a word, 'control' – for production [and holds] that control over the corporation is exercised by managers, not by stockholders[; i]t is the former who are entrepreneurs, not the latter"[2].

The legal literature follows a similar logic: "The owner owns the materialised result of societally beneficial labour expended in the past – a certain tangible benefit, while the manager offers the market his or her labour and professional entrepreneurial skills in the efficient management of an organisation's assets"[3].

Modern Russian economics pays considerable attention to the question of how property, be it private[4] or state-owned[5], is most efficiently managed. For example, Sergey Glazev draws attention to the deficit of efficient capital management mechanisms in Russia and how this has resulted in the transition to a market economy proving ineffective[6].

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1 Kirzner I.M., *Competition and Entrepreneurship*, translated from English by A.V. Kuryayeva and D.A. Babushkin, ed. by A.N. Romanov (Moscow: Unity-Dana Publishing House, 2001), https://libertarium.ru/lib_competition_02.html#06 (accessed on 27 February 2025); {English: University of Chicago Press, 1973, pp. 52 & 56}.

2 Ibid.

3 Benevolenskaya Z.E., *The Fiduciary Management of Property in the Sphere of Entrepreneurship: A Monograph* (Moscow: Prospekt, 2017).

4 See, for example: Teplov T.V. (ed.), *Financial Management: Capital and Investment Management: A Textbook for Universities* (Higher School of Economics (HSE University) & the European Commission, 2000), p. 495; Gusev A.I. et al., *Capital Management: The Status and Prospects of Russian Private Banking* (Moscow: Alpina Publisher, 2005), p. 196.

5 See, for example: Koshkin V.I. and Shupiro V.M. (eds), *The Management of State Property: A Textbook for Universities* (Moscow: INFRA-M, 1997), p. 492; Zeldner A.G. and Smotritskaya I.I. (eds), *Public-private Partnership in the Context of Innovative Economic Development: A Monograph* (Moscow: Institute of Economics, Russian Academy of Sciences, 2012), p. 212; and Smotritskaya I.I. (ed.), *Procurement Management in an Innovative Economy: Theory and Practice: A Monograph* (Moscow: Institute of Economics, Russian Academy of Sciences, 2014), p. 242.

6 Glazev S.Y., 'Strategy for Recession-proofing the Development of the Russian Economy in the 21st Century', *Regional Economy* (2012) No. 2, p. 11.

Apart from separating out the professional-management function, a second way (although not second in importance) of reducing uncertainty in economic activity is to make use of the protection that private-law instruments provide for ownership.

We agree with Gaidar's thesis that "capital is constantly searching for areas of application where there are opportunities for growth"[1]. As we have already noted, many processes, be they sociological, economic and/or legal, are perpetual, this being the usual state of affairs. According to Gaidar, legal mechanisms for preserving assets ("guarantees of inviolability", as the economist called them) are an indispensable condition for the emergence of large private fortunes in Russia that are capable of becoming sources (and, according to Gaidar, should be the predominant sources) of investment in the domestic economy[2].

This idea is supported by other scholars who believe that economic risk-mitigation will be facilitated by mechanisms for protecting ownership (of key business assets) from unscrupulous market players, as well as from arbitrary decisions by overbearing institutions[3].

Summary

1. Individualism is a characteristic feature of the individual's life-cycle and one of the basic components of the value system of countries with market economies.

2. The instinctive desire of individuals to separate themselves is beneficial to society as a whole. Private ownership is an example of this. The development of private law is largely a continuous search for structures that reconcile the individual interests of the owner with the interests of the indefinite number of actors who are participants in the economic relations that are regulated by civil law.

3. Entrepreneurs are characterised by their adaptability to the changes and uncertainties of the world, these being a feature of a free economy, rather than a temporary phenomenon. In this sense, asset partitioning is a variable set of legal mechanisms needed to overcome the uncertainty engendered by external factors.

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[1] Gaidar Y.T., op. cit., pp. 308–309.

[2] Ibid., p. 307.

[3] Grinin L.E. et al., 'Will Capitalism Die? Reflections on Capitalism of the Past, Present and Future', *Sociological Journal* (2022) Vol. 28, No. 2, pp. 100–130.

4. The separation of ownership from management inevitably occurs as the economy develops and wealth is accumulated[1].

5. The presence of valid rules within the legal system that protect property rights and give participants in economic relations an understanding of the limits of their risks and losses is just as important for civil commerce as having well-developed mechanisms for protecting creditors, particularly in the event of a debtor's bankruptcy. It would be wrong to reject the idea of limited liability that the law has adopted in response to demands arising not least in the economic sphere in favour of a literal interpretation of the principle that 'the debtor is liable with all of his assets'[2]. Any such rejection should be exceptional and must be justified on the basis that it affords significantly greater benefits for commerce than the alternative.

1.2 Private capital management as the goal of parties involved in asset partitioning

The problematics of management have been researched on many occasions by economic and legal scholars. They have been elaborated in the works of Dmitry Meyer[3], Gabriel Shershenevich[4], Anatoly Venediktov[5], Alexandr Birman[6], Mikhail Kulagin[7] and the author's contemporaries

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1 See, for example: Hilt E., 'When Did Ownership Separate from Control? Corporate Governance in the Early Nineteenth Century', *The Journal of Economic History* (2008) Vol. 68, No. 3, pp. 645–685.

2 "In Ancient Greece and Ancient Rome, debtors were liable for their obligations with all their assets, their personal freedom and, by virtue of the statutory establishment of the father's authority over all members of the family, including his wife, unmarried daughters, sons and their wives and their children, also with the freedom of members of his family. Therefore, until the adoption of the *lex Poetelia* in 326 AD, in the event of default upon a debt obligation for more than 90 days after the due date, the debtor could lose his assets or even his freedom, falling into debt slavery, on his own or with his family. The Roman Laws of the Twelve Tables contained provisions on the right of a creditor to kill a hopeless debtor (cut them down with a sword)." See: Kubantsev S.P., 'Historical Aspects of Criminal Liability for Dishonest Bankruptcy in Russia and Abroad', *Journal of Russian Law* (2016), No. 12, pp. 98–105.

3 Meyer D.I., *Russian Civil Law. In 2 Parts.* (1902), revised and supplemented 8th edition (Moscow: Statut, 1997), Part 1 (Series: Classics of Russian Civil Law), pp. 127-128.

4 Shershenevich G.F., *A Textbook on Trade Law* (based on the 1914 edition) (Moscow: Firma SPARK, 1994), p. 335.

5 Venediktov A.V., State Socialist Ownership (Moscow, 1948), p. 840.

6 Birman A.M., *Some Problems in the Science of Managing the National Economy* (Moscow: Economika, 1965), p. 110.

7 Kulagin M.I., *Selected Works on Joint-stock Company Law and Trade Law*, https://civil.consultant.ru/elib/books/6/page_19.html (accessed on 27 February 2025).

Leonid Abalkin[1], Abel Aganbegyan[2], Yury Kuznetsov[3], Lidia Mikheeva[4], Oleg Zaitsev[5] and Zlata Benevolenskaya[6].

We will attempt to answer the question of ***what it is*** **that gives rise, in the behaviour of those involved in economic relations (or connections), to the goal of effectively managing their assets or a 'spun-off' portion of them**.

As we noted earlier, this question can be answered through the lens of sociology and economics. This seems logical, since the reasons for the formation of this goal cannot be found in the law as such. The law provides answers to questions that are generated under the influence of extrinsic circumstances or regardless of legal policy or contrary to it, i.e. with the aim of circumventing the law[7].

The transition from an entrepreneur in the process of acquiring resources to an owner who already possesses resources, and from management to making 'rent' profit as owner, as well as the constant migration of the individual across a field with such opposing poles as 'collectivism' and 'individualism', with their characteristic sets of values, are why the problematics of asset partitioning are always topical for any legal order and scholars of it.

As Mikheeva notes, "under certain historical conditions, what became advantageous for property relations was a structure whereby assets could be transferred by the owner to someone else to be managed in the interests of a specific third party"[8].

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[1] Abalkin L.I., *Management Strategy* (Moscow: Politizdat, 1975), p. 79.

[2] Aganbegyan A., *Management of Socialist Enterprises. Issues of Theory and Practice* (Moscow, 1979), p. 447.

[3] Kuznetsov Y.V., 'Theory of Modern Management and Organisational Innovations in Company Management' (Economics PhD thesis, St. Petersburg 1994), p. 282.

[4] Mikheeva L.Y., 'The Fiduciary Management of Property in Russian Civil Law' (Candidate of Law thesis, Tomsk 1998), p. 191.

[5] Zaitsev O.R., 'The Fiduciary Management Agreement for Unit Investment Funds' (Candidate of Law thesis, Moscow 2005), p. 383.

[6] Benevolenskaya Z.E., *The Fiduciary Management of Property in the Sphere of Entrepreneurship*.

[7] Z.E. Benevolenskaya writes, concerning trust ownership in England, that "[t]he circumvention of certain prohibitions of 'positive' law in the interests of private individuals and practices that had acquired the status of custom ultimately found protection in the court of the Lord Chancellor." See: Benevolenskaya Z.E., *The Fiduciary Management of Property in the Sphere of Entrepreneurship*.

[8] Mikheeva L.Y., *The Fiduciary Management of Property. A Commentary on Legislation* (MEGANORM, 2001), https://meganorm.ru/mega_doc/dop1/56/grazhdanskoe_pravo_v_2_t_uchebnik_tom_2_3-e_izdanie/5/doveritelnoe_upravlenie_imushchestvom_kommentariy.html (accessed on 27 February 2025).

Management of another's assets in the interests of a particular person (not always in the interests of the owner) is referred to in classic historical and religious texts. The word 'property' is used 28 times in the Bible[1]. In Chapter 16 of the Gospel of Luke, there is a parable about an unfaithful steward: a wealthy man owns an estate, which he puts under management but, suspecting that the manager is not fulfilling his duties properly, the owner asks for an account[2]. Individual elements of managing another's property can also be found in the Talmud[3]. For example, a wife gives her dowry to her husband for safekeeping and management and, in turn, the husband undertakes to return that property to her in the event of divorce. As part of the woman's 'father's house', the dowry did not become the husband's property: he did not have the right to dispose of it to the detriment of his wife's interests and the return was supposed to be in kind[4].

The development of forms of asset management in a historical context is demonstrated in the work of Zlata Benevolenskaya, who gives examples of their origins dating back to the 600s BC and identifies the following forms: "1) the Roman *mandatum* contract and the management of the gods' property in ancient Rome, the right of usufruct; 2) the British trust and agency agreements; 3) the German procura and usufruct; 4) the institution of estate managers, power of attorney and private easements in pre-revolutionary Russia and land (patrimonial) ownership; 5) the legal status of trusts, trustees and directors of trust-owned factories and the right of operational management and full economic management in the USSR; and 6) the contemporary models of the right of business management and the right of operational management, and the commission agreement, commercial mandate agreement and agency agreement"[5].

Market participants seek to organise the management of personal capital not only when they see prospects for steady growth but also when those prospects are fading and the planning horizon is narrowed. The demand for personal capital management comes to the fore with the aim of preserving

1 'Property in the Bible', *Bibliya Teka: A Collection of Bible Translations, Interpretations, Commentaries and Dictionaries*, http://bible-teka.com/symphony/synodal/word/12669/ (accessed on 27 February 2025).

2 *Gospel of Luke* (Russian Orthodox Church, Moscow Patriarchate), http://www.patriarchia.ru/bible/lk/16/ (accessed on 27 February 2025).

3 'The Dowry', *Electronic Jewish Encyclopedia*, https://eleven.co.il/judaism/family-life-cycle/13316/ (accessed on 27 February 2025).

4 Slepakova A.V., *The Legal Relations of Matrimonial Property* (Moscow: Statut, 2005), p. 444.

5 Benevolenskaya Z.E., op. cit.