

6-19-2019

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How Trust-Like Is Russia’s Fiduciary Management? Answers from Louisiana

Markus G. Puder, Ph.D. and Anton D. Rudokvas, Dr. Sci.***

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INTRODUCTION***

The trust has generally been associated with the common law.¹ It offers a nimble legal institution through which one or more entrusted persons hold specified property for certain defined purposes. Under common law doctrine, the trustee and the beneficiary face each other as formal and beneficial owners. Trusts, whether gratuitous or commercial,²

*** We wish to express our gratitude to Professors Edward E. Chase and George Bilbe for their expert comments on a previous draft of our manuscript.

1. For a detailed discussion, see Mike Macnair, *Development of Uses and Trusts: Contract or Property, and European Influences and Images*, in FIDUCIA, TRUSTS, AFFIDAMENTI: UN PERCORSO STORICO COMPARATISTICO, 66 STUDI URBINATI, NUOVA SERIE A – SCIENZE GIURIDICHE, POLITICHE ED ECONOMICHE 305 (Maria Luisa Biccari ed., 2015). *But see* Monica M. Gaudiosi, Comment, *The Influence of the Islamic Law of WAQF on the Development of the Trust in England: The Case of Merton College*, 136 U. PA. L. REV. 1231 (1988) (advancing compelling arguments that Islamic *waqfs* made significant contributions to the rise of the English trust).

2. For the proposition that “[a]lthough the law focuses almost exclusively on gratuitous trusts, the increasingly dominant use of trusts is for securitization and other distinctly non-gratuitous commercial transactions,” see Steven L. Schwarcz, *Commercial Trusts as Business Organizations: Unraveling the Mystery*, 58 BUS. LAW. 559 (2003).

play increasingly important roles in contemporary society,³ which include estate planning, project finance, commercial structures, asset securitization, pension schemes, and charitable, religious, and educational work.

In recent years, the trust has received renewed legislative and academic attention. This interest has been particularly keen in countries reforming their law through the introduction of full-fledged trusts or trust-like devices.⁴ Those countries include renascent civil law jurisdictions in Eastern Europe, such as the Russian Federation,⁵ which have not received the attention they deserve in the American comparative law literature.

The Civil Code of the Russian Federation provides for *доверительное управление имуществом*, which has been translated into English as “trust of estate,”⁶ “estate trust management,”⁷ “entrusted administration,”⁸ “entrusted management,”⁹ and “fiduciary management.”¹⁰ In light of the Russian source terminology and in the absence of officially endorsed translations,¹¹ the authors of this Article speak of fiduciary management. The new institution of fiduciary management does not transfer the formal legal title to the property from the grantor, commonly referred to as the founder, to the entrusted person. Legal Russian reflects this crucial feature

3. JOHN A. LOVETT, MARKUS G. PUDER & EVELYN L. WILSON, *LOUISIANA PROPERTY LAW: THE CIVIL CODE, CASES AND COMMENTARY* 242 (2014).

4. For draft legislation in Scotland and supporting background information, see SCOT. LAW COMM'N, No. 239, *REPORT ON TRUST LAW* (2014); see also RE-IMAGINING THE TRUST: TRUSTS IN CIVIL LAW (Lionel Smith ed., Cambridge Univ. Press 2012) (offering a collection of essays exploring Québec, Louisiana, Israel, China, and countries subscribing to the Hague Trusts Convention).

5. See, e.g., István Sándor, *Different Types of Trust Like Regulations in Eastern Europe – A Comparison*, in *FIDUCIA, TRUSTS, AFFIDAMENTI*, *supra* note 1, at 437.

6. GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] (Russ.).

7. Irina Gvelesiani, *Terms Related to the “Trust” in Georgian, Russian and English Languages (according to “The Civil Code of Georgia”, “The Civil Code of Russian Federation” and “Montana Code”)*, SPEKALI, <http://www.spekali.tsu.ge/index.php/en/article/viewArticle/3/23> [<http://perma.cc/73YW-KJ6H>] (last visited Apr. 2, 2019).

8. Evguyeni A. Sukhanov, *The Right of Ownership in the Contemporary Civil Law of Russia*, 44 MCGILL L.J. 301, 309 (1999).

9. PETER MAGGS & ALEXEI ZHILTSOV, *CIVIL CODE OF THE RUSSIAN FEDERATION AS IN EFFECT JUNE 1, 2018* (6th ed. 2018).

10. David Russell & Karen Shakhnazarov, *Russia—A New Province for Trust Law?*, 23 TR. & TRS. 936 (2017).

11. *Id.* at 936 (speaking of one document).

by lexically eschewing the calque *mpacm*, which is reserved for discussions of the Anglo-American trust.¹²

This Article introduces Russia's fiduciary management to American legal audiences. For purposes of facilitating its debut in the American comparative literature, the Article positions fiduciary management within the spectrum of trust-like devices that have been brought into civilian ambits by way of reference to Louisiana's trust law. After discussing trust operations in Louisiana, the Article reviews Russia's experiences with conceptions of trust. Through the prism of Louisiana trust law, the Article then analyzes the theoretical underpinnings of fiduciary management in Russia. In further exploration of the degree of operational comparability of fiduciary management to the trust in actual practice, the authors explore examples from Russian jurisprudence. The Article concludes with perspectives for the rise of a trust-like device more closely aligned with the Anglo-American template in Russia.

I. CREATIVE SOLUTIONS TO RECEPTION INHIBITORS REGARDING TRUST OPERATIONS IN LOUISIANA

Colored by its rich legal history under different sovereigns and the great compromise forged after the Louisiana Purchase, the law governing property, donations, and inheritance in Louisiana has remained informed by its Romanist heritage.¹³ The convergence pressures associated with life in the American Union, especially in the areas of commerce, finance, and investment, however, have given rise to incursions by American institutions and doctrine. Trust operations in Louisiana offer a powerful example. Because of the presence of several interconnected obstacles, the entrenchment of the trust in Louisiana did not occur in one big bang. Following a crescendo of statutory forays into trust law in 1882,¹⁴ 1920,¹⁵ and 1938,¹⁶ the Louisiana Trust Code of 1964 attempts Louisiana's own version of the trust woven more or less seamlessly into its mixed law fabric.¹⁷

12. Gvelesiani, *supra* note 7.

13. For a topical *tour de force* covering Roman law, French law (pre-revolutionary to Napoleonic), and Spanish law, see John H. Tucker, *Substitutions, Fideicommissa and Trusts in Louisiana Law: A Semantic Reappraisal*, 24 LA. L. REV. 439, 442–62 (1964).

14. 1882 La. Acts, No. 124.

15. 1920 La. Acts, No. 107.

16. Trust Estates Law, LA. REV. STAT. §§ 9:1791–9:2212 (1938).

17. For recent Louisiana scholarship, see, for example, François du Toit, *Trusts in Mixed Jurisdictions—Aspects of the Louisiana and South African Trusts*

A. Indivisible Ownership

The Louisiana Trust Code defines trust as “the relationship resulting from the transfer of title to property [to the trustee] to be administered by him as a fiduciary for the benefit of another.”¹⁸ Although this language facially eschews the terms “equity” and “equitable,” it evokes the classic dichotomy of divided ownership under American trust law, which permits the separation of formal and beneficial ownership through which the trust functions. Pursuant to this bifurcation, the trustee holds the legal title to the property in trust and, at the same time, the beneficiary is entitled to the economic benefits deriving from the property in trust.

In contrast, unitary ownership under the Louisiana Civil Code¹⁹ stands for the full appropriation of a thing.²⁰ It bundles the elements of use, enjoyment, and disposition of the property as the constitutive triad required for full dominion.²¹ This conception of ownership, which is simple but rigid, does not offer a malleable mechanism for capturing the unique tripartite relationship between the settlor, the trustee, and the beneficiary. A civilian mindset therefore faces significant challenges to ascertain a unitary right of ownership among the interests of the three players within the trinity.²² The trust breaks with the civilian mantra that property is held directly by those who benefit from it. Although the trust is primarily about avoiding ownership in the beneficiary after the settlor has transferred his right of ownership, the trustee only receives the right to administer and dispose of the property.²³

Despite the apparent textual embrace of the common law’s duality between formal and beneficial title in the Louisiana Trust Code, the debate over how to reconcile the trust with a unitary conception of ownership has

Compared, 33 TUL. EUR. & CIV. L.F. 2 (2018); Ronald J. Scalise, *Some Fundamentals of Trusts: Ownership or Equity in Louisiana*, 92 TUL. L. REV. 53 (2017); EDWARD E. CHASE, JR., TRUSTS, in 11 LOUISIANA CIVIL LAW TREATISE (2009 ed.).

18. LA. REV. STAT. § 9:1731 (1964).

19. See, e.g., Michael McAuley, *Truth and Reconciliation: Notions of Property in Louisiana’s Civil and Trust Codes*, in RE-IMAGINING THE TRUST, *supra* note 4, at 172–82.

20. LA. CIV. CODE art. 477 (1980).

21. *Id.*

22. See McAuley, *supra* note 19, at 145 (“The relationship . . . is not triangular . . . [but] trinitarian because the parties to . . . [it] may assume more than one role.”).

23. See Barbara Pierre, *Classification of Property and Conceptions of Ownership in Civil Law and Common Law*, 28 REVUE GÉNÉRALE DUE DROIT 235, 269 (1997).

continued in Louisiana's literature and jurisprudence. The earliest theory, which was advanced in the legal academy at the dawn of modern trust law in Louisiana, considered the beneficiary of property in trust as owner and the trustee as mere administrator.²⁴ Never having gained traction in practice, the construction has meanwhile been abandoned even in academic circles, as it seems hard to reconcile with the express statutory text.²⁵

A second academic theory promises to split the atom by describing the trustee and the beneficiary as holders of novel and distinct real rights.²⁶ Pursuant to this approach, the trustee's title consists of the real right of management and disposition,²⁷ and the beneficiary's interest consists of the real right of ownership subject to trust.²⁸ But does this construction truly avoid or only mask the bifurcation of ownership when it comes to trusts in Louisiana?²⁹ Or is it rather a nifty explanation of bifurcated ownership in terms that a "civilian" jurist might find palatable?

Courts in Louisiana favor another approach. According to a consistent line of decisions, title to the property in trust vests in the trustee alone. At the same time, a trust beneficiary has no title to or ownership interest in the trust property; the beneficiary only has a civilian credit right relative to the trustee for purposes of claiming whatever interest in the trust relationship the settlor has chosen to bestow.³⁰ The courts' construction,

24. Scalise, *supra* note 17, at 81–84.

25. For a rich discussion of Professor Pascal's theory, see *id.* at 83–84 (reviewing source materials and meeting minutes of work conducted under the aegis of the Louisiana State Law Institute).

26. *Id.* at 100–25.

27. *Id.* at 110–11.

28. *Id.* at 111–25.

29. James Chalmers, *Ownership of Trust Property in Scotland and Louisiana*, in *MIXED JURISDICTIONS COMPARED: PRIVATE LAW IN LOUISIANA AND SCOTLAND* 144 (Vernon Valentine Palmer & Elspeth Christie Reid eds., Edinburgh Univ. Press 2009).

30. For the authoritative language coined by the Louisiana Supreme Court in what may be considered the topical lead case, see *Bridges v. Autozone Properties, Inc.*, 900 So. 2d 784, 796–97 (La. 2005) ("Under Louisiana law, title to the trust property vests in the trustee alone, and a beneficiary has no title to or ownership interest in trust property, but only a civilian 'personal right' vis-a-vis the trustee, to claim whatever interest in the trust relationship the settlor has chosen to bestow."). See also *Crosstex Energy Servs. v. Tex. Brine Co.*, 253 So. 3d 806 (La. Ct. App. 2018) (reproducing the Supreme Court's language almost verbatim). For more dated jurisprudence, see, for example, *Reynolds v. Reynolds*, 388 So. 2d 1135, 1138–39 (La. 1979) ("That the title transferred to the trustee . . . was intended to vest ownership in the trustee is made manifest by the meaning of the

however, is also not seamless. It first explains the position of a beneficiary in trust by resurrecting, albeit not in name, a psychology of early equity.³¹ Moreover, the notion of title, which is nowhere defined in positive law, may not be necessarily synonymous with ownership.³² Additionally, unless the trustee's property in her personal capacity and the trustee's property in her official capacity as administrator are treated as separate patrimonies, it would be difficult to explain why the property subject to trust does not fall into the trustee's succession.³³

Alongside the indivisibility of ownership, scholars have raised a further objection to trust operations in connection with what has been dubbed the "doctrine of apparent ownership."³⁴ Designed to avoid concealed property rights, it requires the recordation of transactions creating real rights to make them enforceable vis-à-vis third parties.³⁵ In Louisiana, practitioners speak more broadly of the Public Records Doctrine.³⁶ Those who have viewed apparent ownership as an obstacle to the trust might advance several observations.

First, one could argue that the recordation of the trustee would deprive the beneficiary of the requisite protections should the trustee violate her duties.³⁷ One proposal has therefore been to include the beneficiary in the protection afforded by the registry.³⁸ Independent of this idea, Louisiana law has expanded the beneficiary's standing; pursuant to the Louisiana Trust Code, the beneficiary may now sue to enforce a right of the trust estate to protect the beneficiary's own interest.³⁹

word 'title.' Perhaps the most common use of the word in the law is in the sense of ownership of property. . . . No statute in Louisiana confers upon a trust beneficiary the ownership of the corpus of the trust"); *Dunham v. Dunham*, 174 So. 2d 898, 907 (La. Ct. App. 1965) ("We believe the intent of our trust laws as expressed in the language employed therein by the legislature, is to clearly and unmistakably vest both title and ownership of the trust corpus in the trustee.").

31. See generally Walter Wheeler Cook, *The Powers of Courts of Equity*, 15 COL. L. REV. 37 (1915).

32. Scalise, *supra* note 17, at 88–89.

33. *Id.* at 90.

34. Kathryn Venturatos Lorio, *Louisiana Trusts: The Experience of a Civil Law Jurisdiction with the Trust*, 42 LA. L. REV. 1721, 1722 (1982).

35. *Id.*

36. See, e.g., William V. Redmann, *The Louisiana Law of Recordation: Some Principles and Some Problems*, 39 TUL. L. REV. 491 (1965); Michael Palestina, Comment, *Of Registry: Louisiana's Public Records Doctrine*, 53 LOY. L. REV. 989 (2009).

37. Lorio, *supra* note 34, at 1722.

38. *Id.*

39. LA. REV. STAT. § 9:2222 (1964).

One could also argue that recordation entails a loss of privacy through the exposure of the trust terms to public view. This loss of privacy, however, will occur necessarily in the case of a testamentary trust, however, which is recorded as part of the probation and execution of the will. Louisiana's trust law has codified its own version of the public records doctrine, which applies not only to testamentary but also to *inter vivos* trusts. The doctrine is triggered when the trust property includes or the trust instrument contains a transfer of "immovables or other property the title to which must be recorded in order to affect third parties."⁴⁰

B. Prohibited Substitutions

For many years the trust ran afoul of Louisiana's law governing prohibited substitutions.⁴¹ The prohibition is triggered when a donation of full ownership to the first donee ("institute") is coupled with the charge that he or she preserve the property and, at his or her death, render it to a designated second donee ("substitute").⁴² In such a case, both donative dispositions are null and void, not just the donation to the substitute, as appears to have been the case with *fidei commissa*.⁴³ The sweep of the prohibition is anchored in a dual rationale. A substitution not only keeps the property out of commerce, but also deprives the institute of the power to testate.⁴⁴ In essence, the dead hand ("*mortmain*") gets to write the will for the testator in his capacity as institute.

Louisiana addressed this obstacle posed by the law of prohibited substitutions through legislative and constitutional amendments, which

40. *Id.* § 9:2092 (2016).

41. For a careful scholarly elaboration of the subject, see CHASE, JR., *supra* note 17, at 34–38.

42. LA. CIV. CODE art. 1520 (2001).

43. For language in the jurisprudence relative to a distinction between prohibited substitutions and *fidei commissa* at the dawn of trust law in Louisiana, see *Succession of Reilly*, 136 La. 347, 363 (La. 1914) ("The essential elements of the prohibited substitution are that the immediate donee is obliged to keep the title of the legacy inalienable during his lifetime, to be transmitted at his death to a third person designated by the original donor or testator. . . . In the *fidei commissum* . . . the donee or legatee is invested with the title and [as only a precatory suggestion] charged or directed to convey it to another person or to make a particular disposition of it . . ."). See also Joseph A. Prokop, 1 LOUISIANA SUCCESSIONS § 17.02 (2018) ("The distinction between prohibited substitution and *fidei commissum* appears to have been lost over the years. Now, both terms refer to prohibited substitution.").

44. Thomas Crichton, IV, *Prohibited Substitutions v. The Louisiana Trust Code*, 31 LA. L. REV. 404, 406 (1971).

expressly removed dispositions in trust from the ambit of otherwise prohibited substitutions.⁴⁵ Prior to these changes, courts—without clearly distinguishing between substitutions, *fidei commissa*, and trusts⁴⁶—had consistently invalidated anything with the odor of a disposition in trust.⁴⁷

C. Immediate Vesting

Another challenge to trust operations in Louisiana derives from the civilian rule of immediate vesting, pursuant to which the title to property must at all times be vested in an identifiable or ascertainable owner.⁴⁸ Under Louisiana's doctrine of "the dead seizes the living" ("*le mort saisit le vif*"),⁴⁹ a succession descends to the successors at the very moment of death of the deceased and, as such, becomes immediately transmittable to the next crop of heirs and legatees.⁵⁰ As a corollary to the requirement of vesting at death, the Louisiana Civil Code generally forbids testamentary dispositions committed to the choice of another, except as law expressly provides.⁵¹ This prohibition is also known as "willing through a third party."⁵²

Because of its adherence to the rule of immediate vesting, subject only to limited modifications in law and practice, Louisiana has eyed the deferred vesting of interests in trust at future dates with great suspicion. Therefore, the Louisiana trust must in principle be vested in beneficiaries who are in being and ascertainable when the trust is created.⁵³ For example, a typical American testamentary disposition naming "my issue, then living" as remainder beneficiaries after the death of the surviving spouse as the original principal beneficiary with the right to receive the corpus itself, would likely fail Louisiana's vesting requirement and cause

45. For a crisp overview of the pertinent developments, see Edward F. Martin, *Louisiana's Law of Trusts 25 Years after Adoption of the Trust Code*, 50 LA. L. REV. 502, 510–11 (1990).

46. *Succession of Reilly*, 136 La. at 363; Prokop, *supra* note 43, § 17.02.

47. Joseph Dainow, *The Introduction of the Trust in Louisiana*, 34 CAN. B. REV. 396, 397 (1961).

48. Martin, *supra* note 45, at 509.

49. J. Don Kelly, Jr., *Le Mort Saisit Le Vif: True or False after Succession of Stouaflet?*, 57 LA. L. REV. 1325 (1997).

50. Martin, *supra* note 45, at 509; Prokop, *supra* note 43, § 7.01.

51. LA. CIV. CODE art. 1572 (2019).

52. 17TH ANNUAL TULANE ESTATE PLANNING INST., SELECTED ISSUES UNDER THE LOUISIANA TRUST CODE 1 (Nov. 21, 2008), <https://www.joneswalker.com/images/content/1/4/v2/1456/1363.pdf> [<http://perma.cc/DVZ9-PJPZ>] [hereinafter SELECTED ISSUES].

53. LA. REV. STAT. §§ 9:1802–9:1803 (2019).

the property to pass by intestacy.⁵⁴ When it comes to trusts, however, Louisiana's rule of immediate vesting has been mollified in several regards—through class trusts, revocable trusts, permissible shifting of principal, and certain, albeit limited, powers of appointment.⁵⁵

1. *Class Trusts*

The class trust in Louisiana offers a vehicle to set the interest in trust aside for a statutorily circumscribed group, including some or all of the children, grandchildren, great-grandchildren, nieces, nephews, grandnieces, grandnephews, great-grandnieces, or great-grandnephews of the settlor or of the settlor's current, former, or predeceased spouse, or any combination thereof.⁵⁶ As long as at least one member is alive at the creation of the trust, the class trust may allow beneficiaries born or adopted after the trust is formed to become beneficiaries.⁵⁷ When a class member dies, the property interest in trust may vest in another class member.⁵⁸ If a class member dies with descendants, the trust instrument may provide that the interest vest in the deceased beneficiary's heirs and legatees.⁵⁹ A person who has not yet had a child, however, would still not be able to create the trust in Louisiana because no member of the class is in being.⁶⁰ Practitioners in Louisiana have therefore proposed that the trust law be amended to provide for the creation of an "empty class trust."⁶¹

2. *Revocable Trusts*

Louisiana allows the deferred ascertainment of principal beneficiaries in the context of revocable *inter vivos* trusts. This allowance means that the interests of the beneficiaries do not have to be designated in the trust instrument upon the formation of the trust. This window, however, is only open until the time when the trust becomes irrevocable, however, usually

54. STEVE R. AKERS, ACTEC 2014 FALL MEETING MUSINGS 1 (Nov. 2014), https://www.bessemertrust.com/sites/default/files/2018-06/ACTEC%202014%20Fall%20Meeting%20Musings_FINAL.pdf [<https://perma.cc/9A7B-HA99>].

55. See Martin, *supra* note 45, at 513 (speaking of "[t]hree exceptions [that] have emerged: the class trust exception, the revocable trust exception, and the limited ability to make shift at death").

56. LA. REV. STAT. § 9:1981 (2015).

57. SELECTED ISSUES, *supra* note 52, at 1.

58. AKERS, *supra* note 54, at 1.

59. *Id.* § 2.c.

60. SELECTED ISSUES, *supra* note 52, at 4.

61. *Id.* at 4–6.

at the death of the settlor.⁶² The beneficiaries may even be persons who are not in being when the trust is established.⁶³ If the trust instrument does not designate a principal beneficiary at the time when the principal beneficiary is to be determined, the settlor will be the principal beneficiary; at his death, his interest shall vest in his heirs or legatees.⁶⁴ The revocable trust is “without precise analogy”⁶⁵ in the Louisiana Civil Code. Thus, although donations free of trust cannot be conditioned on the will of the donor,⁶⁶ Louisiana trust law permits a donation into a revocable trust to remain incomplete until the trust becomes irrevocable.⁶⁷ For purposes of forestalling potential abuses,⁶⁸ Louisiana’s trust law restricts the deferred ascertainment to revocable trusts having but one settlor, with a special regime for community property in trust.⁶⁹ In addition, Louisiana’s trust law provides that, in the case of a revocable trust, the trustee owes his duty of keeping and rendering clear and accurate accounts of the administration of the trust exclusively to the settlor.⁷⁰ Some commentators believe that this rule should have even broader application in that the duties of the trustee should be owed solely to the settlor of the trust.⁷¹

3. *Shifting of Principal*

Under Louisiana trust law, the interest of a principal beneficiary is acquired immediately at the inception of the trust;⁷² and upon the principal beneficiary’s death, it vests in her heirs or legatees, subject to the trust.⁷³ This general rule accords with Louisiana’s adherence to the regime of immediate vesting.

In exception to the rule, Louisiana trust law now permits the successive shifting of principal interest upon the death of the principal

62. LA. REV. STAT. § 9:2011 (1995).

63. *Id.*

64. *Id.* § 9:2013 (1988).

65. Martin, *supra* note 45, at 514 (offering, however, that the revocable trust “is not a major tear in the civilian fabric because at least vesting of interests at death is preserved”).

66. LA. CIV. CODE art. 1530 (2009).

67. Martin, *supra* note 45, at 513.

68. *Id.* at 514.

69. LA. REV. STAT. § 9:2014 (1995).

70. *Id.* § 9:2088(A) (2004).

71. *But see* SELECTED ISSUES, *supra* note 52, at 2 (referring to the inconsistency with the rights of the beneficiary to obtain information or to bring suit against the trustee).

72. LA. REV. STAT. § 9:1971 (2010).

73. *Id.* § 9:1972 (2016).

beneficiary.⁷⁴ Should the original principal beneficiary other than a forced heir die without descendants, the trust instrument may designate someone else as substitute.⁷⁵ The same holds true if the beneficiary dies with descendants, as long as the shift operates in favor of one or more of her descendants.⁷⁶ In such a case the successors can even be determined on the date of death of the original beneficiary.⁷⁷ With regard to the forced portion (“*legitime*”) in trust, the shift is only allowed if, in addition to having no descendants, the beneficiary dies intestate.⁷⁸

4. Powers of Appointment

Consistent with the codal prohibition of “willing through a third party,” Louisiana’s trust law does not generally allow settlors to delegate in their trusts the prerogative to decide who will receive some of the benefits of the trust to persons other than the settlor.⁷⁹ This type of delegation, which is routine in Louisiana’s sister states, is known in trust jargon as “powers of appointment.”

The rule of no “powers of appointment” in Louisiana is subject to an important exception. A trust instrument may authorize a person in being at the inception of the trust to modify the provisions of the trust instrument to add or remove beneficiaries or modify their rights, “if all of the affected beneficiaries are descendants of the person given the power to modify.”⁸⁰ Moreover, a beneficiary added under this exception may be a person who is not in being when the trust is created, provided the individual is in being at the time the power to add is exercised.⁸¹

Other adjustments to the civilian rule of no “powers of appointment” include the allocation of income among the income beneficiaries through

74. See also SELECTED ISSUES, *supra* note 52, at 9 (offering, from a pre-revision perspective, three reasons in support of an allowable shift from a principal beneficiary to the descendants of the beneficiary: (1) the absence of a guaranteed protection of the beneficiary’s issue due to the testamentary freedom accorded to the beneficiary; (2) the difference between the robust regime of forced heirship at the time of the Trust Code’s enactment and the curtailed version of forced heirship of our time; and (3) the desire to make available the exclusion of the beneficiary’s interest from his or her taxable estate under every circumstance).

75. LA. REV. STAT. § 9:1973(A)(2) (2016).

76. *Id.* § 9:1973(A)(1).

77. *Id.* § 9:1978 (1997).

78. *Id.* § 9:1973A(2) (2016).

79. *Id.* § 9:2025 (2010).

80. *Id.* § 9:2031(A), cl. 1 (2015).

81. *Id.* § 9:2031(A), cl. 2 (2015).

the trustee, with or without objective standards;⁸² the modification of a trust by way of concurrence among all surviving competent settlors;⁸³ the settlor's delegation of his right to revoke;⁸⁴ and the invasion of principal by the trustee to benefit an income beneficiary—only for certain purposes or under objective considerations, if the income beneficiary is not also the principal beneficiary,⁸⁵ and in the full discretion of the trustee, if both are the same person.⁸⁶

II. CONCEPTIONS OF TRUST PRECEDING THE CODIFICATION OF FIDUCIARY MANAGEMENT IN RUSSIA

In Russia, dramatic shifts and sharp turns in its political and economic form of government have driven the discourse about structuring the right of ownership and its divisibility. Russia's overall posture has oscillated with the passage of time.⁸⁷

A. *Imperial Russia*

The Russian Empire exhibited a flexible disposition toward the right of ownership and its divisibility within the framework of feudal land tenures. For example, Austrian and Prussian conceptions of “complete ownership” and “incomplete ownership” were received into positive law.⁸⁸ Russia thus consecrated the idea of common ownership shared between the “upper owner,” who held the right to the substance of the thing, and the “under owner,” who, in addition to the right to the substance, held the

82. *Id.* § 9:1961(C) (2001).

83. *Id.* § 9:2024. *See also* SELECTED ISSUES, *supra* note 52, at 4, B.4 (suggesting that § 2024 appears to permit the modification by a surviving settlor of the interest of a deceased settlor).

84. LA. REV. STAT. § 9:2045 (2010). *See also* SELECTED ISSUES, *supra* note 52, at 4, B.4 (finding that the delegation allowed by § 2045 could affect who ultimately receives the corpus of the trust).

85. LA. REV. STAT. § 9:2068(A) (2003).

86. *Id.* § 9:2068(B).

87. For a comprehensive study offering historical and comparative perspectives, see Murray Raff & Anna Taitlin, *A Comparative Perspective on the Concept of Ownership in Russian Law: From the Svod Zakonov to the 1994 Civil Code*, 41 REV. CENTR. & E. EUR. L. 263 (2016).

88. Anton Rudokvas, *Trust and Fiduciary Ownership in Russia*, 7 KLRI J.L. & LEGIS. 45 (2017) (referring to the Digest of Laws of the Russian Empire (свод законов Российской империи) of 1832). For more detail, see Raff & Taitlin, *supra* note 87, at 307–10.

right to the enjoyment of the thing.⁸⁹ The experiences with this type of construction have been credited in Russian legal circles with preparing a fertile ground for the possible emergence of trust-like constructions or functional surrogates.⁹⁰

B. Post-Revolutionary Russia

In the wake of the October Revolution of 1917, the legal and political discourse about the right of ownership and its divisibility shifted gears. Having replaced the remnants of the feudal society with state ownership of all means of production, the Soviet State moved quickly to spin off the actual administration of its property to state organizations specifically created to serve as economic catalysts in a new, State-run, command-and-control economy. The relationship between the Soviet State and its economic organizations sparked a long debate in the legal community.⁹¹ Did the new duality embody a novel division of ownership enveloping co-dependent owners?⁹² Or was the relationship not rather reminiscent of a trust, with the Soviet State as the settlor and each of its economic organizations as a fiduciary?⁹³

Discussions abated with the passage of law declaring that:

State property assigned to state organisations shall be in the operative management of these organisations which shall exercise, within the limits established by law and in accordance with the aims of their activity, planned assignments and the designated purpose of the property, the powers of possession, use and disposal of the property.⁹⁴

89. Rudokvas, *supra* note 88, at 67; *see also* JUDITH SCHACHERREITER, DAS LANDEIGENTUM ALS LEGAL TRANSPLANT IN MEXIKO: RECHTSVERGLEICHENDE ANALYSEN UNTER EINBEZUG POSTKOLONIALER PERSPEKTIVEN 136 (2014) (discussing the meanwhile defunct § 357 of the Austrian General Civil Code).

90. Rudokvas, *supra* note 88, at 45.

91. Olympiad S. Ioffe, *Soviet Law and Roman Law*, 62 BOST. U. L. REV. 701, 720 (1982).

92. Rudokvas, *supra* note 88, at 46–47 (answering the question in the negative because the Soviet State was not in a position of dependence as it retained the ability to withdraw any of its property).

93. *Id.* at 46 (refuting such proposition with the argument that, under Soviet doctrine and ideology, the Soviet State enjoyed unmodified, full ownership of the means of production).

94. FUNDAMENTALS OF CIVIL LEGISLATION OF THE U.S.S.R. AND THE UNION REPUBLICS 23 (1968).

This language forestalled the rise of divided ownership in the relationship between the State and its economic organizations. The new real right of “operative management,”⁹⁵ which allowed for civil law transactions in realization of the state plan⁹⁶ and subsisted in various gradations up to “economic control,”⁹⁷ fell short of complete dominion and total appropriation.⁹⁸

C. Russia in Transition

After the Soviet Union had collapsed in 1991, Russia faced the monumental task of transitioning to a market economy on a financially sustainable path toward the privatization of State property. In the absence of a robust institutional framework that could accompany this process, the legal and political discussion about the right of ownership and its divisibility specifically turned to trust-like devices and functional surrogates to accomplish a twin goal: transfer State property to private companies for purposes of temporary management, while replenishing public finances. The desire by some to create a uniquely Russian version of the trust gave birth to the notion of “fiduciary ownership.” Others claimed that such a break with the tradition of the continental legal family was unwarranted, as Russian legislation already had in place a specific surrogate institution that could easily be adapted to accomplish the task—the right of full economic control.⁹⁹ Yet another idea involved the creation of a limited real right for the manager of the property of another, like when a property is given in emphyteusis¹⁰⁰ or what is known in Lithuanian law as “*chinch* possession.”¹⁰¹

95. Rudokvas, *supra* note 88, at 48.

96. Raff & Taitslin, *supra* note 87, at 323–24, 329.

97. Rudokvas, *supra* note 88, at 48; *see also* Notes, *Russian Property Law, Privatization, and the Right of “Full Economic Control”*, 107 HARV. L. REV. 1044 (1994).

98. Ioffe, *supra* note 91, at 721.

99. For a discussion of what the author calls “the grantor trust analogy,” *see* Notes, *supra* note 97, at 1052–57.

100. *See Term: Emphyteutic Lease*, TREASURY BOARD CAN., <http://www.tbs-sct.gc.ca/rpm-gbi/lexicon-lexique/term-terme.asp?Language=EN&id=809> [<https://perma.cc/9CVP-W7TU>] (“An emphyteutic lease is the right, conveyed to the lessee for a certain period, to the full use and all benefits of an immovable belonging to the proprietor, on condition that the lessee does not compromise the existence of the property and improves it by adding constructions, works or plantings that increase its value in a lasting manner.”).

101. Raff & Taitslin, *supra* note 87, at 311 (“The Lithuanian law recognized [in *chinch* possession] a tenure of perpetual possession analogous to the Roman

Following parliamentary discussions of draft legislation, which led to the rejection of divided ownership under the moniker of fiduciary ownership,¹⁰² Russian President Boris N. Yeltsin countered in late 1993. Under his presidential decree entitled “On Fiduciary Ownership (Trust),”¹⁰³ the shares in State-owned enterprises undergoing privatization could be transferred by contract to a trustee¹⁰⁴ such as a bank, an investment fund, or an insurance company.¹⁰⁵ The trustee would acquire full ownership of the shares subject to the obligation to administer these shares in the best interest of the settlor and for the benefit of the federal treasury as the beneficiary.¹⁰⁶ With the expiration of the trust at a fixed date, the ownership of the shares would revert to the settlor or pass to a designated third party.¹⁰⁷ The emergence of this decree and its limited scope may be explained by the fact that a consortium of Russian banks had offered the Russian State, which was in dire need of funds after the collapse of public finances, the following scheme.¹⁰⁸ The banks would provide the State with the coveted loans.¹⁰⁹ In return and as collateral, the State would transfer the title to its shares to the banks.¹¹⁰ For the duration of the relationship, the banks would manage the acquired blocks of shares; thereafter, the banks would return the shares, unless the State defaulted.¹¹¹

With the phased enactment of the Civil Code of the Russian Federation of 1994,¹¹² the widely criticized decree¹¹³ ceased its operations.¹¹⁴ Under Article 209(4) of the Civil Code of the Russian

law *emphyteusis* subject to the payment of certain fixed dues in money or in kind to the land owner.”).

102. Rudokvas, *supra* note 88, at 51.

103. Указ Президента Российской Федерации от 24.12.1993 № 2296 “О доверительной собственности (ТРАСТЕ)” [Presidential Decree of 24.12.1993, No. 2296 “On Fiduciary Ownership (Trust)”], http://www.consultant.ru/document/cons_doc_LAW_2948/ [<https://perma.cc/6PAK-GFT9>].

104. *Id.* at 49.

105. Sándor, *supra* note 5, at 442.

106. Rudokvas, *supra* note 88, at 50 (referring to the Digest of Laws of the Russian Empire (свод законов Российской империи) of 1832).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. Sándor, *supra* note 5, at 442.

113. Sukhanov, *supra* note 8, at 309–10 (characterizing the contents of the decree as “attempts to introduce this concept into Russian civil legislation under the influence of absolutely alien Anglo-American approaches”).

114. *Id.* at 310 n.29.

Federation,¹¹⁵ the owner may transfer his property in fiduciary management. Articles 1012–1026 in Chapter 53, Part 2 of the Civil Code of the Russian Federation¹¹⁶ provide detailed rules for the new institution.

III. FUNDAMENTAL FEATURES OF FIDUCIARY MANAGEMENT THROUGH THE PRISM OF LOUISIANA TRUSTS

In Russia, the installation of the common law trust or a functional surrogate, such as fiduciary ownership, was ultimately deflected. At the end of the day, the Russian legal community was convinced that divided ownership of the property in trust into the trustee's legal title and the beneficiary's equitable ownership could not be reconciled with Russia's unitary conception of ownership under the continental legal tradition.¹¹⁷

But how trust-like, if at all, is the institution of fiduciary management when viewed through the prism of Louisiana's trust law? In search of answers, the following sections discuss the organization of the tripartite relationship under fiduciary management and the legal nature of fiduciary management.

A. A Different Type of Tripartite Relationship Under Fiduciary Management

In comparison to the relationship between the settlor, the trustee and the beneficiary under Louisiana trust law, fiduciary management exhibits notable differences. These include, above all, the absence of a transfer of title to the manager.

1. No Transfer of Title

Russia's fiduciary management, which offers a contractual vehicle for a manager to possess, use, and even dispose of the founder's property over a certain term without becoming its owner,¹¹⁸ involves its own unique tripartite relationship. The contract of fiduciary management, albeit only executed when the object is delivered, is not translatative of ownership. Rather, in contrast to Louisiana trust law, the legal title to the property

115. GRAZHDANSKI KODEKS ROSSIKOI FEDERATSII [GK RF] [Civil Code] art. 209(4) (Russ.).

116. *Id.* arts. 1012–26.

117. Sándor, *supra* note 5, at 443.

118. GRAZHDANSKI KODEKS ROSSIKOI FEDERATSII [GK RF] [Civil Code] arts. 209(4)(cl.1), 1012(1)(cl.1) (Russ.).

entrusted into fiduciary management remains with the founder.¹¹⁹ The title does not transfer to the fiduciary manager.¹²⁰ Instead, the fiduciary manager receives the right to administer the property. Although acting in her own name, the fiduciary manager is bound to proceed in the interest of the beneficiary—either the founder himself or a third person designated by the founder. Examples of fiduciary managers include the guardian for a ward,¹²¹ the testamentary executor in a testate succession,¹²² or the financial advisor entrusted with securities to generate income and wealth.¹²³ Finally, the beneficiary, as a third party to the contract, is protected by the law governing the contract for the benefit of a third party, also known as the *stipulation pour autrui* in Louisiana.¹²⁴ These protections comprise the right to compel performance¹²⁵ and to withhold consent regarding the dissolution or amendment of the contract.¹²⁶

This allocation of roles within the triangle of players in fiduciary management arrangements yields a significant doctrinal restriction. A right of lease or other credit rights cannot be transferred into fiduciary management. Since such a transfer could be accomplished only by way of assignment, which would inevitably lead to the transfer of the right from the assignor to the assignee, it would conflict with the rules barring a transfer of title.¹²⁷

2. Other Differences

The tripartite relationship under Russia's law of fiduciary management differs from Louisiana trust law in several other ways. Notable differences include eligibility criteria for the entrusted manager, objects susceptible of fiduciary management, term limits imposed on the entrustment, and termination of the arrangement.

In Louisiana, the trustee of a private trust may be a natural person who is a citizen or resident alien of the United States with full capacity. Other

119. *Id.* art. 1014.

120. *Id.* arts. 209(4)(cl.2), 1012(1)(cl.2).

121. *Id.* arts. 1026(1)(ind.1), 38.

122. *Id.* art. 1026(1)(ind.2).

123. Sukhanov, *supra* note 8, at 310.

124. *See, e.g.*, *Joseph v. Hosp. Serv. Dist. No. 2 of Par. of St. Mary*, 939 So. 2d 1206, 1211 (La. 2006) (quoting *Paul v. La. State Emps.' Grp. Benefit Program*, 762 So. 2d 136, 140 (La. Ct. App. 2000)).

125. GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 430(1) (Russ.).

126. *Id.* art. 430(2).

127. *See id.* arts. 209(4), 1102(1)[2].

than natural persons, only federally insured depository institutions, financial institutions, or authorized trust companies may be trustees.¹²⁸ Blurring the functional separation between the parties to the relationship, an individual who is a beneficiary of a trust can be a trustee of the trust.¹²⁹ The law does not squarely address the question of whether the person can be both the sole beneficiary and the sole trustee of the trust.¹³⁰ In such a case of personal union the individual would owe no fiduciary duties;¹³¹ hence, under the rules of confusion, the person's position would be more akin to that of an outright owner.¹³² Although rare in practice, the identity between the sole beneficiary and the sole trustee would arguably raise the question of whether creditors may in such a situation seize the property in trust independent of any spendthrift language in the trust instrument.¹³³ In contrast to Louisiana, a fiduciary manager in Russia may not also be a beneficiary.¹³⁴ This prohibition is not further elaborated. Moreover, the position of fiduciary manager is generally restricted to sole proprietors and commercial organizations. Natural persons can only serve as fiduciary managers when and insofar as allowed by law.¹³⁵ Bodies of federal or local government are expressly excluded from the position of fiduciary manager.¹³⁶

Objects susceptible of fiduciary management include enterprises, real estate, securities, exclusive rights, and other properties,¹³⁷ but generally

128. LA. REV. STAT. § 9:1783(A)(2) (2019).

129. *Id.* § 9:1783A(1).

130. SELECTED WORKS, *supra* note 52, at 8, C.1.

131. *Id.*

132. *Id.*

133. *Id.*

134. GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1015(3) (Russ.).

135. *Id.* art. 1015(1).

136. *Id.* art. 1015(2).

137. *Id.* art. 1013(1).

not money¹³⁸ when transferred solely as standalone property.¹³⁹ This stipulation means that, in contrast to a typical revocable living trust savings account in Louisiana, cash simply held in accounts in Russia may not be entrusted into fiduciary management. When a business organization is transferred, however, its cash flows are included in the property transferred into fiduciary management.¹⁴⁰ Also, if the property under fiduciary management itself generates income, those funds are included in the entrusted property.¹⁴¹

In Russia, the contract of fiduciary management is subject to a life span of five years.¹⁴² The tight durational cap for fiduciary management seems to suggest a departure from one of the emblematic purposes behind the creation of trusts—namely, to function as planning tools destined to cover longer time periods. Since the contract of fiduciary management continues until one of its parties terminates it, however, fiduciary management arrangements could in practice last much longer than five years.¹⁴³

Finally, the statutory termination triggers¹⁴⁴ make fiduciary management appear much less durable in comparison with Louisiana trusts. For example, Russia's fiduciary management remains revocable by the founder.¹⁴⁵ Thus, in contrast to the American rule of the indestructibility of

138. *Id.* art. 1013(2). For special rules covering banks, other lending agencies, pension funds, and investment facilities in their capacity as fiduciary managers, see КОММЕНТАРИЙ К ГРАЖДАНСКОМУ КОДЕКСУ РОССИЙСКОЙ ФЕДЕРАЦИИ. ЧАСТЬ ВТОРАЯ 801 (Отв. ред. Александр П. Сергеев) («Проспект», Москва 2010) [COMMENTARIES ON THE CIVIL CODE OF THE RUSSIAN FEDERATION (SECOND PART) 801 (Alexander P. Sergeev ed.) (Prospect, Moscow 2010)]; ПРАВО СОБСТВЕННОСТИ: АКТУАЛЬНЫЕ ПРОБЛЕМЫ 603-31 (Отв. ред. Валерий Н. Литовкин, Евгений А. Суханов, Вадим В. Чубаров) («Статут», Москва 2008) [THE RIGHT OF OWNERSHIP: CURRENT PROBLEMS 603-31 (Valerij N. Litovkin, Evgeni N., Sukhanov, & Vadim A., Chubarov eds.) (Statut, Moscow 2008)].

139. Russell & Shakhnazarov, *supra* note 10, at 937–38 (clarifying that transfers of money as part of another non-monetary property are not swept in by the prohibition).

140. *Id.* at 938.

141. GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1020(2) (Russ.).

142. *Id.* art. 1016(2).

143. Russell & Shakhnazarov, *supra* note 10, at 938.

144. GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1024(1) (Russ.).

145. Russell & Shakhnazarov, *supra* note 10, at 941.

trusts,¹⁴⁶ the irrevocability of fiduciary management is conceptually impossible. Additionally, the fiduciary manager, other than dying or becoming incompetent, can terminate fiduciary management simply by refusing to carry out the contract terms.¹⁴⁷ In Louisiana, which follows the American rule, an early termination or modification of a trust—other than a “small trust”—requires a court proceeding for determining whether the continuation of the trust would defeat or substantially impair the purpose of the trust,¹⁴⁸ or whether the purpose of the trust has become unlawful or impossible to reach subsequent to its creation.¹⁴⁹ This rule means that even the concurrence of all parties to the trust relationship cannot effectuate its termination, except for cases expressly provided by law or the trust instrument.¹⁵⁰

B. Ripples into the Debate Over the Legal Nature of Fiduciary Management

Because the Russian Legislature rejected the notion of fiduciary ownership akin to the trust, the discussions in Russia about how to explain the duality of ownership within a civil law milieu have presently abated. Yet, the door still seems somewhat ajar considering voices in the literature who have offered that with the transfer of the triad of use, fruits, and disposition, ownership is not necessarily lost.¹⁵¹ Some commentators have noted that the registration required for the transfer of real estate into fiduciary management mirrors the requirement governing a full-fledged transfer of such property through a contract translatative of ownership; and therefore, the law could imply the transfer of legal title to the entrusted administrator in the case of real estate.¹⁵²

146. For the classic lead case, see *Chaflin v. Chaflin*, 20 N.E. 454 (Mass. 1899).

147. *Id.*

148. LA. REV. STAT. § 9:2026 (2015). For a discussion of the pre-revision standard requiring a “change of circumstances,” see SELECTED WORKS, *supra* note 52, at 7, B.7.

149. LA. REV. STAT. § 9:2027 (1964).

150. *Id.* § 9:2028 (2015). For pre-revision jurisprudence, see, for example, *In re Guidry Trust*, 713 So. 2d 631 (La. Ct. App. 1998) (affirming trial court’s denial of power to terminate irrevocable trust in person who is both the settlor and the sole beneficiary).

151. Sukhanov, *supra* note 8, at 310. For more detail, see Rudokvas, *supra* note 88, at 62–64.

152. Russell & Shakhnazarov, *supra* note 10, at 939 (discussing article 1017(2) of the Civil Code of the Russian Federation).

In a similar vein, statutory dispositions enacted in other countries of the Commonwealth of Independent States declare that the founder is not entitled to exercise his powers of ownership that have been transferred to the fiduciary manager.¹⁵³ Russian jurisprudence, however, has not supported such a restriction. Rather, courts have allowed the founder of the fiduciary management to dispose of the property held in fiduciary management by transferring it to another person.¹⁵⁴ In their view, such a disposition either terminates the contract of fiduciary management¹⁵⁵ or, in the alternative, assigns the rights and duties of the founder to the new owner should he or she be interested in a continuation of the fiduciary arrangement.

Otherwise, in the absence of a transfer of title from the founder to the fiduciary manager, the Russian legal community has discussed three alternative models for explaining the legal nature of fiduciary management: (1) fiduciary management as a limited real right on another's property; (2) fiduciary management as a type of agency; and (3) fiduciary management as midwife to a separate juridical entity.

153. *See, e.g.*, CIV. CODE art. 886(1)[2] (2003) (Kaz.) (“In the period of duration of the contract of fiduciary management of property, the founder of the fiduciary management is not entitled to take any action with respect to the property that is held in fiduciary management, unless otherwise provided by the legislation of the Republic of Kazakhstan or the given contract.”); CIV. CODE art. 857 (3)[2] (Kyrg.) (“The founder of the fiduciary management is not entitled to interfere with the activities of the fiduciary manager.”).

154. VAS-17481/09 [Ruling of the Presidium of the Highest Arbitration Court of the Russian Federation of February 11, 2010, No. 17481/09], VESTNIK VYSSHEGO ARBITRAZHNOGO SUDA ROSSIISKOI FEDERATSII [VESTNIK VAS RF] [Bulletin of the Highest Arbitration Court of the Russian Federation] 2010 (declaring that the transfer of property into fiduciary management does not restrict the right of the founder of the management to dispose the object of management, which includes the case of a person who became the founder of the fiduciary management as a result of his acquisition of the property burdened by fiduciary management).

155. VAS-11689/09 [Ruling of the Presidium of the Highest Arbitration Court of the Russian Federation of October 28, 2009, No. 11689/09], VESTNIK VYSSHEGO ARBITRAZHNOGO SUDA ROSSIISKOI FEDERATSII [VESTNIK VAS RF] [Bulletin of the Highest Arbitration Court of the Russian Federation] 2009 (the passing of ownership to the object of management provides grounds for termination of the contract of fiduciary management between the fiduciary manager and the previous owner).

1. Limited Real Right

Leading scholars in the Russian literature have advanced the theory that fiduciary management is a limited real right on the property of another.¹⁵⁶ In support of this proposition, they have invoked the procedural protections afforded to the fiduciary manager, the nature of full economic control¹⁵⁷ and operative management¹⁵⁸ as novel real rights established for the public and not-for-profit sectors, the segregation of the founder's and the manager's property estates,¹⁵⁹ and the amenability of the codal enumeration of real rights to further additions.¹⁶⁰

2. Type of Agency

Proponents of the agency model emphasize that although the fiduciary manager proceeds in her own name, she must disclose her capacity as fiduciary manager¹⁶¹ to avoid binding herself to third parties and becoming personally liable with her own property.¹⁶² Moreover, the rights and liabilities resulting from actions in the course of the fiduciary management will be added to or expensed against the property held in fiduciary management.¹⁶³ For the purposes of facilitative transparency, the property under fiduciary management must be separated from the property of the founder and the property of the fiduciary manager.¹⁶⁴ Finally, the liability scheme may be reminiscent of agency law. The fiduciary manager is personally liable if she fails to exercise her duty of care¹⁶⁵ or exceeds the

156. For the most authoritative work in this regard, see ВАДИМ А. БЕЛОВ, ГРАЖДАНСКОЕ ПРАВО: ОСОБЕННАЯ ЧАСТЬ (УЧЕБНИК) 158–61 (АО «Центр ЮрИнфоР», Москва 2004) [VADIM A. BELOV, CIVIL LAW: SPECIAL PART (Textbook) 158–61 (JSC Centre IurInfoR, Moscow 2004)].

157. GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 294 (Russ.).

158. *Id.* art. 296.

159. *Id.* art. 1018(1).

160. *Id.* art. 216.

161. *Id.* art. 1012(3)(subpara.1)(cl.1). *See also* Russell & Shakhnazarov, *supra* note 10, at 937 (explaining that the requirement is met when in a verbal transaction the other party is informed and when in a written transaction under fiduciary management the acronym “F.M.” (*Д.В.*) for “fiduciary manager” (*доверительный управляющий*) is added after the fiduciary's name).

162. GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1012(3)(subpara.2) (Russ.).

163. *Id.* art. 1020(2).

164. *Id.* art. 1018(1).

165. *Id.* art. 1022(1).

scope of her administrative powers.¹⁶⁶ A two-stage sequence controls the execution levied against various types of property for purposes of securing the repayment of debts incurred in connection with fiduciary management.¹⁶⁷ If the property held in fiduciary management is insufficient to satisfy a debt, the property of the fiduciary manager is next in line, and if that property is likewise insufficient, creditors will pursue the property of the founder.¹⁶⁸ When it comes to debts of the founder regarding the property transferred into fiduciary management, the execution is not levied against such property except in case of the bankruptcy of the founder.¹⁶⁹

3. *Legal Entity*

A third model is based on terse comments made by the codal framers at the time of codification. They suggest that the property under fiduciary management gives rise to a distinct legal entity.¹⁷⁰ Accordingly, the drafters saw in the segregation of the property transferred into fiduciary management the rise and expression of its personification. Under this construction, the fiduciary manager is considered the representative and face of the entity.

This approach echoes Justice Barham's famous dissent in a landmark decision of the Louisiana Supreme Court after the enactment of the Louisiana Trust Code.¹⁷¹ The case raised the question of whether a beneficiary's interest in the corpus of an unincorporated trust, which

166. *Id.* art. 1022(2).

167. Russell & Shakhnazarov, *supra* note 10, at 941.

168. GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1022(3) (Russ.).

169. *Id.* art. 1018(2).

170. ВИКТОР А. ДОЗОРЦЕВ, ДОВЕРИТЕЛЬНОЕ УПРАВЛЕНИЕ ИМУЩЕСТВОМ (Гл. 53) / ГРАЖДАНСКИЙ КОДЕКС РОССИЙСКОЙ ФЕДЕРАЦИИ (Часть 2), ТЕКСТ, КОММЕНТАРИИ, АЛФАВИТНО-ПРЕДМЕТНЫЙ УКАЗАТЕЛЬ 547 (под ред. Оксаны М.Козырь, Александра Л. Маковского, Станислава А. Хохлова) («Международный центр финансово-экономического развития», Москва 1996) [Victor A. Dozortzev, *Fiduciary Management of Property (Chpt. 53)*, in CIVIL CODE OF THE RUSSIAN FEDERATION (Pt 2) – TEXT, COMMENTS, ALPHABETICAL SUBJECT INDEX 547 (Oksana M. Kozyr, Alexander L. Makovskij & Stanislav A. Khokhlov eds.) (Int'l Ctr. for Fin. & Econ. Dev., Moscow 1996)].

171. *St. Charles Land Tr., Achille Guibet v. St. Amant*, 217 So. 2d 385 (La. 1968). For commentary, see, for example, Charles B. Mayer, *Trusts—The Characterization of A Beneficiary's Beneficial Interest in a Trust Estate*, 43 TUL. L. REV. 915 (1969); Dan Broussard, *Trusts—Creation—Validity—Nature of Beneficiary's Interest*, 15 LOY. L. REV. 382 (1968–69).

consisted of mineral leases and servitudes on lands in Louisiana, was an incorporeal immovable or an incorporeal movable.¹⁷² Invoking what he called the “entity of the trust [as] the only and real ‘object’ of the beneficiary’s interest,”¹⁷³ Justice Barham asserted that the interest was analogous to shares in companies or “other speculations [sweeping] it into the ambit of [movables].”¹⁷⁴ In contrast, the majority opinion, which was authored by Justice Sanders, emphasized that the trust was not incorporated and therefore could not be analogized to a juridical person.¹⁷⁵ Since the trust corpus consisted of immovables, the majority stated, the concomitant rights to those mineral leases and servitudes were incorporeal immovables under the general rule.¹⁷⁶ The majority’s view continues to be good law in Louisiana.¹⁷⁷

IV. JUDICIAL RESPONSES IN RUSSIA WITH REGARD TO PRACTICAL PROBLEMS SURROUNDING THE OPERATIONS OF FIDUCIARY MANAGEMENT

At first blush, the theoretical mechanics of fiduciary management seem more accessible compared to the trust. The practical problems of its operations, however, have kept the federal State arbitration courts of the Russian Federation quite busy. The following examples of case law discuss issues surrounding the taxation of income derived from fiduciary management and the return of the entrusted property.

A. Taxation of Income Derived from the Management of the Entrusted Property

The codal regulations governing fiduciary management do not offer tailored language regarding an obligation of the manager to extract income from the entrusted property. Teleologically speaking, however, the interest of the founder or the beneficiary lies precisely in the receipt of income derived from the management of the entrusted property,¹⁷⁸ while the

172. *St. Amant*, 217 So. 2d at 385.

173. *Id.* at 391 (Barham, J., dissenting).

174. *Id.* at 392.

175. *Id.* at 390 (majority op.).

176. *Id.*

177. *In re Howard Marshall Charitable Remainder Annuity Tr.*, 709 So. 2d 662, 665 (La. 1998).

178. GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1012(1) (Russ.).

manager who is held to due diligence and care¹⁷⁹ and subject to liability for losses¹⁸⁰ will receive remuneration and reimbursement of expenses.¹⁸¹

Russian accession law now declares that income derived from a thing belongs to its owner unless provided otherwise by law or juridical act.¹⁸² Prior to the reform, the proceeds received from the property as a result of its use belonged to the person using the property subject to exceptions by law or juridical act.

Taxation disputes in Russia have raised the question of whether the founder or manager is subject to taxation on income derived from the management of the entrusted property. According to established case law in Russia, the income is attributed to the founder and not to the fiduciary manager.¹⁸³ A guidance letter from the Russian Ministry of Finance, however, advises that if the founder or beneficiary is a foreign organization without a permanent establishment in the Russian Federation and yet the fiduciary manager is a Russian organization or a foreign organization operating through a permanent establishment in the Russian Federation, then the fiduciary manager shall withhold the tax and transfer it to the treasury from the income of such founder or beneficiary received under the fiduciary management agreement.¹⁸⁴

Similarly, in the United States, federal and state tax authorities are concerned with shoring up their tax base against tax evasion schemes through trust arrangements. Generally, federal income tax filing requirements for trusts hinge on the type of trust in question. According to the Internal Revenue Service (“IRS”), a trust must report its income for each taxable year when the trust has more than \$600 in income or has a non-resident alien as a beneficiary.¹⁸⁵ If the trust is a grantor trust,

179. *Id.* at 1022(2).

180. *Id.* at 15(2).

181. *Id.* at 1023(1).

182. *Id.* at 136 (2013). Fed. L. (Russ. Fed’n) N 142-FZ (“On amendments to subsection 3 of section I of part one of the Civil Code of the Russian Federation”).

183. Fed. State Arb. Court (Volga Reg.) Res. N A49-1843/03-84A/16 (Sept. 4, 2003) (tax on rental income from lease of entrusted nonresidential building); Fed. State Arb. Court (Moscow Distr.) Res. N A40-76017/11-75-313 (Mar. 12, 2012) (tax on income, minus expenses, from the lease of entrusted helicopters in a case not posing confusion between the founder and the manager); Fed. State Arb. Court (NW Distr.) Res. N A42-364/00-12 (May 8, 2005) (reimbursement of value added tax allegedly paid on purchase of fish products from manager entrusted by purchaser with vessels).

184. Min. Fin. (Russ. Fed’n) Letter N 03-03-06/1/642 (Oct. 6, 2009).

185. *Abusive Trust Tax Evasion Schemes - Questions and Answers*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/abusive-trust-tax->

however, the grantor, as the person who transferred property to the trust, is deemed the full owner of the property in trust.¹⁸⁶ In such a case, the IRS will not treat the trust as a separate and distinct tax entity; rather, all income is taxed to the grantor.¹⁸⁷ In a grantor trust,¹⁸⁸ the grantor retains the powers to control or direct the trust's income or principal. Revocable trusts are by definition grantor trusts.¹⁸⁹ In the case of an irrevocable trust, certain powers retained by the grantor could still cause it to be treated as a grantor trust.¹⁹⁰

For purposes of state taxes, the Louisiana Department of Revenue proceeds on a parallel track for Louisiana's fiduciary income tax.¹⁹¹ Like the federal scheme, tax consequences in Louisiana are predicated on whether the trust under scrutiny amounts to a grantor trust.¹⁹²

B. Hidden Privatization Through the Return of the Entrusted Property

Issues relative to the return of the entrusted property stem from the potential conflict pressures accruing from different statutory dispositions in the law of fiduciary management. Upon the termination of the agreement, the entrusted property must be transferred back to the founder, unless the fiduciary management agreement provides otherwise.¹⁹³ Conversely, in the course of fiduciary management, the manager has the power to make dispositions regarding the entrusted property, subject only to the limits established by law or convention.¹⁹⁴ This rule means that at the termination of the fiduciary management, the property that will actually be transferred back may not be identical to the property originally received. The specific type and composition of the property subject to being returned will be determined by the overall purpose and specific outcome of the fiduciary management. In practice, issues arise as to the

evasion-schemes-questions-and-answers [https://perma.cc/ZTK4-B8YS] ("Q: Do trusts have a requirement to file federal income tax returns?") (last visited Apr. 3, 2019).

186. *Id.* ("Q: What is a grantor trust?").

187. *Id.*

188. 26 U.S.C. § 671 (2012).

189. *Abusive Trust Tax Evasion Schemes*, *supra* note 185.

190. 26 U.S.C. §§ 671, 673–77.

191. *See generally Fiduciary Income Tax*, LA. DEP'T REV. <https://www.revenue.louisiana.gov/FiduciaryIncomeTax> [https://perma.cc/9EWA-BP49] (last visited Apr. 3, 2019).

192. LA. REV. STAT. § 47:187 (2019).

193. GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1024(3).

194. *Id.* art. 1020.

legal fate of a clause in a contract of fiduciary management that provides for the entrusted property to become the property of the fiduciary manager upon the termination of the contract.

The Supreme Court of the Russian Federation, sitting en banc, has determined that such a clause must fall as null and void because it is irreconcilable with the nature of the contract of fiduciary management.¹⁹⁵ Legislative policy against hidden privatization of state and municipal property in circumvention of controlling federal law may best explain this judgment and its sweep.¹⁹⁶ The decision may also reflect a subconscious association of fiduciary management as an instrument for the entrustment of state or municipal property into private fiduciary hands. Yet, such a government-centric psychology, which may well be a legacy lingering from Soviet or even Imperial times, does not take into consideration that fiduciary management is not restricted to public property. It often involves private property and private actors. In such a case, a margin of contractual freedom, rather than a wholesale restriction, would make more practical sense.

V. PERSPECTIVES FOR TRUST LAW IN RUSSIA

Literature has occasionally asserted that Russia's fiduciary management embodies a reenactment of the "Louisiana civil law trust."¹⁹⁷ This diagnosis not only declares that Russia has adopted the trust law of Louisiana but also implies that Louisiana has succeeded in "civilizing" the American trust. Although it seems fair to say that Louisiana has successfully created its own version of the trust, Russia's fiduciary

195. Supr. Court (Russ. Fed'n) Plenum's Ordinance N 25 of June 23, 2015 "On application by courts of some rules of the Section I of the First Part of the Civil Code of the Russian Federation," ¶ 74, <http://base.garant.ru/71100882/#ixzz5dKqKLG4O> [<https://perma.cc/VQ2B-VWB6>]. The Ordinance of the Plenum of the Supreme Court is a peculiar source of law in Russia and other post-Soviet countries. In the document, the Supreme Court provides rules formulated in the format of abstracts akin to statutory provisions. These rules, designed to fill gaps in the statutory law, are binding on the lower courts.

196. GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 217; Federal Law N 178-FZ of Dec. 21, 1001 (Russ. Fed'n) ("On privatization of state and municipal property"), arts. 1, 13. For jurisprudence, see, for example, Supr. Court State Arb. Res. 3320/08 (Mar. 13, 2008), in Case N A20-2330/2007; Fed. State Arb. Court (North Cauc. Distr.) Res. N F08-7825/07 (Dec. 25, 2007), in Case N A20-2330/2007.

197. Gábor Hamza, *Different Forms of Ownership with Particular Regard to the Ownership in the Russian Federation—A Historical-Comparative Survey*, 1 PORT. L. REV. 13, 20 (2017).

management, in its current version, does not constitute a legal transplant of the Louisiana trust.

After a long period of skepticism and resistance, Louisiana became the first state in the American Union to clothe its version of trust into a comprehensive statutory regime. Although the trust may be as important as outright donations in real life, the drafters opted against its inclusion in the Louisiana Civil Code. Instead, they decided to offer its provisions in Title 9 of Louisiana Revised Statutes, "Civil Code—Ancillaries."¹⁹⁸ Yet, the farmers called the ensemble of statutory provisions the Louisiana Trust Code. This approach may very well reflect the mixed signals coming from the twilight zone of bifurcated ownership as to the interest in trust. Otherwise, however, Louisiana's trust legislation appears to have successfully reconciled trust operations with indigenous notions of prohibited substitutions, immediate vesting, and non-delegation in the civilian tradition.

In the wake of codifying its trust law, Louisiana has witnessed a significant rise in the use of trusts. In addition to the courts' receptivity to trust operations in Louisiana, the Louisiana Legislature has continued to move the needle toward making available the full complement of benefits associated with the American trust.¹⁹⁹ Still, practitioners advise stakeholders to avoid placing Louisiana real estate into trusts created in other states.²⁰⁰ Instead, they prefer the limited liability company for holding immovable property located in Louisiana.²⁰¹ These same practitioners, however, alternatively recommend considering the establishment of a Louisiana trust.²⁰² Otherwise, those wishing to set up revenue streams could create a usufruct for life rather than an income interest in trust.²⁰³ The practical reality of such professional advice seems to confirm that despite Louisiana's successful management of reception inhibitors and despite the continual trend towards full convergence with

198. David Gruning, *Mapping Society through Law: Louisiana, Civil Law Recodified*, 19 TUL. EUR. & CIV. L.F. 1, 14–15 (2004).

199. Martin, *supra* note 45, at 530 (making this diagnosis 25 years after the adoption of the Louisiana Trust Code).

200. AKERS, *supra* note 54, at 3.

201. *Id.*

202. *Id.*

203. *Id.* (noting that: (1) the trust and the usufruct carry pros and cons; (2) the usufruct may be simpler, as for example, no separate trust income tax return is required; and (3) the usufruct allows for the election of qualified terminable interest property on an asset-by-asset basis).

American templates,²⁰⁴ the Louisiana trust and the American trust cannot yet be considered fully fungible. The uniqueness of Louisiana's posture vis-à-vis the American version of the trust may explain the vigor with which Louisiana has opposed the United States joining the Hague Convention on the Law Applicable to Trusts and Their Recognition of 1985²⁰⁵ ("the Hague Convention on Trusts")²⁰⁶—a multilateral international law treaty with a two-pronged objective: first, to ensure the international recognition of trusts in countries that do not have trusts; and second, to permit these trusts to function as such at the international level.²⁰⁷ Yet the Hague Convention on Trusts, which only 13 countries have ratified or accepted to date,²⁰⁸ does not appear to impact internal conflicts questions and rules with regard to domestic trusts touching several states within the United States.²⁰⁹

Although the locution of the "Louisiana civil law trust" offers a valuable descriptor for the situation in Louisiana, Russia's fiduciary management does not cross the bright line into qualifying as a trust, either in the Louisiana variant or, even less so, in any other guise. Arguably though, fiduciary management might be forced into the broad triad of characteristics required of a trust under the Hague Convention on

204. See Scalise, *supra* note 17, at 125 (offering the bold conclusion that Louisiana has adopted the common law trust). For his classic diagnosis with regard to the 1938 legislation, see John Minor Wisdom, *A Trust Code in the Civil Law, Based on the Restatement and the Uniform Acts: The Louisiana Trust Estates Act*, 13 TUL. L. REV. 70, 83–84 (1938) (explaining that the 1938 law "establishes . . . the common law express trust [. . . with] no local trappings, no subterfuges, or restrictions that cut the ground from under the trustee as holder of the legal title . . . [a] capitulation [b]ut . . . an honorable surrender [. . . as] [t]he trust has met the pragmatic test in Romanesque jurisprudence[: i]t works").

205. 30. *Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*, HAGUE CONF. ON PRIV. INT'L L. (July 1, 1985), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=59> [<https://perma.cc/HL36-EFUU>]. For secondary literature, see, for example, Donald T. Trautman & Emmanuel Gaillard, *Trusts in Non-Trust Countries: Conflict of Laws and the Hague Convention on Trusts*, 35 AM. J. COMP. L. 307 (1987).

206. AKERS, *supra* note 54, at 5, no. 10.

207. Michael W. Galligan, *United States Trust Law and the Hague Convention on Trusts*, NYSBA TR. & EST. L. SEC. NEWSL. 37 (Fall 2000).

208. 30: *Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition, Status Table*, HAGUE CONF. ON PRIV. INT'L L., <https://www.hcch.net/en/instruments/conventions/status-table/?cid=59> [<https://perma.cc/DUW4-VFZJ>] (last updated 2017).

209. Galligan, *supra* note 207, at 38 (reviewing Article 24 of the Hague Convention on Trusts).

Trusts.²¹⁰ In contrast to the legal community in Louisiana, which has found a living arrangement with the trust even absent a formal embrace of equitable interests,²¹¹ the Russian legal academy has continued to balk at such accommodation because it is considered anathema to the essential canons of Russia's traditional property law system. This stance is why, in having the title to the property in fiduciary management remain with the founder, the codal redactors in Russia created a powerful firewall to prevent fiduciary management from straying into the forbidden zone of trusts. Yet, existing codal rules governing Russia's version of the Roman *legatum per damnationem*²¹² could offer a template equipped with a germination capacity. In what the unofficial translations of the Russian Civil Code call a testamentary trust, the testator may burden a successor with a duty of a property nature for the benefit of another.²¹³ Upon the death of the testator, the beneficiary acquires a credit right to claim the execution of the duty.²¹⁴ An example would be a will imposing on those slated to inherit a duty to make periodic payments to a legatee as a means of subsistence, coupled with the instruction that the payments come from the income a designated object contained in the estate produced.²¹⁵ If the beneficiary were to die, her successors would have a claim to any undisbursed income.²¹⁶

210. Russell & Shakhnazarov, *supra* note 10, at 942–43 (diagnosing that a transfer of real estate into fiduciary management comes “quite close to satisfying [the] characteristic” of title in the name of the trustee pursuant to Article 2(b) of the Hague Convention on Trusts). For more background relative to the broad scope of the Hague Convention on Trusts, see Michele Graziadei, *Recognition of Common Law Trusts in Civil Law Jurisdictions under the Hague Trusts Convention with Particular Regard to the Italian Experience*, in RE-IMAGINING THE TRUST, *supra* note 4, at 29–82.

211. See LUIGI CARIOTA FERRARA, I NEGOZI FIDUCIARI: TRASFERIMENTO, CESSIONE E GIRATA A SCOPO DI MANDATI E DI GARANZIA, PROCESSO FIDUCIARIO 33 (Cedam, Padova 1933) (“[I]n quei casi in cui l’equità esige o suggerisce una considerazione di interessi di altre persone di fronte alla posizione formalmente legittima del titolare del diritto.” “[I]n those cases in which equity requires or suggests a recognition of interests of others opposite the lawful position of the holder of the right.”).

212. See, e.g., Thomas R fner, *Testamentary Formalities in Roman Law*, in TESTAMENTARY FORMALITIES 12 (Kenneth G.C. Reid, Marius J. Derwall & Reinhard Zimmermann eds., Oxford Univ. Press 2011).

213. GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1137(1) (Russ.).

214. *Id.*

215. *Id.* art. 1137(2).

216. See *id.* art. 1183(3).

CONCLUSION

If the Russian Federation decides to implement a trust-like device rather than a civilian surrogate,²¹⁷ Louisiana's experience with its codification of trust law over the last 55 years could light the path for reform, notwithstanding the typical challenges associated with legal transplants.²¹⁸ Given the prevailing posture of purism in the Russian legal academy, however, it is unsurprising that the latest stimulus for the rise of trust legislation in Russia has come from the political arena. On March 25, 2015, President Vladimir Putin announced plans for trust legislation expressly providing for the transfer of ownership from the founder to the manager.²¹⁹ As articulated in numerous official pronouncements, the primary reasons behind his initiative include enhancing the business climate and incentivizing the repatriation of capital.²²⁰ Four years later, a draft law has yet to leave the incubator for public viewing. In this sense, all bets are off. After all, as Hermann advises in the final scene of Pyotr Ilyich Tchaikovsky's opera *Пиковая дама* ("The Queen of Spades"): «Что наша жизнь? Игра!» ("Life is but a game").²²¹

217. For a surrogate absolutely within civilian categories harnessed by the author as one of the drafters of the model law slated for adoption by the member states of the Commonwealth of Independent States, see Anton D. Rudokvas, *Affidamento fiduciario in San Marino: Proposal for the Commonwealth of the Independent States*, 9 ВЕСТНИК СПБГУ (ПРАВО) [VESTNIK OF SAINT-PETERSBURG UNIVERSITY LAW] 370 (2018).

218. For the seminal work in this field of study, see ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1974).

219. Кира Латухина, *Путин Поддержал Предложения По Амнистии Капиталов*, РОССИЙСКАЯ ГАЗЕТА (Mar. 25, 2015), <https://rg.ru/2015/03/25/kapitali-site.html> [<https://perma.cc/TGR3-W8YH>]. For the English translation of President Putin's words, see Rudokvas, *supra* note 88, at 54.

220. For more background, along with quotes from various government officials, see Rudokvas, *supra* note 88, at 54–56.

221. ПЕТР И. ЧАЙКОВСКИЙ & МОДЕСТ И. ЧАЙКОВСКИЙ, *ПИКОВАЯ ДАМА*, Акт 3, Сцена 7 (1890) [PETER I. TCHAIKOVSKY & MODEST I. TCHAIKOVSKY, *THE QUEEN OF SPADES*, act 3, sc. 7 (1890)].