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FAMILY ENTERPRISES AND ENTREPRENEURIAL OBLIGATIONS OF SPOUSES-INDIVIDUAL ENTREPRENEURS IN RUSSIA

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A family business is the basis of the middle class being formed in Russia. The imperfection of the legal regulation of this legal phenomenon makes the research on this subject relevant. The legal regulation of property and obligations of spouses- individual entrepreneurs is of particular scientific interest. The legal positions formed by the courts, in the opinion of the author, generate legal uncertainty in law enforcement practice.

Keywords: family business, individual entrepreneur, spouses, family entrepreneurship, liabilities, property.

СЕМЕЙНЫЕ ПРЕДПРИЯТИЯ И ПРЕДПРИНИМАТЕЛЬСКИЕ ОБЯЗАТЕЛЬСТВА СУПРУГОВ-ПРЕДПРИНИМАТЕЛЕЙ В РОССИИ

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Семейный бизнес представляет собой базис среднего класса, который формируется в России. Несовершенство правового регулирования этого юридического феномена делает исследования по данной теме актуальными. Правовое регулирование имущества и обязательств супругов-индивидуальных предпринимателей представляет особый научный интерес, поскольку формируемые судами правовые позиции в данной сфере становятся источниками правовой неопределенности в правоприменительной практике.

Ключевые слова: семейный бизнес, индивидуальные предприниматели, супруги, семейное предпринимательство, ответственность, имущество.

Introduction. The development of family enterprises as a business organization based on marital relations, or common property of spouses, business assets, securities requiring management [1] raises the question of the legal regime of the obligations of spouses-entrepreneurs as a relevant topic of legal research.

The problems of law enforcement in this area can be attributed to the withdrawal of property from the bankrupt estate using the legal regime of the property of spouses (legal and contractual), the reduction of creditors about the debtor marriage status, the availability of alimony recipients, marriage contract, marital settlement agreement, legal possibility of joint enterprise of spouses (family business, division of debts and property on general and personal, prospects of joint bankruptcies and spouses.

It is possible to allocate the following kinds of abuses of a family regime of property and obligations to the detriment of creditors: the lack of spousal consent to the transaction, the requirements for recognition of such transactions invalid, divorce and division of property, agreement of lawsuit on division of property, the agreement on the division of property on which all the property transfer to another spouse, and the bankrupt has only debts.

The courts try to fight against these abuses, often using non-standard methods. However, the difficulty is in the fact that in reality, it is difficult to determine whether the abuse or whether a legitimate family interest was realized.

The disadvantage of the legal regime of obligations of spouses-entrepreneurs should be recognized ignoring their business and legal specifics and, as a result, the distribution of

family law regulation.

Methodology. The article uses the methods of induction, deduction, analysis, and synthesis, particular scientific methods

Discussion. As a general rule, property acquired by spouses in marriage is presumed to be common. At the same time, the regime of marital property does not apply to spousal obligations, which can also be common and personal.

Marital property used in entrepreneurial activity is under the legal regime of the property of spouses (in the absence of a marriage contract). Business income is also spouses co-ownership. Essentially, a group of two people acts in the legal form of an individual entrepreneur. One of them may not take any part in entrepreneurial activity, not have the status of an entrepreneur, but be entitled to a portion of the income from this activity and property used in its exercise, as well as the right to participate in the possession, use, disposal of this property. Circulating assets of the individual entrepreneur do not belong to income. If they are not acquired for the personal funds of the spouse (what is practically excluded, since they are replenished from business income), then they are also the common property of the spouses.

In contrast to the legal regime of the property of the spouses as to their obligations, the presumption of their community is not provided. Thus, in the p. 5 of the Digest of the case law of the Supreme Court N 1 (2016) indicated that if one of the spouses concluded a loan agreement or other transaction, tied to the appearance debt, this debt could be recognized as common only if circumstances are arising from paragraph 2 of Art. 45 of the Family Code of RF, the burden of

proof of which lies on the side claiming the distribution of debt.

As in term of law, the Family Code of the Russian Federation and judicial practice "family" is not subject to the law (legal entity) and therefore not delegate with legal capacity. Each spouse has the rights and duties in the bankruptcy of a debtor-individual, and not the family (Resolution 13 of the AAC of February 22, 2017, on case number A56-91219/2016).

In contrast to the legislation of the Russian Federation, the laws of several countries contain norms that directly regulate the mode of entrepreneurial activity, property, and obligations of a spouse-entrepreneur.

Thus, the PRC Law "On Marriage" contains Art. 18 On Enterprise's debt of the spouse, according to which if the participant of individual private enterprise when applying for registration of the enterprise contributes property, which is a common property of the family, then that participant has unlimited liability for the obligations of individual private property of the enterprise, owned by the family.

However, strict liability traditionally implies liability with property used in entrepreneurial activity (limited liability).

We believe it is necessary to develop mechanisms for the separation of the personal property of an individual entrepreneur from the family property used in business activity.

Traditionally, the legislator differentiates business activities from other activities of subjects, such activities that carry out [2], therefore, it seems all the more strange that there is no distinction between the entrepreneurial and family-legal regime of the property of a spouse-entrepreneur.

Zombart points problems of the genesis of capitalism to two "keynotes" of economic history – "needs satisfaction" and "profit" [3]. In the family, the aspiration to the satisfaction of needs prevails, and in entrepreneurship – to gain profit, and both of these purposes are encountered in family entrepreneurship.

As noted above, the subjects of business law peculiar ringfenced assets. The property of an individual entrepreneur, which is used by him in business activity is not separated from his personal property, that is also confirmed by judicial practice.

The Resolution of 7 AAS from 23.05.2011 №07AP-4096/2010 in the case №A45-28377/2009 concluded that there is no in the current legislation and delimitation property as individuals and individual entrepreneurs.

Similarly Court decision 17 AAC of March 5, 2011, № 17AP-910/2011-AK in case No.A71-12743/2010, in which the court concluded that the law does not differentiate the procedure for foreclosure and the property of a citizen against which recovery proceedings may not be instituted depending on the emergence of obligations from business or other legal relations. In the Court decision № 18AP -11543/2010 of December 21, 2010, on Case № A76-9196/2010, the Eighteenth Arbitration Court of Appeal, referring to clauses 1 and 3 of Art. 23 of the Civil Code of the Russian Federation, clarified that the property of a citizen is not legally delimited, even when he is an individual entrepreneur since he uses his property not only to engage in entrepreneurial activities but also as his personal property necessary to exercise his inalienable rights and freedoms.

The autonomous balance sheet, settlement and other accounts of enterprises are the forms of separation of the business property [4].

We consider it necessary to divide the property of the individual entrepreneur as a subject of business law and property of an individual as a subject of civil and family law.

It seems that the objects of isolation of the individual entrepreneur as a subject of business law can be producing goods and products of productive consumption. An individual uses the property for personal and family purposes, not related to business activities.

As a legal form of separation of property and obligations of an individual entrepreneur, it can be a fund (enterprise).

In foreign legislation, an analog of the proposed fund is an enterprise. Zenin I.A. said: "As means of trade activity of entrepreneur and as a right object, the enterprise, as a property complex, including the material elements, the rights and duties, as well as with other existing businesses and clientele actual relations (production buildings, raw materials , finished products, cash, industrial property rights, license, rental rights, as well as monetary claims and debts, including loans and credits received)" [5].

The analysis of foreign legislation leads M.I. Kulagin to the conclusion that an enterprise is considered as an object of ownership of a merchant, but an object separated from the merchant's property. This separation occurs in three areas. Firstly, the company is obliged to maintain its statements, including tax. If an entrepreneur has several enterprises, he must accordingly keep trade books and submit other documents for each enterprise individually. Secondly, an enterprise can be registered under its firm. Thirdly, an enterprise can act as an object of various trade transactions [6].

Changing of criteria of insolvency, a mixture of criteria of insolvency of the debtor-businessman and not businessman becomes one more trend of judicial practice in the sphere of the bankruptcy of spouse-entrepreneur. We are talking in this case about insolvency and irredeemable as criteria of individual bankruptcy. That is directly linked to the issue of full and limited liability for the obligations of the business activity.

Resolution of the Plenum of the Supreme Court of Russian Federation № 48 dated 12/25/2018 n some issues related to the peculiarities of the formation and distribution of the bankruptcy in bankruptcy cases of citizens are harmonized with the current legislation, and the previously existing position of the Supreme Arbitration Court position was revised.

According to Clause 18 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation of 30.06.2011 № 51 "On Hearing of Bankruptcy Cases of Individual Entrepreneurs" if the debtor is married, then the common property of the spouses was not included in the bankruptcy assets. This legal position is entirely coordinated with the entrepreneurial nature of the obligations of the individual entrepreneur.

With the adoption of Resolution number 48, there was the last change of the trend of law enforcement practice in the sphere of citizens' bankruptcy on the opposite. Preliminary changes were also made to the bankruptcy legislation (clause 7 of Article 213.26 of the Federal Law "On Insolvency (Bankruptcy)" dated October 26, 2002, № 127-FZ.

Now the common property is to be sold with compensation to the spouse the value of its share. At the same time, the interests of the second spouse are violated, because, as a rule, in bankruptcy procedures, the property is sold at a lower price. Besides, the specifics of doing business by an individual entrepreneur under the laws of the Russian Federation are not taken into account.

In general, over the last few years have changed the paradigm of legal regulation of private bankruptcy from pro-debtor [7] on pro-creditor.

We believe that such an approach is favorable, first of all, to structures which activity in the financial market is professional. Therefore, it is essential to consider the status of the creditor. For example, if the creditor is a professional participant in the credit market, check the borrowers has to be carried out by it at a professional level. Respectively, default risk should be distributed between the parties, taking into account the increased requirements for due diligence of such a creditor.

For recognizing the debt of a spouse as personal or common, the specific circumstances of the case are also relevant: the fact of cohabitation (actual and/or legal family disruption), the second spouse's awareness of the existence of a debt, spending the money in the interests of the family.

Guiding the principle of the debtor's solvency to the bankruptcy of individual entrepreneurs is more in keeping with the entrepreneurial nature of its activities. It is possible to bring closer the legislation to this principle by consistently delimiting the legal personality of individuals in civil, family and business law. The next step should be the delimitation of entrepreneurial obligations from family and civil obligations. Allocation of property and obligations from an entrepreneurial activity may allow in the future to limit the liability of an individual entrepreneur only to property used in entrepreneurial activity.

As it noted in legal literature, in business activity person is unable to make payments, not because the value of its assets is insufficient to satisfy the claims of creditors, but because it is unable to be removed from the sphere of circulation contributed capital (source of payment). The economic inability of a person to draw contributed capital from the sphere of circulation finds its formal manifestation in the legal inability of the subject to fulfill his monetary obligations. It is, in turn, means that, from a legal point of view, insolvency is the inability of an entrepreneur to fulfill monetary obligations [8].

The proposed fund will enable the entrepreneur to ringfence its business process, create an opportunity of legal succession not only things but also the obligations of an individual entrepreneur, separate assets and liabilities of the individual entrepreneur.

The ultimate purpose of the activity of an individual entrepreneur is profit as the financial result of such activity. For accounting, profit does not relate to an asset, but to liability, that is, not property, but the sources of its formation.

The Family Code of RF in Art. 34 about the common property of spouses operates not with the concept of profit, but with the concept of income from entrepreneurial activity. It is also incorrect for the economic content of these categories. Profit is the economic result of an activity which is formed taking into account the ratio of income and expenses. Income includes, as a rule, all receipts in the cash desk and on account of the entrepreneur, so the use of the category of "income" without taking into account the costs entails an unfair distribution of the burden of debt.

When dividing the property of the spouses, we believe that it is necessary to consider a real state of the business, and not of an individual who cannot be assessed without isolating his personal property and obligations from the business. An indicator reflecting the real property status of an individual entrepreneur can be considered the indicator of net assets used by courts in assessing the property status of peasant farms. For example, in the case of a member's retirement from the holding, settlements with him are made taking into account the value of net assets (the value of a property, taking

into account expenses and incomes taken into account). The Definition of the Supreme Court of RF from 25.10.2011 №VAS-13262/11 in the case №A48-927/2010 to support the position, determining the value of the property complex of the peasant farm, based on the net asset value. It is considered that at the time of the plaintiff exit from the members of the peasant farm and the signing the agreement, the net asset value was a negative difference. The definition of the Supreme Arbitration Court of the Russian Federation of 28.06.2011 № WAS-7381/11 in case № A46-4697/2007 contains a similar position. The court proceeded from the fact that due to the absence of an agreement on the establishment of shares between the parties, the shares were considered equal, the value of the respondent's property was taken into account, taking into account the existing debt [9].

The question of property obligations, especially debt, as a property is debatable. The property of an individual entrepreneur can be formed at the expense of debts as sources of property formation, since debt obligations, in terms of their economic nature and accounting, are a source of property formation and do not relate to an asset, but liabilities. In the same case, when property is understood as a set of chose, property rights and obligations that characterize the property status of their carrier, it is correct to speak of net assets, the value of which is understood as the value determined by deducting from the amount of assets taken to calculation, the amount of liabilities accepted for calculation.

Thus, the obligations of entrepreneurial activity by their nature are personal obligations of an individual entrepreneur. Income (or, to be more precise, the profit) from business activities is the joint ownership of the spouses.

Often, especially in the situation with micro-enterprises, it is difficult to separate the property used in a business from the personal property of the debtor.

Personal entrepreneurial obligations of the debtor do not have to entail the restriction of proprietary rights of another spouse and alimony recipient.

The practice of forming common approaches to the bankruptcy of individual entrepreneurs and individuals who do not have the status of an individual entrepreneur seems to be conceptually incorrect both due to differences in insolvency criteria and due to different approaches to the responsibility of entrepreneurs and non-entrepreneurs.

The existence of common obligations of the spouses provokes the question of introducing the institution of joint bankruptcy of spouses, known in the US law, for example.

If there are common debts of the spouses, the application of this institution can be helpful for procedural economy, saving on court costs. Also, joint bankruptcy allows harmonizing the interests of the debtor, his spouse, and creditors.

Determination of the Plenum of the Supreme Court of the Russian Federation № 48 dated 25.12.2018, "On some questions connected with the peculiarities of formation and distribution of the estate in bankruptcy cases, citizens' courts the opportunity of integration of two cases on the bankruptcy of the spouses according to the rules of Art. 130 APC RF (p. 10).

Earlier in the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation of June 30, 2011, № 51 (as amended on December 25, 2018) "On the consideration of bankruptcy cases of individual entrepreneurs" a different position was fixed. Guided by paragraph 18 of the Resolution, the courts proceeded from the fact that if the debtor – an individual entrepreneur – is or has been married,

the common property of the spouses could not be included in the bankruptcy estate. In order to form the bankruptcy estate, the bankruptcy trustee in the interests of all creditors could apply to the court with a request to divide the common property of the spouses (Section 3, Article 256 of the Civil Code of the Russian Federation, Section 1, Article 45 of the Family Code of the RF).

However, with the introduction in 2015 of the Federal Law of October 26, 2002, N 127-FZ (as amended on 12/27/2018) "On Insolvency (Bankruptcy)" Art. 213.26 (features of the sale of property of a citizen), p. 17 of the Resolution of the BAC No 51 Plenum became invalid. P. 7 Cover of this article is that the spouse (former spouse) has the right to participate in the bankruptcy case of his spouse when dealing with issues related to the common property. Bankruptcy assets include part of the funds from the implementation of the entire property of the spouses (former spouses), corresponding to the share of the citizen in such property. The rest of these funds are paid to the spouse (former spouse). If at the same time the spouses have common obligations (including joint liability or guarantee), the part of the proceeds due to the spouse (former spouse) is paid after the payment due to the money of the spouse (former spouse) on these common obligations.

Before the Plenum of the Supreme Court № 48 on the issue of the possibility of joint bankruptcy of spouses, the courts merged cases, refused to accept a joint petition on bankruptcy, and returned claims to spouses-debtors. There was no single approach.

On today's moment prevailed the first approach [10].

Thus, there is a very different situation. The property of spouses under the law is assumed to be common, but debts are personal (Section 5 of the Review of Judicial Practice of the Supreme Court of the Russian Federation N 1 (2016) (approved by the Presidium of the Supreme Court of the Russian Federation on April 13, 2016).

Previously, the common property was not included in the bankruptcy assets, which is logical, if we assume that the spouses have personal debts. Now, the procedure for selling the property has been clarified. A part of the common property of the spouses (former spouses), corresponding to the citizen's share in such property, is included in the bankruptcy assets.

According to the Resolution of the Plenum of the Supreme Court of Russian Federation № 48, spouses bankruptcy cases can be consolidated with such conditions as marriage status, insolvency proceedings into both spouses, having common debt (optional).

It should be noted that jurisdictions that recognize common joint ownership of marital property (including some US states), as a rule, also recognize the commonality of the majority of debts of spouses [11]. Suppose in the absence of common debt, the couple joint bankruptcy more consistent with the interests of creditors, because it simplifies the foreclosure of the property, and contrary to the interests of the spouses. That may lead to abuse of the creditors intentionally filing petitions for bankruptcy of both spouses for the realization of the common property of spouses.

At the same time, the integration of spousal bankruptcy cases remains a right of the court, not a court obligation, and the possibility of filing a joint petition for bankruptcy is at the moment not resolved.

The bankruptcy procedure is complicated with the Resolution of the Plenum № 48. Intricate designs always lead to problems in law enforcement, abuse and corruption schemes.

It is fair to assume that the courts of general jurisdiction dividing the property of bankrupt spouses will be based primarily on the norms of family law, and arbitration courts considering cases of bankruptcy will use bankruptcy law. Therefore, sections of the property will be disputed by arbitration managers.

Moreover, there will also be considerable uncertainty. In the fight against abuses, which we spoke about above, the courts will make non-standard legal decisions. That will do unpredictable the results of the actions of the spouses carried out in the legal field at the time they were committed. As an example, one can cite the legal position outlined in the Definition of the Supreme Court of the Russian Federation of September 24, 2017, № 304-ES18-4364 in case № A03-7118/2016. In this definition, the court concluded that determining the future of the property without divorce by making a settlement agreement. The spouses essentially concluded an agreement on the division of common property (clause 2 of article 38 of the Family Code of RF). Therefore, its rule by the contractual constructions. The courts did not take into account the provisions of Art. 46 of the Family Code of RF, guarantees the rights of creditors and therefore the reference of the district court to the principle of general obligatory court rulings of the court of general jurisdiction, in this case, is erroneous. Thus, the court applied substantive norms to the procedural institute, a mixture of substantive and procedural legal methods of protecting the interests of creditors occurred. To predict in advance such a court decision that goes beyond the bounds of the law would also be severe.

In another case, The Supreme Court of Russian Federation does not rule out the possibility of seizing the only property from the debtor because of the inequitable conduct: willful transfer of property to other persons may be deemed fictitious transaction [12].

This interpretation conflicts with clause 4 of Plenum of the Supreme Court of RF № 48 in which it is stipulated that a transaction aimed at alienating the dwelling premises by the debtor is not considered invalid if the debtor and his family members continue to live together in this room premises in the bankruptcy mass, it will be protected from foreclosure.

A particular story is a cross-border family business division. At the same time, the division of property is complicated by the foreign element, which makes it necessary to apply international treaties, conflict of laws rules and foreign law. In this regard, the courts try not to take over such cases, regarding not under the jurisdiction of the Russian court. The Supreme Court of the Russian Federation is also trying to prevent the formation of this practice. So, the definition of the Judicial Collegium for Civil Cases of the Supreme Court of the Russian Federation of 18.09.2018 № 4-KG 18-46 found the practice illegal, canceled the definition of the lower court, referring the case to a new hearing, because the court did not take into account the fact that the plaintiff is not a claim on real estate rights, but is aimed at changing the model of common property of the spouses. As the Supreme Court of the Russian Federation pointed out, the civil procedural law does not include the requirement to divide the marital property of spouses (citizens of the Russian Federation) located in the territory of foreign countries into the exclusive jurisdiction of foreign courts, and therefore the general jurisdiction rules established by Vol. 3 Civil Procedural Code of RF. Such claims are subject to consider by the courts of general jurisdiction of the Russian Federation unless otherwise provided by international agreement.

Results and Conclusion. Since the entrepreneurial obligations of individual entrepreneurs arise primarily between subjects of business law, several conclusions can be made.

– It is necessary to take into account that the risky nature is the business activity of not only the debtor but also a professional participant in the credit market. The research of risks, the credit history of the debtor, his marital status is carried out by it on a professional basis.

– As entrepreneurial activities of the debtor and the creditor's activities, are risky, and the risk is legislatively fixed characteristic of this activity, this risk should be shared equitably between the parties (equally), including moral and ethical point of view.

– Association of the property used in business with the personal (and family) property is conceptually incorrect. The dominance of such a model leads to a fundamental conflict of interest between the debtor, his family, and creditors.

– The delimitation of the entrepreneurial legal personality

of an individual entrepreneur from the legal personality of an individual in civil and family law should result in the consistent separation of property used in entrepreneurial activity from personal and family property and will help to overcome this conflict of interest.

– Obligations from entrepreneurial activity cannot be shifted to the members of the family of an entrepreneur and deprive them of the powers granted by the Constitution of the Russian Federation and the law.

– The concept proposed by the Supreme Court is contrary to the basic principles of state family policy, placing the interests of creditors above the interests of the family, contrary to constitutional principles and priorities. Another essential feature of the resolution of the Plenum of the Supreme Court of RF is that it does not take into account the conceptual differences in the bankruptcy of entrepreneurs and individuals without the status of individual entrepreneur and principles of formation of the property of an individual and entrepreneur, full strict liability.

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