International Journal of Humanities and Applied Social Science (IJHASS)
E-ISSN: 2471-7576
August 2020, Vol: 5, Issue: 8
E-mail: editor@ijhassnet.com
http://ijhassnet.com/ **DOI: 10.33642/ijhass.v5n8p1**

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Disability, Trust and Special purpose Asset in the Italian Law System

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ABSTRACT

Law 22 June 2016, no. 112 (so-called "after us" Law) substantially introduced the trust in Italy. It was issued with the stated objective of promoting the well-being, full social inclusion, and autonomy of people with disabilities. It is aimed at facilitating, through favorable tax regimes, the establishment of trusts, destination restrictions *ex-art*. 2645-*ter* of the Italian Civil Code and special funds governed by a fiduciary entrustment contract. On closer inspection, the "after us" Law, for its systematic contribution well beyond the tax-benefit purposes expressly mentioned, could be considered a first and albeit incomplete trust law, aimed at discouraging the establishment of trusts governed by a foreign law: this, since a large part of the elements indicated in art. 8 Conv. of the Hague so that a specific law can qualify as trust law.

Certainly, relevant appear the subjective prerequisites for the application of the law and, in particular, the serious disability not determined by aging or pathologies related to senility and the absence of family support. Attention then focuses on the *vexata quaestio* of trust's legal nature and its affinity with the deeds of patrimonial destination *ex-art*. 2645-*ter* of the Italian Civil Code, as well as with the fiduciary agreements.

1. Introduction.

Law 22 June 2016, no. 112 (so-called "after us" Law) substantially introduced the trust in Italy. It was issued with the stated objective of promoting the well-being, full social inclusion, and autonomy of people with disabilities. It is aimed at facilitating, through favorable tax regimes, the establishment of trusts, destination restrictions *ex-art*. 2645-*ter* of the Italian Civil Code and special funds governed by a fiduciary entrustment contract[1].

In particular, the goods and rights conferred in trust or burdened by restrictions of destination according to art. 2645-*ter* of the Italian Civil Code or intended for special funds with a fiduciary entrustment contract are exempt from inheritance and donation tax[2] (art. 6): these exemptions are conditional on the pursuit of the purposes – of social inclusion, care, and assistance of the beneficiary person with serious disabilities to be expressly indicated in the public trust deed, of destination restriction according to art. 2645-*ter* of the Italian Civil Code and fiduciary entrustment contract. For the exemptions, this acts must also clearly and unambiguously contemplate the subjects involved, their respective roles and obligations, the specific needs and the assistance activities necessary for the care and satisfaction of the needs of people with serious disabilities; the final term of duration of the trust or the destination deeds or special funds must coincide with the death of the seriously disabled person and the destination of the residual assets must also be established. In the hypothesis, then, of the disabled person's predeceasing, concerning those who established the trust or intended according to art. 2645-ter of the Italian Civil Code or entrusted with a fiduciary contract, the exemptions from inheritance and donation tax and mortgage and cadastral taxes also operate for transfers of assets and rights on the *res* in favor of these subjects.

Article 6 of the "after us" law, finally, provides for further tax breaks such as exemption from stamp duty for all documents, documents, contracts and anything else put in place by the trustee or the constraint manager or again from foster (custodial) of the special fund[3].

But, on closer inspection, the "after us" law, for its systematic contribution well beyond the tax-benefit purposes expressly mentioned, could be considered a first and albeit incomplete trust law, aimed at discouraging the

[1] L. no. 112/2016 provides "Provisions on care for persons with severe disabilities without family support" and "regulates care, care and protection measures in the best interests of people with severe disabilities, not determined by natural ageing or age-related diseases, without family support because they are missing from both parents or because they are unable to provide adequate parental support, as well as in view of the loss of family support, through the progressive care of the person concerned already during the life of the parents" (art. 2). On this topic, see V. Cianciolo, *Il* trust *nel "dopo di noi"*, Bologna, 2017.

[2] For an *excursus* on the trust's tax treatment and the legal guidelines that have occurred over time, see L. Serpieri, *Il trattamento tributario degli atti di dotazione in* trust *per soggetti deboli*, in Trust *e "dopo di noi"* (Trusts *e att. fid.* Quaderni), Milanofiori Assago, 2016, 119 ss.

[3] The law also introduced reduced rates, deductibles or exemptions for the purposes of municipal tax, in the case of the provision of real estate and real rights to them; Higher incentives and deductibility in the 20% limit for those who make liberal disbursements, donations and, in general, acts free of charge against trusts or special funds set up under a trust agreement.

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establishment of trusts governed by a foreign law: this, since a large part of the elements indicated in art. 8 Conv. of the Hague so that a specific law can qualify as trust law.

Also in light of the jurisprudential orientation on the subject and from a comparative point of view, certainly relevant appear the subjective prerequisites for the application of the law and, in particular, the serious disability not determined by aging or pathologies related to senility and the absence of family support: the first, by express regulatory reference to art. 3, par. 3, L. n. 104/1992, exists whenever «the minority, single or multiple, has reduced personal autonomy related to age, to require a permanent, continuous and global assistance intervention in the individual sphere or in that of relationship». Not any disability, therefore, allows access to the facilitating system, but only that "serious" handicap situation[4] certified *ex-art*. 3, § 3, L. n. 104/1992. On closer inspection, the choice appears in contrast, on the one hand, with the "anti-discrimination protection"[5] that the legislator seems to have wanted to recognize to people with disabilities in recent years[6]; on the other hand, in a comparative perspective, with the most recent orientation of the Court of Justice and the consequent expansion of the concept of disability at European level including long-lasting diseases that can prevent or make it more difficult for the person to participate fully in the professional life, even where such diseases have not given rise to official administrative recognition of disability.

In any case, serious disability is a necessary but not sufficient condition for the application of the law, as there is also the absence of family support due to the lack of parents or the impossibility of parents to provide adequate support: hence, the need to interpret the concept of "family support", in a strictly "parental" sense, that is, extended to people other than parents, also in light of the address expressed in this regard by the Constitutional Court and aimed at expanding the so-called family environment[7].

Equally relevant, then, is the objective scope of operation of the law, due to the tax concessions reserved for particular acts and, precisely, the trust[8], the destination deeds *ex-art*. 2645-*ter* of the Italian Civil Code and the fiduciary entrustment contracts aimed at regulating special funds made up of assets subject to destination restrictions. Attention then focuses on trust, on the *vexata quaestio* of its legal nature and its affinity with the deeds of patrimonial destination *ex-art*. 2645-*ter* of the Italian Civil Code, as well as with the fiduciary agreements. With primary reference to the trust, it seems legitimate to ask what type ("foreign", "internal" or "Italian") the legislator intended to refer to and, in the absence of a particular provision, which regulation should be considered applicable[9]: if it is true that following the enactment of Law no. 112/2016, "Italy can no longer be considered a country that does not provide for trust"(*ex-art*. 13 Conv. The Hague), it is equally true that the "law after us" does not contain a detailed regulation of the phenomenon, nor can it rely exclusively on the negotiating regulation (which is also not always exhaustive) or on an undefined "art of the jurist who wishes to try on this point"[10]. An adequate solution to this problem requires rather addressing the *vexata quaestio* of the legal nature of the trust and its traceability or not to the deeds of asset destination referred to in art. 2645-*ter* of the Italian Civil Code, both on a functional profile and in the same way as the current jurisprudential and regulatory context, bearing in mind that in the so-called "Law after us" aimed at promoting the establishment of legally functional complexes in general in the interest of others[11] the trust is counted

[4] F. R. Lupoi, *Legge 22 giugno 2016, n. 112*, in Trust *e dopo di noi*, cit., 195, points out that in Italy it is expected that 160,000 severely disabled people will survive parents and siblings.
[5] See S. F. Martinez, *L'evoluzione del concetto giuridico di disabilità: verso un'inclusione delle malattie croniche*, in *Dir. relazioni industr.*, 2017, 1, 78.
[6] For example, consider art. 9 d. lgs. 68/2012 and, in particular, the exemptions for fees and tuition fees for which the legislature has equated the effects of disability certification with that of disability.
[7] This is the Court Cost judgment 213/2016 on the subject of the use of work permits *ex* art. 33 L. 104/1992, which has extended the family area also to the cohabiting partner *more uxorio*. See, Cordano, *La dichiarazione di incostituzionalità della legge 104/1992 e l'estensione del beneficio del permesso al lavoratore convivente di fatto*, in www.forumcostituzionale.it; Ferluga, *Il congedo straordinario per i familiari di portatori di* handicap, in *Riv. dir. sic. soc.*, 2008, 393 ss.; Tondi della Mura, *Diritto al congedo straordinario per l'assistenza al soggetto disabile: verso una preferenza estesa ai familiari diversi dai genitori?*, in *Giust. cost.*, 2005, 2007 ss.; Castegnaro-Cicoletti, *Il ruolo della famiglia nella cura della persona disabile e nella costruzione del "dopo di noi"*, in E. Vivaldi (curated by), *Disabilità e sussidiarietà. Il "dopo di noi" tra regole e buone prassi*, Bologna, 2012, 113 ss.
[8] The legislature has expressly regulated the trust and has therefore positively overcome the *vexata quaestio* of the incompatibility of that institution with fundamental principles of our legal system, such as the typical nature of separate assets *ex* art. 2740 c.c. and the *numerus clausus* of the rights on the *res*. See L. Santoro, *Il negozio fiduciario*, Torino, 2002, 150 ss.; A. C. Di Landro, Trusts *e separazione patrimoniale nei rapporti familiari e personali*, Napoli, 2010, 173 ss. e, in particolare, nt. 176; M. Bianca, *La fiducia attributiva*, Padova, 2002, 14 e 21; Grassetti, Trust *anglosassone, proprietà fiduciaria e proprietà del mandatario*, in *Riv. dir. comm.*, 1936, 1, 551; S. Bartoli, *Il Trust*, Milano, 2001; F. Santoro-Passarelli, *Dottrine generali del diritto civile*, Napoli, 1964, 180; F. Galgano, *Il negozio giuridico*, in *Tratt. dir. civ. comm.* (Cicu-Messineo), Milano, 2002, 483.
[9] See Tondo, *I patrimoni separati dalla tradizione all'innovazione*, in *Resp. civ.*, 2005, fasc. 3, 1368. Pardolesi, *Destinazioni patrimoniali e* trust *internazionale*, in *Riv. crit. dir. priv.*, 2008, II, 218, defines the trust as an iridescent and magmatic phenomenon, extraordinarily flexible and adaptable to a multiplicity of cases; G. Petrelli, Trust *interno, art. 2645* ter *c.c. e* «trust *italiano*», in *Riv. dir. civ.*, 2016, 171 ss.
[10] L. F. Risso, *Destinazioni, affidamenti e* trust. *Una premessa alle destinazioni esposte al convegno*, in *La destinazione del patrimonio: dialoghi tra prassi notarile, giurisprudenza e dottrina* (curated by M. Banca), Milano, 2016, 262; L. Gatt, *La destinazione patrimoniale di fonte negoziale quale caso emblematico del dilemma Jorgensen. L'art. 2645*-ter *c.c.: una questione di «ragionamento giuridico»*, in *la destinazione del patrimonio: dialoghi tra prassi notarile, giurisprudenza e dottrina* (curated by M. Bianca), Milano, 2016, 252 ss. suggests a return to the strictness of the technique of interpreting the rules in accordance with art. 12, referring to the relationship between trusts and patrimonial destination's deeds *ex* art. 2645-*ter* c.c. On this topic, see also C. Turco, *Diritto civile*, I, Torino, 2014, 50.
[11] The so-called "law of the after us" represents a further piece of that functionally characterized "microsystem" from the destination of the asset to a purpose and the consequent segregation of assets: A. Gentili, *Le destinazioni patrimoniali atipiche. Esegesi dell'art. 2645* ter *c.c.*, in *Rass. dir. civ.*, issue 1, 1 s. suggests to study art. 2645-*ter* in a systematic way, together with related institutions: foundation, wealth fund, assets dedicated to a business, trust.

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together with the destination restrictions *ex-art*. 2645-*ter* of the Italian Civil Code, as well as special funds governed by a fiduciary entrustment contract: this requires investigating the limit of demarcation between these figures which, in the light of the textual data, appear different in various profiles, but at the same time functionally united by the consideration and, in terms of regulation, from tax breaks.

2. The beneficiaries of "after us" Law: severely disabled people without family support.

The beneficiaries of the law "after us" are the "seriously" disabled according to art. 3, § 3, L. n. 104/1992, which defines them as those whose age-related personal autonomy requires permanent, continuous, and global assistance.

On closer inspection, the subjective limitation of "after us" operations to severely disabled people do not, on the one hand, comply with the objective of the law itself which seems to be to recognize the favorable tax treatment of the institutions contemplated therein, as it tends to preserve essential goods for the life of the "disable" person in general (and not exclusively "serious"); and on the other hand, it does not appear in line with the legal concept of disability at European level.

From the first point of view, the same art. 1, par. 1 of the "after us" law, identifies its purpose in «promoting the well-being, full social inclusion, and autonomy of people with disabilities», in explicit implementation of the United Nations Convention on the Rights of Persons with (whatever) disability. At least in the intentions, therefore, the regulatory text aims to protect people affected by specific disability but then saves its concrete application by express indication of the legislator (art.1, par. 2, L. n. 112/2016) exclusively for disabled people of a serious type, according to the parameter of Law no. 104/92. Tax concessions thus remain precluded to subjects with disabilities or in any case invalidity (even 100%), but certified according to a law other than that just indicated, with consequent unreasonable and unjustified unequal treatment[12]. The problems of people with disabilities are to be considered not only individual but belonging to the "whole community": the invalidating conditions are obstacles that the Republic has the task of removing to allow the maximum possible autonomy and protection of rights of the person with (any) disability, regardless of their degree. The "after us" law and the measures provided therein should, therefore, have operated for all disabled people, without further distinctions[13] and, therefore, also for those whose disability does not integrate the characteristics provided for by art. 3, § 3, L. no. 104/1992.

From the second point of view, the facilitating system introduced by the law "after us" for the benefit of people with "serious" disabilities only seem to be in clear contrast with the legislation and with the European anti-discrimination jurisprudential orientation. We intend in particular to refer to the European Convention on the Rights of Disabled Persons (CRPD), which plays a fundamental role in the field of disability law within the sources of international law. In fact, it has achieved a very wide adhesion[14] and has been repeatedly invoked by the European Court of Justice to support the existence of a «general consensus at European and world level regarding the need to protect people with disabilities from discriminatory treatment»[15]. On this basis, the Court has repeatedly criticized differentiated protection systems set up for disabled people according to the recognition of the different level of disability (*minor* or *major* disability) required by national legislation[16] and considered in any case unreasonable, in relation to the founding principles of a democratic society, the arguments put forward by national legislators to justify discriminatory regimes [17]: this also applies to the "after us" law where it provides for a differentiated, and therefore

[12] Consider, for example, the conditions of blind and visually impaired, the assessment of which is governed by laws no. 66/1962 and 138/2001. It is not the first time that the Commission has been involved in this debate. or, again to the civil disability certification referred to in 118/1971 attesting to a 100% disability: all certifications insufficient for the purpose of access to the tax breaks introduced by the Law "after us" (see G. Arconzo, *La L. n. 112 del 2016: i diritti delle persone con disabilità grave prive del sostegno familiare*, in *Il Corriere giur.*, 2017, 4, 517). The assessment of civil impairments is carried out with criteria other than those adopted for the assessment of the state of disability under the L. no 104/1992 and produces a different certification report: only the certification of serious handicap legitimizes the operation of the tax breaks referred to in the Law "after us", where handicap refers to the situation of social disadvantage that depends on disability or disability and the social context of reference in which a person lives (Art. 3, par. 1, L. 104/1992): the handicap is considered "severe" when the person needs permanent, continuous and comprehensive care in the individual or relationship sphere (art. 3, par. 3, L. 104/1992). A person can obtain both the certification of civil disability, blindness or deaf-mutism, as well as that of disability. People with different disabilities (war, service, work) can also apply for disability certification.

[13] A. Gambaro, *La posizione soggettiva dell'affidante fiduciario e la segregazione patrimoniale*, in *Contratti di convivenza e contratti di affidamento fiduciario quali espressioni di un diritto civile postmoderno*, Milano, 2017, 161: the protection of the weak, even beyond the narrowest circle of those who are considered in the law "after us", is undoubtedly a purpose that the order approves and incentivizes.

[14] The Convention has been ratified by 175 states of the world and signed by 160. On this topic, see v. S. Favalli, *La Convenzione ONU sui diritti delle persone con disabilità nella giurisprudenza di Strasburgo: considerazioni a margine della sentenza Guberina c. Croazia*, in *Dir. umani e dir. intern.*, 2017, vol. 11, n. 3, 628. See also, D. Ferri, *The conclusion of the UN Convention on the rights of persons with disabilities by the EC/EU: a constitutional perspective*, in *European Yearbook of Disability Law*, 2010, vol. 2, 47 ss.; L. Waddington, *The European Union and the United Nations Convention on the rights of persons with disabilities: a story of exclusive and shared competences*, in *Maastricht Journal of European and Comparative Law*, 2011, 4, 431 ss.

[15] Così *Glor v. Svizzera*, 30 aprile 2009, (con nota di) J. Stavert, *Glor v. Switzerland: Article 14 ECHR, Disability and Non-Discrimination*, in *Edimburgh Law review*, 2010, 14, 141 ss.

[16] In *Glor v. Svizzera*, the Court found that Switzerland's legislation on compulsory military leverage was against European legislation, where it provides for a discriminatory regime depending on the level of disability less or greater recognised under the national system of tables disability measurement percentages: while those with a major disability are granted exemption from military service without any additional burden, those who have a lower disability are declared unfit for leverage, but are obliged to pay the tax provided for the non-service of the military.

[17] On a jurisprudential *excursus*, see S. Favalli, *op. cit.*, 623 ss.

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discriminatory, tax treatment according to the degree of disability (serious or not), thus incurring a clear violation of the principle of non-discrimination internationally affirmed on the rights of disabled people.

In any case, "serious" disability represents a necessary prerequisite for the application of the legislation, but not sufficient: in fact, as an additional condition, the absence of inadequacy of parental support is necessary. The regulation of assistance, care, and protection measures for people with serious disabilities is also envisaged «in view of the loss of family support» (art. 1, par. 2, Law no. 112/2016). From the literal tenor of the provision, it seems legitimate to deduce a substantial coincidence and overlap between "parental support" and "family support": so that the "after us" measures can be applied in the absence of the parents, although there are other family members who assist (so-called caregivers) the severely disabled. More precisely, the concept of "family" is understood here in a restrictive sense, as it is limited *ictu oculi* to parents: a choice that if, on the one hand, is in clear contrast with the most recent jurisprudential orientation of the Constitutional Court, which has expanded the family environment of the disabled person, including the cohabiting partner *more uxorio*[18] and thus reversing the path laid out by the previous jurisprudence, on the other hand, it certainly finds its *ratio* in greater protection for disabled people, who will benefit from assistance, care and safeguard measures in the absence of their parents, although supported by other family members. In this case, the legislator wanted to offer concrete and reasonable protection to the seriously disabled person, opting for a restricted family environment and guaranteeing him access to the measures provided for in Law no. 112/2016 whenever the support of the parents is inadequate or inadequate, despite that of other family members.

3. Protection tools: in particular, the trust.

Under art. 6, L. no. 112/2016 and the conditions provided for, «the assets and rights granted in trusts [...] people with severe disabilities [...] are exempt from inheritance tax and donations»: this requires, on the one hand, full legitimacy of the trust[19] in the light of fundamental principles of our system, such as the typicality of separate assets and rights on the *res*; and implies, on the other hand, the need to identify the type of trust ("foreign", "internal" or "Italian") to which the legislature intended to refer, since the law does not contain any indication in this regard.

In the first respect, L. no. 112/2016 is certainly one of the cases established by law, which allows the trust to be limited to liability under art. 2740, § 2, c.c.[20], the source of a typical "new" case of asset separation (trust) for the realization of purposes predetermined by the legislature (care and protection of people with severe disabilities). It also unequivocally constitutes the legislative emergence of fiduciary property in domestic law.[21]: a conformed property[22] or "functional"[23] to the realization of a certain purpose, otherwise usually irrelevant and traditionally relegated to the sphere of motives. The trustee's ownership of the "after us", in fact, far from being an atypical property, appears more correctly as a property "modified"[24] or "in the interests of others"[25], expressions to which the doctrine has often resorted and which evoke a language widely experienced already for the "fiduciary" property[26]. It is therefore characterized by the particular constraint of destination (in this case, the protection of the severely

[18] In the 213/2016 ruling, the Constitutional Court has ruled that the person who lives with a disabled person – who is concerned with assistance for a sick or disabled partner – is entitled to take advantage, in the same way as spouses and relatives up to the second degree, of the three days of paid monthly leave covered by the L. no. 104/ 1992.

[19] See T. Tassani, *La fiscalità dei negozi di destinazione nella legge sul "dopo di noi", tra agevolazione e impatto sistematico*, in *Notar.*, 2016, 517; G. Sepio, *Il "dopo di noi" e le misure fiscali a tutela del patrimonio delle persone con disabilità grave*, in *Il fisco*, 2016, 2735; E. Di Maggio, *Commento alla Legge per il "dopo di noi"*, in *Notar.*, 2016, 430; F. Azzarri, *I negozi di destinazione patrimoniale in favore dei soggetti deboli: considerazioni in margine alla L. 22.6.2016, n. 112*, in *Nuova giur. civ.*, 2017, 1, 122, according to who «the casual reference of the l. n. 112/2016 to the trust» marks the definitive acceptance of the internal trust; A. C. Di Landro, *op. cit.*, 55: the legislator considers the problem of the admissibility of the internal trust solved, expressly regulating only a series of tax profiles of the institution.

[20] According to part of the doctrine, the legal nature of the segregation generated by the trust must be identified in articles 2 and 11 of the Hague Convention and in the ratification law with which the covenant text would become state law: on the subject, see F. Cerri, Trust, *affidamento fiduciario e* fiducie, cit., 40 s.; S. Bartoli, *Il trust*, cit., part II, ch. 2.

[21] G. Iaccarino, *L'opportunità di un contratto di fiducia tipico*, in *La destinazione del patrimonio: dialoghi tra prassi notarile, giurisprudenza e dottrina* (curated by M. Bianca), Milano, 2016, 290 ss., correctly highlights how trust always comes from outside the legal system: "the latter can ignore it or, at a certain point, take possession of it and make certain choices", as happened with Law no. 112/2016 for the trust.

[22] According to Gentili, *Le destinazioni patrimoniali atipiche. Esegesi dell'art. 2645*-ter *c.c.*, cit., 28, if the destination is limited to creating new constraints, no question; if the establishment of the bond implies a new type of property and not just a new kind of limit, it is necessary to deal with the *numerus clausus* of rights on the *res*. In hindsight, in both cases the problem of the compatibility of the destination constraint with the typicality of rights on the *res* seems to arise, whether it is configured as a limit or a real constraint, or that it implies a new type of property.

[23] See U. Stefini, *La destinazione patrimoniale dopo il nuovo articolo 2645* ter *c.c.*, *Giur. it.*, 2008, 1830, which, with regard to art. 2645-*ter* of the Italian Civil Code, speaks of typing of "functional" property.

[24] G. Gabrielli, *Vincoli di destinazione importanti separazione patrimoniale e pubblicità nei registri immobiliari*, in *Riv. dir. civ.*, 2007, issue 3, vol. 53, 322 s. On this topic, see G. Oppo, *Patrimoni autonomi familiari ed esercizio di attività economica*, in *Riv. dir. civ.*, 1989, I, 273 ss.; R. Quadri, *L'art. 2645*-ter *e la nuova disciplina degli atti di destinazione*, in *Contr. e impr.*, 2006, 1719.

[25] With this expression, various cases are commonly identified (ownership of the agent without representation, of the trustee, trustee ownership of shares, ownership of trust companies, pension funds, as well as the trust) shared by the fact that the faculties to enjoy and dispose of the property are attributed to the owner not to satisfy his own interest, but an interest of others": see G. Minniti, *La «proprietà nell'interesse altrui»*, in *Destinazione allo scopo, Quaderni romani di diritto commerciale* (cured by B. Libonati – P. Ferro Luzzi), Milano, 2003, 273; A. Saturno, *La proprietà nell'interesse altrui nel diritto civile italiano e comparato*, Napoli, 1999, 7; A. Gambaro, *Appunti sulla proprietà nell'interesse altrui*, in *Trusts*, 2007, 2, 169, which defines the restriction of destination enforceable against creditors «a way of being of the property, which generates utilities destined not already to its owner, but to a beneficiary».

[26] Almost twenty years have passed since the jurisprudence (Cass. n. 5122/1999, in *Foro it.*, 2000, I, 2289) following the outcome of a legal case that lasted about sixty years, which arose around two donations of a building for the realization of a specific purpose (intended for asylum), he observed that "if in Italian law, fiduciary property intended as a bond was configurable of destination imposed on the good, with real character, the will of the donor could have found its proper location in this institution ": on the subject, see M. Lupoi, *Il contratto di affidamento fiduciario*, Milano, 2014, 343 s.; L. Santoro, *Il negozio fiduciario*, Torino, 2002, 150 ss.

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disabled) which, by compressing the owner situation in question from the outside, does not corrode or corrupt its potential fullness: it is not realized a doubling of the property, nor does it give rise to the coexistence of two irreconcilable rights[27], but to a property, limited in time and in the power of enjoyment and disposition of the good[28]. Trust in "after us" law does not introduce a new form of right on the *res*[29], but the trustee has a right of ownership over the assets covered by the trust fund, which is essentially the same as that covered in art. 832 c.c., limited however in the power of use and disposition by the trustee because of the realization of a certain purpose[30] or beneficiary's interest[31], in this case being care and protection for people with severe disabilities[32].

From the point of view concerning the concrete qualification of the trust (*foreign*, *domestic*, or *Italian*), there is no doubt that Law no. 112/2016 works for the trust so-called "foreigner" or "international", characterized by objective elements of extraneousness or internationality other than the reference to foreign regulatory law and recognized in Italy based on art. 11 of the Hague Convention, whenever «by an act *inter vivos* o *Mortis causa* [...] assets have been placed under the control of a trustee in the interest of a beneficiary or for a specific purpose» (art. 2 Conv.). The problem arises for the "internal" trust, so-called as the significant elements[33] except for the regulatory law they are Italian (without the character of extraneousness[34]) and for the "Italian" or "internal law" (whose elements are all located in Italy, also the regulatory law).

As regards the "internal" trust, from a jurisprudential level, thirty years after the ratification of the Hague Convention[35], there are numerous precedents[36] in which it was established to protect so-called subjects weak[37] (disabled and minors)[38], family interests[39] (separation and divorce)[40], *de facto* family[41], conceived babies[42]), inheritance rights[43] and warranty[44] or, again, for public purposes[45].

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[27] Moreover, even in the English model of trust, a split of ownership is not believed to exist: the expression equitable ownership shows how Equity operates by similitude, not by equivalence and "there is only one ownership". Common law rests with the determination of the right to property, while Equity has the decision regarding behavior contrary to the rules of conscience: on the subject, see M. Lupoi, *I* trust *nel diritto civile*, Torino, 2004, 19 s. This is also confirmed by a Scottish ruling (*Sharp v. Thomson*, 1995, in M. Lupoi, Trusts, cit., 371, nt. 190, which excludes that competing property rights exist on the trust property of the trustee and beneficiary. In the same sense, P. Piccoli, *Possibilità operative del* trust *nell'ordinamento italiano. L'operatività del* trustee *dopo la Convenzione de L'Aja*, in *Riv. not.*, 1995, 63, according to which "the structure in which the trust is substantiated leads us to believe that there is not a doubling of the property right, nor of the coexistence of two real rights, but, rather, in a limit to the usability and availability that arises to the trustee, owner of the property of the assets»; *contra*, see C. Castronovo, Trust *e diritto civile italiano*, in *Vita not.*, 1998, 1335: the trust "implies a property that is unknown to the system, split as it is between an empty ownership (that of the trustee) and a fullness without formal investiture (that of the beneficiary)".

[28] The patrimonial destination involves in particular a limitation of the enjoyment and of the power of disposition, compressing the owner's right to derive all its possible benefits from the intended *res*. More specifically, following the affixing of the destination bond, the enjoyment of the intended property is no longer free, but must comply with the intended purpose and the relative wealth retractable from the asset itself must be used for the pursuit of the purpose impressed by the settlor: thus, F. Galluzzo, *Gli atti di disposizione e di amministrazione dei beni destinati*, in *Contr. e impr.*, 2016, 1, 207.

[29] M. Lupoi, Trusts, cit., 567: the separation and management entrusted to a third party do not make membership less, but place it in mediated situation, thanks to which the general events of the subject, who remains the ultimate owner of the separate assets, do not reverberate directly on it and they are transferred on the proprietary connection between the subject and the separate assets.

[30] In this sense, Court of Trento, 20 luglio 2004, in *Trusts*, 2004, 573 ss.

[31] See P. Piccoli, *Possibilità operative del* trust *nell'ordinamento italiano. L'operatività del* trustee *dopo la Convenzione de L'Aja*, in *Riv. not.*, 1995, 63.

[32] From a systematic point of view, the system knows other tools capable of functionalizing the goods for different purposes, with limits of disposition, advertising mechanisms and remedies to protect the legal positions of third parties, suitable to guarantee a safe and orderly circulation system: below this profile, the constraint that obliges the trustee, owner of the asset, to use it in a certain way has nothing more or different than that imprinted on the assets constituting the equity fund referred to in articles 167 ss. cc and enforceable *erga omnes*; or the assets intended for a specific business referred to in articles 2447 bis ss. cc with regard to joint stock companies, where the forms of advertising envisaged for the same are respected, the assets that form the subject matter do not meet the obligations of the company (art. 2447-quinquies of the Italian Civil Code) and can nevertheless be used in that specific way, without undermine the principles governing property rights; or again, the goods subject to destination stores pursuant to art. 2645-*ter* of the Italian Civil Code: Cerio, *La trascrizione del* trust *interno auto dichiarato su beni immobili o complessi di beni immobili*, in *Trusts e att. fid.*, 2005, 188. In other words, with the trust of the "law after us", we do not create a "new" right on the *res*, but we aim to ensure protection for a specific purpose (assistance, care and protection of people with serious disabilities) and effectiveness to third parties to a negotiating tool that affects the conformation and disposition of goods: in this sense, S. Meucci, *La destinazione di beni tra atto e rimedi*, Milano, 2009, 186 ss.

[33] This is the so-called essential elements, such as the place of administration of the trust, the location of the intended assets, the place of realization of the purpose.

[34] On this regard, see F. Cerri, Trust, *affidamento fiduciario e* fiducie, Milano, 2015, 33.

[35] As we Know, the Convention approved in The Hague on 1 July 1985 and ratified in Italy with Law no. 364/1989, which fully reproduces the text, in art. 2 defines the trust as the set of "legal relationships established by a person, the settlor - by deed between *inter vivos* or *mortis causa* - if the assets have been placed under the control of a trustee in the interest of a beneficiary or for a purpose determined". Castronovo, Trust *e diritto civile italiano*, in *Vita not.*, 3, 1998, 1323, notes that the Convention has radically changed the methodological approach to trust, seen before it as an institution under foreign law with respect to which to look for similarities and differences in a comparative perspective; "with the ratification of the Convention", the trust "has become the subject of positive discipline by the Italian legal system".

[36] Cass. n. 13276/2011 in *Guida al diritto*, 2011, 53 ss., following the appeal against an order of the Court of the review that confirmed the preventive seizure of the assets segregated in trust, it considered void because in fraud to creditors the establishment of a self-declared trust in which the settler maintained, *de facto*, the availability of the assets bound, exercising the powers of trustee without any obligation to justify their powers; similarly, Court of Appeal Milano, 29 october 2009, in Trust *e att. fid.*, 2010, 494 ss. (with comment of F. Tedioli), for a liquidation trust with the only effect, in practice, of subtracting and / or distracting the assets of an insolvent company from the legitimate use in the regularization of debts; in the same sense, Court Milano, 16 giugno 2009, *ivi*, 2009, 719 ss. e Court Reggio Emilia, 14 marzo 2011, in *T&AF*, 2011, 630, which judged a trust established by a company in liquidation to operate outside the controls normally required by companies in liquidation, hinder credit claims and defer bankruptcy claims.

[37] Court Bologna, 11 marzo 2009, in *Corriere Giur.*, 2009, 10, 1400 (with comment of Galluzzo), where the transfer to the trustee of hereditary assets purchased by a subject to support administration has been authorized.

[38] On this regard, Court of Roma, 26th october 2009, in Trust *e att. fid.*, 2010, 180 ss., who appointed a support administrator for a disabled beneficiary of a trust and charged him with checking and supervising the trustee's work; Court of Milano, 5th march 2010, Trust *e att. fid.*, 2010, 6, 62: «the implementation of the testamentary provision that provides for the establishment of a trust in favor of one of the children of the deceased, disabled person, whose purpose is the administration and use of the assets indicated in the will to cope with the maintenance, may be authorized , to the care and assistance of the disabled»; Court of Modena, 11 december 2008, Trust *e att. fid.*, 2009, 177 ss., which deemed the internal trust established in favor of a minor based on both Law no. 364/1989, which entered into force on 1 January 1992, ratifying the Hague Convention on 1 July 1985; to art. 2645-*ter*; and to the L. fin. 2007 which identified the tax treatment of the trust. Court of Firenze, 8 april 2004, in Trust *e att. fid.*, 2004, 567, which allowed the parents of a young disabled person to establish a trust to ensure an economically secure future through valuable and profitable real estate investments; Court of Milano, 6 march 2013, in Trust, 2013, 5, 536, according to which the surviving parent can, upon authorization, establish a trust for the minor child, consisting of the assets received by succession of the other parent; Court of Bologna, 3 december 2003, in *Nuovo Dir.*, 2004, 907 (with comment of Santarsiere), which has defined as the best guarantee for the conservation of segregated assets until the beneficiary's ability to act has been established by the establishment of a trust by the parents exercising the power.

[39] Court of Padova, 2th septemper 2008, in Trust *e att. fid.*, 2008, 628, relating to the establishment of a trust for the needs of the family even after reaching the age of majority of the children, or after the death or incapacity of the parents.

[40] Court of Milano, 8th march 2005, in Trust *e att. fid.*, 2005, 585 ss.; Court of Genova, 1st april 2008, in Trust *e att. fid.*, 2008, 392; Court of Milano, 15th november 2011, in Trust *e att. fid.*, 2012, 408 ss.

International Journal of Humanities and Applied Social Science (IJHASS)
E-ISSN: 2471-7576
August 2020, Vol: 5, Issue: 8
E-mail: editor@ijhassnet.com
http://ijhassnet.com/ **DOI: 10.33642/ijhass.v5n8p1**

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On closer inspection, the Hague Convention determines which legal relationships must be recognized by the acceding States under the name of *trust* and does not regulate the English trust, but an open series of cases belonging to both common law and civil law systems and attributable to the trust so-called "amorphous"[46], described by art. 2 Conv. as «legal relationship established by a person, the constituen» and with which «the goods have been placed under the control of a trustee in the interest of a beneficiary or for a specific purpose». An (amorphous) trust may thus exist in any system, including ours (Italian) in particular as the "after us" law, in which the legislator, making *sic et simpliciter* reference to the trust established in favor of people with serious disabilities, seems having not only accepted the jurisprudential and doctrinaire orientation favorable to the admissibility of the so-called trust "internal"; but also definitively standardized and introduced into the Italian legal system the institution of the trust (precisely that one "Italian"), also for purposes other than welfare and given which, for tax reasons, it was expressly typed by the legislator.

In other words and about the second question relating to the operation of the "after us" law for a so-called trust "Italian" (whose elements are all located in Italy, including the regulatory law), there is no doubt that the structural and functional features of the so-called trust "amorphous" occur in the trust contemplated in this law: it is intended in particular to refer to the functionalization or destination and consequent separation of assets for a specific purpose or in the interest of a beneficiary (in this case, a person with a serious disability) and the management power entrusted to a trustee. Similarly, it seems well-founded to believe that Italy is not currently included among the «States that do not provide for the establishment of the trust»[47] and this trust will no longer present the serious disadvantage of having to be necessarily governed by a foreign law[48], however far from our (Italian) juridical tradition and difficult to understand for most, even for legal experts. More precisely, the "after us" law, for its systematic contribution well beyond the tax-benefit purposes expressly mentioned, could be considered a first and albeit incomplete trust law, aimed at discouraging the establishment of so-called trusts "Interiors" governed by a foreign law: this, since a large part of the elements indicated in art. 8 Conv. of the Hague so that a specific law can qualify as a trust law[49].

4. The legal nature of the trust.

The trust, in the legislative silence (also) of the "after us", is notoriously defined as an act with which the settlor transfers the ownership of certain assets to another subject (trustee), trustfully obliged to manage and return them according to the indications and the program identified by the settlor in the deed of trust, in the interest of a beneficiary (in this case, a person with a serious disability).

Unlike the strictly unilateral English model[50], the trust (of the "after us") seems rather sortable as a mere deed, the result of the related agreements[51] between the act of patrimonial destination (unilateral, since it is the

[41] Court of Trieste, 19th september 2007, in Trust *e att. fid.*, 2008, 42, acknowledged the merit of a trust aimed at creating, in the absence of a bond of marriage and in analogy with the property fund, a separate patrimony for cohabitants *more uxorio*, not otherwise protected.

[42] For the Genoa Tax Commission n. 280/2010, in *Guida al diritto*, 2011, 7, 93, in this case it is "an act subject to suspensive condition, which will have to be subjected to taxation only and if this condition occurs".

[43] In succession matters, the trust represents a planning and planning tool for the generational handover of a company: on this regard, Court of Udine, 18 august 2015, in Trust, 2016, 3, 159, the trust established by an entrepreneur to guarantee continuity in the unitary and coordinated management of the group of companies was worthy of protection.

[44] On this topic, see Cass. n. 3735/2015, in *Dir. prat. trib.*, 2015, 4, 688 (with comment of Corasaniti), concerning the establishment of a so-called trust self-declared "guarantee", with which the settlor binds assets for the strengthening of the generic capital guarantee already given, as guarantor, in favor of some banking institutions; Court of Milano, 16th June 2009, cit., 719 ss. has deemed the shareholders' resolution of an s.p.a. to be legitimate aimed at establishing a trust guaranteeing a bond loan; Court of Bologna, 26th march 2014, in Trusts *e att. fid.*, 2015, 73 ss. reiterated that the trust for guarantee purposes is, by constant jurisprudence, an absolutely legitimate and valid institution.

[45] See, *ex multis*, Cass. n. 5322/2015, in *Not.*, 2015, 4, 443, relating to the transfer of sums into a trust, consisting of a Region and a foundation with the aim of providing for the maintenance and requalification of an airport.

[46] This expression is still attributable to M. Lupoi, *Trusts*, cit., 501.

[47] So, art. 13 Conv. of the Hague. The Hague Convention, created primarily to legitimize common law trustees in the exercise of their activities in civil law, has however produced a more radical effect, namely that of legitimizing not only the trusts of the so-called Anglo-American model, but also international and civil law systems, as well as an unspecified series of civilian (and non) like trust institutions. "Above all, [...] (it) has made internal trusts possible": so M. Lupoi, *Trusts*, cit., 518.

[48] L. Gatt, *Il trust c.d. interno: una questione ancora aperta*, in *Notar.*, 2011, 3, 283, moving from a progressive "emancipation" of the trust from the foreign model, it underlines how the choice of foreign law is reduced to a style clause whose elimination is desirable (if not even necessary).

[49] "The powers of the trustee [...]" (letters "d" and "e" of art. 8 Conv. Aja) are implicitly contemplated in art. 6, lett. b) L. n. 112/2016 where it requires that "the trust deed [...] identifies the parties involved and their roles clearly and unambiguously [...] the specific functions and needs of people with serious disabilities [...] the activities necessary to guarantee the care and satisfaction of the needs of people with serious disabilities ", as well as explicitly mentioned both in co. 3, lett. c) of the same art. 6, in which way the trust act must identify the obligations of the trustee who must adopt "any suitable measure to safeguard (e) the rights" of the beneficiary, both in the following paragraph 7 which, albeit for tax purposes, lists in essence everything what the trustee can do ("deeds, requests, contracts ..."); the "duration of the trust" (art. 8, letter "f", Conv. Aja) is established "on the date of death of the person with serious disability" (art. 6, par. 3, lett. g), L. n. 112/2016); "The modification or termination of the trust" (art. 8, letter "h", Conv. Aja), then, finds discipline in art. 6, par. 4, L. n. 112/2016, which identifies the cause of termination of the trust and the succession of the same in the subjective legal situations subject to trust, in the priority of the beneficiary with respect to the entities that established the trust; Article. 6, par. 3, lett. h), L. n. 112/2016 then requires that the trust deed establishes the destination of the residual assets; finally, "the obligation of the trustee to report on its management" (art. 8, letter "j", Conv. Aja) is exactly reported in art. 6, par. 3, lett. c), L. n. 112/2016 according to which "the trust act [...] indicates (a) the obligations and methods of reporting to the trustee".

[50] In the classical configuration of English law, taken from the eighteenth century, the trust has its source in a unilateral act (so-called trust declaration, in trusts express and conclusive behavior in implied trusts), substantially sortable as a unilateral legal transaction, to which access or follow one or more deeds: the settlor translates the goods in favor of the trustee, the original and previous contractual connotations have disappeared, because the transfer of a summer is a one-sided shop and the one-sidedness allows you to include in one the testamentary trust, the trust established by means

International Journal of Humanities and Applied Social Science (IJHASS)
E-ISSN: 2471-7576
August 2020, Vol: 5, Issue: 8
E-mail: editor@ijhassnet.com
http://ijhassnet.com/ **DOI: 10.33642/ijhass.v5n8p1**

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affixing of a constraint on an asset) and a contract with which the trustee transfers the asset to another person in charge of implementing the destination[52]. These are two separate acts ("intended" and "fiduciary"[53]) each characterized by its cause, instrumental about the function unified and globally pursued by the trust therefore aimed at achieving "mediately" a unitary and final practical goal, through the achievement of an "immediate" and partial interest: interest identifiable, respectively, in the conformation or destination of the *res* resulting in the separation of assets (one-sided purpose act) and the transfer of the goods (unilateral act or contract: translative)[54]. In other words, the trust (in this case, of the "after us") is functionally characterized, on the one hand, by the intended consideration typed in art. 2645-*ter* c.c. and can be seen in the destination of heritage for a specific purpose; on the other hand, from the *causa fiduciae*[55] and from the management relationship instrumental to the realization of the same purpose: a combination between the asset allocation and the attribution of ownership to a trustee[56] that «determines a strengthening of the beneficiary's position to the outside world [...]», a strengthening that certainly lengthens the distance from the "amorphous" trust of the Convention of The Hague and shortens it about the "*anglo-Saxon*" trust.[57].

Indeed, the trust of the law of "after us" similar to the anglo-Saxon model and unlike the "amorphous" one that appears to lack the "transfer requirement" and «no reference to the fiduciary nature of the relationship or at least to the fiduciary dimension [...]»[58] replaced by "control"[59] it is configured as the destination fiduciary act with which the settlor transfers ownership of certain assets (real estate, furniture, subjective legal situations in general) to the trustee for a specific destination (care and protection of persons with severe disabilities), with the obligation of the trustee to exercise the right to enjoyment and disposition of the assets following retransferring it to the latter. This is clear from the "after us" law where, in the event of the beneficiary's predeceasing, the "transfer" of the assets and constituent rights of the trust fund in charge of the trust estates (art. 6, § 4, L. 112/2016) or the «transfer of the remaining assets [...] in the event of the beneficiary's death» (art. 6, § 5, L. 112/2016)[60]: this, however, seems to distance the trust of the "after us" from the anglo-Saxon model-based, unlike the first, on German trust[61] instead of Romanistic trust. More precisely, the trustee of the "after us", unlike the Anglo-Saxon one, is not only a formal owner or merely legitimized to the exercise of a right of ownership that remains in the head of the trustee (accordance with the model of Germanistic trust)[62], but he acquires ownership of the goods and the ownership of

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of the trust declaration and the trust with which a translation shop is functionally accompanied is a legal figure. The recurring claim in English law is that trusts are not contracts: the only necessary part of the trust is the settlor and although international practice tends to make the trustee also part of the act, it is considered preferable to maintain the structure of the act institutive as a unilateral act, letting the trustee (or even the guardian) adhere to the act, usually signing it, but without being part of it. On this topic, see M. Lupoi, *Atti istitutivi di* trust *e contratti di affidamento fiduciario*, Milano, 2010, 22; Idem, *Istituzioni del diritto dei* Trust *e degli affidamenti fiduciari*, Padova, 2008, 6; Id., Trusts, Milano, 2001, 155 ss.: «Trusts and contracts belong to distinct legal worlds [...] the trust expressly established has as its source a unilateral act, which is accessed or followed (or even preceded) by one or more disposals. [...] the deed of disposition [...] consists in the transfer of the right: this transfer to the trustee is essential for the trust to come into being "; S. Bartoli, *Il trust*, cit., part I, ch. VI; in the same sense, R. Franceschelli, *Il* «trust» *nel diritto inglese*, cit., 183 ss. With primary reference to the trust in the "after us" law, see G. La Torre, Trust *e dopo di noi*, Milanofiori Assago, 2016, 6: for a trust to be created, first of all, a manifestation of will expressed in a so-called act institute put in place by the settlor to identify the purpose of the trust, the duties and powers of the trustee; secondly, one or more device stores, with which the settlor transfers assets or in general subjective positions to the trustee, functional to the fulfillment of the task entrusted to them.

[51] C. M. Bianca, *Il Contratto*, cit., 454 ss.

[52] See Nuzzo, *Atto di destinazione e interessi meritevoli di tutela*, in *La trascrizione dell'atto di negoziale di destinazione*. *L'art. 2645*-ter *del codice civile* (curated by M. Bianca), Milano, 2007, 60; see, also, A. Falzea, *Interesse a costituire il vincolo di destinazione e tutela dei terzi*, in *Atti di destinazione e* trust. *Art. 2645*-ter *c.c.* (curated by G. Vettori), cit. Part of the doctrine (C. Priore, *Redazione dell'atto di destinazione: struttura, elementi e clausole*, in *I Quaderni della Fondazione Italiana per il Notariato*, *Negozio di destinazione: percorsi verso un'espressione sicura dell'autonomia privata*, 1, 2007, 186 s.; M. D'Errico, *Le modalità della trascrizione ed i possibili conflitti che possono porsi tra beneficiari, creditori ed aventi causa del "conferente"*, in *I Quaderni della Fondazione Italiana per il Notariato*, 93 ss.; U. Stefini, *Destinazione patrimoniale ed autonomia negoziale: l'art. 2645*-ter *c.c.*, Pavia, 2010, 87 ss.; A. Morace Pinelli, *Atti di destinazione,* trust *e responsabilità del debitore*, Milano, 2010, 224 ss.). For a detailed discussion in this regard, see M. Bellinvia, *La struttura dell'atto di destinazione* ex *art. 2645*-ter *c.c.*, in AA.VV., *La destinazione del patrimonio: dialoghi tra prassi notarile, giurisprudenza e dottrina* (curated by M. Bianca), Milano, 2016.

[53] See N. Lipari, *Il negozio fiduciario*, Milano, 1964; L. Santoro, *Il negozio fiduciario*, Torino, 2002; N. Visalli, *Il contratto estimatorio nella problematica del negozio fiduciario*, Milano, 1974, 291 ss.; M. Trimarchi, *Negozio fiduciario*, in *ED*, XXVII, Milano, 1978, 200 ss.

[54] For Galluzzo, *Il* trust *c.d. interno e i negozi di beni allo scopo*, in *NGCC*, 2005, fasc. 2, vol. 21, 91, the destination is carried out by virtue of two connected and autonomous shops: one necessary and constant, suitable to constitute the destination constraint (so-called deed of destination), the other possible and optional suitable for producing the transfer of the intended right (transfer deed, in the especially trustee): this is because the destination can arise regardless of the existence of a transfer deed (think, for example, of the equity fund, made up of the third party that retains ownership of the property or the transfer of assets to creditors).

[55] About *causa fiduciae*, see for all Grassetti, *Del negozio fiduciario e della sua ammissibilità nel nostro ordinamento giuridico*, in *Riv. dir. comm.*, 1936, 1, 364.

[56] See A. Luminoso, *Dottrina e problemi del notariato argomenti e attualità*, in *Riv. notar.*, 2008, issue 5, vol. 62, 1004.

[57] The result is "a model of" reinforced trust ", undoubtedly new for the Italian legal system": seeA. Luminoso, *op. loc. ult. cit.*

[58] So again, M. Lupoi, *Trusts*, cit., 505.

[59] *Ex* art. 2 Conv. De The Hague, as already noted several times, «trust means the legal relationships established by a person, the settlor - by deed *inter vivos* or *mortis causa* - if the assets have been placed under the control of a trustee in the interest of a beneficiary or for a specific purpose».

[60] More specifically, upon the death of the beneficiary of the trust and consequent expiry of the «final term of the trust», the transfer of the residual assets by succession or donation subject to tax is envisaged «in consideration of the relationship of kinship or marriage between the settlor, trustee and recipients of the residual assets» (art. 6, § 5, L. n. 112/2016).

[61] As is well known, the typical trust of Anglo-Saxon or common law systems appears to be assimilable to the scheme of "Germanistic" trust, characterized by a sort of dissociation between property and legitimacy, substantial property and formal property: in the sense that the trustee only purchases the formal ownership of the property, suitable for attributing legitimacy to third parties to carry out the operations and activities envisaged and due in the interest of the trustee, who maintains the substantial and effective ownership of the asset; where, in the "Romanistic" trust, prevalent in our juridical culture and now acknowledged and positivized in Law n. 112/2016, the trustee acquires full ownership of the asset transferred to him by the trustee, who loses any real right on the alienated asset and boasts only a credit right towards the trustee concerning the fulfillment by the latter of the obligations concerning the use of the good and its re-transfer: on the subject, C. Turco, *Diritto civile*, I, Torino, 2014, 626 s. In the Italian legal system, Germanistic trust, founded precisely on the separation of legitimacy from ownership, has a limited value to debt securities and the doctrine has always been rather contrary to generalizing the admissibility of such trust: on this point, see L. De Angelis, Trust *e fiducia nell'ordinamento italiano*, cit., 358. From this it follows, in terms of discipline, that in English law the protection of the fiduciary relationship is conferred on the beneficiary, and not on the settlor.

[62] In reality, according to the reconstructions, the Germanistic trust attributes to the trustee only a legitimacy to exercise the rights and prerogatives inherent in the property, without prejudice to the ownership of the trustee, or a property resolutely conditional on the death of the trustee or the betrayal of the trust: on the point, see G. Iaccarino, *L'opportunità di un contratto di fiducia tipico*, in *La destinazione del patrimonio. Dialoghi tra prassi notarile, giurisprudenza e dottrina*, cit., 291; U. Carnevali, *Negozio fiduciario*, in *Enc. Giur. Treccani*, vol. XX, Roma, 1990, 1.

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E-ISSN: 2471-7576
August 2020, Vol: 5, Issue: 8
E-mail: editor@ijhassnet.com
http://ijhassnet.com/ **DOI: 10.33642/ijhass.v5n8p1**

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certain subjective legal situations with the obligation to retransfer, in the event of the beneficiary's predeceasing or in the case of the death of the beneficiary (art. 6, par. 5, L. 112/2016, according to the scheme of the Romanistic trust)[63]: obligation for the trustee from the *pactum* "dynamic"[64] *fiduciae cum amico*[65] stipulated for the realization of the destination and enforceable to third parties, in the absence of an explicit provision in this regard, just application of art. 2645-*ter* c.c. and art. 1707 c.c., in the light of the traditional (albeit not unique) traceability to the mandate of the trust[66].

5. Trust and art. 2645-*ter* c.c.

The law "after us", next to the trust indicates as further objective conditions of operation of Law no. 112/2016 the acts establishing the destination restrictions *ex-art*. 2645-*ter* of the Italian Civil Code[67]. Thus, on the one hand, the diversity between these figures seems confirmed[68], in contrast to the orientation tending to superimpose the trust on the deeds of patrimonial destination governed by art. 2645-*ter* of the Italian Civil Code[69]; on the other, contrary to what is believed in doctrine[70] and ending the *querelle* that arose about it[71], the law brings significant news to the destination deeds because it enriches them with the figure of the "manager" (trustee), providing and taking for granted the transfer of the goods with a destination constraint to a "manager", unlike the letter of the text of art. 2645-*ter* of the Italian Civil Code, which does not contain any mention of trust or explicit reference to the attribution profile[72]: so that between trusts and deeds of destination the distances appear significantly reduced when the destination is achieved through the assignment to a "manager", substantially and functionally equivalent to the "trustee". In other words, in the trust, the trustee assignment and the transfer to the latter of ownership of the assets (except in the case of self-destination)[73] would be the natural effect of the case, while for the deeds of destination *ex-art*. 2645-*ter* of the Italian Civil Code would be optional[74]: that is, such a rule would seem to "nuclear non-attributive and attributive hypotheses" to a manager[75].

[63] In other words, the purpose (care, assistance and protection for the seriously disabled) could not be implemented if the right transferred trustfully to the trustee could be compromised by acts and facts that do not concern the exercise of that right, as would happen if it fell in succession of the trustee or was attacked by the creditors of these: see M. Lupoi, *Trusts*, cit., 310. This is a functional reason which follows, in English law, the protection of the beneficiary entitled to carry out certain remedies and, in the light of the "law after us", the opposition of the *pactum fiduciae*.

[64] The so-called "dynamic" trust provides, notoriously, for a transfer, while the "static" trust occurs when the trustee already has an active legal situation which, with the *pactum fiduciae*, he undertakes to modify: in this regard, see F. Gazzoni, *Manuale di diritto privato*, Napoli, 2017, 919; F. Galluzzo, *Gli atti di disposizione e di amministrazione dei beni destinati*, cit., 211: "static" destination occurs when the destination effect occurs in relation to a right already belonging to the author of the destination; instead, there is a "dynamic" destination, when the effect of destination is accompanied, functionally related, by the translational effect of a right from the legal sphere of the recipient to that of the recipient of the attribution; Matano, *I profili di assolutezza del vincolo di destinazione: uno spunto ricostruttivo delle situazioni giuridiche soggettive*, in *Riv. not.*, 2007, 2, 370.

[65] As is known, in trust so called *cum amico*, the alienation is aimed at achieving particular purposes in the interest of the alienant or others and not for the purpose of guarantee (trust so called *cum creditore*). Essential to both cases is the assignment of a right to the trustee, accompanied by a mandatory, which tends through the assumption of obligations by the trustee, to bend the attribution of ownership of the right transferred to the specific aims. Already in Roman law, the trustee's power was of such a nature as to be able to abuse it: this was remedied not in the sense of making abuse impossible, but by relying on the trustee's loyalty or fides. Thus, A. Gentili, *Società fiduciarie e negozio fiduciario*, Milano, 1978, 64 s.

[66] See L. De Angelis, Trust *e fiducia nell'ordinamento italiano*, cit., 359; C. M. Bianca, *Il contratto*, in *Diritto civile*, 3, Milano, 2015, 711, underlines how, in relation to disposals aimed at achieving particular purposes in the interest of the alienator or others (*fiducia cum amico*, such as that of the trust), the consideration of the fiduciary act has been identified in the consideration of the mandate and, with regard to the problem of the relevance of the fiduciary consideration with respect to third parties, "the rule valid in terms of mandate without representation can be analogously applied (art. 1707 c.c.)»; A. Falzea, *Introduzione e considerazioni generali*, in *Dal* trust *all'atto di destinazione patrimoniale. Il lungo cammino di un'idea*, cit., 24. In jurisprudence, see Cass. n. 1798/1976 which stated that the fiduciary agreement gives rise to the obligation to transfer the property purchased in trust to the trustee-principal. *Contra*, see L. Santoro, *Il negozio fiduciario*, cit., 67, which considers the arguments put forward in support of the legal construction commonly adopted by the doctrine to qualify the relationship between trustee and trustee as a mandate inconclusive; A. Di Majo, *Il contratto fiduciario*, Milano, 1979, 28; G. Cerdonio Chiaramonte, *La prescrizione del negozio fiduciario*, in *NGCC*, 2016, 2, 347; Galgano, *Il contratto*, 2 ed., Padova, 2011, 473; Franzoni, *Il contratto fiduciario e il contratto indiretto*, in *Dir. civ.* (diretto da Lipari-Rescigno), II, 3, *Il contratto in generale*, Milano, 2008, 837. On the mandate, see in particular G. Di Rosa, *Il mandato*, Milano, 2012.

[67] On this topic, see G. Oberto, *Atti di destinazione (*ex *art. 2645-*ter*c.c. e* trust: analogie e differenze, in *Contr. e impr.*, 2007, 1, 351.

[68] In this sense, in jurisprudence, Court of Reggio Emilia, 22 giugno 2012, in www.ilcaso.it, published 27/6/2012: the deed of assets *ex* art. 2645-*ter* of the Italian Civil Code differs in many aspects from the trust to whose case it cannot be traced in any way and, in particular, due to the absence of translational effects; *contra*, Court of Brindisi, 28 march 2011, in Trusts, 2011, 639, on the basis of which, the institution pursuant to art. 2645-*ter* of the Italian Civil Code allows a person to transfer one or more assets, not unlike what happens to the settlor in the context of the trust. He who performs an act pursuant to art. 2645-*ter* of the civil code attributes to others the ownership of these assets, similarly to the settlor towards the trustee. "If marginal differences are excluded, the two institutions tend to coincide as regards their salient features".

[69] On this regard, see L. Gatt, *Il* trust *italiano*, in *Dal* trust *all'atto di destinazione*, cit., 127, which, focusing attention on the relationship between trust and act of destination, underlines how this relationship can only be of total overlap in the sense of identification of each other.

[70] D. Muritano, *La legge sul "dopo di noi". Prime osservazioni sugli aspetti civilistici*, in www.notariato.it.

[71] Part of the doctrine has always considered a twofold type of constraint compatible with the deed of destination: "static", without transfer of ownership of the property, and "dynamic", with transfer of ownership from the transferor to a manager, who is entrusted with the task of implementing the intended design: see C. Romano, *Riflessioni sul vincolo testamentario di destinazione* ex *art. 2645-*ter *c.c.*, in *Dal* trust *all'atto di destinazione. Il lungo cammino di un'idea*, cit., 171.

[72] The attribution of the assets to a person other than the transferor is not explicitly provided for in art. 2645-*ter* of the Italian Civil Code, but it is not explicitly excluded either: in this sense, see Di Landro, *L'art. 2645-*ter *c.c. e il* trust. *Spunti per una comparazione*, in *Riv. notar.*, 2009, 604. The essence of the English trust, on the other hand, is represented by fiduciary entrustment, which is missing any reference 2645-*ter* of the Italian Civil Code: see, M. Lupoi, *Gli atti di destinazione nel nuovo art. 2645-*ter *c.c. quale frammento di* trust, cit., 172; Id., *Il contratto di affidamento fiduciario*, in *Riv. not.*, 2012, 3, 513 ss.

[73] There is talk of "self-destination" or "pure" or "static" destination to indicate the absence of change of ownership, without prejudice to compliance with the res and the separation of assets. With main reference to art. 2645-*ter* of the Civil Code, there are essentially three arguments adduced *against* the admissibility of self-destination: the legal lexicon, that is, the use of the term "conferring", but it can legitimately object that the literal tenor does not normally have a greater reason in this ambiguous provision of great legal relevance; in any case, the "transfer" of the asset to third parties does not exclude that the settlor may be the beneficiary of the destination.

[74] To the destination *ex* art. 2645-*ter* of the Italian Civil Code the transfer of the right to another subject (manager) for the realization of the purpose can be accompanied. In this case, there are two legal changes which will be publicized: the act of imposition of the recipient constraint *ex* art. 2645-*ter* of the Italian Civil Code and the transfer of rights pursuant to art. 2645 of the Italian Civil Code. The "after us law" therefore put an end, in this respect, to the *vexata quaestio* on the destination's modalities: in the sense that, at this point, the literal tenor of the rule does not exclude the attribution of the destined goods (and not only of the power / duty to implement the destinatory constraint) and a person other than the settlor (manager): see Gentili, *Le destinazioni patrimoniali atipiche*, cit., 24.

[75] M. Bianca, *L'emersione del modello della destinazione di beni ad uno scopo*, cit., 77.

International Journal of Humanities and Applied Social Science (IJHASS)
E-ISSN: 2471-7576
August 2020, Vol: 5, Issue: 8
E-mail: editor@ijhassnet.com
http://ijhassnet.com/ **DOI: 10.33642/ijhass.v5n8p1**

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For both figures, then, art. 6, par. 4, L. n. 112/2016 provides for the «(re) transfers of goods and rights on the *res* in favor of [...] subjects» who «established the trust [...] or established the destination deeds *ex-art*. 2645-*ter* of the Italian Civil Code»: which presupposes, both for the trust and the deeds of destination, a transfer to the trustee and "manager" of the ownership of the assets destined and a retransfer by them once the destination has ceased[76].

In the "after us" law, however, there is no reference to the segregation of assets, typical of the trust: and, unless you want to reduce this institution by dead letter emptying and frustrating the purpose of the law itself, consisting in protection of people with serious disabilities (even and especially after the death of settlers)[77] it should legitimately be postulated that the "after us" legislator takes the segregative effect of the trust for granted and therefore refers to other rules of the system, *in primis* in art. 2645-*ter* of the Italian Civil Code. More precisely in the absence of an *ad hoc* rule, given the international nature of the Hague Convention and its ratification law and given the legal qualification of the trust "after us" as fiduciary act[78] the trust would apply art. 2645-*ter* c.c.[79] which provides, for registered real estate and mobile assets, that «the goods granted and their fruits can [...] be subject of enforcement [...] only for debts contracted for that purpose»; or art. 1707 c.c., whatever the nature of the assets granted, in the light of the traditional (albeit not unequivocal) applicability of the rules on the mandate to the fiduciary act and therefore to the trust, to which «trustee creditors cannot enforce their reasons on assets which, in the execution of the mandate, the authorized representative (regarding trust, the trustee) has purchased in his name, provided that, being mobile assets or credits, the mandate (fiduciary act and, therefore, trust) is a written one with a certain date before the foreclosure, or, being real estate or mobile assets registered in public registers, the transcript of the act of transfer or the judicial application to achieve it is pre-foreclosure»[80]. In other words, to the trust of the "after us", which does not end in the act of destination regulated in the civil code to art. 2645-*ter*, also presenting a *causa fiduciae*, traditionally (although not uniquely) attributable to that of the mandate, it is plausible, in the presence of regulatory or conventional gaps, to extend the rules relating to the enforceability of the segregation of assets contemplated for acts of destination *ex-art*. 2645-*ter* c.c. and for those made by the authorized representative *ex-art*. 1707 c.c.

If all this is true, in the light of the textual data of the law on "after us", the distinction between trusts and acts of destination (although not merely terminology) would be marginal and reduced, first of all, to the objective profile[81] of the trust and the deed of destination in practice put in place for the care and protection of people with severe disabilities: objective profile unlimited in the trust and limited for the destination deed. Despite this, various doctrinal openings concerning the categories of goods that may constitute the object of the destination constraint *ex-art*. 2645-*ter* c.c.[82], the legislature of the "after us" shows an attitude of closure, confirming in art. 6, par. 3, lett. (c) that it may only have "real estate or goods registered in public registers"; instead, the trust fund can be made up of "goods of any kind"[83].

Secondly, from legal nature, the distinction between trusts and deed of asset destination *ex-art*. 2645-*ter* c.c. would remain because the trust is the result of the related agreements between the act of destination and the

[76] On the contrary, that is to say for a difference between the two institutions, see B. Mastropietro, *Profili dell'atto di destinazione*, in *Rass. dir. civ.*, 2008, 4, 1030 s.

[77] More precisely, the "after us law" indicates some models (trusts, destination restrictions pursuant to art. 2645-*ter* of the Italian civil code and fiduciary entrustment) which it intends to encourage the dissemination, in order to guarantee constant support for people with serious disability especially for the time in which they will be deprived of family support: purpose obviously frustrated where the trust property or the so-called "Entrusted" through a fiduciary agreement did not represent separate assets.

[78] See, *supra*, § 4.

[79] The trust would thus become enforceable against third parties, departing from the proper dimension of Romanistic trust, which is characterized, according to the prevailing orientation, by the non-enforceability of fiduciary obligations to third parties: G. Boletto, *Tassazione indiretta dei negozi di destinazione patrimoniale alla luce della l. n. 112/2016 (c.d. "Dopo di noi")*, in *NGCC*, 2017, 583.

[80] For movable property, given the commonality of the structural data of belonging or fiduciary registration for a specific purpose, art. 22, D.lgs. no. 58/1998 and subsequent amendments, which expressly provides that the values and financial instruments of savers-investors managed by the financial intermediary (in the trustee, in particular), although headed by him, constitute a "distinct" and separate asset «to all the effects from that of the intermediaries (o)»(trustee) and, as such, subtracted from any actions of the creditors of the same intermediary (trustee). However, according to the majority orientation, in this hypothesis we would face a "Germanistic" trust, since what is determined is a split between ownership and legitimacy, given that the management company is not technically invested in the ownership of the securities, holder of the rights conferred by the titles: on the subject, see P. Manes, *La segregazione patrimoniale nelle operazioni finanziarie*, in *Contr. impr.*, 2001, 3, 1370.

[81] From a subjective point of view, however, both institutes have an unlimited operating scope, since the apparent subjective limitation to people with disabilities or public administrations contemplated in art. 2645-*ter* of the Italian Civil Code is emptied of the same provision and, precisely, by the reference also to other entities or natural persons, capable of canceling any attempt to circumscribe the relevance of interests and subjects within narrow confines.

[82] See G. Petrelli, Trust *interno, art. 2645*-ter *c.c. e* «trust *italiano*», cit., 182.

[83] Moreover, the trust is notoriously a dynamic model of destination, in the sense that the destination does not concern goods but certain activities. According to M. G. Monegat, *Strumenti di garanzia in ambito concorsuale:* trust *e atto di destinazione a confronto*, in Trusts *e att. fid.*, 2016, 347, the advantage of the trust over the destination constraint pursuant to art. 2645-*ter* of the Civil Code: the object of the guarantee is not simply the constraint on a real estate property, but the price that the settlor will receive from the sale of the segregated property, the value of which is indicated following an appraisal already carried out, to which are added the monthly lease payments, being a leased property, from the date of establishment of the trust to the sale. «The trust may also include non-dominant positions, as well as non-registered movable assets, sums of money, debt securities»: see A. C. Di Landro, *I vincoli di destinazione* ex *art. 2645*-ter *c.c. Alcune questioni nell'interpretazione di dottrina e giurisprudenza*, in *Riv. dir. civ.*, 2014, 3, 731 and, in particular, nt. 24.

International Journal of Humanities and Applied Social Science (IJHASS)
E-ISSN: 2471-7576
August 2020, Vol: 5, Issue: 8
E-mail: editor@ijhassnet.com
http://ijhassnet.com/ **DOI: 10.33642/ijhass.v5n8p1**

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translative fiduciary contract[84]: the trust of the "after us" law contains a deed of destination but does not end in it, as it also contemplates a *pactum fiduciae* connected to the first for the realization of the purpose of the destination.

As for the form, which is also normally counted as a significant structural difference between trusts in its original configuration (usually freeform) and patrimonial destination deed (*ad substantiam* public act), it is no longer decisive as *discrimen*: the law of the "after us", in fact, similar to the patrimonial destination deeds governed by the civil code, also seems to require the form of the public act *ad substantiam* (and not *ad transcriptionem* or mere tax purposes[85]). The same applies to the duration, which is considered unlimited in the trust of the English model and limited (ninety years) for the deeds of destination: on closer inspection, in the trust of the "after us", unlike the common law systems and similar to the acts intended *ex-art*. 2645-*ter* c.c., the duration of the trust is not unlimited but fixed in the death of the beneficiary.

6. Trust and fiduciary entrustment contract.

The so-called fiduciary entrustment contract[86], mentioned in L. no. 112/2016 together with the trust and the deeds of patrimonial destination *ex-art*. 2645-*ter* c.c., for the care and protection of people with severe disabilities, for the first time gets regulatory recognition[87]. It is the result of mere doctrinal elaboration[88] and it aims to regulate "special funds made up of destined goods"[89]. In the absence of a legislative definition, with that expression, the doctrine intends to refer to a necessarily bilateral act and, precisely, a «contract by which one person (entrusting) agree with another (foster or custodial) and identifies subjective positions (existing or future) referred to as "trusted goods" and their destination for the benefit of one or more persons, known as beneficiaries, under a fiduciary program, whose implementation is the responsibility of the foster»[90].

Legal uncertainty appears sovereign, as the fiduciary entrustment contract[91] seems to escape a framing and consequent qualification[92]: the regulation of this figure, in our (Italian) system, is all to be built, even more so than for the trust[93]. Contrary to the trust, there are no specific rules of law aimed at regulating this new type of contract: so, in legislative silence, it is taken for granted[94] that the fund entrusted, consisting of assets with active and passive components, is not confused with the assets of the trustee and responds only to the obligations inherent in the

[84] See, *supra*, § 4.

[85] On the nature *ad substantiam* and not *ad transcriptionem* of the form of the public deed for the deeds of patrimonial destination ex art. 2645-*ter* of the Italian Civil Code, see among others, Petrelli, *La trascrizione degli atti di destinazione*, cit., p. 161 ss.; G. Perlingieri, *Il controllo di «meritevolezza» degli atti di destinazione* ex *art. 2645* ter *c.c.*, cit., p. 14 s.; Gentili, *Le destinazioni patrimoniali atipiche*. *Esegesi dell'art. 2645* ter *c.c.*, cit., 2007, p. 7 ss., stresses that "conversely, the thesis that the public act is required *ad substantiam* has substantial support".

[86] In reality, "fiduciary entrustment contract" already appears in Law no. 3/2012, aimed at regulating «the over-indebtedness situations not subject or subject to the current bankruptcy procedures (art. 6.1.) and allows the debtor to reach a debt restructuring agreement with their creditors on the basis of a plan that ensures the regular payment of creditors unrelated to the agreement [...] The plan may also provide for the assignment of the debtor's assets to a foster for the liquidation, custody and distribution of the proceeds to creditors "(art. 7.1). The law refers here for the first time to the "fiduciary entrustment contract", based on the "program" (liquidation, custody and distribution of the proceeds to creditors) and not on the bond of assets: in the sense that the assets are not to be bound, but the activity that takes place on them, see M. Lupoi, *Il contratto di affidamento fiduciario*, in Trusts *e att. fid.*, 2012, 587. See, also, M. R. Mazzone, *La funzionalità del contratto di affidamento fiduciario*, in Trusts *e att. Fid.*, 2016, 351 ss.; G. Baralis, *Autotutela e autorizzazioni nell'ambito del contratto fiduciario*, in *Quad. Fond. It. Notar.*, 2017, vol. 20, n. 1, 145 ss.; G. Corasaniti, *Profili tributari del contratto di affidamento fiduciario*, in *Dir. e prat. Trib.*, 2018, vol. 89, 541 ss.; M. C. Andrini, *L'affidamento di somme ai notai: una particolare fattispecie di affidamento fiduciario*, in *Vita not.*, 2018, n. 1, 477 ss.; A. Gentili, *Atti di destinazione e negozio fiduciari comparati con l'affidamento fiduciario*, in *Quad. Fond. It. Notar.*, 2017, vol. 20, n. 1, 134 ss.; M. Lupoi, *Le ragioni della proposta dottrinale del contratto di affidamento fiduciario*, in *Contr. e impr.*, 2017, 734 ss.; G. Giusti, *Il regime fiscale del contratto di affidamento fiduciario: riflessi impositivi di un nuovo modello negoziale*, in *Riv. dir. trib.*, 2016, vol. 26, n. 3, I, 371 ss.

[87] G. Boletto, *Tassazione indiretta dei negozi di destinazione patrimoniale alla luce della l. n. 112/2016 (c.d. "Dopo di noi)*, in *NGCC*, 2017, 4, 583: this law represents the first regulatory recognition of the fiduciary entrustment contract, being a negotiating model of recent doctrinal elaboration and, precisely, of M. Lupoi, *Il contratto di affidamento fiduciario*, in *Riv. notar.*, 2012, 516 and Id., *Il contratto di affidamento fiduciario*, Milano, 2014. The same Author, in *Atti istitutivi di* trust *e contratti di affidamento fiduciario*, Milano, 2010, 3, declares that the fiduciary assignment contracts are a juridical construction developed by himself, without any specific jurisprudential and doctrinal support, except for his writings and yet implemented in a law of the Republic of San Marino (L. no. 43/2010). Pursuant to art. 1 of this law, fiduciary assignment is a contract between the entrusting and the foster, under which some assets are destined for one or more beneficiaries, who in turn can be parties to the contract. See M. Tonellato, *Il contratto di affidamento fiduciario: aspetti innovativi della recente pronuncia del Giudice Tutelare di Genova*, in Trusts *e att. fid.*, 42.

[88] The same "father" of the fiduciary entrustment contract (M. Lupoi, *Il contratto di affidamento fiduciario*, Milano, 2014, 487) highlights how it emerges almost exclusively from his writings and from some provision: too "little in terms of sources of production of law". In jurisprudence, see Court of Genova, 31 December 2012, in Trusts, 2013, 422; Court of Civitavecchia, 4 December 2013, in Trusts, 2014, 299; Court of Genova, 30 January 2014, in Trusts, 2014, 511 e Court of Genova, 29Nnovember 2016, in Trusts, 2017, 409.

[89] See M. Lupoi, *L'affidamento fiduciario nella vita professionale*, Milano, 2018, 109. In particular, the author notes the lack of any meaning of the term "special funds" and the textual link between the trust assignment contract and the destination restrictions.

[90] M. Tonellato, *Il contratto di affidamento fiduciario: aspetti innovativi della recente pronuncia del Giudice Tutelare di Genova*, cit., 34 and F. Azzarri, *I negozi di destinazione patrimoniale in favore dei soggetti deboli: considerazioni in margine alla l. 22.06.2016, n. 112*, in *NGCC*, 2017, 1, 128, which refer, respectively, to M. Lupoi, *Istituzioni del Diritto dei* Trust *e degli affidamenti fiduciari*, Padova, 2011, 243 and Id., *Il contratto di affidamento fiduciario*, in *Riv. notar.*, 2012, 516. The heart of the contract would therefore lie in the "program" and not in the bond imposed on the assets: which would distinguish the trust assignment contract from the deed of destination pursuant to art. 2645-ter of the Italian Civil Code The fiduciary entrustment contract is envisaged as a figure forged by private autonomy in order to grasp and resolve the limitations of the existing figures in the context of a full enjoyment of the potential of our right which has remained unexpressed so far: thus avoiding, on the one hand, the "abandonment of some institutes of our system and, on the other, the transmigration into foreign systems". The doctrine (M. Lupoi, *Il contratto di affidamento fiduciario*, cit., 267) thus identified the need for a fiduciary entrustment contract, first of all, between the donor and the one who accepts for unborn babies not conceived pursuant to art. 784 of the Italian Civil Code, by virtue of which the donor would be obliged to preserve the value of the donation and to do everything necessary to ensure that the donated asset (or the one subsequently replaced) reaches the unborn child if he is born (or to any unborn child after the first and the donation is to advantage of all). In fact, according to the dominant orientation in doctrine, a perfect and immediately effective donation contract does not intervene between the donor and the one who accepts the unborn child: on this topic, see for all, G. Oppo, *Note sull'istituzione dei non concepiti*, in *Riv. trim. dir. proc. civ.*, 1948, 72; F. Santoro Passarelli, *Dottrine generali del diritto civile*, Napoli, 1956, 266; M. Lupoi, *last work cited*, 267.

[91] M. Lupoi, *Il contratto di affidamento fiduciario*, Milano, 2014, 255.

[92] The possibility of speaking in this regard of a "contractual type" is doubtful, since this notoriously requires "invariant" and constant structural elements, where the fiduciary entrustment contract would be structurally characterized by a certain elasticity.

[93] In this sense, again, M. Lupoi, *L'affidamento fiduciario nella vita professionale*, Milano, 2018, 3.

[94] On this topic, see again, M. Lupoi, *L'affidamento fiduciario nella vita professionale*, cit., 3 ss.; Id., *Il contratto di affidamento fiduciario*, Milano, 2014, 311 ss.

International Journal of Humanities and Applied Social Science (IJHASS)
E-ISSN: 2471-7576
August 2020, Vol: 5, Issue: 8
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http://ijhassnet.com/ **DOI: 10.33642/ijhass.v5n8p1**

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implementation of the program. Of these, the trustee would also respond with his own assets, who within the limits of the contract and according to the intended program could consume the assets, use them or change them: this because the contract would not constrain the subjective positions (fund entrusted), but the activity of the foster with respect to them. In the ordinary configuration, then, parts (even subjectively complex) of this contract would be the entrusting, the foster and the guarantor of the contract; but, in relation to the concrete program, such a role could also be played by those who derive benefit (beneficiaries) from the implementation of the fiduciary program.

Based on this doctrinaire construction, it would seem legitimate to qualify with quite a few difficulties the fiduciary entrustment contract as an *inter vivos* act, lasting, with mandatory effects and functionally characterized by the so-called fiduciary program. Proceeding in order, the effectiveness of this contract (precisely *inter vivos*) is released from the death of the parties participating in it and remains so even where it unfolds after the death of the assignee[95] and, in the present case, "in view of the loss of family support". Secondly, the fiduciary assignment contract would appear to be framed between the relationships of duration, as it is aimed at a representation of the future, unlike the act of destination which would instead designate an effect already produced when the act itself is accomplished. It would seem, then, to be a contract with binding effects, since the foster undertakes to carry out, with his own more or less discretionary activity, towards to the beneficiary[96] (in this case, a seriously disabled person) a certain "fiduciary program" that the foster (in "after us" law, the parents) cannot personally carry out: the "program", intended as a "series of activities, not always entirely precisely determined, in favor of one of the parties to the relationship or of a third party", seems, moreover, to constitute the concrete consideration of the fiduciary entrustment contract, which would look at the activities to be carried out and would be "focused on the law of obligations, not on the law of goods"[97]. More precisely, the consideration of the fiduciary entrustment contract is identified in the preparation of the stable implementation of a protection's program and which is bound by the activity that the foster will carry out, as a rule, with the contribution of other subjects (entrusting, guarantor or third party).

In fact, the fiduciary entrustment contract, in the doctrinaire configuration, would be the source, in turn, of any authorization deeds[98] by the foster to another entity (entrusting, third party, guarantor and, sometimes, also a beneficiary)[99] or "constitutive" acts[100], as attributing the power to perform acts with "real" effects on the fund entrusted or to give rise to obligations for the foster[101].

Also, in light of the findings made in the previous pages on the trust after us, it seems possible to derive differences and affinities between the two institutions. Without any claim of completeness, with regard to the differences and with primary reference to the legal nature, it appears legitimate to opt for a contractual source of the fiduciary assignment, where the «trust is not (a mere) contract»[102], but (as already specified) a related agreement between a unilateral deed of patrimonial destination and a *pactum fiduciae* of translation: this seems confirmed by the literal tenor of the "after us" law which, unlike the trust, speaks of fiduciary entrustment "contract" instead of "act" or "deed", in accordance with its typical doctrinaire configuration. In particular, on the one hand, the foster, like the "after us" trustee, will always be part of the contract; on the other, according to the doctrinaire reconstruction[103] and unlike the *beneficiary trust*[104], which can only be a mere recipient of the asset attribution, the beneficiaries of a

[95] Similarly, it happens in a life insurance contract entered into by the insured *ex* art. 1920 c.c. in favor of a third party (for example wife and / or children) who certainly produces an effect between the parties, as the insured will be required to periodically pay the premiums provided for in the contract to the insurer, while the beneficiaries will have the right to receive the indemnity due by the insurer only upon the death of the insured: on this point, see C. Turco, *Diritto civile*, I, Torino, 2014, 73.
[96] See G. Giusti, *Il regime fiscale del contrato di affidamento fiduciario: riflessi impositivi di un nuovo modello negoziale*, cit., 377.
[97] M. Lupoi, *Il contratto di affidamento fiduciario*, Milano, cit., 252 and Id., *L'affidamento fiduciario nella vita professionale*, cit., 112.
[98] In this regard, see M. Lupoi, *Il contratto di affidamento fiduciario*, Milano, cit., 316.
[99] In other words, with an authorization act, there would be not only the passing of the rights over the assets and the associated ablative effect, but also the passing of the foster's position: on this point, see M. Lupoi, *Le ragioni della proposta dottrinale del contratto di affidamento fiduciario*, in *Contr. e impr.*, 2017, 3, 739. In any case, it is the fiduciary entrustment contract that determines the subject of the authorization act, adapting it to the specific program: the contract is designed in such a way that in any event there is an authorized subject. On the subject, see M. Lupoi, *Il contratto di affidamento fiduciario*, Milano, cit., 324.
[100] About the distinction between "supplementary" and "constitutive" authorization, see A. Auricchio, *Autorizzazione*, in *Enc. dir.*, IV, Milano, 1959, 504, which underlines how the effect of the "constitutive" authorization is the birth of a legal power to dispose of or a legitimacy to act on the assets of others. According to C. M. Bianca, *Diritto civile*, 3, *Il contratto*, Milano, 2015, 68 ss., the "constitutive" authorization attributes the legitimacy to change the legal sphere of others, carrying out legal acts in the name of the authorized but in the interest of the authorizing officer. On this topic, see M.R. Mazzone, *La funzionalità del contratto di affidamento fiduciario*, cit., 354 and, in particular, nt. 18.
[101] See G. Baralis, *Autotutela e autorizzazioni nell'ambito del contratto di affidamento fiduciario*, cit., 153; M. Lupoi, *Il contratto di affidamento fiduciario*, cit., 322.
[102] M. Lupoi, *last work cited*, 22.
[103] M. Lupoi, *Il contratto di affidamento fiduciario*, cit., 317.
[104] "A beneficiary or more beneficiaries can be parts of a fiduciary entrustment contract, while they cannot be parts of the trust act": see M. Lupoi, *last work cited*, 489.

International Journal of Humanities and Applied Social Science (IJHASS)
E-ISSN: 2471-7576
August 2020, Vol: 5, Issue: 8
E-mail: editor@ijhassnet.com
http://ijhassnet.com/ **DOI: 10.33642/ijhass.v5n8p1**

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fiduciary entrustment contract will not only be able to take advantage of the provisions in their favor as a contract in favor of third parties[105] but also be part of this contract (in this case, multilateral)[106].

On an objective level, then, not only the fiduciary entrustment contract would seem to include both present and future assets, wherein the trust the destination constraint would be impressed exclusively on the assets present[107]; but also assets "entrusted", unlike those "tied" *ex-art*. 2645-*ter* of the Italian Civil Code and the subject of trust, would be placed in a dynamic perspective (rather than static), in which the emphasis is placed not on the individual automictically considered assets (trusts), but on a set of functionally connected assets (fund entrusted) to each other as all instrumental to the execution of the program: on the contrary, "the good is not constrained, but the activity that is carried out on the good", in the sense that "it is the activity that remains bound in the objective and in the ways to achieve it"[108]. In the fiduciary entrustment, therefore, the purpose for which the assets (fund) are destined would not be achievable if they were assessed individually: so, the expression "fund entrusted", unlike the trust fund and the assets intended *ex-art*. 2645-*ter* of the Italian Civil Code should be interpreted as legal "universality"[109].

With regard to the elements in common to the two figures, the "fund entrusted" would constitute – according to the doctrinaire elaboration and analogously to the assets subject to trust a separate patrimony, entrusted to the trustee, whenever it becomes its owner: asset separation which, in the absence of any specific rule in this regard and similarly to what observed for the trust, should be derived once again from art. 2645-*ter* of the Italian Civil Code having as object the deeds of patrimonial destination and with which, *mutatis mutandis*, the fiduciary entrustment contract would still share the destined consideration in favor of one or more subjects, said beneficiaries, by virtue of a destination program[110]. If this were not the case, the same *ratio legis* would be frustrated: that is, the promotion of the negotiation models envisaged therein, in order to guarantee constant support for people with serious disabilities, especially after the death of the settlers.

Finally, in the case of a deed for "translational" effects, the temporary nature of the property would also be analogous to the "after us" trust, as it was transferred by the entrusting to the foster in the interest of others: the assets destined belonging to the foster, similarly to that purchased by the trustee, are characterized by a temporary nature inherent in the relationship and functionally related to the implementation of the program (necessarily temporary)[111]. In both cases, the transfer back to the settlers or the transfer of the goods destined for certain subjects would take place following the beneficiary's premature or deadline expiry, as seems to be reflected in art. 6, par. 4 and 5, L. no. 112/2016.

7. Conclusion.

In light of the above considerations, the "after us" law, for its systematic contribution well beyond the tax-benefit purposes expressly mentioned, could be considered a first and albeit incomplete trust law, aimed at discouraging the establishment of trusts governed by a foreign law: this, since a large part of the elements indicated in art. 8 Conv. of the Hague so that a specific law can qualify as trust law.

As we noted, the subjective prerequisites for the application of the law are, in particular, the serious disability not determined by aging or pathologies related to senility and the absence of family support: the first, by express regulatory reference to art. 3, par. 3, L. n. 104/1992, exists whenever «the minority, single or multiple, has reduced personal autonomy related to age, so as to require a permanent, continuous and global assistance intervention in the individual sphere or in that of relationship». Not any disability, therefore, allows access to the facilitating system, but only that "serious" handicap situation certified *ex-art*. 3, § 3, L. n. 104/1992. On closer inspection, the choice appears in contrast, on the one hand, with the "anti-discrimination protection" that the legislator seems to have wanted to recognize to people with disabilities in recent years; on the other hand, in a comparative perspective, with the most

[105] See M. Lupoi, *Atti istitutivi di* trust *e contratti di affidamento fiduciario*, cit., 25.
[106] F. Alcaro, *Il programma contrattuale: l'attività dell'affidatario fiduciario e i rapporti fra le parti*, in *Contratti di convivenza e contratti di affidamento fiduciario quali espressioni di un diritto postmoderno*, cit., 165.
[107] "Trust assets are never" future assets ", as they are transferred to the trustee precisely because they are segregated": M. Lupoi, Trusts, cit., 576 s.
[108] M. R. Mazzone, *La funzionalità del contratto di affidamento fiduciario*, cit., 351.
[109] A. Gambaro, *La posizione soggettiva dell'affidatario e la segregazione patrimoniale*, cit., 156.
[110] The transfer requires a specific transcription that makes it enforceable against third parties: this should take place pursuant to and for the purposes of articles 2643 and 2644 c.c. and, therefore, with declarative effectiveness aimed at resolving any conflicts with subjects that claim rights incompatible with that purchased by the contractor: in this regard, see M. Lupoi, *L'affidamento fiduciario nella vita professionale*, cit., 164.
[111] «The fund entrusted belongs only temporarily» to the custodian»: thus, M. Lupoi, *Il contratto di affidamento fiduciario*, cit., 314. «Of course, temporary is the trustee in his relationship with trust property, as well as the foster (custodian) with respect to the fund entrusted»: M. Lupoi, *last work cited*, 488.

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recent orientation of the Court of Justice and the consequent expansion of the concept of disability at European level including long-lasting diseases that can prevent or make it more difficult for the person to participate fully in the professional life, even where such diseases have not given rise to official administrative recognition of disability.

In any case, serious disability is a necessary but not sufficient condition for the application of the law, as there is also the absence of family support due to the lack of parents or the impossibility of parents to provide adequate support: hence, the need to interpret the concept of "family support", in a strictly "parental" sense, that is, extended to people other than parents, also in light of the address expressed in this regard by the Constitutional Court and aimed at expanding the so-called family environment.

From an objective point of view, the tax concessions introduced by the "after us" Law are reserved for particular acts and, precisely, the trust, the destination deeds *ex-art*. 2645-*ter* of the Italian Civil Code and the fiduciary entrustment contracts aimed at regulating special funds made up of assets subject to destination restrictions.

Compared to the first acts, the trust of the "after us" does not end in the act of destination regulated in the civil code to art. 2645-*ter*, but it presents the same *causa fiduciae*, and so it is plausible, in the presence of regulatory or conventional gaps, to extend to the trust the rules relating (also) to the enforceability of the segregation of assets contemplated for acts of destination *ex-art*. 2645-*ter* c.c.

Contrary to the trust, then, there are no specific rules of law aimed at regulating the new type of contract, which is the fiduciary entrustment contract. Without any claim of completeness, with regard to the differences and with primary reference to the legal nature, it appears legitimate to opt for a contractual source of the fiduciary assignment, where the «trust is not (a mere) contract», but (as already specified) a related agreement between a unilateral deed of patrimonial destination and a *pactum fiduciae* of translation. With regard to the elements in common to the two figures, the "fund entrusted" would constitute according to the doctrinaire elaboration and analogously to the assets subject to trust a separate patrimony, entrusted to the trustee, whenever it becomes its owner.