

The trust and the guardianship of weak individuals

The aim of the Act 6/2004, which has introduced in Italy the administration of support is clearly enunciated in art. 1, and it is that of "to protect with the smaller possible limitation of the ability to act people who are partly or totally deprived of the autonomy in the accomplishment of the functions of daily life through interventions of temporary or permanent support".

Before the 2004's reform, there was a rigid division between incompetence and disability. Both the guardianships were instruments that foresaw, rigidly, a series of actions and operations that invariably had to be authorized by the judicial authority. The idea was, therefore, on one side to protect the affairs of the incapable one, although with a paternalistic approach, and on the other side to protect people that had come in contact with the incapable subjects through a suitable system of publicity of the personal situation of the subject with who they intended to bargain and of the conditions to which the bargain could be considered incontestable.

The introduction of the administration of support is set as an element of break up with the precedent system. The article 409 of the civil code foresees that the assisted one " is able in every case to complete the necessary actions to satisfy the demands of his/her own daily life."

The new instrument is characterised, therefore, for a great adaptability, both in the initial moment, and during the procedure, to the different disabilities and the consequent needs of protection of every person, without never coming to a total exclusion of the capacity to act. This approach widens the area of the potential beneficiaries, who are not only people in condition of usual mental insanity, but also to all those people that, because of a illness or of a physical or psychic impairment, are deprived in total or part of their autonomy in the carrying out of the functions of the daily life.

A fundamental importance has the decision (a decree) of the judge to nominate the administrator and to indicate the rules that the administrator has to follow in the interest of the beneficiary (art. 405 civil code). The decree must foresee the duration of the charge, that can be indefinitely also, the object of the charge and the actions that the administrator has the power to complete in name and on behalf of the beneficiary.

The provision of nomination must necessarily contain the forecast of the actions for which the beneficiary can preserve the full ability and of those, which, instead, the

integrative or substitutive intervention of the administrator of support is essential.

Among the juridical actions that the beneficiary of the administration of support can validly set down, there are certainly acts that are necessary to satisfy the demands of the daily life, for these acts the beneficiary preserves the full capacity to act, that must be analytically specified by the judge in the decree of nomination of the administrator.

There are other activities for which the judge has held necessary that the will and wishes of the beneficiary must be integrated by the administrator. Moreover, there are activities that must be developed exclusively by the administrator of support.

It has to be considered that quite often, in the case of a weak subject, such instruments must interest, over the aspect of protection of the patrimony and of consequent economic needs, also the aspects of guardianship of the health of the person, of his/her cultural affairs.

The contractual scheme that introduces the greatest flexibility and, therefore, adaptability to the most disparate situations in which a weak subject can find him self and that, therefore, constitutes a valid and effective alternative to the anticipated institutes from the civil code (as *mandato* or *negotiorum gestio*), as the administration of support and the incompetence, is certainly the trust.

On the admissibility of the trust in the Italian legal system, it has to be said that art. 2645-ter c.c. allows the registration of particular kinds of agreements concerning estates, landed property, and other particular goods, in the exclusive interest of disabled or incapable person, or public administrations, or other corporate bodies. This article doesn't refer expressly to the trust, but it constitutes, even though indirectly, a recognition of its admissibility.

For what concern the trust settled for the guardianship of a weak individual, we can imagine the hypothesis of two parents that intended to assure, their life is lasting, or after their death, the necessary means to the maintenance, and the assistance for their disabled child.

Parents have, often, the demand not only to protect the economic aspects of the assistance of the disabled child, but also to guarantee him/her specific conditions of life, for instance, the place where to live, the particular habits of life, forms of assistance from experienced personnel.

Through the trust, parents transfer some assets to the trustee, that could be one or more physical person, an association or a foundation (sometimes also a charity or a

corporation of banking origin), that administrates the asset granting the maintenance, the cares and the support of the disabled child, according to the indications of the parents-settlors.

The assets of the trust, coming from parents estate, are transferred to the trustee, but they don't become part of his personal estate, in fact they constitute a separate mass, although they are administrated by the trustee. In such way, the assets included in the trust constitute a separate estate, non leviabile from the creditors of the settler-parents and from those of the trustee.

The trust agreement, similar to a deed, written and registered by a notary, give to the trustee, the right to own goods, the power to administrate and to sell them, according to the precise indications specified in the deed and in the interest of the disabled beneficiary.

In the case of trust for a weak subject, is opportune to provide for the nomination of a protector of the trust. The protector has the principal assignment to supervise the purpose of the trust, to cooperate with the trustee in the choices that he makes in the interest of the beneficiary and to check his administration. The settler can provide that the trustee is unfaithful can be removed from the protector.

In the hypothesis in which have been effected already the nomination of the administrator of support and the institution of the trust both, it could be useful the administrator's nomination of support as protector of the trust, in consideration of the particular knowledge that he has about the necessities of the protected individual.

The administrator of support could also be authorized from the judge to the institution of a trust in the interest of the protected individual¹.

The “deed” of the trust can establish that after the disabled person death, the trust wouldn't has more effects and that the trustee has to transfer the residual goods, rights and property to some individuated relatives of the disabled (for instance his brothers and sisters, if the parents-settlors have had other children) or to other people pointed out in the “deed” as final beneficiaries.

In order to the application of the trust to the goals of the guardianship of the weak subjects, and more specifically to the relationship among the trust and the administration of support, March 14 th 2006, Tribunale di Genova has authorized the

¹ Tribunale di Genova, March 14 th 2006, that has authorized the administrator of support of an incapable to settle a trust in the interest of the incapable, of the spouse and of their child.

administrator of support of a subject affected by a brain damage, 100% civil invalid, to settle a trust in the interest of the same beneficiary of the procedure of administration of support, and also in the interest of the administrated person's child, who was affected by the same disease of his father².

In particular, the case concern a lady, who asked the judge, in an only context: a) to be named (also with the approval of her son) administrator of support of her husband (the civil invalid subject); b) to avoid if possible, for the husband himself a stronger model of guardianship through the procedure of interdiction (art. 414 c.c.); c) to support also the son, who was affected by a lighter form of the same disease of his father.

The Court, after having accepted the request of the lady to be nominated as administrator of support, has recognized in the specific case the flexibility and the versatility of the trust structure and has admitted the institution of it.

In particular, the judge has authorised the lady as administrator of support of the incapable to confer in the trust the family house and to administrate it in the interest of the beneficiaries; giving her the power to perform every act necessary for beneficiaries daily lives, concerning the house and all the monetary incomes deriving them from social services in consequence of their diseases (disability pension, joint pension...).

The judge has also specified that for acts of extraordinary administration (for example, to sell the family house), the lady should ask him the authorization.

The trust manifests his essential tools also in the further and different case, when a

² For a further close examination see DOGLIOTTI M. e BRAUN A., *Il trust nel diritto delle persone e della famiglia*, Milano, 2003; DOGLIOTTI M., *Trust e amministrazione dei beni del minore*, in *Trust e attività fiduciarie*, 2004; DOGLIOTTI M. e PICCALUGA F., *I trust nella crisi della famiglia*, in DOGLIOTTI M. e BRAUN A., *Il trust nel diritto delle persone e della famiglia*, Milano, 2003; FERRANDO G. (cur.), *L'amministrazione di sostegno*, Milano, 2005; LA TORRE G., *Trust in favore dei disabili*, in LIPPARINI, L. *Trust, interesse del minore e ruolo del giudice tutelare*, in *Trust e attività fiduciarie*, 2004; LUPOI M., *Trusts*, Milano, 2000; PAZÈ P., *L'amministrazione di sostegno*, in www.altalex.com, 8th december 2004; ROSSETTI M., MORETTI M. e MORETTI C., *L'amministrazione di sostegno e la nuova disciplina dell'interdizione e dell'inabilitazione*, Milano, 2004; SPALLAROSSA M.R., *Trust e soggetti deboli*, in DOGLIOTTI M. e BRAUN A. (cur.), *Il trust nel diritto delle persone e della famiglia*, Milano, 2003; SPALLAROSSA M.R., *Amministrazione di sostegno, interdizione, trust: spunti per un confronto*, in *Trust e attività fiduciarie*, 2006; VENCHIARUTTI A., *La protezione dei soggetti deboli*, *Trust e amministrazione di sostegno*, in *Trust e attività fiduciarie*, 2006.

person today fully able and, therefore, not included in the category of weak subjects, intends to guarantee himself a suitable guardianship and a suitable quality of life in the case of a future incapability, consequent to illnesses, traumas, accidents, old age.

The trust can also find effective application within the crisis of the family, where "weak subjects" can be considered both children and the spouse, who is the beneficiary of the right of maintenance in the agreement or in the judge decision concerning separation or divorce.

On the 8th of March 2005 and the 20th of December 2005 the Tribunale di Milano and the Tribunale di Pordenone have confirmed by a decree two different agreement of separation of two married couple that contemplated the institution of a trust, concerning assets purchased by the spouses during the marriage, which have become a segregate estate, whose beneficiaries were the under 18 children of the couples³.

Generally, we can say that quite often conflicts between spouses also continue after the provision of separation or divorce, especially in order to the payment of the maintenance to the other consort and of children, which become an effective tool of "revenge" of the consort forced⁴.

In conclusion, it seems that Courts in Italy are giving to a common law model, as the trust, a practical function, that the legislation hasn't given before.

In other words we haven't a statutory rule on family trust and on trust in the interest of weak individuals, but we have solutions to concrete problems, coming from interested parties and recognised by Courts.

³ For an examination of both these precedents see M. LUPOI, *La giurisprudenza italiana sul trust*, 2006, Ipsoa, pp. 81 and ss. for the first one and pp. 31 and ss. for the second.

⁴ Tribunale di Milano, February 23rd 2005; the Court has declared that can be confirmed by a judge an agreement of consensual separation, that establish a trust in which the settlor (one spouse) - to satisfy the housing demands of the under 18 daughter - confers some assets of his ownership, with the expressed provision that he will transfer the same assets in property to his daughter when she'll be thirty years old.