

# The Italian Law "After Us" nr. 112/2016 and Protection Measures for Persons with Severe Disabilities and without Family Support

**De Marco Eusebio<sup>1</sup>**

*Accountant in Bari (Italy)*

**Dibari Patrizia<sup>2</sup>**

*Lawyer in Bari (Italy)*

**Scalera Francesco<sup>3</sup>**

*University of Bari (Italy)*

## Abstract

The Italian Law named "After Us" nr. 112/2016 regulates protection measures for persons with severe disabilities and without family support. It establishes a fund for the implementation of services programs to support independent living in homes or apartment-groups, in order to prevent the isolation of people with disabilities and supporting the temporary stay outside the family context in case of emergency situations. It is also intended also to the creation of family-type accommodation and co-housing to share with the help of people with disabilities. It provides tax relief in case of payments by private individuals and for the stipulation of insurance policies in favor of persons with severe disabilities by establishing the deductibility of the costs incurred for entering into a life insurance policy for the benefit of the parent who is the son with disabilities' severe. Also It requires the tax exemption on inheritance and donations on the transfers of assets and rights in favor of people with severe disabilities, vested in trust or subject to asset separation tools such as liens or special funds composed of assets with separation liens and regulated by the agreement trust. The aim is to further the Italian Law on disabled persons and the use of legal instruments specified in the Act, made to take the place of both parents of severely disabled persons, to implement well-being, social inclusion and empowerment of persons with disabilities, in according the principles of the Charter of fundamental Rights of the European Union and the United Nations Convention on the Rights of persons with disabilities and the Italian Constitution.

**Key words:** After Us, protection measures, disabilities, insurance policy, trust, tax relief.

## 1. INTRODUCTION

The Italian Law named "After Us" nr. 112/2016<sup>4</sup> regulates protection measures for persons with severe disabilities and without family support and implement the principles established in the Constitution of the Italian Republic, the Charter of Fundamental Rights of the European Union and the Convention of Nations United on the rights of persons with disabilities.<sup>5 6 7</sup>

<sup>1</sup> eusebiodemarco@iol.it

<sup>2</sup> patriziadibari@iol.it

<sup>3</sup> Lecturer in Strategy and Business Policy and International Management - Department of Economics and Finance - University of Bari "Aldo Moro", Italy; Address: P. Amedeo Street 160 -70122, Bari; e-mail: roby\_sca@virgilio.it Mobile:+39 335-7817952

<sup>4</sup> The Law nr. 112/16, published in Official Gazette 146 of 24.6.2016. With Decree of 23.11.2016, published in the Official Gazette 45 of the 23.02.2017, the Ministry of Labor and Social Policy in cooperation with the Ministry of Economy and Finance of 23.11.2016 gave concrete implementation art. 2 par. 2 L.nr.112/16.

<sup>5</sup> Art. 3 par.2 Constitution of the Italian Republic: "And 'duty of the Republic to remove all economic and social obstacles which limit the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the political, economic and social development of the country".

<sup>6</sup> The Charter was officially proclaimed in Nice in December 2000 by the European Parliament, the Council and the Commission. Only with the entry into force of the Lisbon Treaty in December 2009 it became legally binding in the EU. Article 26 of the Charter, concerning the integration of people with disabilities, states: "The Union recognizes and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in community life".

<sup>7</sup> The Law nr.18/ '09, published in the Official Gazette nr. 61 of 14 March 2009, ratified and made executive the Convention on the Rights of Persons with Disabilities, which entered into force on 3 May 2008. The purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities, and to promote respect for their inherent dignity. Article. 3 - general principles: "a) Respect for inherent dignity, individual autonomy - including the freedom to make their own choices - and independence of persons; b) Non-discrimination; c) Full and effective participation and inclusion in society; d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; e) Equality of opportunity; f) The accessibility; g) Equality between men and women; h) Respect for the development of the capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities". Article 19 recognizes the right of disabled people to independent living and inclusion in the community: "The States Parties to this Convention recognize the equal right of all persons with disabilities live in the community, with the same freedom of choice of other people, and take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that: a) people with disabilities have the opportunity to choose, on an equal basis with others, their place of residence and where and with whom they live and are not obliged to live in a particular living arrangement; b) persons with disabilities have access to a range of home support services, residential and other community, including personal assistance necessary to support living at internal community and to fit inside and prevent them from isolation or segregation; c) Community services and facilities for the general population are made available, on an equal basis with others, of persons with disabilities and are responsive to their needs".

## 2. THE LAW "AFTER US" NR. 112/'16

The Law nr.112/'16 integrates to care and support, already existing in other Italian laws, for the protection people with disabilities'.

It promotes well-being, social inclusion and the full autonomy of people with disabilities' serious lack of family support, missing both parents or if any are not able to sustain the responsibilities of their assistance, in the present and into the future, by gradually taking charge of the person concerned already in existence during the life of the parents.<sup>8 9</sup>

The Law nr. 112/'16 established a fund for the implementation of services programs to support independent living in homes or apartment-groups, in order to prevent the isolation of people with disabilities and supporting the temporary stay outside the family context in case of emergency situations. It intended also to the creation of family-type accommodation and co-housing to share with the help of people with disabilities.<sup>10</sup>

It also adopts a policy of social support with the provision of tax benefits to private entities that provide money or take out insurance policies in favor of people with severe disabilities.

The tax benefits consist of the deductibility of expenses incurred for insurance policies for the protection of persons with severe disabilities as stated in article 5: 'As from the tax year in progress at December 31, 2016, the 'amount of EUR 530 and' raised to EUR 750 on premiums for insurance and concerning the risk of death for the protection of persons with severe disabilities as defined in Article 3, paragraph 3, of the law 5 February 1992, n. 104 ascertained in the manner referred to in Article 4 of the same Law'.

The Law nr. 112/'16, however, cares of persons with disabilities. They need proper management of the assets in their own interest, including through family asset that you want to allocate.

It provides a double benefit for people with disabilities. It establishes, article 6, that the transfers of assets and rights in favor of people with severe disabilities are exempt from tax if transferred in trust or subject to asset separation tools such as: 'the allocation constraints of Article 2645-ter of the civil code and special funds, compounds of asset subjected to allocation constraints and regulated by a fiduciary trust contract also in favor of non-profit organizations of utilities' share referred to in Article 10, paragraph 1 of legislative decree 4 December 1997, nr.460, recognized as legal entities, it included mainly in the charity sector as referred to in paragraph 1, letter a), nr. 3), Article 10 of Legislative Decree 4 December 1997, nr. 460, also pursuant to paragraph 2-bis of the same article, in favor of people with disabilities 'serious, according to the procedures' and the conditions laid down in Articles 5 and 6 of this Law'.

Therefore, the Italian Legislature uses the legal instruments identified in Law nr. 112/'16 to ensure the realization of the best possible existence of people with disabilities, regardless of ability and existence of parents providing that their use is subject to special discounts.<sup>11</sup>

<sup>8</sup> Article 1, par 2 L. nr.112/'16: "This Act regulates measures of assistance, care and protection of people in the greater interest with disabilities 'grave, not determined by natural aging or medical conditions related to senility' , devoid of family support as missing of both parents or because 'the same are not able to provide the appropriate parental support, as well as' in view of the absence of family support, through the progressive taking charge of the person concerned already 'existence during the life of the parents. Those measures also to avoid institutionalization, they are integrated with the involvement of stakeholders in individual projects referred to in Article 14 of the law 8 November 2000, n. 328, respecting the will 'of the people with disabilities' grave, where possible, their parents or protecting consumer interests. The state of disability 'serious, in Article 3, paragraph 3, of the law 5 February 1992, n. 104, and ascertained according Article 4 of the same law. There remain however subject to the basic level of care and the other to care and support provided by current legislation in favor of people with disabilities".

<sup>9</sup> Art. 3 L. nr.104/'92. (Subjects entitled) 1. The person who presents a physical, psychic or sensory, stable or progressive, and that 'due to difficulty 'learning, relationships or work integration and such as to determine a disadvantage process or social marginalization. 2. The disabled person is entitled to benefits established in his favor in relation to the nature and size of the impairment, the ability 'residual individual and overall effectiveness of rehabilitation therapies. 3. Should the disabled person handicapped, single or multiple, has reduced personal autonomy, age-related', in order to make necessary a permanent care intervention, continuous and global in the individual sphere or in that report, the situation assumes connotation of severity'. The current situations of gravity 'determine priorities' in the programs and interventions of public services".

<sup>10</sup> Art. 3 L. nr.104/'92. (Subjects entitled) 1. The person who presents a physical, psychic or sensory, stable or progressive, and that 'due to difficulty 'learning, relationships or work integration and such as to determine a disadvantage process or social marginalization. 2. The disabled person is entitled to benefits established in his favor in relation to the nature and size of the impairment, the ability 'residual individual and overall effectiveness of rehabilitation therapies. 3. Should the disabled person handicapped, single or multiple, has reduced personal autonomy, age-related', in order to make necessary a permanent care intervention, continuous and global in the individual sphere or in that report, the situation assumes connotation of severity'. The current situations of gravity 'determine priorities' in the programs and interventions of public services".

<sup>11</sup> G. La Torre, Trust e "Dopo di NOI", Quaderni della Rivista "Trusts e attività fiduciarie" n.12, Wolter Kluwer, Milano 2016.

### 3. TRUST, ALLOCATION CONSTRAINTS BY ARTICLE 2645 TER CIVIL CODE, FIDUCIARY TRUST CONTRACT

A trust is a legal instrument of English origin governed by common law and applicable in Italy following the ratification of the Hague Convention of 1985 made executive in Italy with Law 364 of 16 October 1989 applicable to Trusts and on their Recognition and It entered into force on 1.1.1992.<sup>12</sup>

It provides protection assets with a trust relationship between the settlor and the trustee that administers it for the benefit of a beneficiary or to achieve a purpose according to the indications that the settlor establishes the act of establishing trust.<sup>13</sup>

The trust is a flexible legal instrument characterized by a typical effect: segregation, the 'no confusion between the transferred rights and other assets that make up the assets of the entity to which the right has been transferred to constitute a separate fund and are not included part of the trustee's own estate'<sup>14</sup> It involves three main parties: settlor, trustee and the beneficiaries.

The settlor gives the trust assets and rights in favor of a third party or for the specific purpose; generally, in trust for the disabled, the settlors are the parents or the immediate family.

The trustee is the formal owner of the assets transferred in trust. He is responsible for the management and administration of the trust.

He manages and has the trust assets to beneficiaries in accordance with instructions issued in the trust within the law and in accordance with the provisions of the trust.<sup>15</sup>

The beneficiaries have all the rights to the trustee and they have all benefits of the fund trust.

In this regard it stands out among the beneficiaries of the income they receive each utility resulting from the administration of the trust during his lifetime and the final beneficiaries who will have the trust fund at the end of the trust.

In a trust "After Us" the beneficiaries of income are the people disabled and the duration of the trust coincides with the duration of life of people with disabilities.

The Trust provides the figure of the Guardian that supervises the actions of the trustee in the interest of the beneficiary or for the realization of the aim. The Guardian is required in Law nr. 112/16.

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<sup>12</sup> M. Lupoi, Trusts, Giuffrè, Milano 1997; M. Lupoi, Trusts, Giuffrè, Milano 2001. The three models of the English trust, international and civil law are characterized, in terms comparative, five elements: 1) transfer of a right by the settlor to the trustee or the unilateral declaration issued by the settlor, trustee that he makes a law that already belongs to him; 2) segregation that is no confusion between the transferred rights and other assets that make up the assets of the trustee; 3) entrust: the loss of all faculties of the settlor as a natural result of the transfer; 4) purpose: the existence of a purpose trust, which may or may not relate to beneficiaries; 5) trust: the imposition of a connotation of trust on the exercise of rights of the trustee; M. Lupoi, Trust / II Hague Convention - Apostille of renovation, XIV Legal Encyclopedia 2006; P. Panico, International trust laws, Oxford University press, 2010; D. J. Hayton - P. Matthews - C. Mitchell, Law of Trusts and Trustees, 18th Edition, London 2010; M. Lupoi, M. Lupoi, Istituzioni del diritto dei trust e degli affidamenti fiduciari, Cedam, 2016.

<sup>13</sup> Article 2 Hague Convention of 1985 made executive in Italy with Law nr.364/89 applicable to Trusts and on their Recognition and entered into force on 1.1.1992 provides: 'For the purposes of this Convention, for trusts It means the legal relationship established by a person. the constituent - with inter vivos or mortis causa - when assets have been placed under the control of a trustee in the interest of a beneficiary or for the specific purpose. The trust has the following characteristics: a) the assets constitute a separate fund and are not part of the trustee's own estate; b) the trust assets are held in the name of the trustee or another person on behalf of the trustee; c) the trustee has the power and the duty, of which he is accountable, to manage, employ or dispose of the assets under the terms of the trust and the special duties imposed by law. The fact that the settlor of certain prerogatives or that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust'.

<sup>14</sup> To protect trust assets, the Convention provides a special distinction from the assets of the entity which takes the capacity of trustee, in particular: "a) the assets constitute a separate fund and are not part of the trustee's own estate; In Article. 11 1st and 2nd paragraph of the Convention by clarifying the rules for the recognition of trusts, such protection rules of the trust but also in the interests of bona fide third parties (letter, d). "A trust created in accordance with the law specified by the preceding Chapter shall be recognized as a trust. This recognition implies at least that the trust assets are separate from the personal assets of the trustee, the trustee has the capacity to sue and be sued, or to appear as a trustee before a notary public or any person acting a public authority. Where the law applicable to the trust requires or provides, such recognition shall imply, a) that personal creditors of the trustee shall have no recourse against the trust assets; b) that the trust assets are separate from the assets of the trustee in insolvency the latter or on its own bankruptcy; c) that the trust assets do not form part of the property regime or of the succession of the trustee goods; d) that the claim of the trust assets is permitted if the trustee, in violation of the obligations arising from the trust, has confused the trust assets with her and obligations of any third party holder of the trust assets shall remain subject to the law determined by the conflict rules of the hole". The peculiar institute legal feature is, therefore, within the particular regime of trust property, the C.D. segregation of trust assets.

<sup>15</sup> The law assigns the role of trustee also to the non-profit organization. The large social economy has generated highly specialized workers, especially to assist people with disabilities'; G. P. D'Amato, Codice degli enti non profit, Halley, Salerno 2008; V. Bancone, Le Organizzazioni non profit, Quaderni della Rassegna di diritto civile, Edizioni Scientifiche Italiane, Napoli 2011.

The allocation constraints is provided for by Article 2645 ter Civil Code<sup>16</sup>. The transcription of the allocation constraints is effective against third parties. It happens that the 'bound' assets and their fruits are subtracted execution of actions due to external debts to the constraint.

The article 2645 ter Civil Code separates the property, object of the constraint, from the general assets of the person who owns the property to achieve the purpose<sup>17</sup>.

Here are some differences with the trust.

The allocation constraints:

- a) has real effects only; the trust has effects both real and required;
- b) the cause must necessarily be expressed and is the subject of judgment control; the judgment control is not required in trust, saves the lawfulness and not contrary to public policy;
- c) is static because it does not transfer the property, the trust is dynamic because it involves the transfer of ownership for operators grounds;
- d) is precluded from the alienation of property. There isn't the program and there isn't guarantee of purpose; the trust does not prevent the alienation of term assets as necessary to put the proceeds available to people with disabilities which normally benefit from the income of the assets;
- e) the owner can take action against the operator in the trust no;
- f) there isn't the discipline of management, it there is in trust;
- g) has only relates to immovable and movable property registered or registered securities; the trust may cover all the assets: furniture, real estate, shares cash or shares, usufruct, bare ownership, totality of assets, collections, works of art and also the credits;
- h) is determined over time; the trust can not be; in the Law 'After us' the length coincides with the life of the disabled person;
- i) the beneficiary is determined or determinable; it isn't in trust if the purpose trust;
- j) requires legal form, the trust simply writing but it is required in the Law 'After us'.

The fiduciary trust contract allows a person to blind property and not in order to allocate to beneficiaries to be managed by a third party contractor, in implementation of a program provided by the contractor.

It is not governed by the law being currently processing a legal doctrine matrix but it scored its regulatory recognition in our system with this Law.

It is a new type of contract that operates alongside the institutions of the trust and the allocation constraints by article 2645 ter Civil Code, able to achieve separate assets of negotiating source<sup>18</sup>.

Here are some differences with the trust and the allocation constraints by article 2645 ter Civil Code. The fiduciary trust contract:

- a) it allows to overcome the disadvantages of using the trust that requires a deep understanding of regulating foreign law;
- b) it is a contract and not a unilateral legal unlike the trust;
- c) it allows to realize the program established through the legal institutions of the Italian law (and not international), thereby remedying the inefficiencies arising from the use of traditional institutions of our legal system;<sup>19</sup>
- d) it imposes the fiduciary obligation by the operator and it provides that are subject to the same all assets;

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<sup>16</sup> Article.2645 ter cc (Transcript of acts destination for the realization of interests worthy of protection related to people with disabilities, to governments, or other organizations or individuals) "acts in public form in which immovable or movable property registered in public records are intended for a period not exceeding ninety years or for the duration of life of the beneficiary natural person, the realization of interests worthy of protection related to people with disabilities, to governments, or other organizations or individuals pursuant to Article 1322, second paragraph, can be transcribed in order to make effective against third parties the compulsory destination; for the realization of these interests may act, in addition to conferring, any interested also during the life of the transferring itself. The assets contributed and their fruit can only be used for the realization of the end of the target and can be the subject of execution, except as provided in Article 2915, first paragraph, only to debts incurred for this purpose".

<sup>17</sup> G. Vettori, *Atti di destinazione e trust* (Art. 2645 ter del codice civile), Cedam, Padova 2008.

<sup>18</sup> M. Lupoi, *Istituzioni del diritto dei trust e degli affidamenti fiduciari*, 3ª Edizione rinnovata, Cedam, 2016; M. Lupoi, *Il contratto di affidamento fiduciario*, Giuffrè Editore 2014.

<sup>19</sup> M. Lupoi, *I trust nel diritto civile*, Giuffrè, 2004.

## 5. CONCLUSION

The mentioned instruments are able to meet the needs of protection needs of people with disabilities.

The Law nr. 112 /16 'After Us' encourages the establishment of these tools. It provides a concrete solution for the support and care of of people with disabilities during the existence of the parents and after their death the same.

It also establishes the requirement to control the realization of the order which the assets will be allocated.

This Law identifies the mentioned tools considering them suitable to the needs of those looking for a deed that can detail and unequivocally defining already now the allocation of resources, public or private and family property.

The article. 6 co.3 states that the exemptions and the benefits are permissible if there is together the following conditions: ' the trust or and the allocation constraints by article 2645 ter Civil Code. The fiduciary trust contract are made to place public ".The lett.f) states that the menzioned tools identify the person responsible at the customs control obligations imposed. 'This person must be identifiable for the duration of the trust or the allocation constraints by article 2645 ter Civil Code or the fiduciary trust contract'.

The conditions for the tax benefits are the following: the trust or the allocation constraints by article 2645 ter Civil Code or the fiduciary trust contract:

- a) must describe the functionality and the specific needs of people with severe disabilities, in favor of which are established and designate welfare activities necessary to ensure the care and satisfaction of needs of people with severe disabilities, including activities aimed at reducing the risk institutionalization of the same persons with severe disabilities (article 6 paragraph 3 lett. b);
- b) must identify, respectively, the trustee's obligations, the trustee and manager, with regard to the plan of life and the well-being goals that it must promote in favor of persons with severe disabilities, by adopting all appropriate measures to safeguard their rights and must indicate the obligations and pays reporting mode of the trustee or the trustee or manager (article 6 paragraph 3 lett. c).
- c) must be established the final date of the duration of the trust or special funds or the target constraint on the date of death of the person with severe disability and must be established the target of remaining assets (article 6 paragraph 3 lett. g ) h).

The Law 'After Us' establishes the subjective range for the application of the discipline that identify people with severe disabilities and objective range that identifies the exclusive aim of social inclusion, care and the care of persons with severe disabilities, in favor of which are set up.

Such aims should be expressly stated in the menzioned instruments.

As previously said, the Law "After us" recognizes special tax benefits listed below:

- a) exemption from tax for the assets and the rights subjected to the trust or to the allocation constraints by article 2645 ter Civil Code or to the fiduciary trust contract set up for persons with severe disabilities;
- b) application fixed registration tax rate exemption from tax for the assets and the rights subjected to the trust or the allocation constraints by article 2645 ter Civil Code or the fiduciary trust contract set up for persons with severe disabilities;
- (Euro 200) and land registry (cadastral and mortgage Euro 200 Euro 200) to transfers of the assets and the rights subjected to the trust or to the allocation constraints by article 2645 ter Civil Code or to the fiduciary trust contract;
- c) exemption from stamp duty to records, documents, instances, contracts, as well as declared conform copies, extracts, certificates, declarations and statements of the trust or the allocation constraints by article 2645 ter Civil Code or the fiduciary trust contract;
- d) reduced rates, exemptions or exemptions for IMU established by the municipalities, in the case of real estate and real rights with respect to the assets and the rights subjected to the trust or the allocation constraints by article 2645 ter Civil Code or the fiduciary trust contract.

It provides for the deduction from the total income of the donor within the 20% limit of the total declared income and the maximum of € 100,000 per annum measure. This facility shall be applicable from the tax year 2016.

The article 6 paragraph 3 lett. c) provides that when the disabled person dies, compared with subjects who established the trust, the transfers of assets and property rights in favor of these subjects have the same benefits referred to in this Law and registry taxes, mortgage and land will apply a fixed amount.

Instead, the article 6 paragraph 5) provides that when the disabled dies the transfer of the remaining assets then to a different subject will be subject to taxes provided by Law nr. 262/06 20given the family relationship between the settlor, the settlor and beneficiaries of the remaining assets<sup>21</sup>.

<sup>20</sup> Decree-Law 3 October 2006, n. 262 "Urgent measures concerning tax and financial" published in the Official Gazette nr.230/06.

<sup>21</sup> A. Trombetta, "Dopo di noi", misure fiscali per i disabili gravi senza familiari, Fonte: Fisco Oggi, Rivista Telematica dell'Agenzia delle Entrate, 2016.

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