

The protagonist of the trust: the guardian

Within the trust, the guardian is a non-mandatory figure, but at the same time, it must be considered fundamental. These two statements may seem contradictory and therefore require clarification. It is a non-mandatory figure because we can establish a trust without the need to appoint a guardian unless, in specific situations, its necessary presence is required by the chosen regulatory law of the settlor.

For example, Article 52 of the trust law of San Marino, to which I refer for convenience as it is written in Italian, establishes that "The instrument establishing a purpose trust provides for the office of the guardian," while "The instrument establishing a beneficiary trust may provide for the office of the guardian, but it must provide for it for the period during which there are no beneficiaries in existence." Two cases are identified, therefore, in which the guardian must necessarily be present.

Regardless of these situations of "mandatory" presence, in every trust, it will generally be appropriate for one or more guardians to be appointed by the settlor.

The guardian (in English, protector) has the task of verifying that the trustee does not engage in behavior contrary to the purposes of the trust and manages its assets with the aim of implementing the program outlined by the settlor in the instrument of establishment.

In the law of San Marino (Article 1, letter k), the guardian is defined as "the subject who exercises control over the operation of the trustee or the other tasks delegated to him by the instrument of establishment." The presence of the guardian is fundamental, first of all, because it is the guardian who must act against the trustee in case of default: we remember, in fact, that with the establishment of the trust, the settlor must "step out" and has no legal remedies against the trustee if the latter behaves non-compliant with the obligations arising from the instrument of establishment.

The powers attributed to the guardian can be more or less extensive, depending on the choices made in the instrument of establishment: he may be called upon to give his consent in relation to certain decisions taken by the trustee, give directives and instructions to the trustee regarding the performance of specific acts, or exercise directly dispositional or managerial powers.

For "important" decisions, it is appropriate for the trustee to obtain the consent of the guardian to act: this may, for example, be the case of the acquisition or disposal of companies and shareholdings in control or affiliated companies as well as real estate, or even for financial transactions above a certain threshold value.

For other cases, instead, the obligation of consultation may be provided: the trustee must consult the guardian, but is not bound by his indications. This could be provided for in the instrument of establishment, for example, for the granting of non-real estate guarantees to third parties.

Normally, an important function is attributed to the guardian: that of having the power to revoke the trustee and appoint his "substitute" if the latter fails for any reason (such as resignation, death, or incapacity if a natural person, or submission to insolvency proceedings if a legal person).

In turn, the instrument of establishment generally provides that the guardian can be revoked and replaced by the settlor.

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