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School of Law, University of Tartu, Estonia

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LIST OF ORIGINAL PUBLICATIONS

This dissertation is based on the following publications:

1. K. Sepp, U. Kaarlep, "The Estonian Foundation – What is Missing for It to Be A Well-Designed Wealth-Management Vehicle for Local and Foreign High-Net-Worth Individuals?", Juridica International, Vol 24 (2016) 96–104.
2. K. Sepp, "Legal Arrangements Similar to Trusts in Estonia under the EU's Anti-money laundering Directive", Juridica International, Vol 26 (2017) 56–65.
3. K. Sepp, U. Kaarlep, T. Kuleli, "Unblocking the bottlenecks of the Estonian wealth-management scene for private foundations", Trusts & Trustees, Vol 24, Issue 6 (2018), 558–564.
4. K. Sepp, "Estonian 'trust' – same same but different?", Trusts & Trustees, Vol 24, Issue 9 (2018), 891–900.
5. K. Sepp, "Estate planning beyond the grave: legal instruments comparable to testamentary trusts in Estonian law", Trusts & Trustees, Vol 25, Issue 3 (2019), 303–311.

ANALYTICAL COMPENDIUM TO A CUMULATIVE DISSERTATION

1. Introduction

1.1 Posing the research problem

Succession and inheritance issues, concerns over wealth taxes and matters related to the global economy have been identified as the three main factors threatening wealth creation over the past 10 years and for the coming decade.[1] In many countries, trusts are used to cater for these concerns, as they can ensure the undivided, secure, and profitable placement of assets. In short, a trust has been described as "an equitable obligation, binding a person (called a trustee) to deal with property (called trust property) owned by him as a separate fund, distinct from his own private property, for the benefit of persons (called beneficiaries or, in older cases, cestuis que trust) of whom he may himself be one, and any one of whom may enforce the obligation"[2] (a more thorough description of the trust concept will follow in subsection 1.4.1).

Trusts have long played a significant role in common law[3] systems such as England, the United States and most Commonwealth countries. The most important early trust-like institution in England was the feoffment to uses, a conveyance of land to someone (the feoffee) with a provision that the land would be held for the use (*ad opus*) of a beneficiary (the *cestui que use*). Various examples have been offered for the practice, including the Crusaders (who conveyed their land to a trustee to be held to the use of their family while they were in the military expedition); Franciscan Friars, whose vows of poverty prevented them from owning property, which resulted in conveying the land to the fiduciaries to be held to the use of the friars; avoidance of feudal dues; and evading the common law rule that prohibited testamentary devises of freehold

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1 See A. Shirley (ed.). Wealth Report. Knight Frank 2016, p. 10. Available at: https://content.knightfrank.com/research/83/documents/en/wealth-report-2016-3579.pdf (most recently accessed on 8.1.2020).

2 D. Hayton, P. Matthews, C. Mitchell. Underhill and Hayton: Law of Trusts and Trustees 18th ed. LexisNexis Butterworths 2010, p. 2. This definition has also been utilized by English courts – see D.W.M. Waters. The Institution of the Trust in Civil and Common Law. – Collected Courses, Volume 252, Hague Academy of International Law, Martinus Nijhoff Publishers 1995, p. 215. Dr Waters also brings out other attempts to define the trust in the same paper. For more definitions, see e.g., M. McAuley. Truth and reconciliation: Notions of property in Lousiana's Civil and Trust Codes. – in L. Smith (ed.). Re-imagining the Trust: Trusts in Civil Law. Cambridge University Press 2012, p. 140 ff.

3 The term "common law" is used here to identify the legal tradition rather than the legal system within it. In other words, common law is mentioned as the opposite of civil law and not equity.

land. It can be said that the English use provided a way around inconveniences in the law[4].

There are many works that have aimed to demonstrate historical links and a common core between the English trust and continental fiduciary arrangements: as civil law lawyers usually try to trace the roots of any legal phenomenon back to Roman times, Roman law, especially the institute of *fideicommissum*, was long regarded as the original source of trust[5]. *Fideicommissum* was a testamentary disposition by which a person who gave something to another imposed on the latter the obligation of transferring it to a third person. It was a clever *fraus legis fracta* that enabled the transfer of property by will to those excluded from inheriting by law[6] or the holding of certain property within family for generations[7]. Until the time of Augustus there were no legal means of enforcing the *fideicommissum* – it depended on *fides* (faith or trust) between the parties.[8] Another Roman institute – *fiducia*, which, too, was based on interpersonal trust, has also been seen as a possible precursor to the trusts. There were two types of fiducia: the *fiducia cum amico* under which property was transferred to a friend, e.g. for safekeeping until the transferor returned; and the *fiducia cum creditore* under which property was transferred to a creditor as security for performance of some obligation, subject to being re-transferred to the transferor on completion of the obligation.[9]

In contrast to the prevailing belief that the trusts originate from Roman law, in the 19th century, the theory that the English use, in its essence, corresponds to the institute of Salman of early Germanic law, began to spread.[10] Like the fideicommisioner, the Salman(n) was an intermediary who was given some property to hand over to someone else. Again, the initial reasons were shortcomings in the law of succession, namely the lack of testamentary freedom. Later, the fiduciary was used when one would, e.g. travel, with reasonable belief that the traveller would not return.[11]

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4 S. F. French, G. Korngold. Cases and Text on Property. Wolters Kluwer 2019, p. 313; R. Helmholz. Trusts in the English Ecclesiastical Courts 1300–1640. – in R. Helmholz, R. Zimmermann (eds.) *Itinera Fiduciae*: Trust and Treuhand in Historical Perspective. Duncker & Humblot 1998, pp. 155–157.

5 G. B. Verbit. The Origins of the Trust. Xlibris Corporation 2002, p. 77 ff. (referring to Bacon and Blackstone); See also R. Helmholz, R. Zimmermann. Views of Trust and *Treuhand*: An Introduction. – in R. Helmholz, R. Zimmermann (Note 4), p. 31 ff.

6 D. Johnston. Trusts and Trust-like Devices in Roman law. – In R. Helmholz, R. Zimmermann (Note 4), p. 45 ff.

7 Ibid, p. 49.

8 Ibid, p. 46; Verbit (Note 5), pp. 78–79.

9 P. Stec. Fiducia in an Emerging Economy. – in E. Cooke (ed.). Modern Studies in Property Law Vol 2. Hart Publishing 2003, p. 44.

10 R. Helmholz, R. Zimmermann. Views of Trust and *Treuhand*: An Introduction. – in R. Helmholz, R. Zimmermann (Note 4), pp. 32–33.

11 Verbit (Note 5), p. 97 ff.

Based on the above examples, it can be said that there has always been a need for institutions that involve fiduciary ownership, and nothing seems to have changed. But even though trusts and the various similar civil law institutions might have commonalities or, indeed, the same ancestors, it has been generally agreed that it was in common law countries – starting from English law of the 12–13th century – where the trusts developed into such a universal, flexible and efficient institution to which there is no equivalent in civil law countries, as the similar institutes in civil law countries usually (or at least originally) do not bear all the elements of a trust. This is why since the 20th century the trust concept has generated more and more interest beyond common law jurisdictions, and civil law countries have also started using trusts or devices inspired by trusts. In the first half of the century, Japan, Colombia, Panama, Liechtenstein, Mexico and Puerto Rico started either by enacting a set of provisions introducing the trust or developing or reforming existing fiduciary devices.[12] Later, countries like Luxembourg, France, San Marino, Romania, Hungary and the Czech Republic in Europe, China and Taiwan in Asia, several Latin-American countries[13] and Quebec[14] in Canada implemented trusts or trust-like devices. And then there are countries like Italy[15] and Switzerland[16] that do not have their "own" trust law, but that nevertheless have a prospering trust industry as they have ratified the Hague Convention on the Law Applicable to Trusts and on their Recognition,[17] which facilitates the recognition and use of foreign trusts. Even the Draft Common Frame of Reference (DCFR)[18], which contains Pinciples, Definitions and Model Rules of European Private Law, has included Book X on trusts in order to "enhance freedom by opening up possibilities for setting property aside for

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[12] A. Braun. The State of the Art of Comparative Research in the Area of Trusts. – in M. Graziadei, L.D. Smith (eds.). Comparative Property Law: Global Perspectives. Cheltenham: Edward Elgar Publishing 2016, p. 130, 122 ff.

[13] Ibid, p. 128.

[14] G. Fortin. How the Province of Quebec Absorbs the Concept of the Trust – Part I – Trusts & Trustees, Volume 5, Issue 2, January 1999, pp. 22–26.

[15] See, e.g., M. Lupoi. Trusts in Italy as a living comparative law laboratory. – Trusts & Trustees, Volume 19, Issue 3–4, April/May 2013, pp. 302–308.

[16] D. Jakob. Will-Substitutes in Switzerland and Liechtenstein. – in A. Braun, A. Röthel (eds.) Passing Wealth on Death: Will-Substitutes in Comparative Perspective, Hart Publishing 2016, p. 195.

[17] Available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=59 (23.1.2020). The following countries have ratified the convention: Australia, Cyprus, Canada (8 provinces only), China (Hong Kong only), Italy, Luxembourg, Liechtenstein, Malta, Monaco, the Netherlands (European territory only), Panama, San Marino, Switzerland and the United Kingdom (including 12 dependent territories/crown dependencies).

[18] Which, however, is an academically, but not politically authorized text. C. von Bar, E. Clive, H. Schulte-Nölke (eds.). Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), outline edition, 2009. Available at: https://www.law.kuleuven.be/personal/mstorme/2009_02_DCFR_OutlineEdition.pdf (8.1.2020).

particular purposes (commercial, familial or charitable) in a flexible way which has been much used and much valued in some systems for a very long time and is gradually spreading to others".[19]

During almost thirty years since the restoration of independence, a number of Estonians have finally created a set of assets that, if managed in a sound and reasonable manner, would be sufficient to ensure regular income also for future generations. But when searching for solutions for asset planning, locals seem to prefer to use schemes offered by other countries[20] – local law offices mediate foreign trustees and private foundations (needless to mention that Estonia's export of the relevant service is a non-issue today). This is because the solutions for asset management provided by Estonian law are not sufficient to cover people's needs. That this area is problematic is illustrated by the practice of notaries,[21] law offices,[22] the analysis-concept of the corporate law review team,[23] the activities of certain financial sector representative organisations[24] and the author's own practice as a notary candidate/legal adviser.

Since finding a suitable asset management solution is problematic in Estonia and trusts are one of the most popular wealth management tools in the world[25], which the common law lawyers even regard as "the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence[26]" and which civil law states have increasingly considered necessary to introduce, it is worthwhile exploring and comparing the trusts to the current solutions in Estonia that could be used for the same purposes. Even if it cannot be claimed that trusts

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[19] Ibid p. 71.

[20] R. Kreek. *Ettevõtlusvarade pärimise teema Eestis vähetuntud* (The subject of inheritance of entrepreneurial assets is little known in Estonia). – Äripäev 20.01.2011. Available at: https://www.aripaev.ee/uudised/2011/01/20/ettevotlusest-tulenevate-varade-parimise-teema-on-eestis-uus (25.1.2020); Request for clarification of Law Firm Varul to Ministry of Justice (Ministry of Justice document register reference 10-4/14-5618-1; registration date 2.7.2014).

[21] Opinion of the Chamber of Notaries 8.10.14. regarding amending the regulation related to foundations (Ministry of Justice document register reference 10-4/14-7735-1; registration date 08.10.2014); The inquiry of the Chamber of Notaries 11.09.18. regarding the institutes of the testamentary executor and preliminary/subsequent succession (Ministry of Justice document register reference 10-4/4851-1; registration date 12.07.2018); discussions in the notaries' internet forum and e-mails in notaries' e-mail list (materials in author's possession).

[22] Request for clarification of Law Firm Varul to Ministy of Justice (Note 20).

[23] Ministry of Justice. Analysis-concept of the corporate law review team. Tallinn 2018. Available at: https://www.just.ee/sites/www.just.ee/files/uhinguoiguse_revisjoni_analuus-kontseptsioon.pdf (8.1.2020), p. 163.

[24] Finance Estonia. Finance Estonia wants to bring investments of wealthy families to Estonia. Available at: http://www.financeestonia.eu/news/financeestonia-soovib-tuua-eestisse-varakate-perede-investeeringuid/ (8.1.2020).

[25] B. Harrington. From trustees to wealth managers. – in J. Cunliffe, G. Erreygers (eds.). Inherited Wealth, Justice and Equality. Routledge 2012, p. 196.

[26] D. Runciman, M. Ryan (eds.). F. W. Maitland: State, Trust and Corporation. Cambridge University Press 2003, p. 52.

are absolutely the best legal arrangement for family wealth planning[27], they are definitely one of the most suitable.

Therefore, the main **objective** of this dissertation is to find out whether and to what extent the asset management solutions in Estonian law make family wealth planning goals in a trust-like manner possible.

The first additional aim of the dissertation is to highlight the changes that need to be made to the existing legislation to cover the functions that family trusts cover in other jurisdictions. The second additional objective is to assess whether and to what extent existing trust-like arrangements in Estonian law should be subject to publicity for the purposes of the AML/CFT regulations of the EU – it is no secret that on the international scale, trusts have received negative attention as they have been used for unethical or illegal purposes, such as tax evasion and hiding property from creditors[28] and there has long been a concern that trusts can be used for money laundering and/or terrorist financing.[29] Consequently, directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 (AMLD4)[30] required that trustees of express trusts obtain and hold adequate, accurate and up-to-date information on beneficial ownership regarding the trust, make certain disclosures to counterparties and register the information in a central register (UBO register) (AMLD4 Art 31(1)(2)(4)). The same measures are applied to other types of legal arrangements "having a structure or functions similar to trusts" (AMLD4 Art 3(6)c), Art 31(8)).

In order to achieve the objective, the dissertation focuses upon the following **research questions**:

1. Are there succession law devices in Estonia that would make isolating the estate possible so that the third parties would have no direct impact on it?
2. Could a mandate contract be used for family wealth planning (in a trust-like manner) and what are its main shortcomings?

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[27] Especially compared to foundations – nowadays a potential settlor/founder can probably find in one jurisdiction a trust that perfectly meets his needs and a very similar foundation in another jurisdiction.

[28] See, e.g., N. Forbes Stowell *et al*. Wills, Asset Protection Trusts and Financial Crime. – in Journal of Forensic & Investigative Accounting Volume 9: Issue 1, January–June, 2017, pp. 585 – 605; OECD. Behind the Corporate Veil. Using Corporate Entities for Illicit Purposes, 2001. Available at: https://www.oecd.org/daf/ca/43703185.pdf (11.11.2019), p. 25 ff.

[29] Financial Action Task Force. The Misuse of Corporate Vehicles, Including Trust and Company Service Providers (2006). Available at: https://www.fatf-gafi.org/media/fatf/documents/reports/Misuse%20of%20Corporate%20Vehicles%20including%20Trusts%20and%20Company%20Services%20Providers.pdf (8.1.2020).

[30] Directive 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, 5.6.2015, L 141/73.

3. What are the legal barriers to using foundations for family wealth planning and what changes should be made to existing legislation to overcome these obstacles?
4. Whether and to what extent should the information concerning these trust-like asset management solutions be (publicly) accessible under EU anti-money laundering and anti-terrorism regulations?

The dissertation consists of the current compendium, which, in itself, is based on the author's five publications:

1. "The Estonian Foundation – What is Missing for It to Be A Well-Designed Wealth-Management Vehicle for Local and Foreign High-Net-Worth Individuals?"[31] The article has two authors: Katrin Sepp and Urmas Kaarlep. Urmas Kaarlep contributed to the tax law part of the article (Section 5) and suggested the formulae to calculate the possible effect on the state budget from the use of Estonian private foundations by non-residents (Section 6); Katrin Sepp carried out the research for Sections 3 and 4, structured the article and composed and edited the main part of the article's text.
2. "Legal Arrangements Similar to Trusts in Estonia under the EU's Anti-money laundering Directive"[32]
3. "Unblocking the bottlenecks of the Estonian wealth-management scene for private foundations"[33] The article has three authors: Katrin Sepp, Urmas Kaarlep and Turgay Kuleli. Urmas Kaarlep contributed to the tax law part of the article, Turgay Kuleli contributed to revising of the manuscript and communication with the journal. Katrin Sepp was the main author who made the most significant contribution to the research and also wrote and edited the major part of the work.
4. "Estonian 'trust' – same same but different?"[34]
5. "Estate planning beyond the grave: legal instruments comparable to testamentary trusts in Estonian law"[35]

The analytical compendium to this cumulative dissertation is structured as follows. After introducing the research problem, its relevance and outlining the main research questions, an overview is given of the current status of the field of research and the place of the research problem within it. Subsequently, the author sets forth the methods and resources used for the dissertation. At the end of the Introduction, the author further defines and narrows the topic. The research questions and the author's corresponding main conclusions as can be drawn from the

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[31] Juridica International, Vol 24 (2016) 96−104, http://dx.doi.org/10.12697/JI.2016.24.10.

[32] Juridica International, Vol 26 (2017) 56−65, https://doi.org/10.12697/JI.2017.26.06.

[33] Trusts & Trustees, Vol 24, Issue 6 (2018), 558−564, https://doi.org/10.1093/tandt/tty093.

[34] Trusts & Trustees, Vol 24, Issue 9 (2018), 891–900, https://doi.org/10.1093/tandt/tty144.

[35] Trusts & Trustees, Vol 25, Issue 3 (2019), 303–311, https://doi.org/10.1093/tandt/tty187.

articles included in this compendium reflect the structure of the analytical summary presented in Chapters 2, 3 and 4.

1.2 Current status of the field of research and position of the research problem within it

In Estonian case law and legal literature, the possibilities of fiduciary ownership have not been systematically analysed so far, as already indicated by Villu Kõve in his doctoral thesis in 2009,[36] and the situation has not changed much since then. Kõve (2009) tackled the issue of trusts and similar institutions in chapter 15.4 of his thesis,[37] at the end of which he expressed some scepticism towards the latter, mentioning, *inter alia*, the possible necessity of forbidding the use of fiduciary collaterals, and asking whether § 626 (3) of the Law of Obligations Act (LOA),[38] regulating the mandate agreement, which "factually distinguishes between the ownership of assets in relation to the creditors of the contracting parties from the ownership of the same assets in relation to other persons",[39] might be too extensive.[40]

Urmas Volens, in his doctoral dissertation,[41] has examined borderline cases between contractual law and tort law based on the hypothesis that certain cases of liability – such as *culpa in contrahendo*, apparent authority, experts liability to a third person, claims for compensation for damage resulting from the cancellation of a transaction due to a mistake – form an independent system of liability, a system of liability based on trust (reliance). Some of those issues might, to some

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[36] V. Kõve. *Varaliste tehingute süsteem Eestis. Doktoritöö* (System of Proprietary Transactions in Estonia. Doctoral Thesis). Tartu Ülikooli Kirjastus 2009, p. 307.

[37] Ibid, pp. 304–307.

[38] *Võlaõigusseadus* – RT I 2001, 81, 487; RT I, 20.02.2019, 8. English text available at: https://www.riigiteataja.ee/en/eli/507032019001/consolide.

[39] V. Kõve (Note 36), p. 305.

[40] Here, perhaps, it is possible to answer that yes, if the goal is to have completely transparent ownership systems. But this view is possibly too idealistic even for a country that has based its law system on German law. History has shown that there is a practical need for fiduciary ownership and trust-like structures, and they are recognized elsewhere in the world. And segregation is undoubtedly one of the most important components of a trust, without which it will not work. And, in a nutshell, it can be said that since § 626 (3) of the LOA extends only to claims and movables, the fiduciary title that is created over them probably does not create a considerable impression of 'fake wealth', all the more so that the movables transferred to the trustee may not be in his possession at all. And for specific third parties with whom the trustee deals, (at least in case of movables) the principle of good faith acquisition applies.

[41] U. Volens. *Usaldusvastutus kui iseseisev vastutussüsteem ja selle avaldumisvormid. Doktoritöö* (Liability based on reliance as an independent system of liability and its forms of appearance. Doctoral thesis). Tartu Ülikooli Kirjastus 2011.

extent, be associated with the fields of the application of constructive trusts,[42] which are not, however, in the scope of this dissertation.

Aleksei Kelli, in his master's thesis,[43] has written about duty of confidentiality in a fiduciary relationship. As the main examples of fiduciary relationships in Estonia he has pointed out the relationships between a client and an attorney, between a patient and a doctor and between an expert and the person who relies on the expert's opinion pursuant to § 1048 of the LOA. He has also referred to the mandate contract in general.[44] In order to find legal relationships in the Estonian legal system that may be characterised as fiduciary, Kelli has also used common law principles that apply to trusts.

The need to study those principles can also be seen in several other master's theses, especially in cases where trusts have worked as a model for legal constructions that are used in Estonian legal practice (but are not sufficiently regulated). For instance, there are two works from 2013 on using security agents for purposes of securing bond issuance,[45] which reveal certain shortcomings in the Estonian financial market (compared to the principles and practice renowned in international financial markets that are based on English law) that can seriously undermine the rights of the parties to the legal relationship. Although trusts for security purposes are not in the scope of this dissertation, some of the issues (like the question of expanding the protection stemming from subsection 3 of § 626 of the LOA to all rights, not merely claims – see subsection 3.1) are similar.

There also appears to be some confusion surrounding the intermediated holding of securities. In the case of nominee accounts, the question of who (the nominee account holder or the customer) actually "owns"[46] the securities and holds the rights and obligations of a shareholder has been discussed.[47] And, according to one master's thesis from 2012, the Estonian regulation concerning the custody of

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[42] See, e.g., U&H (Note 2), pp. 587 ff.

[43] A. Kelli. *Konfidentsiaalsuskohustus usaldussuhtes. Magistritöö* (Duty of Confidentiality in a Fiduciary Relationship. Master's thesis). TÜ Õigusinstituut 2005.

[44] Ibid, pp. 40, 50, 56.

[45] E. Pisuke. *Võlakirjaemissiooni tagatisagent. Magistritöö* (The Role of the Security Agent in the Issuance of Bonds. Master's thesis.), TÜ Õigusteaduskond 2013; A. Kotsjuba. *Tagatisagendiga kaasnevate riskide maandamine Eesti õiguses. Magistritöö* (Mitigation of Legal Risks Related to Security Agent under the Estonian Law. Master's thesis), TÜ õigusteaduskond 2013.

[46] Ownerhip is actually a property law term in Estonian law and strictly speaking should not be used in case of rights – see Note 101.

[47] K. Promet. *Väärtpaberite esindajakontol hoidmisega seotud emitendi, investori ja esindajakonto omaja õigused ja kohustused. Magistritöö* (Rights and Duties of Issuer, Investor and Holder of a Nominee Account Arising from the Holding of Securities on a Nominee Account. Master's thesis). TÜ Õigusteaduskond 2015; G. Laub, K. Promet. *Väärtpaberist tulenevate õiguste teostamiseks õigustatud isik* (A Person Entitled to Exercise Rights Arising from Securities). – Juridica 2017/8, pp. 567–575. Without an in-depth knowledge about this subject, but based on the general principles of trust law, it could of course be argued that if a person wants to use a fiduciary to hold the title to an object, he could also agree that he does not have all the rights that a 'full owner' normally would.

the clients' money and securities is unclear, too general and insufficient, and therefore client asset protection is not guaranteed.[48] Again, these topics are not in the scope of this dissertation (due to the limitation in regard to the circle of fiduciaries and assets – see subsection 1.4.3); however, these works point to the problems with the understanding of trust-like institutes in our society.

As far as foreign literature is concerned the historical roots of trusts (including the possible "ancestors" of trusts in Roman law) have been thoroughly studied. There are numerous studies on the concept or essential elements of trusts, whether and how civil-law systems could implement the doctrine of trusts, on how the common law trust would be treated in the context of private international law, and so on. Alexandra Braun has written a comprehensive paper on the state of the art of comparative research in the area of trusts,[49] *inter alia*, summarizing the current stage on the compatibility of trusts with civil-law systems as follows:

> "Gradually an increasing number of authors explored the idea that, not only were there functionally similar instruments in civil-law countries, but also that most of the arguments against the trust were more apparent than real /…/. For example, a number of authors began to accept that some of the principles and doctrines of civilian property law generally treated as being 'absolute', such as the concept of 'ownership' but also the numerus clausus principle of real rights, had already been eroded by the judiciary /../. These days, it has been quite established already that trusts are compatible with the civilian heritage, the question of whether trusts can operate in a civil-law context is now rarely raised /../."[50]

Estonian law has been most affected by the German legal system, which itself is influenced by ancient Rome; thus, the roots of Estonian law, too, can be found in Roman law.[51] This is why the author chose not to incorporate in this dissertation

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[48] T. Säärits. *Kliendi väärtpaberite ja raha hoidmise põhimõtted. Magistritöö* (Principles of Custody of Client Assets. Master's thesis), TÜ õigusteaduskond 2012.

[49] A. Braun (Note 12).

[50] Ibid, pp. 132–137.

[51] Until the beginning of the 20th century, Estonia was ruled by various invaders including German, Swedish, Danish, Polish and Russian. The first major written body of law, the Baltic Private Law Code (BPLC), the main source of which was Roman law, dates back to 1863. The BPLC actually included different types of *fideicommissums*: family *fideicommissum* (§ 2337 ff.) and *fideicommissum* for nobility (§ 2525 ff.) (J. Arro. *Kas kustub aegumise läbi krepostiraamatutesse kantud kinnisvara (liikumata varanduse) omandusnõudmine?* (Will the claim for ownership of real estate (immovable property) entered into land register disappear due to expiration?) – *Õigus, juriidiline kuukiri* (Law, monthly newsletter) 1921 No 4, pp. 74–81 (in Estonian); E. Silvet. *Pärimisseaduse eelnõu põhijoontest* (The main features of the draft Succession Act). – Juridica 1995/7, pp. 282–288 (in Estonian)). In 1918, Estonia became independent and the *fideicommissum* for nobility was abolished in 1919 with the Estonian Land Reform Act that expropriated land from Baltic-German landowners. In the area of private law, the preparation of the Estonian Civil Code commenced in 1920. The draft was prepared mainly on the basis of the BPLC and the German Civil Code (V. Kõve. Applicable Law in the Light of Modern Law of Obligations and Bases for the Preparation of the Law of Obligations Act.–

a study of Estonian legal history to examine (once more) the roots and developments of the concepts of the legal systems of the non-trust and trust jurisdictions and ask (again) what the doctrinal barriers are that hinder or prevent the application of the trust in non-trust jurisdictions, or in a particular jurisdiction – there would probably be not much to add to the countless works of this "legal archaeology" in the context of trusts. However, the dissertation brings out, rather pragmatically, concrete examples from Estonian law that should illustrate that the notion of the trust is not incompatible with our legal system[52].

Nevertheless, in the context of history, it may be pointed out that the slow development of trust-like institutes in Estonia is due to the Soviet era, which led to collective poverty, and since the collapse of the Soviet Union it has taken quite some time to collect property and for interest in trusts or similar institutions to emerge.

1.3 Methods and sources

As trusts are often used in other countries to manage family assets, it is important to understand what is so special about trusts. When a legal researcher is confronted with the question of whether and how to change the national law, it is rather self-evident to look at how other countries have tackled the issue at stake to find the best solution. Therefore, it can be said that the main research method in this dissertation is the comparative law method.

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in Juridica International 6/2001, p. 30). Family *fideicommissums* were excluded from the new Civil Code, mostly because they had not been used and were thus deemed unnecessary (*Tsiviilseadustik: Vabariigi Valitsuse ettepanek* (Civil Code: Proposal of the Government of the Republic) 11. XII 1939, p. 309. Available at https://www.digar.ee/arhiiv/et/raamatud/42352 (in Estonian)). However, the new Civil Code never became an act because the Soviet armed forces occupied Estonia just before the draft was passed. When Estonia restored its independence at the beginning of the 1990s, one of the most important models for private law initially was the draft Civil Code of 1939. Through intensive discussions in the early 1990s, however, it became evident that the mere reintroduction of the old draft statutes would not serve the needs of society and that the goal should be to create a new, modern civil code. The working group decided to use other sources for better solutions – the basic model was the German system, but also legal acts of Switzerland, the Netherlands, Denmark, France, Italy and the Nordic countries (I. Kull. Reform of Contract Law in Estonia: Influences of Harmonisation of European Private Law. – in Juridica International 14/2008, p. 124).

[52] Overall, it can be said that the main reason why there are no trusts in Estonian law is probably that there are none in the countries that have been the main role models for Estonian legislation. In the 1990s, when Estonia's private law was rebuilt, the pools of wealth that could have needed management were a seemingly unattainable dream, which did not need to be regulated in the first place; instead, there were many more issues that needed immediate handling. This points to the conclusion that the absence of trusts from our legal order is not so much based on the deep-rooted perceptions or well-considered decisions of Estonian legislators. However, as countries with different legal systems indeed have similar legal relationships, in some of which trust (in the broader meaning) is an important element, it is probably quite natural that the legislator has taken a somewhat casuistic approach to solve different matters.

The author has chosen English law[53] as the main basis for describing and understanding the concept of the trust, as England is the birthplace of the common law trust, but also because English trust law has remained somewhat conservative – for example, where it relates to balancing the interests of different parties to trusts (and their creditors), and this may help to diminish certain fears related to the image of the trust, which probably have more to do with offshore solutions. For a civil-law lawyer, it is, of course, relatively hard to grasp the common law's case law as well as the different terms, concepts and way of thinking. Therefore, in addition to English law – case law, legislation and legal literature – the author has, in parallel, used the DCFR, which has taken an approach to the English trust model that would also be understandable and applicable in a civil-law setting and helps to understand the basics of the complicated (English) trust in a compact form.

When looking at various academic works of comparative nature, it may be noted that they often speak of an abstract common law or Anglo-American[54] trust rather than proceeding from the trust law of one particular country. Since the trust law of other common law countries has its origins in English trust law, it can be said that the general principles are largely the same.[55] This is why in this thesis the author also uses the term "common law trust" often instead of referring to English trusts. In addition, as Prof Hayton has said, in shaping English trust law, the English judges have to take into account changing practical realities and the characteristics of offshore trusts[56] and it can be said that the trust law is of international character, and therefore trusts in other jurisdictions cannot be completely ignored.

As the trust is a complex notion, which is hard to describe in short, the author considered it necessary to distillate the essential characteristics of the trust concept (these have been presented in 1.4). To do that, the author used the works of prominent trust-scholars – Prof Donovan Waters[57], Prof Maurizio Lupoi[58],

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[53] The United Kingdom of Great Britain and Northern Ireland contains three major legal jurisdictions: England and Wales, Northern Ireland and Scotland. England and Wales form one jurisdiction: Wales has not had its own legal system distinct from England since medieval times. The law relating to trusts in Northern Ireland largely mirrors that of England and Wales (Society of Trusts and Estate Practitioners. Jurisdictional Reports, Northern Ireland. Available at: https://www.step.org/jr-northern-ireland (26.1.2020)). However, Scotland is a mixed law system and has its own trust law, which has certain differences – G. L. Gretton, A. J. M. Steven, Property, Trusts and Succession 3rd ed. Bloomsbury Professional 2017, p. 344.

[54] Waters (Note 2); A. E. von Overbeck. Explanatory Report on the 1985 Hague Trusts Convention. HCCH Publications, 1985. Available at: https://assets.hcch.net/docs/ec6fb7e0-deda-417f-9743-9d8af6e9e79b.pdf (8.1.2020).

[55] M. Lupoi. Trusts. A Comparative Study, Cambridge University Press 2000, p. 6–7; A. W. Scott, Fifty Years of Trusts. – 50 Harvard Law Review 60 (1936), p. 61.

[56] U&H (Note 2), Preface, p. vi.

[57] Waters (Note 2).

[58] Lupoi (Note 55).

Prof Lucina Ho[59], Prof Tony Honoré[60], Prof Marius J. De Waal[61] and Prof David Hayton[62] – who have tried to identify the core elements of either common law trusts in general or also of civil-law instruments that are similar to trusts. It is true that the views of those authors on the basic characteristics of trusts vary, but the author of this compendium has not intended to evaluate here who of those learned authors is right or wrong. Instead, the author has tried to point out most of the elements that were considered important by these scholars. However, it is worth noticing that the three most mentioned elements by these authors were the segregation of patrimonies, the beneficiaries' specific rights to trust assets vis-à-vis third parties, and the fiduciary ownership/position of the trustee.

Understanding the concept of the trust is also important for identifying trust-like arrangements in Estonian law from the viewpoint of the AML/CFT regulations of the EU. However, under those regulations, the trust concept appears to be different from the trust concept in general. The AMLD4 and AMLD5[63] texts do not give a definition of a trust. Instead they equate it with instruments used in civil-law systems that have a similar structure or function, such as the *Treuhand* and *fiducie*. Therefore, the author used legal literature on the German *Treuhand* and French *fiducie* as well as French legislation to compare these intruments to trusts and highlight the similarities between these and trusts.

After identifying the important elements of trusts, the author has tried to determine the trust-like instruments in Estonian law by finding the similarities and differences between trusts and their possible equivalents in Estonia. As it may be that although certain legal instruments are formally, doctrinally or structurally different, they might still be capable of carrying the same functions as a trust. Thus, the author considered not only the main elements of trusts, but also the functions.

To analyse Estonia's current law and to expound its meaning, the author has used a doctrinal method. In interpreting Estonian legislation, the author has investigated the legislative acts, the explanatory notes, case law and legal literature, but – since the volume of domestic material on the subject is very limited – also the law of the countries Estonian law has been modelled after – mostly German but also Austrian law in the case of private foundations (in the case of private

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[59] L. Ho. Trusts: the Essentials – in L. Smith (ed.). The Worlds of the Trust, Cambridge University Press 2013.

[60] T. Honoré. On Fitting Trusts into Civil Law Jurisdictions. – University of Oxford Legal Research Paper Series, Paper No 27/2008.

[61] M.J. De Waal. Comparative Succession Law. – in M. Reimann, R. Zimmermann (eds.). The Oxford Handbook of Comparative Law. Oxford University Press 2006, pp. 960–985.

[62] U&H (Note 2); D.J. Hayton, S.C.J.J. Kortmann and H.L.E. Verhagen. Principles of European Trust Law. Kluwer Law International 1999.

[63] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directives 2009/138/EC and 2013/36/EU, 19.6.2018, L 156/43.

foundations, the author has also given examples of regulations in the Netherlands, Malta, Belgium and Luxembourg, as these countries are probably amongst the most competitive in the current European private foundation scene).

The author has examined the existing legal provisions of Estonian law with a view to assess the efficacy of the law as an instrument of socio-economic necessity, to identify possible bottlenecks and to find consistency of the law and its underlying policy. The analysis will help suggest how to interpret Estonian law – rephrase the legal norms with an eye on their coherence from a wider angle than the institutional role of a judge or other practitioner in a special case would probably allow.

In summary, it can be said that although the author has generally followed Zweigert and Kötz's[64] guidelines for using the functional comparative method, it is intertwined with other methods: to present the way of solving the problem of wealth planning in common law systems and explain the nature of trusts, it was necessary to use the legal literature as a starting point, study the black letter law and of course, the court cases that reflect the law in action. In searching for similar instruments in Estonian law, the author proceeded from both functions and structural elements but in doing so, there is no way to bypass the study of Estonian legislation, legal literature and court decisions. It is also clear that a direct comparison of the legislation in this case would not have given any reasonable result, as totally different legal systems are under scrutiny and trust law in common law countries is largely based on court decisions rather than legal acts. At the same time, the comparison of court decisions would also not yield any results, as there is little case law on the matter in Estonia. Thus, it can be said that the structural method and analytical method are first used within one legal system to understand the law and how the law actually functions in a society and then again to detect common parts and differences in concepts that are functionally equivalent to those of the other system.

After depicting the deficiencies in the area of family asset protection in Estonia, the author uses a normative approach to suggest how to rearrange the existing system by proposing specific amendments to the legislation. Hence, this research should fall into the category of reform-oriented research.

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[64] K. Zweigert, H. Kötz. An Introduction to Comparative Law 3rd ed. Oxford University Press 1998, p. 34 ff.

1.4 Defining the topic

1.4.1 The notion of trusts[65]

A common law trust is neither a legal entity nor a contract.[66] In fact, common law lawyers regard the trust as a property law concept.[67]

It is generally agreed that a trust is such a complex notion that it is hard to define.[68] The definition given in Underhill and Hayton Law of Trusts and Trustees,[69] which is recognised as the leading work in the world with expert commentary on the law of trusts and trustees, was already given at the beginning of the Introduction. X.-1:201 of the DCFR defines the trust as "a legal relationship in which a trustee is obliged to administer or dispose of one or more assets (the trust fund) in accordance with the terms governing the relationship (trust terms) to benefit a beneficiary or advance public benefit purposes".

In addition to a trustee and beneficiary, normally, a trust has a settlor[70] – the person who consitutes the trust. The roles of the parties can overlap: a settlor may also be a trustee,[71] a settlor can also be a beneficiary and a trustee may also be a beneficiary (DCFR, X.-1:203(5)). However, under English law a person cannot be a sole trustee for that person's sole benefit.[72] Each of the various parties to a trust may either be a natural or a legal person.[73]

While a trustee generally becomes the owner of the trust property[74], his powers are subject to an important qualification: unlike full owners, he does not have the liberty to exercise his ownership rights as he pleases. He owes a duty towards the beneficiary to do so for the benefit of the beneficiary, and not for his own benefit[75] (**fiduciary ownership**).

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65 In English, the word is often used in plural – see Lupoi (Note 55), p. 5.

66 The constitution of a trust requires unilateral declaration of the settlor. If it is not a self-declaration trust, where the settlor is also the sole trustee, the transfer of the assets from the settlor to the trustee is the second prerequisite. See C. von Bar, E. Clive (eds.). Principles, definitions and model rules of European private law: draft common frame of reference (DCFR), Volume 6. Oxford University Press 2010, p. 5680.

67 Ibid, p. 5680.

68 M. McAuley (Note 2), Waters (Note 2), pp. 447 ff, 127–128.

69 U&H (Note 2), p. 2. See also footnote nr 2.

70 In DCFR the term 'truster' is used – X.-1:203(1).

71 U&H (Note 2), p. 207 ff.

72 In this case, the trust ends: X.-9:109 of DCFR; see also U&H (Note 2), p. 370.

73 See I.-1:108(1) of DCFR and the definition of "person" in the list of definitions.

74 Waters (Note 2), p. 428; Lupoi (Note 55), p. 271; D. Hayton, Principles (Note 62), p. 13 (Art. 1).

75 L. Ho. (Note 59), p. 5; Lupoi (Note 55), p. 271; D. Hayton, Principles (Note 62), p. 13 (Art. 1); De Waal (Note 61), pp. 1088–1089.

Trust assets are separated from the trustee's personal assets and cannot be claimed by the trustee's creditors[76] (**special patrimony**). Neither is the trust fund available for the creditors of the settlor or beneficiary, but the beneficiary's creditors may invoke the beneficiary's rights relating to the trust fund.[77] However, many jurisdictions have made it possible to create special trusts, providing a measure of protection against creditors, for spendthrift relatives or dependants who need protection against their own improvident, foolhardy habits.[78]

If a settlor created the segregated trust fund in contravention of laws protecting the settlor's creditors (Insolvency Act 1986, ss 339–342 and 423–425), spouse (Matrimonial Causes Act 1973, s 37) or heirs (Inheritance (Provision for Family and Dependants) Act 1975, s 10) then the trust[79] or the disposition to the trustee can be set aside, so as to make the fund available to satisfy the claims of such creditors, spouse or heirs. It is also considered important that the settlor[80] or beneficiaries[81] should not have the right to order the trustee around – the retaining of powers by the settlor includes the limit beyond which the trust can be deemed

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[76] Insolvency Act 1986 c 45 s 283(3)(a); Henry v Hammond (1913) 2 KB 515; R v Clowes (No 2) (1994) 2 All ER 316, CA; X.-1:202(1)(2)(a) of DCFR, X.-1:202(2)(b)(c) of DCFR; Waters (Note 2), p. 428; Lupoi (Note 55), p. 271; Hayton, Principles (Note 62), p. 13 (Art. 1); L. Ho. (Note 59), p. 5; T. Honoré (Note 60), pp. 3–4, 6; De Waal (Note 61), pp. 1088–1089.

[77] X.-10:101(1) of DCFR; Hayton, Principles (Note 62), p. 41.

[78] E.g., English protective trusts under s 33 Trustee Act 1925 c. 19 (Regnal 15 and 16 Geo 5); Spendthrift trusts in the USA – see C. Fox, R. Murphy. Are Spendthrift Trusts Vulnerable to a Beneficiary's Tort Creditors? – Trusts & Trustees, Volume 16, Issue 8, 1 September 2010, pp. 672–681, https://doi-org.ezproxy.utlib.ut.ee/10.1093/tandt/ttq084; A.A. Bove, Jr. The United States as an offshore asset protection trust jurisdiction – the world's best kept secret. – Trusts & Trustees, Volume 14, Issue 1, 1 February 2008, pp. 12–22, https://doi-org.ezproxy.utlib.ut.ee/10.1093/tandt/ttm122. For asset protection trusts in offshore jurisdictions see, e.g., P. Pusceddu. International Trusts and assets protection. – Trusts & Trustees, Volume 20, Issue 7, 1 September 2014, pp. 739–745, https://doi-org.ezproxy.utlib.ut.ee/10.1093/tandt/ttu070.

[79] Midland Bank plc v Wyatt (1995) 1 FLR 697.

[80] Waters (Note 2), p. 428; Lupoi (Note 55), p. 271; Hayton, Principles (Note 62), p. 13 (Art. 1); L. Ho. (Note 59), p. 5.

[81] Re Brockbank, Ward v Bates (1948) Ch 206: beneficiaries of a trust cannot direct a trustee as to exercise of a direction vested in him. However, this decision has been reversed by legislation so far as it applies to the power to appoint new trustees: by virtue of s 19 of the Trusts of Land and Appointment of Trustees Act 1996, beneficiaries who are all of sound mind and full age and between them absolutely entitled under the trust can require trustees to retire and appoint new trustees nominated by the beneficiaries. The statute applies only, however, in the absence of any provision to the contrary in the trust instrument. See also Waters (Note 2), p. 428.

"sham".[82] However, some jurisdictions (mainly offshore) allow trusts that would probably be considered void in others.[83]

The trust fund consists not only of the original assets and those subsequently added and the fruits thereof, but also of those assets from time to time replacing the original or added assets[84] (the principle of real subrogation). This does not include only the authorised substitutions that the trustee has made, but the beneficiaries are entitled to claim that the trust fund comprises the unauthorised assets acquired by the trustee on behalf of the trust and any assets purportedly acquired by the trustee for himself on the account of or in connection with the trust fund or from his misuse of his position as trustee.[85]

In case of the misappropriation of the trust assets to third parties, a beneficiary can "follow" or "trace" trust property.[86] "Following" is the process of following the same asset as it moves from hand to hand and when the transferee is not an acquirer for value in good faith,[87] the beneficiary can require the asset to be restored to the trust. "Tracing" is the process of identyfing a new asset as the substitute for the old. Thus, where one asset is exchanged for another, a claimant can elect whether to follow the original asset into the hands of the transferee or to trace its value into the new asset in the hands of the transferor.[88]

Courts have supervisory jurisdiction over the administration of trusts.[89] The trustee can ask advice or consent from the court for certain issues and for taking decisions.[90] Under certain circumstances the court also has the power to vary trust terms.[91] It can also have the power to release a trustee from office and appoint a new trustee (S 41 of the Trustee Act 1925; DCFR X. – 8:203; X. – 8:402) – a

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[82] Certain rights can still be reserved by the settlor (and in the DCFR some of the powers of the settlor to intervene in the administration of the trust go beyond the powers possessed by an English settlor), but it is important that the fiduciary should not be just a man of straw, who only appears to own some property that is actually controlled by someone else. See, e.g., U&H (Note 2), pp. 88–97.

[83] J. P. Webb. An ever-reducing core? Challenging the legal validity of offshore trusts. – Trusts & Trustees, Volume 21, Issue 5, 1 June 2015, pp. 476–487, https://doi-org.portaal.nlib.ee:2443/10.1093/tandt/ttv010.

[84] DCFR Book X, Ch. 3 S. 2; De Waal (Note 61), pp. 1088–1089.

[85] A-G of Hong Kong v Reid (1994) 1 All ER 1; Foskett v McKeown [2000] UKHL 29, [2000] 3 All ER 97; see also U&H (Note 2) pp. 2, 83–84; DCFR X. – 3:201.

[86] Waters (Note 2), p. 428.

[87] Pilcher v Rawlins (1872) LR 7 Ch 259; Re Diplock (CA) [1948] 1 Ch 465, Ministry of Health v Simpson [1951] AC 251.

[88] In Foskett v McKeown [2000] UKHL 29; [2000] 3 All ER 97.

[89] T. Honoré (Note 60), pp. 3–4, 6.

[90] Civil Procedure Rules Practice Directions 64, 64A, 64B; see also U&H (Note 2), p. 1088 ff.

[91] In England under Section 57 (1) of the Trustee Act 1925, which permits the court to give trustees additional powers if it is expedient, and Section 1 of the Variation of Trusts Act 1958, which permits the court to consent to a variation on behalf of minor, unborn and unascertained beneficiaries; DCFR X. – 9:202 – X. – 9:204.

trust does not end in the case of a trustee's death or incapacity; trusteeship is seen as an office.[92]

English law prevents a trust, other than a trust for exclusively charitable purposes, from lasting longer than a perpetuity period, which generally is 125 years from the date the instrument takes effect (Perpetuities and Accumulations Act 2009, ss 5, 6). This is to prevent the dead from ruling the living for too long.[93] Also, in England, under the so-called principle of Saunders v Vautier[94], notwithstanding the terms of the trust, where all the beneficiaries are in existence, have been ascertained, and are of full capacity, then, if all such beneficiaries are in agreement, they can require the trustee to terminate the trust and distribute the trust fund between themselves. Both, the rule of perpetuities as well as the Saunders v Vautier principle have been abolished in many other trust jurisdictions.[95]

1.4.2 The existence of the basic elements of a trust in Estonian law

The following section explores whether the three (most) important elements of trusts – namely, the unique notion of a trustee's ownership (holding title for another's benefit), the segregation of funds and beneficiaries' special rights – can be found in Estonian law. This is the starting point for looking for arrangements that could be trust-like from the perspective of family asset-management, but it also helps to show that even though the institution is of common law origin, its characteristic elements are not alien to our legal system.

Holding property for another's benefit. Although Estonian law, namely § 68 of the Law of Property Act[96] (hereinafter "LPA") defines ownership as full legal control by a person over a thing, where an owner has the right to possess, use and dispose of a thing and to demand the prevention of violation of these rights and elimination of the consequences of violation from all other persons, a situation where an owner is not using something he owns or is not benefitting from it, is not unusual or unfeasible.[97] For example:

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92 De Waal (Note 61), pp. 1088–1089.

93 Hayton, Principles (Note 62), p. 63.

94 Saunders v Vautier [1841] EWHC J82.

95 In the US, if some material purpose of the settlor remains to be served then the beneficiaries may not be permitted to terminate the trust – called the Claflin doctrine in US trust law. See, e.g., T.P. Gallanis. The New Direction of American Trust Law. – Iowa Law Review, Vol. 97, 2011– pp. 227, 231.

96 *Asjaõigusseadus.* RT I 1993, 39, 590, 11; RT I, 29.06.2018, 7. English text available at: https://www.riigiteataja.ee/en/eli/502012019009/consolide.

97 As Prof I. Kull has said: "Considering the abundance of different constraints nowadays, ownership should also be regarded as a limited right over a thing, as calling it full and unlimited is misleading. Thus, the ownerhip is the most extensive right, but not an unlimited right over a thing." – in P. Varul *et al*. *Asjaõigusseadus I. Kommenteeritud vln* (Property Law I. Commented Edition), Juura 2014, p. 284.

a) According to § 81 (6) of the Law of Succession Act[98] (hereinafter "LSA"), an executor of a will is required to take an object forming part of the estate into his possession or to ensure in other ways the separation of the object from the property of the successor (who is the owner) if it is necessary for the performance of the duties of the executor of the will.
b) It is possible to establish a restricted real right on behalf of a beneficiary; for example, the usufruct[99] or a personal right of use in a residential building.[100]
c) It is possible to conclude different contracts under the law of obligations. According to § 619 of the LOA via the authorisation contract (hereinafter the "mandate"), the agent undertakes to provide services to the principal. These services can vary greatly, including creating trust-like devices where the title of assets is transferred to the agent who is obliged to exercise the owner's rights for the benefit of the transferor (or a third person); for example, by letting him use the asset. The services may also include negotiating and entering into contracts with third parties as well as services that do not include the conclusion of contracts or performing other juridical acts; for example, the maintenance of property, collecting rent or other proceeds from the property, making distributions from it, etc. If the agent's obligations involve entering into transactions in his own name, the provisions regulating the contract of commission, which is one of the subspecies of the mandate agreement, also apply as *lex specialis*.
d) In the case of contractual investment funds (common funds), the money collected through the issue of units and other assets acquired through the investment of such money are owned[101] jointly by the unit-holders, and the management company shall conclude transactions with the assets of the fund for the

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98 *Pärimisseadus*. – RT I 2008, 7, 52. English text available at: https://www.riigiteataja.ee/en/eli/528032016001/consolide.

99 *Kasutusvaldus;* § 201 et. seq. of the LPA: a usufruct encumbers immovables in such a way that the person for whose benefit the usufruct is established is entitled to use the immovable and to acquire the fruits thereof.

100 *Isiklik kasutusõigus elamule*; § 227 of LPA: a personal right of use in a residential building encumbers the immovable so that the person for whose benefit it is established has the right to use the residential building, or a part of it situated on the immovable, for habitation.

101 To be exact, "ownership" as a term in Estonian civil law should relate to corporal objects, i.e. things – either movables (§§ 92–115 of the LPA) or immovables (§§ 119–142). In certain cases, provided by law, provisions concerning things can also apply to rights (e.g. the provisions concerning immovables apply to a right of superficies (*hoonestusõigus*)). In general, however, the use of the concept of "ownership" in relation to incorporeal objects is inaccurate in the Estonian property law context, although it is rather customary when dealing with various types of rights (e.g. securities). In the case of rights (and claims), it would be more appropriate to speak of the rights "belonging" to someone. This is why in this paper the common law term "title" is often used instead of "ownership". However, for the title-holders of incorporeal objects, it can also be said that they have the most extensive rights in relation to that object, compared to other persons, including the right of disposal.

account of all the unit-holders collectively, but in its own name (§ 4 (1) of Investment Funds Act (IFA)[102]).

e) The component of fiduciary ownership also emerges in the case of the intermediated holding of securities, to which the specific provisions of the Securities Register Maintenance Act (SRMA)[103] and Securities Market Act (SMA)[104] apply. Securities that are registered in the Estonian Central Register of Securities (ECRS), such as the shares of most public limited companies as well as private limited companies that have chosen registration in the ECRS,[105] can be accomplished through a nominee account (§ 6 of the SRMA). When exercising the rights and performing the obligations arising from the securities, the holder of the nominee account has to follow the instructions of the client. A notation shall be made in the register indicating that the account is a nominee account (the identity of the client will not be disclosed).
f) While in the case of a trust it is the trustee who owns the trust property, a foundation, as a legal person, can itself own property. But just like the trustee, a foundation administers assets not for its own benefit, but in order to achieve certain objectives, including benefitting certain (set of) people – the beneficiaries.[106]

Segregation of funds. Next, the author will try to find examples of separate patrimony – another essential characteristic of trusts – from Estonian law.[107]

Although Estonian law takes unity of patrimony as its starting point – meaning that generally a person will be liable for his obligations with all of his assets – the segregation of patrimonies within one person's property is also not alien to Estonian law and there can be a pool of assets in the composition of a person's property which have a specific purpose and/or to which the creditors of the person cannot have recourse:

a) According to § 626 (3) of the LOA, claims and movables which a mandatary acquires when performing a mandate in the mandatary's name but on account of the mandator are not included in the bankruptcy estate of the mandatary and they cannot be subject to a claim against the mandatary in an enforcement

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[102] *Investeerimisfondide seadus*. RT I, 31.12.2016, 3; RT I, 04.12.2019, 6. English text available at: https://www.riigiteataja.ee/en/eli/512122019002/consolide.

[103] *Väärtpaberite registri pidamise seadus*. RT I 2000, 57, 373; RT I, 28.02.2019, 9. English text available at: https://www.riigiteataja.ee/en/eli/517122019003/consolide.

[104] *Väärtpaberituru seadus*. RT I 2001, 89, 532; RT I, 10.01.2019, 14. English text available at: https://www.riigiteataja.ee/en/eli/517012019004/consolide.

[105] The registration of the shares of a private limited company in the ECRS is a possibility, not a must. Less than 2% of private limited companies are currently registered in the ECRS.

[106] *Sihtasutuste seadus* (Foundations Act). RT III 2005, 29, 300; 18.12.2012, 32. English text available at: https://www.riigiteataja.ee/en/eli/515012018008/consolide.

[107] For the concept of special patrimony in Estonian law, see also P. Varul *et al. Tsiviilõiguse üldosa. Õigusteaduse õpik.* (General part of Civil Law. Textbook of Law), Juura 2012, p. 315.

procedure. The same applies to claims and movables which the mandator himself transfers to the mandatary for the performance of the mandate.

b) Common funds also provide a trust-like segregation of patrimonies: claims of creditors of the management company cannot be satisfied out of the assets of a fund (IFA § 23 (4) (6)). The assets of the fund are also immune from the claims of creditors of unit-holders (IFA § 13 (4), § 15 (3)).
c) With regard to the creditors of the holder of a nominee account, the securities are deemed to be those of the client and not the holder of the nominee account (§ 6 (4) and (6) of the SRMA); the exclusion of the securities from the bankruptcy estate of the custodian is also provided in § 88 (6) of the SMA.
d) In order to prevent the provisional heir's personal creditors from satisfying their claims from the property to be handed over to the subsequent heir, § 48 (3) of the LSA stipulates that the disposition of an object forming part of an estate made in the course of compulsory execution or by a trustee in bankruptcy is void upon fulfilment of the condition on subsequent succession or on the due date.
e) The foundation, as a separate legal person, has a distinct patrimony independent of its founder, administrator or beneficiaries. In contrast to a company, a foundation has neither shareholders nor owners; it also has no members. Thus, the founder/beneficiaries also do not directly acquire proprietary rights in the foundation that would be seizeable and transferable to meet their creditors' claims.

The special rights of beneficiaries. When it comes to the special interests of beneficiaries in misappropriated assets, then, generally, when the title of assets has been transferred to a person, he will have exclusive powers characteristic to ownership, including alienating the property and if he breaches his contractual duty not to dispose of the property, the validity of his act of alienation will not be affected (§ 76 of the General Part of the Civil Code Act (GPCCA)[108]). However, there are provisions elsewhere in private law that allow for the design of a legal relationship where a person who is not the owner has rights over a particular asset that can be characterised as placing between personal and property rights as they may affect third parties:

a) First, in the case of immovables it is possible to enter in the land register a preliminary notation, which would render the subsequent disposals void (LPA, § 63 (3) and (5)).
b) The disposing of the shares of a private limited company can be limited by prescribing in the articles of association that the transfer of a share shall be permitted only on certain conditions; for example, depending on the consent

[108] *Tsiviilseadustiku üldosa seadus*, RT I 2002, 35, 216; RT I, 30.01.2018, 6. English text available at: https://www.riigiteataja.ee/en/eli/501082019001/consolide.

of another person – under § 149 (3) of the Commercial Code (CC).[109] A transaction performed without the condition shall be null and void.

c) Objects other than immovables can be transferred conditionally under the provisions of Chapter 6 ("Conditional Transaction") of the GPCCA: the person who, as an obligor, has entered into a conditional transaction for the transfer of an object, is prohibited from disposing of the object to third persons (§ 106 (2) of the GPCCA). Thus, when the parties have agreed that upon arrival of a certain condition an asset automatically transfers back to the initial transferor, a disposition made by the fiduciary owner (or his bankruptcy trustee or a bailiff) during the period between the conclusion of the conditional transaction and the fulfilment of the agreed condition shall be void unless the recipient is a bona fide purchaser of a movable (§ 106 (3)).
d) According to § 48 (2) of the LSA, a disposition by the preliminary successor of an object forming part of an estate without charge will be void if the disposition precludes or restricts the rights of the subsequent successor.
e) According to § 79 of the LSA, a successor does not have the right to dispose of objects forming part of an estate which the executor of the will requires to perform the obligations thereof. If the successor violates this rule, it is the disposition by person not entitled thereto, which is, as rule, invalid (GPCCA, § 114).
f) As to the transactions concluded by a member of a foundation's management board in violation of his obligations with mala fide acquirers, the transaction could be cancelled under § 131 (1) of the GPCCA.[110]

Even if the transfer to the third party is valid, a claim for damages against the transferee could be (hypothetically) filed on the basis of tort law – if it can be said that he intentionally behaved contrary to good morals[111] (LOA, § 1045 (1) 8)) or behaved violating a duty arising from law[112] (LOA, § 1045 (1) 7)). In this case it is not entirely impossible that the application of § 136 (5) of the LOA could lead to a situation where the third party has to transfer the acquired object to the beneficiary to compensate for damages.[113]

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[109] *Äriseadustik*; RT I 1995, 26, 355; RT I, 20.12.2018, 2; English text available at: https://www.riigiteataja.ee/en/eli/507012019006/consolide.

[110] See CCSCd 14.10.2015, 3-2-1-110-15, para. 10–13; CCSCd 29.09.2015, 3-2-1-81-15, para. 15. But see also, P. Varul *et al. Tsiviilõiguse üldosa. Õigusteaduse õpik.* (General part of Civil Law. Textbook of Law), Juura 2012, p. 216; P. Varul *et al*. *Tsiviilseadustiku üldosa seadus. Kommenteeritud vln* (General Part of the Civil Code Act. Commented Edition), Juura 2010, p. 382.

[111] See CCSCd 15.4.2015, 3-2-1-18-15, para. 10.

[112] For example, if the third party's activity could be classified as a criminal offense.

[113] For the implementation practice of § 136 (5) of the LOA, see CCSCd 27.9.2017, 2-15-18478, para 14; CCSCd 19.4.2011, 3-2-1-12-11, para. 29; CCSCd 4.3.2010, 3-2-1-164-09, para. 31. See also S. van Erp, B. Akkermans (eds.). Cases, Materials and Text on Property Law. Hart Publishing 2012, p. 585.

Based on the above, it can be said that at least the following institutes in Estonian law combine more than one characteristic of the trust: the mandate contract, the executor of will, the provisional/subsequent heirship, the foundation, the common fund and the intermediated holding of securities.[114]

1.4.3 Possible functional equivalents to family trusts in Estonian law

In common law countries trusts are used for a great variety of purposes: protection of (family) assets; administration and providing for vulnerable persons (minors, addicts, the disabled); preserving an object or appropriating property to a specific use; investment (unit trusts/mutual funds);[115] providing for employees on retirement (pension trusts);[116] charity; to manage the collateral in cases where there is a large number of creditors or where the same security is to benefit successive groups of creditors (syndicate loans, secured bond issuance)[117], etc. Testamentary trusts are created by a person's will and arise upon the death of the testator.

While the abovementioned trusts are express trusts; that is, knowingly created by a person, there also exist trusts that are imposed by law or court: constructive trusts, statutory trusts and resulting trusts.[118] Statutory trusts arise under statutes which stipulate that under certain circumstances the property shall be held in trust, like trusts arising in respect of legal estates co-owned, or on intestacy.[119] Constructive trusts are imposed by courts as a remedy; for example, to prevent unjust enrichment.[120] Resulting trusts can be imposed (in a transferor's favour) in cases where property is gratuitously transferred and there is insufficient evidence to

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[114] If a legal instrument contains several elements or just one feature of the trust, is it enough to qualify it as a trust-like instrument? The answer to this question is not straightforward. As will be shown later in the thesis, for the purposes of AMLD containing just one feature - the fiduciary ownership - will probably suffice. However, for family wealth management purposes, if there is no protection against the claims of the trustee's creditors, an instrument is unlikely to be widely used. Nevertheless, it could probably not be said that all three elements must necessarily exist in order to be able to claim that an instrument is trust-like in terms of family planning. The recognised trust scholars tend to disagree on the nature and extent of the claims of the beneficiary towards third-party transferees. And although the institute of the executor does not entail the fiduciary ownership (because the executor does not become the owner – the successor will remain the owner, but will be stripped of the rights to use, possess or dispose of the property), it probably cannot be said that it is not a trust-like instrument for family estate planning as obviously its function is similar to the function of testamentary trusts in common law.

[115] U&H (Note 2), p. 67.

[116] Ibid, p. 69.

[117] Ibid, p. 60.

[118] Ibid, p. 420.

[119] Ibid, p. 420.

[120] Ibid, p. 83; Pettkus v Becker [1980] 2 S.C.R. 834.

ascertain the transferors intention; that is, that the transferor meant to make a gift or loan and abandon his beneficial interest.[121]

This dissertation focuses on the functional equivalents of express trusts for family wealth management. Therefore, both non-express trusts and express trusts, which are used for other purposes do not get much attention.

As "family asset management" is itself a rather ambiguos concept, for the sake of clarification, the dissertation focuses on trusts with the following objectives[122] (in a trust jurisdiction, all of the purposes can be attained by setting up just one trust):

a) preventing the dispersal of the estate (business) after one's death;
b) ensuring continuity in management of business after one's death. This could be useful when a settlor has no children or if he considers some of his heirs not fit to run the business or they do not wish to do so;
c) providing for the settlor's incapacity. Nowadays, people are tending to live longer, and there is an increase in the number of people who are affected by conditions such as dementia and Alzheimer's disease, which can result in restricted active legal capacity. If a trust has been created beforehand, the settlor can set out the terms concerning the management of trust assets as well as the distributions made out of the trust exactly according to his/her wishes;
d) providing for a relative's incapacity or lack of financial maturity. For example, parents with a disabled or minor child can be concerned with who will manage their child's assets, and how they will be managed, when they die or perhaps become disabled themselves (as in the previous case). If the parents have separated and one of them has concerns about handing over a substantial amount of wealth to the other (who is the child's legal representative), the former might wish to appoint a third-party trustee who can release funds for the needs of the beneficiary when he sees fit. As told earlier, many jurisdictions have made it possible to create special trusts, providing a measure of protection against creditors, for spendthrift relatives or dependants who need protection against their own improvident, foolhardy habits[123];
e) protecting specific assets, as in the case of keeping the family home out of the reach of creditors. This could be especially attractive for businessmen or for those whose professions open them up to the risk of civil liability (e.g., doctors or lawyers), but in light of today's economic and financial instability – and, in some regions, political instability – it could be attractive for anyone. It should be kept in mind, though, that there are usually some specific rules protecting

[121] Ibid, p. 81.

[122] For a discussion of the different uses of trusts, including family trusts, see, e.g., Waters (Note 2); also D. Hayton. The Future of the Anglo-Saxon Trust in the Age of Transparency. Paper prepared for the STEP Caribbean Conference 2015 at St Maarten May 4, 2015. Available at: https://ccj.org/wp-content/uploads/2015/06/The-Future-of-the-Anglo-Saxon-trust-in-the-age-of-transparency-.pdf (8.1.2020).

[123] See note 78.

creditors in a case wherein a trust is set up to harm existing creditors or with no actual change in the control of the property.[124]

Although it is true that tax optimisation is often one of the goals of the creation of trusts, this disseration focuses primarily on private law matters and not tax law. However, in two of the articles this compendium is based on and subsection 4.3, the problems with the current taxation of private foundations have been tackled.

When selecting specific institutes enabling family asset management for a more thorough examination, the author proceeded from the premise that the object of the arrangement could be any transferable asset[125] and that there are no restrictions as to the circle of fiduciaries (i.e., the fiduciary could be a friend, a relative or another person, who does not (necessarily) provide the service as his professional activity). Having that in mind, which of the arrangements in Estonian law mentioned in the previous subsection could function like (family) trusts?

In the field of succession law, the office of the executor of will (subdivision 8 of the LSA) can carry similar functions as those of the testamentary trustee in England. The institution of the executor of the will as well as the subsequent successor[126] can also serve as means for intergenerational wealth planning. As was already shown in the previous subsection, the latter two institutes also hold certain structural elements similar to trusts, which are dealt with in more detail in subsection 2 of this compendium.

As was also already brought out in the previous subsection, common funds embody several trust-specific qualities and are probably one of the most trust-like instruments in Estonia; however, they are not an effective means for intergenerational assets planning, which is the focus of this dissertation.

As was likewise mentioned in the previous subsection, the mandate agreement entails both holding title for another's benefit as well as (at least, a partial) segregation of patrimonies. As this type of contract can have different purposes and thus can also cover the area of intergenerational wealth planning, the author chose to explore them further (subsection 3.1).

As to the intermediated holding of securities, both the component of fiduciary ownership and segregation of patrimonies could be determined. However, the list of possible holders of nominee accounts is limited – it includes professional participants in the Estonian securities market, operators of a securities settlement system, foreign legal persons and other institutions if they meet the criteria set

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[124] Lupoi (Note 55), pp. 135–136; S.E. Sterk. Asset Protection Trusts: Trust Law's Race to the Bottom. – 85 Cornell Law Review 1035 (2000).

[125] Certain rights and obligations are inseparably bound to the person pursuant to law and thus cannot be transferred (§ 6 (1) of the GPCCA). See also P. Varul *et al*. *Tsiviilseadustiku üldosa seadus. Kommenteeritud vln* (Note 110), p 20 and P. Varul *et al*. *Võlaõigusseadus I. Kommenteeritud vln* (Law of Obligations I. Commented Edition), Juura 2016, pp. 834, 861.

[126] In case of arrival of a particular date or fulfilment of a condition the estate or a share thereof transfers from a provisional successor to a subsequent successor (LSA's § 45 (1)).

out in § 6 (1) of the SRMA. It is concluded that persons not specified in § 6 (1) of the SRMA may not act as the holders of those securities.[127] The circle of persons who can act as custodians and administrators of other securities (i.e., those not registered in the ECRS but correspond to the definition of securities within the meaning of § 2 of the SMA) is not limited until their activity can be considered only as ancillary services to an investment service (in the meaning of § 44 of the SMA) and not as an investment service (within the meaning of § 43).[128] Again, as the purpose of this dissertation is to look for family-trust-like arrangements (and thus holdings of different kinds of property, not only securities), these arrangements will not get thorough attention. However, as the SMA's rules do not apply if the service provider is not providing investment services as a permanent activity, the mandate/commission contract provisions in the LOA apply and thus, partly, Section 3 might cover the issues that come up regarding the holding of securities.

As it may be that although certain legal instruments are formally, doctrinally or structurally different, they might still be capable of carrying out the same functions as a trust. Thus, the author subsequently analyses certain arrangements under Estonian law that may not share the main elements of trusts based on their potential functional similarity to trusts.

In the field of administration and providing for vulnerable persons, the guardian of vulnerable persons (§§ 171–209 of the Family Law Act (FLA)[129]) might have similar obligations as the trustee, and the institute of representation (Chapter 8 of GPCCA) can also carry certain functions that trusts have. Especially when considering use case c) described earlier in this subsection, for the purposes of a person's incapacity, giving of a power of attorney could be considered, as under Estonian law the principal's incapacity is not a ground for extinguishment of the right of representation (§ 125 of the GPCCA). The principal can enter into an agreement with the representative that determines the conditions for, for example, asset management and details of personal care. A proxy may be issued to the representative with the condition that the representative has the right of representation only in case the mental health of the principal is such that it precludes his or her ability to make transactions in his or her interests. Regarding the appointment of a guardian, an adult can make a proposal concerning the person to be appointed as his guardian according to § 204 (3) of the FLA or his child's guardian according to § 177 of the same act. If, the parents, for example, have separated and one of them has concerns about handing over wealth to the management of the other (who is the child's legal representative),

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[127] V. Kõve (Note 36), p. 305.

[128] As a rule, only persons specified in § 45 of the SMA can provide investment services as a permanent activity, but § 47 (1) also gives rise to a number of exceptions, which essentially allows the services that can be qualified as an investment service to be provided in certain cases by other persons.

[129] *Perekonnaseadus*. RT I 2009, 60, 395; RT I, 09.05.2017, 29. English text available at: https://www.riigiteataja.ee/en/eli/507022018005/consolide.

appointing a third-party special guardian (§ 209 of the FLA) might be of help. Neither the institute of guardianship or of representation entail the features of fiduciary ownership and segregation of patrimonies as the person under guardianship or the representative is regarded as the owner although he does not have the right to enter into transactions by himself. Also, the appointment of a representative or a guardian (for an incapacitated adult) alone is not sufficient for making dispositions concerning the property in the event of one's death. Thus, it can be said that both the institute of representation as well as guardianship are structurally quite different from trusts and functionally cannot be used in most of the use-cases described earlier in this subsection, and thus will not get further attention in this dissertation.

Another institute that might be worth mentioning in the estate-planning context is (life) insurance.[130] On the one hand, different life insurance services certainly act as an estate-planning tool, as their purpose can be ensuring the standard of living of the policyholder or his/her dependents. On the other hand, special rules apply to insurers,[131] and under the insurance contract, the insurer must make monetary payments and cannot transfer other assets. In addition, insurance companies do not assume discretionary duties, like making payments to others on behalf of beneficiaries, or to see that the funds are used for a stated purpose.

Limited partnership funds established under the IFA might, in some cases, also be available as an alternative to trusts. According to § 125 of the CC, a limited partnership is a company in which two or more persons operate under a common business name, and at least one of the persons (general partner) is liable for the obligations of the limited partnership with all of the general partner's assets, and at least one of the persons (limited partner) is liable for the obligations of the limited partnership to the extent of the limited partner's contribution. Pursuant to § 8 (2) of the IFA, a limited partnership fund may manage its own assets or enter into a management contract with a fund manager. According to the same provision, the circle of persons who can act as a limited partnership fund manager or a general partner of a limited partnership fund which manages its own assets, is limited: only a fund manager which has received an activity licence pursuant to the IFS or which has been issued an activity licence of a UCITS or alternative fund manager in another EEA Member State or which has registered its operation with the Financial Supervision Authority may act as a limited partnership fund manager or a general partner of a limited partnership fund which manages its own assets. Pursuant to § 2 (1) of the IFA, an investment fund has to involve the capital of a number of investors with the view of investing it in accordance with a defined investment policy for the benefit of the investors in question and in their common interests. Under § 20 (1) of the IFA, a limited partnership fund may only engage

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[130] Articles 535–547 of the LOA, § 13 of the Insurance Activities Act (*Kindlustustegevuse seadus*; RT I, 07.07.2015, 1; RT I, 20.02.2019, 6) English text available at: https://www.riigiteataja.ee/en/eli/526032019002/consolide. See also J. Lahe, O.-J. Luik. Kindlustusõigus (Insurance Law). Juura 2018, p. 48–50.

[131] J. Lahe, O.-J. Luik (Ibid.), p. 57 ff.

in the management of its own assets. Thus, a limited partnership fund established under the IFS cannot deal with other activities, and rather it could be concluded that a limited partnership fund cannot be used simply to hold a family property – the main purpose being to preserve existing assets (such as renting real estate), where making payments and investing is only one of the ancillary activities. Per se, the regulation of limited partnership funds allows for great flexibility in the formation of partners' rights, including, for example, voting rights as well as the size of payouts and termination of the company. These issues can be decided in the partnership agreement. The partnership agreement may provide for restrictions on transfer and encumbrance of the units of the limited partnership fund and other conditions and procedures (§ 21 (2) of the IFA). In regard to the fund manager's creditors, the principle of separation of assets under IFA § 23 (4) and (6) also applies to limited partnership funds. In addition, limited partnershp funds are subject to a special tax regime and the CC does not require disclosure of the partners of the fund in the register. Instead, the list of partners is held by the fund manager. However, the obligation to present the information concerning the beneficial owners to the relevant register may result from the MLTFPA if the partner corresponds to the definition of beneficial owner.

As mentioned earlier, in common law countries trusts also arise in cases where; for example, the land is owned by more than one person.[132] In the Estonian context, co-owners (§ 70 (3) of the LPA), spouses (§ 25 of the FLA), co-successors (§ 147 of the LSA) and an "ordinary" partnership (*seltsing*; Ch.-s 30–34 of the LOA), could be mentioned here. However, in Estonia, when a right or a thing belongs to several persons at the same time, it is usually manifested by an entry in the register (Land Register Act (LRA)[133] § 14 (2); § 70 of the LPA) – if the object of shared ownership (LPA § 70 (1)) or community (*ühisus*[134]) has to be registered – or, in the case of movables, by joint possession. Thus, it can be said that these devices lack of an essential component of a trust – there is no fiduciary ownership. There are two exceptions though: silent partnership and common funds.

If in the cases of "ordinary" partnership the parties to it are visible outside, in the case of silent partnership (Ch. 34 of LOA; modelled after German *Stille Gesellschaft*) to a third person, only one of the parties (the "proprietor") is visible, but there exists an internal relationship that offers privacy to the other party of the contract – the silent partner. The silent partner makes a contribution (cash, services or other assets) to the business of the proprietor and in return is entitled to share in the profits arising from the business. The contribution normally becomes the property of the proprietor. With respect to third parties, the proprietor is the owner of the commercial enterprise and carries on business in his own name. Under the partnership agreement the silent partner might have the right to participate in the

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[132] Lupoi (Note 55), p. 19.

[133] *Kinnistusraamatuseadus*. – RT I 1993, 65, 922; 28.6.2016, 8. English text available at: https://www.riigiteataja.ee/en/eli/515122016002/consolide.

[134] If a right belongs to several persons – LPA § 70 (7).

decision-making.[135] For certain operations, the proprietor should obtain the consent of the silent partner, but not having consent does not affect the validity of the transactions concluded (the silent partner will only have a personal claim against the proprietor).[136] The silent partner is generally not liable for third-party claims arising from the business.[137] Nevertheless, if not agreed otherwise, he has to participate in the losses of the business (LOA, § 614 (1), § 618 (2)). The partnership comes to an end when either of the parties goes bankrupt (LOA, § 618 (1), § 596 (1) 7)) and in the case of the proprietor's bankruptcy, the silent partner may, on the basis of the silent partner's contribution, file a claim against the proprietor as a creditor in the bankruptcy proceedings (on an equal footing with other creditors) to the extent which the contribution of the silent partner exceeds the share of the silent partner in the covering of losses. Thus, the assets contributed to the enterprise by the silent partner are not ring-fenced: when the proprietor (either a natural or legal person) has several enterprises or personal creditors, there is no segregation and the silent partner (or the contribution) has no specific protection. Thus, the silent partnership would not qualify as a trust when considering the important elements of a trust (namely regarding the segregation of patrimonies) and is therefore not studied further as a family asset management vehicle.

In addition to the purposes of management or the mere holding of assets, the fiduciary ownership for security purposes – assignment of rights or transfer of ownership of things in order to provide collateral – is used in Estonia.[138] Using a security agent for the purposes of securing bond issuance and syndicate loans can contain a mix of the mandate and the assignment of rights or transfer of ownership of things to the security agent. To third persons, the security agent is the holder of a restricted real right (pledge, mortgage) or an object that has been transferred to him, but he has to exercise the associated rights in the interests of the investors/ lenders.[139] Again, examination of the trust-like arrangements for security purposes does not fit into the scope of this dissertation.

The use of a notary's deposit can also be related to providing additional security – according to § 35 (2) of the Notaries Act[140] a "deposit is an official duty accompanying a notarial act if it is connected with a transaction authenticated by the same notary and the persons applying for deposit have a legitimate interest

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[135] P. Varul *et al*. *Võlaõigusseadus II. Kommenteeritud vln*. (Law of Obligations II. Commented Edition). Juura 2007, p. 717.

[136] Ibid, p. 713.

[137] Ibid; LOA § 610 (3).

[138] P. Varul *et al*. *Asjaõigusseadus II. Kommenteeritud vln*. (Property Law II. Commented Ed.). Juura 2014, p. 434; K. Toommägi. *Vallasasjade tagatisomandamine – selle olemus ja realiseerimine* (Security ownership transfers of movable assets – essence and enforcement. MA Thesis). Tallinn 2014. Available at: http://dspace.ut.ee/bitstream/handle/10062/43015/toommagi_ma_2014.pdf?sequence=1&isAllowed=y (8.1.2020).

[139] See E. Pisuke (Note 45); A. Kotsjuba (Note 45).

[140] *Notariaadiseadus*. RT I 2000, 104, 684; RT I, 29.06.2018, 35. English text available at: https://www.riigiteataja.ee/en/eli/526032019006/consolide (11.1.2020).

arising from the transaction to ensure performance of the transaction by deposit". According to § 120 (1) of the LOA, money, securities, other documents or valuables can also be deposited with a notary if an obligee delays acceptance or if the obligor does not know and does not have to know the identity of the obligee. Depositing money (except cash), securities and documents with a notary is possible also in other cases (§ 35 of the Notaries Act). It seems that the legislation related to notaries' activities does not directly regulate to whom the items deposited with a notary belong or that they are excluded from the private property of a notary in the event of his/her bankruptcy. Possibly, in some cases the LOA's provisions of the mandate agreement may apply and in others, the provisions of deposit contract (*hoiuleping*). However, notaries are not generally involved in asset management and deposits are made primarily for the purpose of securing a transaction.

On the basis of a deposit contract, one person (the depositary) undertakes to keep a movable delivered to the depositary by another person (the depositor) and return it to the depositor upon termination of the deposit (LOA, § 883). The depositary, like a trustee, must ensure that the thing is not damaged, destroyed or lost and that it is subsequently returned to the depositor (or third party). Like a trustee, the depositor may not use the deposited thing for his own benefit. The similarity between trusts and deposit agreements can also be seen in the fact that the (legal) owner of the deposited object is not recognisable to third parties. However, unlike with trusts, the circle of items that can be the object of the deposit contract is much narrower: only movables can be deposited. If money or fungible things are deposited such that the depositary undertakes to return things of the same kind, quality and quantity, it is presumed that the ownership and the risk of accidental loss of and damage to the things will be transferred to the depositor upon delivery of the things, and the provisions concerning loans apply correspondingly (LOA, § 896 (1)). The main difference compared to a trust is that in the case of a trust, the trustee is given the title of the item; that is, the trustee becomes the owner; however, in case of the deposit contract, only the possession of the thing is given to the depositary. In addition to that, the duties of the trustee are generally wider than securing that the thing is not damaged, destroyed or lost.

2. Legal institutions comparable to testamentary trusts

2.1 Testamentary executor and subsequent succession as estate-planning devices

Description of the problem. Although trusts do not exist under Estonian law in the strictest sense, there are similar devices under succession law that should or could cover the same functions as testamentary trusts do in common law countries – namely the institutions of testamentary executor and subsequent succession. This subject matter has not been previously explored in Estonian legal literature, but the practice of legal professionals indicates that this area might be problematic.[141] Concerning the regulation of testamentary execution, it is, first of all, not entirely clear if the appointment of a testamentary executor excludes the heirs' participation in making decisions concerning the estate and their right of disposal of the assets. For example, there are controversial provisions in family law leading to practical problems. Second, it is not clear whether a new executor should be appointed if the previous one willingly or involuntarily vacates the position. Third, the law does not directly regulate the issue of the protection of property administrated by the executor from the heirs' creditors. Regarding the subsequent succession, the biggest problem is that it is uncertain whether and to what extent the testator can restrict the rights granted to the provisional heir by law. There is also some uncertainty regarding unauthorised transactions made by the provisional heir.

Statement set forth for defence. Estonian succession law does not enable the isolation of the estate in a separate "vehicle" on the operation of which third parties have no direct impact.

Reasoning. In principle, the appointment of a **testamentary executor** should exclude the heirs' participation in making decisions concerning the estate and their right of disposal of the assets – despite having the title, the heir has no right to dispose of the objects that the executor requires in order to perform his/her obligations (LSA, § 79). Instead, the executor has the right to dispose of and possess the objects, separate them from the rest of the property, and assume obligations with respect to the estate if necessary for the performance of the duties assigned by the testator (LSA, § 81 (7)).

According to § 81 (2) of the LSA, the executor of a will may only "derogate from the duties assigned in the will with the consent of interested persons if this is in the interest of executing the testamentary intention of the testator." This provision should probably be understood so that the executor may deviate from individual specific orders if this is consistent with the testator's will in a broader sense. In essence, this provision seems rather to be about (additional) interpretation of the testator's will than deviation from his wishes. Thus, this should

[141] Notes 21, 22, 23 and 24.

apply to cases where circumstances at the time the will was signed have substantially changed by the time of the execution of the will and the testator could not have foreseen the changes.[142] However, if a testator's direction seems unreasonable to the others, but is not made due to the testator's misconception of future circumstances, it should probably still be followed. Even if the testator's wishes are somewhat detrimental to the heir's interests, they should be respected (unless the heir is entitled to a compulsory portion – one of the few tools established by the LSA to limit testamentary freedom[143]). One could also conclude that if the testator has appointed an executor, the beneficiaries cannot terminate the execution and require the executor to transfer the estate to them even if every beneficiary agrees.

However, questions arise regarding the relationship between the LSA and the FLA if the heir is a person with limited legal capacity. Section 185 of the FLA reads as follows:

"(1) A guardian shall administer the property which a ward receives by succession or as a gift in accordance with the dispositions included in a gratuitous contract, will or succession contract. A guardian's right or representation arising from law cannot be extended by dispositions. (2) A guardian may derogate from the dispositions with the consent of the court if adherence thereto could damage the interests of the ward." Does this mean that, according to subsection 2, the heir's interests should prevail instead of the testator's wishes? Should it be understood in a way that, for example, legacies[144] for third persons cannot be fulfilled in the wake of the ward's interests? This interpretation certainly does not fit the principle of testamentary freedom.

The relations between the institute of executor and provisions of the FLA also cause confusion in light of the second sentence of § 185 (1) (which states that "a guardian's right or representation arising from law cannot be extended by dispositions") as well as § 209, § 179 (2) and § 122 (1) of the FLA. Normally, an executor does not need the court's consent to enter into transactions while fulfilling the obligations specified in the will. On the other hand, the legal representative of a person with limited legal capacity generally needs the court's consent for transactions listed in §§ 187 and 188 of the FLA. The author would suggest that if the testator explicitly stipulates the fulfilment of testamentary orders by the executor of the will (rather than generally prohibiting the parent or

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[142] I. Mahhov, E. Silvet. *Kuidas pärida ja pärandada (How to Inherit and Bequeth)* (Õigusteabe AS Juura, 1997), pp. 34–35. See also G.S. Alexander. The Dead Hand and the Law of Trusts in the Nineteenth Century. – (1985) 37 Stanford Law Review, p. 1261.

[143] Along with the *numerus clausus* principle and maximum time limits for certain dispositions.

[144] LSA § 56 ("Definition of legacy"): (1) If in a will a testator does not give all his or her property or a legal share thereof to a person but gives a particular proprietary benefit without regarding the recipient of the benefit as his or her legal successor, the benefit shall be deemed to be a legacy and the recipient of the benefit shall be deemed to be a legatee. A disposition to give a legacy entitles a legatee to demand transfer of an object given as a legacy from the executor of the legacy. (2) A legacy may be a thing, a sum of money, a right, a claim, exemption from an obligation or any other transferable benefit.

guardian from administering the property), one should probably proceed from the provisions of the LSA that do not stipulate an obligation to receive the court's consent. That the executor does not require the court's consent in the case of a minor heir also seems to be the dominant position in German law.[145]

Overall, it seems logical to conclude that the purpose of the FLA's regulation of guardianship or legal representation should not interfere with a person's testamentary freedom.

Concerning the termination of the office of executor, although not directly regulated by the law, it seems logical to conclude that a new executor should be appointed if the previous executor dies, his legal capacity is restricted, he renounces the duty, or the court releases him due to a breach (LSA, §§ 80 and 86). However, this is not entirely certain, as the legislator's explanatory comments regarding § 86 of the LSA imply that the execution of the will might terminate entirely if a court removes an executor.[146] Thus, it is worth suggesting that the testator explicitly indicates in his will that a new executor be appointed in the abovementioned cases; furthermore, he should consider specifically naming an alternative executor (§ 78 (1)).

Unlike in German law, where the term for the execution of a will is 30 years (BGB[147], § 2210), the LSA does not stipulate a maximum period. However, it might depend on the type of disposition needing execution; for example, § 63 (2) of the LSA stipulates that if a legacy is given with a suspensive condition that is not fulfilled within twenty years after the opening of the succession, the legacy is invalid; also, under § 155 (3) of the LSA, the testator can prohibit the division of the estate for up to 30 years.

Regarding the segregation of assets, since objects forming part of the estate belong to the heir and not to the executor, they are excluded from the executor's estate in case of his bankruptcy or an execution of enforcement proceedings against him. As to the heir's creditors, unlike German law (BGB § 2214), Estonian law does not explicitly stipulate that creditors of the heir have no recourse to the objects of the estate subject to administration by an executor. The exclusion could be deduced from the *nemo plus* principle, under which an heir's bankruptcy trustee or bailiff should not have a right of disposal greater than what the heir himself initially had. Also, the general principle in the LSA is that the heir's creditors may demand the heir's debts be paid from the share of the estate to which that heir is entitled only after all other obligations regarding the estate have been performed (LSA § 126, § 142 (1)). The latter includes the testator's debts and his

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[145] D. Schwab, P. Gottwald, S. Lettmaier. Family and Succession Law in Germany. Kluwer 2012, p. 180.

[146] *Pärimisseaduse (56 SE) seletuskiri* (in Estonian). Available at: https://www.riigikogu.ee/tegevus/eelnoud/eelnou/bf9178a0-a068-736c-7b0f-654c7b4fa81f/Pärimisseadus (11.1.2020), p. 16.

[147] German Civil Code (*Bürgerliches Gesetzbuch, in der Fassung der Bekanntmachung vom 2. Januar 2002*), English text available at: https://www.gesetze-im-internet.de/englisch_bgb/ (11.1.2020).

last wishes concerning the estate: the execution of legacies, testamentary obligations (*sihtkäsundid*) and testamentary directions (*sihtmäärangud*) (the last two concepts being broad enough to cover many orders made by a testator).[148] However, since there is no relevant case law, there is insufficient certainty to say that such a segregation of assets applies in all cases.

Furthermore, it is unclear whether the executor should act in his name or as a representative of heirs[149]. Concerning unauthorised dispositions made by the executor, it is, however, possible to conclude that heirs can have claims against third-party transferees in both cases; however, there are differences, e.g., when it comes to the possibility of *bona fide* acquisition.

With **subsequent succession** the biggest problem seems to be that it is uncertain whether and to what extent the testator can restrict the rights granted to the provisional heir by law.

The LSA gives the provisional heir the right to use and consume the objects belonging to the estate (LSA, § 53 (1)), collect all benefits receivable from the estate (LSA, § 52 (3)), and dispose of the objects belonging to the estate (except for immovables and gratuitous disposals – LSA, § 48 (2)).

Can, the testator, for example, stipulate that the provisional heir has no right to all the benefit from the estate, but may only receive a certain monthly amount? Could the provisional heir's expenses be reimbursable from the estate? In this case, the provisional heir would have a position more similar to the executor of the will.

On one hand, the LSA's explanatory memorandum[150] states that "as with the provisional heir, the rights and obligations of the executor of the will depend on the testator's wishes". On the other hand, one aim of the changes to the institute of subsequent succession in 2008 was to give the provisional heir greater rights (compared to the previous act) so as to become more of a "full owner".[151]

It should also be noted that in Estonian succession law, the *numerus clausus* principle applies, under which the testator can only make orders of the type and content the LSA provides. Consequently, it should not be possible to alter the nature of provisional or subsequent heirship compared to the LSA's regulation, except to the extent the law provides. On the other hand, when considering the

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[148] According to § 73 (1) of the LSA "a testamentary obligation is a disposition by a testator whereby he or she places an obligation on a successor or legatee in a will or succession contract without the creation in any person of a right corresponding to the obligation". According to § 76 (1) "a testamentary direction is a disposition by a testator whereby he or she obliges a successor or legatee in a will or succession contract to use the estate or legacy for the designated purpose".

[149] See § 81(9) of the LSA; T. Mikk, *Pärimisõigus (Succession Law)*, Sisekaitseakadeemia 2012, p. 63; P. Varul *et al*. The General Part of the Civil Code Act. Commented Edition (Note 110), pp. 352, 359; Ministry of Justice 12.09.2018 response to 12.07.2018 inquiry by Chamber of Notaries.

[150] Note 146, p. 15.

[151] Ibid., p. 7.

concept of "testamentary direction" (*sihtmäärang*) [152], which is one direction a testator can make in a will, it is broad enough to accommodate many possible aspirations by testators, making it difficult to take *numerus clausus* very seriously in succession law. It is also possible to use tools outside succession law for the desired solution, such as entering into a mandate contract for a third party's benefit (and transferring the principal's assets to the mandator and foreseeing that the contract continues even after the principal's death); or to set up a foundation (either *inter vivos* or *mortis causa*) for the testator's family. This again raises questions about there being any sense in the strict application of *numerus clausus*. Indeed, the principle is also blurring in other areas, such as property law. And, if an "ordinary" heir's rights can be restricted, why should a provisional heir be different? However, there still is uncertainty about the permissibility of restricting the rights of the provisional heir under Estonian law.

Another question is to what extent it is possible to deviate from the testator's orders if subsequent succession is stipulated, such as transferring the estate to a subsequent heir before the due date. Under § 48 of the LSA, it seems theoretically possible, because only transactions restricting the rights of the subsequent successor are declared void. To avoid this, the testator should rule it out *expressis verbis* in the will; for example, foresee another subsequent successor in case such things happen.

Regarding unauthorised transactions made by the provisional heir the following can be said. According to the LSA § 48 (2), a transaction to transfer an object forming part of an estate without charge or disposition of an immovable or real right by a provisional heir is void upon fulfilment of the condition on subsequent succession or on the due date, if the disposition precludes or restricts the subsequent heir's rights. It should be noted, however, that the transaction becomes void only "upon fulfilment of the condition on subsequent succession or on the due date". If the thing is still in the third-party transferee's possession, the subsequent heir may vindicate it pursuant to § 80 of the LPA.[153] But once transferred further, the situation becomes more complicated: the law does not provide for the invalidity of the next transaction. Since at the moment the object was further disposed of, the condition triggering the subsequent succession had not yet arrived (meaning the transfer transaction by the provisional heir was valid at that moment?), it is unclear whether the third-party transferor disposed of the object as an entitled or an unentitled person (in the meaning the GPCCA § 114). Under the principle of fairness, this situation should be interpreted in such a way that he was a (conditionally) unentitled person, and therefore the acquisition on the basis of the disposition he made depends on the good faith of the new acquirer.

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[152] See note 148.

[153] In the case of immovables, entries in the land register concerning third parties as owners are incorrect and subsequent heirs can request the correction of entries under § 65 of the LPA.

2.2 The need for registration in the UBO register

Description of the problem. As already mentioned in subsection 1.1, the AML/CFT regulations of the EU require that Member States identify trust-like arrangements used in their countries and assure the submission of the data of related beneficial owners to the register.[154]

This has revealed a certain amount of confusion in Estonia concerning the concept of trust. In the Money Laundering and Terrorist Financing Prevention Act[155] (MLTFPA), which was adopted for the implementation of the AMLD4, with regard to trusts and other similar arrangements (that are not legal entities), the following instruments are named: the trust fund[156], (civil law) partnership (*seltsing*), community (*ühisus*) or any other association of persons not having legal personality (*muu juriidilise isiku staatust mitteomavate isikute ühendus*) (subsection 6 of § 9 ("Beneficial owner")). The aforementioned selection of instruments is not explained in the explanatory memorandum of the MLTFPA. Furthermore, the MLTFPA foresees that in the case of the legal arrangements

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[154] AMLD5 Recitals 26–29. Recital 29: "In order to ensure legal certainty and a level playing field, it is essential to clearly set out which legal arrangements established across the Union should be considered similar to trusts by effect of their functions or structure. Therefore, each Member State should be required to identify the trusts, if recognised by national law, and similar legal arrangements that may be set up pursuant to its national legal framework or custom and which have structure or functions similar to trusts, such as enabling a separation or disconnection between the legal and the beneficial ownership of assets. Thereafter, Member States should notify the Commission the categories, description of the characteristics, names and where applicable legal basis of those trusts and similar legal arrangements in view of their publication in the *Official Journal of the European Union* in order to enable their identification by other Member States. It should be taken into account that trusts and similar legal arrangements may have different legal characteristics throughout the Union. Where the characteristics of the trust or similar legal arrangement are comparable in structure or function to the characteristics of corporate and other legal entities, public access to beneficial ownership information would contribute to combating the misuse of trusts and similar legal arrangements, similar to the way public access can contribute to the prevention of the misuse of corporate and other legal entities for the purposes of money laundering and terrorist financing."

[155] *Rahapesu ja terrorismi rahastamise tõkestamise seadus*. RT I, 04.01.2019, 17; RT I, 17.11.2017, 2. English version available at: https://www.riigiteataja.ee/en/eli/518012019004/consolide.

[156] *Usaldusfond* in Estonian, which, according to the explanatory memorandum (available at: https://www.riigikogu.ee/tegevus/eelnoud/eelnou/fb03e20e-caf7-463d-9b60-ddf6021742b2/Rahapesu%20ja%20terrorismi%20rahastamise%20tõkestamise%20seadus (most recently accessed 11.1.2020) – pp. 31–32), is used in the meaning of "trust" and does not have the same meaning as limited partnership funds as defined in subsection 2 of § 2 of the Investment Funds Act (although the term in Estonian is the same). The use of the term "*usaldusfond*" as probably one of the best equivalents to the "trust" was proposed by the author herself in one of her first articles about trusts (K. Sepp. Good to Know – Trusts. (*Kasulik teada: usaldusfondid*). – Juridica 2011/7, in Estonian). However, the IFA that was established in 2016 started to use the term instead to define a new type of investment fund that is founded as a limited partnership (§ 8 of the IFA).

mentioned in § 9 (6), the obliged entities[157] must identify the beneficial owner (§ 20 (1) 3), § 21 and § 28), register the fact that the transaction was made with such a legal arrangement or its representative / trustee (§ 46 (1) 6)) and retain the collected data (§ 47); however, there is no obligation to submit information concerning the beneficial owners to any registries or databases. Only legal entities must disclose the data of their beneficial owners through the information system of the commercial register.

The draft act[158] for changing the MLTFPA for implementing AMLD5 removes the above list from § 9 (6) as such, mentioning only trusts (*usaldushaldus*[159]) and associations of persons not having legal personality (*muu juriidilise isiku staatust mitteomavate isikute ühendus*). According to the draft act, the registration of the ultimate beneficial owners will be made compulsory for the trustees of foreign trusts residing in Estonia. According to the explanatory memorandum of the draft act, Estonia has notified the European Commission that there are no legal instruments in our law whose structure and function are similar enough to those of the trusts to be subject to Article 31 of the AMLD.[160]

As has been shown earlier in this compendium, in the field of succession law, the offices of the executor of a will and the subsequent successor hold a number of structural elements similar to trusts and can, with certain deficiencies, also serve as a means for intergenerational wealth planning.

The question is if these arrangements should be considered in the listing of similar arrangements in the AMLD context?

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[157] As defined in § 2 (1) of the MLFTPA. Pursuant to § 2 (1) 9) and § 3 of the MLTFPA, "obliged entities" are (among others) persons who provide trust and company services as their economic and professional activities and they also need a license for their activities under § 70 (1) 2) of the MLTFPA. The definition of the provider of trust and company services is provided by § 8 according to which it means a natural person or a legal person who in its economic or professional activities is acting as a representative or trustee of a trust, except for a trust within the meaning specified in subsection 2 of § 2 of the Investment Funds Act, or that of a civil law partnership, community or another association that does not have legal personality, or the appointment of another person to such position.

[158] *Rahapesu ja terrorismi rahastamise seaduse, audiitortegevuse seaduse ja teiste seaduste muutmise seadus*. Draft and explanatory memorandum available at: https://eelnoud.valitsus.ee/main#bogZnv22 (most recently accessed 23.1.2020).

[159] New term invented instead of using the "usaldusfond" to avoid the confusion described in note 156.

[160] Note 156, p. 7; list of trusts and similar legal arrangements governed under the law of the Member States as notified to the Commission (2019/C 360/05, OJ C 360, 24.10.2019, p. 28–29). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C.2019.360.01.0028.01.ENG&toc=OJ:C:2019:360:TOC (11.1.2020). With regard to AMLD, the Commission has already initiated a number of infringement proceedings, but to the author's knowledge none of them specifically concern legal arrangements similar to trusts (or information provided about them); nor is the author aware of any rulings of the Court of Justice of the EU regarding trust-like arrangements in connection to applying of the AML regulations.

Statement set forth for defence. Regarding the office of the executor of a will[161] and the subsequent successor[162] that hold certain structural as well as functional elements similar to trusts, in the AML/CFT context, we can presumably exclude those devices as there is no "hidden" beneficial owner.

Reasoning. As AMLD5 lists such contractual devices as *fiducie*, *Treuhand* and *fideicomiso* as examples of arrangements similar to trusts,[163] highlighting the similarities and differences between these and the trust should aid in ascertaining what the legislator meant under "arrangements similar to trusts".

While the assets constituting the trust fund are ring-fenced in a trust, such that protection is included in the event of the insolvency of the settlor from his creditors, the *Treuhand* ends in the consequence of insolvency of the *Treugeber* and the assets may then be reclaimed from the *Treuhänder*. Thus, we can say that the segregation of property is not an obligatory feature for an arrangement to be treated as similar to trusts under the AMLD. Also, the beneficiaries' rights against third persons in cases of the misappropriation of property by the trustee are generally stronger in the case of trusts compared to *fiducie* and *Treuhand*.[164] This basically leaves us with one common characteristic: the property is entrusted to one person, who holds the title to it for the benefit of one or more other persons or for a specific purpose.

Although an executor of a will might have the right to possess, use, or dispose of the property (while the successor does not have the right to dispose of it), the successor – and not the executor – will be recorded as the owner of the property in the respective registers. In the case of a subsequent trustee, the arrangement may resemble an interest-in-possession trust[165], but until the relevant date or condition has come to pass (and the subsequent successor is to be transferred the ownership), the subsequent successor, in that capacity[166], will have no hidden beneficial rights with regard to the estate and the provisional successor is the full (and recorded) owner. In addition to that, in the case of immovables the fact of the future subsequent succession is recorded in the land register (§ 49^1 of the LRA), and therefore is visible to everyone. Needless to say, the use of those devices can only arise in the case of someone's death, which probably makes it an ineffective means for money laundering.

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[161] Subdivision 8 of the LSA.

[162] In the case of the arrival of a particular date or fulfilment of a condition, the estate or a share thereof transfers from a provisional successor to a subsequent successor (LSA's §45(1)).

[163] Amendment to Article 31 p 1 of the AMLD4.

[164] S. van Erp, B. Akkermans (Note 113), p. 613.

[165] In the case of an interest-in-possession trust, one beneficiary is granted a right to the income from the trust or the right to use it, by the settlor. Upon the death of said (first) beneficiary, the rest of the fund may pass to another beneficiary.

[166] He might be, at the same time, e.g. a legatee.

3. The mandate contract

3.1 The mandate contract as a family asset management device

Description of the problem. As stated at the outset, many legal practitioners in this field are of the opinion that there are no good means (comparable to trusts) for family asset planning in Estonia.[167] When searching for trust-like arrangements in civil-law countries, contractual solutions – and in particular, mandate contracts – are often highlighted.[168] As outlined in 1.4.2, the mandate agreement under the LOA does have similar features to a trust. Therefore, the question arises what are the legal issues that come up when using a mandate agreement for family asset management, and can they be overcome.

Statement set forth for defence. Although the "default rules" concerning mandate contracts in the LOA by themselves do not provide all the features that would be desirable for a trust-like family property management, stretching the law using a broader interpretation and/or using other means provided by the legislation could help achieve the similar goal. However, it seems that it is not possible to obtain a situation where the assets would be protected simultaneously from both the creditors of the third-party-beneficiary and that of the person who settles the property for the benefit of the beneficiary.

Reasoning. According to the definition given by § 619 of the LOA, under a mandate contract, the agent undertakes to provide services to the principal.[169] The services that can be rendered could be various. They may include negotiating and entering into contracts with third parties (the agent can be required to act in the name of the principal or in his own name) as well as services that do not include the conclusion of contracts or performing of other juridical acts; for example, the maintenance of property, collecting rent or other proceeds from the property, making payments from it,[170] etc.

An essential feature of a trust is that the title to the trust fund is vested in the trustee. The LOA does not foresee the transfer of title to the agent as an inseparable characteristic of a mandate contract, but it certainly does not exclude this possibility. In fact, there are provisions (namely § 626 (3) of the LOA, see below) indicating that the legislator took into account that the transfer of title might occur. This dissertation proceeds from the presumption that the title to the assets

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[167] Notes 21, 22, 23 and 24.

[168] M. Graziadei, U. Mattei, L. Smith (eds.). Commercial Trusts in European Private Law. Cambridge University Press 2009, pp. 104 ff, 111 ff, 135 ff, 140 ff, etc.

[169] The official translation of Estonian *käsundusleping* is actually 'authorisation agreement', but 'mandate contract' seems to be more common for these types of legal relationships. Also, instead of 'the mandatary' 'the agent' and instead of 'the mandator' 'the principal' is used in this compendium.

[170] In this case, the provisions of support contracts (LOA, §§ 568–577) should also be consulted.

managed under a mandate contract is vested in the agent, which results in him acting in his own name not as the principal's representative. If the agent's obligations involve entering into transactions in his own name, the provisions regulating the contract of commission, which is one of the subspecies of the mandate agreement, also apply as *lex specialis.*[171]

Position of parties. In the case of trusts, three parties – the settlor, the trustee and the beneficiary – are usually distinguished. Although the LOA provisions on mandate contracts as such are based on the existence of two parties – the principal and the agent – it is possible under Estonian law to achieve a similar triangular relationship by concluding the contract for the benefit of a third party (LOA, § 80).

Compared to trusts, the overall division of responsibilities and rights between parties involved is, however, rather different under the LOA. In the case of a trust, the primary relationship is between the trustee and the beneficiary; the settlor generally drops out of the picture after the trust has been set up.

Under the LOA regulation of mandate contracts, the central relationship is between the agent and the principal, the latter having an active role throughout the duration of the contract. The agent has to provide the principal information on all material circumstances related to the execution of the mandate (LOA, § 624 (1)) as well as an overview of all income and expenses related to the mandate (§ 624 (2)). The principal can give instructions to the agent (§ 621 (1) I).[172] He can terminate the contract under the terms prescribed in § 630 or § 631 of the LOA or it can be agreed that the principal can modify and terminate the contract according to his wishes and changed circumstances. The principal is also the one that can require the performance of the obligations of the agent.

The position of a third-party beneficiary under the default rules of the LOA, on the other hand, is weaker when compared to that of an English trust beneficiary. Under § 80 (2) and (3) of the LOA, the third-party beneficiary has no right to require the performance of an agent's obligation even if that obligation is to be performed for his benefit. The law does not provide for the obligation of the agent or the principal to inform the third-party beneficiary of signing the agreement in his favour. According to § 80 (6) of the LOA, the parties to the contract may amend or terminate an agreement entered into for the benefit of a third party without the consent of the third party, unless otherwise provided by the contract or by law.[173] However, if the principal so wishes, the beneficiary can be given a stronger position. In order for the beneficiary to have the right to require the

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[171] Under § 692 (2) of the LOA the provisions regulating mandate agreements apply to contracts of commission unless the provisions of the commission agreement chapter provide otherwise. Therefore, when writing the dissertation, both the provisions of the commission and the mandate agreement were taken into account. However, most of the issues that are essential in the context of comparability to trusts, are regulated in the mandate contracts' chapter.

[172] However, if the agent must fulfill the mandate based on his professional knowledge or ability, the principal cannot provide detailed instructions concerning the manner and conditions of execution of the mandate (LOA § 621 (1) II).

[173] But see P. Varul *et al. Võlaõigusseadus I. Kommenteeritud väljaanne* (Note 125), pp. 384–385.

performance of an agent's obligation, it must be explicitly provided for in the mandate agreement. In that case, the beneficiary also has the right to demand damages and penalty for late payment, but the right to require the performance does not give him the right to modify or cancel the contract.[174] However, he may be authorised by the principal to do so as the principal's representative or, possibly, under § 26 (1) of the LOA, which prescribes that the parties may leave some of the terms of a contract to be determined by one party or a third party.

Segregation and subrogation. Considering that the rules on mandate contract grant the principal the opportunity to influence the agent's activities during the lifetime of the contract, it is understandable that the assets subject to the mandate agreement are not protected from the principal's creditors in the case of the principal's bankruptcy – in that case the mandate contract expires under § 632 (2) of the LOA, the agent has to transfer the assets back to the principal and they shall be included in the latter's bankruptcy estate. There is less logic in the fact that the same provision seems to apply if the execution of the mandate contract continues after the principal's death – as his heir(s) will be the new principal(s), in the event of the heir's bankruptcy his creditors also have the right to satisfy their claims from the assets subject to the mandate agreement, even when the principal has limited the heirs' rights to terminate or change the contract or to give instructions to the principal. However, this risk can be somewhat decreased if the principal makes certain testamentary dispositions in addition to the conclusion of the mandate contract.[175]

In the case of a mandate agreement for the benefit of a third party, the beneficiary's creditors should be able to satisfy their claims only at the expense of the assets that are already transferred to the beneficiary, insofar as these are not yet the beneficiary's property. Whether the beneficiary's (contingent) future interest is alienable is debatable. First of all, as was shown earlier in this subsection, the beneficary's right can be wholly dependant on the wishes and decisions of the parties to the contract, which undoubtedly decreases its value. Second, if the legal relationship between the principal and the beneficiary has the nature of a donation contract,[176] the interest could be deemed as "inseparably bound" to the benefi-

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[174] Ibid.

[175] Depending on the circumstances, of course, it is probably possible for the beneficiary of the contract to be appointed, for example, as a legatee and the successor's creditors do not have the right to receive the property until all obligations have been fulfilled. Becoming a successor can also be linked to a condition – e.g., to assign a subsequent successor in case the heir does something unacceptable.

[176] In the case of a contract for the benefit of a third party, in addition to the legal relationship between the stipulator and the promisor (in our case the mandate contract between the principal and the agent) and the relationship between the promisor and the third party (the agent and the beneficiary), a third legal relationship can be distinguished. This is the relationship between the stipulator and the third party, which in a trust-like situation is probably a gratuitous contract (*kinkeleping*, hereinafter also the "gift contract") if the aim of the principal is to enrich the third-party beneficiary gratuitously (§ 259 (1) of LOA).

ciary under Estonian law (§ 6 (1) of the GPCCA), as donations usually have personal reasons.[177]

If one of the objectives of the contract is to protect the assets from the principal's creditors (or those of his heirs), the rearranging of legal relationships involved, including the parties to those relationships, could somewhat help. For example, the person who wants to transfer the assets could, first of all, conclude a donation agreement with the beneficiary, who (as the principal) would conclude a mandate contract with the agent concerning the object(s) of the donation contract. Instead of transferring the asset (the gift) to the donee, the parties would agree that the donor's obligation to deliver the gift is fulfilled by transferring it to the agent, who is to transfer the asset to the donee on the terms set out in the mandate contract. To ensure the protection of the donor's wishes, this kind of a mandate agreement would probably also include certain limits to the termination and modification of the contract by the donee-principal as well as to his right of giving instructions to the agent. The donor could withdraw from the contract and reclaim the gift from the donee on the bases provided by the provisions concerning gift contracts (e.g. if the donee behaves in a manner displaying gross ingratitude towards the donor – § 268 (1) and § 267 (1) of the LOA) or on terms agreed in the contract(s), but it must be kept in mind that the donor should have no actual control over the assets or the agent's activities. He should not be a "shadow-principal". With the beneficiary being the principal instead of the donor, § 632 (2) of the LOA would not have an effect on the occasion of the donor's bankruptcy (the rules on recovery (*tagasivõitmine*) in Bankruptcy Act[178] (BA) or Code of Enforcement Proceedings[179] (CEP) could nevertheless be relevant). However, the termination of the contract could be triggered by the donee/principal's bankruptcy.

When it comes to the segregation of assets (transferred under a mandate contract to the agent) from the personal patrimony of the agent, the central provision is § 626 (3) of the LOA, which stipulates that claims and movables which an agent acquires when performing a mandate in the agent's name but on account of the principal, and claims and movables which the principal transfers to the agent for performance of the mandate, are not included in the bankruptcy estate of the agent and they cannot be subject to a claim against the agent in an enforcement procedure. Apparently, the provision does not provide protection from the agent's creditors to immovables or rights other than claims,[180] for example, the shares of private limited companies.

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[177] Which is why a donor may refuse to perform a contract before transferring a gift to a donee and withdraw from the contract if the donee dies (§ 267 (5), LOA). This is also why gifts are regarded as separate property of the spouses who have otherwise chosen a joint property regime.

[178] *Pankrotiseadus*. – RT I 2003, 17, 95; 26.6.2017, 29. English text available at: https://www.riigiteataja.ee/en/eli/516102017003/consolide

[179] *Täitemenetluse seadustik*. – RT I 2005, 27, 198; 3.4.2018, 24. English text available at: https://www.riigiteataja.ee/en/eli/509042018004/consolide

[180] However, money on a bank account is protected as it is seen as a claim in Estonian legal practice – see decision in case no 2-15-4349 of 3.2.2018 of the Tallinn District Court.

It is not entirely evident if this exclusion was clearly acknowledged by the legislator while formulating the wording of § 626 (3). What is known is that the provision was modelled after Art 401 of the Swiss OR[181], which also speaks only of claims and movables. The problem of the wording of that article was also raised[182] in Switzerland in the context of trusts and the ratification of the Hague Trusts Convention. To clear the issue, Art 284B was added to Swiss Debt Enforcement and Bankruptcy Act,[183] which explicitly states that, in the event of a trustee's bankruptcy, all the trust assets are distinct from those of the trustee.

It is difficult to find any reasonable justification why other rights (with, maybe, the exception of (restricted) real rights entered in the land register) should be treated differently from claims and movables here. There is no doubt that objects other than movables and claims can be the subject of mandate and commission contracts. For example, § 697 of LOA (on commission agreements) regulates the sale and purchase of securities. As both, the SMA and SMRA (see subsection 1.4.2) foresee the exclusion of the securities from the bankruptcy estate of the holder of securities, it can be concluded that the legislator does not hold a radical position that rights (other than claims) could not be treated as belonging to a special patrimony. Therefore, § 626 (3) of the LOA could be interpreted as stretching to rights other than claims despite its wording.

The desired result can also be achieved via careful designing of the contract. First, in the case of immovables, it is possible to enter a preliminary notation in the land register to guarantee that any disposal of the immovable after entry in the register of the notation is void if it violates the rights of the person whose claim is secured by the notation (LPA, § 63 (3) and (5)). In the case of other objects; for example, shares of a limited liability company, the conclusion of a conditional transfer transaction of the object (under the provisions of Chapter 6 of the GPCCA; see also subsection 1.4.2) can offer protection from the agent's creditors as, pursuant to the 2nd sentence of § 106 (2) of the GPCCA, the dispositions made by the bankruptcy trustee or bailiff are void upon the arrival of the condition.[184] The disposing of shares of a private limited company can be

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[181] *Schweizerisches Obligationenrecht. Bundesgesetz vom 30. März 1911 betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht)*. Available in English: https://www.admin.ch/opc/en/classified-compilation/19110009/201704010000/220.pdf (11.1.2020).

[182] L. Thévenoz. Trusts in Switzerland. Ratification of the Hague Convention on Trusts and Codification of Fiduciary Transfers. Schultess 2001, p. 307.

[183] Bundesgesetz vom 11. April 1889 über Schuldbetreibung und Konkurs (SchKG). Available at: https://www.admin.ch/opc/de/classified-compilation/18890002/index.html (11.1.2020).

[184] However, it should be noted that the transaction with a third party will become void only at the time the condition is fulfilled. It is doubtful that the principal can submit a claim for the exclusion of an asset from the bankruptcy estate (BA, § 123) or an application for release from seizure (CEP, § 77 (2)) having only the *quasi in rem* right but not being the actual owner or title-holder. The parties could therefore agree that the automatic transfer of the object to the principal also takes place if the agent goes bankrupt or an enforcement procedure is initiated against him, which would allow the release of seizure or the exclusion of the object.

limited by prescribing in the articles of association that the transfer of a share shall be permitted only on certain conditions – for example, depending on the consent of another person – under § 149 (3) of the CC. A transaction performed without the condition shall be null and void.

In addition to creating the status of special patrimony over the assets transferred to the agent, § 626 of the LOA entails the concept of subrogation. Subsection 1 stipulates that the agent has to hand over anything received or created in connection with performance of the mandate to the principal, along with anything the agent received to perform the mandate and did not use to perform the mandate. Thus, the principal's right to claim the assets under this provision expands to the new objects that the agent receives when performing the mandate. The question is whether the principal can claim the objects (under § 626 (1)) or segregate the claims and movables (under § 626 (3)) that are acquired by the agent in breach of the mandate contract but at the expense of the assets received for performance of the mandate. The wordings of those provisions are quite ambiguous on this matter: "anything received or created in connection with performance of the mandate" in subsection 1 and "acquires when performing a mandate" in subsection 3.

For example, if an agent uses the money he should invest to buy himself a car (knowing obviously that he had not been given a mandate to buy a car), it could be somewhat difficult to argue that he acquired it "when performing a mandate". However, a broader interpretation, which is subsequently offered, could help reach the conclusion that subrogation also applies in the case of unauthorised[185] transactions.

First of all, in other special patrimony cases Estonian law does not make a difference, whether the object was acquired with good or bad intentions.[186] Thus, it could be concluded that the wording of § 626 of the LOA was supposed to indicate a difference between the agent's personal property and the assets he has received with the means from the set of assets transferred to him in connection with the mandate.

Second, the principal's right to choose could be deduced from § 693 of the LOA, which allows the principal to deem a transaction made by an agent not to have been entered into on the principal's account if the agent has failed to comply with the principal's instructions – and vice versa, if the principal decides not to reject the transaction (even if the agent did not intend to conclude it on the principal's account), it can be considered that the transaction has been made on the principal's account and in that case his right of recourse and the status of special patrimony resulting from § 626 of the LOA extends to the object acquired by the agent in breach of the mandate contract. This would be a trust-like approach as in the case of trusts, the beneficiary can also choose to adopt an unauthorised transaction/gain.[187]

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[185] Not in line with the terms of the mandate contract, that is.

[186] For example, see § 52 (2) of the LSA.

[187] L. Ho (Note 75), pp. 9–10.

Third, given that the law should be interpreted in light of the principle of justice, it would be unfair to conclude that the privileged position of the principal compared to other creditors of the agent provided by § 626 (3) of the LOA is valid only if the agent is well-behaved and that in the case of a malicious agent the principal's position should be weaker and the possibilities of other creditors to be enriched on his behalf should be greater.

A similar conclusion can be reached through an interpretation of § 108 (7) of the LOA, which speaks of the creditor's right to claim the transfer of the compensation or assignment of the claim for compensation that the obligor has received or may receive in lieu of the initial object – this seems to be the German view for interpreting § 285 of BGB, which served as a model for § 108 (7) of the LOA.[188]

To make the situation clearer, the agent and principal could explicitly agree on the principal having rights *in personam ad rem* towards the objects acquired against the principal's instructions.

The claims against a third-party transferee in case of misappropriation of assets by the agent. As to the principal's/beneficiary's rights affecting third-party transferees, the regulation of mandate contracts does not in itself create rights *in rem*. When assets have been transferred to the agent, he will have exclusive powers characteristic to the ownership, that is to use, manage and alienate the property, as well as the right to prohibit third parties from interfering with his rights over the property. If he breaches his contractual duty not to alienate the property, the validity of his act of alienation will not be affected (§ 76 of the GPCCA). Relying on the nullity of the transaction due to its ostensibility (§ 89 of the GPCCA), being contrary to law (§ 87 of the GPCCA), good morals or public order (§ 86 of the GPCCA) seems also rather difficult taking into account current legal practice.[189] In principle, the recovery of an asset under CEP or BA[190] could be possible, but only if the agent was not able to satisfy the principal's/beneficiary's monetary claim (e.g. for damages). Whether this involves the return of the particular item, is another question.[191]

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[188] B. Häcker. Consequences of Impaired Consent Transfer. A Structural Comparison of English and German Law. Hart Publishing 2013, p. 308.

[189] P. Varul *et al*. The General Part of the Civil Code Act. Commented Edition (note 110), pp. 292–293, 282ff, 273–274. See also V. Kõve *et al. Tsiviilkohtumenetluse seadustik II. Kommenteeritud väljaanne*. (Code of Civil Procedure II. Commented Edition). Tallinn 2017, pp. 408–409.

[190] Depending, of course, on the date and type of the transaction between the agent and the third party (see §§ 109–116 of BA and §§ 187–191 of the CEP).

[191] As a result of the recovery process, the transaction could be declared void, which in turn should result in the return of the asset by the third party to the obligor (§ 19 (1) of the BA, § 195 (1) (2) of the CEP). For claims and movables that are identifiable as an object of the mandate, it could be claimed that the special status provided by § 626 (3) of the LOA remains (although this can be arguable when looking at § 195 of CEP that provides for the consequences of recovery and keeping in mind that the recovery has been initiated on the basis of a monetary claim not on a court decision requiring the transfer of ownership). For other types of objects, the result is the sale of the item and the payment money received from the sale in proportion to the claims of other creditors.

Even if the transfer to the third party is valid, a claim for damages against the transferee could be hypothetically filed on the basis of tort law – if it can be said that he intentionally behaved contrary to good morals[192] (LOA, § 1045 (1) 8)) or behaved in violation of a duty arising from law[193] (LOA, § 1045 (1) 7)). In this case, the application of § 136 (5) of the LOA could lead to a situation where the third party has to transfer the acquired object to the beneficiary to compensate the damages.[194]

However, as already mentioned, there are provisions elsewhere in private law that allow for the formation of a legal relationship in which the principal / beneficiary has rights regarding a particular item between personal and ownership rights as they may affect third parties.

First (as was also mentioned earlier in this subsection), in the case of immovables it is possible to enter in the land register a preliminary notation, which would render the subsequent disposals void. The disposing of the shares of a private limited company can be limited by prescribing in the articles of association that the transfer of a share shall be permitted only on certain conditions under § 149 (3) of the CC. And again, objects other than immovables can be transferred conditionally under the provisions of Chapter 6 ("Conditional Transaction") in the GPCCA. The person who, as an obligor, has entered into a conditional transaction for the transfer of an object, is prohibited from disposing the object to third persons (§ 106 (2) of the GPCCA).

Termination and changing of the contract. Unlike a trusteeship, the role of an agent is not seen as an office. This means that a court cannot replace him. Thus, the death or incapacity of the agent or the possibility for him to unilaterally terminate (under the terms set in § 630 or § 631 of the LOA) the mandate contract could mean that the achieving of the purpose of the contract becomes impossible. Also, the death or incapacity of the principal can pose certain risks. For example, as under § 632 (1) of the LOA it is presumed that the mandate agreement will not end upon the death of the principal, the heirs will replace the principal as his general legal successors (§ 6 of the GPCCA, § 12 of the LOA). With careful designing of the contract it is, however, probably possible to mitigate these risks.

Regarding the death of the principal and the fact that the mandate agreement for the benefit of a third party is, essentially, an intermediated gift contract (see footnote 176), the question arises whether § 262 of the LOA ('*Donatio causa mortis*'), which states that if a gratuitous contract is entered into *causa mortis*, the provisions of the LSA concerning the last will or legacy apply thereto, should be applied. This would, first of all, mean that the contract is void if not concluded in

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[192] See CCSCd 15.4.2015, 3-2-1-18-15, para. 10.

[193] For example, if the third party's activity could be classified as a criminal offense.

[194] For the implementation practice of § 136 (5) of the LOA, see CCSCd 27.9.2017, 2-15-18478, para 14; CCSCd 19.4.2011, 3-2-1-12-11, para. 29; CCSCd 4.3.2010, 3-2-1-164-09, para. 31. See also S. van Erp, B. Akkermans (Note 113), p. 585.

the format prescribed for the last will (LSA §§ 21–24).[195] Second, the application of the provisions of the LSA implies that the terms of the contract must be reclassified according to the principles of succession law: the agent would be a testamentary executor, the transfer of a thing would be a legacy, etc.

The question of the application of § 262 of the LOA should not come up in cases where the gift contract (or the mandate agreement) is conditional, but the arrival of the legal consequences do not depend on whether the donor is dead or alive; for example, when the contract stipulates that an asset shall be transferred to the beneficiary when he becomes 25 years old (even if the donor / principal dies before that).

But the fact that both the chapter of the mandate agreement (§ 632 (1)) as well as § 80 of the LOA regulating the contract for the benefit of a third party include special provisions dealing with the death of the obligee-principal, implies that § 262 of LOA should not be applied even when the transfer of assets to the beneficiary is related to the death of the obligee-principal (§ 632 (1) of the LOA presumes that the mandate agreement will not end upon the death of the principal; § 80 (5) of the LOA stipulates that if an obligor must perform an obligation for the benefit of a third party after the death of the obligee, the third party may require performance of the obligation as of the death of the obligee unless the contract or the nature of the obligation indicates that the obligation must be performed later). The same conclusion (that such contracts are not subject to the special provisions on testamentary dispositions) has been reached in German law,[196] which contains both an equivalent to § 262 of the LOA (BGB, § 2301) as well as to § 80 (5) of the LOA (BGB, § 331 (1)).

3.2 The need for registration in the UBO register

Description of the problem. As shown in the previous subsection, mandate contracts can be considered trust-like because they can (with certain difficulties) be used for the same purposes and they also share certain elements characteristic to trusts. The question is if these types of arrangements should be considered in the listing of arrangements similar to trusts in the AMLD context.

Statement set forth for defence. The author is of opinion that mandate contracts should be added to the listing of trust-like arrangements in MLTFPA. However, which contracts should be registered should not only be based on the (formal) type of contract, but additional criteria should be applied.

Reasoning. As already highlighted in the previous subsection, the services that can be rendered under mandate contracts could be various and the objective of the transaction might not include the transfer of title to the agent. As in the

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[195] See also P. Varul *et al*. *Võlaõigusseadus II. Kommenteeritud vln*. (Law of Obligations II. Commented Edition). Juura 2019, p. 218.

[196] A. Dutta. Will-Substitutes in Germany. – in A. Braun, A. Röthel (eds.) Passing Wealth on Death: Will-Substitutes in Comparative Perspective, Hart Publishing 2016, pp. 183–184.

UBO-registration context (see subsection 2.2) we can presumably exclude those arrangements where there is no 'hidden' beneficial owner, the first criteria for seeing a mandate contract as trust-like would be that the contract includes the feature of fiduciary ownership.

In addition to that, the object of the contract and its value should be considered. As was mentioned in subsection 2.2, the MLTFPA currently requires the explicit submission of the UBO data to the relevant register in the case of legal entities, so if the object of the mandate contract is, for example, a share of a limited liability company, it is required already under current regulation to register the beneficial owners. As also mentioned earlier in this subsection, to protect the principal's or a third-party beneficiary's rights in case of the agent's insolvency, as well as to avoid the possible unauthorised transfer in the case of immovables, these rights have to be made visible in the land register. Thus, it might not be necessary to duplicate this public information in the UBO registry. But what if the object of the contract is not a share of a limited liability company or an immovable – should the mandate contracts that include the fiduciary transfer of title be registered? One option is to tie the registration obligation to the value of the transaction (object); for example, to proceed from the 15,000 eur threshold that the AMLD (and the MLTFPA) has set for the application of due diligence measures (Art 11 of the AMLD and § 19 (1) 2) of the MLTFPA respectively).

The parties to the transaction may also be set as a criterion for the registration obligation. For example, if the agent can be regarded for the purposes of the MLTFPA as an obliged entity, who has to identify the beneficial owners, register and retain relevant information, assess the client's risk profile, perform a risk analysis, draw up rules of procedure and internal control, inform the relevant supervisory institution in case of doubt and obtain a licence for his/her activities, the ML/TF risk should in itself be smaller. Pursuant to § 2 (1) 9) and § 3 of the MLTFPA, "obliged entities" are amongst others persons who provide trust and company services as their economic and professional activities (and they also need a licence for their activities under § 70(1)2) of the MLTFPA). The definition of the provider of trust and company services is provided by § 8 according to which it means a natural person or a legal person who in its economic or professional activities is acting as a representative or trustee of a trust, (except for a trust within the meaning specified in subsection 2 of § 2 of the Investment Funds Act), or that of a civil-law partnership, community or other association that does not have legal personality, or the appointment of another person to such position. It is difficult to match the person acting as an agent under the mandate agreement with the institutes explicity named in the provision – this could be possible based on the spirit of the AMLD. But keeping in mind that Estonia has at the moment notified the Commission of not having trusts or any similar arrangements, this is questionnable.

However, in certain fields where mandate (and commission) contracts are often used – as in trading on stock exchanges and in other regulated markets, specific provisions apply. For example, the list of possible holders of nominee accounts is limited (see 1.4.3), and as under the MLTFPA many of these possible

holders are obliged entities who have to maintain information identifying their nominator, the money laundering risk might not be particularly high. The circle of persons who can act as custodians and administrators of other securities (i.e. those not registered in the ECRS but that correspond to the definition of securities within the meaning of § 2 of the SMA) is partly limited – as a rule, only persons specified in § 45 of the SMA can provide investment services as a permanent activity. Again, the persons normally licenced to provide investment services as a permanent activity are also obliged persons under the MLTFPA, and this should result in lower risk. However, the circle of persons who can act as intermediaries in the securities market is not limited until their activity can be considered only as ancillary services to an investment service (in the meaning of § 44 of SMA, which includes safekeeping and administration of securities for a client and activities related thereto) and not as an investment service (within the meaning of § 43). To these arrangements, the specific provisions of the SMA and SMRA do not apply and they should fall under the general regulation of mandate or commission contracts in the LOA. However, as access to the exchange and multilateral trading facility requires opening an account with an intermediary (system participant)[197] – normally credit institutions or investment firms – their due diligence obligations should include identifying the client and possible UBOs. Furthermore, it is unclear, how the UBO-registration requirement would work in the context of long and possibly cross-border intermediated chains and in that of changing ownership as a result of (high frequency) trading. In such contexts it may be impractical, if not impossible to continuously keep full track of the ultimate beneficial owners, while the available information in the register may well be outdated or otherwise inaccurate.

Thus, it can be said that the criteria of registration should, in addition to the mandate contract having a nature of fiduciary ownership, proceed from characteristics like the arrangement's object, its value, the parties, the duration of the agreement and possibly also the proportionality of costs of registering and monitoring the UBO information and of the infringement of the right to privacy of decent citizens. Just as not all trusts contain comfortably hidden and untaxed piles of valuable property, not all similar arrangements of civil-law countries are ill-intentioned – many may well, for example, only hold an item with a very small value for a very short time as an object. It is hard to believe that the drafters of the AMLD really meant that all instruments that somehow resemble a trust should be entered in UBO registries as it would be an incredible burden to start registering them all and later supervise the fulfilment of the obligation of registration causing a disproportionate administrative hassle, cost, and loss of privacy for decent citizens, while the actual money-launderers would in the future refrain from enaging in arrangements deemed (officially) trust-like and find other means.

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[197] SMA § 151 (3), § 163^3 (1); Nasdaq rulebook 3.1.2 – Available at: https://nasdaqcsd.com/wp-content/uploads/Chapter_I_Rulebook_Sept14_2017.pdf; list of participants: https://nasdaqcsd.com/services/services-to-account-operators/list-of-account-operators/ (9.10.2019).

4. Private foundations

Description of the problem. While many countries have chosen the implementation of the Anglo-American trust for family asset management, the (European as well as the world's) private foundation landscape has also been evolving in recent decades.[198] One of the reasons is definitely the foundation's suitability as an instrument for succession planning in which the foundations are successfully competing with the trusts.[199] The leanings towards the private foundation model rather than the trust model might be related to private foundations being a more familiar and a clearer structure for civil-law countries. Many would-be settlors may be baffled to learn that trusts do not exist as separate legal entities and that the proposed estate-planning exercise consists of an assignment of valuable and hard-earned property to a stranger, who will then hold it in his own name.

Estonia has had its foundation regulation – in the form of the Estonian Foundations Act (FA) – in place since 1995. While some countries require their foundations to be dedicated to public benefit purposes only and some have different laws or categories for public benefit foundations and private foundations,[200] in Estonia the regulation on foundations in principle caters for both public and private benefit purposes and no specific restrictions are imposed on the purpose of a foundation. Thus, they could be (theoretically) used to protect private wealth or benefit present or future generations of a family.

However, it seems that foundations in Estonia are not very often used for family asset management today. There are about 800 foundations in Estonia, and it can be concluded from their fields of activity that most of them are established for the public interest and/or to engage in economic activities.[201] Based on hearsay

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[198] Whereas in Austria before 1993, foundations had no choice except to be charitable, the Private Foundations Law of 1993 enabled private foundations. In Belgium, the private foundation was introduced in 2002, and the foundation sector in Belgium has been growing ever since. Malta enacted specific foundation legislation in 2007. The legal and tax landscape surrounding Dutch private foundations dramatically changed with the introduction of a new tax doctrine on 'segregated private capital' as of 2010. Even before that, one specific foundation form, the so-called 'depository foundation' (*stichting administratiekantoor*, STAK) for the purpose of acquiring and administering assets (shares) was widely used. Regarding common law countries, see P. Panico. New foundation legislation in common law jurisdictions: a 'second generation'? – in Trusts & Trustees, Vol. 24, No. 6, July 2018, pp. 511–518.

[199] F.A. Schurr. Liechtenstein: Beneficiaries' rights and foundation governance in Liechtenstein. – Trusts & Trustees, Volume 21, Issue 6, July 2015, Pages 674–678, https://doi-org.portaal.nlib.ee:2443/10.1093/tandt/ttv062, p. 674.

[200] K.J. Hopt *et al.* (eds.). The European Foundation: A New Legal Approach. Cambridge University Press 2006, p. 38.

[201] According to the statistics of the e-Business Registry: https://www2.rik.ee/rikstatfailid/failid/tabel.php?url=19_02tg.htm (11.1.2020). See also Granting and appropriate use of support given to foundations established by the state. Is the use of public money transparent and verifiable? – Report of the National Audit Office to the Riigikogu, Tallinn, 14 April 2014. Available at: https://www.riigikontroll.ee/tabid/215/Audit/2315/WorkerTab/Audit/WorkerId/28/language/et-EE/Default.aspx (11.1.2020).

in legal circles, local high-net-worth individuals[202] seem to prefer to use schemes offered by other countries. This is because there exist certain bottlenecks in Estonian law which hinder the establishment of private foundations. These include the current taxation of private foundations, public accessibility of documents and the number of people involved in the administration of foundations.

4.1 Excessive publicity

Statement set forth for defence. One of the main problems regarding the establishment of foundations for private purposes is the current over-disclosure (of documents) compared to other countries and also considering AML/CFT regulatory requirements. The author suggests that a new special type of foundation should be introduced in Estonian legislation – a private foundation with limited economic activity, non-public documents and compulsory annual review by an auditor.

Reasoning. With the MLTFPA enacted to implement the AMLD4, an exception was made regarding the registration of ultimate beneficiary owners of private foundations: according to § 76 (3) 4) a foundation the purpose of whose economic activities is the keeping or accumulating of the property of the beneficiaries or a circle of beneficiaries specified in the articles of association and who has no other economic activities, does not have the duty to submit UBO data to the commercial register. However, this regulation is not enough to guarantee the privacy of the private foundations' stakeholders as according to the rules of the FA and related acts, the information on a private foundation is still available to everyone from the register.

According to § 6 (1) of the FA, the foundation resolution shall set out the data (name, address, etc.) pertaining to the foundation, along with the founders, the members of the management/supervisory board, and the assets to be transferred to the foundation by the founders.

Under § 8 of the FA, other terms shall be set forth in the bylaws: the objectives; the (set of) beneficiaries; the distribution of the assets of the foundation upon dissolution of the foundation; the procedure for the appointment and removal of members of the management or supervisory board; the procedure for the amendment of the bylaws; the conditions for the dissolution of the foundation; the remuneration of the board members; the procedure for use and disposal of assets; and any other conditions provided by law or that are not contrary to the law. This also means that the conditions for how the distributions to the beneficiaries are to be made must be laid out in the bylaws. The FA does not foresee the possibility of a separate "letter of wishes", which, in the case of trusts (and in some countries also private foundations), is an indication by the settlor of the manner in which he wishes the trustees to exercise their discretion in relation to

[202] HNWIs are defined as those persons having investable assets of US$ 1 million or more, excluding their primary residence and collectibles, consumables, and consumer durables.

a trust. Even if there exists such a letter, its binding nature might be questionable.[203] Decisions contrary to such a letter probably cannot be challenged under § 38 (1) of the GPCCA.[204]

A foundation resolution and the articles of association approved thereby shall be notarised (§ 6 (3) of the FA) and the notary shall submit the petition for entry in the register (§ 11 (1) and (4) of the FA). After the private foundation is registered, both the resolution and the bylaws are accessible to anyone (for a fee of two euros) from the register of not-for-profit associations and foundations (as they are included in the "public file").[205] Furthermore, under § 34 (4) of the FA, Estonian private foundations have to submit annual accounting reports to the register, and these, too, are publicly available from the register. Hence, everybody can access all the information pertaining to the financial situation, economic performance, and cash flows of any private foundation.

In addition, the terms "interested person" and "person with a legitimate interest" pop up here and there in the FA, the meaning of which is not clear. For example, a "person with a legitimate interest" may, pursuant to § 39 (1) of the FA, demand information from a foundation, including the information pertaining to fulfilment of the objectives of that foundation, the sworn auditor's report, and accounting documents. Section 39 (2) of the FA grants the same right to "all interested persons" if the bylaws do not determine a set of beneficiaries.[206]

If we look at the regulations for private foundations in other countries, we can see that they offer more privacy.

In Austria, the declaration of establishment can be split into two documents: the statutes and the bylaws.[207] The nomination of beneficiaries and giving

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[203] In the case of trusts, the "letter of wishes" might be of more or less binding character (U&H (Note 2, p. 888 ff). In the case of Estonian law, the format probably also plays a role, since the bylaws of the foundation must be notarised.

[204] An interested person may file an action for repeal of a resolution of a body of a legal person which is contrary to law or the articles of association in court.

[205] § 77 (1) and § 85 of Non-profit Associations Act (*Mittetulundusühingute seadus*. RT I 1996, 42, 811; RT I, 09.05.2017, 21; English text available at: https://www.riigiteataja.ee/en/eli/515012018007/consolide; § 217 (1) 2) 3) of the rules of procedure of the court registration department (*Kohtu registriosakonna kodukord*. RT I, 28.12.2012, 10; RT I, 11.01.2019, 8); § 14 (3) of FA.

[206] Grammatically, one might conclude that the coverage of the term "interested persons" could be wider than the "person who has legitimate interest". But according to our legal practice, an "interested person" has the same meaning in Estonian civil law as a person who has a "legitimate interest", "justified interest", "legal interest", etc., and this should not be simply a curious person but a person whose subjective rights could be influenced by a certain situation (who, in this case, should generally be the beneficiaries – § 9 of FA defines beneficiaries both in a more specific (the first sentence) and in a more general (the second sentence) manner) – CCSCd 10.01.2007, 3-2-1-135-06, p. 9.; CCSCd 14.11.2002, 3-2-1-135-02, p. 13; CCSCd 11.03.2015, 3-2-1-167-14, p. 14 ff.

[207] § 10 of *Bundesgesetz über Privatstiftungen (Privatstiftungsgesetz–PSG)* StF: BGBl. Nr. 694/1993; 112/2015; M. Petritz, A. Kampitsch. Austria: The Austrian private foundation. – Trusts & Trustees 20/6 (July 2014), pp. 543–544. DOI: http://dx.doi.org/10.1093/tandt/ttu075.

directions as to distributions to be made to the beneficiaries can be settled in the bylaws, which are not open to the public for inspection.[208] However, based on EU rules on the combat of money laundering and terrorist financing, Austria introduced the transparency register for beneficial owners of Austrian entities in 2018 with the Beneficial Owner Register Act (BORA).[209] Initially, the information in the register was not publicly available and access was limited to obliged entities, other authorities and persons with legitimate interest (Art 9 (1) and (2), Art 10 (1) and Art 12). However, in July 2019 the BORA was amended and it seems that the amendments open access to the private foundation's beneficial owners' information to the public at large[210].

Nevertheless, information on the UBO register is only available about the beneficial owners and not for the entire activities of the foundation: Austrian private foundations are subject to bookkeeping and financial reporting in the same manner as a corporation, but the public has no access to the reports of a private foundation and only the tax authorities are aware of its income, wealth, and assets.[211] A private foundation is, however, subject to an annual audit by an independent professional auditor, who has to assess whether the private foundation's activities have been in line with its purpose as stated in the private foundation documents, whether its funds have been managed properly and wisely, whether all housekeeping tasks have been correctly performed, and whether the private foundation is fully compliant with the law (including tax regulations). The auditor is also to review the private foundation's compliance with the AML/CFT rules.[212]

In Belgium, the bylaws of a private foundation are public,[213] but the accounting obligations depend on the size of the foundation,[214] which also determines where the relevant information has to be filed, as there is no central database for the

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[208] § 10 of PSG; F. Schwank. The Austrian private foundation as a holding structure for global family wealth. – Trusts & Trustees 20/1–2 (February–March 2014), p. 173. DOI: http://dx.doi.org/10.1093/tandt/ttt247. However, if the private foundation is to qualify for tax advantages, the documents must still be disclosed to the Austrian tax authorities – Hasch & Partner Anwaltsgesellschaft. The Austrian private foundation: A brief guide for the investors, p. 4. Available at: http://hasch.eu.dedi2098.your-server.de/files/channels/publikationen/Austrian_Private_Foundation_Brochure__E_.pdf (11.1.2020).

[209] *Wirtschaftliche Eigentümer Registergesetz* (WiEReG). BGBl. I Nr. 136/2017; BGBl. I Nr. 62/2018.

[210] Art 10 of WiEReG. BGBl. I Nr. 136/2017; BGBl. I Nr. 23/2020.

[211] F. Schwank. The Austrian private foundation: Between transparency and bank secrecy. – Trusts & Trustees 16/6 (July 2010), p. 418.

[212] Ibid, p. 416.

[213] A. van Zantbeek, J. Drayey. The Belgian private foundation. – *Trusts & Trustees* 16/6 (July 2010), p. 511. DOI: http://dx.doi.org/10.1093/tandt/tts052.

[214] O. Farny *et al*. Taxation of foundations in Europe, p. 12. Available at: https://www.arbeiterkammer.at/infopool/akportal/Studie_Stiftungsbesteuerung_in_Europa_englisch.pdf (11.1.2020).

foundation sector.[215] Only "large"[216] foundations are to be audited. From 31 October 2018 onward, private foundations have to register the data of ultimate beneficial owners to the General Treasury Administration (GTA) under a new Belgian royal decree of 30 July 2018 creating the Ultimate Beneficial Owner Register.[217] The data can be accessed by: a) the competent authorities (including the Belgian tax authorities); b) entities such as the National Bank, financial institutions, insurance companies, notaries, accountants and lawyers; c) any other person or organisation with a legitimate interest relating to the prevention of money laundering or the finance of terrorism; d) any other person who submits a written access request to the GTA for foundations that exert control over a company, non-profit-association, trust or foundation (Art 7 ff).

In Malta[218] and the Netherlands,[219] the private foundations' deeds are not public, and there is no need for annual reporting. Up until the EU's new UBO-rules, there was no disclosure of founder or beneficiary names. The UBO register came into effect in Malta on 1 January 2018. The Maltese UBO information is publicly accessible only in case of companies, not trusts or foundations.[220] However, it seems that new regulations in the Netherlands will make the UBO information (at least partly) public also in case of foundations[221].

From various versions of AMLD, it is somewhat confusing whether information on the actual beneficiaries of foundations should be publicly accessible or not. According to AMLD4, foundations rather belonged to the category of trusts (recital 17 and Art 3 (6) c)) and the information concerning UBOs of trusts (and similar arrangements) was to be made directly accessible only to competent authorities and financial intelligence units; Member States could decide themselves whether to provide access also for obliged entities (Art. 31 (4)); the persons

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[215] V. Xhauflair *et al*. Belgium Country Report, EUFORI Study, p. 10. Available at: http://euforistudy.eu/wp-content/uploads/2015/07/Belgium.pdf (11.1.2020).

[216] Private foundations that fulfil one or more of the following three criteria: 50 full-time staff, EUR 6,250,000 in annual revenue, and EUR 3,125,000 in total assets. – Ibid, p. 10.

[217] Royal Decree of 30/07/2018, Belgian Official Gazette of 14/08/2018. Unofficial English translation available at: https://finance.belgium.be/sites/default/files/20180817_AR%20UBO_EN.PDF (11.1.2020).

[218] A. Cremona. Malta: Foundations – the new vehicle of choice? – *Trusts & Trustees* 16/6 (July 2010), p. 481. DOI: http://dx.doi.org/10.1093/tandt/ttq046.

[219] M. Vogel. The Dutch foundation: The solution in tax planning, estate planning and asset protection for high net worth individuals worldwide. – *Trusts & Trustees* 21/6 (July 2015), pp. 686–690. DOI: http://dx.doi.org/10.1093/tandt/ttv067; M. Bergervoet, J. Starreveld. How private is the Curaçao private foundation, Curaçao trust, and the Dutch private foundation? – *Trusts & Trustees* 19/6 (July 2013), pp. 577–583. DOI: http://dx.doi.org/10.1093/tandt/ttt080.

[220] PricewaterhouseCoopers International Limited, The UBO register: an update, Dec 2019, p. 16. Available at: https://www.pwc.nl/nl/assets/documents/the-ubo-register-update-december-2019.pdf (29.5.2020).

[221] Deloitte Netherlands. UBO Registration in the Netherlands: Update Fall 2019. Available at: https://www2.deloitte.com/nl/nl/pages/legal/articles/ubo-registration-in-the-netherlands.html (31.1.2020).

with "legitimate interest" were not mentioned[222]. According to the AMLD5 in addition to competent authorities, financial intelligence units and obliged entities, the information in relation to the UBOs of trusts (and similar arrangements) should be accessible to any natural or legal person that can demonstrate a legitimate interest and any natural or legal person that files a written request in relation to a trust/similar arrangement where the latter has direct or indirect controlling interests in certain companies. In the case of foundations, it is confusing whether they should be treated in the same way as trusts or as companies (insofar as they are legal entities – see Art 30 (1)), whose UBO information should be publicly accessible. In essence, private foundations pursue the same purpose as trusts – the administration of assets for the benefit of others – and there is therefore no reasonable justification for treating them differently. The initial proposal for AMLD5 suggested allowing public access to the data on those trusts and foundations that are 'business-type' and/or administered by professionals and granting it to those persons 'with legitimate interest' in the case of others[223] and it is not clear whether the reference to foundations in this context has been omitted intentionally or unintentionally from the final version of AMLD5.

In any case, even if the information of the actual beneficiaries should, in principle, be publicly disclosed, the disclosure of other documents (bylaws, financial statements, etc) seems excessive. Publicity on that level could be explained in the case of foundations with a public purpose (like charities) that have external donors or maybe in cases in which a foundation has engaged heavily in business activities (to protect possible creditors), but in cases of a classical family foundation with an objective of holding property, it raises the question of whether there are third parties actually needing that kind of protection.

The author is of opinion that the founder of a private foundation should be able to stipulate that the foundation documents (foundation resolution, bylaws, documents certifying the transfer of assets to the foundation, accounting reports) are not accessible to everyone. In order to draw as well as to simplify the

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[222] It may be recalled here that the initial introduction of UBO registries opened up a heated debate about privacy. In a PwC study addressing the impact of the UBO register, the following was stated: "It goes without saying that the interests of those involved may be seriously prejudiced by the careless or incompetent processing of personal details […]. [E]ntrepreneurial and high-net-worth families fear that the public information will lead to undesirable mentions on 'lists of millionaires' and the not-inconceivable risk of blackmail, violence, intimidation, kidnapping or fraud. This is particularly so in the case of minors or other vulnerable individuals". See PwC Netherlands. Finding a balance between transparency and privacy – a study of the impact of the UBO register on high-net-worth families and family businesses in twelve European countries, p. 16. Available at: https://www.pwc.nl/en/assets/documents/pwc-finding-a-balance-between-transparency-and-privacy.pdf (11.1.2020).

[223] Explanatory memorandum to the European Commission's 'Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist fi nancing and amending Directive 2009/101/EC of 5 July 2016', p. 16. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0450&from=EN (29.5.2018).

distinction between private foundations and other foundations, it would be advisable to give a separate definition of a private foundation as a new special type of foundation. For that, the author is proposing a new subsection (1^1) to § 1 of the FA, which would set out the most important difference between a private foundation compared to other types of foundations: namely that the documents of a private foundation – in contrast to all other foundations should not be publicly available. In order to reduce the number of business relations and creditors that could be affected by not having access to the foundation's documents, the new definition should also set out that a private foundation is not allowed to engage in economic activities that are not directly related to the maintenance and accumulation of assets in the interests of its beneficiaries. Thus, a private foundation must meet the following conditions: 1) the foundation operates on behalf of private interests and in accordance with the purpose specified in its bylaws; 2) the foundation is established for the purpose of administering assets obtained from its founders or other persons; 3) the foundation does not receive income from active business activities; that is, it does not provide services or sell goods to earn profit. Hence, the private foundation may, for example, invest in securities or conduct some real estate transactions, but not open an online store "in the sole interest of the beneficiaries". If the foundation does not carry on an economic activity, it also generates a minimal number of creditors or other persons who might be interested in obtaining information on the foundation from the registers. However, if it emerges that a foundation whose documents are not publicly available in accordance with the articles of association is carrying on an economic activity as its principal activity, it should be possible to decide on the compulsory dissolution of the foundation in accordance with § 46 (1) 1) of the FA. To ensure that the private foundation is not engaged in unauthorised economic activities, all private foundations should be subject to a review of their annual accounts by an auditor, and the auditor shall additionally give an opinion on whether the activities of the private foundation comply with the law.

The author also proposes that if according to the articles of association, the documents of a private foundation are not subject to disclosure, the documents that would be otherwise kept in the public file shall be kept in a registry file accessible only to persons with a legitimate interest (§ 77 (4) of Non-profit Associations Act, § 61 of the rules of procedure of the court registration department). Such persons having a legitimate interest would include, first and foremost, the persons referred to in § 61 (2) of the rules of procedure of the court registration department (competent authorities, court, bailiff, trustee in bankruptcy), beneficiaries and people who have reason to believe that they might be beneficiaries, members of the bodies of the foundation, auditor of the foundation, founder, persons entitled to access the information pursuant to the foundation's bylaws[224]

[224] The author also proposes to clear the confusion stemming from § 39 of the FA and to include only beneficiaries in this provision – this would also cover beneficiaries in a wider sense (based on the 2nd sentence of § 9 of FA). Other people can obtain information about a foundation from the register. It would also be advisable to give the founder the right to

and obliged entities under the AML/CFT regulations. It is probably not sensible to give an exhaustive list of persons with a legitimate interest in the legislation, since in the case of foundations which are established for private interest but which do not have clearly identifiable (set of) beneficiaries pursuant to the objectives of the foundations (e.g. a pet care foundation), it is necessary that the circle of persons with legitimate interest would be wider in order to maintain control over the bodies of the foundation. It is also reasonable to provide that the court hears the members of the management board and supervisory board of the foundation whenever possible in order to determine the person's legitimate interest.

4.2 Bodies of a foundation: Two boards, four people

Statement set forth for defence. The author suggests that, in the case of private foundations, the supervisory board requirement be relaxed to a minimum of one member.

Reasoning. At the moment, § 16 of the FA foresees two mandatory organs: the management and the supervisory board. According to § 17 (7) and § 18 (3) of the FA, the management board manages and represents the foundation but has to adhere to the lawful orders of the supervisory board. The management board may consist of one or several members, who must be natural persons. Subsection 5 of § 17 of the FA prohibits beneficiaries or persons with an equivalent economic interest from being members of the management board. Also, a member of the supervisory board shall not be a member of the management board (under § 17 (6) of the FA).

According to § 24 of the FA, the supervisory board plans the activities of the foundation, organises the management of the foundation, and supervises the foundation's activities. Subsection 1 of § 26 of the FA foresees that the supervisory board must have at least three members (again, natural persons). The founder and the beneficiaries can be members of the supervisory board (if this is not prohibited by the bylaws).

Consequently, the founder has to find at least three trustworthy persons (in addition to himself) – one to be a member of the management board and three for the supervisory board – to set up a private foundation. For a small family-wealth-protection vehicle, this might be too much.

In Malta, only the board of administrators is mandatory. The founder is the one who may exercise supervision over the administration of the private foundation. He is also entitled to intervene in the appointment of administrators or in the disposal of the assets, when a court is dealing with these issues. Administrators of a private foundation may be either natural or legal persons. In the latter case, there must be at least three directors. Administrators do not need a licence to act as such. A founder may be an administrator of a foundation and may also be a private foundation's beneficiary within his lifetime: if the founder is a

establish a wider set of persons in the articles of association, having this right to obtain information, including the founder himself or herself.

beneficiary, that founder may not, at the same time, act as the sole administrator of the private foundation. The terms for the private foundation may provide for the establishment of a supervisory council consisting of at least one member or for the office of one or more protectors with similar functions.[225]

In Belgium, having a supervisory board is not mandatory, but a private foundation must have at least three directors (either individuals or legal entities).[226] The existence of a supervisory board is voluntary also in the Netherlands.[227]

In Austria, the board of directors has to consist of at least three members. The founder normally appoints the members of the board in its initial composition, and the court subsequently appoints any new members. A (current) beneficiary, a spouse or partner thereof, other relatives (as far as the third degree), and legal persons may not be members of the board. The founder is not generally excluded from membership of the board unless he is a current beneficiary. A supervisory board is mandatory only if the private foundation has more than a certain number of employees.[228]

The author suggests that, in the case of private foundations, the supervisory board requirement be relaxed to specify a minimum of one member. Removing the supervisory board completely would significantly lessen the internal control system, and this is not desirable. The (greater) involvement of external bodies was also considered, but this role would not comply with the scope of responsibilities that auditors currently have in Estonia, and the imposition of more extensive judicial supervision would probably be too much of a burden for the Estonian courts.

4.3 Double taxation

Statement set forth for defence. Another major issue hindering the establishment of private foundations today is the current double taxation. To ensure competitiveness with other well-known foundation jurisdictions, Estonian legislators should abolish double taxation of private foundations and establish rules similar to those applicable to holding companies.

Reasoning. In practice, private foundations are often used for holding the shares of a company, exercising shareholders' rights, and passing on the dividends received to the beneficiaries. When an Estonian company pays dividends (or makes payments from the equity of the company, liquidation proceeds, or other sources listed in § 50 (2) of the Income Tax Act (ITA) [229]), it has to pay income tax

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[225] J. Scerri-Diacono. Malta: A synopsis of the basic rules regulating private foundations. – *Trusts & Trustees* 14/5 (June 2008), pp. 320–333. DOI: http://dx.doi.org/10.1093/tandt/ttn029.

[226] A. van Zantbeek, J. Drayey (see Note 213), p. 510.

[227] M. Vogel (see Note 219), p. 686.

[228] C. Prele (ed.). Developments in Foundation Law in Europe. Springer Netherlands 2014, p. 16. DOI: http://dx.doi.org/10.1007/978-94-017-9069-7.

[229] *Tulumaksuseadus* – RT I 1999, 101, 903; RT I, 28.12.2018, 51. English text available at: https://www.riigiteataja.ee/en/eli/529012019001/consolide

(§ 50 (1)). According to § 50 (1^1) and § 50 (2^1) of the ITA, no income tax is to be charged if the parent company of the relevant company makes further distributions from that profit. These exemptions cannot be applied to a foundation, as it does not have owners and the payments cannot be regarded as dividends or any other type of payments from equity. There is no fundamental difference in the case of the private foundation owning shares of a non-Estonian legal entity, as non-resident companies also normally pay taxes in their countries of tax residency before transferring dividends to the private foundation. Hence, a second taxation of the relevant income takes place when the private foundation transfers funds to beneficiaries. It is not entirely clear how the payment should be defined under the ITA, but there are two options: it is more likely that the payment should be regarded as a gift (which under § 49 (1) of the ITA is taxable if made by a legal entity). The second alternative would be to define the payment as an expense not related to business or activities specified in the bylaws and tax it accordingly (under § 51 (3) of the ITA). Under both options, there is no further taxation if the beneficiary is a resident natural person (see § 12 (2) and § 19 (3) 6) of the ITA). When the beneficiary is a non-resident, further taxation depends on the country of residence.

When a private foundation sells shares of a company and subsequently distributes the gains to beneficiaries, taxation of the distribution takes place in the same way as in the example above. As the gain is already taxed at the level of the investee, double taxation takes place here also, and the same problem is applicable for companies.[230]

The solution for resolving the first issue would be to treat distributions to private foundation beneficiaries made in accordance with the bylaws as if they were dividends of a company. With this approach, all exemptions that are applicable to dividends would be applicable also to payments to beneficiaries from the profits. Payments to third parties or expenses not related to activities specified in the bylaws would be treated in the way they are now.

Another issue is the distribution of endowments to beneficiaries. Payments of this nature are currently taxed similarly to payments from dividend income, as described above. However, there is no gift or inheritance tax in transactions between natural persons,[231] and when a company decreases its share capital and distributes the funds to owners, no tax is charged on the portion not in excess of the contributions made to the equity of the company.

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[230] See E. Uustalu. *Põhimõtteline muudatus maksusüsteemi konkurentsivõime suurendamiseks: vabastame osaluste võõrandamise topeltmaksustamisest* ('A fundamental change in the tax system to increase competitiveness: Getting rid of the double taxation of transfer of shares'). – *MaksuMaksja* 2008/4 (in Estonian). Available at: http://www.maksumaksjad.ee/modules/smartsection/item.php?itemid=730 (11.1.2020).

[231] However, we need to take into account that the acquisition cost for the beneficiary is zero and there could be tax consequences at the point of sale of the asset (e.g., with respect to real estate and investments).

5. Conclusions

When considering different elements and functions of the trust it can be concluded that there are various arrangements in Estonian legal regulation and practice that are similar to trusts, like common funds, nominee accounts, mandate agreements, foundations, testamentary executor, subsequent succession, etc.

From **the AML/CFT perspective**, this does not necessarily mean that they should all be registered in the UBO register – in the AMLD context being 'trust-like' rather boils down to situations wherein from the outside the property has one person as an owner but there also exists an internal relationship that obliges the title-holder to observe certain duties and that may enable another person with economic benefit from the property. In addition, the registration obligations should also be foreseen only if it is, per se, achievable and proportionate. Thus, the current list of trust-like devices brought out in the AMLTF should, on the one hand, be broadened (including the mandate contract) and, on the other hand, probably narrowed.

For family asset management, the author concluded that the mandate agreement, the institutes of the pre-/subsequent successor and testamentary executor and private foundations would be most suitable institutes in Estonian law. However, under the current regulations, all of these have deficiencies compared to trusts.

A legal relationship resulting from a **mandate contract** under Estonian civil law can be rather similar to a common law trust – 1) it can be concluded so that the title to the assets is transferred to the agent; 2) the assets can be segregated from the agent's personal patrimony; 3) the possibility for the beneficiary to obtain the assets from a third-party transferee when the agent has made an unauthorised disposal can be created; 4) there exists a check and balance mechanism between the parties. However, some of those elements are not written in the "default" rules of the Mandate Contract chapter of the LOA and can be achieved only via other means provided in Estonian private law with extremely careful preparing of the contract and the help of a legal professional who can take into account the widest possible spectrum of circumstances that can arise. In addition to covering the "core elements" of a trust-like relationship, specific attention needs to be given to other factors that can be detrimental to the principal's objectives if left unregulated, such as the questions related to the termination of the contract, whether it be due to the death, mental incapacity or the unilateral decision of either of the parties. However, even with careful preparation, a mandate contract concluded under Estonian law would probably not be a perfect equivalent to a trust in every situation. For example, the assets obtained by the agent in connection to the mandate agreement are not protected from the principal's creditors in case of the principal's bankruptcy. Sometimes, the rearranging of the legal relationships involved, namely the parties to those relationships, could help. But it seems that it is not possible to achieve a situation where the assets would be protected simultaneously from both the creditors of the third-party beneficiary and that of the person who settles property for the benefit of the beneficiary.

Regarding solutions comparable to testamentary trusts under Estonian law, a great deal of uncertainty also emerges. In principle, the appointment of a **testamentary executor** should exclude the heirs' participation in making decisions concerning the estate and their right of disposal of the assets. However, there are controversial provisions in family law leading to practical problems regarding the impact of third parties on the estate. Another issue with the testamentary execution is that although the legislator has not explicitly excluded administration of the estate over a longer period nor prescribed a clear time frame, the lack of regulation in important questions shows that the executor's office was seen as a temporary position, with his being a person that divides the estate according to the orders of the testator within a short period of time. For example, it is not clear whether a new executor should be appointed if the previous one willingly or involuntarily vacates the position. The main problem with testamentary execution seems to be that the law does not directly regulate the issue of the protection of property administrated by the executor from the heirs' creditors.

In the case of **subsequent succession**, this question is clearer: until fulfilment of the condition triggering subsequent succession, the estate is protected from the creditors of the provisional heir. The estate is also protected from the subsequent heir's creditors. But the problem with subsequent succession is that it is uncertain whether and to what extent the testator can restrict the rights granted to the provisional heir by law. The LSA gives the provisional heir the right to use and consume the objects belonging to the estate, collect all benefits receivable from the estate, and dispose of the objects belonging to the estate (except for immovables and gratuitous disposals), and it is quite likely that the restriction of those rights can be deemed contrary to *numerus clausus*. There is also some uncertainty regarding unauthorised transactions made by the provisional heir.

With **private foundations**, one of the problems is the current double taxation as the exemptions designed for companies to avoid double taxation of distributions made from already taxed income (such as dividends) do not apply. The next major problem is the excessive accountability and publicity currently involved: an Estonian foundation is registered in a public register from which the information on that foundation is accessible to everyone. The author also questioned the necessity of the current two-tier structure and the number of people involved in operating a private foundation.

Coming back to the goals of family trusts presented in the use-cases in subsection 1.4.3, the conclusions would be as follows: for cases a (preventing the dispersal of the estate or business after death) and b (continuity in management, e.g. when heirs are deemed unfit), the use of a mandate contract would be problematic, as it would require the exclusion of the heirs' rights to give instructions or modify or cancel the contract after the principal's death. The use of an executor in those cases should be possible in theory; however, the question of the protection of property from the heirs' creditors remains. The use of provisional/subsequent heirship would certainly help; however, it must be kept in mind that the preliminary heir's position is more of an owner than an administrator of the estate. For use case c (the settlor's incapacity), neither of the succession law devices

would be suitable, but the use of a mandate contract would be possible. For case d (providing for a relative in the case of the latter's incapacity or lack of financial maturity), the use of a mandate contract would again be problematic – if the settlor dies and the relative is an heir, their bankruptcy can trigger the cancellation of the mandate contract. Also, the provisions of family law would need to be taken into account (such as appointing a third-party special guardian). The conflict with family law provisions also makes the use of an executor ambiguous in this case. The institute of a preliminary/subsequent heir could be beneficial here; however, here, too, it must be borne in mind that the preliminary heir's position is more of an owner than an administrator and that the period for nominating a preliminary heir is limited to 20 years. In use case e (asset protection during a person's lifetime), neither a mandate contract nor the succession law devices would be of any help. A private foundation could, in theory, be used in all cases provided that the settlor does not care about double taxation and privacy and has a sufficient number of people in reserve to take care of the management of the foundation.

In some cases, the combined or sequential use of these instruments would probably help reduce certain problems. For example, in order to deal with cases (a), (b) and (c) at the same time, consideration should be given to first concluding a mandate agreement with the trustee for the duration of the principal's lifetime and making a will for the event of the principal's death, appointing either the same trustee or a third party as an executor. This would reduce some confusion about the continuation of the mandate after the death of the principal but would not eliminate the main problem of using the mandate – protection of the assets from the principal's creditors during the principal's lifetime. In some cases, combining the institutes of succession law could be considered: a testator can assign both subsequent succession and testamentary execution (until the subsequent succession) for the estate. In this case, the property would be protected against the creditors of both the provisional and subsequent heir (as well as the creditors of the executor). Furthermore, the provisional heir could not dispose of objects belonging to the estate.

It would likely not be justified to use a private foundation alongside other institutes – the problem of double taxation could not be eliminated this way. At best, it might be possible to avoid disclosure to a certain extent through a scheme whereby a principal transfers a certain asset to the trustee who undertakes to set up a foundation in their own name and for their own benefit (at least according to the articles of association), but this structure seems too complex, requires in essence the involvement of several trustees and according to AMLD rules, in the UBO register, the actual beneficiaries must be registered one way or another. Overall, creating hugely complex constructions may make a lawyer feel more like a plumber ('trying to repair the many leaks in the system'[232]) than a legal architect.

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[232] E McKendrick, 'Taxonomy: does it matter?' in D. Johnston and R. Zimmermann (eds), Unjustified Enrichment: Key Issues in Comparative Perspective, Cambridge University Press, 2002, p. 627.

As the foundation is probably the most similar device to trusts in the Estonian legal scene at the moment, making amendments to the legal acts regarding the abovementioned issues concerning the foundations would probably be the most logical as well as acceptable solution for a civil-law state (even if integration of a trust into the Estonian legal system does not require fundamental changes in our legal thinking and is rather a question of legal policy). The proposals for amendments concerning private foundations made by the author can be summarised as follows:

1. First of all, the author proposes a new, special type of foundation – the private foundation. The biggest difference between private foundations and other foundations is that the documents of the former should not be publicly accessible.
2. To reduce the number of business relations and creditors that could be affected by not having access to the foundation's documents, this new special type of foundation may engage in commercial activities only to fulfil its main purpose: the maintenance and accumulation of assets in the interests of its beneficiaries.
3. To ensure that the private foundation is not engaged in unauthorised economic activities, all private foundations shall be subject to a review of their annual accounts by an auditor, and the auditor shall additionally give an opinion on whether the activities of the private foundation comply with the law.
4. For the sake of objectivity and transparency and considering the value of the assets that might be involved in a public foundation's (e.g. a hospital's) activities, it may be justified that the administration bodies of public foundations – which operate in the public interest – be required to include a large number of members. However, as confidentiality, effectiveness and privacy regarding assets are in the foreground when it comes to private foundations, reducing the minimum number of members of the supervisory board to one person would be beneficial.
5. To ensure competitiveness with other well-known foundation jurisdictions, Estonian legislators should abolish double taxation of private foundations and establish rules similar to those applicable to holding companies.

REFERENCES

Literature and publications

1. Alexander, G.S., The Dead Hand and the Law of Trusts in the Nineteenth Century (1985) 37 Stanford Law Review 1261.
2. Arro, J., *Kas kustub aegumise läbi krepostiraamatutesse kantud kinnisvara (liikumata varanduse) omandusnõudmine? – Õigus, juriidiline kuukiri* 1921 No 4, pp. 74–81.
3. Bergervoet, M., Starreveld, J., How private is the Curaçao private foundation, Curaçao trust, and the Dutch private foundation? – Trusts & Trustees 19/6 (July 2013), pp. 577–583. DOI: http://dx.doi.org/10.1093/tandt/ttt080.
4. Bove, Jr, A.A., The United States as an offshore asset protection trust jurisdiction – the world's best kept secret. – Trusts & Trustees,Volume 14, Issue 1, 1 February 2008, pp. 12–22, https://doi-org.ezproxy.utlib.ut.ee/10.1093/tandt/ttm122
5. Braun, A., Röthel, A. (eds.), Passing Wealth on Death: Will-Substitutes in Comparative Perspective, Hart Publishing, 2016.
6. Clarry, D., Fiduciary Ownership and Trusts in a Comparative Perspective – International and Comparative Law Quarterly, 63/4, Oct 2014.
7. Cooke, E. (ed.), Modern Studies in Property Law Vol 2. Hart Publishing, 2003.
8. Cremona, A., Malta: Foundations – the new vehicle of choice? – Trusts & Trustees 16/6 (July 2010), pp. 479–489. DOI: http://dx.doi.org/10.1093/tandt/ttq046.
9. Cunliffe, J., Erreygers, G. (eds.), Inherited Wealth, Justice and Equality. Routledge, 2012.
10. Faber, W., Lurger, B. (eds.), National Reports on the Transfer of Movables in Europe. Volume 1: Austria, Estonia, Italy, Slovenia, Sellier, 2008.
11. Farny, O. *et al*., Taxation of foundations in Europe. Available at : https://media.arbeiterkammer.at/wien/PDF/studien/Studie_Stiftungsbesteuerung_in_Europa_englisch.pdf.
12. Fortin, G., How the Province of Quebec Absorbs the Concept of the Trust – Part I – Trusts & Trustees, Volume 5, Issue 2, January 1999, pp. 20–26.
13. Fox, C., Murphy, R., Are Spendthrift Trusts Vulnerable to a Beneficiary's Tort Creditors? – Trusts & Trustees, Volume 16, Issue 8, 1 September 2010, pp. 672–681, https://doi-org.ezproxy.utlib.ut.ee/10.1093/tandt/ttq084.
14. French, S. F., Korngold, G., Cases and Text on Property. Wolters Kluwer, 2019.
15. Gallanis, T.P., The New Direction of American Trust Law. – Iowa Law Review, Vol. 97, 2011.
16. Graziadei, M., Mattei, U., Smith, L. (eds.), Commercial Trusts in European Private Law, Cambridge University Press, 2009.
17. Graziadei, M., Smith, L.D. (eds.), Comparative Property Law: Global Perspectives, Cheltenham: Edward Elgar Publishing, 2016.
18. Gretton, G.L., Steven, A.J.M., Property, Trusts and Succession 3rd ed. Bloomsbury Professional, 2017.
19. Häcker, B., Consequences of Impaired Consent Transfer. A Structural Comparison of English and German Law, Hart Publishing, 2013.
20. Hayton, D., The Future of the Anglo-Saxon Trust in the Age of Transparency. Paper prepared for the STEP Caribbean Conference 2015 at St Maarten May 4, 2015. Available at: https://ccj.org/wp-content/uploads/2015/06/The-Future-of-the-Anglo-Saxon-trust-in-the-age-of-transparency-.pdf

21. Hayton, D., Matthews, P., Mitchell, C., Underhill and Hayton: Law of Trusts and Trustees 18th ed. LexisNexis Butterworths, 2010.
22. Hayton, D.J., Kortmann, S.C.J.J., Verhagen, H.L.E., Principles of European Trust Law, Kluwer Law International, 1999.
23. Helmholz, R., Zimmermann, R. (eds.), Itinera Fiduciae: Trust and Treuhand in Historical Perspective. Duncker & Humblot, 1998.
24. Honoré, T., On Fitting Trusts into Civil Law Jurisdictions. – University of Oxford Legal Research Paper Series, Paper No 27/2008.
25. Hopt, K.J. *et al.* (eds.), The European Foundation: A New Legal Approach. Cambridge University Press, 2006.
26. Johnston, D., Zimmermann, R. (eds.), Unjustified Enrichment: Key Issues in Comparative Perspective, Cambridge University Press, 2002.
27. Kelli, A., *Konfidentsiaalsuskohustus usaldussuhtes. Magistritöö*, TÜ Õigusinstituut 2005.
28. Kortmann, S.C.J.J. *et al.* (eds.), Towards an EU Directive on Protected Funds. Kluwer Legal Publishers, 2009.
29. Kossmann, C.N., 'Luxembourg: The Luxembourg Patrimonial Foundation: what's new in Luxembourg?' – Trusts & Trustees 21/6 (July 2015), pp. 679–680.
30. Kotka, T., Vargas, C., Korjus, K., Estonian e-residency: Redefining the nation-state in the digital era. Oxford Cyber Studies Programme Working Papers Series, No. 3, Sept. 2015.
31. Kotsjuba, A., *Tagatisagendiga kaasnevate riskide maandamine Eesti õiguses. Magistritöö*, TÜ õigusteaduskond 2013.
32. Kõve, V., Applicable Law in the Light of Modern Law of Obligations and Bases for the Preparation of the Law of Obligations Act. – in Juridica International 6/2001, pp. 30–37.
33. Kõve, V. *et al., Tsiviilkohtumenetluse seadustik II. Kommenteeritud väljaanne*, Juura, 2017.
34. Kõve, V., *Varaliste tehingute süsteem Eestis. Doktoritöö*, Tartu Ülikooli Kirjastus, 2009.
35. Kreek, R., *Ettevõtlusvarade pärimise teema Eestis vähetuntud*. – Äripäev 20.01.2011.
36. Kuleli, T., Kaarlep, U., Is the Estonian Foundation Act Ready for Private Purposes? (2017) 23 Trusts & Trustees 653–657.
37. Kuleli, T., Kaarlep, U., What makes Estonia an Attractive Jurisdiction for Global Non-Charitable Private Foundations? (2017) 23 Trusts & Trustees 263–267.
38. Kull, I., Reform of Contract Law in Estonia: Influences of Harmonisation of European Private Law. – in Juridica International 14/2008, pp. 122–129.
39. Lahe, J., Luik, O.-J., *Kindlustusõigus*, Juura, 2018.
40. Laub, G., Promet, K., *Väärtpaberist tulenevate õiguste teostamiseks õigustatud isik*. – Juridica 2017/8, pp. 567–575.
41. Lowry. J., Mistelis, L. (eds.), Commercial Law: Perspectives and Practice. Lexis-Nexis Butterworths, 2006.
42. Lupoi, M., Trusts. A Comparative Study, Cambridge University Press, 2000.
43. Lupoi, M., Trusts in Italy as a living comparative law laboratory. – Trusts & Trustees, Volume 19, Issue 3–4, April/May 2013, pp. 302–308.
44. Mahhov, I., Silvet, E., *Kuidas pärida ja pärandada*, Juura, Õigusteabe AS 1997.
45. Mikk, T., *Pärimisõigus*, Sisekaitseakadeemia 2012.
46. Panico, P., New foundation legislation in common law jurisdictions: a 'second generation'? –Trusts & Trustees, Vol. 24, No. 6, July 2018, pp. 511–518.

47. Petritz, M., Kampitsch, A., Austria: The Austrian private foundation. – Trusts & Trustees 20/6 (July 2014), pp. 541–549. DOI: http://dx.doi.org/10.1093/tandt/ttu075.
48. Pisuke, E., *Võlakirjaemissiooni tagatisagent. Magistritöö*, TÜ Õigusteaduskond 2013.
49. Prele, C. (ed.), Developments in Foundation Law in Europe. Springer Netherlands, 2014. DOI: http://dx.doi.org/10.1007/978-94-017-9069-7.
50. Promet, K., *Väärtpaberite esindajakontol hoidmisega seotud emitendi, investori ja esindajakonto omaja õigused ja kohustused. Magistritöö*, TÜ Õigusteaduskond 2015.
51. Pusceddu, P., International Trusts and assets protection. – Trusts & Trustees, Volume 20, Issue 7, 1 September 2014, pp. 739–745, https://doi-org.ezproxy.utlib.ut.ee/10.1093/tandt/ttu070.
52. Reimann, M., Zimmermann, R. (eds.), The Oxford Handbook of Comparative Law. Oxford University Press, 2006.
53. Risseeuw, P., Dosker, R., Trust Matters: The Dutch Trust Industry Revisited. Amsterdam: SEO Economic Research 2011.
54. Runciman, D., Ryan, M. (eds.), F. W. Maitland: State, Trust and Corporation. Cambridge University Press, 2003.
55. Säärits, T., *Kliendi väärtpaberite ja raha hoidmise põhimõtted. Magistritöö*, TÜ õigusteaduskond 2012.
56. Scerri-Diacono, J., Malta: A synopsis of the basic rules regulating private foundations. – Trusts & Trustees 14/5 (June 2008), pp. 320–333. DOI: http://dx.doi.org/10.1093/tandt/ttn029.
57. Schneider, H., Millner, R., Meyer, M., Austria Country Report, EUFORI Study. Available at: http://euforistudy.eu/wp-content/uploads/2015/07/Austria.pdf
58. Schurr, F.A., Liechtenstein: Beneficiaries' rights and foundation governance in Liechtenstein. – *Trusts & Trustees*, Volume 21, Issue 6, July 2015, pp. 674–678, https://doi-org.portaal.nlib.ee:2443/10.1093/tandt/ttv062
59. Schwab, D., Gottwald, P., Lettmaier, S., Family and Succession Law in Germany, Kluwer, 2012.
60. Schwank, F., The Austrian private foundation as a holding structure for global family wealth. – Trusts & Trustees 20/1–2 (February–March 2014), pp. 171–177. DOI: http://dx.doi.org/10.1093/tandt/ttt247.
61. Schwank, F., The Austrian private foundation: Between transparency and bank secrecy. – Trusts & Trustees 16/6 (July 2010), pp. 415–421.
62. Scott, A.W., Fifty Years of Trusts. – 50 Harvard Law Review 60 (1936).
63. Sepp, K., *Kasulik teada: usaldusfondid* – Juridica 2011/7, pp. 443 – 451.
64. Shirley, A. (ed.), The Wealth Report. Knight Frank 2016. Available at: https://content.knightfrank.com/research/83/documents/en/wealth-report-2016-3579.pdf.
65. Silvet, E., *Pärimisseaduse eelnõu põhijoontest.* – Juridica 1995/7, pp. 282–288.
66. Singh, S.K., Bank Regulations. Discovery Publishing House, 2009.
67. Smith, L. (ed.), Re-imagining the Trust: Trusts in Civil Law, Cambridge University Press, 2012.
68. Smith, L. (ed.), The Worlds of the Trust, Cambridge University Press, 2013. DOI: https://doi.org/10.1017/CBO9781139505994.008
69. Sootak, J., Pikamäe, P., *Karistusseadustik. Kommenteeritud väljaanne*, Juura, 2015.
70. Sterk, S.E., Asset Protection Trusts: Trust Law's Race to the Bottom. – 85 Cornell Law Review 1035 (2000).

71. Stowell, N.F. *et al.*, Wills, Asset Protection Trusts, and Financial Crime. – Journal of Forensic & Investigative Accounting Volume 9: Issue 1, January–June, 2017, pp. 585–605.
72. Thévenoz, L., Trusts in Switzerland. Ratification of the Hague Convention on Trusts and Codification of Fiduciary Transfers. Schultess, 2001.
73. Toommägi, K., *Vallasasjade tagatisomandamine – selle olemus ja realiseerimine*. *Magistritöö*. Tallinn 2014. Available at: http://dspace.ut.ee/bitstream/handle/10062/43015/toommagi_ma_2014.pdf?sequence=1&isAllowed=y
74. Uustalu, E., *Põhimõtteline muudatus maksusüsteemi konkurentsivõime suurendamiseks: vabastame osaluste võõrandamise topeltmaksustamisest*. – *MaksuMaksja* 2008/4. Available at: http://www.maksumaksjad.ee/modules/smartsection/item.php?itemid=730
75. Van Erp, E., Akkermans, B. (eds.), Cases, Materials and Text on Property Law, Hart Publishing, Oxford and Portland, Oregon, 2012.
76. Van Zantbeek, A., Drayey, J., The Belgian private foundation. – Trusts & Trustees 16/6 (July 2010), pp. 509–517. DOI: http://dx.doi.org/10.1093/tandt/tts052.
77. Varul, P. *et al.*, *Tsiviilseadustiku üldosa seadus. Kommenteeritud vln*, Juura, 2010.
78. Varul, P. *et al.*, *Asjaõigusseadus I. Kommenteeritud vln*, Juura, 2014.
79. Varul, P. *et al.*, *Asjaõigusseadus II. Kommenteeritud vln.*, Juura, 2014.
80. Varul, P. *et al.*, *Tsiviilõiguse üldosa. Õigusteaduse õpik.*, Juura, 2012.
81. Varul, P. *et al.*, *Võlaõigusseadus I. Kommenteeritud vln*, Juura, 2006.
82. Varul, P. *et al.*, *Võlaõigusseadus I. Kommenteeritud vln*, Juura, 2016.
83. Varul, P. *et al.*, *Võlaõigusseadus II. Kommenteeritud vln*, Juura, 2007.
84. Varul, P. *et al.*, *Võlaõigusseadus II. Kommenteeritud vln*, Juura, 2019.
85. Varul, P. *et al.*, *Võlaõigusseadus III. Kommenteeritud vln*. Juura, 2009.
86. Verbit, G. B., The Origins of the Trust. Xlibris Corporation, 2002.
87. Vogel, M., The Dutch foundation: The solution in tax planning, estate planning and asset protection for high net worth individuals worldwide. – Trusts & Trustees 21/6 (July 2015), pp. 686–690. DOI: http://dx.doi.org/10.1093/tandt/ttv067
88. Volens, U., *Usaldusvastutus kui iseseisev vastutussüsteem ja selle avaldumisvormid. Doktoritöö*. Tartu Ülikooli Kirjastus, 2011.
89. Von Bar, C., Clive, E. (ed.), Principles, definitions and model rules of European private law: draft common frame of reference, Volume 6. Oxford University Press, 2010.
90. Von Overbeck A.E., Explanatory Report on the 1985 Hague Trusts Convention. HCCH Publications, 1985. Available at: https://assets.hcch.net/docs/ec6fb7e0-deda-417f-9743-9d8af6e9e79b.pdf
91. Waters, D.W.M., The institution of the trust in civil and common law. Collected Courses of the Hague Academy of International Law (Volume 252), Brill | Nijhoff, 1995.
92. Webb, J. P., An ever-reducing core? Challenging the legal validity of offshore trusts. – Trusts & Trustees, Volume 21, Issue 5, 1 June 2015, pp. 476–487, https://doi-org.portaal.nlib.ee:2443/10.1093/tandt/ttv010
93. Xhauflair, V. *et al.*, Belgium Country Report, EUFORI Study. Available at: http://euforistudy.eu/wp-content/uploads/2015/07/Belgium.pdf
94. Zweigert, K., Kötz, H., An Introduction to Comparative Law 3rd ed. Oxford University Press, 1998.

Other sources

95. Chamber of Notaries 11.09.18. inquiry to the Ministry of Justice regarding the institutes of the testamentary executor and preliminary/subsequent succession (Ministry of Justice document register reference 10–4/4851-1; registration date 12.07.2018).
96. Chamber of Notaries opinion 8.10.14. regarding amending the regulation related to foundations (Ministry of Justice document register reference 10–4/14-7735-1; registration date 08.10.2014)
97. Committee on Development opinion (1.12.2016) for the Committee on Economic and Monetary Affairs and the Committee on Civil Liberties, Justice and Home Affairs on the proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC (COM(2016)0450 – C8-0265/2016 – 2016/0208(COD)) Available at: http://www.europarl.europa.eu/doceo/document/A-8-2017-0056_EN.html#title2 (11.1.2020).
98. Deloitte Netherlands. UBO Registration in the Netherlands: Update Fall 2019. Available at: https://www2.deloitte.com/nl/nl/pages/legal/articles/ubo-registration-in-the-netherlands.html (31.1.2020).
99. E-business Registry. Business register and register of non-profit associations and foundations statistics as at 11.1.2020. Available at: https://www2.rik.ee/rikstatfailid/failid/tabel.php?url=19_02tg.htm (11.1.2020).
100. European Commission. European Statistical System (Eurostat). Available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Main_Page (11.1.2020).
101. European Commission. List of trusts and similar legal arrangements governed under the law of the Member States as notified to the Commission (*2019/C 360/05*, OJ C 360, 24.10.2019, p. 28–29). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2019.360.01.0028.01.ENG&toc=OJ:C:2019:360:TOC (11.1.2020).
102. European Commission's 'Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC of 5 July 2016' – Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0450 (11.1.2020).
103. Finance Estonia. FinanceEstonia wants to bring investments of wealthy families to Estonia. Available at: http://www.financeestonia.eu/news/financeestonia-soovib-tuua-eestisse-varakate-perede-investeeringuid/ (8.1.2020).
104. Financial Action Task Force. The Misuse of Corporate Vehicles, Including, Trust and Company Service Providers (2006). Available at: https://www.fatf-gafi.org/media/fatf/documents/reports/Misuse%20of%20Corporate%20Vehicles%20including%20Trusts%20and%20Company%20Services%20Providers.pdf (8.1.2020).
105. Government of the Republic. Proposal for Civil Code *(Tsiviilseadustik: Vabariigi Valitsuse ettepanek)* 11. XII 1939. Available at https://www.digar.ee/arhiiv/et/raamatud/42352.
106. Hasch & Partner Anwaltsgesellschaft mbH. The Austrian private foundation: A brief guide for the investors. Available at: http://hasch.eu.dedi2098.your-server.de/files/channels/publikationen/Austrian_Private_Foundation_Brochure__E_.pdf (11.1.2020).

107. Law Firm Varul to Ministry of Justice – Request for clarification (Ministry of Justice document register reference 10–4/14-5618-1; registration date 02.07.2014)
108. Ministry of Finance. Draft Act on Amendments to the Money Laundering and Terrorist Financing Prevention Act, Auditors Activities Act and Other Acts *(Rahapesu ja terrorismi rahastamise seaduse, audiitortegevuse seaduse ja teiste seaduste muutmise seadus).* The draft as of 22.10.2019. Available at: https://eelnoud.valitsus.ee/main#bogZnv22
109. Ministry of Finance. Explanatory memorandum for changing of the MLTFPA for the implementation of AMLD5 (*Rahapesu ja terrorismi rahastamise seaduse, audiitortegevuse seaduse ja teiste seaduste muutmise seaduse eelnõu)*. Available at: https://eelnoud.valitsus.ee/main#bogZnv22 (24.10.2019).
110. Ministry of Finance. The explanatory memorandum of MLTFPA. Available at: https://www.riigikogu.ee/tegevus/eelnoud/eelnou/fb03e20e-caf7-463d-9b60-ddf6021742b2/Rahapesu%20ja%20terrorismi%20rahastamise%20tõkestamise%20seadus (24.10.2019).
111. Ministry of Justice 12.09.2018 response to 12.07.2018 inquiry by Chamber of Notaries.
112. Ministry of Justice. Analysis-concept of the corporate law review team. Tallinn 2018. Available at: https://www.just.ee/sites/www.just.ee/files/uhinguoiguse_revisjoni_analuus-kontseptsioon.pdf (24.10.2019).
113. Ministry of Justice. The explanatory memorandum of LSA (*Pärimisseaduse (56 SE) seletuskiri*). Available at: https://www.riigikogu.ee/tegevus/eelnoud/eelnou/bf9178a0-a068-736c-7b0f-654c7b4fa81f/Pärimisseadus (11.1.2020).
114. Nasdaq CSD. List of participants: https://nasdaqcsd.com/services/services-to-account-operators/list-of-account-operators/ (24.10.2019).
115. Nasdaq CSD. Rulebook. Available at: https://nasdaqcsd.com/wp-content/uploads/Chapter_I_Rulebook_Sept14_2017.pdf (24.10.2019).
116. National Audit Office. Granting and appropriate use of support given to foundations established by the state. Is the use of public money transparent and verifiable? Report to the Parliament, 14 April 2014. Available at: https://www.riigikontroll.ee/tabid/215/Audit/2315/WorkerTab/Audit/WorkerId/28/language/et-EE/Default.aspx (11.1.2020).
117. OECD. Behind the Corporate Veil. Using Corporate Entities for Illicit Purposes, 2001. Available at: https://www.oecd.org/daf/ca/43703185.pdf (11.11.2019).
118. Ogier Law Firm. Luxembourg private foundation. Available at: https://www.ogier.com/publications/l-luxembourg-private-foundation (11.11.2019).
119. PricewaterhouseCoopers International Limited, The UBO register: an update, Dec 2019. Available at: https://www.pwc.nl/nl/assets/documents/the-ubo-register-update-december-2019.pdf (29.5.2020).
120. PwC Netherlands. Finding a balance between transparency and privacy – a study of the impact of the UBO register on high-net-worth families and family businesses in twelve European countries. Available at: https://www.pwc.nl/en/assets/documents/pwc-finding-a-balance-between-transparency-and-privacy.pdf (11.1.2020).
121. Society of Trusts and Estate Practitioners. Jurisdictional Reports, Northern Ireland. Available at: https://www.step.org/jr-northern-ireland (26.1.2020)

Legislative acts

Estonian legislation

122. Auditors Activities Act (*Audiitortegevuse seadus).* – RT I 2010, 9, 41; 30.12.2015, 8.
123. Bankruptcy Act (*Pankrotiseadus).* – RT I 2003, 17, 95; 26.06.2017, 29.
124. Code of Civil Procedure (*Tsiviilkohtumenetluse seadustik)* – RT I 2005, 26, 197; 15.01.2018.
125. Code of Enorcement Procedure (*Täitemenetluse seadustik).* – RT I 2005, 27, 198; 3.04.2018, 24.
126. Commercial Code (*Äriseadustik*) – RT I 1995, 26, 355; RT I, 20.12.2018, 2.
127. Family Law Act (*Perekonnaseadus)* – RT I 2009, 60, 395; RT I, 09.05.2017, 29.
128. Foundations Act (*Sihtasutuste seadus*). – RT I 1995, 92, 1604; 30.12.2015.
129. General Part of the Civil Code Act (*Tsiviilseadustiku üldosa seadus)* – RT I 2002, 35, 216; RT I, 30.01.2018, 6.
130. Income Tax Act *(Tulumaksuseadus)*. RT I 1999, 101, 903; RT I, 28.12.2018, 51.
131. Insurance Activities Act (*Kindlustustegevuse seadus*). – RT I, 07.07.2015, 1; RT I, 20.02.2019, 6.
132. Investment Funds Act. *(Investeerimisfondide seadus)*. RT I, 31.12.2016, 3; RT I, 04.12.2019, 6.
133. Land Register Act (*Kinnistusraamatuseadus*). – RT I 1993, 65, 922; 28.6.2016, 8.
134. Law of Obligations Act (*Võlaõigusseadus*) – RT I 2001, 81, 487; RT I, 20.02.2019, 8.
135. Law of Property Act (*Asjaõigusseadus*) – RT I 1993, 39, 590; RT I, 29.06.2018, 7.
136. Law of Succession Act (*Pärimisseadus*) – RT I 1996, 38, 752; 2007, 67, 413.
137. Law of Succession Act (*Pärimisseadus*) – RT I 2008, 7, 52; 10.03.2016, 16.
138. Money Laundering and Terrorist Financing Prevention Act (*Rahapesu ja terrorismi rahastamise tõkestamise seadus*) – RT I, 04.01.2019, 17; RT I, 17.11.2017, 2.
139. Non-profit Associations Act (*Mittetulundusühingute seadus*) – RT I 1996, 42, 811; RT I, 09.05.2017, 21.
140. Notaries Act (*Notariaadiseadus*). – RT I 2000, 104, 684; RT I, 29.06.2018, 35.
141. Penal Code (*Karistusseadustik).* – RT I 2001, 61, 364; RT I, 30.12.2017, 29.
142. Rules of procedure of the court registration department (*Kohtu registriosakonna kodukord)* – RT I, 28.12.2012, 10; RT I, 11.01.2019, 8.
143. Securities Market Act (*Väärtpaberituru seadus*) – RT I 2001, 89, 532; RT I, 10.01.2019, 14.
144. Securities Register Maintenance Act (*Väärtpaberite registri pidamise seadus*) – RT I 2000, 57, 373; RT I, 28.02.2019, 9.

United Kingdom legislation

145. Civil Procedure Rules Practice Directions. Available at: https://www.justice.gov.uk/courts/procedure-rules/civil/rules#part61 (24.10.2019).
146. Inheritance (Provision for Family and Dependants) Act 1975. Available at: http://www.legislation.gov.uk/ukpga/1975/63 (24.10.2019).
147. Insolvency Act 1986. Available at: http://www.legislation.gov.uk/ukpga/1986/45/contents (24.10.2019).
148. Matrimonial Causes Act 1973. Available at: http://www.legislation.gov.uk/ukpga/1973/18 (24.10.2019).
149. Perpetuities and Accumulations Act 2009. Available at: http://www.legislation.gov.uk/ukpga/2009/18/contents. (24.10.2019).

150. Trustee Act 1925. Available at: http://www.legislation.gov.uk/ukpga/Geo5/15-16/19. (24.10.2019).
151. Trusts of Land and Appointment of Trustees Act 1996. Available at: http://www.legislation.gov.uk/ukpga/1996/47/contents (24.10.2019).
152. Variation of Trusts Act 1958. Available at: https://www.legislation.gov.uk/ukpga/Eliz2/6-7/53 (24.10.2019).

Legislative acts of other countries
153. Austrian Beneficial Owner Register Act *(Wirtschaftliche Eigentümer Registergesetz)*, BGBl. I Nr. 136/2017; BGBl. I Nr. 23/2020. Available at: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009980 (29.5.2020).
154. Austrian Foundations Act *(Bundesgesetz über Privatstiftungen)* StF: BGBl. Nr. 694/1993; 112/2015. Available at: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10003154 (11.11.2020).
155. Belgium Royal Decree Royal Decree concerning the operating procedures of the UBO register of 30/07/2018, Belgian Official Gazette of 14/08/2018. Unofficial English translation available at: https://finance.belgium.be/sites/default/files/20180817_AR%20UBO_EN.PDF (11.1.2020).
156. French Civil Code (*Code civil des Français)* enacted on March 21, 1804. Available at: https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721&dateTexte=20080225#/ (24.10.2019).
157. German Civil Code (*Bürgerliches Gesetzbuch, in der Fassung der Bekanntmachung vom 2. Januar 2002*), English text available at: https://www.gesetze-im-internet.de/englisch_bgb/ (11.1.2020).
158. Maltese Income Tax Act, passed on 1.1.1949; amended on 15.3.2016. Available at: http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8658&l=1 (11.1.2020).
159. Swiss Code of Obligations (*Schweizerisches Obligationenrecht*). *Bundesgesetz vom 30. März 1911 betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht*). Available in English at: https://www.admin.ch/opc/en/classified-compilation/19110009/201704010000/220.pdf (11.1.2020).
160. Swiss Debt Enforcement and Bankruptcy Act, *Bundesgesetz über Schuldbetreibung und Konkurs vom 11. April 1889*. Available at: https://www.admin.ch/opc/de/classified-compilation/18890002/index.html (24.10.2019).

European Union legislation and model rules
161. Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, 5.6.2015, L 141/73.
162. Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU), 19.6.2018, L 156/43.

163. Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), outline edition, 2009. Available at: https://www.law.kuleuven.be/personal/mstorme/2009_02_DCFR_OutlineEdition.pdf.

International (model) conventions
164. Hague Trusts Convention (Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition). Available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=59.
165. OECD Model Convention with Respect to Taxes on Income and on Capital 2014, Available at: http://www.oecd.org/tax/treaties/model-tax-convention-on-income-and-on-capital-2015-full-version-9789264239081-en.htm (24.10.2019)

Case Law

Case Law of Estonian Courts
166. The Supreme Court's decision 3-2-1-135-02 of 14 November 2002.
167. The Supreme Court's decision 3-2-1-80-05 of 23 September 2005.
168. The Supreme Court's decision 3-2-1-164-05 of 11 April 2006.
169. The Supreme Court's decision 3-2-1-135-06 of 10 January 2007.
170. The Supreme Court's decision 3-2-1-119-09 of 9 September 2009.
171. The Supreme Court's decision 3-2-1-164-09 of 4 March 2010.
172. The Supreme Court's decision 3-2-1-12-11 of 19 April 2011.
173. The Supreme Court's decision 3-2-1-36-11 of 25 May 2011.
174. The Supreme Court's regulation 3-2-1-87-11 of 9 November 2011.
175. The Supreme Court's decision 3-2-1-127-13 of 13 November 2013.
176. The Supreme Court's decision 3-2-1-167-14 of 11 March 2015.
177. The Supreme Court's decision 3-2-1-18-15 of 15 April 2015.
178. The Supreme Court's decision 3-2-1-81-15 of 29 September 2015.
179. The Supreme Court's decision 3-2-1-110-15 of 14 October 2015.
180. The Supreme Court's decision 3-2-1-108-16 of 27 March 2017.
181. The Supreme Court's decision 2-15-9288/60 of 27 September 2017.
182. The Supreme Court's decision 2-15-18478 of 27 September 2017.
183. The Supreme Court's regulation 2-16-16048 of 8 November 2017.
184. Civil Chamber of Tallinn Circuit Court case of 3.2.2018 no 2-15-4349.

Case Law of United Kingdom and Canada
185. *A-G for Hong Kong v Reid* [1994] 1 AC 324, [1993] UKPC 2, [1994] 1 All ER 1. Available at: https://www.bailii.org/uk/cases/UKPC/1993/2.html (24.10.2019).
186. *Brockbank, Re, Ward v Bates* [1948] Ch 206, [1948] 1 All ER 287. Available at: https://www.trusts.it/admincp/UploadedPDF/200904301700230.jUK%20InRe%20Brockbank%2019480127.pdf (24.10.2019).
187. *Diplock, Re, Diplock v Wintle* [1948] 1 Ch 465, [1948] 2 All R 318. Available at: http://www.uniset.ca/other/cs2/1948Ch465.html; affd sub nom Ministry of Health v Simpson [1951] AC 251, [1950] 2 All ER 1137. Available at: http://www.uniset.ca/other/cs3/1951AC251.html (24.10.2019).
188. *Foskett v McKeown* [2000] UKHL 29, [2000] 3 All ER 97. Available at: https://www.bailii.org/uk/cases/UKHL/2000/29.html (24.10.2019).
189. *Henry v Hammond* [1913] 2 KB 515.
190. *Midland Bank plc v Wyatt* [1995] 1 FLR 696.

191. *Pettkus v Becker* [1980] 2 SCR 834. Available at: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2562/index.do (24.10.2019).
192. *Pilcher v Rawlins* (1872) 7 Ch App 259. Available at: http://www.uniset.ca/other/cs3/LR7ChApp259.html (24.10.2019).
193. *R v Clowes (Barlow)* (No 2) [1994] 2 All ER 316, CA. Available at: http://uniset.ca/microstates/clowes.html (24.10.2019).
194. *Saunders v Vautier* [1841] EWHC Ch J82. Available at: https://www.bailii.org/ew/cases/EWHC/1841/J82.html (24.10.2019).

ABBREVIATIONS

AML/CFT	Anti-money laundering and counter terrorist financing
AMLD	Consolidated version of AMLD4 and AMLD5
AMLD4	The Fourth Anti-Money Laundering Directive of the European Parliament and the Council of 20 May 2015
AMLD5	The Fifth Anti-Money Laundering Directive of the European Parliament and of the Council of 30 May 2018
BA	Bankruptcy Act
BGB	German Civil Code (*Bürgerliches Gesetzbuch*)
CC	Commercial Code (*Äriseadustik*)
CEP	Code of Enforcement Proceedings (*Täitemenetluse seadustik*)
DCFR	Draft Common Frame of Reference
ECRS	Estonian Central Register of Securities
FA	Foundations Act (*Sihtasutuste seadus*)
FLA	Family Law Act (*Perekonnaseadus*)
GPCCA	General Part of the Civil Code Act (*Tsiviilseadustiku üldosa seadus*)
IFA	Investment Funds Act (*Investeerimisfondide seadus*)
ITA	Income Tax Act (*Tulumaksuseadus*)
LOA	Law of Obligations Act (*Võlaõigusseadus*)
LPA	Law of Property Act (*Asjaõigusseadus*)
LRA	Land Register Act (*Kinnistusraamatuseadus*)
MLTFPA	Money Laundering and Terrorist Financing Prevention Act (*Rahapesu ja terrorismi rahastamise tõkestamise seadus*)
SMA	Securities Market Act (*Väärtpaberituruseadus*)
SRMA	Securities Register Maintenance Act (*Väärtpaberite registri pidamise seadus*)
UBO	Ultimate Beneficial Owner (i.e. any natural person who ultimately owns or controls a legal person or arrangement or benefits of its activities)

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SUMMARY IN ESTONIAN

Family trust'ide[233] sarnased varahalduslahendused Eesti õiguses

Siinses väitekirjas analüüsitakse, kas Eesti õigus võimaldab pakkuda üldise õiguse (*common law*) süsteemiga riikides kasutatavate *trust*'idega sarnaseid varahalduslahendusi. Küsimus on muutunud aktuaalseks olukorras, kus pea 30 taasiseseisvusaasta jooksul on paljud Eesti ettevõtjad loonud varakogumi, mis oleks tervikliku ja mõistliku haldamise korral piisav, et tagada regulaarne sissetulek nii ettevõtjale enesele kui ka tema järeltulevatele põlvedele.

Lihtsustatult on *trust*'i näol tegemist õigussuhtega, kus üks isik omab vara ja valitseb seda teise isiku kasuks või kindlal eesmärgil. *Trust*'i mõiste selgitamisel eristatakse harilikult kolme poolt: 1) asutajat, kes *trust*'i asutab 2) usaldusisikut, kellele vara üle antakse, ning 3) kasusaajat, kes saab *trust*'i paigutatud varalt kasu ja kellel on õigus nõuda usaldusisikult kohustuste täitmist[234].

Angloameerika õigussüsteemiga riikides ei ole *trust*'i näol tegemist lepinguga[235]. *Trust* ei ole ka juriidiline isik, s.t *trust* ise ei ole õigusvõimeline ning

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[233] Inglise keeles kasutatakse sõna „*trust*" erinevate õiguslike nähtuste nimetuses ja seetõttu on sellele ka eesti keeles pakutud väga erinevaid vasteid, nagu näiteks „investeerimisfond", „sihtfond", „usaldusfond" ja „usaldusühingu vormis asutatud fond", „usaldusleping", „varakogum", „monopol", „usaldusomand" ja „trust". Eestikeelne „trust" seondub siinsele juristile eelkõige kartellide, monopolide ja konkurentsiõigusega. Vastet „usaldusomand" on kasutatud näiteks Euroopa Liidu veebilehtede eestikeelsetes versioonides. Väitekirja autori hinnangul on aga „usaldusomand" laiema tähendusega, hõlmates ka muid instituute peale angloameerika *trust*'i, mille puhul on tegemist pigem usaldusomandi kasutamise ühe väljundiga. Seepärast on autor varem *trust*'idest rääkides pidanud parimaks sõna „usaldusfond", mida aga alates 2016. aastast hakati investeerimisfondide seaduses kasutama usaldusühingu vormis asutatud lepinguliste investeerimisfondide tähenduses. Ka uue rahapesu ja terrorismi rahastamise tõkestamise seaduse eelnõus kasutatav „usaldushaldus" ei ole ehk parim vaste, kuna „haldus" viitab pigem korraldavale, organisatoorsele tegevusele ja valdamisele ega anna edasi seda, et *trust*'i puhul läheb usaldusisikule üle ka vara kuuluvus (omand). Seetõttu otsustas autor kasutada eestikeelses kokkuvõttes ingliskeelset sõna „*trust*".

[234] Vt DCFR X. – 1:201; X. – 1:203; X. – 1:205. Samuti U&H, viide 2, lk 2.

[235] Autor on *trust*'ide kirjeldamiseks ja mõistmiseks võtnud peamiseks aluseks Inglise õiguse, kuna Inglismaa on *trust*'ide sünnikoht ning kuna Inglise *trust*'i-õigus on jäänud suhteliselt konservatiivseks, näiteks seoses eri poolte (ja nende võlausaldajate) huvide tasakaalustamisega. See võib aidata leevendada mõnesid *trust*'idega seonduvaid hirme, millel on tõenäoliselt rohkem pistmist *offshore*-lahendustega. Kontinentaalõiguse taustaga juristi jaoks on siiski raske täielikult haarata üldise õiguse kohtupraktikat, aga ka selle termineid, mõisteid ja mõtteviisi. Seetõttu on autor lisaks Inglise õigusele − kohtupraktikale, seadustele ja õiguskirjandusele − kasutanud paralleelselt ka DCFR-i, mis läheneb Inglise *trust*'i-mudelile tsiviilõiguslikult ja aitab mõista keeruka (Inglise) *trust*'i-õiguse aluseid kompaktsel kujul. Selleks et selgitada *trust*'i kontseptsiooni ja erisusi eri riikides, on töös siiski kasutatud ka teiste jurisdiktsioonide õigust ja võrdlevõiguslikku kirjandust. Nagu professor Hayton on öelnud, peavad Inglise kohtunikud võtma tänapäeval Inglise *trust*'i-õiguse kujundamisel arvesse muutuvat praktikat ja ka teiste riikide *trust*'ide karakteristikuid: võib öelda, et *trust*'i-õigus on üsna rahvusvahelise iseloomuga.

trust'iga seonduvate nõuete adressaadiks on usaldusisik, kes omakorda saab ise esitada *trust*'iga seotud nõudeid.

Kuigi usaldusisik saab üldjuhul *trust*'i vara omanikuks, peab ta selle valitsemisel, kasutamisel ja käsutamisel järgima asutaja poolt asutamisel antud juhiseid ja kasusaaja huve ning ei tohi üldjuhul kasutada vara iseenda huvides. *Trust*'i vara on eraldatud usaldusisiku isiklikust varast (nn erivara) ja usaldusisiku võlausaldajad ning üldjuhul ka asutaja ja kasusaaja võlausaldajad ei saa sellele sissenõuet pöörata. Asutaja võlausaldaja nõuete puudumise loogiline eeldus on, et asutaja ei saa pärast *trust*'i asutamist usaldusisiku tegevust oluliselt mõjutada. Kui vara kantakse üle (peagi saabuva) maksejõuetuse situatsioonis või kui esineb mõni heade kommete vastane asjaolu, on vara ülekandmine tühine või tagasivõidetav.

Kasusaajatel on spetsiifilised nõuded (nn *tracing*) kolmandate isikute vastu, kellega usaldusisik *trust*'i kuuluva vara suhtes tehinguid teeb (eelkõige siiski juhul, kui vara käsutati tasuta või kolmas isik oli pahauskne).

Trust'i kuuluvad esemed on harilikult ajas muutuvad ja asendatavad. See tähendab, et *trust* (sh kasusaajate õigused) laieneb ka *trust*'i esemete võõrandamisel nende asemele saadud varale, samuti varalt saadavale kasule.

Trust ei lõpe asutaja, kasusaaja või usaldusisiku surma või teovõimetuse korral. Järelevalvepädevus usaldusisiku tegevuse üle on kohtutel. Usaldusisik võib kindlates küsimustes ja otsuseid tehes küsida kohtult ka nõu või nõusolekut. Mõnedel asjaoludel on kohtul õigus *trust*'i tingimusi muuta ning vabastada usaldusisik ametist ja määrata asemele uus.

Seega on *trust*'i näol tegemist süsteemiga, mis võimaldab eraldada isiku vara hulgast esemeid, et tagada nende säilimine ja (eelduslikult tulutoov) valitsemine. Samas võimaldab see garanteerida tulud kindlatele isikutele nii, et esemed pole ka nende vara koosseisus ja neil ei ole otsustusõigust vara saatuse üle. See võib olla vajalik olukorras, kus isik soovib välistada mingi varakogumi (nt ettevõtte) killustumise pärijate vahel või takistada vara asjatundmatut või vastutustundetut valitsemist pärast oma surma, soovides samas, et kasumlik tegevus jätkuks ning pärijad saaksid sellest tulu. Samuti on see sobiv näiteks olukorras, kus soovitakse tagada ajalooliselt suguvõsa omandis olnud kinnisasja säilimine ja kasutamise võimalus tulevastele põlvedele. *Trust*'e kasutatakse ka juhul, kui inimene muretseb selle pärast, et ei ole kõrgesse ikka jõudes enam suuteline tegema pädevaid otsuseid varalistes küsimustes, või tal on puudega laps, kes ei ole pärast vanema surma võimeline ise varalisi otsuseid tegema, või soovib vanem lükata lapse omanikuks saamist edasi kuni viimase täisikka jõudmiseni, või on vanemal alust arvata, et laps ei ole varasse puutuvates küsimustes usaldusväärne ka täisealisena (on narkomaan, hasartmängusõltlane või raiskaja). Keerulisi olukordi põhjustavad ka segased pere- ja paarisuhted, näiteks kui abielulahutuse korral soovib üks vanematest varakogumi eraldamise teel kindlustada laste tuleviku, välistades samas teise lapsevanema otsustus- ja käsutusõiguse selle vara üle. Kokkuvõtlikult võib neid olukordi nimetada perevara hoidmiseks või haldamiseks.

Toodud näidete näol on tegemist tüüpiliste perekonna huvides loodud *trust*'idega. *Trust*'ide kasutusspekter on aga palju laiem. Näiteks kasutatakse neid

investeerimisel, töötajatele mingite tagatiste loomiseks, heategevuseks või muudel avalikes huvides olevatel eesmärkidel ja tagatise andmisel. Lisaks eksisteerivad veel nn sekundaarsed *trust*'id, mis on tekkinud seaduse või kohtuotsuse alusel.

Kuigi Eestis juba on õigusinstituute, millel on *trust*'idega sarnased funktsioonid, on Eesti õiguses siiski keeruline leida perevara haldamiseks sobivat vahendit. Autori hinnangul puudub praegu optimaalne õiguslik lahendus, mis võimaldaks näiteks pärast ettevõtja surma jätkata olemasolevate (valdus)äriühingute tegevust kaitstuna perekonnasisestest võimalikest lahkhelidest tulenevate rünnakute, mõne soodustatud isiku liigse tarbimise või riskijulguse ning võlausaldajate võimalike rünnakute eest. Samas on tegelik vajadus sellise lahenduse järele olemas ja muutub üha teravamaks. Tihti on isikud sunnitud otsima abi välisriikidest, kus sobivad õiguslikud lahendused eksisteerivad.

Väitekirja eesmärk on **leida vastus küsimusele, kas ning millises ulatuses võimaldavad *trust*'ide sarnased varahalduslahendused Eesti õiguses saavutada *trust*'idele iseloomulikke eesmärke perevara planeerimise valdkonnas.**

Töö lisaeesmärk on juhtida tähelepanu muudatustele, mida oleks vaja teha kehtivates õigusaktides, et Eesti õigus hõlmaks ka nn pere-*trust*'ide funktsioone.

Trust'i-sarnaste õiguslike üksuste Eesti õiguses eksisteerimise küsimus on praegu oluline ka rahapesu ja terrorismi rahastamise vastase võitluse seisukohalt. AMLD4[236] kohustas liikmesriike tuvastama õiguslikke üksusi, mille struktuur või funktsioonid on sarnased *trust*'idega, ning usaldusisikuid koguma ja hoidma asjakohast, täpset ja ajakohastatud teavet selliste õiguslike üksuste tegelike kasusaajate kohta, tegema sellekohase teabe õigeaegselt kättesaadavaks pädevatele asutustele ja rahapesu andmebüroodele ning esitama asjakohase teabe keskregistrile (art 31 lg 1, 2, 4; art 3 lg 6 p c)). Seetõttu on töö teine lisaeesmärk hinnata, kas ja mil määral peaks teave Eesti õiguses eksisteerivate *trust*'i-sarnaste varahalduslahenduste kohta olema (avalikult) juurdepääsetav.

Väitekirja moodustab ülevaateartikkel, mis omakorda põhineb viiel alltoodud teadusartiklil:

1. "Legal Arrangements Similar to Trusts in Estonia under the EU's Anti-money- laundering Directive", Juridica International, Vol 26 (2017), 56–65.
2. "The Estonian Foundation – What is Missing for It to Be A Well-Designed Wealth-Management Vehicle for Local and Foreign High-Net-Worth Individuals?", Juridica International, Vol 24 (2016), 96–104. Artiklil on kaks autorit: Katrin Sepp ja Urmas Kaarlep. Urmas Kaarlep panustas põhiliselt artikli maksuõiguse ossa (punkt 5) ja pakkus valemid, mille järgi arvutada mitteresidentide poolt Eesti eraõiguslike sihtasutuste kasutamise võimalik

[236] 20. mai 2015. aasta Euroopa Parlamendi ja nõukogu direktiiv (EL) 2015/849, mis käsitleb finantssüsteemi rahapesu või terrorismi rahastamise eesmärgil kasutamise tõkestamist ning millega muudetakse Euroopa Parlamendi ja nõukogu määrust (EL) nr 648/2012 ja tunnistatakse kehtetuks Euroopa Parlamendi ja nõukogu direktiiv 2005/60/EÜ ja komisjoni direktiiv 2006/70/EÜ. − ELT L 141, 05.06.2015, lk 73−117.

mõju riigieelarvele (punkt 6); Katrin Sepp viis läbi uurimistöö artikli punktide 3–4 tarvis, struktureeris artikli ning koostas ja muutis artikli teksti põhiosa.

3. "Estonian 'trust' – same same but different?", Trusts & Trustees, Vol 24, Issue 9 (2018), 891–900.
4. "Estate planning beyond the grave: legal instruments comparable to testamentary trusts in Estonian law", Trusts & Trustees, Vol 25, Issue 3 (2019), 303–311.
5. "Unblocking the bottlenecks of the Estonian wealth-management scene for private foundations", Trusts & Trustees, Vol 24, Issue 6 (2018), 558–564. Artiklil on kolm autorit: Katrin Sepp, Urmas Kaarlep ja Turgay Kuleli. Urmas Kaarlep panustas artikli maksuõiguslikku ossa, Turgay Kuleli redigeeris käsikirja ja suhtles ajakirja väljaandjaga. Peamine autor oli Katrin Sepp, kes andis olulisima panuse uurimistöösse ning kirjutas ja redigeeris ka suurema osa artiklist.

Esimene artikkel analüüsib *trust*'i mõistet ja võrdleb seda kahe õigusinstituudiga: Saksa *Treuhand*'i ja Prantsuse *fiducie*'ga, mida neis tsiviilõigussüsteemiga riikides kasutatakse *trust*'iga sarnastel eesmärkidel ja mida AMLD5[237] otseselt nimetab *trust*'iga sarnaste õiguslike üksustena. Seejärel püüab autor leida Eesti õigussüsteemis instituute, mis võiksid kuuluda *trust*'iga sarnaste üksuste kategooriasse. Käsitluse all on näiteks erinevad perekonna- ja pärimisõiguslikud instituudid, erinevad omandivormid (ühisused), käsundus- ja komisjonileping, väärtpaberite vahendatud hoidmine ja usaldusomand tagatise andmise eesmärgil. Kuigi artikkel on kirjutatud rahapesu ja terrorismi rahastamise vastast võitlust puudutava regulatsiooni seisukohast, peaks see aitama mõista *trust*'i kontseptsiooni ka üldisemalt.

Artiklid 2–4 analüüsivad lähemalt Eesti õiguse instituute, mida võiks kasutada perekondlike varaküsimuste planeerimiseks või nn perevara hoidmiseks. Artiklid käsitlevad vastavalt sihtasutust, käsunduslepingut ja testamentaarseid korraldusi ning toovad esile nende instituutide aluseks oleva regulatsiooni puudused võrreldes *trust*'idega.

Viiendas artiklis tehakse ettepanekuid sihtasutuste regulatsiooni muutmiseks, et kõrvaldada kitsaskohad, mis võivad takistada erasihtasutuste loomist Eestis.

Autor on *trust*'ide olemust ja funktsioone analüüsides kasutanud peamiselt võrdlevõiguslikku meetodit ja käsitlenud *trust*'idega sarnaseid Eesti õigusinstituute eelkõige Inglise õiguse taustal. Lisaks on autor lähtunud DCFR-ist, mis annab Inglise *trust*'i-õiguse põhitõed edasi kompaktsel kujul 116 artiklis. Et näidata *trust*'ide regulatsiooni erinevusi eri riikides, on toodud näiteid ka teistest jurisdiktsioonidest.

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[237] 30. mai 2018. aasta Euroopa Parlamendi ja nõukogu direktiiv (EL) 2018/843, millega muudetakse direktiivi (EL) 2015/849, mis käsitleb finantssüsteemi rahapesu või terrorismi rahastamise eesmärgil kasutamise tõkestamist, ning millega muudetakse direktiive 2009/138/EÜ ja 2013/36/EL. – ELT L 156, 19.06.2018, lk 43−74.

Töö autor on süstemaatiliselt analüüsinud *trust*'idega sarnaseid Eesti varahalduslahendusi. Võrdlemisel on autor lähtunud ühest küljest *trust*'i n-ö põhikomponentidest, mida tunnustatud autorid on pidanud oluliseks. Samas võivad eri riikides samadel eesmärkidel kasutatavad õigusinstituudid olla küll formaalselt, doktriiniliselt või struktuurselt erinevad, kuid täita siiski samu ülesandeid. Seega on autor Eesti õigusest sarnaseid lahendusi otsides lähtunud lisaks *trust*'ide n-ö põhielementidele ka funktsioonidest. Seejuures võib öelda, et suures osas on *trust*'i põhielemendid kantud selle funktsioonidest ja vastupidi.

Eesti õiguse paremaks mõistmiseks on autor analüüsinud nii riigisiseseid õigusakte ja kohtuotsuseid kui ka õiguskirjandust. Kuna Eesti eraõigus põhineb enamjaolt Saksa õigusel, on autor toonud näiteid ka Saksa õigusest, sihtasutuste puhul lisaks Austria õigusest, kuivõrd kehtiva sihtasutuste seaduse väljatöötamisel võeti suures osas aluseks just sealne regulatsioon.

Doktoritöö eesmärkide täitmiseks on autor püstitanud neli uurimisküsimust. Järgnevalt esitatakse väitekirjas püstitatud uurimisküsimused koos analüüsi tulemusel selgunud vastustega.

1. Kas Eestis on pärimisõiguslikke instituute, mis võimaldaksid isoleerida pärandvara selliselt, et kolmandatel isikutel puuduks sellele otsene mõju?

Eesti pärimisõigusest võib leida õigusinstituute (eelkõige testamenditäitja ning eel- ja järelpärija – vastavalt pärimisseaduse (PärS)[238] §§ 78–87 ning §§ 45–55), mis peaksid või võiksid hõlmata samu funktsioone nagu testamentaarsed *trust*'id nn *trust*'i-jurisdiktsioonides. Seda teemat ei ole Eesti õiguskirjanduses varem uuritud, kuid praktika näitab, et see valdkond võib olla problemaatiline. Eesti õiguse kohaselt ei ole selge, kas ja kuidas saab testaator teha pärimisõiguslikke korraldusi, mis tagaksid, et tema vara valitsemine pärast tema surma vastab tema soovidele – näiteks keelata (lõplike) kasusaajate osalemine otsustusprotsessis (vähemalt mingi ajavahemiku vältel), kaitstes üheaegselt vara nii kasusaajate kui ka usaldusisiku võlausaldajate eest.

Põhimõtteliselt peaks testamenditäitja määramine (PärS § 78 lg 1, § 79 ja § 81) välistama pärijate osalemise pärandit puudutavate otsuste tegemisel ja nende õiguse vara käsutada – vähemalt nende esemete osas, mille puhul testaator on nii ette näinud.

Samas põhjustab vastuolusid näiteks perekonnaseaduse (PKS)[239] eestkoste regulatsioon, mille üldisem eesmärk ei tohiks küll olla isikute testeerimisvabadusse sekkumine, kuid mis siiski võib praktikas tuua kaasa rakendamisprobleeme. Näiteks ei ole üheselt arusaadav, kas testamenditäitjaks määratud isik saab testaatori korraldustest lähtudes tegutseda kohtu nõusolekuta ka siis, kui soodustatud isik on piiratud teovõimega.

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238 RT I 2008, 7, 52; RT I, 10.03.2016, 16.

239 RT I 2009, 60, 395; RT I, 09.05.2017, 29.

Kuigi seadusandja ei ole otseselt välistanud seda, et testamenditäitja võiks pärandvara valitseda ka pikema aja vältel, ega näe testamendi täitmiseks ette selget ajavahemikku, viitab regulatsiooni nappus olulistes küsimustes sellele, et testamenditäitja ametit on nähtud pigem ajutisena ja testamenditäitjat isikuna, kes jagab pärandvara vastavalt pärandaja korraldustele laiali ja viib protsessi suhteliselt lühikese aja jooksul lõpule. Näiteks ei tulene PärS-st otseselt, kas kohus peaks määrama uue testamenditäitja, kui eelmine sureb, muutub piiratud teovõimega isikuks, loobub ametist või kui kohus vabastab ta oma ülesannetest kohustuse täitmise olulise rikkumise tõttu.

Segadust lisab ka see, et õigusdogmaatiliselt ei ole selge, kas testamenditäitja tegutseb enda nimel eraameti pidajana või pärijate esindajana. Mis puutub testamenditäitja tehtud, pärandaja viimse tahtega vastuolus olevatesse käsutustesse, võib siiski järeldada, et pärijatel on lootust nõuda kolmandast isikust saajalt eseme väljaandmist nii juhul, kui testamenditäitja on ületanud esindusõiguse piire, kui ka siis, kui ta teeb käsutus enda nimel õigustamata isikuna.

Kõige suurem probleem testamenditäitja regulatsiooni puhul on ilmselt see, et seadus ei reguleeri otseselt testamenditäitja valitseda määratud vara kaitset pärija võlausaldajate eest, kuivõrd pärandvarasse kuuluvate testamenditäitja valitsetavate esemete kuuluvus ei lähe üle testamenditäitjale, vaid nende omanik/omaja on pärija.

Eel- ja järelpärija (PärS §§ 45–55) puhul on see küsimus selgem: kuni järelpärimise tingimuse saabumiseni on eelpärija küll pärandvara hulka kuuluvate esemete omanik/omaja, kuid vältimaks eelpärija isiklike võlausaldajate nõuete rahuldamist varast, mis tuleb järelpärimise tingimuse saabumisel anda üle järelpärijale, sätestab PärS § 48 lõige 3, et pärandvara hulka kuuluva eseme käsutustehing, mis on tehtud sundtäitmise käigus või mille on teinud pankrotihaldur, on järelpärimise tingimuse saabumisel tühine, kui see välistab või kahjustab järelpärija õigusi. Kuni järelpärimise tingimuse saabumiseni on pärandvara ühtlasi kaitstud ka järelpärija võlausaldajate eest.

Samas on eel- ja järelpärija instituudi puhul probleem, et ei ole kindel, kas ja mil määral on (*numerus clausus*'e printsiibist tulenevalt) võimalik eelpärija õigusi võrreldes seadusega kitsendada. Nimelt annab PärS eelpärijale kui omanikule/omajale õiguse kasutada pärandvara hulka kuuluvaid esemeid ja neid oma oludele vastava tavalise tarbimise piires ära tarvitada. Samuti on tal õigus pärandvara hulka kuuluvaid esemeid käsutada (v.a kinnisasjad ja tasuta käsutused) ning talle kuulub ka pärandist saadud kasu.

Lisaks on mõnetine ebakindlus seoses esemete lubamatu käsutamisega eelpärija poolt. PärS järgi on eelpärijal üldreeglina keelatud käsutada kinnisasju ning teha tasuta käsutustehinguid – sellisel juhul on eelpärija tehtud käsutustehing küll tühine, kui see välistab või piirab järelpärija õigusi, kuid seda alles tagantjärele, järelpärimise tingimuse või tähtpäeva saabumisel. Kui asi on siis veel kolmandast isikust saaja valduses, saab järelpärija selle temalt välja nõuda asjaõigusseaduse (AÕS)[240] § 80 alusel. Kui tegemist on kinnisasjaga, on kolmandast isikust saaja

[240] RT I 1993, 39, 590; RT I, 22.02.2019, 11.

kohta tehtud omanikukanne vale ning järelpärija saab nõuda kande parandamist AÕS § 65 alusel. Kui aga kolmandast isikust saaja on eseme omakorda edasi võõrandanud, on olukord mõnevõrra keerulisem – seadus sellise käsutustehingu kehtetust ette ei näe. Keerukust lisab asjaolu, et sel ajal, kui ese edasi võõrandati, ei pruukinud järelpärimise tingimus olla saabunud (ja eelpärija tehtud käsutustehing oli veel kehtiv), seega ei ole selge, kas oli tegemist õigustatud või mitteõigustatud isiku käsutusega.

Mõnel juhul võib kaaluda eri instituutide kombineerimist: testaator võib määrata nii eel- ja järelpärija kui ka testamenditäitja (kuni järelpärimise tingimuse saabumiseni). Sellisel juhul oleks vara kaitstud nii eel- kui ka järelpärija (samuti testamenditäitja) võlausaldajate eest. Lisaks ei saaks eelpärija pärandvarasse kuuluvaid esemeid käsutada.

Kokkuvõttes jõuab autor järeldusele, et Eesti õigus ei võimalda täie kindlusega isoleerida pärandvara selliselt, et kolmandatel isikutel puuduks sellele otsene mõju.

2. Kas käsunduslepingut saab kasutada perevara hoidmiseks *trust*'iga sarnasel viisil ja millised on sellise varahalduslahenduse peamised puudused?

Trust'iga sarnaste lahenduste otsimisel tsiviilõigussüsteemiga riikides viidatakse tihti käsundisarnastele lepingulistele suhetele[241]. Senini ei ole analüüsitud seda, kas Eesti õiguse alusel sõlmitud käsunduslepinguga on võimalik saavutada *trust*'iga sarnast tulemust.

Autori hinnangul võib võlaõigusseaduse (VÕS)[242] alusel sõlmitud käsunduslepingust tuleneva õigussuhte hoolika planeerimise korral kujundada üsna *trust*'iga sarnaseks.

Kuivõrd käsunduslepingu mõiste on väga lai – käsunduslepinguga kohustub üks isik (käsundisaaja) vastavalt lepingule osutama teisele isikule (käsundiandja) teenuseid (täitma käsundi), käsundiandja aga maksma talle selle eest tasu, kui selles on kokku lepitud (VÕS § 619) – võib käsundi anda igasuguse teenuse osutamiseks, mille hulka võib kuuluda käsundiandja mistahes asjade ajamine, nagu lepingute sõlmimine või vara valitsemine. *Trust*'i puhul antakse usaldusisikule üle *trust*'i vara koosseisus olevate esemete kuuluvus, usaldusisik teeb tehinguid oma nimel, mitte asutaja või kasusaajate esindajana. Sellest lähtudes on *trust*'iga sarnane komisjonileping, mis on üks käsunduslepingu alaliike ja millele erisätete puudumisel kohaldub käsunduslepingu üldregulatsioon. Komisjonilepinguga on VÕS § 692 lõike 1 kohaselt tegemist siis, kui komisjonär kohustub tegema tehingu(id) oma nimel, kuid komitendi arvel (ja komitent maksma selle eest komisjonitasu).

Kui *trust*'i puhul võib enamasti eristada kolme isiku rolli, siis käsunduslepingu sätted lähtuvad eelkõige kahe osalise, käsundiandja ja käsundisaaja olemasolust.

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[241] M. Graziadei, U. Mattei, L. Smith (eds.). Commercial Trusts in European Private Law. Cambridge University Press 2009, p 104 ff, 111 ff, 135 ff, 140 ff, etc.

[242] RT I 2001, 81, 487; RT I, 08.01.2020, 10.

Samas on ka Eesti õiguse kohaselt võimalik saavutada *trust*'iga sarnane kolmnurksuhe, sõlmides lepingu kolmanda isiku kasuks (VÕS § 80).

Võrreldes *trust*'iga on VÕS käsunduslepingu regulatsiooni puhul poolte üldine kohustuste ja õiguste jaotus siiski erinev. *Trust*'i puhul on peamine suhe usaldusisiku ja kasusaaja vahel; enamasti (välja arvatud juhul, kui asutaja on endale mingid õigused jätnud või on ise üks kasusaajatest) jääb asutaja pärast *trust*'i loomist tagaplaanile. Tal ei tohiks olla õigust anda usaldusisikule juhiseid ega kontrollida usaldusisiku tegevust. Seevastu VÕS käsunduslepingu regulatsiooni kohaselt on keskne just käsundiandja ja käsundisaaja vaheline suhe, kusjuures käsundiandjal on oluline roll kogu lepingu kestvuse jooksul. Käsundisaaja on kohustatud andma käsundiandjale teavet kõigi käsundi täitmisega seotud oluliste asjaolude kohta (VÕS § 624 lg 1), samuti on ta kohustatud esitama ülevaate kõigist käsundiga seotud tuludest ja kuludest koos asjakohaste tõenditega (VÕS § 624 lg 2). Ka on käsundiandjal õigus anda pärast lepingu sõlmimist käsundisaajale juhiseid selle kohta, kuidas lepingut täita, ning käsundisaajal on kohustus neid järgida (VÕS § 621). Käsundiandja võib ka lepingu vastavalt VÕS §-le 630 või §-le 631 lõpetada ning lepingus saab kokku leppida, et seda on võimalik muuta ja lõpetada vastavalt käsundiandja soovile või muutunud asjaoludele. Käsundiandja on ka isik, kellel on õigus nõuda käsundisaajalt lepingu täitmist.

Kolmandast isikust kasusaaja positsioon on seevastu VÕS sätete alusel vaikimisi nõrgem võrreldes *trust*'i kasusaajaga. VÕS § 80 lõike 2 punkti 3 kohaselt ei ole kolmandal isikul, kelle kasuks on leping sõlmitud, õigust nõuda lepingupoole kohustuse täitmist isegi siis, kui see kohustus tuleb täita tema kasuks. Seadus ei näe ette lepingupoolte kohustust teavitada kolmandat isikut lepingu sõlmimisest tema kasuks. VÕS § 80 lõike 6 kohaselt võivad lepingu pooled kolmanda isiku kasuks sõlmitud lepingut muuta või lõpetada ilma kolmanda isiku nõusolekuta, kui lepingust või seadusest ei tulene teisiti. Kui käsundiandja soovib, võib kasusaajale siiski anda tugevama positsiooni. Selleks, et kasusaajal oleks õigus nõuda käsundisaajalt lepingu täitmist, peab selle õiguse lepingus selgesõnaliselt ette nägema (VÕS § 80 lg 2). Sellisel juhul on kasusaajal õigus nõuda ka kahju hüvitamist ja viivist, kuid õigus nõuda lepingu täitmist ei anna talle õigust lepingut muuta või tühistada. Samas võib käsundiandja lubada tal seda teha käsundiandja esindajana ja ilmselt ka VÕS § 26 lõike 1 alusel, mis võimaldab jätta mõne lepingutingimuse kolmanda isiku määrata – seega on poolte soovi korral ilmselt võimalik kokku leppida selliselt, et näiteks lepingu lõpetamine või lepingu tingimuste muutmine sõltub kolmandast isikust.

Nagu eespool välja toodud, on *trust*'i vara eraldatud usaldusisiku isiklikust varast ja usaldusisiku võlausaldajad ning üldjuhul ka asutaja ja kasusaaja võlausaldajad ei saa sellele sissenõuet pöörata. Ka käsunduslepingu puhul on võimalik erivarast[243] rääkida, kuid siiski mitte *trust*-idega võrdväärses mahus. Esiteks

[243] „Kui seadusjärgse tüüpjuhtumina kuulub vara (olgu õiguste ja kohustuste või üksnes õiguste kogumine) mingile isikule tervikuna, siis reaalselt võib vara või osa sellest kuuluda ka mitmele isikule, samuti on teatud juhtudel ette nähtud, et samale isikule kuuluv vara allub

lõppeb Eesti õiguse järgi käsundusleping käsundiandja pankroti korral (VÕS § 632 lg 2) ja vara tuleb tagastada käsundiandja pankrotivara hulka (VÕS § 626 lg 1). Kuna käsundiandjal on õigus pärast lepingu sõlmimist anda käsundisaajale juhiseid selle kohta, kuidas lepingut täita, on see ilmselt ka loogiline, et käsundi esemeks olevat vara peetakse majanduslikus mõttes käsundiandja varaks ka siis, kui see on käsundisaajale üle kantud.

Teiseks, rääkides käsunduslepingu objektiks olevate esemete eraldatusest käsundisaaja muu vara hulgast, näeb VÕS käsunduslepingu puhul ette üksnes osalise vara segregatsiooni põhimõtte: VÕS § 626 lõike 3 kohaselt ei kuulu nõuded ja vallasasjad, mille käsundisaaja omandab käsundi täitmisel oma nimel, kuid käsundiandja arvel, samuti käsundiandja poolt käsundisaajale käsundi täitmiseks üleantud nõuded ja vallasasjad käsundisaaja pankrotivarasse ja neile ei saa pöörata sissenõuet täitemenetluses käsundisaaja vastu. See säte ei näe ette kaitset käsundisaaja võlausaldajate eest kinnisasjadele või muudele õigustele peale nõuete (nt osaühingu osadele).

Kui soovida välistada käsundisaaja võlausaldajate nõudeid talle usaldusomandina[244] kuuluva kinnisasja suhtes, on võimalik kanda käsundiandja või kolmanda isiku kasuks kinnistusraamatusse eelmärge, millisel juhul oleksid hilisemad käsutused, sh sundtäitmise käigus, pankrotihalduri poolt või kohtulahendi alusel tehtavad käsutused tühised, kui need kahjustavad isiku õigusi, kelle kasuks eelmärge on seatud (AÕS § 63 lg-d 3 ja 4). Muude objektide, näiteks osaühingu osa puhul võib käsundisaaja võlausaldajate eest kaitset pakkuda tingimusliku käsutustehingu sõlmimine (vastavalt tsiviilseadustiku üldosa seaduse (TsÜS)[245] 6. peatüki sätetele), sest TsÜS § 106 lõike 2 teise lause järgi on täitemenetluses, hagi tagamiseks või pankrotihalduri poolt tehtud käsutus, mis välistab või piirab tingimusega seotud õigusliku tagajärje saabumist, tühine. Lisaks võimaldab äriseadustiku (ÄS)[246] § 149 lg 3 näha osaühingu põhikirjas ette, et osa

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erinevatele õiguslikele režiimidele. Mõlemal juhul saab rääkida, et vara või osa sellest on allutatud teatud erilisele õiguslikule käsitlusele ehk tinglikult saab rääkida n-ö erivarast. Erivara ühiseks tunnuseks on esmajoones võlausaldajate nõuete maksmapaneku erisused selle vara osas (s.t kas nõude realiseerimise piiratus erivaraga või eraldi täitedokumendi vajalikkus varale sissenõude pööramises). Erireeglid kehtivad ka erivara valitsemisel. Samuti kehtib üldiselt nn surrogatsiooni põhimõte, s.t erivarasse kuuluva vara arvel või asemel või hüvitisena omandatu kuulub samuti erivarasse. /.../ Osa isikule kuuluvast varast võib olla allutatud erireeglitele, näiteks lahusvara kõrvuti ühisvaraga, vara eraldamine vara valitsemisega seotud riskide hajutamiseks. Erivara on kasutusel eelkõige väärtpaberite valitsemisel, olgu käsunduslepingu (eelkõige komisjonilepingu) alusel (vt mh VÕS § 626 lg 3), esindajakonto vahendusel (EVKS § 6 lg-d 2 ja 3) (nt investeerimisfondidesse paigutatud vara puhul, vt investeerimisfondide seaduse § 105 lg 1), samas saab seda kokkuleppel luua ka muul juhul, andes vara valitsemise õiguse (s.t õiguse oma nimel, kuid võõra arvel tehinguid teha) üle teisele isikule (*Treuhand, trust*)." – P. Varul *et al.* Tsiviilõiguse üldosa. Õigusteaduse õpik. Juura 2012, lk 315.

[244] Usaldusomand tähendab „asja või õiguse kuulumist n.ö väljapoole ühele isikule, kuid selle isiku toimimist esemega teise isikuga sõlmitud lepingu alusel tema juhiste kohaselt". – V. Kõve. Varaliste tehingute süsteem Eestis. Doktoritöö. Tartu Ülikooli Kirjastus 2009, lk 304.

[245] RT I 2002, 35, 216; RT I, 06.12.2018, 3.

[246] RT I 1995, 26, 355; RT I, 28.02.2019, 11.

võõrandamine on lubatud üksnes täiendava tingimuse täitmise korral, eelkõige, et osa võõrandamiseks on vajalik teiste osanike, juhatuse, nõukogu või muu isiku nõusolek. Vastava tingimuseta või nõusolekuta tehtud tehing on tühine.

VÕS § 626 lg 1 sisaldab ka *trust*'idele omast surrogatsioonipõhimõtet: käsundisaaja peab käsundiandjale välja andma selle, mis ta seoses käsundi täitmisega on saanud või loonud, samuti selle, mis ta käsundi täitmiseks sai ja mida ta käsundi täitmiseks ei kasutanud. See põhimõte kehtib mitte ainult käsundiandja poolt käsundisaajale üle antud esemete suhtes, vaid ka uute esemete suhtes, mille käsundisaaja on käsundi täitmisel omandanud.

Mis puutub käsundiandja ja kasusaaja nõuetesse kolmandate isikute vastu, siis asjaõiguslikke nõudeid käsunduslepingu regulatsioon iseenesest käsundiandjale ei tekita. Kui käsundiandja annab lepingu esemeks oleva(te) asja(de) omandiõiguse ja muude esemete kuuluvuse üle käsundisaajale, kuulub viimasele täielik õiguslik võim talle üle antud eseme(te) üle. Kui lepingus on ette nähtud täpsed tingimused, millal ja kellele tohib käsundisaaja eset võõrandada, kehtib see kokkulepe ainult nendevahelistes suhetes ega piira tema käsutusõigust kolmandate isikute suhtes (TsÜS § 76). Seega on tehinguga seatud käsutuskeelu vastaselt tehtud käsutustehing kehtiv (kui just ei esine muid kehtetuse aluseid) ning isik, kelle kasuks käsutus tehti, omandab selle eseme vaatamata tehinguga seatud käsutuspiirangule ning sõltumata tema hea- või pahausksusest kokkuleppelise käsutuspiirangu olemasolu suhtes.

Arvestades senist kohtupraktikat tundub, et ka käsundisaaja ja kolmanda isiku vahelise tehingu tühisusele tuginemine tulenevalt selle näilikkusest (TsÜS § 89) või vastuolust seadusega (§ 87), heade kommete või avaliku korraga (§ 86) on üsna kaheldav.

Kui kolmandale isikule tehtud käsutus on kehtiv, võib hüpoteetiliselt olla võimalik tema vastu nõuete esitamine kahju õigusvastase tekitamise sätete alusel (VÕS § 1045 lg 1 p-d 7 ja 8). Sellisel juhul ei ole täielikult välistatud, et VÕS § 136 lõike 5 kohaldamine võib viia tulemuseni, kus kolmas isik peab saadud eseme kasusaajale või käsundiandjale üle andma.

Kasusaajale saavad kaitset pakkuda ka sellised kokkulepped, mida autor mainis eespool nn erivara kontekstis: kui lepingu esemeks on kinnistu ning kui käsundiandja ei soovi, et käsundisaaja müüks või pandiks kinnistu kolmandatele isikutele, siis saab ka sellise piirangu teha kinnistusraamatus nähtavaks, seades eelmärke käsundiandja või kolmanda isiku kasuks, millisel juhul on käsundisaaja tehtud käsutustehingud tühised (AÕS § 63 lg-d 3 ja 4). Osaühingu osa puhul saab usaldusisiku käsutusõiguse piirata põhikirjas (ÄS § 149 lg 3). Muude esemete kui kinnisasjade puhul on võimalik sõlmida tingimuslik käsutustehing TsÜS 6. peatüki sätete alusel: pooled võivad kokku leppida, et kindla tingimuse saabumisel kandub ese automaatselt tagasi käsundiandjale (või edasi kasusaajale), millisel juhul on (TsÜS § 106 lõike 2 kohaselt) tingimusliku tehingu teinud isiku poolt hõljumisajal tehtud käsutustehing tingimuse saabumisel tühine, kui käsutustehing välistab või piirab tingimusega seotud õigusliku tagajärje saabumist.

Viimaks on oluline märkida, et käsundi puhul on tegemist lepinguga, mille eesmärgi saavutamist võib mõjutada lepingupoole surm, muutused teovõimes või

ühepoolse lõpetamise õigus. Kohus ei saa määrata uut lepingupoolt. Seega tuleb lepingu sõlmimisel neile teguritele erilist tähelepanu pöörata.

Kokkuvõttes leiab autor, et ehkki käsunduslepingu regulatsioon võlaõigusseaduses iseenesest ei sisalda kõiki olulisi elemente, mis oleksid vajalikud perevara eduka haldamise jaoks usaldusisiku poolt, on seadust laiendavalt tõlgendades ja/või muid õigusaktidega ette nähtud vahendeid kasutades võimalik saavutada suhteliselt *trust*'i-sarnane õigussuhe. Samas ei ole ilmselt võimalik saavutada olukorda, kus vara oleks pankrotiolukorras samaaegselt kaitstud nii kolmandast isikust kasusaaja võlausaldajate kui ka käsundiandja võlausaldajate eest.

3. Millised õiguslikud takistused on sihtasutuse kasutamisel perevara hoidmiseks ja kasvatamiseks tulevaste põlvkondade huvides ning milliseid muudatusi kehtivates õigusaktides tuleks nende takistuste ületamiseks teha?

Sissejuhatavas osas kirjeldatud pere-*trust*'idega sarnaste eesmärkide saavutamiseks on paljudes riikides kasutusel sihtasutused. Nii Euroopa kui ka muude riikide sihtasutuste turg on viimastel aastakümnetel jõudsalt arenenud ja muutunud, et pakkuda enda ja välisriikide kodanikele võimalust tagada vara terviklik, turvaline ja tulus paigutamine, pakkuda lahendusi pärandiküsimustele ning vähendada muret maksude ja maailmamajandusega seotud küsimuste üle.

Ka Eesti õiguskorras olemasolevatest instituutidest oleks sihtasutuste seaduses (SAS)[247] reguleeritav sihtasutuse vorm sarnaste küsimuste reguleerimiseks olemuslikult ilmselt kõige loogilisem, kuid sihtasutusi on seni valdavalt kasutatud vara haldamiseks avalikes huvides või sotsiaalsetel eesmärkidel. Perevara planeerimisel kasutavad eestimaalased praegu pigem välismaiseid sihtasutusi ja *trust*'e, millega kaasneb kapitali väljavool, mh näiteks tasude näol välismaistele usaldusisikutele ja juhatuse liikmetele. Samuti võib kaasneda mõningane ebakindlus nii asutajate endi kui ka nende võimalike võlausaldajate, pärijate ning pereliikmete jaoks. Kapitali juurdevoolust – s.t Eesti atraktiivsusest varakate välismaalaste jaoks – ei ole selles kontekstis praegu üldse võimalik rääkida.

Üks peamine takistus sihtasutuse vormi kasutamisel perevara haldamiseks on praegu ilmselt topeltmaksustamine. Sihtasutust on võimalik asutada nii, et selle eesmärk on hallata üleantud vara ning teha vara haldamisega teenitud tulu arvelt väljamakseid sihtasutuse põhikirjas määratud soodustatud isikutele. Praktikas on sihtasutusele üleantav vara tihtipeale äriühingu osalus ning sel juhul tehakse väljamakseid eelkõige äriühingult saadud dividendidelt ja muudelt kasumieraldistelt. Topeltmaksustamine väljamaksete tegemisel sellise sihtasutuse kaudu väljendub kehtiva õiguse järgi järgnevas: 1) esiteks peab sihtasutuse hallatav äriühing, kes maksab sihtasutusele välja dividendi või muu kasumieraldise, maksma sellelt tulumaksu (tulumaksuseaduse (TuMS)[248] § 50 lg 1), tulumaksu

[247] RT I 1995, 92, 1604; RT I, 09.05.2017, 34.

[248] RT I 1999, 101, 903; RT I, 28.02.2020, 14.

peab hallatav äriühing maksma ka omakapitalist tehtud väljamaksetelt ning likvideerimisjaotistelt (TuMS § 50 lg 2); 2) teiseks toimub maksustamine sihtasutuse tasandil – siis, kui sihtasutus teeb väljamaksed soodustatud isikutele, kuna väljamakset tuleb eelduslikult käsitleda kingitusena (TuMS § 49 lg 1; kõne alla saaks tulla ka väljamaksete maksustamine ettevõtlusega mitteseotud kuluna TuMS § 51 lõike 3 alusel). Väljamakse füüsilisest isikust saaja tasandil maksustamist sellisel juhul ei toimu (TuMS § 12 lg 2 ja § 19 lg 3 p 6).

Teine probleem on praegune teabe ülemäärane avalikkus: sihtasutused registreeritakse mittetulundusühingute ja sihtasutuste registris, kust sihtasutuse kohta käivad andmed on kõigile kättesaadavad. See hõlmab andmeid asutaja ja kasusaajate kohta, põhikirja sisu, sh väljamaksete tegemise tingimusi, ning majandusaasta aruannete kaudu teavet sihtasutuse sissetuleku, vara ja rikkuse kohta. Kui vaadata teiste riikide sihtasutuste regulatsioone, võib näha, et need pakuvad rohkem privaatsust. Kuigi rahvusvahelised rahapesu ja terrorismi rahastamise vastase võitluse regulatsioonid liiguvad suurema avalikustamise suunas, on Eesti praegune korraldus autori hinnangul siiski privaatsust ebaproportsionaalselt piirav. Rahapesu vastu võitlemiseks ei ole vaja, et igaühel oleks juurdepääs sihtasutuse põhikirjas sätestatud tingimustele, dokumentidele ja varalistele üksikasjadele – piisab sellest, kui vastavast registrist on võimalik saada tegelikke kasusaajaid puudutavat teavet.

Kolmandaks probleemiks on see, et sihtasutuse juhtimise ja valitsemisega peaks tegelema vähemalt neli inimest, s.o vähemalt kolm nõukogu liiget ja vähemalt üks juhatuse liige – nii sätestab praegune regulatsioon (SAS § 16, § 17 lg 1, § 26 lg 1). Erahuvides asutatud sihtasutuse puhul, eelkõige perevara hoidmise ja valdamisega tegeleva sihtasutuse jaoks on keeruline leida sellisel hulgal usaldusväärseid isikuid. Paljudes riikides ei ole nõukogu sihtasutuste puhul kohustuslik, samas on juhatuse tegevuse kontrollimise huvides üritatud leida muid toimivaid vahendeid. Näiteks Austrias on kõikide sihtasutuste puhul kohustuslik audiitorkontroll ja audiitori näol on tegemist sihtasutuse organiga, kellel on Eesti audiitorite tavapäraste ülesannetega võrreldes tunduvalt suurem pädevus juhatuse ja sihtasutuse tegevuse jälgimisel ning vajalike meetmete kasutusele võtmisel.

Kokkuvõtlikult võib öelda, et sihtasutusi ei kasutata Eestis perevara haldamiseks eelkõige seetõttu, et nendega kaasneb topeltmaksustamine ning sihtasutustega seotud teave on registritest kõigile kättesaadav, samas kui välismaised sihtasutused või *trust*'id võimaldavad rohkem privaatsust. Samuti on välismaiste instrumentide struktuur tavaliselt lihtsam ning nende juhtimisse ning haldamisse ei ole vaja kaasata nii palju isikuid, kui nõuab kehtiv seadus

Need probleemid oleks võimalik lahendada, kehtestades Eesti õiguses uue, eritüüpi sihtasutuse – piiratud majandustegevusega erasihtasutuse, mille dokumendid ei oleks avalikult kättesaadavad ning millele kehtiks kohustuslik audiitorkontroll, leebemad nõuded nõukogu osas ja eriline maksusüsteem.

Autori esitatud muudatusettepanekud lähtuvad põhimõttest, et kindlat tüüpi sihtasutuste puhul peaks asutajal olema võimalik põhikirjas ette näha, et asutatava sihtasutuse dokumendid (põhikiri, asutamisotsus, sihtasutusele vara üleandmist tõendavad dokumendid ning majandusaasta aruanne ja sellega koos esitatavad

dokumendid) ei kuulu avalikustamisele, s.t ei ole registrist igaühele kättesaadavad. Sellist erandit võiks lubada erahuvides asutatud sihtasutuste suhtes. Erahuvides asutatud sihtasutusena tuleks mõista sihtasutust, mille eesmärk ei ole seotud üldiste huvide järgimise või avalikkusele või määratlemata isikute ringile hüvede pakkumise või teenuste osutamisega. Erahuvides asutatud sihtasutus oleks näiteks perevara hoidmiseks asutatud sihtasutus. Selliste sihtasutuste põhitegevus ei tohiks olla majandustegevuse kaudu tulu saamine. Kui sihtasutus majandustegevusega ei tegele, tekib tal ka minimaalselt võlausaldajaid või muid isikuid, kellel võiks olla huvi saada registritest sihtasutusega seotud teavet. Kui siiski selgub, et sihtasutus, mille dokumendid ei ole põhikirja kohaselt avalikud, tegeleb põhitegevusena majandustegevusega, peaks olema võimalik otsustada sihtasutuse sundlõpetamine vastavalt SAS § 46 lõike 1 punktile 1.

Kehtiva õiguse kohaselt peab iga sihtasutus koostama ja esitama majandusaasta lõpus aastaaruande (SAS § 34), kuid audiitoripoolne raamatupidamise aastaaruannete ülevaatus või audit on kohustuslik ainult audiitortegevuse seaduse (AudS)[249] § 91 lõikes 4 ja § 92 lõikes 2^1 nimetatud tingimustel. Autor on arvamusel, et kõigi erasihtasutuste suhtes võiks kehtestada aastaaruande ülevaatuse kohustuse ning tagamaks, et erasihtasutus ei tegele põhitegevusena majandustegevusega, võiks SAS-i täiendada sättega, mis näeb ette, et erasihtasutuse majandusaasta aruandele tuleb lisada audiitori arvamus selle kohta, kas erasihtasutuse tegevus on kooskõlas seadusega, s.t erasihtasutus ei tegele majandustegevusega, mis ei seostu otseselt vara hoidmise ja kogumisega soodustatud isikute huvides.

Samuti võiks ette näha, et kui erasihtasutuse põhikirja kohaselt ei kuulu sihtasutuse dokumendid avalikustamisele, hoitakse muidu avalikus toimikus säilitamisele kuuluvaid dokumente (mis põhikirja kohaselt ei ole avalikud) registritoimikus, millele on ligipääs õigustatud huvi omavatel isikutel (mittetulundusühingute seaduse (MTÜS)[250] § 77 lg 4, kohtu registriosakonna kodukorra[251] § 61). Selliseks õigustatud huvi omavaks isikuks oleksid eelkõige registriosakonna kodukorra § 61 lõikes 2 nimetatud isikud (kohus, pädev asutus, kohtutäitur, pankrotihaldur, ajutine pankrotihaldur, notar ja notari volitatud notaribüroo töötaja), soodustatud isik ja isik, kellel on põhjust arvata, et ta võib olla soodustatud isik, sihtasutuse organite liikmed, sihtasutuse audiitor, asutaja, isikud, kellele on sellekohane õigus antud sihtasutuse põhikirjaga, ja AMLD-st tulenevad tegelike kasusaajate registriga tutvuma õigustatud isikud. Õigustatud huvi omavate isikute ammendavat loetelu ei ole ilmselt mõistlik õigusaktis anda, kuna selliste sihtasutuste puhul, mis on küll asutatud erahuvides, kuid mille eesmärgi tõttu ei ole üheseid soodustatud isikuid (nt lemmiklooma eest hoolitsemiseks mõeldud sihtasutus), on vajalik, et õigustatud huvi omavate isikute ring oleks laiem, selleks et säiliks sihtasutuse organite üle kontrolli teostamise võimalus. Samuti

[249] RT I 2010, 9, 41; RT I, 28.02.2019, 2.

[250] RT I 1996, 42, 811; RT I, 19.03.2019, 24.

[251] RT I, 28.12.2012, 10; RT I, 22.01.2020, 9.

on otstarbekas sätestada, et isiku õigustatud huvi tuvastamisel kuulab kohus võimaluse korral ära ka sihtasutuse juhatuse ja nõukogu liikmed.

Nagu juba mainitud, ei ole autori hinnangul erahuvides asutatud sihtasutuse puhul ka põhjendatud, et selle juhtimise ja valitsemisega peaks tegelema vähemalt neli inimest. Eesti õiguskorra väljakujunenud loogikast lähtuvalt tasub autori hinnangul küll säilitada kohustuslik kaheastmeline juhtimisstruktuur (juhatus ja nõukogu), kuid erahuvides asutatud sihtasutuste puhul võiks seadus siiski lubada, et nõukogu võiks tegutseda ka üheliikmelisena.

Selleks, et vältida topeltmaksustamist, oleks ilmselt otstarbekas sätestada TuMS § 50 lõigetega 1^1 ja 2^1 analoogsed erisätted selliste sihtasutuste puhuks, kelle põhikirjaline eesmärk piirdub sihtasutusele üleantud vara haldamisega ja sellelt teenitud tulu jaotamisega füüsilistele isikutele.

4. Kas ja mil määral peaks teave nende varahalduslahenduste kohta olema EL-i rahapesu ja terrorismi rahastamise vastase võitluse regulatsioonist lähtuvalt (avalikult) juurdepääsetav?

Nagu juba eelpool mainitud, kohustas AMLD4 liikmesriike tuvastama õiguslikke üksusi, mille struktuur või funktsioonid on sarnased *trust*'idega, ning usaldusisikuid koguma ja hoidma asjakohast, täpset ja ajakohastatud teavet selliste üksuste tegelike kasusaajate kohta, tegema sellekohase teabe õigeaegselt kättesaadavaks pädevatele asutustele ja rahapesu andmebüroodele ning esitama asjakohase teabe keskregistrile (art 31(1)(2)(4); art 3(6)c)).

AMLD4 rakendamiseks vastu võetud rahapesu ja terrorismi rahastamise tõkestamise seaduse (RahaPTS[252]) § 9 lõikes 6 on *trust*'ide ja *trust*'idega sarnaste õiguslike üksustena nimetatud järgmised: usaldusfond (seletuskirja kohaselt kasutatakse terminit „usaldusfond" siin „*trust*'i" tähenduses, mitte investeerimisfondide seaduse (IFS)[253] § 2 lõikes 2 sätestatud tähenduses), seltsing, ühisus või muu juriidilise isiku staatust mitteomav isikute ühendus. Nimetatud õiguslike üksuste puhul peavad kohustatud isikud tuvastama tegeliku kasusaaja (RahaPTS § 20 lg 1 p 3, § 21 ja § 28), registreerima selle, et tehing tehti seltsingu, ühisuse või muu juriidilise isiku staatust mitteomava isikute ühenduse esindajaga või usaldusfondi või usaldusisikuga (§ 46 lg 2 p 6), ja säilitama kogutud andmed (§ 47). Samas ei kohusta seadus esitama andmeid selliste õiguslike üksuste tegelike kasusaajate kohta mistahes registrisse.

AMLD5 rakendamiseks koostatud RahaPTS muutmise eelnõus[254] on § 9 lõikest 6 eeltoodud nimekiri sellisel kujul ära kaotatud ning loetelusse on alles jäänud üksnes usaldushaldus (*trust*-i eestikeelse vastena) ning juriidilise isiku

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[252] RT I, 17.11.2017, 2; RT I, 19.03.2019, 78.

[253] RT I, 31.12.2016, 3; RT I, 04.12.2019, 6.

[254] Rahapesu ja terrorismi rahastamise seaduse, audiitortegevuse seaduse ja teiste seaduste muutmise seadus. Eelnõu ja seletuskiri kättesaadavad: https://eelnoud.valitsus.ee/main#bogZnv22 (23.1.2020).

staatust mitteomav isikute ühendus. Lisaks tehakse eelnõu kohaselt kasusaajate registreerimine kohustuslikuks ka Eestis elu- või asukohta omavate välismaiste *trust*'ide usaldusisikutele (eelnõu p 80). Usaldusfondide ja äriühingute teenuse pakkuja all mõistetakse eelnõu kohaselt isikuid, kes osutavad kolmandatele isikutele „usaldushaldurina või seltsingu, ühisuse või muu juriidilise isiku staatust mitteomava isikute ühenduse esindajana või usaldusisikuna tegutsemise" teenust (eelnõu p 13). Kohustatud isikud peavad selliste isikute või nende esindajatega tehinguid tehes ka edaspidi registreerima, et isikul on selline staatus. Eelnõu seletuskirja kohaselt on Eesti Euroopa Komisjonile teatanud, et Eesti õiguses puuduvad õiguslikud üksused, mille struktuur ja ülesanded sarnaneksid *trust*'idele piisavalt, et nende suhtes kuuluks kohaldamisele direktiivi artikkel 31.

Arvestades seda, et nii käsunduslepinguid kui ka testamenditäitja ja eel- ja järelpärija instituute saab pidada *trust*'i-sarnasteks, kuna neid saab (mõnede raskustega) kasutada varaplaneerimisel ja neil on ka teatud *trust*'idele iseloomulikud elemendid, tekib küsimus, kas neid instituute tuleks näha *trust*'i-sarnasena ka AMLD kontekstis.

Autori hinnagul tähendab *trust*-ide sarnasus AMLD kontekstis seda, et õigusliku üksuse puhul esineb usaldusomandi element. See järeldus põhineb eelkõige AMLD5-s nimetatud *trust*'i-sarnaste üksuste (*fiducie* ja *Treuhand)* kõrvutamisel *trusti*-idega ning nende sarnasuste ja erinevuste esiletoomisel, et välja selgitada, mida seadusandja *trust*'i-sarnasete õiguslike üksuste all silmas pidas. Näiteks *Treuhand*-i puhul ei ole erinevalt *trust*-ist usaldusisikule üle antud esemed kaitstud asutaja võlausaldajate nõuete eest. Seega võib öelda, et vara eraldatus ei ole kohustuslik tunnus, käsitlemaks õiguslikku üksust AMLD kohaselt *trust*'i-sarnasena. Ka siis, kui usaldusisik on *trust*'i tingimusi rikkudes käsutanud eseme kolmandale isikule, on kasusaajate õigused kolmandate isikute suhtes *trust*'i puhul üldiselt tugevamad kui näiteks *fiducie* ja *Treuhand*'i puhul. Nii jäigi võrdlusel sisuliselt alles vaid üks ühisjoon: vara kuulub ühele isikule, kuid ta valitseb seda teis(t)e isiku(te) kasuks.

Seega leiab autor, et kuigi testamenditäitja ning eel- ja järelpärija instituudid kannavad sama funktsiooni nagu testamentaarsed *trust*'id ning nende puhul esineb muid *trust*'ile omaseid elemente, võib tegelike kasusaajate registri kontekstis need instituudid pigem välistada, kuivõrd nende puhul puudub varjatud omanik: kuigi testamenditäitjal võib olla õigus vara vallata, kasutada või käsutada (ning pärijal samal ajal puudub käsutusõigus), kuulub pärandvara siiski pärijale, kes registreeritakse omanikuna/omajana ka asjaomastes registrites. Kui on määratud järelpärija, kuulub pärandvara kuni järelpärimise tingimuse saabumiseni eelpärijale. Lisaks on saabuva järelpärimise fakt kantud kinnisasjade puhul kinnistusraamatusse (kinnistusraamatuseaduse (KrS)[255] § 49[1]), olles seal kõigile nähtav. Lisaks on selge, et nende lahenduste kasutamine võib leida aset üksnes kellegi surma korral, mis muudab need rahapesu jaoks ilmselt ebatõhusaks vahendiks.

[255] RT I 1993, 65, 922; RT I, 13.03.2019, 89.

Käsunduslepingu puhul on aga lood teisiti. Nagu eelnevalt välja toodud, võib VÕS alusel sõlmitud käsunduslepingust tuleneva õigussuhte hoolika planeerimise korral kujundada üsna *trust*'iga sarnaseks: 1) lepingu võib sõlmida selliselt, et selle esemeks olevad objektid kantakse üle käsundisaajale (tema kuuluvusse); 2) vara on võimalik eraldada käsundisaaja isikliku vara hulgast (erivara); 3) leping on võimalik konstrueerida selliselt, et soodustatud isikul tekib nõue kolmanda isiku vastu, kellele käsundisaaja on lepingut rikkudes vara üle kandnud. Ilmselt ei ole käsunduslepingu abil võimalik saavutada olukorda, kus vara oleks pankrotiolukorras samaaegselt kaitstud nii kolmandast isikust kasusaaja võlausaldajate kui ka käsundiandja võlausaldajate eest. Selle omaduse puudumine aga ei tähenda, et tegemist ei oleks *trust*'iga sarnase instituudiga AMLD mõttes, kuivõrd direktiiv nimetab *trust*'iga sarnase õigusliku üksusena ka Saksa *Treuhand*'i, mis samuti lõppeb *Treugeberi*'i pankroti korral, ning sellisel juhul saab usaldusisikule üle antud esemed võlausaldajate huvides temalt välja nõuda.

Nagu varasemalt mainitud, võivad käsunduslepingu alusel osutatavad teenused olla erinevad ja tehingu eesmärgi hulka ei pruugi kuuluda esemete ülekandmine käsundisaajale. Kuna tegelike kasusaajate registreerimine ei puuduta selliseid õiguslikke üksusi, kus puudub varjatud tegelik kasusaaja, oleks käsunduslepingu *trust*'i-sarnaseks tunnistamise esimene kriteerium see, et lepinguga kaasneb usaldusomandi komponent.

Lisaks tuleks arvesse võtta lepingu eset ja selle väärtust. RahaPTS nõuab praegu sõnaselgelt tegelike kasusaajate andmete esitamist registrisse juriidiliste isikute puhul. Seega, kui käsunduslepingu ese on näiteks osaühingu osa, on tegeliku kasusaaja registreerimine juba kehtiva regulatsiooni kohaselt kohustuslik. Nagu eelmises alapunktis märgitud, tuleb kinnisasjade puhul käsundiandja või kolmandast isikust kasusaaja õiguste kaitsmiseks käsundisaaja maksejõuetuse või väärkäsutuste eest teha käsundiandja või kasusaaja õigused nähtavaks kinnistusraamatus. Seetõttu ei pruugi olla otstarbekas seda avalikku teavet tegelike kasusaajate registris kopeerida. Mis saab aga siis, kui lepingu objekt ei ole osaühingu osa ega kinnisasi? Üks võimalus on siduda registreerimiskohustus tehingu (objekti) väärtusega, lähtudes näiteks 15 000 euro künnisest, mille AMLD (ja RahaPTS) on kehtestanud hoolsusmeetmete kohaldamisele (AMLD artikkel 11 ja RahaPTS § 19 lg 1 p 2).

Registreerimiskohustuse kriteeriumiks võiks seada ka tehingu pooled. Näiteks kui käsundisaaja on RahaPTS tähenduses kohustatud isik, kes peab tuvastama tegelikud kasusaajad, registreerima ja säilitama asjakohast teavet, hindama kliendi riskiprofiili, tegema riskianalüüsi, koostama protseduurireeglid ja korraldama sisekontrolli, teavitama kahtluste korral järelevalveasutust ja hankima oma tegevuseks tegevusloa, peaks rahapesu ja terrorismi rahastamise risk iseenesest olema juba väiksem.

Lisaks võiks käsunduslepingu registreerimise kriteeriumide sätestamisel lähtuda ka lepingu kestusest ja proportsionaalsusest tegelike kasusaajate registreerimiskohustuse ja selle täitmise kontrollimisega seotud kulude vahel, samuti

peaks arvesse võtma kodanike eraelu puutumatuse õiguse rikkumist ning võrdlema seda potentsiaalsete registreerimisest saadavate kasuteguritega.

Kokkuvõtlikult võib öelda, et kui testamenditäitja ning eel- ja järelpärija instituudid võib tegelike kasusaajate registri kontekstis pigem välistada, siis käsunduslepingud tuleks lisada *trust*'i-sarnaste õiguslike üksuste loendisse RahaPTS-s. Kuid see, milliste lepingute puhul teave tegelike kasusaajate registrisse esitada, ei peaks siiski põhinema üksnes (formaalsel) lepingu liigil, vaid tuleks kohaldada lisakriteeriume lähtuvalt lepingu sisust, objektist, hinnast ja osapooltest.

Erasihtasutuste tegelike kasusaajate esitamise osas vastavale registrile on RahaPTS § 76 lg 3 punktis 4 tehtud erand: seda kohustust ei kohaldata sihtasutuste seaduses sätestatud sihtasutusele, kelle majandustegevuse eesmärk on põhikirjas määratud soodustatud isikute või isikute ringi huvides vara hoidmine või kogumine ja kellel puudub muu majandustegevus. Seega ei tulene sihtasutuse andmete liigne avalikustamine mitte rahapesu- ja terrorismi rahastamise vastase võitlusega seonduvatest aktidest, vaid eraõiguslikest aktidest; seetõttu on sihtasutustega seonduvat avalikustamist käsitletud 3. uurimisküsimuse all. Kokkuvõtlikult võib siiski üle korrata, et kuigi rahvusvahelised rahapesu ja terrorismi rahastamise vastase võitluse regulatsioonid liiguvad suurema avalikustamise suunas, on Eesti praegune korraldus autori hinnangul siiski privaatsust ebaproportsionaalselt piirav.

PUBLICATIONS

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Publications

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- K. Sepp, "Regulation of the conjugal community of same-sex couples in Estonia with notarial collaboration" ("Az azonos nemű párok életközösségének szabályozása Észtországban közjegyzői közreműködéssel"), 4 Közjegyzők Közlönye 2014 (in Hungarian).
- K. Sepp, U. Kaarlep, "The Estonian Foundation – What is Missing for It to Be A Well-Designed Wealth-Management Vehicle for Local and Foreign High-Net-Worth Individuals?", Juridica International, Vol 24 (2016) 96–104.
- K. Sepp, "Legal Arrangements Similar to Trusts in Estonia under the EU's Anti-money laundering Directive", Juridica International, Vol 26 (2017) 56–65.
- K. Sepp, "Right to compulsory portion and recovery" („*Sundosaõigus ja tagasivõitmine*"). Juridica, 10, 687–697 (in Estonian).
- K. Sepp, U Kaarlep, T. Kuleli, "Unblocking the bottlenecks of the Estonian wealth-management scene for private foundations", Trusts & Trustees, Vol 24, Issue 6 (2018), 558–564.
- K. Sepp, "Estonian 'trust' – same same but different?", Trusts & Trustees, Vol 24, Issue 9 (2018), 891–900.
- K. Sepp, "Estate planning beyond the grave: legal instruments comparable to testamentary trusts in Estonian law", Trusts & Trustees, Vol 25, Issue 3 (2019), 303–311.

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- K. Sepp, „Kasulik teada: usaldusfondid“, 7 Juridica (2011).
- K. Sepp, „Regulation of the conjugal community of same-sex couples in Estonia with notarial collaboration“ (“Az azonos nemű párok életközösségének szabályozása Észtországban közjegyzői közreműködéssel”), 4 Közjegyzők Közlönye 2014.
- K. Sepp, U. Kaarlep, “The Estonian Foundation – What is Missing for It to Be A Well-Designed Wealth-Management Vehicle for Local and Foreign High-Net-Worth Individuals?”, Juridica International, Vol 24 (2016) 96–104.
- K. Sepp, “Legal Arrangements Similar to Trusts in Estonia under the EU’s Anti-money laundering Directive”, Juridica International, Vol 26 (2017) 56–65.
- K. Sepp, „Sundosaõigus ja tagasivõitmine“. Juridica, 10, 687–697.
- K. Sepp, U Kaarlep, T. Kuleli, “Unblocking the bottlenecks of the Estonian wealth-management scene for private foundations”, Trusts & Trustees, Vol 24, Issue 6 (2018), 558–564.
- K. Sepp, “Estonian ‘trust’ – same same but different?”, Trusts & Trustees, Vol 24, Issue 9 (2018), 891–900.
- K. Sepp, “Estate planning beyond the grave: legal instruments comparable to testamentary trusts in Estonian law”, Trusts & Trustees, Vol 25, Issue 3 (2019), 303–311.

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