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FOUNDER INTENT AND BENEFICIARY INTERESTS IN THE POLISH FAMILY FOUNDATION: LESSONS FROM THE *MATTER OF DUMONT* **

I. INTRODUCTION

The trust is one of the most distinctive and most thoroughly analysed forms of fiduciary arrangement known to comparative private law. In Poland, the legal institution most closely comparable to a trust is the family foundation. The family foundation was introduced in response to the inability of the law of succession alone to accommodate the planned intergenerational transfer of substantial wealth, particularly of business assets[1]. Unlike a trust, a foundation possesses legal personality, and its structural design resembles that of a limited liability company[2]. Moreover, the two arrangements differ in their composition and in the nature of the rights held over the assets under management.

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[1] Explanatory memorandum to the Family Foundation Act, Sejm of the Republic of Poland, 9th term, Sejm Print No. 2798, p. 3–6, 65; M. Konarski: *Fundator — prawa i obowiązki* (in:) *Fundacje rodzinne. Aspekty prawne i podatkowe*, ed. A. Mariański, Warszawa 2023, p. 57.

[2] A. Herbet: *New Prospects for Wealth Management in Poland? General Characteristics of the Family Foundation under the Act of 26 January 2023*, Forum Prawnicze 2024, no. 4, p. 59. This feature of the family foundation may itself appear surprising, particularly given that the explanatory memorandum to the Act expressly emphasised that the previously existing corporate structures (such as the limited liability company) were ill-suited to the specific requirements of succession in family businesses. Explanatory memorandum to the Family Foundation Act, Sejm of the Republic of Poland, 9th term, Sejm Print No. 2798, p. 4.

Although the two legal forms differ significantly in several respects, their underlying idea is similar. Both are designed to separate a portion of the settlor's or founder's assets and to place them under management in order to pursue specific purposes designated by that person. Those purposes typically differ from those pursued under the ordinary rules of succession. Even where the manner of achieving that objective is complex, both the trust and the family foundation allow for its fulfilment, subject to the necessary limitations. The comparison pursued below is therefore functional rather than structural. In this limited sense, a family foundation may be described as a form of fiduciary arrangement. In academic writing, the family foundation is often characterised as a "personified fiduciary"[3]. Polish scholarship also likens the members of a family foundation's management board, by virtue of their administration of fiduciary assets, to trustees[4].

Since the Polish family foundation was introduced only in 2023, it has not yet given rise to a significant body of private-law case law. Comparative analysis is therefore valuable in identifying issues on which domestic case law does not yet offer guidance. The article accordingly examines the problem through a concrete comparative case study.

The use of US trust law is justified by the nature of the decision-making problem rather than by any claim that a trust and a family foundation are structurally identical. In this particular field, US trust law offers a longer-established and more fully developed body of judicial, statutory and model-law guidance on conflicts among settlor-imposed investment directions, changing economic conditions, beneficiary interests and fiduciary liability. For this question, its comparative value lies in the depth of reported decisions on retained-asset directions and fiduciary responsibility; structurally closer foundation models would serve a different comparative purpose. *Matter of Dumont*[5] is particularly useful because it presents the conflict in a concrete setting and assesses the asset manager's response from a liability perspective. The comparison, therefore, adopts a functional, problem-oriented method: it asks whether, and through which domestic-law mechanisms, the considerations identified in the case may inform the management board of a Polish family foundation in an analogous situation, while the legal answer remains grounded in the Family Foundation Act[6].

[3] K. Górniak (in:) *Ustawa o fundacji rodzinnej. Komentarz*, ed. K. Osajda, Warszawa 2025, art. 1, marg. no. 16.

[4] *Ibidem*.

[5] *Matter of Dumont*, 4 Misc. 3d 1003(A), 791 N.Y.S.2d 868, 2004 N.Y. Slip Op. 50647(U) (Sur. Ct. Monroe Cnty. June 25, 2004), rev'd *sub nom. Matter of Chase Manhattan Bank*, 26 A.D.3d 824, 809 N.Y.S.2d 360 (App. Div. 4th Dep't 2006), leave to appeal denied, 7 N.Y.3d 824 (2006), reargument denied, 7 N.Y.3d 922 (2006).

[6] For a comparable problem-oriented inquiry into whether solutions available under one legal system can be achieved through the institutions of another, see *Shaping the Status of Heirs by Contractual Components under the Polish and German Inheritance Law: Comparative Challenges and Perspective of Approximation of Legal Systems*, eds. B. Kucia, E. Macierzyńska-Franaszczyk, E. Rott-Pietrzyk, F. Zoll, Göttingen 2023, p. 24–25.

The case-note format is particularly suited to this inquiry because the problem concerns the application of general fiduciary and investment standards to a concrete managerial decision. A comparison of statutory provisions alone would not reveal how the competing considerations are balanced or how the asset manager's conduct is subsequently assessed for liability.

The Family Foundation Act identifies the statutory purpose of the family foundation and regulates the duties and liability of the management board, but it does not expressly determine how the board should resolve a conflict among founder-imposed investment directions, beneficiary interests and changing economic conditions. The tension is most apparent where continued adherence to those directions may cause loss, because the board must make the decisive choice and may incur liability as a result. A trustee and a management board are institutionally distinct, but each faces a functionally similar decision when managing assets.

The article addresses the following research question: how should the management board of a Polish family foundation respond when changing economic conditions make continued adherence to founder-imposed investment directions potentially harmful to the foundation and its beneficiaries, and how should the resulting choice be assessed for the purposes of board members' liability? The article argues that the answer should take the form of an ordered decision-making sequence. The board must first identify the legal form and binding force of the direction and obtain reliable, current analyses. It should depart from a non-binding direction where an informed assessment shows that continued adherence would materially threaten the foundation's assets, liquidity or solvency, or its ability to pursue its statutory and charter purposes. A binding charter provision must instead be interpreted in light of Article 2 of the Family Foundation Act and any applicable escape clause; if that does not resolve the conflict, the available amendment mechanism must be pursued, and dissolution considered only as a last resort.

Section II identifies the relevant gap under Polish law and the standards governing the management board's decision and liability. Section III examines how *Matter of Dumont* and American trust law address the analogous conflict. Section IV uses that reasoning to formulate differentiated guidance for the management board of a Polish family foundation, depending on the legal form and binding force of the founder's investment directions. Section V concludes.

II. FOUNDER-IMPOSED INVESTMENT DIRECTIONS AND MANAGEMENT BOARD DUTIES UNDER POLISH LAW

The Polish legal problem arises from the interaction among the statutory purpose of the family foundation, founder-imposed directions in its charter, and the duties and liability of the management board.

A fundamental attribute of a foundation is its underlying purpose. Article 2 sec. 1 of the Family Foundation Act (hereinafter: "FFA")[7] provides: "A family foundation constitutes a legal entity established to accumulate assets, administer them for the benefit of its beneficiaries, and fulfil obligations owed to those beneficiaries. The founder, in the foundation's charter, determines its more detailed objectives". The first sentence sets forth the general, legally mandated purpose of the foundation, whereas the second confirms the founder's ability to articulate more concrete goals in the charter, provided they do not contradict the statutory purpose[8].

Article 2 gives the statutory purpose of a family foundation a beneficiary--oriented character: its assets are to be accumulated and managed in the interests of beneficiaries, and benefits are to be provided to them. It does not follow that the board must maximise the immediate economic advantage of current beneficiaries or treat their preferences as controlling. The charter specifies the foundation's detailed purposes and the position of its beneficiaries, thereby structuring how the statutory purpose is to be pursued and which beneficiary interests are legally relevant. The Family Foundation Act, however, does not specify what, in concrete terms, the designation of such a purpose entails. Accordingly, the foundation's charter may be drafted so that, immediately upon the founder's death, its assets are distributed to the beneficiaries. Conversely, it may be structured to function as a multigenerational vehicle designed to preserve family wealth over time. The statutory boundaries are therefore broad.

Nevertheless, it appears that a family foundation cannot serve merely as a vehicle for the indefinite accumulation of assets, with only successive beneficiaries changing over time. The accumulation of assets is not a legal objective of a family foundation but a means of achieving the foundation's purpose[9]. A foundation may in practice be structured to accumulate wealth even where no transfer upon the founder's death is contemplated, but accumulation alone does not exhaust its statutory purpose[10]. The statutory purpose lies in managing the assets in the beneficiaries' interests and providing benefits to them, as further specified in the charter detailed purpose[11].

Regardless of the specific objective of any individual foundation, regard must also be had to the functions envisaged by the legislature when enacting the Family Foundation Act. Those functions are described at length in the explanatory memo-

[7] Ustawa z 26 stycznia 2023 r. o fundacji rodzinnej (the Act of 26 January 2023 on Family Foundations), Journal of Laws 2023, item 326.

[8] K. Górniak (in:) *Ustawa o fundacji rodzinnej…*, *op. cit.*, art. 2, marg. nos. 8–9.

[9] A. Herbet: *New Prospects for Wealth Management…*, *op. cit.*, p. 51.

[10] As noted by K. Górniak: "The purpose of a family foundation is distinct from its institutional functions, that is, the activities it may carry out within the legal framework and in the broader context of economic practice"; K. Górniak (in:) *Ustawa o fundacji rodzinnej…*, *op. cit.*, art. 2, marg. no. 8.1.

[11] A. Herbet: *New Prospects for Wealth Management…*, *op. cit.*, p. 51. The author observes that the wording of Article 2 may give rise to interpretative controversy. Confusion may arise between the means of achieving the foundation's purpose and the purpose itself, particularly where the course of action most beneficial to the beneficiaries would be the liquidation of the foundation's assets.

randum to the Act. The Act is intended to facilitate the intergenerational transfer of family businesses, whether arranged during the founder's lifetime or upon the founder's death, and to prevent the fragmentation of their ownership structures[12], thereby supporting business continuity[13].

Although facilitating such an intergenerational transfer is generally uncontroversial, the continued concentration of ownership in a private company that a family foundation may preserve has never been afforded special legal protection under the Polish Constitution or under statutory law[14]. Since the explanatory memorandum to the FFA does not refer to a broader set of values, it is difficult to determine precisely why the ownership structure of private enterprises should be afforded special protection. It is therefore unclear what social or economic interest would justify a company belonging to one family rather than to another, or to an investment fund. Furthermore, economic research indicates that a higher degree of ownership concentration may be negatively correlated with a company's financial performance[15].

Accordingly, while it cannot be denied that placing a family business within a family foundation — thereby "locking it in" to a certain extent — constituted one of the underlying policy considerations behind the introduction of the Family Foundation Act, neither this function nor the use of a foundation as a vehicle for accumulating the founder's assets should be decisive in disputes concerning the interpretation of the charter. Where founder-imposed investment directions conflict with the interests of the family foundation and its beneficiaries, these practical functions cannot by themselves justify giving priority to the founder's preference to preserve a particular asset or ownership structure.

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[12] *Nota bene*, the term "family business" is not defined in any statute. Neither the FFA nor its explanatory memorandum provides a definition. It is therefore unclear whether a company may be labelled a family business merely because its majority shareholder is a natural person (after all, everyone belongs to a family) or whether the shareholders from a single family must constitute a majority and, if so, how many such shareholders are required and what aggregate percentage of shares they must hold. This gives the impression that the reference to "family businesses" is intended, by itself, to justify the very existence of a family foundation, yet the precise meaning of the term remains unclear.

[13] Explanatory memorandum to the Family Foundation Act, Sejm of the Republic of Poland, 9th term, Sejm Print No. 2798, p. 3–6; N. Kozioł: *Fundacja rodzinna — nowa instytucja w polskim prawie*, Przegląd Prawa Handlowego 2024, no. 10, p. 19.

[14] In Poland, by contrast, certain property rights are subject to special protection in the context of succession. Foremost among these is the "agricultural holding", with respect to which Title X of the Act of 23 April 1964 — Civil Code (hereinafter: "CC") establishes specific rules of succession. These rules are aimed primarily at ensuring that estates remain in the hands of heirs who actually engage in agricultural work. The rationale for this protection is, most importantly, to prevent the fragmentation of individual family farms (given the greater economic efficiency of larger estates) and to counteract the outflow of capital from agricultural holdings; see J. Nadler (in:) *Kodeks cywilny. Komentarz*, eds. E. Gniewek, P. Machnikowski, Warszawa 2025, art. 1058, marg. no. 5. First, this justification is more persuasive than in the case of shares in commercial companies; second, under Article 23 of the Constitution of the Republic of Poland, the family farm constitutes the basis of the agricultural system of the State, which justifies the need for its protection; and third, Article 55ł CC defines what constitutes an agricultural holding, thereby clarifying the scope of the provisions contained in Title X of the Civil Code.

[15] P.C. Bishwas, M.S. Hossain: *Does ownership concentration have an impact on financial performance of firms?*, 11 Future Business Journal, article 86 (2025), p. 18.

Apart from the statutory objective, the charter may, in accordance with Article 26 sec. 3 point 3 FFA, also specify investment guidelines for the family foundation's assets[16]. However, as emphasised in Polish scholarly literature, these guidelines are not binding on a family foundation, and no mechanism exists by which the founder[17] may effectively enforce them. Because these guidelines lack binding force, they cannot be treated as a comprehensive statutory standard for investment. More generally, although a family foundation may also be used without serving as a vehicle for a transfer upon the founder's death, its statutory logic is not the accumulation or multiplication of assets for their own sake, but their administration in the beneficiaries' interests and the provision of benefits to them[18].

Article 2 gives the foundation's statutory purpose a beneficiary-oriented character, but the FFA also recognises forms in which the founder's will remains relevant after the charter has been adopted[19]. Notably, Article 15 of the FFA authorises the founder to submit observations, opinions, or recommendations to the foundation's governing bodies concerning its administration and activities. Although such submissions are non-binding, Polish scholarship has criticised this mechanism because it arguably allows the founder to function as an informal organ of the foundation and influence the board's decision-making[20].

Regardless of the foregoing, it must be emphasised that the only obligation of the management board regarding a non-binding opinion is to formally acknowledge it[21]. For the purposes of a board member's liability, such an opinion may nevertheless be relevant: where the founder has signalled irregularities, a board member's failure to address them may aggravate the assessment of culpability[22].

The FFA does not establish a detailed statutory regime governing the investment of family foundation assets. Article 54 sec. 1 points 2 and 3 FFA require the management board to pursue the objectives specified in the charter and to take the measures necessary to ensure the foundation's liquidity and solvency. Article 55 of the FFA additionally requires due care, confidentiality, and loyalty towards the foundation. The beneficiaries' interests are legally relevant not because the board owes them a free-standing duty of loyalty, but because Article 2 makes administration for their benefit part of the foundation's statutory purpose. The liability regime in Article 75 must be read against that framework. Article 75 sec. 2 establishes process-based protection for a loyal and informed decision taken within the limits of justified business risk[23].

[16] P. Bender, J. Miłaszewski (in:) *Ustawa o fundacji rodzinnej…*, *op. cit.*, art. 26, marg. no. 99.

[17] *Ibidem*, art. 26, marg. nos. 83–89.

[18] K. Górniak (in:) *Ustawa o fundacji rodzinnej…*, *op. cit.*, art. 1, marg. no. 48, together with the sources cited therein. The author refers to Austrian and German foundation-like structures.

[19] See A. Herbet: *New Prospects for Wealth Management…*, *op. cit.*, p. 51.

[20] A. Kidyba: *Klęska tzw. fundacji rodzinnej*, Monitor Prawniczy 2025, no. 9, p. 537.

[21] K. Grzegorczyk (in:) *Ustawa o fundacji rodzinnej…*, *op. cit.*, art. 15, marg. no. 2.

[22] *Ibidem*, marg. no. 5.

[23] P. Słup (in:) *Ustawa o fundacji rodzinnej. Komentarz*, ed. K. Osajda, Warszawa 2025, art. 75, marg. nos. 14–15. The business judgment rule applies irrespective of whether the family foundation conducts business activity.

Article 75 sec. 1 FFA makes a management board member liable to the family foundation for damage caused by a culpable act or omission contrary to the law or the charter. Article 75 sec. 2 does not create a general immunity from liability for breach of the charter. It instead provides that the duty of due care is not infringed where the member acts loyally towards the foundation, within the limits of justified business risk and on the basis of information, analyses and opinions that ought to have been taken into account in the circumstances. Reliable analyses may therefore protect a decision that remains within the law, the charter or a permissible interpretation of the charter, but they do not independently authorise the board to disregard a binding provision. Conversely, literal compliance with a non-binding founder direction does not by itself protect the board if a properly informed assessment would have revealed a serious threat to the foundation. This distinction between legal authority and decision-making quality is central to the assessment developed below.

A retention restriction can therefore bind the management board internally if, consistently with the Act, it is formulated as part of the detailed purpose or as another mandatory charter rule rather than merely as an investment guideline under Article 26 sec. 3 point 3 FFA. Its internal force follows from Article 54 sec. 1 point 2, which requires the board to pursue the objectives specified in the charter, and Article 75 sec. 1, which attaches liability to culpable conduct contrary to the charter. Article 53 sec. 2 confirms the distinction between that internal effect and the validity of a transaction: an act performed without an approval required solely by the charter remains valid, although liability for breach of the charter is not excluded. The internal effect does not depend on whether the restriction is temporary or indefinite. Nor does a later threat to the foundation's liquidity or solvency permit the board simply to disregard a binding provision. Articles 2 and 54 sec. 1 point 3 shape its interpretation but do not independently authorise the board to override it. If the conflict cannot be resolved through permissible interpretation or a registered amendment, the board must resort to the applicable dissolution mechanism under Articles 87–89 rather than disregard the charter, as explained below[24].

The foregoing analysis reveals a genuine interpretative gap in Polish law: the FFA neither fully determines the legal effect of founder-imposed investment directions nor provides a clear standard for resolving conflicts between them and the interests of the foundation and its beneficiaries when economic conditions change. American trust law is useful in this context not because a trust and a family foundation are structurally identical, but because it has long addressed the same functional problem through a developed body of case law concerning fiduciary asset

[24] The present analysis concerns the internal effect of founder-imposed directions on the management board's duties and liability. It does not treat such directions as limitations on the foundation's legal power to dispose of assets or as restrictions effective against third parties. The issue is therefore distinct from that arising under Article 338 § 1 of the Polish Commercial Companies Code, which regulates restrictions on the disposal of shares. Article 357[1] CC likewise concerns judicial adaptation or termination of an obligation following an extraordinary change of circumstances and is not itself a mechanism for modifying a family foundation's charter.

managers. *Matter of Dumont* may therefore be examined as a comparative case study rather than as a source of rules directly applicable in Poland.

III. THE DUMONT LITIGATION AND AMERICAN TRUST LAW

The litigation began with the 2004 decision of the Surrogate's Court, Monroe County, in a contested proceeding for the judicial settlement of the trustee's second intermediate account. The beneficiaries objected to the account and sought a surcharge for the allegedly imprudent retention of Eastman Kodak Company stock. Charles Dumont's 1951 will provided for a residuary testamentary trust for the benefit of his daughter, his granddaughter and their successors, with charities as contingent remainder beneficiaries. The trust portfolio consisted predominantly of Kodak stock.

Dumont stated that it was his "desire and hope" that the stock be retained and directed that it should not be sold merely for diversification. The will nevertheless permitted a sale where a "compelling reason" other than diversification arose. Despite substantial declines in Kodak's share price, the trustee retained the stock, resulting in significant losses for the trust. The dispute, therefore, concerned whether the retention clause justified continued adherence to the testator's investment preference or whether changing economic conditions required the trustee to sell[25].

Two standards were applied during the accounting period. Until the end of 1994, the prudent person rule under EPTL § 11–2.2[26] governed the trustee's conduct. From 1 January 1995, the Prudent Investor Act under EPTL § 11–2.3 made diversification the default rule, subject to exceptions. Although the accounting period straddled both regimes, the alleged divestment dates were 1973 and 1974, and the dispute was therefore assessed under the prudent person rule; under either regime, however, the governing instrument remained relevant.

In construing the trust provisions, the Surrogate's Court took into account the settlor's intent, which reflected a clear desire to prevent diversification of the Kodak stock. At the same time, it emphasised that the settlor's intent was not the sole factor that should determine a trustee's conduct. The court held that the trustee's actions

[25] The factual resemblance to *Matter of Janes* should not obscure the different legal issue. *Janes* also concerned the retention of a concentrated Kodak holding, but the will contained no comparable direction against diversification. Liability concerned the bank's administration of the estate as co-executor rather than its conduct as trustee of an existing testamentary trust. The appellate courts affirmed liability under the prudent person rule for the fiduciary's failure to analyse the portfolio, formulate an investment plan, attend to the beneficiary's needs and consider alternative investments; the Appellate Division modified only the measure of damages. *Matter of Janes*, 165 Misc. 2d 743, 630 N.Y.S.2d 472 (Sur. Ct. Monroe Cnty. 1995), modified, 223 A.D.2d 20, 643 N.Y.S.2d 972 (App. Div. 4th Dep't 1996), aff'd, 90 N.Y.2d 41, 659 N.Y.S.2d 165, 681 N.E.2d 332 (1997), reargument denied, 90 N.Y.2d 885 (1997).

[26] N.Y. Estates, Powers & Trusts Law (McKinney 1992), hereinafter: "EPTL".

should be guided by three considerations: the settlor's intent, the interests of the beneficiaries and prevailing external economic conditions.

The Surrogate's Court also treated the beneficiaries' benefit as an interpretative principle: the method selected for managing trust assets could not be understood in a manner that would defeat the purpose for which the trust was created. Although the testator's preference to retain the shares was evident, the phrase "it is my desire and hope" was precatory rather than independently binding. It therefore did not carry the same weight as the separate provision authorising a sale upon the occurrence of a "compelling reason".

The Surrogate's Court ultimately held that the decline in the share price, considered together with the other circumstances, constituted a "compelling reason" under the will and that at least part of the Kodak stock should have been sold. It imposed a surcharge on the trustee for the resulting loss.

On appeal, the Appellate Division unanimously reversed the surcharge and dismissed the objections. Its principal holding concerned an unpleaded date and a composite theory unsupported by the objectants' pleadings and proof, while its alternative discussion of the merits — addressing hindsight, the retention clause and the beneficiary's circumstances — remained tied to the evidence concerning 31 January 1974; it is therefore not examined at greater length[27]. With the appellate outcome fully taken into account, the article uses the Surrogate's Court's substantially fuller analysis of settlor intent, beneficiary interests and changing economic conditions as comparative material, without treating its disposition as final or as a statement of controlling New York law.

The issues exposed by the *Dumont* litigation form part of a long-standing debate in American scholarship and case law. Traditionally, both case law[28] and scholarly literature[29] emphasised the primacy of settlor intent, although later developments reflect a shift in emphasis[30]. Current case law[31] continues to describe settlor intent as paramount, whereas scholarship[32] often treats acting in the beneficiaries' best

[27] *Matter of Chase Manhattan Bank*, 26 A.D.3d 824, 809 N.Y.S.2d 360 (App. Div. 4th Dep't 2006), leave to appeal denied, 7 N.Y.3d 824 (2006), reargument denied, 7 N.Y.3d 922 (2006); see also *Matter of Hunter*, 27 Misc. 3d 1205(A), 2010 N.Y. Slip Op. 50548(U), at *6–7 (Sur. Ct. Westchester Cnty. 2010).

[28] E.g., *In re Sherman Trust*, 179 N.W. 109, 112 (Iowa 1920). The court described the settlor's intent as the "polestar" guiding the trustee.

[29] See G.H. Jones: *The Dead Hand and the Law of Trusts* (in:) *Death, Taxes and Family Property*, ed. E.C. Halbach Jr., 1977, p. 119–126; J.A. Cooper: *Empty Promises: Settlor's Intent, the Uniform Trust Code, and the Future of Trust Investment Law*, 88 Boston University Law Review 1165 (2008), p. 1171–1172.

[30] J.A. Cooper: *Empty Promises…*, *op. cit.*, p. 1171–1172, together with the sources cited therein.

[31] E.g., *Bryan v. Dethlefs*, 959 So. 2d 314, 317 (Fla. Dist. Ct. App. 2007), in which the court again described the testator's expressed intent as the "polestar" for the interpretation and administration of the trust. In a similar vein: *Thorson v. Neb. Dep't of Health & Human Servs.*, 740 N.W.2d 27, 33 (Neb. 2007).

[32] S.E. Sterk: *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 Cardozo Law Review 2761 (2006), p. 2763; M.B. Leslie: *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 Georgetown Law Journal 67 (2005), p. 89; H. Hansmann, U. Mattei: *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 New York University Law Review 434 (1998), p. 449.

interests as the fundamental rule. The first view seeks to give the settlor's wishes the broadest possible effect; the second seeks to constrain the so-called dead-hand control of the settlor[33].

This discourse initially concerned the so-called rule against capricious purposes, that is, the prohibition on creating trusts containing provisions wholly devoid of economic justification[34]. The doctrine has since evolved, and the principle is increasingly invoked both to challenge and to support a pro-beneficiary reading of those provisions of trust instruments that govern specific investment strategies[35].

As regards law-reform instruments, the Uniform Trust Code and the Restatement (Third) of Trusts[36] both expressly reflect the benefit-the-beneficiaries rule[37]. The official commentary to the Uniform Trust Code confirms that the primary purpose of a trust is to serve the interests of the beneficiaries — "in accordance with those interests as defined by the terms of the trust"[38]. The qualifying phrase is important: beneficiary interests are not external to the instrument but are defined within the arrangement established by the settlor[39]. The Restatement (Third) of Trusts adopts the same position. Subject to this overarching objective, the settlor retains broad discretion to establish additional purposes and determine how they are to be pursued[40].

The beneficiary-oriented approach identified in American case law and scholarship and expressly reflected in model trust codes provides a functional point of comparison with Article 2 FFA, which likewise requires that the foundation's assets be accumulated and managed for the benefit of its beneficiaries.

Consequently, the settlor's directions as to the manner in which the trust property is to be managed must be taken into account; they must, however, remain consistent with the purposes prescribed by law[41]. Above all, they must remain compatible with the trust's beneficiary-oriented purpose as defined by its terms. In the

[33] J.A. Cooper: *Empty Promises…*, *op. cit.*, p. 1215. The doctrine of the dead hand, in its broader sense, extends also to ordinary succession. The debate concerns the scope and duration of the period during which the decedent's intentions ought to be carried out; see G.H. Jones: *The Dead Hand…*, *op. cit.*, p. 119, 126.

[34] J.H. Langbein: *Mandatory Rules in the Law of Trusts*, 98 Northwestern University Law Review 1105 (2004), p. 1107. The Uniform Trust Code (Uniform Law Commission 2000, as amended), hereinafter: "UTC", uses the terms "frivolous" and "capricious" to describe trust provisions entirely devoid of economic justification; see Uniform Trust Code § 404 cmt. (Unif. L. Comm'n 2000).

[35] See, e.g., *Wood v. U.S. Bank, N.A.*, 828 N.E.2d 1072, 160 Ohio App.3d 831 (Ohio Ct. App. 2005). The court held that a general authorisation to retain assets did not clearly displace the statutory duty to diversify; it did not establish that an unambiguous retention direction could be disregarded whenever another strategy would better serve the beneficiaries.

[36] Restatement (Third) of Trusts (American Law Institute 2003), hereinafter: "Restatement".

[37] Uniform Trust Code § 404; Restatement (Third) of Trusts § 27(2) (Am. L. Inst. 2003) and § 78 (Am. L. Inst. 2007).

[38] Uniform Trust Code § 404 cmt. (Unif. L. Comm'n 2000).

[39] W. Bańczyk: *Spadkobierca nieruchomości położonej w Polsce powołany na podstawie testamentu z wykorzystaniem konstrukcji trustu oraz personal representative (uwagi na tle postanowienia SN z 17.12.2020 r., III CSK 141/18)*, Państwo i Prawo 2023, no. 11, p. 100–101.

[40] Restatement (Third) of Trusts § 27 cmt. b (Am. L. Inst. 2003).

[41] A.M. Hess, G.G. Bogert, G.T. Bogert: *The Law of Trusts and Trustees*, 2025, Westlaw, § 611.

specific context of trust investment, the Uniform Prudent Investor Act[42] provides a model investment standard. One of the principal obligations imposed by the UPIA is the duty to diversify trust assets under § 3[43, 44].

The duty to diversify is not absolute. Under § 3 UPIA, a trustee need not diversify where the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversification. A retention clause is therefore relevant but not indispensable to a justified decision not to diversify; even in its absence, the decision depends on the purposes and terms of the trust and on the contemporaneous circumstances rather than on an inflexible rule. Trusts holding publicly traded securities nevertheless frequently include retention clauses, often because the settlor has a personal or professional connection with the issuer or a particular attachment to the asset[45].

Unlike this developed investment framework, the FFA establishes no comparably detailed statutory investment standard. As noted above, Article 26 sec. 3 FFA merely permits the charter to specify investment guidelines, which Polish scholarship regards as non-binding.

Within the American framework, however, the extent of trustees' liability remains uncertain. Where a trustee breaches a binding term of the trust, beneficiaries may seek the remedies provided by § 1002[46] UTC. A trustee is not liable to a beneficiary insofar as the trustee acted in reasonable reliance on the terms of the trust[47]. The UPIA, the UTC and the Restatement do not define "reasonable reliance", which limits the precision of that protection. The trust instrument may also specify additional grounds for relieving the trustee from liability in defined circumstances. Such provisions are particularly advisable where the settlor intends to authorise risky investments[48].

The Surrogate's Court's formulation of the conflict among the retention direction, the beneficiary-oriented purpose of the trust and changing economic conditions supplies the analytical material used below to identify the problem faced by a Polish management board. The following section translates that interpretative formulation into a sequence grounded in the FFA and in the duties of a family foundation's management board.

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[42] Hereinafter: "UPIA".

[43] The UPIA is a model act. In New York, investments made or held on or after 1 January 1995 were governed by the Prudent Investor Act, EPTL § 11–2.3; the earlier accounting period was governed by the prudent person rule in EPTL § 11–2.2.

[44] The diversification requirement reflects Modern Portfolio Theory, under which diversification reduces investment risk and protects against uncompensated loss; see Uniform Prudent Investor Act § 3 cmt. (7 U.L.A. 403, 1994).

[45] T.S. Kiziah, L.J. Campbell: *Drafting to effectuate grantor's retention desires with respect to publicly held securities*, 46(2) Real Property, Trust and Estate Law Journal (2011), p. 201.

[46] See, e.g., § 1002 UTC.

[47] § 1006 UTC, § 1(b) UPIA.

[48] T.S. Kiziah, L.J. Campbell: *Drafting to effectuate grantor's retention…*, *op. cit.*, p. 208.

IV. IMPLICATIONS FOR POLISH FAMILY FOUNDATION LAW

The comparison does not ask whether the Surrogate's Court's judgment could simply be reproduced under Polish law. It assumes an analogous foundation whose charter contains either non-binding investment guidelines under Article 26 sec. 3 point 3 FFA or a binding detailed purpose or provision requiring the retention of a specified asset. The restriction is assumed to have been economically defensible when adopted and to have become harmful only after conditions changed. These legal forms must be analysed separately, because Article 75 liability depends on whether the board departed from a non-binding guideline or acted contrary to binding law or a binding charter provision[49].

It should be recalled that the Polish family foundation possesses legal personality and is the sole owner of its assets. It does not involve the "split ownership" or "dual ownership" associated with a trust[50]. The management board is therefore neither a trustee in the technical sense nor a representative of the beneficiaries, and it owes its statutory duty of loyalty to the foundation. The beneficiaries' interests are nevertheless legally relevant because Article 2 incorporates management for their benefit into the foundation's statutory purpose. The foundation's own interest is thus an additional consideration, particularly where literal compliance with a founder-imposed direction threatens its liquidity, solvency or continued operation.

The rules governing a family foundation are set out in its charter and, where applicable, in documents adopted under the charter. The charter must specify the rules for its amendment, and an amendment becomes effective only upon its entry in the register[51]. The FFA does not give the beneficiaries or the foundation's bodies a general power to amend the charter independently of the procedure designed by the founder. That procedure may be restricted and may become difficult to use after the founder's death. A binding investment strategy may therefore remain in force even after it has become economically harmful, potentially threatening the foundation's solvency.

These structural features preclude an abstract formula under which founder intent, beneficiary interests and economic conditions exert "equal influence", or under which one of them always prevails. They enter the analysis through different legal channels. Founder intent is institutionalised through the legal form and content of the foundation's charter. Once expressed in that form, it is legally relevant through the foundation's autonomous framework rather than as an external preference, and the management board must protect that arrangement insofar as it remains consist-

[49] P. Stępień (in:) *Fundacja rodzinna. Aspekty prawne i podatkowe. Komentarz*, ed. P. Tomczykowski, Warszawa 2023, art. 75, marg. no. 5.

[50] On the legal nature of ownership in trusts see M. Zachariasiewicz: *Trust i inne stosunki powiernicze w prawie porównawczym i prawie prywatnym międzynarodowym*, Katowice 2016, p. 126.

[51] P. Bender, J. Miłaszewski (in:) *Ustawa o fundacji rodzinnej…*, *op. cit.*, art. 26, marg. nos. 83–89.

ent with the Act[52]. The board does not thereby become the founder's agent: its duty of loyalty runs to the foundation, and its autonomy also prevents non-binding, extra-charter wishes from functioning as instructions. Beneficiary interests enter the analysis through Article 2, but they are shaped by the lawful charter and the conditions governing benefits; they do not amount to ownership of the foundation's assets or a free-standing right to maximise immediate distributions. Economic conditions are relevant to the board's duties concerning liquidity, solvency, due care and justified business risk. Preserving a particular asset or ownership structure may form part of the foundation's interest when embodied in a valid charter provision; it is not, however, an autonomous statutory objective that invariably overrides the beneficiary-oriented dimension of Article 2 or the board's mandatory duties.

Before formulating the management board's response, three objections to the use of changed economic conditions must be addressed.

First, the management board may not modify the rules of a legally autonomous entity merely because changed conditions make compliance disadvantageous. Article 15 FFA does not answer this objection: the founder's observations, opinions and recommendations under that provision are non-binding and derive from the Act, not from an exception created by the charter. This confirms the need to distinguish a permissible interpretation of the charter from its unauthorised modification.

Second, respect for founder intent remains an important structural consideration. Where a family foundation is designed to operate upon the founder's death, it gives continuing institutional effect to the arrangement chosen by the founder rather than leaving the relevant assets to be distributed subsequently under the ordinary rules of succession alone. This function is not universal because a family foundation may also be established and operated during the founder's lifetime[53]. In either setting, the founder's design is given legal effect through the charter and is administered by an autonomous management board, while remaining subject to the statutory purpose set forth in Article 2.

Third, a later change in economic conditions cannot retroactively make an initially valid charter provision void. Nor may the board simply treat a binding provision as though it had ceased to apply. The appropriate response is therefore not automatic invalidity *ex tunc*, but a sequence of interpretation, amendment where available and, only ultimately, dissolution[54]. This sequence is also necessary to preserve legal certainty when the conduct of management board members is later assessed for liability.

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[52] W. Bańczyk (in:) *Ustawa o fundacji rodzinnej. Komentarz*, ed. K. Osajda, Warszawa 2025, art. 54, marg. no. 12.

[53] See K. Górniak (in:) *Ustawa o fundacji rodzinnej…*, *op. cit.*, art. 1, marg. no. 38.

[54] Judgment of the Supreme Court of Poland of 30 May 2019, V CSK 209/18, LEX No. 2690833 (holding that validity under Article 58 CC is assessed by reference to the circumstances existing at the date of the transaction rather than later events).

The comparison with *Matter of Dumont* accordingly supports a differentiated decision-making sequence rather than a general rule that automatically gives priority either to founder intent or to beneficiary interests.

Timing affects the applicable analysis. If a detailed purpose or investment rule was manifestly inconsistent with Article 2 and prevailing economic conditions at the time of adoption — for example, because it required the destruction of assets or investment in an evidently failing entity — the problem concerns the initial validity and registration. On this interpretation, the registration court should refuse to register a foundation whose charter is incapable from the outset of serving its statutory purpose. The scenario examined here is different: the direction was defensible when adopted and became harmful only after economic conditions changed.

In that later-change scenario, the management board should identify the legal form and binding force of the direction and determine whether the charter contains an escape clause applicable to the new circumstances. It should also obtain and document information, analyses and opinions proportionate to the risk involved, including the effects of continued retention on the value of the assets, the foundation's liquidity and solvency, and its ability to fulfil its obligations to beneficiaries. This follows from Articles 54 and 55 of the FFA and is relevant to the process-based protection in Article 75 sec. 2.

Where the direction is a non-binding investment guideline under Article 26 sec. 3 point 3 FFA, it remains relevant evidence of the founder's intent, but cannot replace the board's own assessment. If reliable analyses show that continued adherence would materially endanger the foundation's assets, liquidity or solvency, or its ability to pursue its purposes and provide benefits, the board should depart from the guideline and consider disposing of the asset and acquiring an economically justified substitute. Departure from such a guideline does not in itself establish liability. Liability depends on whether the board acted loyally towards the foundation, with due care and within the limits of justified business risk.

Where the restriction forms part of a binding detailed purpose or another mandatory charter provision, the board cannot simply disregard it. It must first interpret the provision within the charter as a whole and in light of Article 2 FFA, taking into account any express escape clause applicable to changed conditions. The beneficiaries' interests matter under the foundation's statutory purpose, while the founder's choice remains relevant under the charter's binding terms. A reasonable interpretation that permits a sale or a change of investment strategy keeps the decision within the charter; the analyses collected by the board should document the contemporaneous basis for that interpretation.

If interpretation cannot resolve the conflict, the amendment procedure prescribed by the charter should be used or initiated by the competent person or body. Under Article 26 sec. 4 FFA, an amendment becomes effective only upon registration. Article 75 sec. 2 may confirm the diligence of the decision-making process, but it

does not remove the separate risk under Article 75 sec. 1 arising from conduct contrary to the law or the charter, nor does it allow the board to treat a proposed amendment as already effective.

If a binding restriction cannot be reconciled with Article 2 through interpretation or amendment, the board should neither silently violate it nor passively allow further harm. It should instead evaluate the statutory mechanisms for dissolution. Where further pursuit of the foundation's purpose has become impossible, or involves excessive difficulties that cannot be removed without incurring disproportionately high costs, Articles 87, point 1, and 89, section 1, point 1 FFA permit dissolution by resolution of the management board. A case of management manifestly contrary to the foundation's purpose or the interests of its beneficiaries falls under Article 87, point 2; after the remedial mechanism in Article 88, dissolution may be ordered by the registration court under Article 89, section 1, point 3. Dissolution for other important reasons under Article 87, point 3 requires either a unanimous resolution of the beneficiaries' meeting under Article 89, section 1, point 2 or an order of the registration court under Article 89, section 1, point 3.

Dissolution is the most severe response available to the foundation and should therefore remain a last resort, after interpretation and the available amendment mechanism have been exhausted. The ultimate assessment of liability must address both the legal basis of the board's decision and the quality of the process by which it was reached. Evidence of a later loss does not replace that inquiry. Compliance with a non-binding direction is not automatically safe, while reliable analyses do not legalise a breach of a binding charter provision.

The comparison, therefore, yields not a substantive rule that can simply be transplanted into Polish law, but an ordered decision-making framework: classify the direction, investigate the current conditions, interpret the charter, use the amendment mechanism, and, only if necessary, consider dissolution. That framework links continued adherence to founder-imposed investment directions with the statutory purpose of the family foundation and with the liability standard in Article 75 FFA.

V. CONCLUSION

The comparison does not establish an abstract priority between founder intent and beneficiary interests. A trust and a family foundation differ in legal structure, ownership and the institutional position of the asset manager. They nevertheless present a comparable managerial problem in which a directive to retain a particular asset becomes economically harmful. American law is useful because it provides a developed account of how the governing instrument, beneficiary-oriented purposes and investment standards interact in that situation.

Under Polish law, Article 2 gives the foundation's statutory purpose a beneficiary-oriented character, but it does not make current beneficiaries owners of the assets or persons to whom the board owes its duty of loyalty. Founder intent remains legally relevant through the charter and through the founder's choice of the means by which the statutory purpose is to be pursued. The board's institutional autonomy mediates the possible conflict between that objectified design, the foundation's own interest and beneficiary interests. This tension may arise in an arrangement intended to operate upon the founder's death, but it is equally capable of arising in a lifetime foundation.

The answer developed in this article is a sequence that should guide the management board. The board must identify the legal form and binding force of the investment direction, obtain and document reliable analyses, and assess the consequences for the foundation's assets, liquidity, solvency and ability to perform its statutory and charter purposes. It should depart from a non-binding investment guideline where reliable analyses show that continued adherence would materially jeopardise those interests and should consider disposing of the asset and acquiring an appropriate substitute. In the case of a binding charter provision, it must first apply Article 2 as an interpretative principle, use any available escape clause and pursue the amendment mechanism prescribed by the charter. Only where these measures cannot reconcile the restriction with the statutory purpose should dissolution under Article 87 be considered.

Article 75 accordingly requires an assessment both of the legal basis of the board's decision and of the quality of the process by which it was reached. An informed decision within the charter, or within its permissible interpretation, may fall under the process-based protection afforded by Article 75 sec. 2 of the FFA. Reliable analyses do not, however, create a general permission to disregard a binding provision. The comparative value of *Dumont* lies in its detailed formulation of why the manager's responsibility cannot end with literal obedience. The board must determine the force of the founder's direction, test it against current conditions and the foundation's statutory purpose, use the available corrective mechanisms and document each stage of that process.

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Słowa kluczowe: fundacja rodzinna, wola fundatora, interesy beneficjentów, wytyczne inwestycyjne, odpowiedzialność zarządu, prawo trustów, prawo prywatne porównawcze.

WOJCIECH GIBAS

FOUNDER INTENT AND BENEFICIARY INTERESTS IN THE POLISH FAMILY FOUNDATION: LESSONS FROM THE *MATTER OF DUMONT*

S u m m a r y

The issue addressed by this article concerns how the management board of a Polish family foundation should respond when continued compliance with a founder-imposed investment direction becomes economically harmful. The Family Foundation Act allows the founder to shape the foundation's detailed purposes and investment policy, but it does not expressly determine how the board should reconcile those directions with the foundation's statutory purpose, the interests of beneficiaries and its duties concerning liquidity, solvency and due care. The article examines Matter of Dumont and the American rules governing trust investment as comparative material rather than as rules directly applicable in Poland. It distinguishes non-binding investment guidelines from binding provisions of the foundation's charter. A non-binding direction should not replace the board's own informed assessment and may be departed from where continued adherence would materially endanger the foundation. A binding charter provision must first be interpreted in light of Article 2 of the Family Foundation Act and any available escape clause; if necessary, the amendment procedure should be pursued, while dissolution should remain a last resort. The article concludes that liability under Article 75 depends both on the legal basis of the board's decision and on the quality of the decision-making process, including the reliability and contemporaneous character of the analyses obtained.

Key words: family foundation, founder intent, beneficiary interests, investment directions, management board liability, trust law, comparative private law.