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Using a trust in the context of family law: are you really safe?

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Although a trust is a valuable financial, tax and estate planning tool, does it allow one to "shelter" some assets from the public order rules which apply in the context of family law?

What is a trust?

A trust is a legal disposition which allows a person to transfer the ownership of one or more of his or her assets to a trust for the trust to administer such assets for the benefit of one or more beneficiaries. The transferred assets therefore constitute an autonomous and distinct patrimony from that of the transferor.

Although there are many types of trusts, the trust created for the purpose of protecting assets against future creditors is called an *asset protection trust*. However, the transfer of some assets forming part of the family patrimony or the partnership of acquests into a trust during the marriage or civil union does not automatically remove them from the application of the rules found in *Civil Code of Québec*.

The mandatory effects of marriage or civil union… you won't escape!

As for the assets transferred to a corporation, those transferred into a trust are no longer part of the personal patrimony of the transferor. When the right to partition of the family patrimony is acquired, for example, on the occasion of a divorce, can a spouse still claim his or her right to half of the net value of the family residence, the ownership of which has been transferred to the trust? What happens to an asset which, had it not been for the transfer to a trust, would have been included in the family patrimony or the partnership of acquests?

Family law provides many binding effects of marriage, such as the setting up, as an effect of marriage, of a family patrimony composed of some assets belonging to either of the spouses, namely, the family residences or the rights which confer use of them, the movable property with which they are furnished or decorated and the motor vehicles used for family travel. Even if, in practice, a trust may be used as a tool to mask the reality of the assets and circumvent the family law rules, the courts may rely on some legal mechanisms to prevent this attempt to avoid the rules designed to protect vulnerable spouses from being successful.

The courts may lift the fiduciary veil, that is, consider that the patrimony of the trust is not separate

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from that of the transferor of the assets. This results in bringing back into the patrimony of the transferor spouse assets which would have otherwise been included in the family patrimony or the partnership of acquests had it not been for them being transferred to the trust. This procedure would then allow the partition of such assets between the spouses.

The courts will give a great deal of importance to the way in which the assets transferred to the trust have been used during the marriage, the way in which the parties acted, both when the trust was created and during its existence and to the agreements entered into between them.

Lessons to be learned?

It must be remembered that it is the nature of the evidence which will allow the court to determine whether the spouse has created the trust for the purpose of escaping the mandatory effects of the marriage or civil union. When creating a trust, it would be desirable to ask for a tax memorandum explaining the context and the purpose sought by creating the trust, for example, an estate freeze. The preamble of the trust deed also becomes a precious tool for analyzing the intent of the parties at the time the trust was created.

Although a trust may be an interesting mechanism, particularly for protecting assets, it must be noted that it must be used in compliance with family law public order rules.

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