

**THE EFFECT OF TRUSTS  
ON THE FAMILY  
PATRIMONY AND THE  
PARTNERSHIP OF  
ACQUESTS**



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# THE EFFECT OF TRUSTS ON THE FAMILY PATRIMONY AND THE PARTNERSHIP OF ACQUESTS

A presentation  
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# PRESENTATION OUTLINE

1. Introduction;
2. Case Study: *Yared v. Karam*, 2019 SCC 62;
3. The Trust;
4. The Family Patrimony and in particular, the Family Residence;
5. The Partnership of Acquests;
6. Possible Quagmire;
7. Possible Solutions;
8. Conclusion?



## INTRODUCTION

**Why are we here  
and  
Why do we care?**



## THE “BUTTERFLY EFFECT” OF A FAMILY TRAGEDY

- Trusts and Estate Planning;
- Matrimonial law;
- Successions;

## CASE STUDY : YARED V. KARAM, 2019 SCC 62

- The Deceased and her husband (the “Husband”) were married in 1998 under the legal matrimonial regime of Lebanon at the time (Separation as to Property);
- There were four children born of their marriage (the “Children”);
- On October 11<sup>th</sup>, 2011, a Trust is formed (the “Family Trust”);
- The Husband is a co-trustee of the Family Trust along with his elderly mother;
- The Husband also holds the title of "Électeur", with additional discretionary powers;



## CASE STUDY : *YARED V. KARAM*, 2019 SCC 62

- In particular, the Husband held the following discretionary powers in the Family Trust:
  - To name and replace Beneficiaries, including *inter alia*, to name himself as a Beneficiary;
  - To pay out the capital and revenue of the Family Trust to the Beneficiaries in whatever proportions and to whomever of them at his sole discretion;
  - To alienate the property of the Family Trust;



## ASIDE RE: DANGERS OF BOILER PLATE CLAUSES

- *« (...) il ne sera pas obligé de maintenir la valeur, de faire fructifier, ni d'accroître le Capital ou tout bien de la Fiducie malgré le Code civil ou toute autre disposition des présentes et malgré la référence ci-dessous aux pouvoirs de pleine administration. »*



## ANOTHER EXAMPLE – DROIT DE LA FAMILLE -19968, 2019 QCCS 2019

« ARTICLE 11 : BÉNÉFICES PROPRES, INSAISSABLES ET PARTIELLEMENT INCESSIBLES

*Les droits d'un Bénéficiaire dans la fiducie ainsi que tout droit ou bien remis ou attribué à un Bénéficiaire, que ce soit à même ou concernant le revenu du patrimoine fiduciaire ou son capital, tout revenu provenant de tels droits ou biens, tout droit ou bien substitué à de tels droits ou biens et tout revenu provenant de droits ou biens substitués à tout droit ou bien remis (le tout appelé les « Bénéfices »), seront et demeureront la propriété propre et exclusive dudit Bénéficiaire et ils ne pourront faire partie d'aucune communauté de biens, ni société d'acquêts, ni du patrimoine familial, ni des biens familiaux nets, ni être sujets à quelque droit matrimonial (tel, le Family Law Act) que ce soit, institué par la législation de toute juridiction applicable à ce Bénéficiaire; ils ne devront pas être affectés par les obligations de tels conjoints, communauté, société d'acquêts ou droit matrimonial quelconque. » »*

## **CASE STUDY : YARED V. KARAM, 2019 SCC 62**

- The Deceased along with the Children were the initial Beneficiaries of the Family Trust;
- However, in his role as “Électeur”, the Husband had the power to name and replace Beneficiaries;
- The Deceased was aware of the Family Trust and its purpose was to protect assets from potential creditors;
- There was no original intention to circumvent the rules governing the Family Patrimony;

## CASE STUDY : YARED V. KARAM, 2019 SCC 62

- In June 2012, the Family Trust acquires a family residence for \$2,350,000.00 (the “Family Residence”);
- The Deceased, the Husband and the Children cohabited at the Family Residence until July 2014, when divorce proceedings were instituted between the Deceased and the Husband;



## CASE STUDY : *YARED C. KARAM*, 2019 SCC 62

- On August 22<sup>nd</sup>, 2014, the Deceased, who had been severely ill for several years, executed a last Will and Testament, in virtue of which:
  - She bequeathed the entirety of her Estate in equal portions to four separate Trusts, each of the Children being named as beneficiary of one of the said Trusts;
  - The Deceased appointed her brothers as liquidators of the Estate and Trustees of the four testamentary Trusts;
- On April 6<sup>th</sup>, 2015, the Deceased died following an approximate four year battle with her illness;



## **CASE STUDY : YARED C. KARAM, 2019** **SCC 62**

- The Deceased and the Husband were still married on the date of the Deceased's death;
- The Children continue to reside with the Husband at the Family Residence;



## QUESTION OF LAW

- « *In substance, the Court must decide if the value of a family residence held under a trust controlled by one of the spouses is included in the family patrimony, even in the absence of fraud or bad faith.* »

### IN OTHER WORDS:

- « *... the question before this Court is in what circumstances a family residence held under a trust can nonetheless be included in the value of the family patrimony on the basis of the « rights which confer use » within the meaning of art. 415 C.c.Q.* »

- Yared c. Karam, 2019 SCC 62, par. 2, 21;

# APPEAL

- The Superior Court's decision to include the value of the Family Residence in the Family Patrimony in Yared (Succession de), 2016 QCCS 5581 was overturned by the Court of Appeal in Karam v. Succession de Yared, 2018 QCCA 320;
- Leave for appeal to the Supreme Court of Canada was granted;
- On December 12<sup>th</sup>, 2019, the Supreme Court granted the appeal, reinstating the conclusions of the Superior Court Judgment;

## DROIT DE LA FAMILLE – 19224, 2019 QCCS 654

- Judgment rendered following Court of Appeal decision but prior to Supreme Court decision;
- Similar fact pattern to Yared v. Karam as it pertains to family patrimony property held in trust;
- Court finds way to include property in the Family Patrimony;
- This case is demonstrative of the court's general tendency to include property held in trust in the family patrimony even prior to the reversal of the Court of Appeal Judgment;



## TWO OPPOSING FORCES AT PLAY

1) The Autonomous and distinct nature the Trust's patrimony;

2) The Family Patrimony:

- Public Order “Effect of Marriage” applicable to all married couples residing in Quebec; (Droit de la famille – 1463, [1991] R.J.Q. 2514)

# THE TRUST

- **Legislative background:**

- **1260.** *A trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer.*
- **1261.** *The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right.*



# THE FAMILY PATRIMONY

- **The legislative background:**

- **414.** *Marriage entails the establishment of a family patrimony consisting of certain property of the spouses regardless of which of them holds a right of ownership in that property.*
- **415.** (1) *The family patrimony is composed of the following property owned by one or the other of the spouses: the residences of the family or the rights which confer use of them, the movable property with which they are furnished or decorated and which serves for the use of the household, the motor vehicles used for family travel and the benefits accrued during the marriage under a retirement plan (...).*

## THE PUBLIC ORDER NATURE OF THE FAMILY PATRIMONY

- **Article 391 C.c.Q.** (Chapter IV “Effects of Marriage”):
  - *“In no case may spouses derogate from the provisions of this chapter, whatever their matrimonial regime.”*
- **Article 423 (1) C.c.Q.:**
  - *“The spouses may not, by way of their marriage contract or otherwise, renounce their rights in the family patrimony.”*

## PRINCIPLES SET OUT IN DOCTRINE AND JURISPRUDENCE

- *« (...) La jurisprudence à ce sujet prévoit clairement que le patrimoine familial est d'ordre public, que l'on ne peut y renoncer que suivant les prescriptions de l'article 423 C.c.Q »*

– Marie-Claude Armstrong, J.C.S., *La fiducie en droit familial: à l'abri de qui et de quoi?*

- *“That which cannot be done directly shall not be done indirectly”*

– *Kelron Montreal inc. c. Comitini, 2012 QCCS 4710;*

## RENOUNCING TO THE FAMILY PATRIMONY

### ■ Article 423 (2) C.c.Q.:

*“A spouse may, however, from the death of the other spouse or from the judgment of divorce, separation from bed and board or nullity of marriage, renounce such rights, in whole or in part, by notarial act en minute; that spouse may also renounce them by a judicial declaration which is recorded, in the course of proceedings for divorce, separation from bed and board and nullity of marriage.”*

## PRIOR JURISPRUDENCE

- *Droit de la famille - 3511*, [2000] R.D.F. 93 (C.S.) (reasoning confirmed in Court of Appeal);
  - Court doubts monsieur's « intentions » in forming the Trust and transferring the Family Residence therein;
  - Family Residence forms part of the Family Residence;

## CAVEATS FROM JURISPRUDENCE

- *Karam v. Yared*, 2018 QCCA 320;
- *Droit de la famille* - 2285, 1995 CanLII 4580 (QC CA)
  - Trust formed in accordance with Income Tax Act - Deferred Profit Sharing Plan;
- *Droit de la famille* - 071938, 2007 QCCS 3792;
  - Value of rights conferring use offest;
- *Droit de la famille* - 111774, 2011 QCCS 3127;
  - Community of Property Regime;
- *Droit de la famille* - 0924821, 2009 QCCS 4656;
  - Alimentary Support;
  - The Husband did not have complete effective control of Trust and its property;



# INTENTION VS EFFECT

- Droit de la famille - 13681, 2013 QCCA 501, par. 29 - 31:
  - “[29] Le patrimoine ainsi créé constitue un patrimoine d’affectation sur lequel personne n’a de droit réel:

(...)

[30] Le constituant crée la fiducie et lui transfère des biens qu’il affecte à une fin particulière et le fiduciaire détient ces biens et les administre (art. 1260 C.c.Q.). Les biens formant ce patrimoine doivent être affectés à une fin permise par la loi.

[31] La constitution d’une fiducie ne doit pas avoir pour conséquence d’éviter l’application de dispositions d’ordre public telles celles relatives au patrimoine familial.”



## INTENTION VS EFFECT

- “... the fact that the spouses were pursuing a legitimate objective in organizing their affairs the way that they did is not a bar to inclusion of the residence in the partition of the family patrimony.”
  - Yared v. Karam, 2019, SCC 62, par. 52.

## RIGHTS CONFERRING USE

- “By referring to the “rights which confer use” of a family residence at art. 415 C.c.Q., the legislator intended to include in the family patrimony the type of living arrangement where spouses, without being owners in title, nonetheless are in control of the family residence.”

- Yared v. Karam, 2019 SCC 62, par. 33.

## « RIGHTS CONFERRING USE » VS « RIGHT OF USE »

- « ... it is clear that the rights which confer use referred to in art. 415 C.c.Q. are not limited to dismemberments of the right of ownership. »
- « The « rights which confer use » under art. 415 C.c.Q. are therefore not limited to rights of use within the meaning of art. 1172 C.c.Q, or other real rights listed at art. 1119 C.c.Q. It follows that family residences held in trust are not, in principle, outside the scope of art. 415 C.c.Q. »
  - *Yared v. Karam, 2019 SCC 62, par. 40, 42.*

## EFFECTIVE CONTROL

- *“What may or may not constitute a “right which confers use” within the meaning of art. 415 C.c.Q. is therefore dependent on the circumstances and will generally be determined in relation to the level of control exercised by either spouse with respect to the residence. (...) given the purpose of the family patrimony and the rationale for including the “rights which confer use” in the text of art. 415 C.c.Q., it is preferable to accord wide discretion to the trier of fact when making such a determination.”*

- *Yarad v. Karam, 2019 SCC 62, par. 37.*



## EFFECTIVE CONTROL

- “If the trial judge is satisfied, based on the evidence before him or her, that the spouses are in control of the residence, not merely by way of exercising control over the entitlement to the value of the assets but by controlling whom may benefit from the use of the property, it is open to him or her to include the value of the residence in the family patrimony based on art. 415 C.c.Q., even when such a residence was acquired directly by a trust or a corporation.”

- Yared v. Karam, 2019 SCC 62, par. 45.

## JURISPRUDENCE

- Droit de la famille – 3511, [2000] R.D.F. 93 (C.S.):
  - “Le Tribunal est d’avis que la fiducie et la donation constituent les droits qui confèrent l’usage de la résidence et que cet immeuble doit retourner dans le patrimoine familial”
  - Cites Justice Sénécal on the issue;
  - See also: Droit de la famille – 142245, 2014 QCCA 1660

## JURISPRUDENCE RE: COMPANY

- *D.L. c. L.G., 2006 QCCA 1125;*
  - Family Residence transferred to Company for tax purposes;
  - The Parties held unequal shares of the Company;
  - The Court rules that the Family Residence is to be divided equally;
  - “[22] Citant des décisions antérieures, il fait abstraction de l’actionariat de la Société et assimile la situation à celle plus courante où l’un ou l’autre des conjoints est propriétaire de la résidence familiale. Cette assimilation correspond à la réalité.”



## ARTICLE 317 C.C.Q.

- *“The juridical personality of a legal person may not be invoked against a person in good faith so as to disassemble fraud, abuse of right or contravention of a rule of public order.”*

## LIFTING THE TRUST VEIL

- The Court of Appeal specifically proscribes the notion of lifting the Trust Veil in *Karam v. Yared*, 2018 QCCA 320;
- *“... given that the analogy to art. 317 C.c.Q. is faulty, the Court should refrain from referring to the operation of these remedies [art. 415, 421, 422 C.c.Q.] as a “lifting of the trust veil”. The legal basis for considering the value of such property in an equitable partition of the family patrimony is not art. 317 C.c.Q. but rather the relevant provisions related to the family patrimony.”*
  - *Karam v. Yared*, 2019 SCC 62, par. 33

## THE VALUE OF THE RIGHTS CONFERRING USE

- The Courts tend to value the rights conferring use of a family residence to be equal to the value of the Family Residence itself when there is effective control;
  - Droit de la famille 10174, 2010 QCCS 312, par. 52;
  - D.L. v. L.G., 2006 QCCA 1125;
  - Droit de la famille - 142245, 2014 QCCA 1660 par. 13 & 14;



## PUBLIC INTEREST CONSIDERATION

- « (...) Permettre au Défendeur, en un tel cas, d'éviter l'application des règles impératives du patrimoine familial ouvrirait une immense brèche dans ce régime d'ordre public applicable à l'ensemble des couples mariés au Québec. »

- *Yared (Succession de), 2016 QCCS 5581, par 55.*



## ECONOMIC EQUITY EVEN IN THE EVENT OF DEATH

- *« Le patrimoine familial est un régime de création récente. Il vise à assurer l'équité économique des époux au moment de la rupture du mariage, qu'elle découle d'une acte naturel, la mort, ou d'une décision judiciaire. (...) L'intervention judiciaire a donc pour objet et doit avoir pour effet de restaurer et maintenir, dans des cas concrets, les principes qui sous-tendent l'institution. »*

*-Droit de la famille – 2285, 1995 CanLII 4580 (QC CA);  
(cited by opposing party – for Deferred Profit Sharing Plan)*

## THE PARTNERSHIP OF ACQUESTS

### ■ Qualification of Acquests:

#### ■ Article 449 C.c.Q.:

*“The acquests of each spouse include all property not declared to be private property by law, and, in particular,*

*(1) the proceeds of that spouse’s work during the regime;*

*(2) the fruits and income due or collected from all that spouse’s private property or acquests during the regime.”*

# THE PARTNERSHIP OF ACQUESTS

## ■ Article 450 C.c.Q.:

*“The private property of each spouse consists of*

*(1) property owned or possessed by that spouse when the regime comes into effect;*

*(2) property which devolves to that spouse during the regime by succession or gift, and the fruits and income derived from it if the testator or donor has so provided;*

*(3) property acquired by that spouse to replace private property and any insurance indemnity relating thereto;*

*(4) the rights or benefits devolved to that spouse as a subrogated holder or as a specified beneficiary under a contract or plan of retirement, other annuity or insurance of persons;*

*(5) that spouse’s clothing and personal papers, wedding ring, decorations and diplomas;*

*(6) the instruments required for that spouse’s occupation, saving compensation where applicable.”*

## THE PARTNERSHIP OF ACQUESTS

### ■ Administration of Acquests:

#### ■ Article 461 C.c.Q.:

*“Each spouse has the administration, enjoyment and free disposal of his or her private property and acquests.”*



## THE PARTNERSHIP OF ACQUESTS

- Article 462 C.c.Q.:

*“Neither spouse may, however, without the consent of the other, dispose of acquêts inter vivos by gratuitous title, with the exception of property of small value or customary presents.*

*A spouse may be authorized by the court to enter into the act alone, however, if consent cannot be obtained for any reason or if refusal is not justified in the interest of the family.”*

## DROIT DE LA FAMILLE - 19968, 2019 QCCS 2019

- Recent decision where the Superior Court where the Court makes abstraction of the trust to include property in the Partnership of Acquests;
- Ironically applies principles from the Yared Court of Appeal decision in order to include property in the Partnership of Acquests that was otherwise held in trust;
- Objective reading of trust deed demonstrates intention to circumvent public order rules regarding the Family Patrimony and Partnership of Acquests;
- Example of jurisprudence finding ways around Yared Court of Appeal decision prior to Supreme Court decision;

# THE PARTNERSHIP OF ACQUESTS

- In the event of Death:

- Article 473 C.c.Q.:

*“When the regime is dissolved by death and the surviving spouse has accepted the partition of the acquests of the deceased spouse, the heirs of the deceased spouse may accept or renounce the partition of the surviving spouse’s acquests, and, excepting preferential awards which only the surviving spouse is entitled to receive, the provisions on the dissolution and liquidation of the regime apply to them.*

*If one of the heirs accepts partition and the others renounce it, the heir who accepts may not take more than the portion of the acquests that he would have had if all had accepted.*

*Renunciation by the surviving spouse may be set up against the creditors of the deceased spouse.”*

## OTHER POSSIBLE RECOURSES AGAINST THE TRUST

- Simulation – articles 1451 & 1452 C.c.Q. – of prête-nom agreement;
  - Similar to common law notion of the bare trust;
- Sham trust possibility?

## EXECUTION AGAINST THE TRUST

### ■ Paulian Action:

- **Articles 1631 to 1636 C.c.Q.; (Specific criteria to be met):**

*“1631. A creditor who suffers injury through a juridical act made by his debtor in fraud of his rights, in particular an act by which the debtor renders or seeks to render himself insolvent, or by which, being insolvent, he grants preference to another creditor, may obtain a declaration that the act may not be set up against him.*”

## EXECUTION AGAINST THE TRUST

*1632. An onerous contract or a payment made in performance of such a contract is deemed to be made with fraudulent intent if the other contracting party or the creditor knew the debtor to be insolvent or knew that the debtor, by the juridical act, was rendering himself or was seeking to render himself insolvent.*

## EXECUTION AGAINST THE TRUST

*1633. A gratuitous contract or a payment made in performance of such a contract is deemed to be made with fraudulent intent, even if the other contracting party or the creditor was unaware of the facts, where the debtor is or becomes insolvent at the time the contract is formed or the payment is made.*

## EXECUTION AGAINST THE TRUST

*1634. The claim must be certain at the time the action is instituted, and must be liquid and exigible at the time the judgment is rendered.*

*The claim must exist prior to the juridical act which is attacked, unless that act was made for the purpose of defrauding a subsequent creditor.*



## EXECUTION AGAINST THE TRUST

*1635. The action is forfeited unless it is brought within one year from the day on which the creditor learned of the injury resulting from the act which is attacked, or, where the action is brought by a trustee in bankruptcy on behalf of all the creditors, from the date of appointment of the trustee.*

## EXECUTION AGAINST THE TRUST

*1636. Where it is declared that a juridical act may not be set up against the creditor, it may not be set up against any other creditors who were entitled to institute the action and who intervened in it to protect their rights; all may have the property forming the subject of the juridical act seized and sold and may be paid in proportion to their claims, subject to the rights of prior or hypothecary creditors.”*

## EXECUTION AGAINST THE TRUST

- Will need to implead the trust at execution stage even if the origin of the claim was between 2 persons;

## QUAGMIRE

- The Debtor Spouse may end up owing half of the value of a family residence to the other spouse, while he continues to have a fiduciary duty to the Trust;
  - Role as trustee
  - Role as appointer

## LIMITATION ON POWERS AS TRUSTEE

- Trustees are administrators of property of others and are bound to act diligently, honestly and in the best interest of the beneficiaries;

## LIMITATION ON POWER OF APPOINTMENT

- “This power of appointment is exercised as the trustee (or settlor) sees fit; however, he may not do so in a completely arbitrary manner or in a way that runs counter to purpose of stipulations of the trust deed. Furthermore, art. 1283 C.c.Q. provides that the person having the power to appoint the beneficiaries or determine their shares cannot exercise this power for his or her own benefit, which would normally preclude him from electing himself as a beneficiary. Authors are of the view that this limitation at art. 1283 C.c.Q. can however be set aside when a trustee having the power to appoint is himself a beneficiary un the trust deed.”

- Yared v. Karam, 2019 SCC 62, par. 19

# SOLUTIONS

- **Article 1294 C.c.Q.**

- *“Where a trust has ceased to meet the original intent of the settlor, particularly as a result of circumstances unknown to him or unforeseeable and which make the pursuit of the purpose of the trust impossible or too onerous, the court may, on the application of an interested person, terminate the trust; the court may also, in the case of a social trust, substitute, for the original purpose of the trust, a purpose as nearly like it as possible.*
- *Where the trust continues to meet the intent of the settlor but new measures would allow a more faithful compliance with his intent or facilitate the fulfilment of the trust, the court may amend the provisions of the constituting act.”*

- **Foreseeing this possibility in the Trust Deed;**



## CONCLUSION #1

- When advising clients on setting up a trust for whatever reason, be aware of implication as they pertain to matrimonial rights:
  - Upon divorce;
  - Upon death of one of the spouses;





## CONCLUSION #2

- Expect that the value of the Family Residence (or other family patrimony property) will be divided even if held under a trust if one of the spouses control the trust property:
  - “... the introduction of the family patrimony in Quebec family law is “consistent with a general trend in Canada to protect vulnerable spouses”. As a remedial set of rules that aims to foster economic equality between spouses, it should therefore be given a generous and liberal interpretation to favour the inclusion of property in the value to be partitioned between the spouses.

“This principle should guide our interpretation of art. 415 C.c.Q. and its application in this and similar cases, even if the record does not demonstrate that one of the spouses was in a position of economic vulnerability.”

- Yared v. Karam, 2019 SCC 62, par. 22, 23.

## CONCLUSION #3

- Spouses should sign a marriage contract and adopt the matrimonial regime of separation as to property if it is their intention to not share their acquests;

# THANK YOU

- For any questions or if anyone would like to further discuss, please send me an e-mail at [slitvack@rsslex.com](mailto:slitvack@rsslex.com) or call me at 514-393-7481. Thank you.