Trust Issues in Divorce

By K. Dean Kantaras & Erin Grant

If you fall into the eleven percent of people in the United States who hold assets in trust, and you are currently undergoing a marriage dissolution (or anticipate one in the near future), you may be wondering how the divorce will affect these trust assets. The answer, like any good attorney will tell you, is "it depends." Though trusts do serve as a shield against creditors or other claims, including those in a divorce, they are not airtight, and there are factors that the court will examine to determine whether the trust assets are eligible for division between divorcing spouses. These factors include the timing of the trust's creation, the source of the assets funding the trust, and the type of trust, among other factors.

On the issue of timing, generally, trusts created and funded before the marriage are generally considered non-marital property. However, if the trust was created and funded during the marriage, this analysis becomes more complex, particularly if the assets were acquired during the marriage or clearly belonged to both spouses.

Consequently, the source of the trust funds will always be important when examining whether a trust's assets are subject to distribution in a dissolution. While trusts funded with non-marital property, as well as trusts inherited by one party, tend to remain non-marital, trusts funded or otherwise "commingled" with marital property tend to fall under the category of marital assets subject to equitable distribution.

Further, the type of trust will also affect whether the assets are considered distributable in a dissolution proceeding. For example, revocable trusts carry the least amount of protection; because the grantor retains control over the trust and its assets, the trust and its grantor are usually considered the same entity and consequently are subject to division. This can apply even if the other spouse's name is not on the revocable trust. Conversely, assets in an irrevocable trust are much harder to include in a divorce, as the individual who placed assets into the trust is considered to have relinquished control and ownership of those assets. The assets are considered to belong to the trust and not to either spouse. However, even an irrevocable trust can later become subject to dispute if marital assets were used to fund the trust, if both spouses benefitted from the trust distributions, or if the court finds that the trust was created to shield assets from the other spouse during the dissolution.

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Finally, regardless of the type of trust, if trust distributions were used for the benefit of both spouses, such as to cover joint expenses, to open a joint bank account, or to purchase a marital home, the court may consider this when determining how assets should be divided. The court may also look to whether the trust was managed jointly to determine whether its assets are marital.

However, even if your trust remains separate when considering division of assets, it can still affect how the court determines spousal and child support obligations. If you receive regular distributions from your trust, this will be counted as part of your income and may reduce the total amount of spousal support you are eligible to receive. Additionally, distributions from a trust may be garnished to satisfy child support responsibilities.

With the protections of a trust available, if you're contemplating divorce, does this mean you should rush to put your assets in an irrevocable trust to protect them in the impending dispute? Florida law resoundingly advises otherwise. Courts may examine whether trust was created with the intent of concealing or shielding assets from a spouse during a dissolution and will look to whether the transfers were seemingly made in anticipation of or in response to a dissolution. Under the Florida Uniform Voidable Transactions Act, transfers made with the intent to hinder or defraud a spouse of marital assets are voidable, and the court may elect to void such transfers up to four years later or may adjust the amount of assets awarded to the other party to account for the value of the transferred assets.

Ultimately, Florida seeks to provide equity to parties seeking dissolution, and this persistent pursuit extends to all assets deemed marital—including trusts. Though trusts may protect assets from creditors, or may guide how wealth is used, they are not exempt from the knife of the court when it comes to dividing marital assets and should not be considered a weapon to hide or conceal desired property if a dissolution is anticipated. ❖

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