

Trusts in the context of Swiss divorce proceedings

Tina Wüstemann* and Delphine Pannatier Kessler†

Abstract

Foreign trusts are sometimes involved in Swiss divorce proceedings, which raises questions not yet determined by case law. In this article, the authors deal with the validity of transfers of marital property to trusts and possible attacks against foreign trusts based on Swiss matrimonial property law. They will also discuss how trust assets and distributions from a trust to a spouse are qualified in the context of Swiss divorce proceedings, both for Swiss matrimonial property regime purposes and with regard to post-divorce maintenance payments.

International issues in Swiss divorce proceedings therefore often arise, sometimes involving trusts.

As a result of the ratification of the Hague Trust Convention (HTC),² which became effective in Switzerland on 1 July 2007, Switzerland fully recognizes foreign trusts.³ Swiss courts do, however, not yet have much experience in dealing with trusts in a divorce context, mostly because these cases have been settled before reaching judgment. As a result, there is little guidance from case law and general principles of Swiss law must be applied.

Switzerland fully recognizes foreign trusts. Swiss courts do, however, not yet have much experience in dealing with trusts in a divorce context, mostly because these cases have been settled before reaching judgment

Introduction

Swiss law does not know the concept of trust. Yet, Switzerland is seen by many foreigners as an attractive place to live and trusts are thus often ‘imported’ by spouses relocating to Switzerland. With 47 per cent Switzerland has one of the highest divorce rates in Europe whereby almost half of nearly 20,000 divorces each year in Switzerland involve international couples.¹

This article deals with the principles applicable to trust assets in the event of a (international) divorce in Switzerland. After a brief introduction of the three types of matrimonial property regimes and related financial provisions under Swiss divorce law, the authors will deal with potential challenges to the transfer of matrimonial assets to trustees and their

*Tina Wüstemann, attorney-at-law, LL.M., Partner, Bär & Karrer AG, Brandschenkestrasse 90, CH-8027 Zurich, Switzerland. Tel: +41 58 261 50 00; Email: Tina.Wuestemann@BaerKarrer.ch

†Dr. Delphine Pannatier Kessler, attorney-at-law, LL.M., holder of the notary diploma, Associate, Bär & Karrer AG, Zurich.

1. In 2009 there were 19,321 divorce cases in Switzerland, of which 10,090 concerned Swiss spouses, 3,132 concerned spouses who were both foreigners, 2,862 marriages between a Swiss citizen and a foreign wife and 3,237 marriages between a foreigner and a Swiss wife. The average duration of marriage at the time of divorce in 2009 is 14.5 years (source: Swiss Federal Statistics Office).

2. Hague Convention on the law applicable to trusts and on their recognition, RS 0.221.371.

3. In parallel, the Swiss Taxation Conference undertook in 2007 to unify the non-uniform practice of the cantons on trust taxation issues. The Swiss Taxation Conference summarized some basic principles of trust taxation in Circular Letter Nr 30. This Circular is not formally binding but shall harmonize the cantonal tax practice in this respect. Taxation of trust structures is thus subject to detailed analysis on a case-by-case basis and a tax ruling should be obtained.

restitution (see section III). Finally, the article describes how trust assets and distributions from a trust to a spouse are qualified in the context of Swiss divorce proceedings, both from a matrimonial property law perspective as well as with regard to post-divorce maintenance payments.⁴

The three-pillar system under Swiss Divorce Law

Generally speaking, upon divorce, there are three financial issues that must be resolved between the spouses under Swiss law:⁵ (i) liquidation and division of their matrimonial property regime; (ii) sharing of the pension schemes; (iii) and post-divorce maintenance payments. While we understand that, unlike the three-pillar system in Switzerland, English law considers all financial issues together and aims towards a global 'fair and equitable distribution', Swiss divorce law addresses these questions separately, whereby the result of each of these points may be taken into account in the calculation and lead to adjustments if fairness commands.

Swiss Matrimonial Property Regimes

Swiss matrimonial property rights deal with the effects of marriage on the spouse's rights to their assets in case of divorce or death of one of the spouses.⁶ Swiss matrimonial property law also includes rules governing the spouses' power to dispose or to administer their marital assets and their liability for debts, etc.⁷ Once the matrimonial property regime is

dissolved, which occurs namely when one of the spouses dies or upon divorce,⁸ the matrimonial property regime must be liquidated, ie the spouses' financial situation must be disentangled by division of the assets between the spouses and eventually monetary compensation must be paid, pursuant to the rules of the applicable matrimonial property regime. There are three main types of matrimonial property regimes in Switzerland: the participation in acquisitions, the community of property regime and the separation of property regime.⁹

There are three main types of matrimonial property regimes in Switzerland: the participation in acquisitions, the community of property regime and the separation of property regime

Participation in acquisitions (article 196ff, Civil Code CC)

Absent a specific choice of a matrimonial property regime by the spouses by way of marriage contract in the form of a public deed,¹⁰ the ordinary regime of participation in acquisitions applies. Under this regime, each spouse participates in half of the other spouse's *acquisitions*, ie mainly income from work acquired during marriage and revenues from *own property*,¹¹ as well as any surrogate thereof. Such participation is reflected in a monetary claim by a spouse against the other upon divorce or death of a spouse. By way of marriage contract, the spouses can deviate from this general rule. Hence, unlike in other jurisdictions such as England,¹² pre-marital assets of a spouse, inherited wealth or wealth derived from

4. See also Tina Wüstemann and Delphine Pannatier Kessler, 'Nuptial Agreements and Trusts in the Context of Divorce in Switzerland, Newsletter IBA Legal Division' (2010) 3 Family Law Committee 18–21.

5. We will hereunder assume that Swiss law applies to the divorce, the general effects of marriage and the matrimonial property regime (see art 46 ff, 51 ff and 59 ff of the Private International Law Act (PILA)).

6. See Henri Deschenaux, Paul-Henri Steinauer and Margareta Baddeley, *Les effets du mariage* (2nd edn, Berne 2009) s 751, 357.

7. *ibid* s 753, 357–58.

8. Dissolution of the matrimonial property regime can also be ordered by the court or can be agreed upon by the spouses in a notarized marriage contract.

9. See for a detailed overview Philippe Pulfer and Azadeh Djalili, 'Acquiring Domicile in Switzerland: Consequences of the Matrimonial Property Regime' (2011) 17(4) *Trusts & Trustees* 323–27.

10. Tina Wüstemann and Delphine Pannatier Kessler (n 4) 20.

11. That is the assets which belonged to the spouses at the beginning of the marriage or were inherited and/or received by gratuitous transfer; see arts 197 and 198 CC for the characterization of *own assets* and *acquisitions* in the participation in acquisitions regime.

12. We understand that, for example, England has no concept of matrimonial property regime, and therefore, all assets however derived are potentially vulnerable on divorce (as there is no concept of separate or marital property). However, further to recent case law among which the *Radmacher v Granatino* case, there seems to be a tendency in English divorce law to treat inherited wealth differently from earned wealth and protect it from division.

gifts received during marriage will not be subject to division or to compensation in case of divorce or death.

Community of property (article 221ff, Civil Code)

Under the regime of community of property, which necessitates a notarized marriage contract and which largely allows the spouses to design their marital property regime as they wish, most of the spouses' assets belong to the community, whether earned, gifted or inherited, except for personal belongings.¹³ Each spouse owns jointly all the community assets and participates in half of the community in case of death or divorce.¹⁴

Separation of property (article 247ff, Civil Code)

Under the regime of separation of property, each spouse administers and enjoys the benefits of his or her own property alone and has the power of disposal over it. There is no *acquisition* or community assets that give rise to a monetary compensation claim or that must be divided upon death or divorce. Strictly speaking, there is no matrimonial property regime because the spouses' assets remain unaffected by marriage.

Sharing of the pension schemes

Swiss divorce law sets forth that the savings accrued in the spouses' pension fund during marriage must be divided between the spouses upon divorce.¹⁵ The same applies to the basic domestic pension plan's

premiums, which have to be split in equal shares between the spouses.¹⁶ A Swiss court is not bound by an advance waiver of the spouses by means of a marriage contract as regards the sharing in their pension schemes, it being noted that Swiss law governs this issue regardless whether the spouses have opted for a foreign matrimonial property law in their marriage contract.

Swiss divorce law sets forth that the savings accrued in the spouses' pension fund during marriage must be divided between the spouses upon divorce

Maintenance between spouses

Post-divorce maintenance between spouses is only due if a spouse cannot reasonably be expected to provide for his or her own maintenance.¹⁷ The jurisprudence on maintenance is restrictive compared to the English approach. The underlying principle in Swiss divorce law as regards maintenance payments is that the spouses must after the break-up of the marriage provide for themselves (so-called clean break). Maintenance is only due if it is impossible or unacceptable under the circumstances for the other spouse to provide for his or her needs.¹⁸

Post-divorce maintenance between spouses is only due if a spouse cannot reasonably be expected to provide for his or her own maintenance

13. There are other exceptions, for instance for gifts by third parties who explicitly ordered that such gifts be excluded from the community (art 225 para 1 CC). Moreover, the definition of community assets and own assets depends from the definition agreed upon in the marriage contract. The above is a generalization of the legal position.

14. However, in case of divorce, some type of assets, for instance assets already owned before marriage, inherited or gifted assets, are retransferred to the relevant spouse (see art 242 para 1 CC).

15. Art 122–24 CC, art 141–42 CC; there may however be exceptions to this rule.

16. Federal law on old age and survivors' insurance (LAVS), art 29quinquies para 3 lit c LAVS.

17. Art 125 CC:

If a spouse cannot reasonably be expected to provide for his or her own maintenance, including an appropriate level of retirement provision, the other spouse must pay a suitable contribution.

In deciding whether such a maintenance contribution is to be made and, if so, in what amount and for how long, the following factors in particular must be considered: 1. The division of tasks during the marriage; 2. The duration of the marriage; 3. The standard of living during marriage; 4. The age and the health of the spouses; 5. The income and assets of the spouses; 6. The extent and duration of child care still required of the spouses; 7. The vocational training and career prospects of the spouses and the likely cost of reintegration into working life; 8. Expectancy of federal old age and survivor's insurance benefits and of occupational or other private or state pensions, including the expected proceeds of any division of withdrawal benefits (...).

18. Leading case of Supreme Federal Court BGE 115 II 6; BGE 127 III 289.

The decisive criterion for the granting of post-divorce maintenance payments under Swiss law is whether the marriage had a significant impact on a spouse's life as regards the capacity to provide for oneself and that spouse's expectation to be provided for as a result of the marriage.¹⁹ According to Swiss case law, a marriage that lasted less than 10 years, is in principle considered as not having had a significant impact on the spouse's life unless the couple has children. According to Swiss case law, if a spouse is over 45 years old at the time of divorce after a long marriage, it is presumed that taking up employment again at that age is no longer reasonable; there have however also been other cases where a spouse was expected to take up work again after 45.²⁰

As regards the amount of alimony to be paid, the wealth of the respondent spouse is usually not decisive but rather the claiming spouse's needs, the income at disposal and to some extent the standard of living of the spouses during the marriage. As a principle, except for very long marriages exceeding 25–30 years, maintenance is only due for a limited transitional period to enable the other spouse to adjust to separate life or until the children reach the age of 16.²¹

In connection with trusts of particular relevance are the income and assets of the spouses and their standard of living. This will be further developed below.

Validity of transfer of matrimonial assets to trusts

Where a spouse is a settlor or beneficiary of a trust, the question arises whether the trust assets should be taken into consideration in the liquidation of

the matrimonial property regime upon divorce in Switzerland. The decisive question in that regard is how a spouse may validly transfer assets into a trust.

From the perspective of Swiss law, once matrimonial assets have been properly transferred to a trust, they left the matrimonial property regime and in principle do not have to be taken into account anymore in case of divorce because Switzerland recognizes in application of article 11 HTC the fact that the trust assets are held by the trustee as a separate entity and that these assets therefore do no longer belong to the settlor/beneficiary spouse. We will, however, see in the next section that it is nevertheless possible under Swiss law to take these trust assets to some extent in consideration. However, before, it has to be assessed whether the assets have been validly transferred to the trustee under Swiss matrimonial law in the first instance. The issue of the validity of a transfer of assets to a trustee does not fall within the scope of the Hague Trusts Convention because article 4 HTC excludes these matters. Therefore, this question is governed by the law designated by the conflict of law rules of the respective forum. We will hereinafter only address the limitations under Swiss matrimonial property law to transfer assets to a trust but not deal with other issues that may be equally relevant to ensure a valid transfer, such as the capacity of the settlor, the formal requirements or the validity of the underlying contract for instance.

Once matrimonial assets have been properly transferred to a trust, they left the matrimonial property regime and in principle do not have to be taken into account anymore in case of divorce

19. BGE 135 III 59, see also for further details Heinz Hausheer and Annette Spycher, *Handbuch des Unterhaltsrechts* (Berne 2010) N 05.16.

20. *ibid* s 02.04, 44–45.

21. In particular, the following aspects have to be taken into consideration to assess to which extent alimony payments are due: the duties of the spouses during the marriage, the duration of the marriage, the standard of living during the marriage, the spouse's age and state of health, the spouses' income and assets, the scope and duration of childcare to be provided by a spouse, the spouses' professional qualifications and their employment prospects as well as the probable expense of reintegration into business life (cf art 125 (22) CC; BGE 5C.129/2001, cons 3a; Praxkomm/Ingeborg Schwenzer, art 125 ZGB N 4.).

Matrimonial home

The first limitation to the transfer in trust of matrimonial assets can be found in article 169 CC, which sets forth that

a spouse may terminate a tenancy agreement, alienate the matrimonial home or limit the rights in respect of the matrimonial home by other transactions only with the express consent of the other.

This rule is applicable in all Swiss matrimonial property regimes and results in the transfer of the matrimonial home to a trustee without the other spouse's consent as not being valid.²² The judge's approval can replace the spouse's consent if withheld without good cause. However, for Swiss real estate, in practice, a transfer into a trust without authorization of the other spouse or the judge should not occur because the Land Registry will not allow such transaction.²³ Hence, a spouse can only validly transfer the matrimonial home to a trust with the express consent of the other spouse or with the judge's approval.

Provisional orders restricting a spouse's power to dispose

When the relationship between the spouses is strained, one spouse, usually the financially strong one, may be tempted to take measures in order to protect his/her wealth from matrimonial claims. These may include the transfer of assets to offshore trusts, out of the realm of the Swiss divorce judge. To prevent this, article 178 paragraph 1 CC provides that

to the extent required to ensure the family's financial security or fulfillment of a financial obligation arising

from the matrimonial union, at the request of one spouse the court may make the power to dispose of certain assets conditional on its consent.

Protective measures can be added to block any transfer according to article 178 paragraph 2 and 3 CC. This type of provisional order may prove to be efficient to prevent a spouse from transferring matrimonial assets to a trustee.²⁴ A transfer in trust in violation of this type of order would not be valid under Swiss law.

Restrictions under the matrimonial property regime of participation in acquisitions

There are also specific matrimonial property regime rules preventing transfers to trusts. In the most common regime of the participation in acquisitions, article 201 paragraph 2 CC sets forth that

if an asset is co-owned by both spouses, neither spouse may dispose of his or her share in it without the other's consent, unless otherwise agreed.²⁵

Hence, a spouse cannot transfer his share in co-owned assets without the other spouse's consent and of course cannot transfer the other spouse's share, not being their owner.²⁶ One may argue that it is not common for spouses to co-own assets in practice; however, there is a presumption in Swiss law that if no proof of a spouse's sole ownership over an asset can be adduced, the object is presumed to be co-owned by the spouses (article 200 paragraph 2 CC).²⁷ As an example, if the spouses have in their home art works or if they both have access to a safe containing valuables and none of them can prove his/her sole ownership otherwise,

22. For more details, see also Margareta Baddeley, 'Vermögensübertragungen an Trusts und schweizerisches Eherecht' (Vol. 2/ 2011) FamPra 309.

23. Unless the matrimonial home is held through a company, the shares of which are transferred to a trustee. Such transfer *per se* is not valid based on art 169 CC but the Land Registry will not control the transaction which occurs out of its scope of control.

24. For more details, see Margareta Baddeley (n 22) 309–10; Julien Perrin, 'Trusts et droit matrimonial suisse' (Vol. 2/2009) FamPra 329–31.

25. Co-ownership means that each spouse has a definite share in the property and may freely dispose over such share. However, the rule of art 201 para 2 CC is a *lex specialis* which restricts this power of disposal.

26. Henri Deschenaux, Paul-Henri Steinauer and Margareta Baddeley (n 6) s 1076–77, 511; see also Julien Perrin (n 24) 326.

27. For more details, see Delphine Pannatier Kessler, 'Trusts and Matrimonial Law – Challenges Against the Trust Assets by Deprived Spouses' (2011) Der Schweizer Treuhänder (Vol. 3/2011) 169.

they will be deemed as co-owners based on this presumption.

On the contrary, assets solely owned by a spouse can be freely transferred to a trustee because

each spouse administers and enjoys the benefits of his or her own property and has power of disposal over it.²⁸

As a result, in the matrimonial property regime of the participation in acquisitions, a spouse can validly transfer to a trustee assets over which he/she is sole owner without the other spouse's consent. For co-owned assets or for jointly owned assets, consent is required. In the absence of such consent, it might be argued that the transferee, here the trustee, is a *bona fide* acquirer and is protected in his acquisition of the other spouse's share in the property.²⁹ This kind of argument, which could also be made with regard to the other types of Swiss matrimonial property regimes, is in our opinion not likely to prevail under Swiss law because the transferor's knowledge should be construed as the trustee's knowledge, hence excluding good faith.³⁰

Transfer of assets in violation of the above-mentioned rules are invalid and entitle the deprived owner to vindicate them against the trustee (see hereunder). Moreover, even in cases where the transfer is valid, there may be other means to nevertheless take into consideration or claw back the trust assets (see hereunder).

Restrictions in the regime of community of property

In the community of property regime, the community assets are jointly owned by the spouses

except within the limits of everyday management, the spouses may incur commitments on behalf of the joint property and dispose thereof only jointly or individually with the other's consent.³¹

If a spouse wishes to transfer community assets to a trust, he or she will either need to act jointly or to obtain the other spouse's consent because such transfer cannot be seen as an everyday management act.³² For individual property, ie assets that belong to one spouse individually and hence do not belong to the community, there is no such restriction.³³ As a result, the existence of a community of property regime strictly limits the room of manoeuvre for unilateral transfer of property into trusts and protects the other spouse.³⁴

Restrictions in the regime of separation of property

In the separation of property regime, as seen above, each spouse is free to dispose of his/her assets.³⁵ Hence, he/she can also freely transfer them to a trustee. There is no specific matrimonial limitation to such transfer.³⁶ However, in the relatively frequent case where a spouse holds assets in co-ownership with

28. Art 201 para 1 CC.

29. Swiss law does not in principle require consideration to have been paid. There are however doctrinal opinions that hold that *bona fide* donees, like in English law, cannot be protected in their acquisition; for a comparison between Swiss and trust rules on *bona fide* protection, see Delphine Pannatier Kessler, 'Le droit de suite et sa reconnaissance selon la Convention de La Haye sur les trusts' Geneva 2011 ch VI, 205ff.

30. This is supported also by the KYC rules imposed on trustees. In addition, based on the doctrinal position mentioned in FN 28 that considers invalid a donation made from assets not belonging to the donor, no *bona fide* acquisition can occur because the *causa* is not valid, on this see Delphine Pannatier Kessler (n 29) 213.

31. Art 228 para 1 CC.

32. Also Julien Perrin (n 24) 327; Henri Deschenaux, Paul-Henri Steinauer and Margareta Baddeley (n 6) § 1506a, 700.

33. See art 232 para 1 CC that sets forth that 'each spouse administers and disposes of his or her individual property within the limits of the law'.

34. Margareta Baddeley (n 22) 311.

35. Art 247 CC.

36. Except that resulting from art 169 and 178 CC, which are general matrimonial rules applicable in all types of matrimonial property regimes; Baddeley (n 22) 311.

his/her spouse despite their separation of property regime, he/she alone will only be able to transfer his/her share in the co-owned assets, not that of the other spouse.

Attacks against trust assets based on Swiss matrimonial property law

Vindication

In the event that the transfer of matrimonial assets by one spouse without the other spouse's consent infringed Swiss matrimonial property rules, such transfer is not valid under Swiss law. This issue does not fall under the scope of the Hague Trusts Convention because it is a preliminary issue pursuant to article 4 HTC and is thus governed by the law applicable to the matrimonial property regime. Hence, the deprived spouse, as the owner of the matrimonial assets invalidly transferred, can pursue a vindication claim *in rem* based on article 641 paragraph 2 CC against the trustee for his/her part of ownership in the assets.³⁷

However, against offshore trustees in jurisdictions which enacted *anti-forced heirship* and the like provisions, such claims are unlikely to be successful, unless the vindicated assets are located in the realm of the Swiss judge, eg in Switzerland or in Lugano Convention jurisdictions.³⁸

Reunion to acquisitions and claw back

Only in the regime of the participation in acquisitions, even if each spouse is entitled to dispose alone of his or her assets in sole ownership during

marriage, there are specific provisions that allow the value of assets characterized as *acquisitions* to be nonetheless taken into account in the matrimonial property regime. The Hague Trusts Convention is not an obstacle to the assertion of these claims because these rules are mandatory rules, which have priority based on article 15 (b) HTC. According to article 208 CC,

the following are added to the gains accrued during marriage: 1. the value of dispositions made without consideration by one spouse without the other's consent during the five years preceding the dissolution of the matrimonial property regime, save for the usual occasional gifts; 2. the value of assets disposed of by one spouse during the matrimonial property regime with the intention of diminishing the other's share.³⁹

The assets are notionally added for calculation purposes to the regime and hence increase the other spouse's monetary claim.⁴⁰ To the extent the remaining assets of a spouse are not sufficient to compensate the other spouse in case of divorce, the entitled spouse has a direct claim against the third party according to article 220 CC.⁴¹

If a spouse transferred assets financed by income earned from work during marriage, ie characterized as *acquisition*, the value of these trust assets could be taken into account for calculation purposes, provided that the other requirements of article 208 CC are met. As a result, the deprived spouse's monetary claim against the settlor spouse would increase accordingly.⁴² If this monetary claim cannot be satisfied, the deprived spouse may claw back the trust assets against the trustee. Such litigation would however in

37. Unless the trustee could make a defence based on his bona fide acquisition, which should in practice hardly be admitted, see above s III 3. For more details on the vindication claim, see Delphine Pannatier Kessler (n 27) 169.

38. Delphine Pannatier Kessler (n 27) 170.

39. See also Heinz Hausheer and Regina Aebi-Müller, *Basler Kommentar ZGB I* (3rd edn, Basle 2006) ad art 208, N 1ff; Henri Deschenaux, Paul-Henri Steinauer and Margareta Baddeley (n 26) s 1316ff, 603.

40. Heinz Hausheer and Regina Aebi-Müller *ibid* N 8; Deschenaux, Steinauer and Baddeley (n 26) s 1313, 602.

41. Art 220 para 1 CC:

If the assets of the debtor or his or her estate are insufficient to cover the participation claim on division of the property, the entitled spouse or his or her heirs may demand from third-party beneficiaries the return of such dispositions as are to be added to the accrued gains up to the amount of the shortfall.

42. A similar reasoning applies when a spouse validly transfers assets to a trust, to the value of which the other spouse also contributed. In such case, the monetary claim of the other spouse takes into account an eventual increase in value (art 206 para 2 CC and art 209 para 3 CC), on this see Margareta Baddeley (n 22) 317–18.

principle have to be brought at the trustee's seat.⁴³ Assuming that it is in an offshore jurisdiction, the offshore conflict of laws rules will in many cases prevent Swiss matrimonial law to apply before the offshore jurisdiction or by preventing the enforcement of a Swiss judgment. The claimant's situation would be more favourable if the trust assets were to be located in Switzerland, where jurisdiction based on articles 3 or 4 of the Private International Law Act (PILA) could be obtained.⁴⁴

Inclusion of trust assets in Swiss divorce

In the regime of participation in acquisitions and of community of property, the regimes must be liquidated upon divorce. Such liquidation means that the spouses' assets must be completely disentangled. This is achieved as follows: each spouse takes back and if necessary vindicates the assets of which he/she is the owner,⁴⁵ eventual debts between spouses are settled,⁴⁶ the assets belonging to the community are divided between the spouses,⁴⁷ compensatory claims between spouses are calculated and settled.⁴⁸

In the event that a spouse invalidly transferred assets to a trust, the Swiss judge could take these assets into account in the liquidation as if they still formed part of the matrimonial property regime and could consider that the settlor spouse notionally owns such assets. To re-establish fairness, the judge could then order the settlor spouse to retransfer to the deprived spouse the part of the trust assets that has been invalidly transferred and if the settlor fails to do so, for instance alleging that he/she does not have any control over the trust assets, this claim could be transformed into an additional monetary claim against the

settlor spouse equivalent to the value of the trust assets he or the trustee failed to retransfer. Of course, if the settlor does not have sufficient assets left in his direct ownership to cover the monetary claim, his insolvency will prevent the satisfaction of the other spouse's claims.⁴⁹

For lack of a statutory provision, the Swiss judge does not have the power to vary the trust instrument. He would, however, have the power to make an order against the trustee to retransfer trust assets based on a *rei vindicatio*, assuming that such transfer of property was not valid from the perspective of Swiss law; the enforcement thereof may however prove difficult offshore. Moreover, the Swiss judge is limited in his discretion to make property adjustment orders. As a matter of law, he/she cannot decide to redistribute assets between spouses, unless these are co-owned and one spouse can demonstrate a predominant interest to obtain sole ownership.⁵⁰ Nevertheless, in abusive cases where trusts are interposed in order to deprive the other spouse, in particular when offshore *anti-forced heirship* rules and the like are used to prevent any attack against the trust, the authors are of the view that the Swiss judge should have more discretion⁵¹ and be able to attribute to the deprived spouse's assets in the settlor's sole ownership to re-establish fairness in a similar way as English property adjustment orders.

Characterization of trust distributions for matrimonial property regime purposes

After having addressed the issue of how to deal with trust assets upon divorce, we would like to briefly

43. Heinz Hausheer and Regina Aebi-Müller (n 39) ad art 220, N 16; Henri Deschenaux, Paul-Henri Steinauer and Margareta Baddeley (n 26) s 1405, 646.

44. For more details on these questions, see Delphine Pannatier Kessler (n 27) 169–70; Julien Perrin (n 24) 333–35.

45. Art 205 para 1 CC.

46. *ibid* para 3 CC.

47. Art 241–46 CC.

48. Art 206, 209 CC and 215 CC; art 238–39 CC.

49. Claims based on fraudulent conveyance rules (so-called 'Pauliana' art 286–88 of the Debt Collection and Bankruptcy Act) could be brought to claw back the assets validly transferred to the trustee but enforcement offshore of such claims may be difficult depending on the cases.

50. Art 205 para 2 CC, art 251 CC, see also art 244–246 CC.

51. By an extensive interpretation of art 205 para 2 CC for instance; for a more detailed analysis, see Delphine Pannatier Kessler (n 27) 170–71.

discuss the question of how to characterize for matrimonial property regime purposes trust distributions that were made to a spouse during marriage.

As a matter of principle, we are of the view that trust distributions should generally be characterized in the same way as *inter vivos* gifts provided the trust has been settled before marriage by one of the spouses or at anytime by a third party. Under the regime of participation in acquisitions, trust distributions would be *own assets* based on article 198 ¶ 2 CC; in the community of property regime, they would in principle belong to the community according to article 222 paragraph 1 CC;⁵² and in the separation of property regime, they would belong to the spouse who received them, without giving raise to any claim from the other spouse (article 247 CC).

Trust distributions should generally be characterized in the same way as inter vivos gifts provided the trust has been settled before marriage by one of the spouses or at anytime by a third party

If, however, the trust has been settled by a spouse during marriage, in application of the principle of patrimonial subrogation, trust distributions should be notionally characterized in the same fashion as the assets were characterized when they formed part of the matrimonial property regime, unless agreed otherwise by means of a notarized marriage contract. For instance, if the trust has been settled with *acquisitions*, then the trust distributions must also be characterized as such and give raise to a monetary claim of the other spouse provided that the trust distributions are still in the beneficiary's ownership at the time of dissolution of the matrimonial property regime. A differentiated treatment for trust income accrued during marriage and distributed may have to be

made depending on the matrimonial property regime applicable.⁵³

Trusts and maintenance

With regard to maintenance, Swiss law distinguishes between revenues and capital: while all the revenues of the spouses (including that of inherited or gifted assets) must be taken into account for the calculation of post-divorce maintenance,⁵⁴ the substance of the assets in the spouses' ownership must not be undermined, ie one cannot require a spouse to sell his/her assets, except in specific cases.⁵⁵ Thus, assets held in trust may in principle not be taken into account for the calculation of post-divorce maintenance payments under Swiss law because they are not owned by the spouses and as they would not be taken into account according to Swiss divorce law even if they were in the spouse's direct ownership.

With regard to maintenance, Swiss law distinguishes between revenues and capital

The legal position is different in connection with trust distributions. Their characterization shall be determined in a differentiated way depending on the type of trust. Assuming that a spouse has a fixed interest in a trust, such trust distributions should be taken into consideration as income, like any other revenue, in analogy to a life annuity or a usufruct.⁵⁶ If the amount of the distributions varied along the years, an average during the last three to five years would have to be taken into account.⁵⁷

In the event that a spouse is beneficiary of a discretionary trust, over which he/she neither has any entitlement nor control, trust distributions should be characterized for civil law purposes as discretionary gifts made by a third party, ie for which there is no

52. This however depends on the type of community agreed upon and whether the trustee expressly declared that the distribution should not belong to the community pursuant to art 225 para 1 CC.

53. For more details on the issue of characterization of trusts distributions for matrimonial property regime purpose, see Delphine Pannatier Kessler (n 27) 62–65.

54. Heinz Hausheer and Annette Spycher (n 19) s 01.40, 19; Urs Gloor and Annette Spycher (n 39) ad art 125, N 9.

55. Heinz Hausheer and Annette Spycher *ibid* s 01.75, 35.

56. *ibid* s 01.48, 23; Julien Perrin (n 24) 336.

57. Heinz Hausheer and Annette Spycher (n 19) s 01.34, 16.

guarantee that they will be recurrent. As a result, discretionary trust distributions should in the authors' opinion not be taken into account as income for maintenance purposes.⁵⁸ However, should a spouse effectively obtain an important distribution, a modification of the maintenance judgment may be requested provided that the increase of maintenance is already ordered in such eventual case in the divorce judgment.⁵⁹ However, even with a discretionary trust, there may still be exceptional cases where trust distributions can be considered as income. Should the judge be under the impression that the spouse has control over the trust assets and can influence distributions, he may consider in his/her discretion that the average of the last five years' distributions will likely be distributed again in the future and, thus, take them into consideration as future revenues in the maintenance calculation.^{60,61}

Conclusion

The interface between offshore trusts and divorce in Switzerland raises many interesting issues. Swiss

divorce and matrimonial property law include various rules which, even though they are not tailor-made to deal with trusts, are able to provide solutions by applying them by analogy. According thereto, trust assets may to some extent be taken into consideration while dissolving the matrimonial property regime upon divorce and trust distributions to a spouse can be qualified for matrimonial property regime purposes. Finally, under Swiss law, trust distributions but not trust assets can be taken into account for the calculation of post-divorce maintenance payments. Nevertheless, faced with offshore trust jurisdictions which do not cooperate in the enforcement of foreign judgments involving matrimonial claims, spouses' claims deriving from Swiss civil law may not always be enforced. As long as enforcement will remain difficult offshore, there will be a gap between reality and wishful thinking.

Swiss divorce and matrimonial property law include various rules which, even though they are not tailor-made to deal with trusts, are able to provide solutions by applying them by analogy

58. *ibid* s 01.44, 22; also Julien Perrin (n 24) 336.

59. Art 126 para 3 CC; otherwise, there are strict restrictions for a maintenance increase order, see art 129 para 3 CC.

60. See also Margareta Baddeley (n 22) 315–16; Julien Perrin (n 24) 336.

61. For more details on this, see for more details, Delphine Pannatier Kessler (n 27) 65.