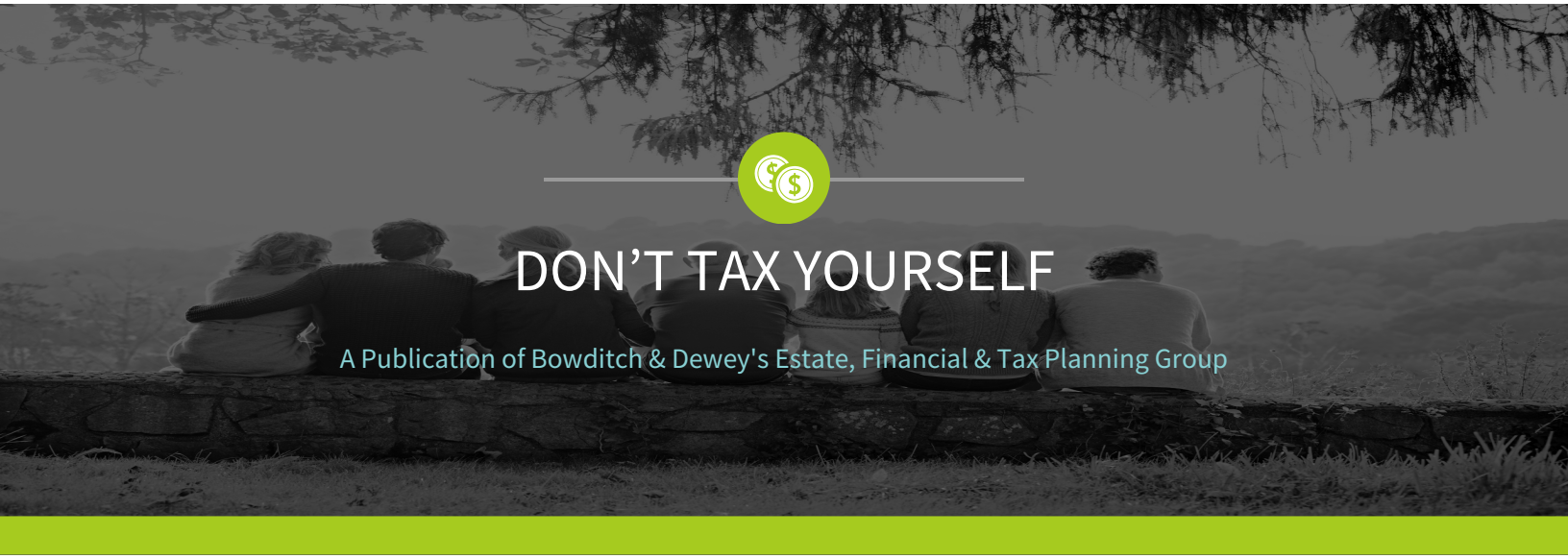

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Will Your Trust Assets Be Protected If Your Child Gets Divorced?

BY KATHERINE R. DORVAL • NOVEMBER 14, 2019

Trusts are an attractive estate planning tool for a variety of reasons. Although potential estate tax savings is often a motivating force for couples thinking about establishing a trust, they also want to be assured that their hard-earned assets will be protected in trust and preserved for the benefit of their children. Specifically, they want to know how to protect their assets from a child's divorcing spouse.

The question has historically turned on whether a child's interest in a trust is a mere expectancy or a present, enforceable right. Although case law has varied greatly depending on the circumstances of each trust, Massachusetts courts have held in the past that interests in discretionary trusts (i.e., where a disinterested Trustee has absolute discretion to make distributions) would not be included in the marital estate under the relevant Massachusetts statute, because such interests were determined to be too speculative. In such cases, there was no guarantee that a child/beneficiary would ever receive a distribution of trust assets. It would be inequitable to include in the marital estate trust assets which a child/beneficiary may never receive; therefore, instead of including such assets in the marital estate and subjecting them to equitable division, the court generally considered such assets as "opportunity of each [spouse] for future acquisition of capital assets and income." Pfannenstiehl v. Pfannenstiehl, 475 Mass. 105, 112 (2016), quoting Williams v. Massa, 431 Mass. 619, 629 (2000).

The Appeals Court issued a troublesome decision this year, wherein it held that all the assets of a discretionary trust share for the benefit of the wife ($1.6 million in value) should be included in the marital estate, regardless of whether a disinterested trustee had complete discretion to make distributions to the wife (see Levitan vs. Rosen, No. 18-P-847 (Mass.App. 2019)). In this case, the wife did have a fixed right to some of the trust property, including a right to withdraw 5 percent of the trust property each year (which she had a history of exercising), and her current, rent-free occupancy of a trust-owned house, which was valued at $645,000. She did not, however, have an absolute right to a distribution of the remainder of the trust property, but the Court did not find the Trustee's absolute discretion over distributions determinative.

Instead, the Court considered many other factors in making its decision, including the settlor/parent's primary intent,

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the Trustee's history of making distributions to the wife, whether the class of beneficiaries was closed and whether the wife was the sole beneficiary of her trust share. The Court further held that the trust assets must be assigned to the wife in the divorce and could not be assigned to the divorcing husband due to the inclusion of a "spendthrift" provision in the trust prohibiting the distributions to a beneficiary's creditors and other third parties (including divorcing spouses).

In the end, trust assets will ultimately be protected from the divorcing husband because of the spendthrift provision; however, the wife will be attributed assets in the divorce she may never actually receive, and the husband may receive a larger share of joint marital assets that he would otherwise be entitled.

This case is a warning that purely discretionary trusts for the benefit of a divorcing spouse established by a parent will not automatically be excluded from marital property in a divorce action. The Levitan decision highlights the importance of keeping your trusts updated to reflect the most recent case-law. Otherwise, your testamentary intent could be frustrated.

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