



SUPREME COURT OF CANADA

CITATION: Yared v. Karam, 2019 SCC 62

APPEAL HEARD: March 19, 2019

JUDGMENT RENDERED: December 12, 2019

DOCKET: 38089

BETWEEN:

Ramy Yared and Rody Yared
Appellants

and

Roger Karam
Respondent

CORAM: Wagner C.J. and Abella, Karakatsanis, Côté, Brown, Rowe and Martin JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 72)

Rowe J. (Wagner C.J. and Abella, Brown and Martin JJ.
concurring)

DISSENTING REASONS:
(paras. 73 to 142)

Côté J. (Karakatsanis J. concurring)

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YARED v. KARAM

**Ramy Yared and
Rody Yared**

Appellants

v.

Roger Karam

Respondent

Indexed as: Yared v. Karam

2019 SCC 62

File No.: 38089.

2019: March 19; 2019: December 12.

Present: Wagner C.J. and Abella, Karakatsanis, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Family law — Family patrimony — Trusts — Partition of family
patrimony — Family residence held under trust — Whether residence of family held
in trust or rights which confer use of it included in family patrimony — Civil Code of
Québec, art. 415.*

In 2011, K set up a trust to protect his family's assets for the benefit of his and his wife T's four children. In 2012, the trust acquired a residence with funds transferred by the spouses to the trust patrimony and the family moved in. The house was a residence of the family within the meaning of art. 415 *C.C.Q.*, which sets out that the family patrimony includes the residences of the family or the rights which confer use of them. T filed for divorce in 2014 and passed away in 2015. The liquidators of her succession filed for a declaration that the value of the residence held by the trust should be included in the division of the family patrimony, half of which would therefore go to the estate of T. The trial judge decided that the value of the residence ought to be included in the family patrimony despite the fact that it was held under a trust and not owned directly by one of the spouses. The Court of Appeal allowed K's appeal and declared that no value from the residence ought to be included in the family patrimony.

Held (Karakatsanis and Côté JJ. dissenting): The appeal should be allowed.

Per Wagner C.J. and Abella, Brown, **Rowe** and Martin JJ.: Family residences held in trust are not, in principle, outside the scope of the composition of the family patrimony set out at art. 415 *C.C.Q.* 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 arrangements where spouses, without being owners in title, nonetheless are in control of the family residence. Wide discretion

should be accorded to the trier of fact when making the determination of what may or may not constitute a right which confers use. In this case, absent an overriding and palpable error in the trial judge's determination that K held "rights which confer use" within the meaning of art. 415 *C.C.Q.*, it was not open to the Court of Appeal to overturn his decision on appeal. His decision should be restored.

When applying art. 415 *C.C.Q.* to a family residence not directly owned by the spouses, the question is whether the record supports a finding of rights which confer use of the residence. What may or may not constitute a right which confers use within the meaning of art. 415 *C.C.Q.* is 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. Simple occupation of a property not owned by the spouses will not automatically give rise to "rights which confer use" within the meaning of art. 415 *C.C.Q.* However, these rights are 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.* 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 residence was acquired directly by a trust or a corporation. Prior ownership and occupation of a family residence can be relevant to show that the spouses hold a right which confers use

within the meaning of art. 415 *C.C.Q.*; however, it is not, as a matter of law, a necessary condition.

When the constitution of a trust conflicts with the operation of the family patrimony, a court should resolve the matter by relying on the rules pertaining to both of these institutions rather than by lifting the trust veil by analogy with art. 317 *C.C.Q.* In Quebec law, trusts are not legal persons endowed with juridical personality. Contrary to a corporation, there is in the case of a trust no veil to lift nor any mastermind hiding behind a distinct juridical personality. In the case of a family residence, issues arising from indirect ownership or de facto control of the property can be resolved with the notion of “rights which confer use” set out in art. 415 *C.C.Q.* For this category of property, there is therefore no need to rely on art. 317 *C.C.Q.* by analogy so as to order an equitable partition of the family patrimony. Furthermore, more generally when property listed in art. 415 *C.C.Q.* is held in trust, arts. 421 and 422 *C.C.Q.* may allow the court to correct a potential inequity created by the operation of the trust. Again, it is not necessary to rely on an analogy with art. 317 *C.C.Q.* to reach an equitable result in these circumstances.

As a remedial set of rules that aims to foster economic equality between spouses, rules relating to family patrimony should 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 the interpretation of art. 415 *C.C.Q.* and its application, even if the record does not demonstrate that one of the spouses

was in a position of economic vulnerability. Care should be taken not to adopt an interpretation of the rules governing the family patrimony that would create a breach in the protection guaranteed by the law to vulnerable spouses.

Furthermore, the fact that the spouses were pursuing a legitimate objective in organizing their affairs the way they did is not a bar to inclusion of a residence not directly owned by them in the partition of the family patrimony. In so far as the intention to use a property as a residence of the family has been established, art. 415 *C.C.Q.* does not require any further demonstration of intention to avoid the rules of the family patrimony. These rules are protective public order rules, in that they are imposed by the legislature to safeguard the interests of vulnerable parties and to insure a certain equity within the institution of marriage. Accordingly, the operation of these rules will not depend on the behaviour, intention or good faith of the parties during their contractual relationship. This does not mean that the intention of the spouses is never relevant when applying art. 415 *C.C.Q.* to a family residence. The intention of the spouses is essential to characterize a property as a residence of the family within the meaning of art. 415 *C.C.Q.*

The public order character of the rules governing the family patrimony does not eliminate the freedom of spouses to acquire, sell or choose never to own the property included in the family patrimony per art. 415 *C.C.Q.* Neither the constitution of the family patrimony nor its partition alters the rights of ownership held by each spouse in relation to their property. Spouses generally remain free to manage and

dispose of their property included in the family patrimony, although certain specific rules will nonetheless limit their freedom to do so. Spouses also need not acquire property falling under the family patrimony provisions, and neither spouse is obligated to own the property enumerated in s. 415 *C.C.Q.*

Per Karakatsanis and **Côté** JJ. (dissenting): The appeal should be dismissed. While family patrimony provisions are intended to protect economically disadvantaged spouses, spouses are free to acquire and dispose of property as they wish, even if this means that they do not acquire property falling within the family patrimony. Included in the spouses' freedom to choose how they arrange their affairs is the option to live in a residence held by a trust. Where spouses opt for the various advantages and disadvantages associated with the legal institution of the trust, it may be that they will not acquire property that is subject to the family patrimony.

Where spouses reside in a property owned by a trust, there may be situations in which this arrangement gives rise to "rights which confer use" of the property under art. 415 *C.C.Q.* When such questions arise, the situation must be analyzed on the basis of the legislative provisions governing both the institutions of the trust and the family patrimony. There is agreement with the majority's rejection of the reliance on an analogy with the lifting of the corporate veil under art. 317 *C.C.Q.* To determine whether a right which confers use exists where a residence is owned by a trust, courts must consider the circumstances surrounding the establishment of the

trust, its intended purpose, and the rights and obligations of the trustees and beneficiaries under the terms of the trust deed.

There is disagreement with the majority, which would hold that the level of control attributed to a trustee will determine whether there is a right which confers use. As a general rule, though the powers with which the trustee is charged under the *Civil Code of Québec* are significant, they do not constitute a right which confers use. The trustee has the control and exclusive administration of the trust patrimony but such a role imposes duties and obligations. These powers must be exercised in the best interest of the beneficiaries and in keeping with the purpose of the trust. Powers must not be conflated with rights. It is rather the interests of the beneficiary that are more likely to give rise to a right which confers use under art. 415 *C.C.Q.* It is important to look both to the trust deed and to the *Civil Code of Québec* in order to gain a full picture of the protections afforded to the beneficiaries. The interpretation of the trust deed pursuant to the rules of contractual interpretation must include an analysis of the parties' objectives in establishing the trust, along with the trustee's obligations and the rights of beneficiaries under the terms of the deed. While a deed may entrust a trustee with significant powers, these are circumscribed by the trust provisions of the *Civil Code of Québec*. For instance, a trustee must perform his or her duties in keeping with the purpose of the trust and cannot do so for his or her own benefit or in an arbitrary manner.

There is also disagreement with the majority that the intention of the spouses in setting up a trust should have no bearing on the determination of whether there are any rights which confer use. The intention in establishing a trust will be relevant insofar as it informs the purpose of the trust. Where a trust has no legitimate purpose beyond evading the family patrimony rules, the powers actually exercised by the trustee might exceptionally be construed, on the facts of that case, as a right which confers use. For instance, where a residence owned by a trust previously belonged to one of the spouses and there has been no change in circumstances in the intervening years apart from the transfer to the trust, a right which confers use may exist under art. 415 *C.C.Q.* Such a situation may indicate that the transfer to the trust had the purpose of evading the family patrimony provisions. However, where the trust has a valid purpose and acquires the residence directly, a closer analysis of the terms of the trust deed and the surrounding circumstances will be necessary.

The arrangement in the instant case is anything but artificial as the record discloses no intention to evade the family patrimony provisions and there is unchallenged evidence that the trust was established for the long-term benefit of the children. The trial judge was content with a literal reading of the trust deed and conflated powers with rights. As such, the trial judge erred in finding that K alone held a right which conferred use. If such a right existed, it was held only by T as beneficiary of the trust or was jointly held by both spouses as a result of a tacit agreement between them and the trust.

Cases Cited

By Rowe J.

Referred to: *G.B. v. Si.B.*, 2015 QCCA 1223; *Miller (Succession de)*, 2013 QCCS 5184; *Droit de la famille — 977*, [1991] R.J.Q. 904; *M.T. v. J.-Y.T.*, 2008 SCC 50, [2008] 2 S.C.R. 781; *Droit de la famille — 112948*, 2011 QCCA 1744, [2011] R.J.Q. 1729; *Droit de la famille — 172765*, 2017 QCCA 1844; *Droit de la famille — 1463*, [1991] R.J.Q. 2514; *Droit de la famille — 121301*, 2012 QCCA 1018; *Droit de la famille — 162780*, 2016 QCCS 5562; *D.L. v. L.G.*, 2006 QCCA 1125; *Droit de la famille — 142245*, 2014 QCCA 1660; *Droit de la famille — 1931*, [1994] R.J.Q. 378; *Droit de la famille — 1931*, [1996] R.D.F. 6; *Droit de la famille — 10174*, 2010 QCCS 312; *Droit de la famille — 102269*, 2010 QCCA 1586; *Droit de la famille — 071938*, 2007 QCCS 3792, [2007] R.D.F. 711; *Droit de la famille — 10977*, 2010 QCCA 892; *Droit de la famille — 3511*, [2000] R.D.F. 93; *Droit de la famille — 3511*, 2000 CanLII 2002; *Droit de la famille — 2225*, [1995] R.D.F. 465; *J.-Y.H. v. C.B.*, 2005 CanLII 14832; *Droit de la famille — 171064*, 2017 QCCS 2076; *Droit de la famille — 2420*, [1996] R.D.F. 363; *Droit de la famille — 13681*, 2013 QCCA 501; *Garcia Transport Ltée v. Royal Trust Co.*, [1992] 2 S.C.R. 499; *Droit de la famille — 19582*, 2019 QCCA 647; *Droit de la famille — 131166*, 2013 QCCS 2194; *Droit de la famille — 1487*, 2014 QCCA 123; *Droit de la famille — 112467*, 2011 QCCS 4229; *Droit de la famille — 121301*, 2012 QCCA 1018; *Droit de la famille — 121905*, 2012 QCCS 3977; *L.G. v. D.L.*, 2005 CanLII 22738; *Droit de la famille — 133443*, 2013 QCCS 6099; *Droit de la famille — 142245*, 2014 QCCA

1660; *J. (Y.) v. B. (M.)*, 1999 CanLII 10838; *J. (Y.) v. B. (M.)*, 2000 CanLII 10021;
Poulin v. Dumas, 2014 QCCA 676.

By Côté J. (dissenting)

Droit de la famille — 071938, 2007 QCCS 3792, [2007] R.D.F. 711;
Trust général du Canada v. Service alimentaire exclusif inc., [1984] C.A. 145;
Québec (Curateur public) v. A.N. (Succession de), 2014 QCCS 616; *Miller (Succession de)*, 2013 QCCS 5184; *Droit de la famille — 3511*, [2000] R.D.F. 93;
D.L. v. L.G., 2006 QCCA 1125; *Droit de la famille — 2225*, [1995] R.D.F. 465; *Droit de la famille — 1646*, [1992] R.D.F. 463; *N.R. v. R.P.*, [2003] R.D.F. 831; *Droit de la famille — 13681*, 2013 QCCA 501; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014.

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Civil Code of Lower Canada, art. 981e.

Civil Code of Québec, S.Q. 1980, c. 39, arts. 454, 462.2.

Civil Code of Québec, arts. 9, 317, 391, 404, 405, 406, 414, 415, 416, 421, 422, 423, 516, 911, 912, 1119, 1121, 1172, 1260, 1261, 1262, 1265, 1278, 1282 para. 1, 1283, 1284, 1294, 1295, 1306, 1307, 1310, 1425, 1426.

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APPEAL from a judgment of the Quebec Court of Appeal (St-Pierre, Mainville and Gagné JJ.A.), 2018 QCCA 320, [2018] J.Q. n° 1465 (QL), 2018 CarswellQue 1400 (WL Can.), setting aside a decision of Gaudet J., 2016 QCCS 5581, [2016] J.Q. n° 16001 (QL), 2016 CarswellQue 10844 (WL Can.). Appeal allowed, Côté and Karakatsanis JJ. dissenting.

Stewart Litvack and Louis Dessureault, for the appellants.

Antoine Aylwin and Michael Adams, for the respondent.

The judgment of Wagner C.J. and Abella, Brown, Rowe and Martin JJ. was delivered by

ROWE J. —

[1] The appellants, Mr. Ramy and Rody Yared, are the liquidators of the succession of their sister, Ms. Taky Yared, who passed away in April 2015. In July 2016, they sought a declaration in Superior Court that the value of the family residence should be included in the division of the family patrimony. At the time of Ms. Yared's death, this residence was held under a trust controlled by her husband, the respondent Mr. Roger Karam.

[2] The question raised by this case concerns the proper interaction between these two institutions of Quebec civil law: the family patrimony created by art. 414 of the *Civil Code of Québec (C.C.Q. or Civil Code)* and the trust under art. 1260 *C.C.Q.* In substance, this 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. The trial judge declared that the value of the residence was to be included in the family patrimony, relying on an analogy with the lifting of the corporate veil at art. 317 *C.C.Q.* and on the “rights which confer use” of art. 415 *C.C.Q.* The Court of Appeal reversed that decision and declared that no value from the family residence ought to be included in the family patrimony.

[3] The trial judge did not err in his conclusion. Although I would not rely on art. 317 *C.C.Q.* by analogy, in my view the “rights which confer use” of the family residence at art. 415 *C.C.Q.* provided a sound basis for him to declare that the value of the residence ought to be included in the family patrimony. Absent an overriding and palpable error in his determination that Mr. Karam held “rights which confer use” within the meaning of art. 415 *C.C.Q.*, it was not open to the Court of Appeal to overturn this decision on appeal. I would therefore set aside the decision of the Court of Appeal and reinstate the declaratory relief granted by the trial judge.

I. Facts

[4] The respondent, Mr. Karam and Ms. Yared were married in 1998. They had four children, born between 2001 and 2010. In August 2011, the Karam family

moved to Montreal following the announcement of tragic news. Ms. Yared was diagnosed with an incurable cancer and her days were numbered. In light of this, Mr. Karam set up a trust to protect the family assets for the benefit of the four children. It is not contested that at the time, Mr. Karam acted in good faith and had no intention to avoid the rules of family patrimony.

[5] The [TRANSLATION] “Taki Family Trust” (“the trust”) was constituted before a notary on October 4, 2011 (Exhibit A-1, A.R., vol. II, at p. 110). The settlor is Ms. Tammie Dion, the wife of one of the appellants and sister-in-law of Mr. Karam. The trustees are Mr. Karam himself and his mother, Ms. Amal Hanache-Karam. The trust deed also conferred extensive powers of “Appointer” on Mr. Karam, providing for him *inter alia* to name new beneficiaries, including himself. The initial beneficiaries were Ms. Yared and the four children.

[6] Upon the constitution of the trust, the settlor transferred a silver ingot valued at \$45 to the trust patrimony. In June 2012, the trust acquired a residence on Docteur-Penfield Avenue in Montreal for \$2,350,000 with funds transferred by the spouses to the trust patrimony. Mr. Karam stated that his intention was to acquire a house that would serve both as the family residence and as an investment protected under the trust for the benefit of his children. The family moved in and it is not contested that at the relevant times, this house was a residence of the family within the meaning of art. 415 *C.C.Q.* Indeed, regardless of the potential investment value of the property, if either of the spouses had been owner in title there would be no dispute

that the house would be part of the family patrimony. In fact, Mr. Karam conceded that the furniture in the residence was included in the family patrimony as movable property furnishing or decorating the family residence.

[7] Two years later, in June 2014, Ms. Yared left the residence and filed for divorce. In August of the same year, she divided her estate by notarial will by way of four trusts established for the benefit of each of the four children. In April 2015, Ms. Yared died without having obtained a divorce.

[8] Following Ms. Yared's death, Mr. Karam commenced proceedings to contest the validity of her will. A few months later, he unilaterally renounced his powers to elect new beneficiaries under art. 4.2 of the trust deed in a notarized document, the [TRANSLATION] "Act of Renunciation and Cancellation by the Appointer Concerning the 'Taki Family Trust'". According to his testimony, Mr. Karam proceeded to this renunciation after the appellants expressed some concerns about the children's interest in the trust. In July 2016, the appellants filed for a declaration that the value of the residence held by the trust should be included in the division of the family patrimony, half of which would therefore go to the estate of Ms. Yared. If the appellants do not obtain such a declaration, the estate of Ms. Yared will be of little value.

II. Decisions Below

A. *Superior Court of Quebec (Gaudet J., 2016 QCCS 5581)*

[9] The trial judge decided that the value of the residence ought to be included in the family patrimony despite the fact that it was held under a trust and not owned directly by one of the spouses. In his view, this follows from the fact that spouses cannot contract out of the public order rules regarding the family patrimony, regardless of their intentions (para. 55 (CanLII)). If one of them has effective control of a family residence even where that is through a trust or a corporation, its value must be divided as part of the patrimony upon dissolution of the marriage (paras. 52-53).

[10] The trial judge relied on two provisions of the *Civil Code* to arrive at this conclusion. First, he considered that the lifting of the corporate veil codified at art. 317 *C.C.Q.* could be applied by analogy when the constitution of a trust would have the effect of trumping or displacing the rules of the family patrimony (paras. 30-36). Second, he relied on the wording of art. 415 *C.C.Q.*, which provides that “the residences of the family or the rights which confer use of them” are included in the family patrimony. In his view, these rights are not strictly limited to the rights of use defined by art. 1172 *C.C.Q.* and can include any arrangement by which the spouses can occupy a residence as if they are the owners (paras. 39-41).

[11] Critical to his conclusion was the trial judge’s factual finding that Mr. Karam had effective, almost complete control of the family residence as the trustee and appointer of the trust under which it was held (para. 51). This finding was based on the following discretionary powers granted to Mr. Karam under the trust

deed: 1) the power to appoint new beneficiaries, including himself; 2) the power to destitute any beneficiaries; and 3) the power to decide to which beneficiaries and in what proportion the revenues and capital of the trust would be paid (paras. 44-47). In this regard, the trial judge further held that Mr. Karam's subsequent renunciation of his power to elect new beneficiaries under art. 4.2 of the trust deed was immaterial as this was invalid per art. 1294 *C.C.Q.*, as well as because it had been done after the dissolution of the marriage and, in any case, it left unaffected the other important powers granted to Mr. Karam (paras. 58-60).

B. *Court of Appeal of Quebec (2018 QCCA 320)*

[12] Writing for a unanimous court, St-Pierre J.A. allowed the appeal and declared that no value from the residence on Docteur-Penfield Avenue ought to be included in the family patrimony of Ms. Yared and Mr. Karam. In her view, in the absence an intention to avoid the rules of the family patrimony, the contractual freedom of spouses who decide to reside in a property held in a trust for investment purposes ought to be respected (paras. 51-59 (CanLII)).

[13] In this regard, St-Pierre J.A. concluded that the trial judge committed various reviewable errors (para. 50). In her reasons, she focused on three issues: 1) the analogy with art. 317 *C.C.Q.*; 2) the application of existing rules governing both the family patrimony and the trust, including "rights which confer use" per art. 415 *C.C.Q.*; and 3) the determination that the value of these rights was equal to the value of the house.

[14] With regards to the “lifting of the trust veil” based on art. 317 *C.C.Q.*, St-Pierre J.A. expressed the view that this analogy was [TRANSLATION] “problematic, unsound and inappropriate” (at para. 74) and that the concept ought to be rejected from the outset (para. 75). In her view, the fact that a trust is not endowed with juridical personality and that it involves a relationship between different parties — the settlor, trustee and beneficiary — is a bar to the application, by analogy, of art. 317 *C.C.Q.* to a trust (paras. 71-73).

[15] Rather than relying on this analogy, St-Pierre J.A. held that the trial judge was required to apply existing rules governing the family patrimony and trusts. In her view, the value of a family residence held under a trust that is legally constituted should not be included in the family patrimony, unless it belonged to one of the spouses prior to the constitution of the trust. In this case, it is possible that the “rights which confer use” of the residence may be included in the family patrimony per art. 415 *C.C.Q.* when constitution of the trust had no impact on the living arrangements of the family (paras. 90-91). Furthermore, St-Pierre J.A. noted that arts. 421 and 422 *C.C.Q.* already allowed for corrective measures in the division of the family patrimony where there has been misappropriation or some other injustice (para. 92).

[16] On this basis, St-Pierre J.A. determined that the record did not provide a basis for the trial judge to conclude that Mr. Karam held “rights which confer use” of the residence, let alone that he was the sole holder of these rights (paras. 103-4).

Although it was not necessary to dispose of the appeal, St-Pierre J.A. further held that the trial judge ruled beyond the conclusions sought in the application when he determined that the value of the rights of use was equal to the full value of the residence (para. 108).

III. Analysis

A. *The Trust in Quebec Civil Law*

[17] The *Civil Code* defines a trust as 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 (art. 1261 *C.C.Q.*). The concept of a patrimony without a holder was introduced in Quebec law following the adoption of the *Civil Code*, in an effort to adapt the common law trust to the framework of civil law (see S. Normand, *Introduction au droit des biens* (2nd ed. 2014) at pp. 26-28). In short, contrary to a common law trust, the trust in Quebec civil law does not result from the division of ownership but rather from the transfer of property in a patrimony created for a particular purpose and not held by anyone. The transferred property is administered by the trustee for this purpose, yet neither the trustee, the beneficiary nor the settlor own what has been transferred into the trust patrimony.

[18] Upon the trust's creation, the trustee has control and exclusive administration of the patrimony (art. 1278 para. 1 *C.C.Q.*). He or she is charged with the full administration of the property held in the trust (art. 1278 para. 2 *C.C.Q.*). By

virtue of this, the trustee is vested with extensive powers that he is required to use to secure appropriation of the patrimony, as defined by the trust deed (arts. 1260, 1278 and 1306 *C.C.Q.*). He may *inter alia* sell the property, charge it with a real right or change its destination in order to perform his obligations as administrator of the trust (art. 1307 *C.C.Q.*). Hence, although the trustee is not the owner of the property, his control over the trust patrimony is similar to ownership, as the Minister of Justice explained upon the adoption of art. 1261 *C.C.Q.*:

[TRANSLATION] Moreover, the property making up the trust patrimony is not property without an owner that can be appropriated by simple occupation, since the trustee has control and detention of it. Nor is the property liable to be paralyzed as a result of having no owner. The broad powers of the trustee, acting in that capacity, will in fact allow the trustee to ensure not only the preservation of the property, but also its free movement, as if he or she were its owner. These powers will also allow the trustee to perform any kind of act relating to the managed property, including exercising the rights attached to it.

(Ministère de la Justice, *Commentaires du ministre de la Justice*, t. I, *Le Code civil du Québec — Un mouvement de société* (1993), at p. 750).

[19] If provided by the trust deed, the trustee may also have the power to appoint beneficiaries and determine what they receive from the trust (art. 1282 para. 1 *C.C.Q.*). This power of appointment is exercised as the trustee (or settlor) sees fits; however, he may not do so in a completely arbitrary manner or in a way that runs counter to purpose or stipulations of the trust deed (J. Beaulne, *Droit des fiducies* (3rd ed. 2015) at p. 229; *G.B. v. Si.B.*, 2015 QCCA 1223, at para. 53 (CanLII). 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 (*Miller (Succession de)*, 2013 QCCS 5184, at para. 88 (CanLII)). 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 under the trust deed (Beaulne, at pp. 229-30; D. Bruneau, “La fiducie et le droit civil” (1996), 18 *R.P.F.S.* 755, at p. 776; J.E.C. Brierley, “Powers of Appointment in Quebec Civil Law” (1992), 95 *R. du N.* 131, at p. 161-2).

B. *The Family Patrimony*

[20] Per art. 414 *C.C.Q.*, marriage results in the establishment of a family patrimony, which consists of property described in art. 415 *C.C.Q.* and owned by one or the other spouses. Upon dissolution of marriage, the value of this family patrimony is divided in equal shares between the spouses (art. 416 *C.C.Q.*), unless the court exercises the remedial power provided by art. 422 *C.C.Q.* to order unequal partition. As Baudouin J.A. explained in *Droit de la famille — 977*, [1991] R.J.Q. 904, at p. 909, we must bear in mind that the family patrimony entails the creation, upon dissolution of marriage, of a personal claim against the other spouse rather than a competing right of ownership.

[21] Article 415 *C.C.Q.* provides that residences of the family owned by one of the spouses or the rights which confer use of them are included in the value of the family patrimony. As explained in the above section, neither a beneficiary nor a trustee owns the property held under a trust. In my view, 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.* Before turning to this matter, I find it necessary to restate two core principles of law on the family patrimony.

[22] The first relates to the approach that a court should take when interpreting and applying the rules relating to the family patrimony in ambiguous cases. As LeBel J. wrote for a unanimous court in *M.T. v. J.-Y.T.*, 2008 SCC 50, [2008] 2 S.C.R. 781, at para. 16, 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 (*Droit de la famille — 112948*, 2011 QCCA 1744, [2011] R.J.Q. 1729, at para. 60; *Droit de la famille — 977*, at p. 909; *Droit de la famille — 172765*, 2017 QCCA 1844, at paras. 102-13 (CanLII)).

[23] 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. Contrary to what counsel for Mr. Karam suggested in his oral submissions (transcript, at pp. 55-58), the fact that this case does not raise issues of inequality between spouses is immaterial for the resolution of the larger question raised by the appeal. Indeed, we should be careful

not to adopt an interpretation of the rules governing the family patrimony that would create a breach in the protection guaranteed by the law to vulnerable spouses.

[24] The second principle relates to the public order character of the rules governing the family patrimony. The *Civil Code* is clear: spouses cannot contract out of these rules. Article 391 *C.C.Q.* provides that spouses cannot derogate from the provisions of chapter IV on the effect of marriage, which includes the provisions on the family patrimony. Article 423 *C.C.Q.* further specifies that spouses may not renounce in advance, by contract of marriage or otherwise, their rights in the family patrimony, while allowing them to do so in certain circumstances, notably upon the dissolution of marriage, and under stringent conditions. On this basis, Quebec courts have consistently held that the rules of the family patrimony are of public order and cannot be avoided by spouses through various kinds of contractual arrangements (see, for example, *Droit de la famille — 977*, at p. 908; *Droit de la famille — 1463*, [1991] R.J.Q. 2514 (C.A.), at pp. 2516-17; *Droit de la famille — 121301*, 2012 QCCA 1018, at para. 46 (CanLII); *Droit de la famille — 162780*, 2016 QCCS 5562, at paras. 54-55 (CanLII). This well-settled principle is not disputed by the parties. Rather, it is the scope and the effect of these public order rules that is at the heart of the debate.

[25] Mr. Karam correctly points out that the public order character of the rules governing the family patrimony does not eliminate the freedom of spouses to acquire, sell or choose never to own the property included in the family patrimony per art. 415 *C.C.Q.* (R.F., at paras. 23-29). Indeed, neither the constitution of the family patrimony

nor its partition alters the rights of ownership held by each spouse in relation to their property. It follows that spouses generally remain free to manage and dispose of their property included in the family patrimony, keeping in mind that certain specific rules will nonetheless limit their freedom to do so (*Droit de la famille* — 977, at p. 908).

[26] As pointed out by Justice Côté, spouses are free to arrange their personal affairs as they see fit; they need not acquire property falling under the family patrimony provisions. Thus, as St-Pierre J.A. remarked, neither spouse is obligated to own the property enumerated in art. 415 *C.C.Q.* (para. 58). A married couple can lease rather than own their family residence or their car. It is trite that such living arrangements do not *per se* offend the public order rules of family patrimony. The question raised by this appeal is whether this logic extends to a family residence acquired by way of a trust controlled by one or both spouses. Because the legislator included the “rights which confer use” of a family residence in addition to direct ownership, in my view it does not.

[27] Before discussing the “rights which confer use” per art. 415 *C.C.Q.*, I wish to make a few comments on the “lifting of the trust veil” by analogy with art. 317 *C.C.Q.*, since the trial judge and the Court of Appeal disagreed on the applicability of this notion. First, I agree with St-Pierre J.A. that the analogy with art. 317 *C.C.Q.* is, on its face, tenuous (para. 74). As she explains, this provision [TRANSLATION] “is intended to prevent a person from making improper use of a legal person, of which he or she is in fact the directing mind, in such a way as to interpose

the existence of that legal person as a defence to try to avoid personal liability” (para. 69). But in Quebec law, trusts are not legal persons endowed with juridical personality. Rather, they are the result of a relationship among three actors — the settlor, trustee and beneficiary — who gravitate around a distinct and autonomous patrimony. It follows that, contrary to a corporation, there is in the case of a trust no veil to lift nor any mastermind hiding behind a distinct juridical personality. In this regard, I agree with the general proposition set out by St-Pierre J.A. that when the constitution of a trust conflicts with the operation of the family patrimony, the court should resolve the matter by relying on the rules pertaining to both of these institutions rather than by analogy with art. 317 *C.C.Q.* (paras. 50, 76 and 87).

[28] In the case of a family residence, issues arising from indirect ownership or de facto control of the property can, as I will explain in the section below, be resolved with the notion of “rights which confer use” set out in art. 415 *C.C.Q.* For this category of property, there is therefore no need to rely on art. 317 *C.C.Q.* by analogy so as to order an equitable partition of the family patrimony.

[29] Also, more generally when property listed in art. 415 *C.C.Q.* is held in trust, arts. 421 and 422 *C.C.Q.* may allow the court to correct a potential inequity created by the operation of the trust. Again, it is not necessary to rely on an analogy with art. 317 *C.C.Q.* to reach an equitable result in these circumstances.

[30] If property listed at art. 415 *C.C.Q.* is transferred to a trust, the court can order a compensatory payment based on art. 421 *C.C.Q.*, provided that the transfer

occurred within a year of various reference points (institution of proceedings for either divorce, separation from bed and board or annulment of marriage, or death) or earlier in the case of fraud or bad faith. This is the case because, as we have seen, property transferred to a trust is removed from the patrimony of the original owner and held in a distinct and autonomous patrimony. The property is therefore alienated within the meaning of art. 421 *C.C.Q.* and is thus subject to a compensatory payment. This would apply to furniture and family vehicles (as well as residences of the family) transferred to a trust.

[31] If such property is not transferred but rather acquired directly through a trust, the court cannot order a compensatory payment based on art. 421 *C.C.Q.* since there is strictly speaking no alienation. In such cases, art. 422 *C.C.Q.* would nonetheless allow the court to order an unequal partition in order to compensate for the loss of value in the family patrimony, provided that the operation amounts to an economic fault (*M.T. v. J.-Y.T.*, at para. 28). As I will explain below, what is often the most valuable items listed at art. 415 *C.C.Q.* — the residence(s) of the family — can be included in the family patrimony whether the residence is transferred into or acquired directly by the trust. Thus, in such cases, there will be sufficient value in the patrimony for an unequal partition to constitute a meaningful remedy when furniture or family vehicles are acquired directly by a trust.

[32] As indicated above, the idea of a “lifting of the trust veil” as envisioned by analogy to art. 317 *C.C.Q.* ought to be rejected by this Court. However, this is not

to say that the existence of a trust is a bar to the operation of the three remedies listed above — the rights which confer use, the compensatory payment and the unequal partition — in the context of property held in trust. In all three situations, the effects of the trust will be effectively “lifted” to enable the operation of the remedy. However, given that the analogy to art. 317 *C.C.Q.* is faulty, the Court should refrain from referring to the operation of these remedies 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 relating to the family patrimony.

C. *The Rights Which Confer Use per Article 415 C.C.Q.*

[33] 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. Although the legislative debates leading to the adoption of art. 462.2 of the *Civil Code of Québec (C.C.Q. (1980))* which became art. 415 *C.C.Q.* do not discuss the notion of rights which confer use, the context in which this provision was adopted suggests that the intention was to cover a broad range of situations beyond ownership. Indeed, the notion of rights which confer use of a family residence was debated on the same day in relation to another provision, art. 454 *C.C.Q. (1980)* (which became art. 406 *C.C.Q.*), which limits the faculty to alienate a family residence owned by one of the spouses. At the time, legislators were

concerned by the fact that corporations were sometimes used to avoid these restrictions on the sale of a family residence. To counter this practice, the reference to the notion of “rights which confer use” was added to art. 454 *C.C.Q.* (1980) (now 406 *C.C.Q.*) to protect family residences indirectly owned through a corporation (as to the foregoing, see B. Lefebvre, “Les droits qui confèrent l’usage des résidences familiales: quelques difficultés lors de la liquidation du patrimoine familial” (2014), 116 *R. du N.* 389, at pp. 392-94; J.-P. Sénécal, *Le partage du patrimoine familial et les autres réformes du Projet de loi 146* (1989), at p. 38).

[34] Since the adoption of art. 462.2 *C.C.Q.* (1980) (now 415 *C.C.Q.*), Quebec courts have often relied on the “rights which confer use” to partition the value of family residences held through corporations controlled by one of the spouses. For example, in *D.L. v. L.G.*, 2006 QCCA 1125, at paras. 22-29 (CanLII), the Quebec Court of Appeal ruled that the value of a family farm that had been transferred to a corporation for fiscal reasons ought to be included in the partition of the family patrimony based on the rights of use. See also *Droit de la famille — 142245*, 2014 QCCA 1660, at paras. 13-14 (CanLII); *Droit de la famille — 1931*, [1994] R.J.Q. 378 (Sup. Ct.), at p. 381, conf. on appeal, [1996] R.D.F. 6 (C.A.); *Droit de la famille — 10174*, 2010 QCCS 312, at para. 48-52 (CanLII), conf. on appeal, *Droit de la famille — 102269*, 2010 QCCA 1586 (CanLII).

[35] Quebec courts have applied the same logic in the case of family residences held in trust. In *Droit de la famille — 071938*, 2007 QCCS 3792, [2007]

R.D.F. 711, the Superior Court relied on the “rights which confer use” of art. 415 *C.C.Q.* to conclude that a family residence transferred to a trust controlled by both spouses was included in the family patrimony. In this case, the court ruled that as trustees, the spouses had conferred upon themselves an implicit and non-written right of use of the residence within the meaning of art. 415 *C.C.Q.* (paras. 71, 81 and 100). See also *Droit de la famille — 10977*, 2010 QCCA 892, at para. 16 (CanLII); *Droit de la famille — 3511*, [2000] R.D.F. 93 (Sup. Ct.), at p. 97, conf. on appeal on this point, 2000 CanLII 2002 (C.A.).

[36] In other instances, courts have determined that certain rights to use a residence were not captured by arts. 415 or 406 *C.C.Q.* This was so for a residence provided by an employer through an employment contract, even where the employee was a minority shareholder of the employer (*Droit de la famille — 2225*, [1995] R.D.F. 465 (Sup. Ct.); *J.-Y.H. v. C.B.*, 2005 CanLII 14832 (Que. Sup. Ct.), at para. 25). Similarly, courts usually do not include rights conferred by a lease agreement within art. 415 *C.C.Q.*, although the issue has been debated in doctrine and jurisprudence (*Droit de la famille — 171064*, 2017 QCCS 2076, at para. 176; *Droit de la famille — 2420*, [1996] R.D.F. 363 (Sup. Ct.)). In these cases, while the spouses had a right to use the family residence, they did not control it in any meaningful way.

[37] 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. As such, I agree with my colleague that simple occupation of a property not owned by the spouses will not automatically give rise to “rights which confer use” within the meaning of art. 415 *C.C.Q.* However, 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. Rather than providing a formal definition of the “rights which confer use”, I would make the following remarks in relation to the arguments raised in the present case.

(1) Rights which confer use are not limited to real rights

[38] Mr. Karam argues that given the particular characteristics of patrimonies by appropriation, the rights which confer use under art. 415 *C.C.Q.* cannot be relied on to partition the value of a family residence held under a trust. In his view, art. 415 *C.C.Q.* refers to the right of use within the meaning of art. 1172 *C.C.Q.*, that is a dismemberment of the right of ownership by which one can temporarily use the property of another and take its fruits and revenues, to the extent of one’s needs. Since art. 1261 *C.C.Q.* clearly establishes that neither the trustee, nor the settlor, nor the beneficiaries have any real right in the trust patrimony, it follows that a family residence held under a trust cannot fall within the scope of art. 415 *C.C.Q.* on the basis of the “rights which confer use” (R.F., at paras. 46 and 51-52). With respect, this narrow interpretation of art. 415 *C.C.Q.* cannot be accepted.

[39] First, it runs contrary to the approach the court should take in interpreting the rules of the family patrimony. Rather than fostering a broad application of the regime, requiring a proof of rights of use within the meaning of art. 1172 *C.C.Q.* (or any other dismemberments of the right of ownership) would significantly restrict the ability of a trial judge to order an equitable partition of the family patrimony in cases where one spouse while not the owner in title of a residence, has the authority to exercise control over the other spouse's use of the residence. Moreover, such an interpretation of "rights which confer use" would have the effect of legitimizing the trust as a vehicle to avoid the application of art. 415 *C.C.Q.* to family residences, which is precisely the type of result the legislature sought to avoid with similar wording in art. 406 *C.C.Q.*

[40] Second, when read alongside art. 406 *C.C.Q.*, 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. In art. 406 *C.C.Q.*, the first paragraph provides that holders of real rights of usufruct, emphyteusis or use are subject to arts. 404 and 405 *C.C.Q.*, which protect the family residence. In the second paragraph, the legislature specified that similar protection applies to other rights which confer use of the family residence, i.e. not the real rights listed in the previous paragraph:

406. The usufructuary, the emphyteuta and the user are subject to the rules of articles 404 and 405.

Neither spouse may, without the consent of the other, dispose of rights held by another title conferring use of the family residence.

[41] The interpretation of the “rights which confer use” at art. 415 *C.C.Q.* based on the text of art. 406 *C.C.Q.* is supported by doctrine and jurisprudence (see Senécal, at pp. 38-39; C. Labonté, “Le patrimoine familial” , in *Droit de la famille québécois* (loose-leaf), vol. 3, by J.-P. Senécal, at pp. 3/2282 to 3/2286; *Droit de la famille — 3511* (Sup. Ct.), at p. 96). I would add that it is consistent with the presumption that the same expression within a statute conveys the same meaning (P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at pp. 353-54).

[42] 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.*

(2) Whether the Residence Is Acquired Directly or Transferred to a Trust Is Not Determinative

[43] While my colleague and St-Pierre J.A. share the view that the “rights which confer use” at art. 415 *C.C.Q.* can apply to a residence held in trust by one of the spouses, their reasons suggest that this would be the case only when the residence is transferred to the trust, rather than acquired directly by it (C.A. reasons, at para. 91). Such an approach gives rise to the question: Why should the consequences of acquiring a family residence through a trust in order to avoid undesirable tax treatment be any different than transferring the property from the spouse’s estate for

the same purpose? With respect, I see no meaningful difference between these two situations.

[44] In most cases cited by the appellants on this particular issue, the family residence had been the property of the spouses prior to its transfer to either a trust or a corporation (*D.L.*; *Droit de la famille — 10174*; *Droit de la famille — 13681*, 2013 QCCA 501(CanLII)). In *D.L.*, the Court of Appeal insisted on the occupation of the residence prior to its transfer to show that, despite the lack of formal arrangement with the corporation that owned the residence, the couple enjoyed “rights which confer use” within the meaning of art. 415 *C.C.Q.* (at paras. 23-26).

[45] I agree that prior ownership and occupation of a family residence can be relevant to show that the spouses hold a right which confers use within the meaning of art. 415 *C.C.Q.* This will be the case when, as in *D.L.*, the record shows that the transfer of the property to either a trust or a corporation had no impact on the living arrangements of the spouses, who continue to occupy the residence as if they were still the owners. However, prior ownership is not, as a matter of law, a necessary condition for a finding of “rights which confer use” within the meaning of art. 415 *C.C.Q.* 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 residence was acquired directly by a trust or a corporation.

(3) The Absence of Intention to Avoid the Family Patrimony Is Irrelevant With Respect to the “Rights Which Confer Use” at Article 415 *C.C.Q.*

[46] Central to Mr. Karam’s submissions is the fact that the trust was set up for a legitimate objective and that at no time was he acting with the intention of avoiding the rules of the family patrimony. According to him, to include the value of the residence in the family patrimony in the absence of bad faith or fraudulent intention would be to transform unduly a rule of protective public order into a rule of directive public order (R.F., at para. 36). In my view, this reasoning is based on a misunderstanding of the difference between protective and directive public order rules and on the operation of such mandatory rules more generally.

[47] I would agree with Mr. Karam that the rules of the family patrimony are protective public order rules, in that they are imposed by the legislature to safeguard the interests of vulnerable parties and to insure a certain equity within the institution of marriage (C. Dubreuil and B. Lefebvre, “L’ordre public et les rapports patrimoniaux dans les relations de couple” (1999), 40 *C. de D.* 345, at p. 351). However, it does not follow from this characterization that the operation of these rules will depend on the behavior, intention or good faith of the parties during their contractual relationship, as Mr. Karam suggests (R.F., at para. 32).

[48] In *Garcia Transport Ltée v. Royal Trust Co.*, [1992] 2 S.C.R. 499, at pp. 528-30, Justice L’Heureux-Dubé explained that the difference between protective and directive public order rules arises from the possibility, in the case of protective public order rules, to renounce the protection offered by the law once the right is acquired. This is consistent with art. 423 *C.C.Q.*, which provides that spouses can renounce their rights in the family patrimony only upon the death of the other spouse, the judgment of divorce, separation from bed and board or nullity of marriage. As the Court of Appeal recently stated, [TRANSLATION] “[t]he courts recognize that ‘any renunciation made otherwise than in the form prescribed by article 423 *C.C.Q.* is prohibited and contrary to public order’. Such a renunciation ‘must be clear, precise and explicit’. Moreover, a spouse may withdraw his or her renunciation as long as the court has not recorded it” (*Droit de la famille — 19582*, 2019 QCCA 647, at para. 24 (CanLII) (footnotes omitted); see also *Droit de la famille — 131166*, 2013 QCCS 2194, at paras. 70-76, conf. by *Droit de la famille — 1487*, 2014 QCCA 123, at paras. 60-62 (CanLII); *Droit de la famille — 112467*, 2011 QCCS 4229, at paras. 45-48 (CanLII), conf. by *Droit de la famille — 121301*, 2012 QCCA 1018, at paras. 44-48 (CanLII)).

[49] It does not follow, as Mr. Karam suggests, that spouses are free to organize their affairs in a way that displaces the mandatory rules imposed by the legislature, provided that they did not intend to avoid these rules or did not act in bad faith. If we were to include this subjective element as a requirement for the operation of mandatory rules, it would necessarily put the burden on the party claiming the

protection of the law to demonstrate that the co-contracting party knew about this rule and was trying to evade it. This would run contrary to the purpose of protective public order rules. I am not aware of any authority, jurisprudential or doctrinal, suggesting that mandatory rules are triggered only by one's intention to evade them.

[50] I therefore share the view of the trial judge when he writes that the [TRANSLATION] “question is thus not so much what the Defendant’s objective was in creating the trust, but rather whether the interposition of the trust patrimony would here have the *consequence* of avoiding the imperative family patrimony rules” (para. 55 (emphasis in original)). Having regard to the contrary opinion, this is also how we should understand the comment made by the Court of Appeal in *Droit de la famille — 13681*, at para. 31, where Fournier J.A. writes that [TRANSLATION] “[t]he creation of a trust must not have the consequence of avoiding the application of public order provisions, such as those pertaining to the family patrimony”. In this case, the spouses had transferred all their assets to two trusts constituted based on the advice of their accountant and their tax lawyer in an effort to protect their assets and minimize their taxes (see *Droit de la famille — 121905*, 2012 QCCS 3977, at paras. 48, 54 and 71 (CanLII)). The remark of Fournier J.A. was made in that context and is not limited, as St-Pierre J.A. suggests, to spouses who deliberately attempt to avoid the rules of the family patrimony (C.A. reasons, at para. 81).

[51] In fact, in other cases where the courts have included in the family patrimony the value of a residence not directly owned by the spouses, the record did

not show an intention to avoid these mandatory rules. In *D.L.*, the family residence had been transferred to a corporation controlled by the spouses for purely fiscal reasons and at no point did the Court of Appeal or the trial judge suggest that there was an attempt to avoid the operation of the family patrimony (paras. 23-26; *L.G. v. D.L.*, 2005 CanLII 22738 (Que. Sup. Ct.), at paras. 22-24 and 47). The same is true in *Droit de la famille — 133443*, 2013 QCCS 6099, where the trial judge applied *D.L.* to partition the value of a family residence held by a farmers' association. In this case, the record was clear that the association was created for fiscal purposes and to facilitate a transfer of property from a father to his son (paras. 28-31(CanLII), conf. on appeal by *Droit de la famille — 142245*, 2014 QCCA 1660, at paras. 13-14). Again, at no point was intention, behavior or good faith relevant for the application of art. 415 *C.C.Q.*

[52] When applying art. 415 *C.C.Q.* to a family residence not directly owned by the spouses, the question is therefore relatively simple: Does the record support a finding of rights which confer use of the residence? If so, 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.

[53] This is not to say that the intention of the spouses is never relevant when applying art. 415 *C.C.Q.* to a family residence. In fact, the intention of the spouses is essential to characterize a property as a “residence of the family” within the meaning of art. 415 *C.C.Q.* (see, for example, *J. (Y.) v. B. (M.)*, 1999 CanLII 10838 (Que.

Sup. Ct.), at paras. 32-39, conf. on appeal by 2000 CanLII 10021 (C.A.), at paras 17-19). But in so far as the intention to use a property as a residence of the family has been established, art. 415 *C.C.Q.* does not require any further demonstration of intention.

D. *Application to This Case*

[54] Applying the principles stated above to the facts of this case, I find that the trial decision did not contain a reviewable error that justified the intervention of the Court of Appeal. While I agree with St-Pierre J.A. that the application of art. 317 *C.C.Q.* by analogy is not appropriate to dispose of the matter, the trial judge also anchored his decision in the “rights which confer use” of art. 415 *C.C.Q.* (paras. 39-40). Thus, insofar as the reference to art. 317 *C.C.Q.* was an error of law, this was of no consequence for the result.

[55] Furthermore, it was open to the trial judge to consider whether or not the circumstances of the case, and in particular the content of the trust deed, supported a finding of rights which conferred use of the family residence. As explained above, that the residence on Docteur-Penfield Avenue was acquired directly by the trust and partly for investment purposes is not a bar to a finding of rights which confer use. The main question remaining is whether the trial judge erred in his determination that Mr. Karam was the sole holder of rights which confer use of a family residence within the meaning of art. 415 *C.C.Q.* Absent a finding of palpable and overriding

error in this determination, the Court of Appeal could not intervene and substitute its own view.

(1) The Finding of Rights Which Confer Use

[56] In my view, the factual determinations of the trial judge were amply supported by the evidence. The trial judge based his conclusions on the interpretation of the trust deed, and in particular the clauses relating to the power of Mr. Karam as a trustee and “appointer” of the trust. In his view, [TRANSLATION] “it is clear that the entire Trust Deed is structured so as to give the Defendant almost total control over the Trust and the property held by it. This emerges clearly from all of its provisions” (para. 51). More specifically, the trial judge relied on paras. 4.2 and 4.3 of the trust deed, which granted the following discretionary powers to Mr. Karam (paras. 45-47; A.R., vol. II, at pp. 117-19):

- Appoint new beneficiaries, including himself.
- Destitute any beneficiaries, including his children and wife.
- Determine how the revenues and capital of the trust would be distributed.

[57] The trial judge referred to other stipulations that reinforced his view that Mr. Karam was in full control of the trust, and by extension of the house acquired

through it (paras. 49-50). He noted, *inter alia*, that para. 2.4 indicated the intention of the settlor to see the decisions of the appointer (Mr. Karam) respected by the beneficiaries and the other trustee, his mother. Furthermore, while my colleague is of the view that the sole purpose of the trust was to invest in the property for the benefit of the four children, it is clear that the family promptly moved in and used the property as a family residence, and that the trust gave Mr. Karam extensive powers over the property. I concede that certain stipulations of the trust deed listed by the trial judge are of questionable validity, more specifically art. 6, by which the trustee is under no obligation to maintain or increase the capital of the trust, or art. 8.10 by which the trustee can continue to perform his duty despite a conflict of interest. The validity of these stipulations was, however, not challenged before any court; they are immaterial, given the other aspects of the trust deed analyzed by the trial judge. It is not for this Court to speculate whether Mr. Karam's powers as drafted would have sustained the scrutiny of the trial judge's review had this issue been litigated. I see no basis to conclude that the trial judge committed a palpable and overriding error in determining that Mr. Karam possessed "rights which confer use" within the meaning of art. 415 *C.C.Q.* and was in full control of the residence, not only as to its use, but also as to entitlement to the value of the property. a

[58] St-Pierre J.A.'s understanding of the record is diametrically opposed to this. In her view, there was no evidence on the record to prove either the existence of rights which conferred use or that Mr. Karam was the sole holder of these rights. In

her view, the evidence before the trial judge regarding the relationship between the trust and the spouses was limited to the following elements (para. 98):

- The trust was constituted by both spouses for a common purpose to which they had freely consented.
- The trust deed reflected the intention of the spouses who had received professional advice on the matter.
- The property on Docteur-Penfield Avenue was acquired by the trust as an investment.
- This property was eventually occupied by the spouses and their children, but the record says no more on this.

[59] If we set aside the interpretation of the trust deed for a moment, the view by St-Pierre J.A. that the record did not contain any proof of rights which confer use is somewhat surprising. Who else, if not Mr. Karam and his family, would have had a right to use this property? The reality is that the occupation of the residence on Docteur-Penfield Avenue by Mr. Karam and his family was neither illegal, nor based on the tolerance of a third party nor precarious in any other way. The record is clear, and the trial judge so found, that their occupation of the house was legitimate and firmly grounded in the rights that resulted from a trust that Mr. Karam controlled entirely. In fact, according to Mr. Karam himself, the acquisition of a residence for

the family was precisely what they intended when they constituted the trust (A.R., vol. II, at pp. 66 and 82-84). In this context, it was entirely reasonable for the trial judge to infer that the trust controlled by Mr. Karam granted rights which conferred use of the residence within the meaning of art. 415 *C.C.Q.*

[60] In short, it was in fact their residence and they could stay there as long as Mr. Karam, who was in full control of the trust, saw this arrangement as a good way to manage the assets of the family. Therefore, I cannot subscribe to the views of St-Pierre J.C.A. when she writes that [TRANSLATION] “[t]he evidence adduced provides no basis for affirming the existence of such ‘rights which confer use of [it]’ on a balance of probabilities” (para. 104). The record as a whole amply supports the trial judge’s findings and conclusion.

[61] As for the determination of the trial judge that Mr. Karam was the sole holder of these rights, this resulted from his interpretation of the trust deed and more specifically of the extended powers of appointer granted to Mr. Karam. Again, I see no reviewable error. The fact that Ms. Yared and her children were beneficiaries of the trust does not change this as there was no assurance, under the trust deed, that they would receive anything at all or even remain beneficiaries of the trust. The status of the beneficiaries was precarious. Once again, it depended on the exercise of Mr. Karam’s discretionary powers. While my colleague seems assured that the rights of Ms. Yared and her children would have been protected had Mr. Karam decided to remove them and/or name himself as beneficiary, this was not part of the pleadings

before us nor before the courts below. I will refrain from speculating as to what might have been.

(2) Mr. Karam's Renunciation to his Powers as Appointer

[62] According to the Court of Appeal, the trial judge erred by failing to consider that Mr. Karam never used his powers of appointer to the beneficiaries' detriment and later renounced those powers (para. 100). Without discussing the arguments raised by the trial judge in relation to Mr. Karam's renunciation, St-Pierre J.A. then proceeded in her conclusions to confirm this modification of the trust deed (para. 111). At the hearing in this Court, both parties agreed that at no point had the Court of Appeal been asked to confirm the validity of the [TRANSLATION] "Act of Renunciation" of July 12, 2016 (transcript, at pp. 20-21 and 81).

[63] As the trial judge noted, the renunciation by Mr. Karam of his powers as appointer amounted to a modification of the constituting act of the trust. According to art. 1294 and 1295 *C.C.Q.*, this can be done only by a court after notice is given to the interested parties, including the settlor, the trustees and the beneficiaries, except in certain narrow circumstances that do not apply here (para. 58). In my view, it was not open to the Court of Appeal to modify the trust deed according to the [TRANSLATION] "Act of Renunciation", given that neither party had asked the courts below to do so and given that the conditions provided in art. 1295 *C.C.Q.* were not met. Thus, the trial judge did not err when he attached no significance to Mr. Karam's renunciation of his powers as appointer in his interpretation of the trust deed.

(3) The Valuation of the Rights Which Confer Use

[64] The Court of Appeal also held that the trial judge could not declare that the value of the rights which confer use was equal to the full value of the residence, since this question was not before him (paras. 108-9). On this, I am persuaded by the appellants that given the nature of the problem before him, it was well within the jurisdiction of the trial judge to slightly modify the declaration sought in the application in order to properly dispose of the issue (A.F., at paras. 131-34). In the context of an application for declaratory judgement, this does not amount to ruling *ultra petita* (*Poulin v. Dumas*, 2014 QCCA 676, at para. 3 (CanLII)). Of course, this reasoning does not apply to the question raised in the above section on Mr. Karam's renunciation. The exercise of the power granted by art. 1294 C.C.Q. to modify an act constituting a trust is beyond the authority of a court if it is not expressly asked to do so by one of the parties.

[65] We should also remember that the parties are waiting for a definitive answer on the current issue in order to decide how they will conduct a parallel litigation on the validity of Ms. Yared's will. If the trial judge had failed to declare how the value of these rights which confer use was to be determined, the value of Ms. Yared's estate would remain impossible to estimate and the parties would perhaps have had to seek another declaratory judgement on this narrow issue. Since the trial judge had all the evidence he needed to determine how the rights which confer use ought to be valued, it was justified for him to make a declaration to this

effect. Based on the jurisprudence on this issue and on the circumstances of this case, it was also open to the trial judge to conclude that the rights which confer use were equal to the full value of the residence (*Droit de la famille — 142245*, at paras. 13-14; *Droit de la famille — 10174*, at para. 52). I see no basis for appellate intervention on this question.

(4) The Fairness of the Result for Mr. Karam

[66] As a final point, I wish to address the issue of fairness that was raised by the respondent and by the Court of Appeal. As they both point out, if we determine that the full value of the residence is to be included in the family patrimony, it could follow that the children of Mr. Karam, theoretically, could inherit half of that value while remaining the sole beneficiaries of the trust (C.A. reasons, at para. 101; R.F., at paras. 119-20). In such a way, they could claim 150 percent of the value of the residence, while Mr. Karam would end up with nothing other than a large debt. That result would indeed be unfair for Mr. Karam.

[67] This eventuality, however, is premised on the assumption that Mr. Karam would be unable to exercise his powers as trustee and appointer to dispose of the property in order to pay the debt that would result from the partition of the family patrimony and recuperate the other half of that value. This was briefly discussed during the hearing, but I would note that the validity of the trust deed, the powers of Mr. Karam or his faculty to exercise those powers was not addressed fully before any court. In the end, I am of the view that, should Mr. Karam and his children find

themselves unable to reach a common solution that is equitable and respectful of the rights of each other, the courts will be able to avoid the unfair result noted above, notably by using the power granted by art. 1294 *C.C.Q.*, to modify the trust deed.

[68] My colleague, in her reasons at paras. 132-138, has taken issue with the foregoing. In my colleague's view, art. 1294 *C.C.Q.* cannot be relied on by Mr. Karam to avoid the possibility of being obliged to transfer half the value of the property to Ms. Yared's estate, while also being liable to the beneficiaries for the property. In the end, this is a matter for the Superior Court to deal with should Mr. Karam bring an application before it. I leave it to that court to dispose of it properly under the *Civil Code*.

[69] What is relevant to a proper disposition of the matter before this Court is that the point made by my colleague focuses on what is an ancillary question. The issue in this appeal is whether Ms. Yared (or her estate) is entitled to a half interest in the property by virtue of the division of the family patrimony. That does not depend on the operation of art. 1294 *C.C.Q.* Rather it turns on art. 415 *C.C.Q.*, which is a *rule of public order* under the *Civil Code*. A rule of public order cannot be undermined or denied based on a point of the nature made by my colleague.

[70] Taken to its logical conclusion, my colleague's reasoning at para. 137 would seem to suggest that because it is awkward for Mr. Karam to unwind the arrangement by which Ms. Yared would be cut out of the family patrimony, one should therefore give effect to the arrangement that would cut out Ms. Yared (in this

instance her estate) from her share of the family patrimony. That is not how my colleague puts it, but that is the implication of her position.

[71] I would recall the wording of art. 9 *C.C.Q.*: “In the exercise of civil rights, derogations may be made from those rules of this Code which supplement intention, but not from those of public order.” What is at issue here is whether such derogation is to be given effect. I would say no. In my view Ms. Yared’s right to a share of the family patrimony cannot be denied by the use of a trust, essentially for the same reasons that it could not be denied by the interposition of a corporation. Neither of these devices should be allowed to circumvent a rule of public order, in this case the division of the family patrimony between husband and wife.

IV. Conclusion

[72] For these reasons, I would allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of the Superior Court with costs to the appellants throughout.

The reasons of Côté and Karakatsanis JJ. were delivered by

CÔTÉ J. —

I. Overview

[73] This appeal concerns the interaction between the provisions of the *Civil Code of Québec* (“C.C.Q.”) governing the institution of the family patrimony and those governing the institution that is the civil law trust. This Court is asked to determine whether the family patrimony can include a family residence or the “rights which confer use” of it under article 415 C.C.Q. when the residence is owned by a discretionary trust controlled by one of the spouses.

[74] In 2011, Roger Karam and Taky Yared, a married couple, established the *Fiducie famille Taki* (Taki Family Trust) (“Trust”). The purpose of the Trust was to provide for the couple’s four children in light of Ms. Yared’s recent terminal cancer diagnosis: [TRANSLATION] “. . . for the benefit and welfare of the Beneficiaries, the whole shielded from the vagaries of life” (A.R., vol. II, at p. 110). Mr. Karam was named both as co-trustee of the Trust, along with his elderly mother, and as the sole “*Électeur*”, or appointer, under the Trust, while Ms. Yared and the four children were named as beneficiaries. Although Mr. Karam had the power to appoint and remove beneficiaries under the Trust Deed, at no point did he exercise that power during the relevant period.

[75] In 2012, the Trust purchased a mixed-purpose property allowing for both residential and commercial uses (“Residence”), in which the family resided from the time of purchase and for the remainder of the spouses’ cohabitation. In June 2014, Ms. Yared left the Residence and shortly thereafter served divorce proceedings on

Mr. Karam. In August 2014, she executed a last will and testament bequeathing the entirety of her estate to the four children.¹ Ms. Yared died on April 6, 2015.

[76] On July 19, 2016, the appellants, in their capacity as liquidators of Ms. Yared's estate, served an application for a declaratory judgment to have the Residence declared part of the family patrimony under the *Civil Code of Québec*. The trial judge concluded that the value of the Residence formed part of the family patrimony, relying on an analogy with the lifting of the corporate veil under art. 317 *C.C.Q.* and on the notion of "rights which confer use" at art. 415 *C.C.Q.* The Court of Appeal overturned that decision and declared that neither the Residence nor any rights which conferred use of it formed part of the family patrimony.

[77] I would dismiss the appeal. I share in my colleague's rejection of the trial judge's reliance on the "lifting of the corporate veil" (para. 32), and would agree that questions arising from a conflict between the establishment of a trust and the operation of the family patrimony provisions should be resolved by referring to the rules pertaining to both of those institutions (reasons of Rowe J., para. 27). However, I disagree with my colleague's interpretation of those rules and his conclusion that Mr. Karam held rights which conferred use of the Residence pursuant to art. 415 *C.C.Q.*

¹ The validity of this will is disputed in proceedings that are suspended pending this decision (Que. Sup. Ct., 500-17-093260-167).

[78] To determine whether a right which confers use exists where a residence is owned by a trust, courts must consider the circumstances surrounding the establishment of the trust, its intended purpose, and the rights and obligations of the trustees and beneficiaries under the terms of the trust deed. While it is important to keep in mind that the family patrimony provisions are intended to protect economically disadvantaged spouses, courts must not overlook the fact that spouses are free to acquire and dispose of property as they wish, even if this means that they do not acquire property falling within the family patrimony.

[79] In the instant case, the trial judge committed a reversible error by focusing solely on Mr. Karam's powers under the Trust Deed, conflating those powers with rights, and failing to consider the purpose of the Trust and the rights of its beneficiaries. Consequently, he erred in finding that Mr. Karam held rights which conferred use of the Residence, in failing to find that if such rights conferring use of the Residence existed, they were held either by Ms. Yared or jointly by both spouses, and in assigning to those rights a value equal to the value of the Residence.

II. Analysis

A. *Family Patrimony Provisions*

[80] The provision that is primarily at issue in this case is art. 415 *C.C.Q.*, which provides as follows:

415. 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 payment of contributions into a pension plan entails an accrual of benefits under the pension plan; so does the accumulation of service recognized for the purposes of a pension plan.

[81] Under the *Civil Code of Québec*, the family patrimony includes, namely, the residence owned by one or the other of the spouses or a right which confers use of it at the time of separation from bed and board or of the dissolution or nullity of the marriage (arts. 415 and 416 *C.C.Q.*). Marriage is dissolved by the death of either spouse — as was the case here — or by divorce (art. 516 *C.C.Q.*).

[82] In this case, it is not disputed that neither of the spouses ever owned the Residence, as it was directly acquired by the Trust (A.R., vol. II, at pp. 110 and 149). Thus, it is only the notion of “rights which confer use” that would allow the inclusion of some or all of the value of the Residence in the family patrimony.

[83] I am in agreement with my colleague that the family patrimony provisions of the *Civil Code of Québec* are of protective public order and that spouses cannot renounce in advance, by marriage contract or otherwise, their rights in the family patrimony (art. 423 *C.C.Q.*; reasons of Rowe J., at para. 24). The purpose of these provisions is to protect economically disadvantaged spouses at the time of separation from bed and board or of the dissolution or nullity of the marriage.

[84] However, while the family patrimony provisions are rules of public order, they only apply to property held by the spouses which falls under art. 415 *C.C.Q.* The *Civil Code of Québec* does not oblige spouses to acquire property falling under the family patrimony provisions:

[TRANSLATION] . . . nothing obliges spouses to have a principal or secondary residence, movable property or motor vehicles that they own, or even retirement plans. In addition, spouses are not obliged to have the same family patrimony throughout their marriage. It is only the family patrimony as it exists on the date of one of the situations giving rise to partition that is the parties' true family patrimony.

(C. Labonté, "Le patrimoine familial", in *Droit de la famille québécois* (loose-leaf), vol. 3, at pp. 3/2234-3/2235)

[85] In establishing the family patrimony rules, the legislature did not intend to compel spouses to possess any of the property listed at art. 415 *C.C.Q.* Spouses retain the freedom to acquire and dispose of property as they see fit, and are in no way required to own or otherwise acquire property that could be subject to the family patrimony provisions:

[TRANSLATION] Usually, spouses will . . . individually or together, purchase and sell various residences and several motor vehicles, and carry out various transactions to the credit or the debit of their retirement plans. The legislator did not want to impede these common occurrences of married life; it did, however, put some safeguards in place.

(*Droit de la famille* — 071938, 2007 QCCS 3792, [2007] R.D.F. 711, at para. 60)

[86] Article 423 *C.C.Q.* aims to prevent a spouse from renouncing his or her rights in the family patrimony during the marriage. However, the choice not to own property does not amount to such a renunciation. In practical terms, spouses may choose to rent rather than own a family residence and to lease rather than purchase a vehicle, and may never contribute to a pension plan during the marriage. Consequently, they may actually possess little property that would otherwise be part of the family patrimony.

[87] Included in spouses' freedom to choose how they arrange their affairs is the option to live in a residence held by a trust. Where spouses opt for the various advantages and disadvantages associated with the legal institution of the trust, it may be that they will not acquire property that is subject to the family patrimony.

[88] Of course, where spouses reside in a property owned by a trust, there may be situations in which this arrangement gives rise to "rights which confer use" of the property under art. 415 *C.C.Q.* As the Court of Appeal observed, when such questions arise, the situation must be analyzed on the basis of the legislative provisions governing both the institutions of the trust and the family patrimony, and the evidence surrounding the terms of the trust and any arrangement between the trust and the family members must be considered (paras. 87-88).

[89] Mr. Karam submits that the notion of "rights which confer use" in art. 415 *C.C.Q.* is limited to real rights such as those referred to in art. 1119 *C.C.Q.* (R.F., at paras. 46-48; see also arts. 911, 912, and 1172 *C.C.Q.*). As such, in

Mr. Karam’s view, given that no real rights were granted here, there is no right which confers use that could be included in the family patrimony. This position is not without merit. In *Droit de la famille — 071938*, at paras. 70-79, the Superior Court held that a right which confers use under art. 415 *C.C.Q.* must be in the nature of a right of use within the meaning of art. 1172 *C.C.Q.* and the articles that follow it (see also B. Lefebvre, “Les droits qui confèrent l’usage des résidences familiales: quelques difficultés lors de la liquidation du patrimoine familial” (2014), 116 *R. du N.* 389, at pp. 398-99).

[90] My colleague rejects this interpretation of art. 415 *C.C.Q.*, favouring a broader approach to support his conclusion that, as trustee, Mr. Karam does hold rights which confer use in the Residence. His approach rests on the understanding that rights conferring use of the Residence flow from Mr. Karam’s control over the Trust (reasons of Rowe J., at paras. 56-61). Without deciding whether art. 415 *C.C.Q.* should be read in such a broad fashion or should be limited to real rights, I am of the view that a trustee’s control over a trust that owns a residence does not automatically give rise to a right which confers use in the residence within the meaning of art. 415 *C.C.Q.* Where a residence is owned by a trust, the trust deed and the surrounding circumstances must be analyzed, in accordance with the trust provisions of the *Civil Code of Québec*, to determine whether the terms of the trust deed actually bestow upon one or both of the spouses a right which confers use pursuant to art. 415 *C.C.Q.*

B. *Trust Provisions*

[91] Under the *Civil Code of Québec*, “[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” (art. 1260 *C.C.Q.*). The constituting act of a trust may be a contract (art. 1262 *C.C.Q.*). The assets held by a trust form a trust patrimony, which is “autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right” (art. 1261 *C.C.Q.*).

[92] Unlike trusts under the common law, civil law trusts do not involve a separation of legal and beneficial ownership, rather, they consist of an aggregate of assets that falls within the trust patrimony, in which none of the settlor, trustee or beneficiary has any real right. Civil law trusts therefore have no element of “split ownership” as is the case in common law trusts (see *Trust général du Canada v. Service alimentaire exclusif inc.*, [1984] C.A. 145, at p. 148, per Nichols J.; J. Beaulne, *Droit des fiducies* (3rd ed. 2015), at pp. 37-38).

[93] Moreover, while civil law trusts have a separate and distinct patrimony, known as a patrimony by appropriation, they have no separate legal personality. In this way, they differ from corporations. In short, a trust can only exist if its patrimony is distinct from the patrimony of a natural or legal person (R.F., at para. 50).

[94] Upon creation of the trust, the trustee is charged with seeing to the administration of the trust patrimony, and the beneficiary's right is established "with certainty" (art. 1265 C.C.Q.). Among other things, the beneficiary has the right to require, pursuant to the constituting act, the provision of a benefit granted to him or her, or the payment of the fruits and revenues and of the capital (art. 1284 C.C.Q.).

[95] The trustee has the control and exclusive administration of the trust patrimony, exercises all the rights pertaining to the patrimony, and may take any proper measure to secure its appropriation (art. 1278 C.C.Q.). Such a role, however, imposes duties and obligations. As Madeleine Cantin Cumyn discusses, for the trustee, "may" is often accompanied by "shall":

[TRANSLATION] We are also unable to identify any right held by the trustee in the trust property. The trustee's situation appears rather to be the very antithesis of a right. The trustee is imposed with a charge in which the authorization to perform an act is often coupled with the obligation to perform the authorized act.

(Les droits des bénéficiaires d'un usufruit, d'une substitution et d'une fiducie (1980), at p. 69)

The trustee thus performs his or her duties in the interest of the beneficiary and in keeping with the purpose of the trust (arts. 1278 and 1306 C.C.Q.). To fulfill these obligations, the trustee may alienate the property by onerous title, charge it with a real right or change its destination and perform any other *necessary* or useful act, including any form of investment (art. 1307 C.C.Q.).

[96] It should be noted that the person having the power to appoint beneficiaries or determine their shares cannot exercise that power for his or her own benefit (art. 1283 C.C.Q.). As my colleague observes, the limitation in art. 1283 C.C.Q. providing that this person cannot exercise that power for her own benefit may be set aside where the trustee is himself or herself a beneficiary under the trust deed (reasons of Rowe J., at para. 19; Beaulne, at pp. 229-30). Nevertheless, it is generally accepted that a trustee having the power to appoint or remove beneficiaries cannot exercise that power in an arbitrary manner:

[TRANSLATION] Second, article 1283 C.C.Q. establishes, in an admittedly very general manner, the scope of the power to appoint by giving its holder broad latitude in exercising it. Indeed, the holder may appoint the beneficiaries or determine their shares without any real constraints, that is to say, without outside interference and without any control. What is more, the article even allows the holder to change or revoke his or her decision in the course of the trust. Despite the apparent absolute freedom of the rule, it is clear that the holder of the power to appoint may not, however, exercise it in a completely arbitrary manner. In fact, he or she must use it in strictest compliance with the constituting act.

(J. Beaulne, at pp. 228-29; see also *Québec (Curateur public) v. A.N. (Succession de)*, 2014 QCCS 616, at para. 53; *Miller (Succession de)*, 2013 QCCS 5184, at para. 88 (CanLII)).

[97] As author Julie Loranger notes, art. 1283 C.C.Q. would seem to be a rule of public order:

[TRANSLATION] Article 1283 C.C.Q. adds that a trustee who is entitled to exercise a power to appoint may not do so for his or her own benefit. This provision seems to us to be of public order. This requirement is consistent with article 1275 C.C.Q., which requires the presence of a trustee who is not a beneficiary at all times.

("Le fiduciaire: entre le tyran et le serviteur", in *Développements récents en successions et fiducies* (2010), see also Ministère de la Justice, *Commentaires du Ministre de la Justice*, vol. 1, *Le Code civil du Québec — Un mouvement de société* (1993), at p. 765; art. 1310 C.C.Q.)

[98] From the above, we may conclude that the trustee is charged with significant powers under the *Civil Code of Québec* and that these powers must be exercised in the best interest of the beneficiaries and in keeping with the purpose of the trust. But can these *powers* constitute a *right* which confers use? As a general rule, I would answer this question in the negative. The distinction between "rights" and "powers" is supported in academic literature:

[TRANSLATION] . . . the very concept of a trust requires recognition of the difference that exists between "rights" and "powers", given that the trustee has no real right in the trust property while being the administrator thereof. Indeed, [Professor Cantin Cumyn] explains that a right is a "legal prerogative recognized to its holder in his or her own interest", whereas a power can be defined rather as a "prerogative exercised in the interest of another". [Citation omitted.]

(Beaulne, at p. 44)

Indeed, this dichotomous view of powers and rights existed before the trust provisions as they currently read were enacted as part of the *Civil Code of Québec*:

[TRANSLATION] The trustee's legal situation must be analyzed in terms of powers over the trust property rather than in terms of rights. The Civil Code itself uses this designation.² It authorizes the trustee to perform certain acts and imposes certain obligations on the trustee.

² The provision referenced in this quotation (art. 981e of the *Civil Code of Lower Canada*) reads as follows: "The *powers* of a trustee do not pass to his heirs or other successors, but the latter are bound to render an account of his administration".

(Cantin Cumyn, at p. 71)

[99] It is on this point that I disagree with my colleague, who would hold that the level of control attributed to Mr. Karam as trustee will determine whether there is a right which confers use (reasons of Rowe J., at para. 59). In my view, it is rather the interests of the beneficiary that are more likely to give rise to such a right under art. 415 *C.C.Q.*

[100] In addition to the *Civil Code of Québec* provisions governing trusts, we must consider the nature of the Trust Deed and the circumstances in which it was established (art. 1426 *C.C.Q.*). Indeed, as a contract, the Trust Deed is subject to the usual rules of contractual interpretation found in the *Civil Code of Québec*, including art. 1426 *C.C.Q.* Thus, the interpretation of the Trust Deed pursuant to these rules must include an analysis of the parties' objectives in establishing the Trust, along with the trustee's obligations and the rights of beneficiaries under the terms of the deed.

[101] This brings me to an additional point of disagreement with my colleague, who finds that the intention of the spouses should have no bearing on the determination of whether there are any rights which confer use (reasons of Rowe J., at paras. 52-53). With respect, I disagree with my colleague's assertion that the fact that the Trust was set up for a legitimate purpose — and not with a view to evading the family patrimony rules — is irrelevant. In my view, the intention in establishing a

trust will be relevant insofar as it informs the purpose of the trust. Given that the trustee's powers and control are constrained by the purpose of the trust, the parties' objectives in establishing the trust must be taken into consideration. For instance, where a trust has no legitimate purpose beyond evading the family patrimony rules, the powers actually exercised by the trustee might exceptionally be construed, on the facts of that case, as a right which confers use.

C. *Treatment of Article 415 C.C.Q. in Jurisprudence*

[102] An analysis of the case law involving residences held by trusts or corporations in the context of partition of the family patrimony reveals that the main concern of the courts has been to prevent spouses from evading the family patrimony rules and to avoid an economic imbalance, rather than to recognize simple occupation as a right under art. 415 C.C.Q. Courts have considered it appropriate to intervene where the evidence shows that there is a right which confers use of the residence, particularly in cases where the residence is transferred by the spouses to a company in which one or both of them are shareholders, or to a trust, with the use of the residence continuing as it had before the transfer.

[103] In *Droit de la famille — 3511*, [2000] R.D.F. 93 (Sup. Ct.), the spouses established a trust and, the same day, transferred the family residence, in which they were already living, and vehicles to the trust. Gendreau J. concluded that despite the husband's claim that the purpose of the transfer was to shield these assets from seizure, the evidence indicated that the true purpose was to evade the family

patrimony provisions. Specifically, the spouses had transferred only the assets falling under the family patrimony rules to the trust, and not the husband's personal property, which he presumably would also have wished to protect from creditors. Additionally, the parties continued to make regular payments on the residence following the transfer, as they had in the years preceding.

[104] In *Droit de la famille — 071938*, a case to which I will return in greater detail below, the evidence revealed that the spouses' occupation of the residence remained the same despite the transfer of ownership to a trust. Gagnon J. found that a joint right which conferred use existed by virtue of an unwritten contract between the trust and the spouses, pursuant to art. 1121 *C.C.Q.*

[105] Similarly, in *D.L. v. L.G.*, 2006 QCCA 1125 (CanLII), the Court of Appeal upheld the trial judge's determination that a right which conferred use existed. This conclusion was based on the fact that the family residence had been transferred to a corporation in which both spouses were shareholders, without any change in the spouses' occupation of the residence. The Court of Appeal was of the view that the transfer of the residence to the corporation was artificial and motivated solely by tax considerations (para. 23). It found that the spouses appeared to have wanted to perpetuate their existing rights as users of the residence (para. 26).

[106] In *Droit de la famille — 2225*, [1995] R.D.F. 465 (Sup. Ct.), at p. 468, Goodwin J. considered the concept of "rights which confer use" in the context of art. 406 *C.C.Q.* and noted that the mere fact of having lived in a house owned not by the

spouses, but by a corporation of which one spouse was vice-president, does not confer a right of use on any of the occupants:

[TRANSLATION] The Court notes that this provision must be interpreted broadly to protect the family, including the children.

But the mere fact of having stayed and even lived with one's spouse in a house or dwelling provided, in the circumstances described, does not confer a right on any of the occupants.

[107] The situation might be different if there were a formal arrangement or agreement concerning the occupation of the residence. In *Droit de la famille — 1646*, [1992] R.D.F. 463 (Sup. Ct.), Frappier J. held that the husband had a right which conferred use in a residence held by a corporation that he owned with his father. In that case, the judge inferred from the evidence that the husband's father had granted the husband and his family the right to live in the residence for free. Frappier J. concluded that a right of use must necessarily result from an agreement between one or both of the spouses and the owner of the residence, such as that between the spouses and the husband's father (see also *N.R. v. R.P.*, [2003] R.D.F. 831 (Sup. Ct.)).

[108] The appellants rely on *Droit de la famille — 13681*, 2013 QCCA 501, at para. 31 (CanLII), in which the Quebec Court of Appeal held that it is not possible to avoid the application of public order provisions, such as those pertaining to the family patrimony, as a consequence of the establishment of a trust:

[TRANSLATION] The creation of a trust must not have the consequence of avoiding the application of public order provisions, such as those pertaining to the family patrimony

[109] On this point, I would agree with the Court of Appeal in the present case (paras. 80-84). While the appellants' argument may, on its face, seem to have some merit because of the use of the word [TRANSLATION] "consequence" in the quote above, it cannot withstand a more rigorous analysis. The Court of Appeal did not find in *Droit de la famille — 13681* that a trust can never acquire a residence without the residence automatically being incorporated into the family patrimony. In fact, that case did not deal with the question of "rights which confer use" under art. 415 C.C.Q. Rather, the words "consequence of avoiding" refer to the purpose or objective pursued at the time the trust is established. Indeed, rather than justifying a consequentialist approach, this case illustrates the importance of carefully considering intent and the trust deed itself in order to ascertain the trust's purpose.

D. *Application to This Case*

(1) Rights Which Confer Use

[110] I turn now to the facts of this case. The evidence does not demonstrate a right which conferred use of the Residence in Mr. Karam. An analysis of the Trust Deed shows that Mr. Karam had significant powers as trustee, but it does not reveal any right to the family residence. As to the purpose of the Trust, Mr. Karam's unchallenged testimony indicates that the spouses had the common objective of

investing in this property for the benefit of their four children, which purpose is reflected in the Deed itself. Any exercise of Mr. Karam's powers over the property must be consistent with this purpose. It would therefore be impossible for him to remove the beneficiaries for his own benefit without failing to honour his obligations under the trust. Consequently, it cannot be said that the Trust Deed and the surrounding evidence show any right which conferred use in Mr. Karam pursuant to art. 415 *C.C.Q.*

[111] However, as I will discuss below, assuming without deciding that a right of use such as the one provided for in art. 1172 *C.C.Q.* may be conferred by tacit agreement, I believe it was open to the trial judge to find a joint right held by Mr. Karam and Ms. Yared based on a tacit agreement between them and the Trust. It was also open to the trial judge to find a right which conferred use on Ms. Yared alone as a result of her status as beneficiary of the Trust.

[112] I will begin with the Trust Deed, which provides as follows:

- a) The beneficiaries are the late Ms. Yared and the four children (Article 4.1).
- b) The trustees are Mr. Karam and his elderly mother. As "*Électeur*", or appointer, Mr. Karam had the sole discretion to appoint a new beneficiary to the Trust, including himself, or to remove any existing beneficiaries (Article 4.2).

- c) The trustees have the discretion to determine in what proportion the capital and revenue of the Trust are provided to the beneficiaries as well as to determine which beneficiaries are to receive, in whole or in part, the capital and revenue of the Trust (Articles 4.3 and 4.4).
- d) There are a variety of methods by which the trustees may determine how best to utilize the funds of the Trust and to allow them to grow (Article 5).
- e) The trustees have broad powers of administration over the Trust's assets as well as additional powers to make purchases, sales, contracts and loans, to pay for consulting services and to take out insurance policies under the Trust (Article 6).

[113] Again, the terms of the Trust Deed confer significant powers and responsibilities on Mr. Karam as trustee. This is consistent with the powers of trustees set out in the *Civil Code of Québec* provisions outlined above. However, on the terms of the Trust Deed alone, which does not grant Mr. Karam any right to the property held by the Trust or to the use of it, it is difficult to identify the source or existence of any right that he might have to the Residence.

[114] Rather, in my view, it is Ms. Yared who, as beneficiary, has a stronger claim to rights conferring use of the Residence. She had the right to require, pursuant to the Trust Deed, the provision of any benefit granted to her (art. 1284 *C.C.Q.*). While it is widely accepted that a beneficiary's rights in a trust are personal rights

(D.-C. Lamontagne, *Biens et propriété* (8th ed. 2018), at p. 145; Beaulne, at pp. 232-33), the notion of “benefit” allows for a broader conception of the content of the beneficiary’s rights, which may not be limited to receiving revenue or capital from the trust. This right to a benefit, albeit personal, may not be purely monetary and may instead relate to specific property (Beaulne, at p. 234). Such a right might be akin to the notion of a *jus ad rem*, which requires the debtor (or the debtor patrimony) to provide the property to the beneficiary (see Cantin Cumyn, at p. 64; H. Roland and L. Boyer, *Locutions latines du droit français* (4th ed. 1998), at p. 239); *Private Law Dictionary and Bilingual Lexicons: Property* (2012), “*jus ad rem*”, at pp. 97-98. This right to a benefit, corresponding to specific property held by the trust, remains in the nature of a personal rather than a real right. As such, it is analogous yet distinct from, for example, rights under a lease.

[115] In any case, what remains clear is that Mr. Karam had no such right in the assets of the Trust. Such a right flows from the beneficiaries’ rights under the Trust, and Mr. Karam was not a beneficiary.

[116] The following portions of Mr. Karam’s testimony are also relevant:

- a) The spouses’ objective in establishing the Trust was to protect and provide for the children in light of Ms. Yared’s diagnosis and the fact that Mr. Karam would soon become a single parent (A.R., vol. II, at pp. 65, 82 and 84).

- b) The Residence was chosen as a result of its mixed commercial and residential uses and its potential to generate revenue to provide for the children. The family intended, if the need arose in the future, to rent or sell the space (A.R., vol. II, at pp. 84 and 85).
- c) The idea of establishing the Trust came from Mr. Karam's brothers-in-law (the appellants in the instant case), one of whom made the suggestion after arranging his own affairs in a similar manner. Mr. Karam and Ms. Yared used the same lawyer and notary that Mr. Yared had used, and the trust deeds were similarly formatted (A.R., vol. II, at pp. 65, 66 and 83).
- d) Both Mr. Karam and Ms. Yared were advised on the establishment of the Trust, and the content of the Trust Deed accurately reflects their intentions (A.R., vol. II, at p. 72).

[117] These facts have some similarities to those in *Droit de la famille* — 071938, which was relied on by the Quebec Court of Appeal in the instant case. In that case, the spouses acquired joint ownership of the family residence during the marriage. A few years later, the residence was transferred to a trust. The beneficiaries of the trust were the wife and the couple's children, and both spouses were trustees. As in the instant case, the Superior Court found that the residence did not form part of the family patrimony, given that it was no longer the property of the spouses, and relied instead on rights which confer use pursuant to art. 415 *C.C.Q.* The Superior

Court held that there was a right which conferred use as a result of an unwritten contract between the trust and the spouses pursuant to art. 1121 *C.C.Q.*

[118] In the present case, assuming without deciding that a right of use may be conferred without any formality, or in other words, that tolerance may constitute a basis for such a right, I believe it was open to the trial judge to similarly find that a right which conferred use of the Residence existed by way of a tacit agreement between the Trust and the spouses. The spouses and their children moved into the Residence following its purchase, and the family would presumably have had the trustees' consent to reside in the home. The practical result of such an agreement would be a joint right which conferred use held by both spouses.

[119] My colleague is skeptical of the level of protection enjoyed by the beneficiaries pursuant to the Trust Deed (reasons of Rowe J., at para. 61). However, it is important to look both to the Trust Deed and to the *Civil Code of Québec* in order to gain a full picture of the protections afforded to the beneficiaries. While the Deed may entrust Mr. Karam with significant powers, these are circumscribed by the trust provisions of the *Civil Code of Québec*. It is thus not necessary to speculate on what might follow the purported removal of Ms. Yared and the children as beneficiaries. Quite simply, the law does not allow Mr. Karam to exercise his powers arbitrarily (art. 1283 *C.C.Q.*; see also Beaulne, at p. 228-29; *A.N. (Succession de)*, at para. 53).

[120] To address my colleague's position that the trial judge did not err in finding rights which confer use in Mr. Karam alone, I would reiterate that, as trustee,

Mr. Karam must perform his duties in keeping with the purpose of the Trust and cannot do so for his own benefit (arts. 1260, 1283 and 1306 *C.C.Q.*). As the purpose of the Trust was stated, yet not expressly defined in the Trust Deed, we must look to the circumstances surrounding its establishment. Mr. Karam's unchallenged testimony confirms that the spouses' objective in constituting the Trust was to create an asset protection vehicle to provide for the children. Accordingly, despite the broad powers conferred upon Mr. Karam in the Trust Deed, his discretion as "*Électeur*", or appointer, and co-trustee was constrained by this purpose. Moreover, as trustee, Mr. Karam holds no right, real or personal, in the Trust's assets:

[TRANSLATION] [The trustee] is not only required to perform the acts necessary for sound management, which excludes any freedom, but also has the duty not to derive any personal benefit from the trust property. It may be added to the foregoing that real rights and personal rights necessarily represent assets in the patrimony of their holder. This is not the case for the trustee. [Emphasis added.]

(Cantin Cumyn, at p. 69; see also Beaulne, at pp. 266-67.)

[121] As an example, the Trust Deed does grant Mr. Karam the power to appoint beneficiaries, which may include himself (A.R., vol. II, at pp. 117-18; reasons of Rowe J., at paras. 5, 11 and 56). However, he could not appoint himself beneficiary of the Trust to the detriment of his wife and children, as he cannot exercise the power of appointment for his own benefit (art. 1283 *C.C.Q.*). Given that art. 1283 *C.C.Q.* is a rule of public order, it therefore seems impossible that Mr. Karam could name himself beneficiary, despite the fact that the Trust Deed

grants him that power. As the Minister of Justice explained upon the enactment of article 1283 C.C.Q.:

[TRANSLATION] This article is new and completes the preceding one. It gives the person having the power to appoint or to determine shares the assurance of enjoying a broad enough latitude to be able to change or revoke his or her decision where the achievement of the purpose of the trust depends on it.

The article makes it possible to change a decision that, for example, granted a scholarship enabling a deserving student to pursue a university education, where it is proved that the chosen student has abandoned his or her studies, in order to use the scholarship for a different purpose.

Moreover, the article states that the power to appoint or to determine shares may not be exercised for the benefit of the person on whom it has been conferred. If it were otherwise, the person with this power would be breaching his or her obligations. [Emphasis added.]

(*Commentaires du ministre*, at p. 765; see also Beaulne, at pp. 228-29.)

[122] My colleague places weight on the fact that the family resided in the Residence (reasons of Rowe J., at para. 59). While the family began to reside in the home following its acquisition by the Trust, the evidence is silent as to the nature of any relationship between the family and the Trust (C.A. reasons, at para. 55). All that the evidence discloses is the occupation of the Residence and the intention of the spouses to use it as an investment given its mixed residential and commercial uses. There is no evidence of a formal arrangement between the spouses and the Trust, as was the case in *Droit de la famille — 1646*.

[123] If, indeed, we were to accept that mere occupancy could give rise to a right which confers use, the necessary conclusion would be that both spouses held

that right, given that they both resided in the Residence. I do not conclude as such, and find rather that the likely source of the legitimacy of the occupancy is an *agreement* between the Trust and the Residence's occupants.

[124] Unlike the cases in which courts have concluded that spouses had rights which conferred use by virtue of the transfer of the residence to a trust, the arrangement in the instant case is anything but artificial (*Droit de la famille — 3511; Droit de la famille — 071938*; see also *D.L.*). The record discloses no intention to evade the family patrimony provisions. On the contrary, there is unchallenged evidence that the Trust was established for the long-term benefit of the children.

[125] There is no reason to construe the powers exercised by Mr. Karam as trustee as anything but powers to be exercised for the benefit of his wife and children. No rights of occupancy existed prior to the establishment of the Trust, as the Residence was purchased by the Trust directly, and so it cannot be said that the spouses' rights continued as they had prior to the Trust's inception.

[126] I would agree with the Court of Appeal that where a residence owned by a trust previously belonged to one of the spouses and there has been no change in circumstances in the intervening years apart from the transfer to the trust, a right which confers use may exist under art. 415 *C.C.Q.* (C.A. reasons, para. 91). Such a situation may indicate that the transfer to the trust had the purpose of evading the family patrimony provisions. However, where, as in the instant case, the trust has a

valid purpose and acquires the residence directly, a closer analysis of the terms of the trust deed and the surrounding circumstances will be necessary.

[127] In his interpretation of the Trust Deed, the trial judge failed to consider several relevant factors. His determination was based on the powers vested in Mr. Karam as trustee and “*Électeur*”, or appointer, which, as I have established above, are not equivalent to rights. In making his findings, the trial judge ignored the beneficiary rights vested exclusively in Ms. Yared and the four children, which would give Ms. Yared a stronger claim to any rights which conferred use than Mr. Karam could hold as trustee. Nor did the trial judge take into account the evidence demonstrating that Mr. Karam had never exercised his powers as trustee and appointer in any way, let alone for the purpose of reducing or modifying the rights of any of the original beneficiaries. The trial judge also failed to consider that Mr. Karam’s powers must be exercised in a manner consistent with the purpose of the trust, and not for his own benefit (arts. 1283 and 1306 *C.C.Q.*).

[128] The trial judge’s failure to observe the common intention of the parties and to take into account the nature of the contract and the surrounding circumstances was contrary to arts. 1425 and 1426 *C.C.Q.* It is accepted that these factual elements should be central to courts’ interpretation of contracts:

[TRANSLATION] [A]rticle [1426 *C.C.Q.*] adopts, in part, the rules in articles 1016 and 1017 *C.C.L.C.* concerning the nature of the contract and usage, but it adds a certain number of new elements that must be considered in interpreting the contract, such as the parties’ conduct in the

performance of the contract or, more generally, the interpretation they seem to have given to the contract through their acts and their own subsequent conduct.

It is very rare for article 1426 C.C.Q. to be used separately from article 1425 and vice-versa. These two provisions are complementary and essential to the interpretative process. Indeed, in seeking the parties' true intention, the courts must review the factual elements relating to the nature of the contract, the circumstances and the conduct of the parties, as well as usage.

It should be noted that courts generally tend to give this article a broad interpretation. This allows them to take into account as many elements and indicia as possible that can be helpful to them in determining the solution to the legal problem. [Emphasis added.]

(V. Karim, *Les obligations* (4th ed. 2015), vol. 1, at pp. 1713-15)

[129] The trial judge was content with a literal reading of the Trust Deed. As a result, he disregarded the very nature of a trust and the relevant provisions of the *Civil Code of Québec*, thereby conflating powers with rights. In my view, this misconception of the evidence constitutes a material error that affected the trial judge's conclusion (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 72; *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, at para. 15).

[130] I would emphasize again that the *Civil Code of Québec* does not oblige spouses to acquire property which would fall under the family patrimony. The effect of the trial judgment is to deprive the spouses of the characteristics and benefits of the legal institution of the trust, of which they freely chose to avail themselves.

[131] To sum up, the trial judge erred in finding that Mr. Karam alone held a right which conferred use in the Residence. If such a right existed, it was held only by

Ms. Yared, as a beneficiary of the Trust, or was jointly held by both spouses as a result of a tacit agreement between them and the Trust.

(2) Fairness Concerns

[132] Article 416 *C.C.Q.* provides that in the event of the dissolution or nullity of a marriage, the value of the family patrimony is divided equally between the spouses, or, as in the instant case, between the surviving spouse and the heirs. Everything forming part of the family patrimony must therefore be evenly divided, with each spouse or his or her estate receiving 50 percent of the value (subject to some exceptions not applicable in this case).

[133] Consequently, should any rights conferring use of the Residence exist, the value of those rights must be divided equally between Mr. Karam and Ms. Yared's estate.

[134] As my colleague acknowledges, the inclusion of the rights which conferred use of the Residence in the family patrimony would unfairly impoverish Mr. Karam (reasons of Rowe J., at para. 66). Not only would he be required to pay 50 percent of the value of the Residence into Ms. Yared's estate, despite the fact that the title to the Residence remains in the Trust patrimony, but he would be left with nothing. In other words, he would not get his 50 percent of the value of the rights conferring use of the Residence — to which he is entitled pursuant to art. 416 *C.C.Q.* — while the children would receive up to 150 percent of the value of

the Residence. Indeed, under the terms of Ms. Yared's will, the children would inherit 50 percent of the family patrimony's value as Ms. Yared's heirs, in addition to being the sole beneficiaries of the Trust. The result is a legal and mathematical incoherence.

[135] My colleague proposes a solution in the event that the parties are unable to reach an agreement. I would note in passing that while a peaceful resolution of the dispute may be hoped for, it is not for the courts to assume that parties will reach agreements; parties remain free to negotiate as they wish, but if no agreement is reached, it is then up to the courts to resolve the dispute. My colleague suggests that the courts should be able to avoid an unfair result by using the power granted by art. 1294 *C.C.Q.* to amend the Trust Deed in order to allow Mr. Karam to sell the property, pay his debt to Ms. Yared's estate and keep 50 percent of the value of the Residence (reasons of Rowe J., at para. 67).

[136] Respectfully, I do not agree that the answer lies in art. 1294 *C.C.Q.*, which reads as follows:

1294. 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.

[137] I note that any amendment to the Trust Deed pursuant to art. 1294 *C.C.Q.* would still have to be consistent with the purpose of the Trust. In fact, amendments must prove better at fulfilling the trust's purpose than the original terms of the trust deed itself. To allow Mr. Karam to sell the property and use some of the proceeds to pay his debts arising from the inclusion of the value of the Residence in the family patrimony would result in a deprivation to the children of a portion of that value. This would certainly run contrary to the Trust's purpose to provide for the children, as well as to Mr. Karam's obligation to act in the best interest of the beneficiaries. It is far from clear that an obstacle has arisen in this case which prevents the Trust from continuing to fulfill the purpose for which it was originally established, namely to provide for the children of Ms. Yared and Mr. Karam (A.R., vol. II, at p. 110). Thus, it is difficult to imagine that an amendment to the Trust Deed such as is suggested by my colleague is available in these circumstances.

[138] As the parties, the Court of Appeal and my colleague have noted, the purpose of the family patrimony provisions is to prevent economic inequality and undue hardship to spouses, a hardship that will surely befall Mr. Karam should the rights conferring use of the Residence be included in the family patrimony.

(3) Valuation

[139] As for the value of the rights which confer use of the Residence, I would agree with the Court of Appeal that if such rights were held jointly by the spouses, they would cancel each other out at the time of partition (C.A. reasons, para. 105). A

similar conclusion was reached in *Droit de la famille — 071938*, in which Gagnon J. found that the spouses had equal rights of use which cancelled each other out and that it was therefore unnecessary to assign a dollar value to those rights (paras. 110-12).

[140] Even assuming that either Mr. Karam or Ms. Yared alone held rights which conferred use, I highly doubt that those rights could have the same value as the Residence itself, as the trial judge found. Neither spouse could have sold the Residence and retained the proceeds under the terms of the Trust or the relevant provisions of the *Civil Code of Québec*. Insofar as they derived a benefit, it was merely from occupation of the Residence.

[141] In any event, there was no evidence before the trial judge to support his finding that the rights which conferred use of the Residence were equivalent to the market value of the property. Expert evidence would have been required to value such rights, and no such evidence was proffered at trial. As the Court of Appeal stated, the question of valuation was not one of the subjects of debate on which counsel and the trial judge had agreed at the outset of the hearing, and the trial judge should have refrained from making a determination on this point (paras. 107-10).

III. Conclusion

[142] For these reasons, I would dismiss the appeal with costs throughout.

*Appeal allowed with costs throughout, CÔTÉ and KARAKATSANIS JJ.
dissenting.*

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