V Wealth & Family Law: Part 1 - Family Patrimony in Québec

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Keith: Welcome to the Empowered Investor. My name is Keith Matthews and I'm joined by my co-host Ruben Antoine. Welcome, Ruben.

Ruben: Hi, Keith. Thank you.

Keith: So, listen, today we've got a unique twist. We're departing from some of our more traditional content which was up to now focused on portfolio management and pure financial planning. We're moving into family law. Family law is critical in wealth management. There are so many moving parts and there's so much to know about. What we've decided is to set up three shows which will uniquely review and discuss content around the division of assets and the separation of assets. So, Ruben, why would we do a show like this?

Ruben: Like you said, I think it's a very important aspect of wealth management because when you think about it, this show can be very relevant for people entering into a serious relationship, people about to get married, or people who have kids that are about to get married so that they can understand the basis around what happens if and when something were to happen in that relationship. And there are some assets that were built. So it's really relevant for this group but also for people who were in a long-term relationship and unfortunately are going through a difficult period and maybe are entering into a separation or divorce process. So I think sometimes people are asking themselves what is going to happen to the assets that were built—the house and all the investment accounts—if there is a divorce or a separation.

Keith: And in Canada, Canadian law is divided into two components. We have the Civil Code in Quebec and we have common law for the rest of Canada. We have clients and listeners across the country. So what we've decided to do is set up two or three parts for each one. We're going to release the episodes in clusters three to four days apart. And we're going to start with the Civil Code. We've got a great guest. There'll be three parts to this series. The first one will be on family patrimony. The second one will be on matrimonial regime. And the third one will be on unmarried couples. So, Ruben, tell us a little bit about our guest.

Ruben: Yes. Our guest is an amazing lawyer and partner at a firm called Miller Thompson. Her name is Patricia Foucault. Miller Thompson is a large Canadian law firm with offices all over the country. So, Patricia has over 20 years of experience in family law. She has expertise in divorce, separation, child custody, and support payment, for example. And she's also a fellow at the International Academy of Family Lawyers, which is a worldwide association that recognizes lawyers that are the most experienced and skilled in family law in their respective countries. So we are very excited to have her as a guest on our podcast.

Keith: She has outstanding credentials. We've had her in our offices. She's a wonderful speaker. Listeners, please enjoy the next three parts with Ruben interviewing Patricia. Thanks and have a great show. Patricia, welcome to the Empowered Investor Podcast.

Patricia: Thanks for having me.

Ruben: Patricia, in the introduction, we already gave a bit of detail about you, but could you please tell us in your own words what you do exactly? How would you describe your role to someone who has no knowledge of what you do?

Patricia: I'm a family law attorney. I practice in terms of divorce, separation, custody disputes, but we also accompany people in the context of their marriage. We do marriage contracts, what Americans call prenups, but in Quebec law we call them matrimonial contracts. So we help people prepare, draft, and negotiate those contracts in view of their marriage. And we also work closely with tax lawyers and estate planners in terms of asset protection to make sure that the dimension of family law and the consequences of the application of family law on a person's asset is taken into consideration in corporate organizations and tax structures that could be put in place and in terms also of estate fees.

Ruben: Wow, this is a very exciting topic, actually. And we are very happy to be covering that on this podcast because we often get questions from our clients, questions like, do you divide investment accounts or assets in case of divorce? So I know that there is a lot to cover. For example, in Quebec, there are different categories that the asset can fall under, and those categories will determine how they are divided in case of a separation. We will cover, if I can call it, the first category—family patrimony—in this first portion of the podcast. And in the second part, we'll go into the details of the other category. Let's start from the basics. If a couple gets divorced in Quebec, how does the family asset get divided? Can you explain to us the basic rules and also what falls under that first category, basically?

Patricia: Okay, great. So when you're trying to assess what is partitionable in terms of divorce, separation as to bed and board, or also if one of the spouses is deceased, you have to start by applying the family patrimony law. The family patrimony law is a law of public order that was put in place in Quebec to guarantee that certain assets which are usually used by the family will be partitionable regardless of your matrimonial regime. So the family patrimony has a basic protection for all couples who are basically habitually residing in Quebec at the time either of their separation as to bed and board or at the time of divorce or at the time that one of the spouses is deceased. So regardless of where you were married, if at the time you separate you are residing in Quebec, the family patrimony law will apply.

Ruben: Or it is based on residency.

Patricia: Absolutely. At the time of the divorce or separation. We'll analyze this later on, but the matrimonial regime is based on the place of habitual residence at the time of the marriage. So the family patrimony—there's a moment in time you have to put yourself in—at the time of separation, death, or divorce.

Ruben: I see. So what is that family patrimony exactly? Can you define it and really explain the impact? What assets are included in that category that we call the family patrimony?

Patricia: The family patrimony consists of certain assets which are mainly used by the family. It includes residences of the family, both the main family residence as well as any secondary family residence that the family might have. It includes the furniture, decoration, and movable effects that are used in the family residences. Also, the vehicles used for the family's transportation. And finally, the pension plan accrued during the marriage which includes RRSPs. So all of those assets are partitioned in accordance with the Family Law Act.

Ruben: Okay, so basically when you say partition, we are talking about they get divided. And the main categories are the house or family residences, then the family transportation—so the cars, for example—and anything in the house like the furniture, and also RRSP and pension that were accrued during the marriage. So those are, if we can call it, four types of assets, generally speaking, that for married couples, if they get divorced or separated or at death, it gets divided in half. Is that what we are saying? Just so that I understand.

Patricia: Yes, generally it's partitioned, it's divided 50/50, but under reserve of certain exclusions which are provided also by the law.

Ruben: Okay. Okay. So we'll talk about exclusions. I can see this is the main type of assets. And if I understand right, no matter who owns those assets—so, for example, if Mrs. bought the house but the house is used for the family and then they are separated—even if the house is under her name in terms of legal ownership, it will fall under that category that we call the family patrimony and may get separated in half if we don't talk about exclusions yet.

Patricia: Absolutely. Family patrimony says that all those assets are shared equally among the spouses regardless of who is the legal owner of the property, again under reservation of the deductions provided by the law.

Ruben: Okay, very interesting because we do get questions, for example, about the RRSPs, and it's important as an investment manager to understand that if those RRSPs were built during the marriage, even if they are under one specific spouse's name, they can get divided.

Patricia: Absolutely. They can get divided because in Quebec, once you marry a person, you basically create a family patrimony with that person, but that family patrimony basically is crystallized at the time of death or separation. Meaning during the marriage, you have your own RRSPs. You do what you want with your RRSPs. You can invest them as you wish. You can take them out during the marriage in order to travel or buy a property. So you have full administration of those assets during your marriage. But once there's a death or separation or divorce, the family patrimony rights of the other spouses are crystallized, and they can request a partition of the RRSPs which are in the other spouse's name. And as well, the pension fund, the family residences, which includes not only the main residence but also a country house which is used by the family, a condo in Miami. So all of those assets can be partitioned.

Ruben: Oh, okay. Okay. So that's interesting. So it's not only, if we can say, the main residence. If the family is using, like you said, a condo in Florida, if they have a cottage, this one falls under the family residences and can be divided as well.

Patricia: Absolutely. If one of the spouses or both spouses are owners of a condo or country house that they use for the family, it is a secondary residence. Therefore, it is also partitioned.

Ruben: So what happens if many people have a condo that they will only use one month during the wintertime or two, but the rest of the year that condo is rented? So if we can say it's not really for the family for 10 months or nine months in a year, will that have any implication?

Patricia: If the family uses it for one month a year, it is considered a secondary residence.

Ruben: Oh wow. Okay.

Patricia: It's the same thing for cars. The jurisprudence is clear. Some people will say, "This car is a collection car. It's not really a car used daily for the family."

Ruben: But if from time to time it happens that maybe once a month or twice a month you and your spouse have gone to your country house with this collection car, it falls in the family patrimony. So if you want the condo, let's say in Florida, to be considered a rental property and not a family residence, then it's better that it not be used by the family. And if for that one month a year you want to go to Florida, then you rent an apartment.

Ruben: I've heard, sorry, you were talking about the car. I've heard a story where they said if someone used the collection car to simply go and buy something at the grocery for the family, it can be a question that this car is thus part of the family patrimony. Is that true? Can you use that to say that car is part of the family patrimony?

Patricia: If you went to the store with your wife or one of your children, yes, it would be part of the family patrimony.

Ruben: Absolutely. That's amazing. I'm assuming that whole law was put in place to protect one spouse that historically, if we can say historically, especially the women, that can be disadvantaged in case of a dissolution of a marriage. Is that the case? Is that the main reason and the goal, the principle why that was created?

Patricia: Absolutely. What happened is that in the 1950s and 60s, a lot of women were signing marriage contracts by which basically they became married under separation as to property, which means that they kept their assets, their husbands kept their assets. And it was viewed as a progress because the women were able to have full administration of their own assets, which might be useful for very rich families. Let's say this: I'm from a very rich family. I have inherited a lot of money from my ancestors or gifts from my parents and I do not want to have to partition those assets with the gentleman I'll be marrying. But for most Quebecers, they did not realize that at the end of the day, they were not from extremely wealthy families. And at the end of the day, when they get divorced, they would have no assets under their name. Whereas the husband oftentimes had a family residence under their name, the wives were not working, they did not accumulate any pension fund or RRSPs, the husband had his own RRSPs, his own pension, possibly a company. And basically, the wife who might have been given spending money to pay for the family and herself had basically no asset, and the Quebec courts were not particularly generous in terms of spousal support. So we basically had wives that had very little financial security in the context of divorce. So seeing that, the government put in place the Family Law Act, the Family Patrimony Act, which was introduced in 1989 to remedy the situation and to make sure that the spouse which had been disadvantaged by signing a marriage contract under separation as to property had a minimum of assets on which they could count on in case there was a separation or divorce.

Ruben: I see. I see. Now definitely there is some good reason why this is in place. So earlier, Patricia, you mentioned we are talking about the family patrimony and what assets are included under that, if I can call it, category and how that will define how those assets are divided. But you mentioned earlier there are some exclusions. So we are talking about houses, cars, pensions, RRSPs, and furniture. What assets are not included in those rules? If you can give us some examples.

Patricia: For example, if you had a family residence that was owned by one spouse prior to marriage and, let's say, this house was paid in full, then the spouse gets married and the family lives in this house. If that house was purchased prior to marriage and was paid in full, that house is excluded from the family patrimony.

Ruben: Okay, so it's only the houses that were bought after the marriage or if they were not paid in full.

Patricia: Exactly. For example, if you had a house which was purchased prior to marriage but only 50 percent of the mortgage was paid off, basically the 50 percent of the mortgage that was paid off, so the net value of the family residence at the time of marriage is 50 percent, is excluded from the partition of the family patrimony as well as the accrued value proportional to this net value. So to make it simple, let's say you have a family residence that's worth $1 million at the date of marriage and that there's a mortgage of $500,000 at the date of marriage. Let's say at the date of separation the house is worth $2 million and there is no mortgage. So basically the gross value of the house has doubled from $1 million to $2 million. Therefore, the amount that was paid prior to marriage, meaning the net value of the family residence prior to marriage, has doubled also. So the $500,000 becomes $1 million, and that $1 million is excluded from the partition of the family patrimony.

Ruben: So basically you own the whole house, but the half that was already paid, the equity on the house before the marriage, is for that spouse, but the rest is for the family. So when you sell, you not only keep what was paid but also an increase in value on that portion only. That's what you're saying, basically.

Patricia: Exactly. Exactly.

Ruben: Yeah. So that's for houses. And if we go asset by asset that are under the family patrimony, we are talking about furniture. What happens if you get an inheritance for some chairs from your grandmother? Is that part of the family patrimony?

Patricia: Inheritances are another exclusion from the family patrimony.

Ruben: Oh, generally speaking.

Patricia: Generally speaking, be it furniture, if you've used an inheritance to buy a car, all of those assets which were purchased through money from an inheritance or the assets that you received yourself as an inheritance—as you receive a car as an inheritance or furniture—those assets will be excluded from the partition of family patrimony. It's not only inheritances, it's donations also.

Ruben: Oh, like gifts from your parents, for example. Yeah.

Patricia: Let's say that you're married and your father gives you a gift and you receive as a donation a house. Even if the house is used for the family, even if it was acquired during the marriage, it is still excluded from the family patrimony because it was acquired through donation. So donations and inheritances are excluded from the partition of the family patrimony if that donation and inheritance was only to one spouse. Sometimes the other spouse could say it was a gift to both of us, let's say the chair. So ideally, it's good to have a notary contract that confirms the donation and confirms that it was made either to two spouses if it was a gift to both spouses or a gift to only one spouse like that. We have the undeniable proof of what the intention was behind this gift.

Ruben: Oh, so you are saying, because I see that sometimes where our parents might help a child and give $20,000 to do something and it's better even when they are giving a cash gift to go through the notary to say that cash gift was given to my daughter only.

Patricia: Yes. People don't think about this thing, but that's better if we really want to protect that portion from the family patrimony.

Ruben: Absolutely. Because then it becomes a question of proof. If it's a cash amount, how do we know that you were actually given this amount? How do we know it was only gifted to you and not to your spouse only? And also, what did you do with the cash? Some people say I have received many donations during the duration of our marriage, and they say therefore half of my assets are not partitionable. And what we try to tell our clients is that you need clear proof of where the money you received as a donation or inheritance is. So it is important to try to have a paper trail and also not to commingle assets or money that were provided to you by donation and inheritance with basically money that you earned through your work during the marriage like that. It's easier to make the proof of what is included and what is excluded from the family patrimony.

Ruben: Wow.

Patricia: Let's say you get a gift of $100,000, and with that money, you're going to do renovations in your house. Are you going to buy a car? It is better to put it in a separate bank account to make sure that we know that we can follow what you did with this money and whatever purchases you made with this money that was basically related to an asset of the family patrimony. Make sure that this asset can be deducted from the partition.

Ruben: Patricia, between me and you, most people don't do that. So when people do get divorced, it must be quite a work for you guys to figure out with your clients to go and investigate and find proofs and the trail. I'm sure you may have situations where it's, I would not say a nightmare, but it's a lot of work to try to see where the money went, right?

Patricia: Absolutely. And that's why we like to be there for people when they're going through a separation or divorce, but we really like it when we're able to have a consultation with clients before they get married.

Ruben: Yeah, it's better.

Patricia: So they just know what is the best course of action. They understand their rights, they understand their obligations, and they understand the importance of having a very clear accounting of everything that they owned prior to marriage and anything they might have acquired through donation or inheritance.

Ruben: So that's very interesting. So basically, just to recap, assets that fall under the family patrimony, which generally speaking are the family residences, any RRSP and pension during the marriage, furniture, and family cars, no matter who owns those assets, unless they are a gift or inheritance, they tend to fall under family patrimony, meaning that they can be divided if there is a separation no matter who owns those assets. So that's the first, if we can call it, which is the family patrimony, which we wanted to cover in the first section of the podcast. The second section is what happens to all other assets.

So if someone has cash at the bank or TFSAs or shares of a company that didn't come from an inheritance, what happens to those other assets? So that's what we're going to cover in the second section of the podcast. Thanks a lot, Patricia, for sharing your expertise, and I will see you in the next part of this podcast on Family Law.

Patricia: Thank you so much, Ruben.

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