

Asset protection and its limits

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The protection of family wealth against creditors is a legitimate objective of wealth planning, which the structures described in this chapter can serve. A trust whose assets are held by an independent trustee for discretionary beneficiaries, a foundation with its own legal personality or a company whose shares are held within the family can shield assets from the personal creditors of the family members. The protection has limits, however, and the practitioner must respect them.

Swiss law allows creditors to challenge transfers of assets made by a debtor with the intention of disadvantaging them. The actions for avoidance of the Federal Debt Enforcement and Bankruptcy Act allow the creditors or the bankruptcy administration to set aside gifts and gratuitous transfers made within one year before the bankruptcy or the unsuccessful enforcement, transfers made by an over-indebted debtor within the same period, and transfers made within five years with the intention, recognisable to the other party, of disadvantaging the creditors.¹ A trust or foundation created by a debtor who is already in difficulty can therefore be challenged. Foreign trust laws contain similar rules. Many jurisdictions disregard trusts that are shams, in which the settlor has retained effective control over the assets.

The protection of wealth against the claims of a spouse in divorce is another objective. The matrimonial property regime and the rules on the division of pension assets determine what a spouse can claim. Within the limits of the law, a marriage contract can modify the regime. Assets transferred to a trust or foundation during the marriage may, depending on the circumstances, be taken into account in the division of property.²

The practitioner who advises on asset protection must distinguish between two things. One is the legitimate protection of wealth against future risks, such as the risks of an entrepreneurial activity, the dissolution of a marriage or the incapacity of a family member. The other is the illegitimate

concealment of assets from existing creditors. Whereas the first is part of prudent wealth planning, the second may constitute a criminal offence, such as the fraudulent disposal of assets or the concealment of assets from enforcement.³ The timing of the structure, the solvency of the family at the time of its creation and the genuine surrender of control are the decisive factors.

1 Notes

1. Art. 286–288 SchKG (SR 281.1), text via [swissrights.ch](https://www.swissrights.ch): gifts and gratuitous dispositions within the last year before seizure or opening of bankruptcy (Art. 286), specified transactions of an over-indebted debtor within the last year (Art. 287), and all transactions within the last five years made with an intention, recognisable to the other party, to disadvantage the creditors (Art. 288). Close associates bear the burden of proof under Art. 286 para. 3 and Art. 288 para. 2. ↩
2. Art. 208 para. 1 ZGB, text via [swissrights.ch](https://www.swissrights.ch): added to the acquired property are gratuitous transfers made by a spouse without the other's consent during the last five years before the dissolution of the regime (customary occasional gifts excepted) and transfers made during the regime with the intention of reducing the other spouse's share. ↩
3. Art. 163 StGB (fraudulent bankruptcy and fraud against seizure: diminishing assets to the detriment of creditors, up to five years' custodial sentence) and Art. 169 StGB (disposal of seized assets, up to three years), text via [swissrights.ch](https://www.swissrights.ch). ↩

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