

# Ensuring women's property enjoyment by means of trust law: Best practices from the world and implications for Viet Nam

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## ABSTRACT

As a positive result of the global feminist movement, women's rights have been improved significantly in an increasing number of countries, covering various aspects from educational freedom, political participation to property ownership. Regardless of Viet Nam's current reputation as a country which highly recognizes female's status and emphasizes gender equality, this paper shows that there are still rooms for national legal framework modification to provide more shields for women to protect their pre-marriage property during the marital period, to shelter their principal family home from spousal's business debt, to avoid being treated unfairly in property division. This article presents how the application of trust law in Anglo-American jurisdictions can ensure daughters, wives and mothers an enjoyment of property regardless of any possible incidents pushing them away from the loving and caring arms of their parents, spouse or children. While prenuptial agreements, Acts on property division in divorce cases, inheritance regime, bank system or any other tools cannot deter greedy husbands or partners, naughty children and deceiving swindlers from gradually exploit the property of physically or emotionally vulnerable and innocent women, effective trust arrangements from beloved parents, husbands or from women themselves in many common law jurisdictions can automatically do such functions in an efficient way. Best practices from the world illustrated then serve as an implication for Vietnamese legislators to seriously consider the possibility of establishing a similar legal framework accordingly. Suggestions from the article for an introduction of trust law into Vietnam's domestic legislation may contribute greatly to perfect its protection to women from a feminist approach.

**Key words:** trust law, women, property enjoyment

## INTRODUCTION

In Vietnam, gender equality is expressly confirmed in its national Constitution as well as in the law on gender equality. At the same time, the Vietnamese modern legal framework provides a lot of protection to women in many aspects of social life such as labour issues, marriage and family relations or specifically property division in divorce. However, as a nation under the heavy and lasting influence of feudal ideology which emphasizes the obedience or impliedly requires a setback or avoids confrontation of females to their counterparts, it is necessary for Vietnam to apply more instruments for better sheltering the right of its female residents, especially in terms of property enjoyment. Reality has proved that it is common to witness cases where women's property rights are violated as a result of lacking effective tools to protect their property from their own emotional weakness, their poor asset management skills or from the greediness of their beloved. One typical example is the act of voluntarily or involuntarily putting their private property into the community property for family welfare during marriage life. In some unfortunate cases,

when a marriage ends up as a result of the husband's betrayal, a decision on equal division of community property may shock the heartbroken wife. Additionally, in other circumstances, the failure of a spousal business, especially in the form of a sole proprietorship, can lead women to miserable lives though they have no involvement in such business or have no intention of being involved. From an overview of some typical relevant issues in reality, experience from the enforcement of trust law in Anglo-American jurisdiction should be put into consideration to be adopted in Vietnamese current legal context.

## LACK OF PROTECTION TO WOMEN'S PROPERTY ENJOYMENT: SOME COMMON SITUATIONS IN VIETNAM

*The very first popular situation mentioned above is the case when a female's private property turns into community property with or without her willingness.* Together with the fact that an increasing number of Vietnamese women enjoys better education, plays more important roles in society and consequently

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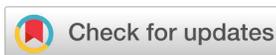
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earns a higher income, it is not rare to see a lot of future wives own their private assets before marriage. It is also common that parents offer a big sum of dowry to their beloved daughters to ensure their comfortable life independently from the attitude and income of their husbands. Pursuant to Point 4, Article 59 of Viet Nam law on Family and Marriage 2014, the private property of spouses remains private during marriage and is not divided in case of divorce except for some specific cases set forth by the same provision. Generally, a wife's property remains her own but in reality, her ability to control her property according to her wish is indeed typically limited as a result of implied or express impact from husband or husband's family. Obviously those people are not able to dispose of it without her consent but also obviously she will be under their strong influence on using it. Any refusals to follow the in-laws' arrangement will be considered as a lack of wholehearted care for the family. Despite awareness of apparent potential risks to their private property, not many Vietnamese women are courageous enough to keep their own assets separate from their community assets. A typical example recently reported shows that a successful woman used all of her own savings to build a house on the land under the title of her parents-in-law because they persuaded her to and promised to transfer the land use right to the couple after marriage but in fact they did not<sup>1</sup>. Years and sums spent decorating the house and taking care of husbands' family paid her nothing but a bitter decision of ending the marriage with "bare hands" due to her husband's betrayal and in-laws' greediness. Obviously, she is entitled to initiate a lawsuit to somehow get back a part of her investment as regulated in Point 4, Article 59 of Viet Nam law on Family and Marriage 2014. However, in reality, it would be a long and painful battle that surely affects her and her children's psychology, which she tried her best to avoid. Similarly, a wife went into trouble with her husband and mother-in-law when she requested them to repay the sum that they borrowed to buy a house under her husband's title before their marriage although she previously expressed her unwillingness to lend<sup>2</sup>. The relationship between spouses and between daughter-in-law and mother-in-law are getting worse and worse when the in-laws' debtors claimed the creditor- wife- to be mean, greedy, selfish and refused to repay the loans.

Apparently, when couples are in love and when the relationship is still during the sweetest time, not many people search for a tool to protect themselves from future incidents. Notwithstanding the fact that any vagueness, especially in issues relating to a property,

may lead to a high potential of disputes, strong belief in an intimate long-lasting relationship hinders females from the wise decision. If her private immovables, movables or dowry exists in some forms far from her own decision of disposal and is managed in the way that she can merely benefit from it, the risk of total loss will be mitigated. Vietnamese current legislations have not been able to satisfy this demand.

***The second circumstance illustrating a need to protect women's property enjoyment rights takes place in consideration of spousal contribution to community property in divorce cases.***

The breaking down of an intimate relationship is never expected by any parties involved and if it ever terminates, the husband is expected to behave reasonably and generously toward his wife who traditionally plays the major role in child-rearing and family-caring. Point 2b, Article 59 of Viet Nam law on Family and Marriage 2014 regulates an equal division of community property with a calculation of spousal contribution to the acquisition and maintenance of property<sup>3</sup>. Domestic care is considered as an activity generating income, which generally signals protection to women's rights because wives normally spend more time or even whole time for such activities. The question is whether a woman can enjoy a share in the property registered in her civil partner's title. Pursuant to Point 1, Article 43 and Article 44 of Viet Nam law 2014 relating to family and marriage issues, the above-mentioned assets are considered spousal private's and hence the other partner cannot have any beneficial interest in it without the owner's agreement. However, basing on the common intention of the parties to build a family home, a woman financially contributes to the purchase price or renovation of the husband's property whose title was acquired before marriage and whose monthly installment duties are requested for many years. Frequently, a woman may contribute indirectly by spending all of her income on daily domestic bills, children's education, etc, so that her spousal salary can be totally used for settling mortgage's installments. If there is no evidence showing that the contributing party had intended a gift, is there any clear rule in favour of the contributing party coming into existence? In another case, a demeaning husband may trickily convert the community into his private property during the marriage. Consequently, the concept of private property in divorce cases needs to be redefined and there should be a tool enabling the grieving party to chase the community property no matter what form it may turn into to avoid an equal division. There is still room for improvements

in current Vietnamese legislation concerning relevant issues.

There are also instances where a woman cohabitates with her partner for a long time but fails to establish a beneficial interest in the family home as a result of lacking evidence to show her direct payment towards the acquisition of the family's home and that "the home was held in the sole name of her partner"<sup>4</sup>. Because cohabitation is not recognized by current Vietnamese legislations, no matter what contribution she may make, women normally are in an extremely disadvantaged situation once the relationship breaks up. In brief, both a married woman and a cohabitating one are apparently and popularly in an inferior position concerning property rights in case of intimate relationship termination, which needs a more effective protection tool from national legal framework.

***Similarly, a shortage of management skills and a status of vulnerability may result in negligently handling the property, leading to substantial loss to a female's right of asset enjoyment in domestic cases.***

Such situations are ordinarily found when a person, usually a woman, who is at her old age or has just suffered from trauma such as spousal death or marriage termination and the like, carelessly dispose of her assets for children, offspring or for risky investments. Real examples include the case of an elderly who, after the death of her beloved husband, under the request of her children, divided all of her assets for them, transferred the title to family home and land use right to the oldest son but then received maltreatment from them, resulting in no income, no accommodation and no shelters<sup>5</sup>. Obviously, as the conveyance was legally valid, she could not reverse her careless decision and get back the property. Consequently, not only vulnerable women but also the wealthy and independent ones need an effective legal tool or appropriate legal framework which allows them to transfer the assets' title to children or offspring but remains to be a property beneficiary regardless of any subjective objections or bad faith of the new asset owners. However, pursuant to Article 158 of Viet Nam Civil Code 2015, the owner of a property is fully entitled to possess, use and dispose of the property according to his/ her own wish under no further additional conditions. As a result, there exists a gap between Vietnamese current legislations and the people's practical demand.

***Another concern is the failure of the husband's business who trades as a sole proprietor, which naturally puts all of the family assets at risk no matter whether there is an agreement or acknowledgement from his wife.***

Fehlberg shows that most women are frequently involved in family business or husband's business without sharing strategic decision-making power<sup>6</sup>. Specifically, Fehlberg also proves that when a wife is requested to sign a surety contract for a business by her husband, she most likely bases her decision on the impact that her refusal to sign would have on the relationship rather than on legal and economic consideration<sup>7</sup>. In general, a wife's decision in a commercial situation will be motivated more by her loyalty, trust towards her husband and less by business considerations. Pursuant to Article 36, Viet Nam law on Family and Marriage 2014, the law requires written consent from a spouse before community property is put into business<sup>8</sup>. However, under the influence of Vietnamese culture, husbands' decisions are placed more value in the family, resulting in a reality that many miserable women shockingly find all of the family assets to be seized as a result of their husbands' failure in debt payment. The point is that if she does not know about or does not have any intentions of putting her part into such kind of business, her obligation to be involved in business failure seems not to be fair enough for herself and her children. Following the Vietnamese current legal framework, the fact that evidence about the innocence and the lack of acknowledgement from the wife cannot protect her and the children from the loss of property raises a demand for some kinds of protection to women in such situations.

In brief, women's property enjoyment rights in domestic issues should be better protected in the current context of Vietnam. Some best practices from the world can play as an implication or suggestion for improvement in our contemporary legal framework of the nation.

## **AN APPLICATION OF TRUST LAW: BEST PRACTICES FROM THE WORLD AND EXPERIENCE FOR VIETNAM**

Common law jurisdictions have long been using trust law as an effective tool to handle various demands in property protection or management, in asset arrangement according to individual's wish. Originating from the Roman time, the concept of trust began when "the wealthy Romans trusted their friends' to manage their property in favour of the principal's wife and heirs after their death"<sup>9</sup> and then it was developed in English law until the modern day. In Anglo-American jurisdictions, the trust is used flexibly and routinely as tools for gifting, asset management, tax shelter and protection from creditors. With reference to the issues above-mentioned, it is quite easy for

Western people to resolve by an application of trust tools.

First, in order to protect women's private assets from being merged into marriage community property, although the two most popular tools applicable include a prenuptial agreement or a trust, the second method proves itself to prevail. While a prenuptial agreement can merely serve to make a clear distinction between spousal assets acquired before and during the marriage, an Anglo-American trust can be effective to deter the owner from any intention of disposing of the property for the purposes which are not previously defined in the trust. In the mentioned jurisdictions, for many single women, trusts are the most effective method to effectively protect their property rights and financial interests. Once assets are transferred into and placed in a domestic asset protection trust established before marriage, the trust, not the women, would legally own the assets. Depending on the trust's terms and conditions, it is quite possible that the trust operates for the benefit of the settlor (the woman) and/ or her future children (if any) in such a way that even the settlor herself cannot dispose of the assets kept in trust. In addition, wealthy parents also take advantage of trust to protect the valuable dowry for their beloved daughters, far from any control of her in-laws or her own naivety. By establishing a trust defining their daughter as the beneficiary, the settlers- parents of the bride- can assign themselves or any other person to be the trustee who manages the trust property and only pays for the beneficiary's needs. When the formation of the trust predates the wedding, the trust will operate only for the benefit of the bride and cannot be influenced by any persons, including the beneficiary, the bride herself. Consequently, the future ex-spouse has no claim against the trust property because the trust property is treated as a special private property of the bride, which operates for her but exists independently from her and does not depend on her wish. The advantage of trust over a prenuptial agreement also lies in the fact that there is no need for any approval of the fiancé to set up the first, while an agreement is necessary for the second. Although a prenuptial agreement is well accepted by Vietnamese current laws, living in a country strongly affected by oriental culture, Vietnamese women are generally aware of the significance of saving face for their fiancé. The enforcement of an express declaration is helpful in certainty but in fact a blunt instrument self-regulation of property entitlements which violently wounds fiancé's pride and hence ruins the relationship. Considering the fact that it is unnecessary to request any involvement from any parties

to arrange a trust, it seems that the trust mechanism should be considered by Vietnamese lawmakers to bring about more benefits to future brides.

Second, in relation to the vulnerability of women's property right during the divorce process, the consideration of an Anglo-American constructive trust is relatively useful. A constructive trust automatically arises when there is an agreement, arrangement, understanding or promise between the two parties that a person holds property as its nominal owner for a beneficiary. A constructive trust is not expressly created in writing by parties but "typically implied into the circumstance to prevent a person holding the property from unjustly benefiting from the property's beneficiaries"<sup>10</sup>. It is imposed by the court irrespective of the intentions of the parties in divorce cases. The court determines that the nominal owner of the property holds it as a constructive trustee for beneficiaries and makes a decision whether a spouse has a share in a private property of the other<sup>11</sup>. Much of the time, the intentions to share the property of newly married couples are only spoken in conversations and this comes down to one party's word against the other later during divorce without any clear physical evidence. Where there is no such evidence, the Court may look at the parties' conduct in relation to the property and search for a common intention. If a spouse contributes directly or indirectly to the payment of mortgage installments or payments for a substantial improvement to the property, the court may infer that this must have been because there was a common intention to share the property. For example, A (husband) acquired the title over an apartment mortgaged with installments over ten years. At the second installment, he got married to B (wife). During marriage life, A continued using a major part of his salary to pay for apartment installments while B paid all or most bills for domestic issues. At the time of dividing property in divorce, the court will consider whether there exists a constructive trust in the private property registered solely in A's name and calculate even though such property was acquired before the marriage. The court will determine that the nominal owner of the property holds it as a constructive trustee for beneficiaries<sup>12</sup> and calculate the share accordingly. The constructive trust is also used to settle disputes between common-law couples who request an ownership interest in the property held by the other, normally the family home. The court will look at whether or not there is evidence that the parties have mutual for the good of the relationship and integrated their financial affairs for the benefit of each other and their family to decide the existence of a constructive trust

in the house. If a constructive trust is found to exist, the non-titled spouse may be granted an ownership interest in the property, or if not an ownership interest, compensation for his or her efforts<sup>13</sup>. If the application of such a tool is conducted in the Vietnamese context, the property right of Vietnamese women who have long been well-known for their sacrifice for the family would be more likely to be protected besides the protection that national law on family and marriage can offer them.

In addition, a family constructive trust is also assumed by the court in common law jurisdiction to protect the elderly in cases similar to the one earlier mentioned in the Vietnamese context. The example is of an elderly mother who sold her house and gave her daughter the sum of \$500,000 under the promise of the daughter that the mother could live with her on her property until she died. During this time, the mother contributed to the payment of various bills and purchasing household items. The daughter then sought to sell the property and buy a new property where she would live without the mother. In such circumstances, the mother might seek an order from the Court that she had an interest in the daughter's property by way of a constructive trust because of what she had put into the property and the money she gave the daughter during her tenure<sup>10</sup>. In the situation that the parents desire to let the children enjoy the profits, yields from the property (like the stock, business or rent etc) and take care of parents but retain the title until they pass away, the commonly chosen option by most people in common law jurisdiction, especially in America, is the establishment of a trust. To sum up, by forming a trust, the elderly people can have good asset management planning for their vulnerable future, independently from the conduct of their children or siblings. In Viet Nam, no matter how successful they used to be at a young age, people at their old age tend to transfer all or majority of assets to their children and traditionally rely on the level of their children's piety and love. Consequently, the negligence of their beloved children will result in the elderly's suffering and discomfort. However, the retaining of assets is also inappropriate because their children are more skillful in property management. Perhaps the existence of a family trust can help Vietnamese elderly people, especially females, have a better plan for their property enjoyment during a vulnerable time.

Forth, a family home trust can also be greatly effective to protect women and family homes from spousal business failure and bank loan<sup>14</sup>. In some common law countries, like Australia, people usually set up a

family trust to get some benefit from no longer personally owning an asset such as to protect selected assets against claims and creditors. Once a couple transfers the legal ownership of their assets (for example the family home) to the trust, the assets are owned by the trustees but they use and enjoy them if that's what the trust deed states and the trustees agree. The trust assets, and any income earned, can be distributed to beneficiaries (normally the settlers themselves), loaned to them, or held in trust. If the spouse's business fails and he is pursued personally for the debts of the business, the family home will be safe because it is owned by their trust and not by them<sup>a</sup>. Furthermore, in the situation that the spouses fail to evoke the family trust as a protection, in fact, the ground that the husband only plays as a trustee toward his spouse's property segment in the community property provides a kind of shelter to women's property rights. In brief, in jurisdictions where family trusts are popularly adopted, the unwilling and reluctant acceptance of wives to jointly secure their only family house for husband's business debt are reviewed as a shield from husbands' failure. This solution is seemingly logical for the fact that although the spouse trades as a sole trader, his liability should be only limited to his share in the community property. In the Vietnamese context, this kind of protection is not available for wives whose husbands do business as sole traders. Therefore, it is worth doing further research on trust law to increase the possibility of women's property enjoyment.

## CONCLUSIONS

Globally women are usually expected to serve various domestic duties including child-rearing and educating, satisfying family needs, providing stability and love, taking care of parents-in-law, leaving husbands freedom to pursue their professional success, etc. At the same time, wives also utilise the majority of their income for the day-to-day needs of the family such as food, clothes, household devices, education rather than for the acquisition of assets. Meanwhile, the men are often responsible for other major bills, more particularly, repair and maintenance costs of the family home and mortgage payments and enjoy more chances for job achievement. Devoting time and efforts to fulfilling the mentioned roles naturally drains women's energy and put women in an inferior position in comparison to men's. From a feminist perspective, it is necessary to protect the right

<sup>a</sup> Obviously, protections for creditors are guaranteed by the review of transactions to trust within a certain timeframe before the business failure or the bankruptcy with the purpose of fraud avoidance

of women in different aspects, especially relating to right of property enjoyment. The article first focuses on presenting four domestic circumstances in Viet Nam where females' right of property enjoyment is in danger of being violated without an effective legal tool to regulate. Then, basing on the introduction of some best practices from Anglo-American jurisdictions with the application of trust mechanism, the paper suggests that Vietnamese legislators should conduct more research about the notion of trust law so that adoption of trust into the Vietnamese legal framework can provide women more shields in relating to property enjoyment. In particular, although the importance of encouraging the parties to make their own arrangement should be emphasized, a trust established before marriage will function more efficiently than a prenuptial agreement. A constructive trust will protect females in divorce cases and also when their spouses are involved in business without their knowledge or agreement. At the same time, trust arrangements offer good chances for elderly females to prepare well for their vulnerable future situation, living independently from the mercy of anybody including their beloved. The limitation of the discussion presented is that the paper merely mentions the advantages of trust and ignores the disadvantages such as cost incurred as well as ignoring the fact that some women do not need such kinds of protection. However, considering the enormous benefits that trust tools can bring about to the country's civilians in meeting their daily demands to handle unexpected incidents or liability exposure, it is essential to protect women from loss of property enjoyment, especially in domestic cases by an introduction and adoption of trust law into Vietnamese current legal framework.

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## COMPETING OF INTEREST

The authors declare that they have no conflicts of interest.

## AUTHORS' CONTRIBUTION

- Author Le Bich Thuy is responsible for the whole content of the article.
- Author Le Vu Nam is responsible for reviewing the article.

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# Đảm bảo quyền hưởng thụ tài sản của phụ nữ thông qua luật tín thác: Kinh nghiệm thế giới và một số gợi ý cho Việt Nam

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## TÓM TẮT

Dưới tác động tích cực của phong trào nữ quyền toàn cầu, quyền của phụ nữ đang được ngày càng cải thiện một cách đáng kể tại một số quốc gia, ở nhiều khía cạnh khác nhau từ quyền tự do tiếp cận giáo dục, tham chính đến sở hữu tài sản. Mặc dù hiện tại Việt Nam là một quốc gia để cao vị thế của phụ nữ và nhấn mạnh đến bình đẳng giới, bài báo cho thấy khung pháp lý quốc gia vẫn cần một số sửa đổi nhằm tạo thêm lá chắn cho phụ nữ bảo vệ quyền hưởng thụ tài sản của họ, bao gồm nhưng không giới hạn ở tài sản riêng tiền hôn nhân hoặc phần tài sản trong khối tài sản chung của vợ chồng trong thời kỳ hôn nhân, để bảo vệ nơi ở duy nhất của gia đình không bị ảnh hưởng bởi thất bại trong quá trình kinh doanh của vợ chồng, để tránh bị đối xử bất công trong việc phân chia tài sản. Bài viết này trình bày cách thức luật tín thác tại các quốc gia theo hệ thống pháp luật Anh-Mỹ đảm bảo cho phụ nữ (con gái, vợ, mẹ) được hưởng thụ tài sản cho dù một số biến cố có thể khiến họ không còn nhận được sự yêu thương, chăm sóc của những người thân. Trong thực tế, cho dù tồn tại các thỏa thuận tiền hôn nhân, quy định của pháp luật về phân chia tài sản khi ly hôn, chế định về thừa kế, hệ thống ngân hàng ... không có công cụ nào có thể ngăn cản những người bạn đời tham lam, những đứa con hư và những kẻ lừa đảo dần dần bóc lột tài sản của những người phụ nữ để bị tổn thương về thể chất hoặc tinh thần. Tuy nhiên, tại một số quốc gia, tín thác do cha mẹ, chồng hoặc bản thân người phụ nữ lập có thể tự động bảo vệ quyền hưởng thụ tài sản của họ một cách hiệu quả. Bài viết trình bày kinh nghiệm áp dụng tín thác trong các vấn đề liên quan như một minh họa và gợi ý để các nhà lập pháp Việt Nam nghiêm túc xem xét khả năng thiết lập một khung pháp lý tương tự. Đề xuất về việc đưa luật tín thác vào luật pháp Việt Nam có thể góp phần to lớn vào việc hoàn thiện các biện pháp bảo vệ phụ nữ từ góc độ nữ quyền.

**Từ khoá:** Luật tín thác, phụ nữ, hưởng thụ tài sản

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## Lịch sử

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## Bản quyền

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