The relevance of "trust" assets upon divorce

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LLB

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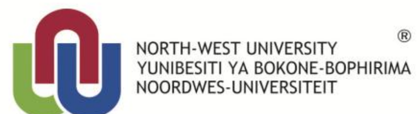

It all starts here ™

Abstract

Keywords: Marriage in community of property, divorce, forfeiture order, trusts, trust assets, separation of control and enjoyment, piercing, lifting, veil, *sham*, alter-ego, *WT v KT*.

The purpose of this study is to determine under which circumstances trust assets will become relevant in divorce litigation where the spouses are married in community of property.

The study commences with a discussion on the law of divorce and specifically the forfeiture order under section 9(1) of the *Divorce Act*. The purpose of this discussion is to determine the factors which a court will take into consideration when making a divorce order.

The attention of the study then shifts to the law of trusts. The chapter is mainly focussed on the separation of control and enjoyment and the importance of distinguishing between lifting and piercing the veil of the trust. The concepts of alter-ego and *sham* trusts are then discussed separately. The chapter concludes with a recommended process which courts could follow when faced with the question of whether trust assets should become relevant at divorce proceedings of spouses married in community of property.

The study then discusses the recent case of *WT v KT*, which dealt with the topic of this study. The theory laid down throughout the study is then used to critically evaluate the judgment and identify any points which the court may have failed to identify. The recommended process mentioned above is then used to determine whether it would have delivered a different result *in casu*.

The study concludes by answering the research question with specific reference to the case of *WT v KT* by concluding that, as a result of the judgment, trust assets will not be relevant at divorce proceedings of spouses married in community of property. This position is criticised and certain recommendations, aimed at ensuring that trust assets remain within the trust, are formulated.

Opsomming

Sleutelwoorde: Huwelik binne gemeenskap van goedere, egskeiding, verbeuringsbevel, trusts, trust bates, skeiding van beheer en genot, deurdringing, te lig, vertrouensluier, voorwendsel, alter-ego, *WT v KT*.

Die doel van hierdie studie is om te bepaal onder watter omstandighede trust bates relevant sal wees tot egskeiding waar gades binne gemeenskap van goedere getroud is.

Die studie neem aanvang met n bespreking van die egskeidingsreg en spesifiek die verbeuringsbevel in terme van artikel 9(1) van die *Wet op Egskeiding*. Die doel van hierdie bespreking is om die faktore vas te stel wat 'n hof in ag sal neem wanneer 'n egskeidingsbevel gemaak word.

Die fokus van die studie verskuif dan na die trustreg. Die hoofstuk fokus hoofsaaklik op die skeiding van beheer en genot en die belangrikheid daarvan om onderskeid te tref tussen die deurdringing en lig van die vertrouensluier. Die konsepte van alter-ego en voorwendsel (*sham*) trusts word dan apart bespreek. Die hoofstuk sluit af met n voorgestelde proses wat howe kan volg wanneer hulle voor die vraag te staan kom of trustbates relevant moet word by die egskeiding van gades wat binne gemeenskap van goedere getroud is.

Die studie bespreek dan die onlangse saak van *WT v KT* wat oor die onderwerp van die studie handel. Die teorie wat deurlopend uiteen gesit word in die studie word dan gebruik om die uitspraak krities te evalueer en enige punte, wat die hof nie geidentifiseer het nie, te identifiseer. Die voorgestelde proses, soos bogenoem word dan gebruik om vas te stel of dit tot 'n ander bevinding kon lei *in casu*.

Die studie sluit af deur om die navorsingsvraag te beantwoord met spesifieke verwysing na die saak van *WT v KT*. Daar word gestel dat trust bates nie relevant sal word by die egskeiding van gades wat binne gemeenskap van goed getroud is nie. Hierdie posisie word gekritiseer en sekere voorstelle, gemik daarop om te verseker dat trust bates binne die trust bly, word geformuleer.

List of contents

Abstract i

Opsomming ii

List of abbreviations v

1 Context and methodology 1

1.1 Definitions 1

1.2 Introduction and problem statement 2

1.3 Research question 6

1.4 Chapter outlines 7

1.5 Research methodology 8

2 Divorce law 9

2.1 Marriage out of community of property 9

2.1.1 Antenuptial contract 9

2.1.2 Complete separation of property 10

2.1.3 Marriage out of community of property subject to the accrual system . 11

2.2 Marriage in community of property 12

2.2.1 General 12

2.2.2 Separate property 13

2.2.3 Assets at divorce 14

2.2.4 Patrimonial consequences of divorce 15

2.3 Divorce orders 17

2.3.1 Settlement agreement 17

2.3.2 Redistribution order 17

2.3.3 Forfeiture order 18

3 Trust law 23

3.1 Introduction 23
3.1.1 A brief history of the South African trust 23
3.1.2 Defining the South African trust 24
3.1.3 The different types of trusts in South Africa 24
3.2 Fiduciary duty of trustee 25
3.3 The separation of control and enjoyment 28
3.3.1 General 28
3.3.2 Terminology 30
3.3.3 Lifting or piercing the veil 32
3.3.4 The alter-ego trust 33
3.3.5 The sham trust 36
3.3.6 Conclusion 40
4. *WT v KT* 42
4.1 Facts 42
4.2 Legal issues 45
4.3 Judgment 45
4.4 Critical evaluation 47
4.4.1 Patrimonial consequences of marriage and divorce 48
4.4.2 Trust law 50
4.4.3 Forfeiture order 55
5. Conclusion 58
Bibliography 62

List of abbreviations

All ER	All England Law Reports.
INSOL	International Insolvency Review.
JEPL	Journal for Estate Planning Law.
PELJ	Potchefstroom Electronic Law Journal.
RabelsZ	The Rabel Journal of Comparative and International Private Law.
SAJHR	South African Journal on Human Rights.
SALJ	South African Law Journal.
Stell LR	Stellenbosch Law Review.
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg.
TSAR	Tydskrif vir die Suid-Afrikaanse Reg.

1 Context and methodology

1.1 Definitions

The law of trusts is a very specific field of law and as such a number of concepts have to be defined at the onset in order to grasp the purpose of this study.

Section 1 of the *Trust Property Control Act*[1] provides the definition of a trust[2] for South African law purposes. An *inter vivos* trust is a trust which is created during the lifetime of the trust founder through an agreement with the trustee(s) in the form of a trust deed.[3]

The distinction between the alter-ego trust and the *sham* trust lies at the core of this study and as such it is necessary to give an elementary definition of these concepts. There is general consensus among courts[4] and academics[5] that a *sham* trust is a trust where the *bona fide* intention to create a trust was never present. Upon finding a trust to be a *sham* a court would proceed to give effect to the true intention of the parties.

An alter-ego trust, on the other hand, is created with the *bona fide* intention of creating a trust. The level of control exercised by the founder is however used as an avenue to attack the credibility of the trust.

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1 *Trust Property Control Act* 57 of 1988 (hereafter the *Trust Act*).

2 … the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed- (a) to another person the trustee … to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or (b) to the beneficiaries designated in the trust instrument, which property is placed under the control of … the trustee to be administered … (own emphasis added).

3 Olivier *Trustreg en Praktyk* 26,29; Geach and Yeats *Trusts Law and Practice* 18; Robbertse *Going beyond the trust veil in insolvency and divorce matters* 17; similar to a *stipulatio alteri*.

4 *Van Zyl v Kaye* 2014 4 SA 452 (WCC); see paragraph 3.3.5 for an in-depth discussion on *sham* trust.

5 Stafford *A Legal-comparative Study of the Interpretation and Application of the Doctrines of the Sham and the Alter-ego in the Context of South African Trust Law* 161.

Where the founder exercises *de facto* control over a trust and the trustees merely cater to the whims of such founder, the trust will be found to be an alter-ego trust.[6] Under these circumstances the founder could be visited by a judicial order declaring the trust property to form part of his or her estate.[7]

The importance of the distinction between these two concepts will become evident throughout this discussion when the rudimentary definitions mentioned above will be expanded upon in more detail.

Although not of critical importance for the purpose of this study, it is worth noting the difference between the *fideicommissum* and the usufruct. The idea of a *fideicommissum* is that a person receives a bequest, but subject to him restoring it to a third party, the *fideicommissary*.[8] The usufruct allows the usufructuary to use and enjoy the property, but ownership (bare dominium) is not transferred.[9]

1.2 Introduction and problem statement

The protection of assets and tax savings which a trust affords to the founder thereof has made it an essential tool in the planning of a large number of estates.[10] These arrangements are normally legal, but like anything else people have attempted to see how far they can take the advantages which a trust has to offer. This has led to the abuse of the trust form whereby the founder, *inter alia*, uses the trust vehicle with the purpose of defeating the claims of personal creditors[11] and no intention of benefitting the beneficiaries.[12]

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6 *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA) 260-261 J; Robbertse *Going beyond the trust veil in insolvency and divorce matters* 30; Stafford *A Legal- comparative Study of the interpretation and Application of the Doctrines of the Sham and the Alter-ego in the Context of South African Trust Law* 109-110.

7 See paragraph 3.3.4 for an in-depth discussion on the alter-ego trust.

8 *Estate Watkins-Pitchford v CIR* 1955 2 SA 437 (A) 459 A-B.

9 *Estate Watkins-Pitchford v CIR* 1955 2 SA 437 (A) 437 H.

10 This is especially true in the case of large estates.

11 Cameron *South African Law of Trusts* 15.

12 The trust is used as the "alter-ego" of the founder; see *Jordaan v Jordaan* 2001 3 SA 288 (C).

One of the main motivations behind the use of a trust is growing and maintaining generational wealth. The reason why the trust offers so many advantages is because the assets contained therein does not farm part of the personal estate of the founder[13] or a trustee, except insofar as such a person is also a beneficiary under the trust and has become entitled to trust assets.[14] These assets can therefore not be taxed in the hands of the founder, which means that no estate duty will be payable upon his death.[15]

Placing assets in a trust would not only protect them from claims which creditors might have against trustees or the founder in their personal capacities, but also against claims which might arise upon divorce.[16] Because trust assets do not form part of the personal estates of either spouse (in their capacity as a trustee or founder) or the joint estate, they should in principle not be taken into consideration upon divorce. This ensures that trust assets remain within the family estate upon divorce and prevents a divorcee from using such assets in any subsequent marriages or in his personal estate.

This study will focus on the protection which a trust affords upon divorce and establish exactly under which circumstances and to what extent trust assets will become relevant at the division of assets upon divorce.

Since the dawn of the new millennium a large number of cases have dealt specifically with the issue of whether or not trust assets, or the value thereof, may be taken into consideration upon divorce. These judgments are in line with Joubert JA's statement in *Braun v Blann and Botha*[17] that:

> Our Courts have evolved and are still in the process of evolving our own law of trusts by adapting the trust idea to the principles of our own law.[18]

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13 Cameron *South African Law of Trusts* 6.
14 Sec 12 of the *Trust Act*.
15 Except insofar as he is a beneficiary who is also entitled to trust assets.
16 Burger *The future of trusts as an estate planning tool* 89.
17 *Braun v Blann and Botha* 1984 2 SA 850 (A).
18 *Braun v Blann and Botha* 1984 2 SA 850 (A) 859.

It is therefore of critical importance to investigate and understand the principles applicable to both divorce law and trust law before a meaningful conclusion can be drawn and useful recommendations can be formulated. These two fields of law will therefore firstly be discussed separately, focussing on those principles which can contribute towards determining when trust assets will become relevant upon divorce. Emphasis will be placed specifically on those aspects which regulate the manner in which assets are divided upon divorce as well as those which determine when trust assets may be taken into consideration for the satisfaction of claims against the founder or trustee.

At the onset of this discussion it has to be understood that the aim of this study is to provide novel research and that certain aspects which might seem relevant to the topic will therefore only be discussed briefly. Under the next chapter it will be illustrated that extensive academic research has already been conducted in respect of the relevance of trust assets at the dissolution of a marriage out of community of property.

The main focus of this study will therefore be on marriages in community of property and the impact which recent case law and academic discussions will have on the future of trust assets at the dissolution of these marriages. The forfeiture order which a court may grant under section 9 of the *Divorce Act*[19] will also be discussed with specific reference to marriages in community of property. Academic criticism[20] of the order as it is currently applied as well as the impact of potential reform on the topic of this study will be discussed and evaluated. This will ensure that meaningful long-term conclusions can be drawn with recommendations that will remain relevant if these changes are indeed brought about.

The discussion of the law of trusts will likewise be limited to those aspects which can assist in establishing what the future holds for the efficiency of a trust as an estate planning tool. A discussion of the fiduciary duty of a trustee is necessary in order to understand the nature and purpose of a valid trust and the consequences of failing

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19 *Divorce Act* 70 of 1979 (hereafter *Divorce Act*).

20 Marumoagae 2014 *De Jure* 85-100; Heaton 2005 *SAJHR* 547-574; Bonthuys 2014 *SALJ* 439-460.

to abide to this duty will also be shown to be of utmost importance in determining whether or not trust assets can be deemed to form part of the personal estate of a trustee or founder for the purpose of division of assets upon divorce.

The notion of the separation of control and enjoyment, which will be shown to ultimately stem from the fiduciary duty mentioned above, will also be discussed in order to illustrate under which circumstances courts have decided that trust assets, or the value thereof, may be considered in divorce litigation. This will be followed by a discussion on the concepts of alter-ego and *sham* trusts aimed at determining what these concepts entail and under which circumstances a court will declare a trust to be an alter-ego or *sham*.

The recent case of *WT v KT*[21], which dealt specifically with the main topic of this study, namely the relevance of trust assets at divorce proceedings where spouses are married in community of property, will then be discussed in order to understand exactly what the current position is and the impact of those principles laid down by the Supreme Court of Appeal. The judgment will be critically evaluated in order to determine whether the court might have left open certain questions and how these could be answered.[22] This will assist in reaching the primary goal of this study; to provide recommendations which would not only address the current issues but also those issues which might arise in the future.

The purpose of these recommendations would be to ensure that trust assets remain in the trust in order to ensure generational wealth as well as financial stability in a family. This necessitates the discussion of potential changes which might be brought about in the future as these changes might have an impact on the sustainability of trusts as an estate planning tool in the context of generational wealth.

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21 *WT v KT* 2015 3 SA 574 (SCA).

22 This judgment will be discussed in detail at a later point in this study.

1.3 Research question

The main research question of this study, based on the problem statement above, is stated as the following: To what extent, if any, will trust assets become relevant at the division of assets upon divorce where spouses are married in community of property?

In order to answer this question, a number of secondary research questions will have to be addressed and thoroughly answered, these secondary questions are:

a.) Which assets form part of the joint estate of spouses married in community of property and how are these assets divided upon divorce?

b.) What impact will the reform of section 9 of the *Divorce Act* have on the manner in which assets are divided upon divorce of spouses married in community of property?

c.) Under which circumstances will a court decide that trust assets, or the value thereof, can be taken into consideration in litigation against a trustee or founder in his or her personal capacity?

d.) What impact will the decision of *WT v KT*[23] have on the future of the trust as an estate planning tool?

e.) What is the most appropriate way to ensure that trust assets do not become subject to matrimonial litigation and ensuring that they remain within the family trust?

These questions form the core of this study and it will become clear that each chapter will be devoted to comprehensively answering one or two of these questions. A brief outline of each chapter will illustrate this.

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[23] *WT v KT* 2015 3 SA 574 (SCA).

1.4 Chapter outlines

The study will, including this chapter, be divided into five chapters which will each form a critical part of answering the research question set out above.

The second chapter will deal with the division of assets upon divorce. The marriage out of community with and without the accrual will be briefly discussed. This is necessary in order to fully understand the marriage in community of property in the context of divorce law as a whole. The relevant case law and literature which have dealt with trust assets at the dissolution of these marriages will be briefly discussed and referenced; this will allow interested individuals to find and read these sources if it should be required.

The marriage in community of property will then be comprehensively discussed, focussing specifically on those assets which form part of the joint estate and how these assets are divided upon divorce. Certain exceptions to the general rules which might become relevant to the topic at hand will also be discussed in order to fully understand the nature of this matrimonial property regime. The recent calls for reform of section 9 of the *Divorce Act* will also form part of this chapter and the impact which such reform might have on divorce proceedings where parties are married in community of property will be discussed.

Chapter three will deal with the nature of the trust and the requirements for a valid trust. The fiduciary duty of the trustee will be used in this regard to clarify exactly how a valid trust should operate and what the consequences are if a trustee should fail to adhere to this duty. A discussion of the separation of control and enjoyment will then follow, with the specific concepts of the alter-ego trust and the *sham* trust discussed under this heading. This will assist in the argument that the *sham* trust has been overlooked by courts and practitioners alike and that it could possibly, in light of recent case law, prove to be highly relevant in future litigation involving trust assets at the division of assets upon divorce.

Chapter four will deal specifically with the case of *WT v KT*[24] and the consequences which this judgment will have on the relevance of trust assets at the dissolution of assets upon divorce where spouses were married in community of property. The manner in which the court dismissed the alter-ego claim, based on lack of judicial discretion or *locus standi* will be shown to be problematic. The judgment will be critically evaluated and further arguments will be presented which might not have come before the court, including the application of section 9 of the *Divorce Act* and the impact which potential reform might have on similar cases.

The final chapter will be a concise summary of the previous chapters and this summary will then be used to formulate valuable recommendations aimed at ensuring that the trust remains a valuable tool in estate planning, with specific reference to family trusts.

1.5 Research methodology

The most appropriate research method for a study of this nature is a literature review. Case law and legislation will be used to determine exactly what the current legal position is and how it has evolved in recent years.

Textbooks and journal articles will assist in interpreting the positive law and identifying areas where the current legal position has come under criticism. The arguments put forward by the authors of these sources will be used to formulate and support arguments of potential reform in key areas. In formulating the recommendations, cognisance will also be taken of similar contributions by various authors.

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24 *WT v KT* 2015 3 SA 574 (SCA).

2 Divorce law

South African family law recognises two main forms of matrimonial property systems, the marriage in community of property and the marriage out of community of property.[25] The marriage out of community can furthermore be divided into the complete separation of property and the accrual system.[26] These systems determine, *inter alia*, the patrimonial consequences of the marriage and divorce and the financial relationship between the parties, *inter partes* and in relation to third parties, during and after the marriage.[27] The *Matrimonial Property Act*[28] abolished the marital power[29] and introduced the accrual system[30] which can be seen as a compromise between the two main systems.

Each of these matrimonial property regimes have different principles which apply to them in terms of legislation and the common law.[31] The discretion which the court is afforded in deciding how assets are divided also depends on the specific matrimonial property regime. As stated above, this study will focus primarily on the relevance of trust assets at the dissolution of marriages in community of property. The other two systems will however be briefly discussed in order to understand the difference between the systems and the rules governing the dissolution of each form of marriage.

2.1 Marriage out of community of property

2.1.1 Antenuptial contract

Where the prospective spouses elect not to marry in community of property they have to specifically exclude community of property by way of an antenuptial contract.[32] Section 2 of the *Matrimonial Property Act* makes it clear that where an antenuptial contract specifically excludes the community of property it will be subject

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25 Heaton *The Law of Divorce* 59.
26 Heaton *The Law of Divorce* 59.
27 Skelton *et al Familiereg* 79.
28 *Matrimonial Property Act* 88 of 1984.
29 Sec 14 of the *Matrimonial Property Act* 88 of 1984.
30 Sec 2-10 of the *Matrimonial Property Act* 88 of 1984.
31 Skelton *et al Familiereg* 79-80.
32 Hahlo *The South African Law of Husband and Wife* 258.

to the accrual system unless this system is specifically excluded in the antenuptial contract.

Antenuptial contracts are also used to determine the manner in which the respective spouses' estates will devolve upon the death of either of them,[33] for the creation of trusts[34] and to make marriage settlements and donations between spouses.[35] Section 87 of the *Deeds Registries Act*[36] requires an antenuptial contract to be attested by a notary and registered at the deeds registry within 3 months of execution thereof.

A brief distinction between the two forms of marriage out of community is necessary in order to understand how assets are divided upon divorce. This discussion will also assist in understanding how assets are divided upon divorce of marriages in community of property.

2.1.2 Complete separation of property

A marriage out of community of property does not bring about any changes to the contractual capacity and rights to property of the respective spouses and they retain their respective separate estates.[37] There are however some deviations from the notion of complete separation of property that are inherent in the marriage out of community of property.

The court in *Olley v Maasdorp*[38] explained that spouses benefit from each other's property income and this means that they have at the very least an indirect pecuniary interest in each other's contractual undertakings.[39] Spouses are also jointly and severally liable for debts incurred in acquiring household necessities against creditors.[40] Spouses may furthermore acquire joint property together or open a joint

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33 Van Schalkwyk *General Principles of the Family Law* 194.
34 Hahlo *The South African Law of Husband and Wife* 258.
35 Van Schalkwyk *General Principles of the Family Law* 193.
36 *Deeds Registries Act* 14 of 1937.
37 Hahlo *The South African Law of Husband and Wife* 287.
38 *Olley v Maasdorp* 1948 4 SA 657 (A).
39 *Olley v Maasdorp* 1948 4 SA 657 (A) 667.
40 Hahlo *The South African Law of Husband and Wife* 289; Skelton *et al Familiereg* 111.

bank account but they would need sufficient evidence to prove that they made such decisions together.[41]

In the absence of a settlement agreement,[42] forfeiture order[43] or a redistribution order[44] each spouse will retain his or her separate estate.[45] The spouses can enforce any agreement under the antenuptial contract which has not been satisfied.[46] Section 7(2) of the *Divorce Act* allows a court to make a maintenance order where no settlement agreement can be agreed upon.

2.1.3 Marriage out of community of property subject to the accrual system

As mentioned above[47] spouses who want to exclude community of property need an antenuptial contract and if the accrual system is not specifically addressed it will apply *ex lege*. The accrual system is often called a deferred community of gains[48] because the spouses are *stante matrimonio* in a similar position to those spouses married without the accrual.[49] It is only upon dissolution of the marriage that the accruals of the respective spouses are added up and an accrual claim arises.[50]

Section 3(1) of the *Matrimonial Property Act* provides that, upon dissolution of the marriage, the spouse with the smaller accrual has a claim against the other spouse for half the difference between the respective estates. The accrual of a spouse is calculated by deducting the net commencement value of the estate from the net value at the date of dissolution.[51]

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41 Hahlo *The South African Law of Husband and Wife* 290; Skelton *et al Familiereg* 110; Heaton *The Law of Divorce* 99.
42 Sec 7(1) of the *Divorce Act*.
43 Sec 9(1) of the *Divorce Act*.
44 Sec 7(3)-(6) of the *Divorce Act*.
45 Hahlo *The South African Law of Husband and Wife* 383; Skelton *et al Familiereg* 174; Heaton *The Law of Divorce* 98-99.
46 Hahlo *The South African Law of Husband and Wife* 383; Skelton *et al Familiereg* 174; Heaton *The Law of Divorce* 100.
47 See *2.1.1* above.
48 Hahlo *The South African Law of Husband and Wife* 304; Skelton *et al Familiereg* 120; Heaton *The Law of Divorce* 64.
49 Hahlo *The South African Law of Husband and Wife* 304; Skelton *et al Familiereg* 120; Heaton *The Law of Divorce* 64.
50 Sinclair "Marriage" 202.
51 Sec 4(1)(a) of the *Matrimonial Property Act* 88 of 1984.

The court in *Reeder v Softline*[52] explained that a spouse will not succeed on a claim for specific assets in lieu of an accrual claim, because the claim does not lie against specific assets.[53]

The legislator introduced section 8 of the *Matrimonial Property Act* in order to combat situations where spouses may attempt to abuse the accrual system. This section empowers the court to order the immediate division of the accrual where the conduct of one spouse will prejudice[54] the right of the other spouse to share in the accrual of the estate.[55] The court may also order that the accrual system be replaced with any other system and that the marriage continue with complete separation of property.[56]

2.2 Marriage in community of property

2.2.1 General

This is the standard matrimonial property regime in South Africa and all marriages, subject to certain exceptions such as minors who failed to obtain the required assistance,[57] concluded without a valid antenuptial contract are automatically in community of property.[58] A rebuttable presumption thus exists that all civil marriages are in community of property.[59] Sections 14-17 of the *Matrimonial Property Act* set out the manner in which joint property is to be administered.

The community of property comes *ex lege* into being upon it being formalised.[60] This regime results in a merger of all assets and liabilities of the respective spouses upon marriage. This merger also applies to all assets and liabilities which the spouses incur

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52 *Reeder v Softline* 2000 4 All SA 105 (W).
53 *Reeder v Softline* 2000 4 All SA 105 (W) 113.
54 Or is already prejudicing.
55 Provided no other person will be prejudiced by such order.
56 Sec 8(2) of the *Matrimonial Property Act* 88 of 1984.
57 Van Schalkwyk *General Principles of the Family Law* 206-208.
58 Sinclair "Marriage" 182-183.
59 Heaton *South African Family Law* 65.
60 Robinson 2007 *PELJ* 71; Peyper *The effect of modern constitutional development on the marriage in community of property* 14.

or gain during the subsistence of the marriage.[61] The court in *Corporate Liquidators (Pty) Ltd v Wiggill* [62] approvingly quoted Claasen J from the court *a quo:*

> ... one of the natural legal consequences of a marriage in community of property is that both spouses immediately become co-owners of their previously separate estates; which becomes their joint estate, irrespective of in whose name these assets are held.[63]

Each spouse owns an equal, undivided half-share in the joint estate.[64] The court in *Ex parte Menzies et Uxor* [65] went on to clarify that co-ownership of the half share is not only undivided but that it is also indivisible.[66] A spouse can therefore not dispose of his or her half share during the subsistence of the marriage as this would automatically dispose of the other spouses' half share because the shares are not divisible.[67]

2.2.2 Separate property

Spouses are allowed to keep separate estates after the conclusion of the marriage.[68] This includes assets which are specifically excluded in an antenuptial contract, assets bequeathed or donated to a spouse subject to the condition that it shall not form part of a joint estate[69] and assets in which a spouse holds a limited interest.[70] It is important to note that, strictly speaking, property in a trust will also not form part of the joint estate.[71]

A spouse's separate estate will however not be immune to the claims of creditors as the Supreme Court of Appeal in *Du Plessis v Pienaar*[72] explained:

61 Sinclair "Marriage" 185.
62 *Corporate Liquidators (Pty) Ltd v Wiggill* 2006 4 All SA 439 (T).
63 *Corporate Liquidators (Pty) Ltd v Wiggill* 2006 4 All SA 439 (T) 442.
64 *Estate Sayle v CIR* 1945 AD 388.
65 *Ex parte Menzies et Uxor* 1993 4 All SA 455 (C).
66 *Ex parte Menzies et Uxor* 1993 4 All SA 455 (C) 466.
67 Robinson 2007 *PELJ* 72.
68 Robinson 2007 *PELJ* 72.
69 Sinclair "Marriage" 186.
70 *Fideicommissum* or usufruct; it is important to note that the fruits of such asset form part of the joint estate as confirmed in *Barnett v Rudman* 1934 AD 203.
71 Hahlo *The South African Law of Husband and Wife* 167.
72 *Du Plessis v Pienaar* 2002 4 All SA 311 (SCA).

> The fact that some of [a spouse's] property is separately owned is relevant to the manner in which the property may be dealt with by the spouses *inter se* … but does not affect the ordinary right of a creditor to look at all the property of a debtor in satisfaction of a debt.[73]

If this case is read together with section 17(5)[74] of the *Matrimonial Property Act*, it becomes clear that the separate estates of spouses are not immune to those consequences[75] flowing from the manner in which the joint estate or the separate estate of either spouse is administered. The assets falling in a spouse's separate estate will therefore always remain relevant in litigation concerning the joint estate.

2.2.3 Assets at divorce

It is generally accepted that only those assets to which a spouse has a vested right will fall into the joint estate (or the separate estate if applicable) on divorce.[76] This includes assets such as immovable property, vehicles, livestock and money.[77] The right to occupy an immovable property under a statutory lease has also been considered as an asset by our courts in making an order for the forfeiture of patrimonial benefits.[78] In relation to the joint estate, assets therefore mean rights, corporeal things and claims with a favourable monetary value.[79]

Assets which are placed in an *inter vivos* trust will, in accordance with section 12 of the *Trust Act*, vest in the trustees. Our courts have however recognised the need to take trust assets into consideration during divorce proceedings.[80] Although the case of *Badenhorst v Badenhorst*[81] dealt with a redistribution order under section 7(3) of the *Divorce Act* it is important to note that the court held that the deciding factor would be the level of *de facto* control which the founder exercised over the trust

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73 *Du Plessis v Pienaar* 2002 4 All SA 311 (SCA) 313-314.

74 Where a debt is recoverable from a joint estate, the spouse who incurred the debt *or both spouses jointly* may be sued therefor, and where a debt has been incurred for necessaries for the joint household, the spouses may be sued *jointly or severally* therefor. (Italics added.)

75 Such as attachment by third parties who have a claim against the joint estate or insolvent spouse.

76 Heaton *The Law of Divorce* 70.

77 Heaton *The Law of Divorce* 71.

78 *Moremi v Moremi* 2000 1 SA 936 (W).

79 Van Schalkwyk *General Principles of the Family Law* 213.

80 Heaton *The Law of Divorce* 72; *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA); *Jordaan v Jordaan* 2001 3 SA 288 (C).

81 *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA).

assets.[82] The court held that it is necessary to look at the terms of the trust deed as well as the manner in which the trust was administered during the marriage in order to determine whether or not the exercised *de facto* control.[83]

The court in *BC v CC*[84]also accepted that where it can be proven that trust assets are *de facto* the property of the founder that such assets may be taken into consideration in determining the extent of such a person's accrual in a divorce matter.[85] The court also held that precluding courts from taking trust assets into account during divorce proceedings would lead to the abuse of the trust whereby a divorcing spouse could place assets in a trust with the sole intention of hiding it from the court since the court would not be allowed to look at the trust assets under these circumstances.[86] In *MM v JM*[87] it was decided that it was only possible to consider "trust" assets as forming part of a spouse's accrual if supported by an averment that the assets in question are factually owned by such person and not the trust.[88]

These cases make it clear that trust assets can, under the correct circumstances, be taken into consideration at the division of assets upon divorce. None of these cases dealt with the marriage in community of property, but it is submitted that the reasoning followed in these cases will be of assistance in determining the relevance of trust assets where spouses married in community of property divorce. Chapter four will furthermore discuss the recent case of *WT v KT*[89] and look at the court's view on these arguments.

2.2.4 Patrimonial consequences of divorce

An order for division of the joint estate will *ex lege* follow upon an order for divorce.[90] The only exception is where another order is granted in respect of the joint estate such as a settlement agreement or division of joint estate in terms of section

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82 *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA) 261 A.
83 *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA) 261 A-B.
84 *BC v CC* 2012 5 SA 562 (ECP).
85 *BC v CC* 2012 5 SA 562 (ECP) 568 C-D.
86 *BC v CC* 2012 5 SA 562 (ECP) 565 F-G.
87 *MM v JM* 2014 4 SA 384 (KZP).
88 *MM v JM* 2014 4 SA 384 (KZP) 391 D-F.
89 *WT v KT* 2015 3 SA 574 (SCA).
90 Wimpey 2006 *De Jure* 440; Heaton *The Law of Divorce* 94.

20 of the *Matrimonial Property Act*.[91] Section 7(1) of the *Divorce Act* allows a court to make an order in respect of the division of assets upon divorce in accordance with a written agreement between the parties. The majority of spouses who divorce would opt for a settlement agreement as it saves unnecessary litigation costs incurred during trial which might bring about a similar result.

The consequence of divorce is therefore that the previously undivided and indivisible half shares become divided.[92] The court may then either order the division of the joint estate in a manner which it deems fit, or appoint a liquidator to handle the division of the joint estate.[93] Any provision contained in an antenuptial contract remains enforceable after divorce.[94] Assets which formed part of the separate estates of the spouses will not be divided upon divorce.[95] Fruits gathered from assets held subject to *fideicommissum*, ususfruct or trust before the divorce will form part of the joint estate, however the fruits gathered after divorce will form part of the separate estate.[96]

The position of divorcing spouses was set out clearly in *Ex parte Menzies*,[97] where King J explained that:

> ... upon dissolution of the community by divorce, the ex-spouses become in effect free[98] co-owners *entitled* to a division of the estate ... the rule has grown that that the granting of a divorce carried with it an automatic order for division[99] [of the joint estate] (own emphasis in brackets.)

This essentially means that dissolution of a marriage in community of property automatically results in an order for the equal division of the joint estate. Each spouse has a vested right to his or her half share of the joint estate. The most

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91 Wimpey *De Jure* 440-441.
92 Hahlo *The South African Law of Husband and Wife* 174; Skelton *et al Familiereg* 168.
93 Heaton *South African Family Law* 126; Skelton *et al Familiereg* 168.
94 Heaton *The Law of Divorce* 95; Hahlo *The South African Law of Husband and Wife* 383; Skelton *et al Familiereg* 174.
95 Hahlo *The South African Law of Husband and Wife* 180; Van Schalkwyk *General Principles of the Family Law* 215; Heaton *The Law of Divorce* 81.
96 Hahlo *The South African Law of Husband and Wife* 181; Van Schalkwyk *General Principles of the Family Law* 215; Heaton *The Law of Divorce* 81.
97 *Ex parte Menzies et Uxor* 1993 4 All SA 455 (C) 470.
98 As opposed to bound co-owners during the subsistence of the marriage.
99 *Ex parte Menzies et Uxor* 1993 4 All SA 455 (C) 470.

relevant question for purposes of this study will be to determine whether not trust assets can be declared to form part of this joint estate and if so under which circumstances. These principles will again become relevant in chapter 4 where an evaluation will be done to determine whether or not the above principles were applied correctly in the court.

2.3 Divorce orders

The patrimonial consequences of the marriage in community of property have now been clearly explained. The next important topic is to determine exactly how assets will be divided upon divorce.

2.3.1 Settlement agreement

As mentioned above spouses would normally try to reach a settlement agreement regarding the division of assets upon divorce. In such a case the spouses have the power to decide exactly how their assets and liabilities should be divided and they may even deviate from the statutory rules governing their matrimonial property system. This study is however concerned with trust assets and it is highly unlikely that a spouse would agree to transfer trust assets to another spouse. Since trust assets vest in the trustee, a spouse would not have the right to transfer such assets and serious questions could be raised regarding the *de facto* control of the trust assets if such spouse creates the idea that he or she is in fact able to transfer trust assets.

In the absence of a settlement agreement, the division of assets will be normally governed by the relevant matrimonial property system.[100]

2.3.2 Redistribution order

The court also has the power to make an order for the redistribution of assets in terms of section 7(3) of the *Divorce Act*. This order was introduced in order to accommodate spouses who were married out of community, with the complete

[100] Heaton *The Law of Divorce* 90.

separation of property prior to the enactment of the *Matrimonial Property Act*.[101] Under this order a court is allowed to order that assets of one spouse be transferred to the other spouse, provided the parties were married with the complete separation of property prior to the enactment of the *Matrimonial Property Act*.

There are a number of cases[102] and scholarly articles[103] which have dealt specifically with the relevance of trust assets under those circumstances where a redistribution order is made. It is however not important for the purpose of this study to go into an in-depth discussion on this topic, the theory discussed in these sources will however be of assistance in determining under what circumstances trust assets may become relevant during divorce proceedings.

The redistribution order as it is currently applied has however been criticised by various authors,[104] but after deliberation of this critique the Law Commission decided against reform holding that it would lead to legal uncertainty and negate the contractual decision of parties to marry out of community of property.[105] These issues will however not be discussed as the redistribution order does not apply to the marriage in community of property which is the topic of this study.

2.3.3 Forfeiture order

As indicated above, the forfeiture order forms an integral part of this study. It is submitted that recent criticism levelled against the forfeiture order as it is currently applied and the potential for reform justifies a discussion on this subject in isolation. This line of reasoning might be dismissed as speculative in nature, it is however submitted that a pre-emptive discussion of the reform will ensure that a basic understanding regarding the impact of reform on the topic of this study is already established and understood. This will provide legal clarity and certainty should the reform be brought about, which would obviously be of assistance to practitioners and

101 Heaton *South African Family Law* 132-133.

102 *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA); *Jordaan v Jordaan* 2001 3 SA 288 (C); *Brunette v Brunette* 2009 5 SA 82 (SE).

103 De Waal 2012 *RabelsZ* 1078-1100; Van der Linde 2012 *THRHR* 371-388.

104 Sinclair *The Law of Marriage*; Sinclair *Inleiding tot die Wet op Huweliksgoedere 1984*; Heaton 2005 *SAJHR* 547-574; Costa 1990 *De Rebus* 916-917.

105 Sinclair *The Law of Marriage* 144-145.

academics alike. Additionally it is submitted that the discussion below will make it clear that the likelihood of reform is very good, which furthermore emphasises the importance of this discussion.

Under section 9 of the *Divorce Act* a court granting a decree of divorce may order that a spouse forfeits the patrimonial benefits which he or she would have received as a result of the matrimonial property regime in place to the other party. This order is only available where the ground of divorce is the irretrievable breakdown of the marriage.[106]

There are three factors which a court would have to take into account in deciding whether to grant a forfeiture order. Firstly the duration of the marriage; secondly, the circumstances giving rise to the breakdown of the marriage and finally, any substantial misconduct on the part of either party.

Should the court upon consideration of these factors be satisfied that either spouse would be unduly benefitted if the order is not granted, such an order may be granted. The court in *Botha v Botha*[107] explained that section 9(1) of the *Divorce Act* does not contain a catch-all phrase allowing for the consideration of any other factor and as such a court is limited to considering those factors contained in the section.[108]

The question as to whether all three factors need to be proved was addressed in *Wijker v Wijker*[109] where it was held that:

> … it [is] abundantly clear that the Legislature could never have intended that the factors mentioned in the section should be considered cumulatively.[110]

This essentially means that a spouse seeking a forfeiture order need not allege and prove all three of the factors mentioned in section 9(1).[111] The court went on to explain a two-stepped approach to forfeiture orders by firstly asking whether a spouse would actually benefit and secondly, having regard to the three factors in

106 Heaton *The Law of Divorce* 91.
107 *Botha v Botha* 2006 4 SA 144 (SCA).
108 *Botha v Botha* 2006 4 SA 144 (SCA) 146 G-147 B.
109 *Wijker v Wijker* 1993 4 SA 720 (A).
110 *Wijker v Wijker* 1993 4 SA 720 (A) 721 D.
111 Marumoagae 2014 *De Jure* 96.

section 9(1), whether a spouse would be unduly benefited if the order is not granted.[112]

Heaton[113] and Bonthuys[114] have discussed this issue at length covering various topics such as discrimination, historical development as well defining patrimonial benefits and contribution in the context of a forfeiture order. For the sake of brevity this study will however not elaborate on the arguments of equality and fairness[115] but will instead focus on those arguments relating to the definition of patrimonial benefits and contribution respectively.

The section is currently interpreted by courts in such a manner that the spouse who has made the smaller contribution to the joint estate is the only spouse that can be ordered to forfeit patrimonial benefits, which means that the spouse who made the larger contribution is immune to a forfeiture order against him or her.[116]

In *Singh v Singh*[117] it was held that a forfeiture order does not extend to the forfeiture of something which a party brought into the joint estate him- or herself.[118] Similarly it was explained in *Rousalis v Rousalis*[119] that a forfeiture order does not extend to the forfeiture of an errant husband's separate estate because "forfeiture connotes the losing of a right or asset".[120] Neither of these courts gave an in-depth explanation as to why a person cannot be ordered to forfeit something which he or she brought into the joint estate, they merely accepted that the *Divorce Act* did not change the common law in this respect.

112 *Wijker v Wijker* 1993 4 SA 720 (A) 721 E.
113 Heaton 2005 *SAJHR* 547-574.
114 Bonthuys 2014 *SALJ* 439-460.
115 It should be understood that this argument is of utmost importance and would definitely be of assistance in arguing for reform under the current constitutional dispensation.
116 Lowndes *The need for a flexible and discretionary system of marital property distribution in the South African law of divorce* 25.
117 *Singh v Singh* 1983 1 SA 781 (C).
118 *Singh v Singh* 1983 1 SA 781 (C) 790 C.
119 *Rousalis v Rousalis* 1980 3 SA 446 (C).
120 *Rousalis v Rousalis* 450 E.

Since the *Divorce Act* does not explicitly state that a forfeiture order can only be made against a spouse who has contributed less to the joint estate,[121] the roots of this argument has to be found in the common law.[122] The common law rule is based on the premise that the benefit of a marriage in community of property is to benefit in what a person did not contribute to the joint estate.[123] This would mean that, should a forfeiture order be granted against a spouse, he or she will lose all rights to whatever the other spouse brought into the marriage but retain everything that he or she brought into the marriage.[124]

This is however not necessarily true. As stated above the consequence of a marriage in community of property is that spouses become bound co-owners of the separate assets and this becomes the joint estate irrespective of in whose name these assets are held.[125] The court in *Menzies* furthermore explained that the co-ownership is both undivided and indivisible illustrating that it would be very difficult to determine which asset was contributed by which spouse.

This leads one to conclude that spouses are neither expected nor obligated to keep exact records of who contributed what to the joint estate.[126] The courts would therefore not always be in a position to determine who contributed which specific asset as such a determination would go against the very essence of a marriage in community of property. Bonthuys[127] therefore puts forward the argument that the benefit of a marriage in community of property is to receive one half of the joint estate and not necessarily only to benefit in what the other spouse contributed.[128] This is in line with the Roman-Dutch and English law positions which holds that it may be necessary to transfer assets which one spouse brought into the estate to the

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121 Lowndes *The need for a flexible and discretionary system of marital property distribution in the South African law of divorce* 25.

122 Bonthuys 2014 *SALJ* 440; Lowndes *The need for a flexible and discretionary system of marital property distribution in the South African law of divorce* 25.

123 Bonthuys 2014 *SALJ* 453.

124 Skelton *et al Familiereg* 174.

125 *Corporate Liquidators (Pty) Ltd v Wiggill* 2006 4 All SA 439 (T) 442.

126 Bonthuys 2014 *SALJ* 454.

127 Bonthuys 2014 *SALJ* 439-460.

128 Bonthuys 2014 *SALJ* 454.

other spouse in order to come to reach make an equitable order.[129] It is submitted that this is a logical and sound legal argument which, if presented in court, may influence the judiciary's point of view and lead to reform.

The second argument against the current interpretation of the forfeiture order relates to the question of what exactly constitutes a contribution to the joint estate.[130] If courts were to give more recognition to non-financial contributions such as childcare or household duties it would balance out some of the financial contributions made by the other spouse which could potentially lead to the former spouse being allowed to claim in terms of a forfeiture order.[131] Section 7(3) of the *Divorce Act* regulates redistribution orders and recognises non-patrimonial contributions as a factor which has to be considered when making such an order.[132] In the case of *Gates v Gates*[133] it was also emphasised that domestic duties performed by a wife saved the family money and that it should therefore be taken into account when a court determines the respective contributions to the joint estate.

It is submitted the abovementioned legislation and case law clearly support the notion that non-patrimonial contributions made by a spouse during the subsistence of the marriage should be a factor in determining whether or not a forfeiture order can be made.[134] These arguments clearly illustrate that the potential exists for the reform of the manner in which the forfeiture order is currently applied by the judiciary.

A thorough understanding of the law of trusts is however necessary in order to fully comprehend the likely effect which reform would have in this regard.

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129 Lowndes *The need for a flexible and discretionary system of marital property distribution in the South African law of divorce* 26.

130 Bonthuys 2014 *SALJ* 455; Lowndes The need for a flexible and discretionary system of marital property distribution in the South African law of divorce 27.

131 Bonthuys 2014 *SALJ* 455-456; Where the one spouse works and looks after the daily needs of the family, while the other spouse only works; the former would possibly have contributed more to the joint estate and therefore be entitled to a forfeiture order against the latter (own argument).

132 Sec 7(5) of the *Divorce Act*.

133 *Gates v Gates* 1940 NPD 361.

134 Bonthuys 2014 *SALJ* 456.

3 Trust law

This study is primarily concerned with the law of trusts. In order to establish whether trust assets can become relevant during divorce proceedings it is necessary to understand how trusts operate and under what circumstances trust assets, or the value thereof, have in the past been taken into consideration in litigation involving a trustee or founder in their personal capacity.

A brief discussion of the origin, definition and various forms of trusts will assist in understanding the nature of the South African trust. This will be followed by an investigation into the fiduciary duties of a trustee since these duties form an integral part of the manner in which trusts operate and is necessary in order to understand the concept of separation of control and enjoyment. Failure to comply with this fiduciary duty has led to serious consequences, specifically in relation to divorce proceedings and these cases will also be discussed as they relate directly to the topic of this study.

The chapter will conclude with an investigation into the separation of control and enjoyment. Recent case law dealing with the *sham* trust, alter-ego trust and the abuse of the trust form will be discussed in order to determine under which circumstances courts have disregarded the trust form and considered trust assets or their value in litigation. These principles and rules will be used to determine whether trust assets can become relevant at divorce proceedings, specifically with reference to marriages in community of property where either spouse is a trustee or founder of a trust.

3.1 Introduction

3.1.1 A brief history of the South African trust

The South African law of trust has its origins in the English law of trust[135] but has developed independently by incorporating certain elements of Roman-Dutch

[135] Cameron *South African Law of Trusts* 22; Geach and Yeats *Trusts Law and Practice* 11; Du Toit *South African Trust Law* 18-20.

concepts such as the *fideicommissum* and the *stipulatio alteri*.[136] The South African trust is therefore uniquely South African and is still in the process of adapting and developing in accordance with the South African legal system.[137]

3.1.2 Defining the South African trust

The most widely recognised definition of a trust is the following:

> … a trust exists when the creator or founder of the trust has handed over or is bound to hand over to another the control of property which, or the proceeds of which, is to be administered or disposed of by the other (the trustee or administrator) for the benefit of some person other than the trustee as beneficiary, or for some impersonal object.[138]

The statutory definition[139] of a trust is contained in the first section of the *Trust Act* and includes both forms of trusts recognised in South Africa, which will be discussed under the next heading.

3.1.3 The different types of trusts in South Africa

This study is primarily concerned with the *inter vivos* trust as this is the only type of trust that has come up in case law concerning the topic of this study. The term *inter vivos* denotes that the trust is created during the lifetime of the founder through an agreement with the trustees in the form of a trust deed.[140] The testamentary trust on the other hand is created in a will and comes into existence upon the death of the testator.[141]

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136 Geach and Yeats *Trusts Law and Practice* 11; Du Toit *South African Trust Law* 21-23.

137 Cameron *South African Law of Trusts* 23; *Braun v Blann and Botha* 1984 2 SA 850 (A) 859.

138 Cameron *South African Law of Trusts* 4.

139 Sec 1 of the *Trust Act* defines a trust as: … the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed- (a) to another person the trustee … to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or (b) to the beneficiaries designated in the trust instrument, which property is placed under the control of … the trustee to be administered … (own emphasis added).

140 Olivier *Trustreg en Praktyk* 26,29; Geach and Yeats *Trusts Law and Practice* 18; Robbertse *Going beyond the trust veil in insolvency and divorce matters* 17; similar to a *stipulatio alteri*.

141 Olivier *Trustreg en Praktyk* 28; Geach and Yeats *Trusts Law and Practice* 18; Robbertse *Going beyond the trust veil in insolvency and divorce matters* 16.

Under an ownership trust, the trustees in their capacity as such become the owners of the trust property. This has to be distinguished from the *bewind* trust where the beneficiaries are the owners of the trust property.[142]

3.2 Fiduciary duty of trustee

As stated above the fiduciary duties of a trustee lies at the very core of the law of trusts and the failure to observe this duty has been the primary source of case law on the topic of this study. It is therefore essential to form a thorough understanding of the nature of these duties and the effect which non-compliance would have on the relevance of trust assets during divorce proceedings. It is furthermore submitted that the separation of control and enjoyment, which will be discussed under the next heading, is of utmost importance for the purpose of this study and that a discussion on the fiduciary duty is essential in order to understand this aspect.

The court in *Land and Agricultural Bank of South Africa v Parker*[143] emphasised the importance of the fiduciary duty when it held that:

> ...the trustee is appointed and accepts office to exercise fiduciary responsibility over property on behalf of and in the interest of another.[144]

When a trustee is acting in his capacity as such, it is expected that he or she will exercise his duties with trustworthiness and devotion in favour of the beneficiaries.[145] This duty is similar to the duty of a *diligens et bonus paterfamilias* to act, in favour of another, without the intention of receiving benefit for oneself.[146] An important element of the fiduciary duty is to avoid conflict of interests at all costs between beneficiaries *inter se* and also between the trustee and beneficiaries; this requires the trustee to act impartially at all times.[147]

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[142] This distinction is evident from the definition of a trust in the *Trust Act* which distinguishes between the two forms of trusts.

[143] *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA).

[144] *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 86 G.

[145] Olivier *Trustreg en Praktyk* 5; Geach and Yeats *Trusts Law and Practice* 71.

[146] Olivier *Trustreg en Praktyk* 6; Du Toit *South African Trust Law* 70.

[147] Coetzee *'n Kritiese Ondersoek na die Aard en Inhoud van Trustbegunstigdes se Regte Ingevolge die Suid-Afrikaanse Reg* 351-352.

The legislature also gave recognition to this fiduciary duty in section 9(1) of the *Trust Act* which states that:

> A trustee shall in the performance of his duties and the exercise of his power act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.

It is clear that this applies to all trustees in South Africa, regardless of the type of trust.[148] Section 9(2) furthermore makes it clear that any clause which attempts to exempt a trustee from this duty shall be void. This section fortifies the fiduciary duty as a critical element to all trust dealings in South Africa.

Most authors agree that a trustee's fiduciary duty stems from, and is equivalent to, the duty imposed by section 9(1).[149] Kloppers[150] supports this view by stating that section 9 confirms a trustee's fiduciary obligation towards the trust beneficiaries.[151] De Waal[152] goes one step further and states that section 9 contains the very essence of a trustee's fiduciary duty regarding the administration of the trust.[153] This seems to be the correct view, especially when one considers Conradie J's explanation in *Hofer v Kevitt*[154] that the management of trust property is the most important element of a trustee's fiduciary duty.[155] In contrast, Du Toit argues that the duty in terms of section 9(1) is one of many duties which a trustee has to comply with as a result of his fiduciary office.[156]

It has now been established that the trustee has a fiduciary duty and since any duty has a corresponding right, it becomes necessary to establish the nature of any rights stemming from this duty. Coetzee explains that the contents of the fiduciary duty can

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148 Coetzee *'n Kritiese Ondersoek na die Aard en Inhoud van Trustbegunstigdes se Regte Ingevolge die Suid-Afrikaanse Reg* 354.
149 Du Toit 2007 *Stell LR* 473.
150 Kloppers 2006 *TSAR* 414-423.
151 Kloppers 2006 *TSAR* 421; Du Toit *South African Trust Law* 70; Geach and Yeats *Trusts Law and Practice* 98.
152 De Waal 1998 *TSAR* 326-334.
153 De Waal 1998 *TSAR* 330.
154 *Hofer v Kevitt* 1996 2 SA 402 (C).
155 *Hofer v Kevitt* 1996 2 SA 402 (C) 407 F.
156 Du Toit 2007 *Stell LR* 474.

be used to determine the extent of the "fiduciary right" of a trustee.[157] Where a trustee deals with assets in breach of this fiduciary duty or amends the trust deed to the disadvantage of potential beneficiaries, it becomes clear that there are definitely rights which need to be protected.[158] Since the beneficiaries have these rights it is only logical that they would be able to enforce these rights against a trustee who fails to adhere to the fiduciary duty.

This makes it clear that the trustee must have a certain extent of liability towards the beneficiary (and third parties) which would safeguard against the breach of his fiduciary duty. Where a trustee does not comply with his fiduciary duties, it is said that he or she is in breach of trust.[159] Certain consequences flow from the breach of trust which is primarily aimed at the protection of beneficiaries, but which also deters trustees from acting contrary to their fiduciary duties.

In the case of maladministration of trust funds, a beneficiary may institute action in his personal capacity which is known as taking direct action.[160] A trustee can rebut an allegation of maladministration by proving that, notwithstanding the loss of funds, he or she still exercised his discretion properly and carefully.[161] The trustee can also defeat the claim by proving that the beneficiary, with full capacity and knowledge of circumstances, consented to the breach of trust.[162]

This discussion makes it clear that the fiduciary duty of a trustee is the most important duty relating to the administration of trust property. The importance hereof will become evident when the case law is discussed below which will show how spouses, who were also trustees, have in the past failed to properly exercise their fiduciary duties. A foundation has also now been laid in order to discuss the

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157 Coetzee *'n Kritiese Ondersoek na die Aard en Inhoud van Trustbegunstigdes se Regte Ingevolge die Suid-Afrikaanse Reg* 358; Du Toit *South African Trust Law* 108.

158 Coetzee *'n Kritiese Ondersoek na die Aard en Inhoud van Trustbegunstigdes se Regte Ingevolge die Suid-Afrikaanse Reg* 360.

159 Rahman *Defining the Concept "Fiduciary Duty"* 87; Du Toit *South African Trust Law* 84; Geach and Yeats *Trusts Law and Practice* 98-101.

160 Rahman *Defining the Concept "Fiduciary Duty"* 87; Du Toit *South African Trust Law* 100; *Gross v Pentz* 1996 (4) SA 617 (A) 625 F.

161 Rahman *Defining the Concept "Fiduciary Duty"* 88 referring to *Clarkson v Gelb* 1981 1 SA 288 (W).

162 Rahman *Defining the Concept "Fiduciary Duty"* 89; Cameron *South African Law of Trusts* 387.

next concept regarding the separation of control and enjoyment which also relates to the manner in which trust assets are administered.

3.3 The separation of control and enjoyment

The issue of the separation of control and enjoyment has become increasingly more important in recent litigation involving trusts. The case law discussed below will illustrate how courts have used this notion to explain why trust assets can, under certain circumstances, be taken into consideration in litigation involving a trustee or founder in his or her personal capacity. The principles laid down in these cases will then be used to determine what the consequences would be if either spouse to a marriage in community of property was a founder or trustee of a trust where it is established that the separation of control and enjoyment has been found wanting.

3.3.1 General

Hahlo[163] identified the characteristic feature of the trust as:

> ... the separation between the control which ownership gives and the benefits of ownership.[164]

He went on to explain that the founder "entrusts" property to a trustee to use it for a specific purpose determined by the founder,[165] specifically not for the benefit of the trustee in his capacity as such. This clearly links with the fiduciary duty of a trustee, but the specific aspect of separation of control and enjoyment deserves a separate discussion in light of the increased importance thereof in recent South African case law and literature.

Although the case dealt with a business trust it is important to note that in *Nieuwoudt v Vrystaat Mielies*[166] the court identified the trust *in casu* as a "newer type of trust" whereby "someone ... forms a trust while everything else remains the same."[167] In such a case, the separation between control and benefits of ownership

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[163] Hahlo 1961 *SALJ* 195-208.
[164] Hahlo 1961 *SALJ* 195.
[165] Hahlo 1961 *SALJ* 196.
[166] *Nieuwoudt v Vrystaat Mielies* 2004 3 SA 486 (SCA).
[167] *Nieuwoudt v Vrystaat Mielies* 2004 3 SA 486 (SCA) 493 E.

is absent and it can consequently be stated that the central feature of the trust is absent.

The Supreme Court of Appeal case *Land and Agricultural Bank v Parker*[168] has formed the basis of most of these discussions. Cameron JA's formulation of the basic, or core, trust idea[169] is widely recognised as the *locus classicus* in this regard. The court explained that this core trust idea will be lacking where the beneficiaries, in their capacities as trustees, exercise absolute discretion over control of the trust.[170] The potential consequences of such "abuse"[171] or "debasement"[172] of the core trust idea play a significant role in determining whether or not trust assets[173] may become relevant in litigation concerning trustees or founders.

A number of authors[174] as well as the courts[175] have in recent times used various terms to describe the different scenarios under which the separation of control and enjoyment is not present. These terms have however caused a certain amount of confusion and it is therefore necessary to distinguish between the lifting (and piercing of the trust veneer, the *sham* trust[176] and the alter-ego trust. The main purpose of this is to determine exactly what the difference, if any, between these concepts are and what the consequences would be if a trust is found to be a *sham* or alter-ego. This discussion will furthermore assist in providing a platform from where to discuss the case of *WT v KT*[177] and determining what the future holds for trust assets in the case of marriages in community of property.

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168 *Land and Agricultural Bank v Parker* 2005 2 SA 77 (SCA).

169 *Land and Agricultural Bank v Parker* 2005 2 SA 77 (SCA) 86 D-E: "The core idea of the trust is the separation of ownership (or control) from enjoyment".

170 *Land and Agricultural Bank v Parker* 2005 2 SA 77 (SCA) 88 G-H.

171 *Land and Agricultural Bank v Parker* 2005 2 SA 77 (SCA) 89 G.

172 *Land and Agricultural Bank v Parker* 2005 2 SA 77 (SCA) 88 B.

173 Or the value thereof.

174 De Waal 2012 *RabelsZ* 1078-1100; Van der Linde 2012 *THRHR* 371-388; Stafford *A Legal-comparative Study of the Interpretation and Application of the Doctrines of the Sham and the Alter-ego in the Context of South African Trust Law*; Harding *Importance of Adhering to the Basic Trust Idea in the Formation and Administration of Trusts*.

175 *Van Zyl v Kaye* 2014 4 SA 452 (WCC); *Jordaan v Jordaan* 2001 3 SA 288 (C); *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA).

176 This is not really a trust; but rather the construction which the parties intended to create.

177 *WT v KT* 2015 3 SA 574 (SCA).

De Waal and Stafford seem to agree that the fundamental difference between the *sham* trust and the alter-ego trust is the presence or absence of the intention to create a trust.[178] As will become clear below, these authors and the judiciary[179] argue that in the case of a *sham* trust there was never any intention to create a trust while an alter-ego trust is a valid trust, but due to the manner of administration the court may ignore the trust form for a specific purpose.[180]

3.3.2 Terminology

As explained above, the language which the courts and authors have used in explaining and applying the principles of alter-ego and lifting the trust veneer has caused confusion; this necessitates a brief explanation of what exactly each of these terms mean.[181]

De Waal holds that the term "go(ing) behind the trust form" has been described, *inter alia*, as "disregard(ing) the veneer of the trust", "pierc(ing) the veil of the trust" and treating the trust as someone else's "alter-ego".[182] He does however specifically state that is incorrect to label a trust under these circumstances as a *sham*.[183] It is submitted that De Waal is incorrect in equating the concepts of "go(ing) behind the trust form" with a finding of an "alter-ego" trust, it will be illustrated[184] that a court would first have to "go behind the trust form" or "lift the veneer" of a trust before it would be able to make a decision of a trust being a *sham* or the alter-ego of a person.

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[178] De Waal 2012 *RabelsZ* 1096; Stafford *A Legal-comparative Study of the Interpretation and Application of the Doctrines of the Sham and the Alter-ego in the Context of South African Trust Law* 121.

[179] *Van Zyl v Kaye* 2014 4 SA 452.

[180] De Waal 2012 *RabelsZ* 1096.

[181] Take note of Stafford's LLM dissertation *A Legal-comparative Study of the Interpretation and Application of the Doctrines of the Sham and the Alter-ego in the Context of South African Trust Law*.

[182] De Waal 2012 *RabelsZ* 1079; who personally uses the term "abuse of the trust".

[183] De Waal 2012 *RabelsZ* 1079.

[184] See paragraph 3.3.3 below.

Van der Linde also notes the different terms which have been used by the court,[185] but explains that the need for "lifting the veneer of the trust" arises as a result of the trust being the alter-ego of the founder.[186] This clearly illustrates the relationship between the two concepts. Hyland and Smith[187] states that the courts will pierce the veneer of the trust where it is used as a mere "smokescreen" in order to achieve some or other objective contrary to the concept of a trust. Nel adds to this formulation by declaring that courts will pierce the veneer of a trust where ownership and enjoyment of trust assets vest with the same person so that the trust becomes the alter-ego of such person.[188]

In *Van Zyl v Kaye*[189] the judiciary finally took their chance to define these concepts and explain the difference between the various terms. Binns-Ward J clarified the confusion by stating that:

> ... establishing a trust is a sham and 'going behind the trust form' entail fundamentally different undertakings. When a trust is a sham, it does not exist and there is nothing to go behind.[190]

This construction has been acknowledged as a welcome and theoretically sound contribution towards the definition of these concepts.[191] This indicates that the courts do not believe it is necessary (or possible) to go behind the trust form when a trust is a *sham*. As will be illustrated below, this line of reasoning has the potential to cause confusion as it fails to differentiate between going behind the trust form and declaring a trust to be the alter-ego of the founder.

As a starting point, it is submitted that in order to determine whether a trust is used as an alter-ego, amounts to a *sham* or whether the trust form is abused in any other

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185 Van der Linde 2012 *THRHR* 376; such as "piercing the corporate veil", "going behind the trust form".

186 Van der Linde 2012 *THRHR* 376; interestingly the author also cites the *sham* trust as a reason for lifting the veneer.

187 Hyland and Smith 2006 *JEPL* 10.

188 Nel 2014 *Obiter* 575.

189 *Van Zyl v Kaye* 2014 4 SA 452.

190 *Van Zyl v Kaye* 2014 4 SA 458 D.

191 Stafford 2015 *Without Prejudice* 25; *WT v KT* 2015 3 SA 574 (SCA) at page 583 B with reference to footnote 5.

manner, the court would have to look behind the trust form or pierce the veneer of the trust.

3.3.3 Lifting or piercing the veil

Drawing from the dictum of Joubert JA,[192] the court in *Land and Agricultural Bank v Parker*[193] held that:

> It may be necessary to go further and extend well-established principles to trusts by holding ... that the trust form was a mere cover for the conduct of business "as before"... [194]

The court then exercised its discretion to develop the law of trusts by introducing the company law concept of "piercing the corporate veil"[195] into the law of trusts as follows:

> Where trustees ... act in breach of the duties imposed by the trust deed, and purport on their sole authority to enter into contracts binding the trust that may provide evidence that the trust form is a *veneer that in the interest of justice should be pierced*... (own emphasis). [196]

Flemming R in *Botha v Van Niekerk*[197] explained that the core reason why the law recognises the independence of a separate juristic person is to protect such juristic person from the debts of a natural person and *vice versa*.[198] He goes on to explain that piercing the veil is an extraordinary measure that should be reserved for those circumstances where, in the interest of justice, some compelling matter of urgency demands that a shareholder or director be held personally liable for liabilities incurred by the company.[199]

In order to apply this principle to trust law in a meaningful manner, it becomes necessary to understand and distinguish between the company law concepts of "piercing the veil" and "lifting the veil". The veil, as it is used in this context, refers to

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192 See paragraph 1.1 above; our Courts have evolved and are still in the process of evolving our own law of trusts by adapting the trust idea to the principles of our own law.
193 *Land and Agricultural Bank v Parker* 2005 2 SA 77 (SCA).
194 *Land and Agricultural Bank v Parker* 2005 2 SA 77 (SCA) 91 A-B.
195 Stander 2008 *INSOL* 165.
196 *Land and Agricultural Bank v Parker* 2005 2 SA 77 (SCA) 91 B-C.
197 *Botha v Van Niekerk* 1983 3 SA 513 (W).
198 *Botha v Van Niekerk* 1983 3 SA 513 (W) 523 E-F.
199 *Botha v Van Niekerk* 1983 3 SA 513 (W) 523 G-H.

the separation between the identity of the company and its members. The difference between "piercing" and "lifting" the veil lies in the extent to which the separate legal identity of the company will be disregarded.[200] Where a court "pierces the veil" it will ignore the separate identity of the company in its entirety and treat the rights of the company as the rights of the members.[201] The veil which separates the trust assets from the personal assets of a trustee is pierced.[202] "Lifting the veil" entails a process of looking at the manner in which a company is administered and is also called "looking behind the veil".[203]

The courts have equated "a decision to disregard" and "piercing" the veneer in *Van der Merwe v Hydraberg Hydraulics*[204]. Robbertse,[205] without citing any authority on the matter, holds that courts and academics regard these concepts as synonyms.[206] Stafford[207] also uses the terms interchangeably throughout his dissertation. It is however submitted that the conclusion of this chapter will highlight the importance of this distinction and illustrate how it can be of assistance in determining the relevance and significance of trust assets at divorce proceedings.

3.3.4 The alter-ego trust

Section 12 of the *Trust Act* provides that trust property shall not form part of the personal estate of the trustee, in his capacity as such. This section was clearly introduced in order to provide a legislative footing for the separation of ownership and enjoyment.

Like the concept of "piercing" or "lifting" the trust veneer, the alter-ego also stems from the company law and in *Cape Pacific v Lubner Controlling Investments*[208]

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200 Davis, Beneke and Jooste *Estate Planning* 13.9; referring to 779 of the English case of *Atlas Maritime Co SA v Avalon Maritime Ltd, The Coral Rose (No. 1)* 1991 4 All ER 769 (CA).

201 Davis, Beneke and Jooste *Estate Planning* 13.9.

202 *RP v DP* 2014 6 SA 243 (ECP) 248 E-F.

203 Davis, Beneke and Jooste *Estate Planning* 13.9.

204 *Van der Merwe v Hydraberg Hydraulics* 2010 5 SA 555 (WC) 570 F-G.

205 Robbertse *Going beyond the trust veil in insolvency and divorce matters*.

206 Robbertse *Going beyond the trust veil in insolvency and divorce matters* 3 fn 23.

207 Stafford *A Legal-comparative Study of the Interpretation and Application of the Doctrines of the Sham and the Alter-ego in the Context of South African Trust Law*.

208 *Cape Pacific v Lubner Controlling Investments* 1995 4 SA 790 (A).

Smalberger JA explained that the respondent had abused the separate identity of the companies by treating them as his alter-ego.[209] He went on to explain that the will of the company was in fact the will of the respondent and that policy considerations suggest that the corporate veil should be lifted.[210]

The alter-ego principle was introduced into the trust law in the case of *Jordaan v Jordaan*.[211] It was held that the defendant had deliberately created a trust after divorce proceedings were instituted with the sole purpose of placing assets outside the reach of the defendant.[212] The defendant saw the trust as a way in which to obtain financial benefits and it was therefore held that the trust was in fact his alter-ego.[213]

In *Badenhorst v Badenhorst*[214] the court held that in order to prove that a trust is the alter-ego of a person, it needs to be shown that the person controls the trust and would have acquired the property in his own name if the trust did not exist.[215] It was explained that the relevant level of control is *de facto*, which is not always the same as *de iure* control.[216] In order to determine the level of *de facto* control it is necessary to look not only at the trust deed, but also at the manner in which the trust was administered.[217] It was held in *Van Zyl v Kaye*[218] that a trust is an alter-ego if the trustees effectively control the trust in such a manner that they benefit from the property as if it was their own property.[219]

The alter-ego trust is seen as a puppet which is controlled by the founder of the trust, while other trustees merely cater to the founder's personal needs.[220] These

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209 *Cape Pacific v Lubner Controlling Investments* 1995 4 SA 790 (A) 804 H.
210 *Cape Pacific v Lubner Controlling Investments* 1995 4 SA 790 (A) 804 H-I.
211 *Jordaan v Jordaan* 2001 3 SA 288 (C).
212 *Jordaan v Jordaan* 2001 3 SA 288 (C) 301 B-C.
213 *Jordaan v Jordaan* 2001 3 SA 288 (C) 301 B.
214 *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA).
215 *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA) 260-261 J.
216 *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA) 261 A.
217 *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA) 261 A-B.
218 *Van Zyl v Kaye* 2014 4 SA 452 (WCC).
219 *Van Zyl v Kaye* 2014 4 SA 452 (WCC) 460 C.
220 Robbertse *Going beyond the trust veil in insolvency and divorce matters* 30; Stafford *A Legal-comparative Study of the Interpretation and Application of the Doctrines of the Sham and the Alter-ego in the Context of South African Trust Law* 109-110.

trustees would be provided with *de iure* control over trust assets while the founder would retain *de facto* control by using the trust as his or her alter-ego. Under such circumstances it can be inferred that a founder-trustee pays scant regard to his or her fiduciary duty as mentioned above.[221]

Where a court then concludes that a trust is in fact the alter-ego of the founder, it will have the power to disregard the illusion of the trust and treat the trust assets, or the value thereof, as falling in the personal estate of the founder in litigation against him or her. The alter-ego trust has manifested itself in number of ways. The assets can be placed in a trust but the founder retains the power to control these assets, while the trustees merely do whatever they are told to do.[222] The other situation is where trust assets are treated as if they belong to the founder in his personal capacity and not the trustees.[223] The court has held in *MM v JM*[224] that finding a trust to be the alter-ego of the founder could, under certain circumstances result in a finding that the assets "placed" in a trust are actually owned by such founder in his or her personal capacity.[225]

It is clear that under both these circumstances a court would be required to lift the veil of the trust and look into the manner in which the trust has been administered.[226] Only after the veil of the trust has been lifted will the court be able to determine whether or not the trust is in fact the alter-ego of the founder. This illustrates that the concepts of lifting the trust veil and finding the trust to be an alter-ego are not synonyms, but two distinct parts of a process wherein the courts try to establish whether or not trust assets should be taken into consideration in litigation involving a founder-trustee in his or her personal capacity. The courts also

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221 See Pages 23-25 above; Stafford *A Legal-comparative Study of the Interpretation and Application of the Doctrines of the Sham and the Alter-ego in the Context of South African Trust Law* 110.

222 Robbertse *Going beyond the trust veil in insolvency and divorce matters* 30; Stafford *A Legal-comparative Study of the Interpretation and Application of the Doctrines of the Sham and the Alter-ego in the Context of South African Trust Law* 110.

223 Robbertse *Going beyond the trust veil in insolvency and divorce matters* 30; Stafford *A Legal-comparative Study of the Interpretation and Application of the Doctrines of the Sham and the Alter-ego in the Context of South African Trust Law* 110.

224 *MM v JM* 2014 4 SA 384 (KZP).

225 *MM v JM* 2014 4 SA 384 (KZP) 392 D.

226 Robbertse *Going behind the trust veil in insolvency and divorce matters* 31.

have the power to, while lifting the trust veil, amend unconstitutional[227] or overly burdening[228] clauses in terms of section 13 of the *Trust Act*.[229]

It is submitted that this distinction is of critical importance in understanding the process which courts follow in determining the relevance of trust assets at divorce proceedings. A discussion on the *sham* trust is also required in order to understand the difference, if any, between the alter-ego trust and *sham* trust. This discussion will also illustrate the significance of lifting the veil of the trust in the context of *sham* trust.

3.3.5 The sham *trust*

In order to comprehend[230] the idea of a *sham* trust it is necessary to understand what Innes JA, in *Zandberg v van Zyl*[231] meant when formulating the guiding principle concerning simulated transactions as follows:

> … the parties to a transaction [have frequently] endeavour[ed] to conceal its real character. They call it by a name, or give it a shape, intended not to express but to disguise its true nature (own emphasis in brackets).[232]

The judge went on to explain that when a court presides over a matter like this, it has to give effect to what the transaction really is and not what it purports to be.[233] This may mean, in a trust law context, that a trust has been "created" in terms of the necessary trust documents, but these documents do not reflect the true intentions of the parties.[234] If the true intention of the parties[235] is to create some other legal agreement such as a partnership or a *stipulatio alteri*, it can be said that they lacked the intention to create a trust.[236]

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[227] *In Re Heydenrych Testamentary Trust* 2012 4 SA 103 (WCC) 107H–108C.
[228] Rahman *Defining the Concept "Fiduciary Duty"* 86.
[229] No decision is needed regarding the alter-ego issue.
[230] De Waal 2012 RabelsZ 1085.
[231] *Zandberg v van Zyl* 1910 AD.
[232] *Zandberg v van Zyl* 1910 AD 302.
[233] *Zandberg v van Zyl* 1910 AD 302.
[234] Stephens *When to Cry,* Sham*!* 44.
[235] Founder and/or trustee(s).
[236] De Waal 2012 *RabelsZ* 1084.

Stafford, relying on foreign case law, calls for the so-called *Snook* test to be used in determining whether or not a trust is a *sham* which essentially boils down to asking what the intention of the parties were when creating the trust.[237] He does however also mention the emerging *sham* trust, where the parties had the true intention to create a trust at the onset, but that their intentions changed over time and they are merely using the trust as a façade in furthering their true intentions.[238]

In South African law, the test for simulation[239] was verbalised in *C:SARS V NWK* [240]as follows:

> ... if the purpose of the transaction is only to achieve an object that allows the evasion of tax, or of a peremptory law, then it will be regarded as simulated.[241]

The court explained that this requires an examination into the real substance and purpose of the transaction and that the mere fact that parties perform in accordance with the agreement does not mean that simulation is absent.[242] The court in *Van Zyl v Kaye* [243] similarly explained that a trust will be a *sham* where:

> … a finding [was made] that the requirements for the establishment of a trust were not met, or that the appearance of having met them was in reality a dissimulation (own emphasis in brackets).[244]

These tests are very similar to the one proposed by Stafford[245] and it is therefore submitted that these courts have done away with the need of incorporating the *Snook* test[246] into South African law.

The court will therefore be required to look at the founding documents of the trust and subsequent documentary evidence of the trust in order to determine whether or

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237 Stafford *A Legal-comparative Study of the Interpretation and Application of the Doctrines of the Sham and the Alter-ego in the Context of South African Trust Law* 162.
238 Stafford *A Legal-comparative Study of the Interpretation and Application of the Doctrines of the Sham and the Alter-ego in the Context of South African Trust Law* 164.
239 Or *sham*.
240 *C:SARS V NWK* 2011 2 SA 67 (SCA).
241 *C:SARS V NWK* 2011 2 SA 67 (SCA) 80 E.
242 *C:SARS V NWK* 2011 2 SA 67 (SCA) 80 F-G.
243 *Van Zyl v Kaye* 2014 4 SA 452 (WCC).
244 *Van Zyl v Kaye* 2014 4 SA 452 (WCC) 459 E.
245 Stafford *A Legal-comparative Study of the Interpretation and Application of the Doctrines of the Sham and the Alter-ego in the Context of South African Trust Law*.
246 Stafford *A Legal-comparative Study of the Interpretation and Application of the Doctrines of the Sham and the Alter-ego in the Context of South African Trust Law* 162.

not the parties had the intention to create a trust. Should it be found that the parties did not intend to create a trust, this investigation will furthermore enable the court to ascertain the true intention of the parties.[247] This means that every case would have to be considered on its own merits and that no general rules or principles can be applied.[248]

An interesting question arises as to the determination of the true intention of the parties. The court has to be convinced that the requirements[249] for a valid trust have not been met[250], but this, in itself, entails a process of looking behind the possible illusion of a trust. It is therefore submitted that before a court is satisfied that a trust is a *sham*, it would have to look behind the trust veil. This is a logical sequence of events as a trust can obviously not be declared a *sham* before the court has looked at the evidence before it.

The court in *Rees v Harris*[251] even went so far as to say that our courts have "pierced the corporate veil" where an entity is a *sham* or alter-ego.[252] Upon declaring the trust to be a *sham* the court will no longer be dealing with a trust, but with whichever arrangement the parties intended to create. Only then would there be nothing to look behind and the trust will fail.

Some authors like Stafford[253] and Robbertse[254] argue that only upon a trust being declared a *sham* will a court have the power to lift the veil of the trust.[255] It is submitted that they are putting the cart before the horse. How will a court be able to declare a trust to be a *sham* without having lifted the veil? By Stafford's own

247 Such as to create a partnership or agency; De Waal 2012 *RabelsZ* 1096-1097.
248 De Waal 2012 *RabelsZ* 1082.
249 Du Toit *South African Trust Law* 27-34; specifically the intention to create a trust.
250 Stafford 2015 *Without Prejudice* 25.
251 *Rees v Harris* 2012 1 SA 583 (GSJ).
252 589 B; It should be noted that the court was referring to the decision of *Cape Pacific v Lubner Controlling Investments* 1995 4 SA 790 (A) which dealt with company law. The importation of the "piercing the veil (or veneer)" principle from company law to trust law has been recognised by academics and courts alike. This will be discussed in more detail below.
253 Stafford *A Legal-comparative Study of the Interpretation and Application of the Doctrines of the Sham and the Alter-ego in the Context of South African Trust Law*.
254 Robbertse *Going behind the trust veil in insolvency and divorce matters*.
255 Robbertse *Going behind the trust veil in insolvency and divorce matters* 31; Stafford *A Legal-comparative Study of the Interpretation and Application of the Doctrines of the Sham and the Alter-ego in the Context of South African Trust Law* 162.

reasoning he concludes that a trust will be a *sham* where the parties lacked the *bona fide* intention to create a trust,[256] but how will a court be able to determine the true intention of the parties without disregarding the illusion of a true intent to create a trust. It is worth noting De Waal's converse argument that a court would first have to decide whether a valid trust exists (decide whether or not it is a *sham*) before there could theoretically be something to look behind.[257] This would imply that courts would request evidence to be placed before it proving that a trust is valid before being able to look at the manner in which the trust is administered.

The South African legal system is adversarial and as such the judiciary is primarily tasked with making an objective decision, as an impartial referee, while the parties are allowed to decide when and how the steps of litigation will be followed.[258] It would therefore go against the nature of our legal system to allow the courts to require evidence proving the validity of the trust; this is true because it implies a point of departure where the judicial officer decides that a certain step has to be taken, i.e. proving the validity of the trust. This makes it clear why the parties would firstly have to place evidence before the court before the court, weighing up all the evidence presented before it, can decide whether or not to look behind the veil of the trust.

This is where the importance of differentiating between lifting and piercing the veil of the trust will become evident. It is submitted that at the onset of litigation involving the abuse of a trust the court will, by lifting the veil of the trust, look behind the trust form in order to determine whether or not the parties had the intention to create a trust. This will require the court to not only look at the founding documents of the trust, but also the level of separation of control and enjoyment during the administration of the trust and the real nature of the transaction. If the court is satisfied that the parties did not have the intention to create a trust at the onset, it may declare the trust to be a *sham*. At this point the court will pierce the "veil" of the

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256 *Stafford A Legal-comparative Study of the Interpretation and Application of the Doctrines of the Sham and the Alter-ego in the Context of South African Trust Law* 161.
257 De Waal 2012 *RabelsZ* 1085.
258 Friedman 1997 *Consultus* 40.

trust and disregard the separate legal identity of the trust by attributing the trust assets to the founder for the purpose of litigation. The trust property will therefore be regarded as the property of such "founder".[259]

3.3.6 Conclusion

The purpose of the discussion on the separation of control and enjoyment was firstly to establish a starting point from where to discuss the circumstances under which trust assets or the value thereof can be declared to form part of the personal estate of a trustee-founder. In this regard an investigation was done into the nature of the lifting and piercing of the veil and what the consequences would be if a court decided to lift or pierce the veil.

A distinction was also clearly drawn between the alter-ego trust and the *sham* trust. The main difference between the two is the consequences which flow from declaring a trust to be either of these.[260] Where a trust is found to be the alter-ego, it will remain valid and the court would therefore not pierce the veil of the trust because it would still have to acknowledge the existence of the trust. The court will however have the discretion to attribute the value of trust assets to the personal estate of a founder-trustee for the purpose of litigation against him or her.[261] However, Ploos van Amstel J in *MM v JM*[262] held that section 3 of the *Matrimonial Property Act* does not afford the court the same discretion as section 7(3) of the *Divorce Act*[263] to make a just or equitable decision, but merely to factually determine the value of a spouse's estate.[264] It is however submitted that the legislation used is irrelevant since a court's discretion is not based on any legislative powers, but rather on the common law power to determine the value of a person's estate.[265]

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259 De Waal 2012 *RabelsZ* 1098.
260 Robbertse *Going behind the trust veil in insolvency and divorce matters* 27.
261 *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA); *Jordaan v Jordaan* 2001 3 SA 288 (C).
262 *MM v JM* 2014 4 SA 384 (KZP).
263 The section used in, *inter alia*, *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA); see paragraph 2.2.3 above.
264 *MM v JM* 2014 4 SA 384 (KZP) 388 H-I.
265 *YB v SB* 2016 1 SA 47 (WCC) 60 H-G.

In the case of a *sham* trust the court would also have to begin by lifting the veneer of the trust in order to establish what the true intention of the parties were when creating the trust, once it is determined that the intention to create a trust was not present, the court will declare the trust to be a *sham* and thereupon pierce the "veil" of the trust by totally disregarding the separate legal identity of the trust for purposes of litigation against the founder. It would therefore be unnecessary to plead and prove that a trust amounts to a *sham* if it can be proven that a founder had the intention of controlling and benefit from trust assets as if it was his own.[266]

Based on this reasoning it is respectfully submitted that the court in *Van Zyl v Kaye*[267] erred in its explanation of the difference between declaring a trust to be a *sham* and lifting the veneer of the trust.[268] A court cannot assume that a trust is a *sham* and as such at the onset of litigation it would have to lift the veil of the trust in order to determine whether or not it is in fact a *sham*. Only after a finding of the trust being a *sham* will there no longer be anything to look behind and only then will a court be able to disregard the separate identity of the trust. This is possibly why Binns-Ward J in *Van der Merwe v Hydraberg Hydraulics* decided, contrary to his own opinion, that it was not legally valid to "disregard the trust veneer".[269]

These principles will be used in the next chapter to determine the process which a court should follow where either spouse avers that trust assets or their value should become relevant during divorce proceedings.

The judgment in *WT v KT*[270] will be used as a template in establishing the process which the courts currently follow and what the outcome would be if the abovementioned process were to be used. This will assist in reaching a legally sound and realistic answer to the research question by establishing with certainty when trust assets will become relevant during divorce proceedings of spouses married in community of property.

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266 *YB v SB* 2016 1 SA 47 (WCC) 61 B-C; although the court shied away from the specific terminology, it can be inferred that a finding of *sham* and alter-ego are mutually exclusive.
267 *Van Zyl v Kaye* 2014 4 SA 452 (WCC).
268 See paragraph 3.3.2 above.
269 *Van der Merwe v Hydraberg Hydraulics* 2010 5 SA 555 (WC) 571 A-G.
270 *WT v KT* 2015 3 SA 574 (SCA).

4. *WT v KT*

A critical aspect of this research is the position of trust assets at divorce where spouses are married in community of property. It is therefore of paramount importance to discuss the Supreme Court of Appeal case of *WT v KT*[271] *which* dealt specifically with the issue of whether or not assets in a discretionary family trust can be considered as assets of the joint estate of spouses married in community of property.[272] This case is of vital importance in determining how the judiciary has addressed the topic of this study and whether there is room for improvement. The matter also dealt with issues of deceit and misrepresentation, but these issues will not be addressed in this study since they will not assist in answering the research question.

The facts of the matter and the judgment of the court a *quo* will be briefly discussed in order to establish the context wherein the court's judgment was made. The issues of law will then be identified so as to ascertain what the court set out to address. The judgment of the SCA, as well as its views on the court *a quo*'s judgment, will then be critically evaluated in light of the principles laid down in chapter two and three of this study. After this a determination will be made as to the impact which this judgment will have on similar cases and whether or not circumstances exist under which a court would come to a different conclusion than the one reached in *WT v KT*. The purpose of this chapter is to use the principles which have been laid down in chapter two and three to establish whether or not the court in *WT v KT* arrived at a theoretically sound conclusion and whether or not a forfeiture order as contemplated in section 9 of the *Divorce Act* could become relevant under circumstances such as this in light of recent calls for reform.

4.1 Facts

KT and WT started living together in 1997, WT then identified a specific immovable property as an investment opportunity. This property was purchased in the name of

[271] *WT v KT* 2015 3 SA 574 (SCA) (hereafter *WT v KT*).
[272] *WT v KT* 2015 3 SA 574 (SCA) 576 C.

a trust and WT and KT moved into the property in 2000 and lived there until 2009 without paying any rent to the trust.[273]

The trust was created by WT in 1999 and the only two trustees were WT and his brother. A number of beneficiaries were nominated but there was no evidence that KT was ever nominated as a capital beneficiary, while no mention is made of income beneficiaries.[274] WT did however still deem it necessary to amend the trust deed after institution of divorce proceedings specifically in relation to the defined beneficiaries.[275]

WT lent R 150 000 to the trust in order to finance the purchase of the abovementioned property[276] which was interest-free, unsecured and no repayment dates were mentioned.[277] He also bound himself as a surety in relation to debts incurred by the trust by virtue of a mortgage bond registered over the property.[278] WT then used R 350 000 of his inheritance to settle this debt.[279] The shares in two companies, established by WT, vested entirely in this trust.[280]

WT and KT were married in community of property on the 6th of October 2001.[281] WT controlled their joint estate and was authorised by KT to transfer funds from her banking account, which included her salary, bonuses and pension fund, into the trust account.[282] WT drew money from the trust account which was used for the benefit of the joint estate and it was clear that, coupled with the fact that they lived in the property rent-free, the spouses and therefore the joint estate benefitted greatly from the trust.[283]

273 *WT v KT* 2015 3 SA 574 (SCA) 577 H – 578 B.
274 *WT v KT* 2015 3 SA 574 (SCA) 583 F-G – 584 A.
275 *WT v KT* 2015 3 SA 574 (SCA) 578 A-D.
276 *WT v KT* 2015 3 SA 574 (SCA) 578 E-F.
277 *WT v KT* 2015 3 SA 574 (SCA) 578 G.
278 *WT v KT* 2015 3 SA 574 (SCA) 578 G.
279 *WT v KT* 2015 3 SA 574 (SCA) 578 I.
280 *WT v KT* 2015 3 SA 574 (SCA) 578 H.
281 *WT v KT* 2015 3 SA 574 (SCA) 579 E.
282 *WT v KT* 2015 3 SA 574 (SCA) 579 G-H.
283 *WT v KT* 2015 3 SA 574 (SCA) 579 I – 580 A.

The affairs of the trust, WT (and by implication the joint estate) and the companies created by WT were inextricably linked at all times. WT even described himself as the "main breadwinner" of the trust and explained how he paid money into the trust when it was needed.[284]

The evidence before the court showed that only four resolutions, all dated after divorce proceedings were instituted, had been passed by WT and his brother. All other matters relating to the trust were exclusively managed by WT with his brother taking an extremely passive, if not absent role, in the administration of the trust.[285] It can therefore be inferred that WT was the only *de facto* trustee of the trust for more than ten years.

WT instituted an action against KT claiming a decree of divorce in January 2010. While KT did not oppose this claim, she did file a counterclaim wherein she claimed that the assets of a family trust formed part of the joint estate between her and WT.[286]

One of KT's averments was that the trust was the alter-ego of WT based, *inter alia*, on the arguments that firstly, WT lacked the intention to create a trust; secondly, WT exercised *de facto* control over the trust and finally, that the property would have been acquired in the name of the joint estate had the trust not been created.[287]

The court *a quo* ruled that WT had structured the administered the trust with the sole idea of amassing wealth for himself.[288] The court, relying on *Badenhorst v Badenhorst*,[289] held that it has the discretion to decide whether trust assets belong to a specific party and would therefore form part of the joint estate. It was also held that the trust was a mere continuation of the situation existing between the parties

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284 *WT v KT* 2015 3 SA 574 (SCA) 580 B-C.
285 *WT v KT* 2015 3 SA 574 (SCA) 580 D-E.
286 *WT v KT* 2015 3 SA 574 (SCA) 576 D-F.
287 *WT v KT* 2015 3 SA 574 (SCA) 576 F – 577 A-C.
288 *WT v KT* 2015 3 SA 574 (SCA) 581 B-C.
289 *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA).

before they were married.[290] The trust assets were found to be WT's personal assets and therefore formed part of the joint estate.[291]

4.2 Legal issues

The main issue for the purpose of this study is whether or not the trust was the alter-ego of WT in that he administered it for his own benefit alone.[292] As stated above the issue of deceit and misrepresentation[293] will not be discussed for the purpose of this study.

Other issues which KT raised in the court *a quo*, but dropped on the appeal were that WT never had the intention to create a trust and that it was therefore never a trust in the strict sense.[294] Although these issues were not discussed in the Supreme Court of Appeal, they can still be of assistance in this study since they relate to issues of a *sham* trust and they will therefore be briefly discussed at the conclusion of this chapter.

4.3 Judgment

On appeal the court explained that the principle of looking behind the veneer of a trust originated from the concept of piercing the corporate veil in company law, whereby a court can disregard the separate identity of a company.[295] The case of *Land and Agricultural Bank v Parker*[296] case was used to explain that the abuse of the trust would allow a court to look behind the trust form.[297]

The court then held that because KT was not a defined beneficiary or a trust creditor, WT owed no fiduciary responsibility towards her. The court explained that the importance of separation of control and enjoyment is limited to circumstances

290 *WT v KT* 2015 3 SA 574 (SCA) 581 A.
291 *WT v KT* 2015 3 SA 574 (SCA) 581 D.
292 *WT v KT* 2015 3 SA 574 (SCA) 582 C.
293 *WT v KT* 2015 3 SA 574 (SCA) 582 B.
294 *WT v KT* 2015 3 SA 574 (SCA) 582 A.
295 *WT v KT* 2015 3 SA 574 (SCA) 583 B-C.
296 *Land and Agricultural Bank v Parker* 2005 2 SA 77 (SCA).
297 *WT v KT* 2015 3 SA 574 (SCA) 583 C-D.

where a third party transacted with the trust.[298] Based on this, the court decided that KT has no standing to challenge the manner in which WT managed the trust.[299]

The court furthermore criticised the judgment of the court *a quo* and held that, because the parties did not own the property in equal shares prior to the marriage and WT had established the trust and bought the property before the marriage, the trial court had no legal basis to decide that the trust was simply a continuation of the situation.[300] Emphasis was also placed on the fact that KT made no significant contribution to the purchase of the property.[301]

The trial court's reliance on *Badenhorst v Badenhorst*[302] was also criticised on the basis that when determining the proprietary consequences of a marriage in community of property a court is limited to directing that the assets of the joint estate be divided.[303] *Badenhorst v Badenhorst*[304] dealt with a redistribution order under section 7(3) of the *Divorce Act* and it was held that a court dealing with a marriage in community of property does not have the same discretion to include trust assets in the joint estate.[305] The court also relied on section 12 of the *Trust Act* which states that trust property does not form part of the personal estate of a trustee.[306]

The transfer of assets from the trust to the joint estate was criticised in light of the fact that no consideration was taken of the mortgage bond registered over the property.[307] The court also questioned whether courts would under any circumstance have the discretion to transfer trust assets to a trustee or merely the value thereof.[308]

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298 *WT v KT* 2015 3 SA 574 (SCA) 583 F, based on the decision in *Land and Agricultural Bank v Parker* 2005 2 SA 77 (SCA).
299 *WT v KT* 2015 3 SA 574 (SCA) 584 B-C.
300 *WT v KT* 2015 3 SA 574 (SCA) 584 C-D.
301 *WT v KT* 2015 3 SA 574 (SCA) 584 D-E.
302 *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA).
303 *WT v KT* 2015 3 SA 574 (SCA) 584 E-H.
304 *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA).
305 *WT v KT* 2015 3 SA 574 (SCA) 584 H.
306 *WT v KT* 2015 3 SA 574 (SCA) 584 H-I.
307 *WT v KT* 2015 3 SA 574 (SCA) 584 I – 585 A.
308 *WT v KT* 2015 3 SA 574 (SCA) 585 A.

Based on all the reasons mentioned above the court upheld the appeal against the court *a quo* and the trust assets were not taken into account at the division of the join estate.

4.4 Critical evaluation

The judgment of the Supreme Court of Appeal will now be tested against the theory explained in chapter two and three. The purpose behind this evaluation is to determine whether or not the Supreme Court of Appeal has now set precedent whereby trust assets will never become relevant at the divorce of spouses married in community of property. Depending on the outcome of the evaluation, certain guidelines can then be established in order to ensure that spouses and trustees all understand what the current situation is and what the consequences of divorce would be.

The principles laid down in chapter two will firstly be used in order to determine whether or not the court explained and applied the patrimonial consequences of a marriage in community of property correctly. The consequences of divorce will be discussed in a similar fashion in order to establish whether the court could have come to any other conclusion.

Chapter three will then be used to evaluate whether or not the trust was in fact the alter-ego of WT or whether the possibility was there to declare the trust a *sham*. The facts of the case will be applied to the theory mentioned under the separation of control and enjoyment in order to establish whether the court could have come to any other conclusion.

Although the issue did not arise *in casu* the forfeiture order will also be discussed in light of recent calls for reform. The facts of the case will once again be used to explain why, specifically under circumstances where trusts are involved, reform is imminent and legally valid.

These discussions are all in line aimed at ultimately answering the research question by determining whether, in light of *WT v KT*, trust asset will become relevant at the divorce of spouses married in community of property.

4.4.1 Patrimonial consequences of marriage and divorce

The court correctly set out the proprietary consequences of the marriage in community of property, i.e. that all assets acquired by either spouse forms part of the joint estate.[309] This would mean that the trust assets would have formed part of the joint estate if it was purchased in either spouse's personal capacity.

The discretion which a court has under section 7(3) of the *Divorce Act* is limited to ordering that the assets, or a part thereof, of one spouse be transferred to the other spouse. No mention is made of trust assets and as such the Supreme Court of Appeal's view that a court has some sort of unfettered discretion under a redistribution order is unfounded. The salient question, in cases such as this, should be whether or not the trust is a *sham* or the alter-ego of a trustee. Should a court then find that the trust form had been debased, the trust assets or the value thereof will be deemed to form part of the relevant trustee's personal estate. This would mean, in cases of marriage in community of property, that it forms part of the joint estate and illustrates why the relevant question is not the level of judicial discretion, but rather whether or not the trust is an alter-ego or *sham*.

During the court's criticism against the decision of the court *a quo*'s decision, it was held that because the spouses did not own the property in equal shares prior to the marriage and because they had no agreement to purchase the said property, it could not have been decided that the trust was merely a continuance of the situation between the spouses. It is submitted that the decision of the court *a quo* was based on the premise that the trust was in fact the alter-ego of WT and that the Supreme Court of Appeal could have merely dismissed this argument based on its finding that the trust assets do not form part of the joint estate. The arguments brought against the trial court's decision now have the potential to cause theoretical confusion.

309 *WT v KT* 2015 3 SA 574 (SCA) 581 E-F; see paragraph 2.2.1 above.

As explained in *Wiggill*[310] one of the consequences of a marriage in community of property is that the spouses become co-owners of previously separate estates, irrespective of the fact that property is registered in their separate names.[311] It should therefore be emphasised that even if spouses were not co-owners of property before marriage, or reached an agreement as to the purchase of the property, they automatically and *ex lege* become co-owners of all property upon the marriage in community of property being formalised. This does not detract from the ultimate conclusion of the Supreme Court of Appeal because the court decided that the trust assets do not form part of the joint estate, but it remains important to understand this principle in order to establish helpful guidelines for the future.

Another important factor to consider is that all assets to which a spouse has a vested right are considered to form part of the joint estate upon divorce. This is important to keep in mind when discussing the court's decision regarding the averments of alter-ego. An attempt will be made to determine whether WT was the *de facto* owner of the property, which would mean that he did in fact have a vested right thereto.

The court's assertion that a court is limited to merely dividing the joint estate in cases where spouses are married in community of property, while theoretically correct and sound, also has certain exceptions such as a settlement agreement being reached or a forfeiture order being granted against either spouse.

It is submitted that the court correctly applied the principles governing the marriage in community of property but that some of its formulations, such as the court's contention that the property could not farm part of the joint estate because the spouses were not co-owners of the property or reached an agreement in respect thereof before the marriage, has the potential to cause confusion. It was therefore necessary, specifically for the purpose of this study, to clarify any confusion and provide clarity with regards to the divorce law before a meaningful discussion on the law of trusts and its application to the case could be done.

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310 *Corporate Liquidators (Pty) Ltd v Wiggill* 2006 4 All SA 439 (T) 442.

311 See paragraph 2.2.1 above.

4.4.2 Trust law

The distinction between lifting and piercing the veil was explained in chapter three and it is submitted that the court, relying on *Land and Agricultural Bank v Parker*,[312] failed to appreciate the difference between piercing and lifting the veil. The concept of "looking behind the trust form" is similar to lifting the corporate veil and entails a process of observing how the company or trust is actually being administered by disregarding the fiction of a separate juristic personality.[313] Piercing the veil refers to a process whereby a court would totally disregard the separate legal identity of the company or trust by imputing the rights and duties of the company or trust on the members or trustees.[314] It is clear that there are different consequences which flow from piercing and lifting the veil and as such it is of utmost importance to appreciate this distinction when adjudicating matters such as this.

As to the *locus standi* of KT to question the manner in which the trust is administered, it is submitted that the court missed a number of important factors. The fact that WT amended the trust deed right after divorce proceedings were instituted is a clear indication that he wanted to change the trust deed as it stood during the marriage. The fact that the only four resolutions which were ever passed by WT and his brother together all occurred after the divorce underlines the intention which WT had to change the *status quo* which existed during the marriage. No mention is made in the entire judgment of who the income beneficiaries were and it is submitted that, the fact that KT lived in the immovable property could imply that she was in fact an income beneficiary.

Even if these arguments are found not to carry any weight it is submitted that KT's counterclaim was not as an aggrieved beneficiary or third party seeking damages, but as a spouse who believed that the trust was either a *sham* or an alter-ego and that the trust assets, or the value thereof formed part of the joint estate. It seems premature to dismiss her claim on the basis lack of *locus standi* without even

312 *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA).
313 See paragraph 3.3.3 above.
314 See paragraph 3.3.3 above.

establishing whether the trust is actually a *sham* or the alter-ego of WT. The danger behind this line of reasoning is that it would provide a defence to a spouse who hides his or her assets in a trust, which could be a *sham* or alter-ego and decides not to nominate his or her spouse as a beneficiary. It would then be illogical to, before finding the trust to be a *sham* or alter-ego, refuse a claim from such a spouse based on lack of *locus standi* and then find the trust to be a *sham* or alter-ego. The aggrieved spouse would then not have any claim to these assets, or their value, which form part of the joint estate.

It was explained above that the relevant question *in casu* is not the level of discretion which a court has at the division of a joint estate, but rather whether or not the trust assets should be deemed to form part of WT's personal estate and therefore the joint estate.[315] It therefore becomes necessary to establish whether or not the trust could have been deemed to be the alter-ego of WT or even a *sham*.

The most important factor in determining whether or not the trust was in fact the alter-ego of WT is whether or not there was functional separation between control and enjoyment during the administration of the trust. This is established by not only looking at the *de iure* control of the trust, but more importantly the *de facto* control of the trust.[316] This also links up with another question, and one of KT's original allegations, which asks whether WT would have owned the property in his own name had the trust not existed.

The trust deed *in casu* nominated both WT and his brother as trustees which indicates that *de iure* control vested with both of them and that they would have to make decisions together. There are however a number of facts which point to WT exercising sole *de facto* control over the trust. The fact that only four resolutions were ever passed by both trustees, all of them after divorce proceedings were instituted,[317] shows that WT's brother never took an active role in the administration of the trust before the divorce.

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[315] See paragraph 4.4.1 above.
[316] See paragraph 3.3.4 above.
[317] See paragraph 4.1 above.

The manner in which the immovable property was purchased and administered is also suspect. WT lent R 150 000 to the trust for the purchase of the property; he did not charge any interest and no agreement was made as to repayment dates. He also stood surety for the trust in order to obtain a mortgage bond and used R 350 000 of his inheritance to settle this mortgage bond.[318] These transactions, coupled with the fact that WT and KT lived in the house without paying any consideration[319] leads one to conclude that the only reason why the property was placed in a trust was to enjoy the protection which a trust affords.

No mention is made of other income beneficiaries and based on the facts given in the judgment it would seem that WT was the sole *de facto* trustee and the sole income beneficiary. This means that there is no functional separation between the control and enjoyment. Further evidence of the lack of separation of control and enjoyment can be found in the fact that all the shares in two companies, created by WT, vested in the trust and that his personal affairs were inextricably linked with the affairs of the trust, even going so far as to describe himself as the "main breadwinner" of the trust.[320]

An agreement will be considered to be a *sham* where its only purpose is to avoid the operation of a peremptory law.[321] Where it can be established that the requirements for the creation of a trust was not met or that the illusion of meeting these requirements was in fact a dissimulation, a court would be allowed to declare the trust to be a *sham*.[322] The court would therefore have to investigate and ascertain what the true intentions of the parties were before it would be able to determine whether or not the trust is a *sham*. As explained above this would require the court to lift the veil of the trust and look at the manner in which it had been administered and created.[323]

318 See paragraph 4.1 above.
319 See paragraph 4.1 above.
320 See paragraph 4.1 above.
321 See paragraph 3.3.5 above; *C:SARS V NWK* 2011 2 SA 67 (SCA).
322 See paragraph 3.3.5 above; *Van Zyl v Kaye* 2014 4 SA 452 (WCC).
323 See paragraph 3.3.5 above.

The court *in casu* paid little regard to the manner in which the trust was created and administered and as such it is difficult, based solely on the judgment of the court, to determine whether or not the trust was a *sham*. The factors mentioned above in determining whether or not the trust is the alter-ego of WT could point towards the fact that the parties never had the true intention to create a trust, but merely created the illusion of intent to create a trust in order to disguise the true intention of the parties. It is however acknowledged that the facts contained in the court's judgment would not be enough to declare the trust a *sham* because it does not unequivocally point to the fact that, on a balance of probabilities, the founder and the trustees lacked the *bona fide* intention to create a trust.

In light of the points highlighted above it is submitted that the court failed to attach sufficient weight to the manner in which the trust was administered. This was brought about as a result of the premature finding that KT did not have *locus standi* to bring such a claim and the belief that courts making a redistribution order have the discretion to look at the administration of trust affairs, while at the division of the joint estate courts are not allowed to even consider whether or not the trust is a *sham* or alter-ego.

This case illustrates the importance of following the logical process as explained in chapter three.[324] It is submitted that the court should have lifted the veil of the trust at the onset in order to determine whether the trust was properly administered. This would have placed the court in a position to establish whether the factors mentioned above could have led to the conclusion that the trust is in fact the alter-ego of WT or a *sham*. The court would furthermore have been able to obtain more information regarding the manner in which the trust was administered which would have placed it in a better position to make a judgment. This would ultimately have placed the court in a position to determine whether the trust assets or their value form part of the joint estate. It would then have been unnecessary to rely on the discretion of a court or the *locus standi* of a party to dismiss the claim, as the central question should ultimately be whether the trust assets form part of the joint estate.

[324] See paragraph 3.3.6 above.

The court's reliance on section 12 of the *Trust Act* to dismiss claims of this nature is also problematic. It is submitted that it was not the intention of the legislature to provide arbitrary protection to trustees who abuse the trust form. As explained in *BC v CC*[325] this would lead to a situation where a spouse, anticipating divorce, could easily move assets from his or her personal estate, or even the joint estate,[326] and thereby deprive the other spouse of his or her rightful share to the property. This could lead to chaos in divorce proceedings since the aggrieved spouse would not have any remedy as a result of the operation of section 12 of the *Trust Act*.

The court also questioned whether a court would ever have the discretion to transfer trust assets to the personal estate of a trustee or merely the value thereof. It is submitted that where a trust is found to be a *sham* there would not be any trust assets to speak of and the trust assets would revert back to the "founder".[327] In this regard it should be noted that the circumstances under which the trust was created, while indicating that WT's father was the founder of the trust, is also susceptible to further investigation since the facts state that WT created the trust. If it was found that the trust *in casu* was actually a *sham*, it is submitted that the trust assets would have formed part of the joint estate.

The finding of alter-ego will however bring about different consequences. Since the trust remains valid and there are valid rights and duties which exist between the parties it would not be possible to rule that the trust assets be transferred to the personal estate of a founder. Under these circumstances the appropriate approach would be to deem that the value of the assets form part of the personal estate of a spouse since the trust is his or her alter-ego.[328] The section 12[329] argument would then also be irrelevant since the trust assets will not form part of the personal estate of a trustee.

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325 *BC v CC* 2012 5 SA 562 (ECP).

326 Obtaining consent from the other spouse under false pretences, while anticipating that he or she would institute divorce proceedings shortly thereafter.

327 See paragraph 3.3.5 above.

328 See *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA) and *RP v DP* 2014 6 SA 234 (ECP) in this regard.

329 Section 12 of the *Trust Act*.

It has now been illustrated that it is of significant importance to investigate the manner in which a trust has been administered before dismissing the claim based on other factors. The purpose of this study is however not to argue that the court erred in not finding the trust to be an alter-ego or a *sham*, but merely to explain the consequences if this approach should be followed in the future.

4.4.3 Forfeiture order

Although the issue of a forfeiture order was never brought up in the case of *WT v KT* it remains important, especially in light of recent criticism against the manner in which it is currently applied, to consider whether it has the potential of being applied in cases such as this.

As the forfeiture order is currently applied, the spouse who has made the smaller contribution to the joint estate cannot be granted a forfeiture order in his or her favour.[330] In the abovementioned case, KT had authorised WT to transfer her salary and other sources of income into the trust account.[331] Her estate was therefore significantly decreased during the marriage. If the trust were then declared a *sham* or the alter-ego of WT, the court would in all likelihood deem that the trust assets were brought into the joint estate by WT because he was the one who financed the purchase of the immovable property and placed his shares in his companies in the trust. KT would then not be able to succeed based on a forfeiture order because her estate had shown the smaller accrual.

If one were to consider the implications of refusing to grant KT a forfeiture order, it becomes abundantly clear why the forfeiture order has been subject to criticism in recent times.[332] No records were kept of the contributions made by KT to the trust or the joint estate because, as the court put it, the parties have one joint estate and it would be a mistake to give any weight to contributions made by either spouse.[333] The benefit of a marriage in community of property has been stated to be the right

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330 See paragraph 2.3.3 above.
331 See paragraph 4.1 above.
332 See paragraph 2.3.3 above.
333 *WT v KT* 2015 3 SA 574 (SCA) 585 C.

to share in the joint estate upon divorce[334] and if the trust assets, or their value, are deemed to form part of the joint estate a spouse will have a right to share in half of this.

Should a court find that, after considering the three factors mentioned in section 9(1) of the *Divorce Act* a spouse will be prejudiced in relation to his or her right to share in the joint estate it will grant a forfeiture order. It therefore seems absurd that an aggrieved spouse will not be able to rely on section 9(1) where he or she is about to be prejudiced merely because that spouse made the smaller contribution to the joint estate. This is especially true in cases such as *WT v KT* where KT contributed significantly to the trust by allowing her husband to use her salary and other sources of income for trust affairs.

No investigation was made as to the non-financial contributions made by KT. It was however stated that she did not work the last five years of the marriage.[335] Since no investigation was made into what she did during this period, assumptions have to be made.[336] If KT took charge of general household duties such as cleaning the house, washing clothes and looking after the children she would have saved considerable costs for the joint estate. This is true because the joint estate would not have incurred the expenses of hiring a domestic worker or a nanny to assist with these household duties. KT would therefore have made an indirect, non-financial contribution to the joint estate.

Critics of the forfeiture order argue that if these contributions were given more recognition, it would significantly increase a spouse's contribution to the joint estate and could lead to such spouse being allowed to succeed on a forfeiture claim because he or she made larger contribution to the joint estate.[337]

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[334] See paragraph 2.3.3 above.
[335] *WT v KT* 2015 3 SA 574 (SCA) 579 G.
[336] These assumptions also serve to illustrate the need for reform of the forfeiture order.
[337] See paragraph 2.3.3 above.

This discussion makes it clear why certain authors are arguing for the reform of the forfeiture order. It can also be argued that KT's counsel did not even consider the use of the forfeiture order in the matter exactly because of the way in which it is applied currently. The purpose of this discussion was to illustrate what the consequences would be if courts or the legislature decided to amend the forfeiture order in the future.

5. Conclusion

The point of departure for this study has set out to ascertain whether or not trust assets could become relevant at the divorce of spouses who are married in community of property. In order to address this central topic, the principles of divorce law and trust law were discussed separately.

The aspects which dealt with the patrimonial consequences of divorce were addressed in chapter two. It was shown that any asset to which a spouse has a vested right will form part of the joint estate and that this joint estate has to be divided equally between the spouses upon divorce. The most important critique against the forfeiture order is firstly, that it is based on the premise that the benefit of a marriage in community is to share in everything which a spouse did not contribute to the joint estate and secondly, that it fails to recognise non-financial contributions made by a spouse.

Case law and academic literature was used to illustrate that the benefit of a marriage in community of property is to share in half of the joint estate, irrespective of who contributed the most or least to the joint estate. It was also shown that non-financial contributions are recognised when a court makes a redistribution order and that there is nothing preventing a court from recognising same when making a forfeiture order. This clearly illustrated that the arguments for reform are not unfounded and that there is a real prospect of reform of this order, which would allow spouses who made the smaller financial contribution to the joint estate to use the forfeiture order under circumstances where they are, or are about to be, prejudiced.

The practical implications of the forfeiture order were explained by using the facts of *WT v KT*[338] to illustrate how a spouse can be prejudiced if the reform is not brought about. Reform would allow a prejudiced spouse to claim his or her half share in the joint estate under those circumstances where the other spouse tries to conceal assets behind the veil of a trust.

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[338] *WT v KT* 2015 3 SA 574 (SCA).

This brings the attention to the part of this study concerning trust assets being taken into account in litigation involving a trustee or founder in his or her personal capacity. Only those aspects which could assist in determining the relevance of trust assets at divorce were discussed. In chapter three it was clearly stated that the fiduciary duty of a trustee lies at the core of this question. Where it is found that there was no functional separation between the separation and control of trust assets, a trust can be declared to be the alter-ego of a trustee or even a *sham*.

Where the parties to the trust never had the *bona fide* intention to create a trust, the trust should be declared a *sham* because it would lack the essential element of intent to create a trust. This lack of intent can be established by looking at the founding documents of the trust and establishing whether or not the trustees really had the intention of administering the trust for the benefit of the beneficiaries. If the trust is declared to be a *sham* there would no longer be a trust to speak of and the assets of the trust will revert back to the "founder".[339]

A trust will be found to be the alter-ego of a trustee or founder where *de facto* control vests solely with one person who administers the trust for his own benefit. It is clear that under such circumstances there would not be any separation of control and enjoyment and that the trust assets would have fallen into the personal estate of such a person if the trust did not exist. The consequence of declaring a trust to be the alter-ego is that the value of the trust assets and not the trust assets themselves will be deemed to form part of that person's separate estate.

The importance of distinguishing between the lifting and piercing of the trust veil was also emphasised. It was shown that the court in *WT v KT*[340] possibly erred in finding reasons for refusing KT's claim without actually conducting an investigation as to whether or not the trust assets, or the value thereof, formed part of the joint estate.

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339 De Waal 2012 *RabelsZ* 1098.

340 *WT v KT* 2015 3 SA 574 (SCA).

The next aim of the study was to discuss and critically evaluate the impact which the decision of *WT v KT*[341] might have on the future of the trust as an estate planning tool. It was illustrated that the case has the potential to set dangerous precedent which would allow spouses to use the trust as a vehicle to hide assets which would otherwise have formed part of the joint estate. The court declared that a spouse who is not a beneficiary has no *locus standi* to question whether or not the trust assets form part of the joint estate and that even if a spouse had such standing, a court would not have the discretion to declare the trust assets as forming part of the joint estate. The most important points of criticism against the judgment have already been mentioned in this chapter.

The immediate impact of *WT v KT*[342] would therefore be that trust assets would never become relevant where spouses are married in community of property because it was decided that court's do not have the discretion to make such a decision and that section 12 of the *Trust Act* also prohibits a court from declaring trust assets to form part of the joint estate.

It remains to be seen whether or not courts will in the future follow this line of reasoning or start paying more attention to the fact that a trust might be the alter-ego of a trustee or a *sham* and thereby acknowledge that the relevant questions should not be whether or not the court has a certain level of discretion, but rather whether the trust assets, or the value thereof, are *de facto* part of the joint estate. It is submitted that further research on this topic would create more legal certainty and bring the issue to the attention of the courts.

Based on the line of reasoning followed throughout this study it can now be stated that trust assets should become relevant at the divorce of spouses married in community of property when the trust is the alter-ego of either spouse or a *sham*. A court should at the onset of litigation lift the veil of the trust which will enable it to determine whether or not there was functional separation of control and enjoyment

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[341] *WT v KT* 2015 3 SA 574 (SCA).
[342] *WT v KT* 2015 3 SA 574 (SCA).

during the administration of the trust.[343] The different factors to be considered in assessing whether a trust is a *sham* or alter-ego have already been laid down in this study and it is therefore unnecessary to repeat them. The current legal position, based on *WT v KT*,[344] is however that trust assets will never become relevant during divorce proceedings of spouses married in community of property. This means that trusts offer absolute protection against a divorce order of spouses married in community of property.

One of the most important reasons behind this study was to provide guidelines aimed at safeguarding trust assets from divorce litigation. It can be stated beyond certainty that the most important guideline at all times is to ensure that a trustee is aware of his or her fiduciary responsibility towards the beneficiaries and that this duty is strictly adhered to throughout the administration of the trust. As long as this duty is observed there will be functional and actual separation of control and enjoyment and parties to the trust would never have to be concerned that trust assets, or the value thereof, become susceptible to attachment in personal litigation. This can be achieved by strict adherence to the trust deed and the *Trust Act*. Regular meetings of trustees could also assist in ensuring that the best interests of beneficiaries are kept in mind throughout the administration of the trustees. All trusts should ideally have three trustees and each of them should have equal voting power so that no trustee would ever be in a position to exercise sole *de facto* control over the trust assets.

The trust remains a valuable tool to estate planners and as long as it is created with the *bona fide* intention of ultimately benefiting the beneficiaries there is no reason why people should shy away from the use of a trust as an estate planning tool.

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[343] See paragraph 3.3.5 above.
[344] *WT v KT* 2015 3 SA 574 (SCA).

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