

Acknowledgments

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Evaluating courts' discretion to award trust assets in divorce matters

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SUMMARY

In recent years, the establishment of trusts has increased. The reason for trusts is mainly for the protection of trust assets. A founder creates a trust by donating assets toward the trust and the trust in turn offers protection for those assets from third parties and creditors. Due to the protection gained from a trust, it often happens that founders or trustees misuse or abuse trusts by using the assets in the trust for their own personal use and not for the benefit of the trust beneficiaries.

In this paper, the overarching question that was asked was to what extent does the Court have the discretion to include trust assets in determining a redistribution order in terms of section 7 of the *Divorce Act* 70 of 1979. In terms of section 12 of the *Trust Property Control Act* 57 of 1988 the assets in a trust do not form part of a trustee's personal estate.

The aim of this study was to get a better understanding of how trusts work and how they are abused or misused. The requirements of a valid trust were also examined along with the basic principles of trusts. An important part of this discussion is also the relationship between marriage, divorce and trusts. The obligations of trustees as well as the consequences of not adhering to trust principles were also investigated.

The cases that form the basis of this investigation are the *Jordaan v Jordaan* 2001 3 SA 288 (C) and *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA). In both these cases the Court dealt with the question whether or not trust assets should be included in a redistribution order. Other cases that form an important part of this study is *Land and Agricultural Development Bank of SA v Parker* 2004 4 SA 621 (SCA) where the Court emphasised the importance of the separation of control, *Braun v Blann and Botha* 1984 2 SA 850 (A) and *Miller v Miller* 2014 JOL 32176. In all these cases the question before the Court was whether the assets in an *inter vivos* trust could be included in the determination of a redistribution order. The problem comes when the founders or the trustees do not relinquish control over the trust assets. If this happens, the trust may be seen as an *alter ego*, which will leave the assets of the trust exposed to creditors.

The purpose of this research was therefore to determine which factual circumstances the Court takes into consideration and to what extent the Court's discretion extends in determining whether or not trust assets should be included in a redistribution order.

Keywords: Trusts, Marriage, Divorce, Marriage dispensation system, Redistribution order, Spouses, Court's discretion.

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LIST OF ABBREVIATIONS

ILP	International Legal Practitioner
JEPL	Journal for Estate Planning Law
JCLS	Journal of Civil Law Studies
SALJ	South African Law Journal
SLR	Stellenbosch Law Review
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
CILSA	Comparative and International Law Journal of Southern Africa
JLH	Journal of Law History
ISFL	International Survey of Family Law
RJCIPL	Rabels Journal of Comparative and International Private Law

CHAPTER 1: INTRODUCTION TO TRUSTS

1.1 Problem statement

When a couple decides to get married in South Africa, there are two main matrimonial property regimes that can apply. The first is a marriage in community of property and the other is a marriage out of community of property with or without the inclusion of the accrual.¹ These methods have an effect on how the redistribution of assets occurs when a couple enters divorce. When a couple decides to get a divorce, the *Divorce Act* 70 of 1979 will be applicable. This Act was instituted to amend the law relating to divorce and to provide for incidental matters.² According to section 3 of the *Divorce Act*, a Court may dissolve a marriage by a decree of divorce. The only grounds on which such a decree may be granted is:

- a) The irretrievable breakdown of the marriage as contemplated in Section 4 of the Act.
- b) The mental illness or the continuous unconsciousness as contemplated in section 5, of the Act, of a party to the marriage.

Section 7 of the *Divorce Act*, which was amended by section 36 of the *Matrimonial Property Act* 88 of 1984, regulates the redistribution of assets by a Court when a divorce decree is made.³ According to section 7(1) when granting a divorce decree a Court may, in accordance with a written agreement between the parties, make an order with regards to the division of the assets of the parties or the payment of maintenance by the one party to the other. The rest of section 7 regulates the ways in which the divisions of assets should take place. Section 7(3)-(6) contains the provisions relating to the redistribution of assets in divorce matters.⁴ Another way of redistributing assets when a couple gets a divorce is in terms of section 3 of the *Matrimonial Property Act*.⁵

¹ Heaton 2015 *ISFL* 319.

² Preamble of the *Divorce Act* 70 of 1979 (*Divorce Act*).

³ Dillon 1986 *CILSA* 271. Also see Du Toit 2015 *JCLS* 659.

⁴ Heaton 2015 *ISFL* 320. One of the first cases that dealt with section 7 of the *Divorce Act* was *Beaumont v Beaumont* 1987 1 SA 967 (A) 970 (*Beaumont* case). In this case the court considered the relationship between subsection (2) and (3) in a redistribution order.

⁵ S3 of the *Matrimonial Property Act* 88 of 1984 (hereafter *MPA*). Also see Du Toit 2015 *JCLS* 659. Both of these redistribution orders will be discussed further in this paper.

A trust is a separate entity without any legal personality, as confirmed in the *Land and Agricultural Bank of South Africa v Parker and others*⁶ case. The Court in this case held that the core idea of a South African trust lies in the separation between the trustees who control the trust property and the trust beneficiaries who enjoy the benefits of the trust property.⁷ Trust property is registered under section 11 of the *Trust Property Control Act* and regulated in terms of section 12 of the Act.⁸

In recent years there has been a wave of Court cases that all presented a similar problem. The *Jordaan v Jordaan*⁹ case and the *Badenhorst v Badenhorst*¹⁰ case form the base of this problem for the study. In these cases, the question before the Court was whether trust assets could be taken into account when a redistribution order is made in accordance with the *Divorce Act* if the assets were in an *inter vivos* trust and the other party was not a trust beneficiary.

The issue arises when the party, who is a trustee of a trust, uses the trust as an *alter ego* in order to avoid exposure of the assets of the trust to other parties, as seen in *Miller and Others v Miller*.¹¹ In this case, the defendant held that the family trust was an *alter ego* of the plaintiff and that the assets included in the trust should be included in the redistribution order.¹² A trust that is used as an *alter ego* means that the trust property is treated as if it was the personal assets of the trustees or founder and not the property of the trust. If it comes to light that the trust is in fact an *alter ego*, it is evident that the trust was abused or misused. A trust that is deemed an *alter ego* is however not void and the corporate veil may not be lifted without further evidence that indicates that the trust is a sham.¹³

⁶ 2004 JOL 12992 (SCA) (hereafter *Parker* case). Also see Cassim *et al* *The law of business* 47.

⁷ *Parker* case par 19. This has been confirmed by various authors including Du Toit 2015 *JCLS* 656 as well as Heaton 2015 *ISFL* 313.

⁸ S12 of the *Trust Property Control Act* 57 of 1988 (the *Trust Act*).

⁹ 2001 3 SA 228 (C) (*Jordaan* case). This case is also reviewed by Van der Linde and Venter 2002 *De Jure* 355-360.

¹⁰ 2006 2 SA 225 (HHA) (*Badenhorst* case).

¹¹ 2014 JOL 32176 (KZP) (*Miller* case). *Alter ego* trusts is discussed further in this paper.

¹² *Miller* case Mini Summary.

¹³ Stafford *Without prejudice* 2015 24. It is also stated in *Van Zyl and Another NNO v Kaye NO and Another* 2014 4 SA 452 (WCC) p452 (*Van Zyl* case), that the trust in this case was a sham because it did not meet the criteria to establish it and where it seemed as if the criteria were met, it was in fact a dissimulation. This meant that going behind the trust form was an equitable remedy for the third

In the *WT and others v KT*¹⁴ case the parties were married in community of property and the defendant held that the trust formed part of their joint estate.¹⁵ The Court *a quo* held that the trust assets should be included in the joint estate, because according to the defendant the applicant deceived her in the acquisition of a dwelling.¹⁶ However the Supreme Court of Appeal overturned the decision because it felt that the Court *a quo* did not consider the ramifications of piercing the veil with regards to creditors.¹⁷ There are also instances where a trustee used a trust in order to obtain assets for their own personal use as seen in the *B v B and Others*¹⁸ case. The defendant in this case held that the plaintiff acquired assets through the trust and used the assets for his own personal benefit.¹⁹ In some cases the Court can go "beyond the trust form"²⁰ which could be used in cases where trustees abuse the trust form for their own personal benefit.²¹ However, the question remains: to what extent can a Court "pierce the veil" of a trust?

Based on this question, the problem is to what extent the Court's discretion can extend to pierce the veil and go behind the trust form in order to include trust assets for redistribution. The issue regarding this discretion also creates opportunity for potential creditors to cease assets that are situated in a trust that was misused or abused.

1.2 Research question

The general question of this study is: What is the extent of a Court's discretion in determining whether or not trust assets may be included in a redistribution order in divorce matters where one of the parties is not entitled to the trust assets?²² In order to answer this general question, specific questions will also be asked. The first question is:

party and it is evident that the trustee used the trust property for his own personal benefit, therefore the trust was the trustee's *alter ego*.

¹⁴ 2015 3 SA 574 (SCA) (*WT* case).

¹⁵ *WT* case p574 F-G.

¹⁶ *WT* case (*a quo* case – 933/2013) par 2. This came under fire in the appeal case – 2015 3 SA p574I-575A the Court held that the Court *a quo* had no factual or legal basis for the findings. The parties never co-owned the property prior to the marriage nor had it been established on the probabilities that they had ever concluded any agreement relating to the purchase of the property.

¹⁷ *WT* case p583. Also see Pace and Van der Westhuizen *Wills and Trusts* par B15.1.6.

¹⁸ 2016 1 SA 47 (WCC) (*B v B* case).

¹⁹ *B v B* case par 2.

²⁰ The concept of going behind the trust form or piercing the corporate veil is discussed in Chapter 2 of this study.

²¹ Du Toit 2015 *JCLS* 665.

²² The party who is not a beneficiary of the trust.

What is the essence of a trust? This question examines the history of trusts in South Africa as well as the definitions and characteristics of trusts, the nature and legal personality of trusts, the composition of trusts the requirements for a valid trust and finally *alter ego* trusts sham trust and piercing the veil. The second question is: What is the influence of trust assets in marriages and divorce? In this question the matrimonial property dispensation regimes are examined as well as how assets are distributed in divorce matters. The third question is: To what extent a trustee's power stretches to act on behalf of the beneficiaries? In this question the powers of the trustee are studied as well as the consequences of not adhering to the law and its principles.

1.3 Case study²³

The aim of including this case study is to explain the research question in a practical way. In addition, the case study serves as a central point of the study to connect all the chapters and render the study relevant.

Phillip and Emma Abbot were married on 20 December 1996. They were married out of community of property and their marriage was subject to the accrual system in terms of Chapter 1 of the *MPA*.²⁴ After 20 years of marriage, Mr Abbot filed for divorce stating irretrievable breakdown of the marriage as contemplated in section 3 of the *Divorce Act*. Mrs Abbot in her claim for redistribution of the trust assets sought an order directing her husband to pay her an amount equal to half of the amount by which the accrual of his estate exceeded her estate.

Mr Abbot was also the founder of the Sunstone Trust in 2001 and he and Mrs Abbot along with their accountant Stephan Smith, who was also the best friend of Mr Abbot, were the trustees. Mr Abbot was also one of the beneficiaries of the trust along with his brother John Abbot. When the trust was created, Mr Abbot donated assets into the trust. The claim brought by Mrs Abbot with regards to the Sunstone Trust is that the assets situated in the trust should be included in the accrual of the husband's estate. Mrs Abbot argued that Mr Abbot used the trust as an *alter ego* by acquiring assets through the trust and using them for his own personal use. She also stated that he did

²³ This case study is loosely based on the facts of the *Miller* case.

²⁴ Chapter 1 of the *MPA*.

not adhere to the trust principles set out by the trust deed and therefore the assets should be included in the redistribution order.

In her claim Mrs Abbot stated that the assets of the trust should be included in the redistribution order on the following grounds:

- Mr Abbot caused the trust to be registered, but did not intend it or its assets to be independent or to be controlled by any other person than himself.
- In the trust deed, Mr Abbot reserved for himself the power to nominate his successor in his will, but this power did not pertain to the other two trustees.
- All negotiable instruments, for example contracts that needed to be signed on behalf of the trust, had to be signed by Mr Abbot.
- Mr Abbot exercised *de facto* control of the trust and its assets.
- From the registration of the trust in 2001 until June 2016, no meeting of the trustees was ever convened and the other two trustees acted solely on his instructions.
- The other trustees did not exercise any control over the assets of the trust.
- Mr Abbot did not consult the other trustees in reaching decisions regarding the trust assets and did so, on his own.
- Mr Abbot conducted the affairs of the trust without drawing any distinction between the interests of the trust and his own.
- Mr Abbot exercised full and exclusive control over the assets, management and conduct of the trust.
- Mr Abbot effected distributions from the funds of the trust without reference to the other trustees and utilised trust funds to meet his maintenance and other personal obligations.
- Except for the trust, ownership of the trust's assets would have vested in Mr Abbot.²⁵

The request from Mrs Abbot was that the Court takes these allegations under consideration when determining whether the assets should be included in the redistribution of their estates. This is also the main issue that is considered in this study. In other words, should the assets of the Sunstone Trust be included in the determination of the accrual of Phillip Abbot's estate? And to what extent does the Courts have the discretion to make such an order. This question is discussed in detail in this paper.

²⁵ These were some of the points Mrs Miller argues in the *Miller* case. *Miller* case par 5.

1.4 Research outline

This research consists of five chapters. The first chapter introduces the research and identifies the research problem. In the second chapter, the definitions and characteristics of trusts, the nature and legal personality of trusts, the composition of trusts the requirements for a valid trust and finally a discussion on *alter ego* trusts sham trust and piercing the veil will be made. The third chapter is centred on a discussion of trusts with regards to marriage and divorce and the redistribution of assets. In the fourth chapter the relationship of trustees and trust assets are examined, specifically pertaining to the *essentialia* of a valid trust, the powers of a trustee to act on behalf of a beneficiary with regards to the property and the consequences of not adhering to the trust's principles. The final chapter consists of the conclusion of the findings of the research.

The reason for this study is to examine the position of a court to award trust assets in a redistribution order in divorce proceedings. In order to answer the questions that are set out in paragraph 1.3 the views of various authors as well as the decisions made in various law reports will be examined. The case study will be used to practically explain the research and research question. In the following chapter the essence of trust will be discussed. The aim of chapter two is to explain and understand how a trust works and how it can be abused.

CHAPTER 2: ESSENCE OF TRUSTS

It is important to know what a trust consists of in order to understand how a trust operates. Therefore, the essence of what trusts are, are examined in this chapter. A short history of trusts and trust law in South Africa is included in this chapter as well as a discussion of the definitions and characteristics of trusts, as set out by the *Trust Act* and various other authors. The nature and legal personality of trusts are also examined as well as the composition of trusts, including founders, trustees, beneficiaries and trust property. The requirements of establishing a valid trust are also discussed. The final part of this chapter will be the discussion on alter ego trust, sham trusts and piercing the veil. The aim of this chapter is to fully understand the inner workings of the trust instrument. It is important to understand how a trust works in order to know where and when it is being misused or abused.

In 2001 Mr Phillip Abbot decided to create a trust in order to protect his assets and for the tax applications that trusts had. He approached his auditor and best friend Mr Stephan Smith who aided him in creating the trust. Mr Smith informed Mr Abbot that he needed to understand how a trust works.

2.1 Short history of trusts in South Africa

The common law trust that originated from English Law was introduced to South Africa after the Cape came under British rule in 1806. Even though the terms trust and trustee originated from English law, the basis of English trusts law is not the same as the basis of South African trust law²⁶. The South African judicial system has developed trust law and continues to develop trust law by integrating the trust idea into the South African legal system.²⁷ Trusts are used on a daily basis in a variety of ways and therefore the trust as an entity needs to keep developing in the South African context.

²⁶ Jamneck *et al Erfreg in Suid-Afrika* 191. This was also stated by Cameron, De Waal and Wunsh, *Honoré South African Law of Trusts* 2 and Du Toit *South African Trust Law Principles and Practise* 1.

²⁷ Jamneck *et al Erfreg in Suid-Afrika* 191. Olivier, Strydom and Van den Berg *Trust Law and Practice* par 1.8. *Braun v Blann and Botha NNO and Another* 1984 2 SA 850 (A) (*Braun case*).

The introduction of the *Trust Act* in 1988 was an important milestone for South African trust law.²⁸ This Act further regulates the control of trust property and provides for matters connected therewith. The purpose of this Act is to aid the administration of trusts by the Master of the High Court²⁹, however the act is not a complete codification of South African trust law and some aspects such as the essential elements of a valid trust and the fiduciary office of the trustees are still regulated by common law.³⁰

Trusts are one of the most efficient forms of enterprises available to a person wishing to arrange their finances and assets to provide for their needs and the needs of their family during their lifetime and even after death. The flexibility of the trust institution makes it highly suitable to address various problems and therefore it may be applied in numerous ways.³¹ Trusts have become increasingly popular in recent years and unfortunately, so have the misuse and abuse of trusts. The reasons for the misuse can be attributed to the protection that trusts offer assets as well as the multiple uses of trusts.³² In recent years, Courts have been challenged with a wave of cases like *Badenhorst and Jordaan* that all deal with the misuse and abuse of trusts. Due to this increase of abuse or misuse of trusts, Courts have become stricter and have applied the *Trust Act* more stringently to deal with the problem. A rise is seen in the amount of cases brought before the Courts regarding the misuse of trusts and specifically the misuse of trusts regarding trust assets in divorce matters.³³

Before 2001, Courts gave little to no attention to the question of whether trust assets form part of the personal estate of a trustee.³⁴ However, the question when and under

²⁸ Jamneck *et al Erfreg in Suid-Afrika* 191. The law governing trust is mainly common law and the *Trust Act* is a short statute which establish firmer control over the trust. Cassim *et al The law of business* 48.

²⁹ Jamneck *et al Erfreg in Suid-Afrika* 191. Preamble of the *Trust Act*.

³⁰ Jamneck *et al Erfreg in Suid-Afrika* 191.

³¹ Olivier, Strydom and Van den Berg *Trust Law and Practise* 1–2. Hyland and Smith 2006 *JEPL* 1. Hyland and Smith state that the popularity of trusts is situated in trusts' flexibility and adaptability.

³² Olivier, Strydom and Van den Berg *Trust Law and Practice* 1–2. Pace and Van der Westhuizen *Wills and Trusts* B1.

³³ Olivier, Strydom and Van den Berg *Trust Law and Practice* 1–2. Also see Heaton 2015 *ISFL* 313.

³⁴ Even though there have been cases before 2001, the *Jordaan* case and *Badenhorst* case forms the basis of this discussion.

which circumstances trust assets fall under the personal estate of a person have been raised frequently in Courts since 2001.³⁵ The *Trust Act* states that:

Trust property shall not form part of the personal estate of the trustee except in far as he as the trust beneficiary is entitled to the trust property.³⁶

In order to understand the position of assets in the trust, one must first understand the core idea of what trusts are about. And in order to understand the core idea of trusts one must know what the definition of a trust is. In the next paragraph the definition and characteristics of trusts will be discussed.

2.2 Definitions and characteristics of trusts

In order to get a better understanding of the position of trust assets, it is necessary to firstly define what a trust is. This is however difficult as stated by De Waal,³⁷ quoting Hayton that a trust is like an elephant, hard to define but easy to recognise.³⁸ Trusts in the South African context can best be described as an evolutionary hybrid, a combination of the Roman-Dutch civil law and the English common law in the mixed legal system that South Africa uses.³⁹ A trust refers to a variety of legal constructs that may lead to misunderstandings by jurists, for example the legal constructs of trusts. Trusts have also been given different names for different types of trust constructions like a testamentary trust or an *inter vivos* trust. Depending on the trust's construction, different aspects or facets of the trust instrument as well as different names are used as criteria to classify the type of trust. The result is however that people do not know about all these facets and therefore do not realise that there are different types of trusts that can be used in different ways.⁴⁰

The first and most important definition of a trust is found in the *Trust Act*. In terms of section 1 of the Act, a trust:

³⁵ Cases relating to this question include *Jordaan case*, *Parker case*, *Badenhorst case*, *Miller case*, *WT case*, etc.

³⁶ S12 of the *Trust Act*.

³⁷ De Waal 2000 *SALJ* 548.

³⁸ De Waal 2000 *SALJ* 548.

³⁹ Du Toit 2015 *JCLS* 1. *Braun case* 859H states that a trust is a mere administrative device through which trustees control trust property for the benefit of trust beneficiaries.

⁴⁰ Olivier, Strydom and Van den Berg *Trust Law and Practice* 1–4.

Means 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, in whole or in part, to be administrated 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.
- b) To the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administrated or disposed of according to the provisions of the trust instrument for the benefit of the person or class of the persons designated in the trust instrument or for the achievement of the object stated in the trust instrument, but does not include the case where the property of another is to be administrated by any person as executor, tutor or curator in terms of the provisions of the *Administration of Estates Act* 66 of 1965.⁴¹

The definition of trust has also received international attention. In the 1985 Hague Convention it was held that a trust refers to the legal relationships created by the founder, when assets have been placed under the control of a trustee for the benefit of a beneficiary.⁴²

In recent years authors have also defined trusts in order to understand the concept better. Honoré⁴³ defines a trust as a legal institution in which a person, normally the trustee, holds or administers property independently from his or her own estate for the benefit of another person or persons or for the continuance of charitable or other purposes. In addition, in the narrower sense, Honoré explains that a trust comes into existence when the founder of the trust, hands over or is obligated to hand over control of the property to trustees of the trust. The trustee is then obligated to administer the property or the proceeds gathered from the property for the benefit of some person or persons other than the trustee or in pursuance of an impersonal object.⁴⁴

Olivier, Strydom and Van den Berg affirm Honoré's definition of trusts by stating that a distinction must be made between the narrow and wide sense of the word. The distinction is not only found in the South African context, but also in other law

⁴¹ This definition was accepted by various authors including Cameron, De Waal and Wunsh, *Honoré South African Law of Trusts* 3. Du Toit *South African Trust Law Principles and Practise* 3.

⁴² Article 2 of the *Hague Convention* 1985.

⁴³ Honoré *The South African Law of Trusts* 2.

⁴⁴ Honoré *The South African Law of Trusts* 2. This is also confirmed by Cameron, De Waal and Wunsh, *Honoré South African Law of Trusts* 4 as well as Du Toit *South African Trust Law Principles and Practise* 2.

systems.⁴⁵ The distinction between the wide and narrow sense divides the great number of trust institutions that exist in the South African context into two categories.⁴⁶

The concept of a trust emphasises the idea that somebody, such as the trustee, holds and administers property on behalf of another person who is the beneficiary. The hold and administration of the property exists because of the fiduciary relationship based on the contract between the founder and trustees, which comes into existence between the trustee and beneficiary.⁴⁷

Oosthuizen⁴⁸ adopt a similar definition as Olivier, which describes a trust as a legal concept where a person, the founder, vests some of his assets in another person or persons - the trustees - subject to regulations and on the behalf of a third party - the beneficiaries. Olivier further states that trusts could firstly be classified in terms of whether the trustee has the power to freely decide what to do with regards to the assets in the trust. This type of trust is known as a discretionary trust. Secondly, a trust can be classified according to the foundation of the trust. Thirdly a trust can be classified in relation to the purpose of its creation. Finally, a trust can be classified in terms of the vesting of rights in the trust assets in either the trustee or the beneficiary.⁴⁹ Based on these classifications, it is evident that trusts cannot be classified according to only one criterion.⁵⁰

De Waal⁵¹ states that trusts in the most common sense is an arrangement under which, one person holds or administrates property on behalf of another person or a group of persons and most importantly not on his own behalf. This includes trusts that are administered by curators for mentally ill persons and agents holding property on behalf of a trust.

⁴⁵ Other legal systems include the Anglo American system etc. Olivier, Strydom and Van den Berg *Trust Law and Practice* 1–4.

⁴⁶ Olivier, Strydom and Van den Berg *Trust Law and Practice* 1–4. Du Toit *South African Trust Law Principles and Practise* 2.

⁴⁷ Olivier, Strydom and Van den Berg *Trust Law and Practice* 1–4. Du Toit *South African Trust Law Principles and Practise* 2.

⁴⁸ Oosthuizen *Suid-Afrikaanse Handelsreg* 590.

⁴⁹ Olivier, Strydom and Van den Berg *Trust Law and Practice* 1–4.

⁵⁰ Olivier, Strydom and Van den Berg *Trust Law and Practice* 1–4.

⁵¹ De Waal 2000 *SALJ* 548. See also Stafford 2015 *News and Opinion* 1.

When considering the definitions given by these authors, Honoré and later Cameron judged the definition of trust in the narrow sense in terms of the capacity in which the trustee acts with regards to the trust assets and not necessarily who the holder of the trust assets are.⁵² According to these authors the trust in the narrow sense is a specimen of the trust in the wider sense, no matter where the ownership of the trust assets is vested.⁵³

As stated in the definitions by the various authors and especially the *Trust Act*, the Courts have accepted that a trust in the narrow sense enjoys statutory regulations.⁵⁴ It is evident that a trust in the narrow sense has two extensions. The first extension is a trust where the trustee acquires ownership of the trust assets and administers the assets on behalf of the beneficiaries. This type of trust is called a discretionary trust. The second extension of a trust is called a vesting trust. In this type of trust the ownership of the trust assets are vested in the beneficiaries and the trustees of the trust only act as an administrative body, looking after the trust's assets.⁵⁵ For the purposes of this discussion the vesting trust is not discussed.⁵⁶

The concept of a trust has also been questioned in numerous Court cases. In the *Land and Agricultural Bank of South Africa v Parker and others* case the Court held that a trust is a legal entity without any legal personality.⁵⁷ The Court also stated in this case that the "core idea" of a South African trust lies in the separation between the trustees, who control the trust property, and the trust beneficiaries, who enjoy the benefits of the trust property.⁵⁸

⁵² Coetsee 'n Kritiese ondersoek 129. Honoré *The South African Law of Trusts* 2.

⁵³ Coetsee 'n Kritiese ondersoek 133.

⁵⁴ Coetsee 'n Kritiese ondersoek 133. Statutory regulation relates to the narrow definition of trusts received by authors and more particularly the *Trust Act*. Also see Du Toit *South African Trust Law Principles and Practise* 3.

⁵⁵ Coetsee 'n Kritiese ondersoek 133.

⁵⁶ When considering the construct and purpose of the vesting trust it is evident that the purpose of the vesting trust is not the same as the purpose of an *inter vivos* trust, which is to protect the assets on behalf of the beneficiaries. The main purpose of the vesting trust is for the trustees to administer the trust assets while ownership of the assets lies with the beneficiaries.

⁵⁷ *Parker* case par 10. Also see Cassim *et al The law of business* 47, where Cassim stated in which circumstances a trust could be considered a legal person for example a trust is considered a juristic person for purposes of the *Companies Act* 71 of 2008 etc.

⁵⁸ *Parker* case par 19. The core idea stated in the *Parker* case has been the basis for many court cases including *Groeschke v Trustee for the time being of the Groeschke family trust and others* 2014 JOL

The Court in *Thorpe v Trittenwein* also refers to the "core idea" of a trust.⁵⁹ Scott JA states that:

The trust is typical of the modern business or family trust in which there is a blurring of the separation between ownership and enjoyment, a separation, which is the very core of the idea of a trust.⁶⁰

This means that the core idea of the trust instrument is that the ownership and control of trust assets and the use and enjoyment of the trust assets must be kept separate.⁶¹ The reason for this is that the trustees do not administer the trust assets for their own personal benefit. If a proper separation were made between the control and the use of a trust, it would ensure that the trustees administer the trust assets with care and diligence. If the separation is not made, the beneficiaries have a claim against the trustees to ensure that the trust assets are administered correctly.⁶² Thus, the trust is not for the trustee but for the beneficiaries.⁶³

Considering the definition and the characteristics of the trust instrument, it can be said that there are two notable aspects that should be considered in this discussion. The first aspect is that a founder of a trust vests an asset in the trust by means of a donation to the trustees and the trustees are then obligated to administer the assets in accordance to the trust deed.⁶⁴ The second aspect that needs to be considered is that the trustees must administer the assets on behalf of the beneficiaries.⁶⁵

For the purposes of this paper, the case study that introduces the Abbot case is used to practically explain the definition and characteristics of a trust. Considering the definition given by the *Trust Act* and the descriptions of a valid trust given by numerous authors, the Sunstone Trust can be deemed as valid trust. Mr Abbot donated assets to the Sunstone Trust to be administered by the trustees on behalf of the beneficiaries. In the following section, the nature and legal personality of a trust are examined to better

31730 (GSJ) (*Groeschke* case). De Waal 2012 *RJCIPL* 11 stated that the separation of control and enjoyment is absolutely vital. This was also stated in the *Hague Convention* 1985 Article 2.

⁵⁹ *Thorpe v Trittenwein* 2007 2 SA 172 (SCA) par 17 (*Thorpe* case). Also see Pace and Van der Westhuizen *Wills and Trusts* B15.1.6.

⁶⁰ *Thorpe* case par 17.

⁶¹ Kloppers 2006 *TSAR* 419. Also see Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-21. *Parker* case par 19. Du Toit 2015 *JCLS* 656.

⁶² Kloppers 2006 *TSAR* 420. Honoré *The South African Law of Trusts* 6.

⁶³ Coetsee 'n *Kritiese ondersoek* 133.

⁶⁴ Pace and Van der Westhuizen *Wills and Trusts* par B9.2.2. *Parker* case par 22.

⁶⁵ Honoré *The South African Law of Trusts* 3.

understand whether the Sunstone trust is a valid trust in accordance with the legality of the trust. To ensure the validity of a trust a study needs to be made of the legal nature of the trust form. In the next part of this discussion a closer examination of the nature and legal personality of a trust is presented.

2.3 Nature and legal personality of trusts

Cooray⁶⁶ states that a trust comes into existence when a person has the intention of creating a trust or the law imposes a trust under specific circumstances. The trust as an entity may be used for family settlements, business ventures or for charitable purposes. If it is used for family settlements, the creation of a trust makes it possible to separate the benefit of ownership from the burden of ownership.⁶⁷ The trust form is a diverse instrument that can be used for a wide range of applications. The creator of a trust may want to separate his assets for a variety of reasons, including to keep the assets out of the hands of potential creditors, family members or tax authorities.⁶⁸ Trusts make this separation of assets possible. When the creator of the trust decides to use a trust there are two types that are available to him, the first being the trust *mortis causa* and the second is an *inter vivos* trust.

A *mortis causa* trust comes into existence upon the death of the creator by means of a testamentary clause.⁶⁹ The *mortis causa* trust was originally considered as a *fideicommissum* in South African law.⁷⁰ However, currently this kind of trust is seen as an independent legal figure.⁷¹ In terms of the *fideicommissum* rule, where a fiduciary received a personal benefit, which stayed in the trust instrument, the trustee is only

⁶⁶ Cooray *The reception in Ceylon of the English Trust* 13. Honoré *The South African Law of Trusts* 82. Cameron, De Waal and Wunsh, *Honoré South African Law of Trusts* 4 as well as Du Toit *South African Trust Law Principles and Practise* 118. and De Koker *Silke on International Tax* 27.2.1.

⁶⁷ Cooray *The reception in Ceylon of the English Trust* 13.

⁶⁸ Honoré *The South African Law of Trusts* 5. Also see Du Toit *South African Trust Law Principles and Practise* 1.

⁶⁹ A *mortis causa* trust is a legal concept *sui generis* as was stated by Coetzee in 'n *Kritiese ondersoek* 124. Also see Du Toit *South African Trust Law Principles and Practise* 23.

⁷⁰ Oosthuizen *Suid-Afrikaanse Handelsreg* 591. This was also stated in *Estate Kemp and Others v McDonalds trustee* 1915 AD 491 p491 (*Estate Kemp* case) as well as *Braun* case p860.

⁷¹ *Braun* case. Also see *Estate Kemp*.

awarded dominium over the assets in the trust and not any enjoyment of the use of the asset.⁷²

In South African law, an *inter vivos* trust is considered as an institution *sui generis*.⁷³ The *inter vivos* trust comes into existence while the creator is still alive by means of a contract.⁷⁴ Thus, in its pure practical form, an *inter vivos trust* is an agreement and therefore the rules of the law of contract are applicable.⁷⁵ The idea of the *inter vivos* trust in the South African context is that this type of trust is an agreement between the founder and the trustees on behalf of a third party - the beneficiaries.⁷⁶ An *inter vivos* trust comes into existence between the trust founder, the trustees and at their acceptance, the beneficiaries. When the beneficiaries accept the benefits protected for them by the founder and the trustees they are entitled to enforce their right to these benefits against the trustees.⁷⁷ A distinction should be made between the creation of an *inter vivos* trust on one hand and the trust itself on the other hand. The former is based on contractual principles, which do not render the trust itself a contract. Unilateral actions by a founder of a trust only creates an *inter vivos* trust without divesting the property rights of the trust assets in the trustees or if the trust is only signed by the founder the trust will be invalid.⁷⁸

In terms of common law, neither the *inter vivos* trust nor the *mortis causa* trust has any legal personality.⁷⁹ However, a trust is deemed to be a person for the purposes of the

⁷² Oosthuizen *Suid-Afrikaanse Handelsreg* 591. This is also stated in *Estate Kemp* case as well as *Braun* case 860.

⁷³ This is first stated in *Commissioner for Inland Revenue v MacNeillie's Estate* 1961 3 SA 833 (A) (*MacNeillie's case*) p840G-H and confirmed in *Braun* case p859D. Olivier, Strydom and Van den Berg *Trust Law and Practice* also uses *MacNeillie's case* and *Braun* case to better explain the *sui generis* position of *inter vivos* trusts. *WT* case par 26.

⁷⁴ Oosthuizen *Suid-Afrikaanse Handelsreg* 590. A trust comes into existence in terms of a contract or *stipulatio alteri* for the benefit of the beneficiaries. See Du Toit *South African Trust Law Principles and Practise* 23.

⁷⁵ Pace and Van der Westhuizen *Wills and Trusts* par B5.2. Cameron, De Waal and Wunsh, *Honoré South African Law of Trusts* 34.

⁷⁶ Oosthuizen *Suid-Afrikaanse Handelsreg* 591. Also see Klopper 1990 *SALJ* 704.

⁷⁷ Oosthuizen *Suid-Afrikaanse Handelsreg* 591.

⁷⁸ Pace and Van der Westhuizen *Wills and Trusts* par B5.2. Also see Du Toit *South African Trust Law Principles and Practise* 37, Cameron, De Waal and Wunsh, *Honoré South African Law of Trusts* 6.

⁷⁹ Pace and Van der Westhuizen *Wills and Trusts* par B5.1. This was also confirmed in numerous cases including the *Parker* case in par 83F – I where the court held that the trust does not have any legal personality. The *Parker* case is the leading case in considering whether a trust have legal personality. Other cases that came before the *Parker* case that also stated that a trust does not have any legal personality is *Braun* case in 850, and the *MacNeillie's case* p840. Other cases that support

registration of immovable property.⁸⁰ Due to the legal nature of trusts in South Africa, legislation had to be developed in order to include laws that consider a trust as a person.⁸¹

To practically understand the legal nature of the trust, the case study is referenced. Phillip Abbot had the intention to create a trust; therefore the Sunstone Trust was created. The trust is an *inter vivos* trust, which was created in terms of a contract between the founder Mr Abbot and the trustees, who included Mr and Mrs Abbot, their accountant, Mr Smith, on behalf of the beneficiaries, Mr Abbot and his brother, John Abbot. In this instance a contract come into existence between the parties and therefore the principles of the law of contract would be applicable. In order to examine the trust form further a study must be made on how a trust is constructed. The construction of a trust is an important aspect of this study because if the regulations of the composition of a trust is not met, the trust will not exist and therefore be a sham.

2.4 Composition of trusts

When examining the definitions set out by the *Trust Act* and the nature and legal personality of a trust (as discussed above) it is clear that a contract comes into existence between a founder of a trust and the trustees in an *inter vivos* trust. This contract is called the trust deed. When the trustees of the trust accept their appointment, the trustees receive the duty to administer the trust assets on behalf of the beneficiaries.⁸² It is therefore important to examine the parties of the trust and their responsibilities because if the regulations of the composition of trusts are not met the trust may be considered an *alter ego* or a sham of the trustees or founder.

the *Parker* case is *Lupacchini v Minister of safety and security* 2010 6 SA 459 and *Theron and Another NNO v Loubser NO and Others* 2014 3 SA 323 (SCA) p327.

⁸⁰ S 102 of the *Deeds Registrar Act* 47 of 1949 (*Deeds Registrar Act*).

⁸¹ After the decision in the *Commissioner for Inland Revenue v Friedman* 1993 1 SA 353 (A) p353 the decision was made to amend the *Income Tax Act* 58 of 1962 to include a trust as a person for the purposes of the Act. After the decision of the *Mkangeli v Joubert* 2002 4 SA 36 (SCA) the *Deeds Registrar Act* amended the definition of a person in s102 of the *Act* to include a trust as a person. In the *Companies Act* which took effect in 2011 includes a trust as a juristic person.

⁸² *Crookes, NO and Another v Watson and Others* 1956 1 SA 277 (A) p284B-D (hereafter *Crookes* case).

2.4.1 Founder

The founder of the trust is the person who conveys property to a trust to the nominated trustees with clear intentions to create a trust.⁸³ The founder must legally relinquish all control and ownership over the trust assets on behalf of the trustees. The founder of a trust can be a natural or legal person and there are no rules that state that there can only be one founder.⁸⁴

In the case of an *inter vivos* trust, the founder is the person who enters into an agreement with the trustees by means of a contract and by donating assets to the trust to be administered on behalf of the beneficiaries.⁸⁵ The founder of the trust must adhere to all the principles of a valid contract. The founder must be of legal age and he must have the intention to create a trust. The founder must also transfer property rights to the trustees.⁸⁶ It sometimes happens that the founder of the trust wants to retain control over the trust assets. It then happens that the founder nominates himself as a trustee. The Founder may also be a beneficiary of the trust. If it happens that the founder is a trustee and a beneficiary it could mean that the trust is invalid and therefore a sham or *alter ego* as was explained in *Groeschke*.⁸⁷ The court in this case held that there is nothing that prohibits a founder of a trust to also be a trustee and a beneficiary. This position can however not be created. If a trust is created with only one trustee and one beneficiary then such a trust will be invalid.⁸⁸ If the situation of the trust change in such a way that the founder ends up being the sole trustee and the sole beneficiary the situation may be undesirable but the trust is not necessarily invalid.⁸⁹

Without the intention from a founder to create a trust no trust will be created. The founder may be a trustee or a beneficiary of the trust but it is advisable that the founder is not the only trustee or beneficiary. The founder must also release control

⁸³ Pace and Van der Westhuizen *Wills and Trusts* par B6.1. Du Toit *South African Trust Law Principles and Practise* 4.

⁸⁴ Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-3. Du Toit *South African Trust Law Principles and Practise* 5.

⁸⁵ Pace and Van der Westhuizen *Wills and Trusts* par B6.1.

⁸⁶ Pace and Van der Westhuizen *Wills and Trusts* par B6.1.

⁸⁷ *Groeschke* case par 1. Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-22. Du Toit *South African Trust Law Principles and Practise* 5.

⁸⁸ *Groeschke* case par 30-31. See Also Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-22.

⁸⁹ *Groeschke* case par 32. See Also Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-22 as well as Du Toit *South African Trust Law Principles and Practise* 5.

over the trust assets in order for the trustees to administer the assets on behalf of the trust beneficiaries.⁹⁰

In the case of the Sunstone Trust, the founder, Mr Abbot, had the intention of creating a trust and therefore he transferred assets and property rights to the trustees. Mr Abbot is however also a trustee of the Sunstone Trust and therefore the characteristics of a trustee must also be examined.

2.4.2 Trustee⁹¹

Section 1 of the *Trust Act* defines a trustee as any person who acts as a trustee in accordance with authorisation granted under section 6 of the *Trust Act*. This may also include the founder of the trust.⁹² Although a trust may be administered by one trustee it is advisable to have more than one trustee to conduct the affairs of the trust.⁹³ According to the *National Credit Act* a trust will only be considered to be a juristic person if there are three trustees nominated in the trust.⁹⁴ In recent years the Master has been reluctant to register family trusts where an independent trustee had not been nominated. The Master's reluctance comes from South African legislation that requires a trustee to act with the highest possible ethical standards.⁹⁵ Even if an independent trustee is not a legal requirement, cases like *Parker* have also emphasised that the Master should ensure the adequate separation of control and enjoyment is maintained and therefore insist that an independent outsider must be nominated as a trustee.⁹⁶

The trustees of a trust are the people who receive property rights over trust assets from the founder of a trust. It is the trustees responsibility to administer these assets

⁹⁰ Pace and Van der Westhuizen *Wills and Trusts* par B6.1.

⁹¹ Trustees are examined in-depth in Chapter 4.

⁹² S1 of the *Trust Act*. The *Trust Act* contains sections on trustees. S6 contains the provisions of authorization of a trustee by a Master of the Court. S7 regulates the Masters authority to appoint a trustee or co-trustee. S8 examines the position of foreign trustees and how the master deals with these situations. In terms of S9 of the *Act* a trustee must act with the utmost care, diligence and skill required to be a trustee. This provision will also be discussed further in chapter 4. This has also been confirmed in Cassim *et al The law of business* 53.

⁹³ Du Toit *South African Trust Law Principles and Practise* 6. It is advisable to have more than one trustee to ensure that the trust is treated with the utmost care and that the trust does not get disrupted at the absence of a trustee.

⁹⁴ S1 of the *National Credit Act* 34 of 2005 (*Credit Act*). See also Pace and Van der Westhuizen *Wills and Trusts* B5.1.

⁹⁵ S9 of the *Trust Act*.

⁹⁶ *Parker* case par 19D-F. Strauss 2014 <https://www.sanlam.co.za/mediacentre/media-category/media-releases/The%20Independent%20Trustee%20-%20Why%20The%20Big%20Fuss>.

on behalf of the beneficiaries.⁹⁷ For a person to become a trustee some conditions need to be met. A trustee must:

- a) Be nominated in a lawful manner.
- b) Be properly qualified.
- c) Accept the office of trusteeship.
- d) In some cases, obtain or grant or endorse letters of administratorship.⁹⁸

When a trust comes into effect, a fiduciary relationship comes into existence between the trustees and the beneficiaries with regards to the trust and the trust assets.⁹⁹ Conradie J states in *Hofer and Others v Kevitt NO and others*¹⁰⁰ that the administration of trust assets is one of the most important characteristics of the trustees' fiduciary relationship. Conradie J further states that the fiduciary relationship stems from the trust contract concluded between the founder and the trustees.¹⁰¹ This relationship means that trustees have the responsibility to ensure that the trust principles that are set out in the trust deed are met and that the beneficiary's interests are always the trustees' first priority.¹⁰²

Furthermore, trustees are regarded as the owners of the assets of the trust.¹⁰³ However, in terms of section 12 of the *Trust Act*, the trust assets do not form part of the personal estate of the trustees, unless the trustees are also beneficiaries of the trust and are therefore entitled to ownership of the property.¹⁰⁴

In the case study, Mr Abbot appointed three trustees to the Sunstone Trust, as required by the *Parker* case. The trustees of the trust are Mr Phillip Abbott himself, Mrs Emma Abbot and an independent trustee Mr Stephan Smith, who is also Mr Abbot's best friend and accountant. Mr Abbot in his capacity as founder and trustee gave himself the ownership rights to administer the trust assets on behalf of the beneficiaries. He

⁹⁷ Olivier, Strydom and Van den Berg *Trust Law and Practice* 1–10.

⁹⁸ Honoré *The South African Law of Trusts* 123. See also the discussion on the *essentialia* of the creation of trusteeship in Oosthuizen *Suid-Afrikaanse Handelsreg* 615–616.

⁹⁹ Du Toit 2007 *SLR* 469 – 470.

¹⁰⁰ 1996 (2) SA 402 (C) 407F (*Hofer*). Du Toit echoes the judgement of Conradie J in "Beyond Braun" 2001 *TSAR* 126 and states further that a trustee's fiduciary relationship does not extend to the protection of beneficiaries interests, but only to the administration of the assets on their behalf.

¹⁰¹ *Hofer* 408B–C.

¹⁰² Coetzee 2007 *De Rebus* 3.

¹⁰³ Olivier, Strydom and Van den Berg *Trust Law and Practice* 3–25. Honoré *The South African Law of Trusts* 202.

¹⁰⁴ S12 of the *Trust Act*. This was also stated in the *Hague Convention* 1985 article 11.

however did not vest the rights of the trust assets in all the trustees. Mr Abbot was also a beneficiary of the trust; therefore the characteristics of a beneficiary are also examined.

2.4.3 Beneficiaries

Legal persons and natural persons, including unborn children, can be beneficiaries of a trust. This includes a founder and trustee of a trust.¹⁰⁵ A beneficiary is the person for whose benefit the trust is created and who derives a benefit from the trust.¹⁰⁶ There are two types of beneficiaries when talking about trust beneficiaries, a capital beneficiary and an income beneficiary. A capital beneficiary benefits from the trust property or capital itself. An income beneficiary benefit from the income derived through the operation of the trust for example interest, dividends or rentals.¹⁰⁷

A beneficiary must be identifiable. Without an identifiable beneficiary a trust cannot be formed.¹⁰⁸ The beneficiaries of a trust are identified in the trust deed and could be named or ascertainable beneficiaries. Ascertainable beneficiaries are beneficiaries who can objectively be identified in terms of the trust deed. These beneficiaries include lawful children, a born or still to be born child or the grandchildren or a blood relative of the founder.¹⁰⁹ A trustee can also be a beneficiary of a trust, but cannot be the sole beneficiary because of the conflict of interest that could arise from the duties of the trustee and the beneficiary.¹¹⁰ In addition, the founder of the trust can also be a beneficiary. One of the only requirements of a beneficiary is that the beneficiary must be determined or determinable.¹¹¹

¹⁰⁵ Honoré *The South African Law of Trusts* 375. Pace and Van der Westhuizen *Wills and Trusts* par B6.3. Cassim *et al The law of business* 53.

¹⁰⁶ Olivier, Strydom and Van den Berg *Trust Law and Practice* 1–10. Also see Du Toit *South African Trust Law Principles and Practise* 6 and Pace and Van der Westhuizen *Wills and Trusts* par B6.3.

¹⁰⁷ Du Toit *South African Trust Law Principles and Practise* 6. Cameron, De Waal and Wunsh, *Honoré South African Law of Trusts* 580.

¹⁰⁸ Olivier, Strydom and Van den Berg *Trust Law and Practice* 1–10.

¹⁰⁹ Olivier, Strydom and Van den Berg *Trust Law and Practice* 2 – 5.

¹¹⁰ Honoré *The South African Law of Trusts* 375.

¹¹¹ Honoré *The South African Law of Trusts* 375.

A beneficiary has the right to accept or renounce the benefit of the trust. If the beneficiary does not accept the nomination there is no right.¹¹² The effect of the renunciation of trust benefits may result in an accrual to another beneficiary or in an acceleration of the claim of the beneficiaries.¹¹³ The rights that a beneficiary acquires when he accepts the trust nomination are either vested or contingent.¹¹⁴ It must be stated that a contingent beneficiary also has a vested right in the proper administration of a trust.¹¹⁵ The law recognises this right to the extent that they receive the right to institute legal proceedings in order to protect the trust. For example, a beneficiary may petition a Court to remove a trustee from office for maladministration. A beneficiary also has *locus standi* to interdict a trustee from unlawfully dissipating the assets of the trust.¹¹⁶

In terms of the rights of an *inter vivos* trust and the principles of the *stipulatio alteri*, the beneficiaries obtain certain rights from the trustees, in accordance with the trust deed and in terms of the trust property.¹¹⁷ The Court in *Potgieter v Potgieter*¹¹⁸ confirmed the use of the *stipulatio alteri* stating that:

A trust deed executed by a founder and trustees of a trust for the benefit of others is akin to a contract for the benefit of a third party, also known as a *stipulatio alteri*. In consequence, the founder and trustee can vary or even cancel the agreement between them before the third party has accepted the benefits conferred on him or her by the trust deed. But once the beneficiary has accepted those benefits, the trust deed can only be varied with his or her consent.

For the purposes of this paper in the Sunstone Trust case study, Mr Abbot and his brother John were the beneficiaries of the trust. They accepted the terms of the trust

¹¹² *Crookes* case p277. This is also confirmed in *Hofer*. Also see Cameron, De Waal and Wunsh, *Honoré South African Law of Trusts* 555.

¹¹³ Honoré *The South African Law of Trusts* 376.

¹¹⁴ Honoré *The South African Law of Trusts* 376 - 378. What is meant when saying that a right is vested in a person is that the person is the owner of the right and has all rights of ownership including enjoyment. It is also important to know that a vested right is distinguished from a contingent or conditional right. A contingent right in a discretionary trust implies that the trustee has the discretion to not merely how but whether to pay income or distribute capital to the beneficiary, whose right is merely contingent. An advantage of such a right is that it is not subjected to income tax nor does it fall into the estate of the beneficiary if the beneficiary dies or declares insolvency.

¹¹⁵ Honoré *The South African Law of Trusts* 377.

¹¹⁶ *Pentz v Gross and others* 1996 2 SA 518 (C) p523.

¹¹⁷ Pace and Van der Westhuizen *Wills and Trusts* par B6.3.1.

¹¹⁸ 2012 1 SA 637 (SCA) par 18.

and were therefore entitled to the benefits pertaining to the trust if and when the trustees decided to benefit them.

2.4.4 Trust property

The existence of a trust relies on property and the disposition thereof. If there are no trust assets in the trust, the trust will fail.¹¹⁹ The *Trust Act* defines trust property as:

Movable or immovable property, including contingent interest in property, which in accordance with the provisions of a trust instrument are to be administrated or disposed of by a trustee.¹²⁰

Trust property may consist of any asset or group of assets that are movable or immovable, corporeal or incorporeal. For example a farm, a house, a car, shares or any other material asset can be a trust property, however a trust property must be reasonably identifiable.¹²¹ If the property is described ambiguously, the ambiguity must be resolved in the contract or will.¹²² If the trust property is not described in an adequate manner then the trust would be considered invalid.¹²³

The founder donates the property in the trust and then the trustees, on behalf of the beneficiaries, administer the trust property. In some cases the trustees obtain the right to invest the trust property, but they may not expose the trust property to unnecessary risk.¹²⁴ A trustee can also be held accountable for dangerous and risky investments, as seen in *Sackville West v Nourse*.¹²⁵ In this case, Solomon ACJ found the trustee to be negligent and therefore liable for a breach of trust on account of a speculative investment, which resulted in a loss of trust capital and interest.¹²⁶

¹¹⁹ Olivier, Strydom and Van den Berg *Trust Law and Practice* 2–4. Also see Du Toit *South African Trust Law Principles and Practise* 7.

¹²⁰ Section 1 of *Trust Act*.

¹²¹ Honoré *The South African Law of Trusts* 100. This was also stated in Cameron, De Waal and Wunsh, *Honoré South African Law of Trusts* 146 and Du Toit *South African Trust Law Principles and Practise* 7.

¹²² Honoré *The South African Law of Trusts* 100. This has also been stated in Cameron, De Waal and Wunsh, *Honoré South African Law of Trusts* 147, *Trust law* and Du Toit *South African Trust Law Principles and Practise* 7.

¹²³ Pace and Van der Westhuizen *Wills and Trusts* par B8.3. Cameron, De Waal and Wunsh, *Honoré South African Law of Trusts* 146.

¹²⁴ Du Toit 2001 *TSAR* 129.

¹²⁵ 1925 AD p516.

¹²⁶ 1925 AD p516.

When Mr Abbot founded the Sunstone Trust he donated assets into the trust thereby making the trust a valid trust entity. Mr Abbot gave ownership rights of the trust assets to the trustees, including himself, his wife Emma and his Accountant Mr Smith. The property was to be administered on behalf of the beneficiaries who included Mr Abbot and his brother. Keeping in mind the legal nature of a trust and the composition of a trust one can see that there are a number of requirements for the valid creation of a trust. It is therefore important to examine these requirements to establish whether Mr Abbot created a valid trust or not.

2.5 Requirements for the valid establishment of a trust

2.5.1 Requirements of a valid established trust

As was seen in the discussion above, there are some requirements that need to be met for a trust to be considered valid. If these requirements are not met, the trust might be invalid.¹²⁷ However, there has been a difference of opinion on what exactly those requirements are.¹²⁸ Authors like Honoré and Olivier agree that a trust comes into existence when the founder relinquishes his ownership rights of the trust to the trustees to be administered by them, on behalf of the beneficiaries.¹²⁹ Other authors like Yeats argue that a trust comes into existence when the founder hands over the assets to the trustees and the beneficiaries accept the benefits of the trust.¹³⁰ What is evident is that in some way, assets must be handed over by the founder to the trustees in order for the trust to be valid.¹³¹

Yeats states that when all the requirements of a valid trust are met there will be a number of consequences as a result. No one, including the founding trustee, beneficiaries or any other person, can ignore or attempt to avoid these consequences. These consequences include:

- a) Control and non-beneficial ownership of trust assets passed to the trustees. The trustees are co-owners in equal and undivided shares of the trust property.

¹²⁷ Geach and Yeats *Trust Law and Practise* 36. Veldhuizen 2013 *Business Tax and Company Law Quarterly* 27

¹²⁸ Olivier 2001 *SALJ* 225.

¹²⁹ Olivier 2001 *SALJ* 225.

¹³⁰ Geach and Yeats *Trust Law and Practise* 3.

¹³¹ Olivier 2001 *SALJ* 225. Cameron, De Waal and Wunsh, *Honoré South African Law of Trusts* 176.

- b) The trustees have certain obligations. In particular, they must act in the best interest of the beneficiaries, and they cannot act in the interest of themselves or in the sole interest of the founder of the trust.
- c) The beneficiaries have certain rights, even though they may be only discretionary beneficiaries. For example, the beneficiaries are entitled to information regarding the management and administration of trust assets.
- d) The founder and beneficiaries do not control or own the trust or its assets and cannot treat trust assets as their own.¹³²

The requirements of a valid trust as well as the opinions of various authors and the position of Courts are discussed in the following section.¹³³

Honoré and Pace and Van der Westhuizen state that for a valid trust to be created:

- a) The founder must intend to create a trust.
- b) The founder must express his intention and in a mode apt to create an obligation.
- c) The subject matter must be defined with reasonable certainty.
- d) The trust object, which may either be personal or impersonal, must be defined with reasonable certainty.
- e) The trust object must be lawful.¹³⁴

These requirements stated by Honoré and Pace and Van der Westhuizen are in line with the 'core idea' as set out by Scott JA in *Thorpe v Trittenwein*.¹³⁵ In some instances, the trustees and the beneficiaries may have the same objectives and ideas regarding a trust as was seen in *Nel and others v Metequity Ltd and Another*.¹³⁶ One of the arguments in this case dealt with the identical interest of the trustees and the beneficiaries regarding the trust and whether or not the trust was valid.¹³⁷ The appellants in the case argued that when the interest of the trustees and the beneficiaries collide, the separation of control and enjoyment get blurred.¹³⁸ The separation does not however mean that the trust assets may be included in the redistribution order. The respondents relied on the *Parker* case's statement that the core idea of a trust is the separation of ownership and control.¹³⁹ The main objection the appellants had was that the trustees must be

¹³² Geach and Yeats *Trust Law and Practise* 36. There are also some factors that are not needed for the formation of a valid trust Cameron, De Waal and Wunsh, *Honoré South African Law of Trusts* 176.

¹³³ In this study the main focus will be on the conflict of decisions by Courts regarding trust assets and s12 of the *Trust Act*.

¹³⁴ This is stated by Honoré *The South African Law of Trusts* 82 and by Pace and Van der Westhuizen *Wills and Trusts* par 8. And in Cassim *et al The law of business* 49.

¹³⁵ *Thorpe* case par 17. This is also stated and confirmed in the *Parker* case the *Jordaan* case the *Badenhorst* case etc.

¹³⁶ 2007 (3) SA 34 (SCA) (*Nel* case).

¹³⁷ *Nel* case p34.

¹³⁸ *Nel* case p37 par 5.

¹³⁹ *Nel* case p37E-H. De Waal 2012 *RJCIPL* 13

impartial at all times regarding the business of the trust. The Court *a quo* held that there was no identified interest between the trustees and the beneficiaries.¹⁴⁰ The appeal Court in *Nel* held that:

The fact that trustees and beneficiaries have identical interests insofar as the object of the trust is concerned is not the identity of interests in the same person, purporting to act in different capacities, which, as was stated by Cameron JA in *Land and Agricultural Bank*, is inimical to the trust idea. Identical interests will invariably exist in relation to the fulfilment of the trust objects. The beneficiaries' interest in the trust is that effect be given to the trust deed and it is the obligation of the trustees to do so. As Goldblatt J stated, the separate personalities of the corporate trustees, even where one is also a beneficiary, preclude an inimical identity from arising.¹⁴¹

Van der Linde and Lombard state that a valid trust comes into existence when the founder has the intention of creating a trust, when the trust property and the beneficiaries are determined or determinable and when the trust object is legal.¹⁴² Van der Linde compares *Nel* with *Goodricke and son v Registrar of Deeds*.¹⁴³ In this case four people had the intention of creating a common investment fund and so entered into a deed of trust. The trustees were also the beneficiaries of the trust and another trustee was a company.¹⁴⁴ The Court examined the requirements of a valid trust and found that it was indeed a valid trust despite the interlocking provisions.¹⁴⁵ There was enough separation of duties to ensure that the separation of duty and control could remain separate.¹⁴⁶

In *Nel* there were two beneficiaries and one of the beneficiaries was the sole executive trustee. The question that was asked was: 'How independent the trustees of the trust are?', although the beneficiaries and the trustees had the same interests as far as the object of the trust was concerned. The Court held that the fact that the trustee and beneficiary share the same interests does not make the trust invalid.¹⁴⁷

¹⁴⁰ *Nel* case p38C-D.

¹⁴¹ *Nel* case p38E-G.

¹⁴² Van der Linde and Lombard 2007 *De Jure* 434. Also see Du Toit *South African Trust Law Principles and Practise* 27 and Cameron, De Waal and Wunsh, *Honoré South African Law of Trusts* 176.

¹⁴³ 1974 1 SA 404 (N) (*Goodricke* case).

¹⁴⁴ *Goodricke* case p405.

¹⁴⁵ *Goodricke* case p408F – 409A.

¹⁴⁶ Van der Linde and Lombard 2007 *De Jure* 435.

¹⁴⁷ Van der Linde and Lombard 2007 *De Jure* 435.

The fact that trustees and beneficiaries may have the same interest in the trust does not change the judicial situation. Even when dealing with a redistribution order, the Court in *Badenhorst* laid down the following test:

To succeed in a claim that trust assets be included in the estate of one of the parties to a marriage there needs to be evidence that such party controlled the trust and but for the trust would have acquired and owned the assets in his own name. Control must be *de facto* and not necessarily *de iure*.¹⁴⁸

Additionally, it is important for trustees to understand that the situation where there are identical interests, it could lead to the misuse of the trust instrument. Trustees must keep in mind the warning stated by *Parker* regarding the separation of control and enjoyment when this occurs.¹⁴⁹

Olivier states that the legality of a trust is not affected when a new trustee is nominated or when the trust property is not transferred at the inception of the trust.¹⁵⁰ According to Olivier the elements of a legal trust are:

- a) The founder must have the intention to create a trust.
- b) Trust assets must be derived from the founder.
- c) There needs to be beneficiaries that receive benefits pertaining to the trust assets.
- d) The trustee must acquire legal ownership over the trust property and honour the fiduciary relationship that comes into existence between the trustees and the beneficiaries.¹⁵¹

Coetzee also identifies four main characteristics or *essentialia* that separate the trust instrument from other similar instruments. These characteristics are:

- a) The trustee holds a fiduciary position in the trust.
- b) There are separate estates involved.
- c) There is proper separation of control and enjoyment.
- d) Trusteeship exists as an office.¹⁵²

It is evident from the above discussion that the founder must have the intention to create a trust. The trust property as well as the beneficiaries must be adequately defined and the trust object must be lawful. If these requirements are not met, the trust would be invalid which could lead to misunderstandings.

¹⁴⁸ *Badenhorst* case 260I-261A.

¹⁴⁹ Van der Linde and Lombard 2007 *De Jure* 435.

¹⁵⁰ Olivier, Strydom and Van den Berg *Trust Law and Practice* 2–16.

¹⁵¹ Olivier, Strydom and Van den Berg *Trust Law and Practice* 2–15.

¹⁵² Coetzee *'n Kritiese ondersoek* 139.

2.5.2 *Essentialia for the continued existence of a trust*

In order to answer the question of validity of a trust the *essentialia* for the continued existence of a trust needs to be considered. It is important to understand the *essentialia* of a valid trust, because these elements are fundamental to the trust instrument and is important for the continued existence of the trust instrument.¹⁵³ If these *essentialia* are missing, Courts and creditors can target the assets of the trust.

It is important for the *essentialia* to stay present in the trust to ensure that creditors, and for the purposes of this study, spouses in divorce matters cannot target the trust's assets.¹⁵⁴ The *essentialia* of an *inter vivos* trust are explored in the following discussion.

Joubert and Farris are of opinion that a trust can only legally continue to exist if the following requirements are met:

- a) The founder of the trust has segregated the trust assets from the rest of his estate.
- b) The trustee is under a duty to keep the trust assets apart from their own estates.
- c) The trust assets must be administered otherwise than solely for the founder's own benefit.
- d) The trustees acquire control or the prospect of control.
- e) The administration of the assets is in the final resort subject to the Court's control.¹⁵⁵

In addition to the requirements of a valid trust that have been discussed, the trustees need to ensure that they adhere to the basic trust principles to ensure the continuation of the trust.¹⁵⁶ Trust principles are regulated by the common law, while the *Trust Act* regulates the statutory duties of the trustees and the trust deed regulates the powers of the trustees.¹⁵⁷

When the basic principles are not met it could lead to the 'piercing of the veil' by Courts and a Court may award a redistribution order of the trust assets in a divorce matter. This could also leave the trust assets exposed to creditors. However, the Courts are

¹⁵³ Van der Linde and Lombard 2007 *De Jure* 434.

¹⁵⁴ Ownership of the trust assets should be vested in the trustees, but in some cases the founder of the trust can also be a trustee of the trust. This is seen in the case of the Sunstone trust where Mr Abbot is the founder of the trust and a trustee.

¹⁵⁵ Joubert and Farris *Law of South Africa* 298.

¹⁵⁶ *Parker* case par 37.3.

¹⁵⁷ This is confirmed by Pace and Van der Westhuizen *Wills and Trusts* B15, by Oosthuizen *Suid-Afrikaanse Handelsreg* 623 as well as the discussion of Kloppers 2006 *TSAR* 416. The function of trustees is discussed in more detail in Chapter 4.

hesitant to award such an order.¹⁵⁸ The concept of 'piercing the veil' is contradictory to section 12 of the Trust Act that states that the assets vested in the trust cannot be included in the estate of a trustee. From an estate planning perspective, some people bequeath property to their children via a trust to ensure that creditors or spouses seeking a redistribution order cannot attack the property.¹⁵⁹

2.5.3 Relinquishment of control over trust assets

One of the most important *essentialia* of the trust that needs to be met is the relinquishment of control over trust assets.¹⁶⁰ The defining element of a trust lies in the fact that the founder must give up some or total control over the trust assets by means of the trust deed.¹⁶¹ The founder of the trust may still be a trustee, but he must administer the trust on behalf of the beneficiaries. Furthermore, there must be a clear distinction between enjoyment and control over the assets.¹⁶²

In some cases, a person could be founder, a trustee and a beneficiary (as seen in the case of Mr Abbot's Sunstone Trust). If this happens the person runs the risk of controlling the trust assets as his own personal assets. Van der Linde and Venter highlight problem areas regarding this situation and state that:

- a) The founder and/or trustees retain the right to replace any trustee at any time.
- b) The founder and/or trustees retain a veto right.
- c) The founder and/or trustees retain the right to leave provisions to the trustees by means of a will.

This problem has also been noted in deceased person cases. In term of section 3(3)d of the *Estate Duty Act*, it is not sufficient for the deceased person to have had the competency to dispose of the property. He had to have been competent to dispose of the property for his own benefit or for the benefit of his estate. Therefore, if the founder or trustee in an *inter vivos* trust uses his discretion to dictate provisions of the

¹⁵⁸ Even though a Court may award a redistribution order, the Courts have not yet awarded the assets as a whole to be redistributed. In most of the cases, like *Badenhorst*, *Jordaan* case, *Parker* case, *WT* case etc. the Court only redistributed the value of the assets. The question of this discussion is whether or not a Court has the discretion to award trust assets as a whole to a person seeking a redistribution order.

¹⁵⁹ Olivier, Strydom and Van den Berg *Trust Law and Practice* 8–14.

¹⁶⁰ The relinquishment of control over trust assets are found in s7 of the *Divorce Act*, s7(6) of the *Income Tax Act* and finally the *Estate Duty Act* 45 of 1955 (*Estate Duty Act*).

¹⁶¹ Hyland and Smith 2006 *JEPL* 4. Cottis 2001 *ILP* 106.

¹⁶² This is confirmed in *Parker* case which forms the basis of the separation of control and enjoyment.

trust by means of a will that asset could form part of the deceased estate of the founder or trustee and would therefore be liable for estate duty in terms of section 3(3)(d).¹⁶³

However, the scope of section 3(3)(d) cannot always be defined with certainty. It would apply if the deceased had the power to revoke or vary the provisions of any donation, settlement or trust for the benefit of his own estate. Therefore, if a deceased reserves the right to maintain control over the assets in a discretionary trust, which the deceased formed to freeze his assets in the estate, the whole estate planning course could be rendered nugatory. To avoid such situations, a trust deed should not permit the founder to make decisions on property dispositions. It would be safer for the trust if the trust deed states that all property disposals can only be implemented by the majority vote of the trustees.¹⁶⁴

The *Jordaan* case emphasises the importance of the separation of control by the founder. Traverso J also states that the trustees, in terms of their fiduciary obligation, have the obligation to administer and manage trust assets on behalf of the trust beneficiaries.¹⁶⁵ The Court held:

For these reasons I come to the conclusion that at the assessment of what the extent of the redistribution should be, it is just and equitable to make the assets of the trusts into account. Because of this finding the decision to penetrate the corporate veil is not necessary.

In the *Jordaan* case, the parties were married out of community of property and asked the Court to exclude the assets that were situated in the trust.¹⁶⁶ The defence argued that the power of the trustees was regulated by the trust deed and the Court could not include the assets in the determination of the redistribution. The Court did not reject this argument, but concentrated on how the trusts were administered by the trustee. Based on this, the Court held that it would be just and equitable to include the assets

¹⁶³ S3(3)(d) of the *Estate Duty Act*. This is also stated in the *South Africa Financial planning handbook*. According to Goodall *et al* property which is deemed to be property of the estate is property not belonging to the deceased but which immediately prior to their death, the deceased was competent to dispose of for their own benefit or for the benefit of their estate.

¹⁶⁴ Goodall *et al South Africa Financial Planning* par 30.5.5.

¹⁶⁵ Van der Linde and Venter 2002 *De Jure* 358.

¹⁶⁶ *Jordaan* case p288.

for redistribution.¹⁶⁷ The Court found the defendant used the trust for personal financial benefits and that the trust was an *alter ego* of the trustee.¹⁶⁸

These are only some consequences of the non-compliance of the requirements for the valid continued existence of a trust. The reason for this discussion in this paper is that if the valid requirements of a valid trust are not met it could result into the trust assets being available for capture by third parties or even spouses. The Courts may award a redistribution order if the assets are not administered properly in a valid trust. The question then arises what happens when the trust is not valid or the trust is misused or abused? In the next part of this discussion the *alter ego* trust, sham trust and piercing the veil will be discussed.

2.6. *Alter ego trusts, sham trusts and piercing the veil*

The inclusion of *alter ego*, sham trust and piercing the veil in this discussion is because when a Court hears an argument stating that one of the spouses in the marriage used the trust for his/her own personal benefit the Court would find that the trust was either an *alter ego* of the spouse or a sham trust and then the Court may pierce the veil and award the trust assets for redistribution. The questions that need to be asked in this discussion is under what circumstances will a Court go behind the trust form and what the consequences of such a decision is? This is relevant in this paper because if a trust has been misused or abused a court may be obligated to pierce the veil of the trust and retrieve the assets to redistribute them to a spouse or another party.¹⁶⁹ In the following discussion these three aspects will be discussed.

2.6.1 *Alter ego trusts*

A trust being used as an *alter ego* means that the trust assets are treated as the personal assets of the trustees or founder and not the property of the trust. It can therefore be stated that the trust is nothing more than the *alter ego* of the trustee.¹⁷⁰ If it emerges that the trust is an *alter ego* of the founder or trustee, it is likely that the

¹⁶⁷ *Jordaan* case p299G-H.

¹⁶⁸ *Jordaan* case p289D, p301C-D.

¹⁶⁹ De Waal 2012 *RJCIPL* 2-3.

¹⁷⁰ Du Toit 2015 *JCLS* 658. Also see Nel 2014 *Obiter* 575.

trust has been abused or misused.¹⁷¹ In analysing whether or not a trust is an *alter ego* Stafford proposes a three step analysis which include the fact that the trust is the *alter ego* of the founder or trustee as the first step. The second step requires a study of the terms of the trust and how the trust was conducted by the trustees. The final step includes the conduct of the trustees etc.¹⁷² If these factors are present in the trust the founder or trustee of the trust may be deemed to have *de facto* control over the trust assets and therefore the trust could be seen as the *alter ego* of the founder or trustee.¹⁷³

A trust that is deemed to be an *alter ego* is however not void and the corporate veil may not be lifted without further evidence that indicates that the trust is a sham.¹⁷⁴ The issue arises when the party, who is a trustee of a trust, uses the trust as an *alter ego* in order to avoid exposure of the trust assets to other parties, as seen in *Miller*. In this case, the defendant argued that the family trust was an *alter ego* of the plaintiff and that the assets included in the trust should be included in the redistribution order.¹⁷⁵ The Court in this case held that the Court is not required to make an assessment on what is just to redistribute in an accrual claim. The determination of the accrual claim is regulated by section 4 and 5 of the *MPA*.¹⁷⁶ There is no justification in the *MPA* to have regard to assets that do not form part of the trustee's estate on the basis that it would be "just to do so". The Court stated:

The exceptions before me accept that if Mrs Miller pleaded that the assets of the trust are in truth her husband's property, then her claim that those assets must be taken into account in determining the accrual of her estate would have been in order. The issue before me is whether assets owned by the trust can be taken into account in determining the accrual of the husband's estate in the absence of averments that the husband and not the trust is in fact the owner of such assets.¹⁷⁷

The Court in *Miller* held that the trust was not an *alter ego* of the founder. The Court in *Parker* stated that in order to remedy the abuse of a trust by a trustee the Court may

¹⁷¹ Du Toit 2015 *JCLS* 658.

¹⁷² Stafford *A Legal-comparative study* 168. Stafford introduces the remaining factors in chapter 4 of his document in figure 5.4.

¹⁷³ Stafford *A Legal-comparative study* 169. De facto control has also been explained in the *Badenhorst* case and will be examined the further in this paper.

¹⁷⁴ Stafford *Without prejudice* 2015 24. Also see Pace and Van der Westhuizen *Wills and Trusts* par B15.1.6. This was also stated in Rhodie 2015 *Without Prejudice* 56.

¹⁷⁵ *Miller* case Mini Summary . The redistribution is a factual enquiry.

¹⁷⁶ *Miller* case Mini Summary.

¹⁷⁷ *Miller* case par 18.

find that the "trust form is a veneer that in justice should be pierced".¹⁷⁸ A trust which is used by a trustee to position their assets in the trust out of reach from third parties, disregards the core idea of a trust (the separation of control and enjoyment). When making a claim that the trust was the *alter ego* of one of the trustees or the founder the claimant must persuade the Court that there was an intention to mislead any party from the inception of the trust or from the moment the trust assets were donated into the trust.¹⁷⁹ Considering the legal development of the *alter ego* trust the reach of this principle also found itself in divorce proceedings.

2.6.2 Sham trusts

The sham trust principle applies when the founder of the trust or the trustee have too much control over the trust assets and do not act on behalf of the beneficiaries. Another situation where sham trust finds application is where the transaction simulates a trust.¹⁸⁰ If it comes to light that the trust is a sham it may have serious consequences. It would mean that the trust assets will be vested in someone other than the trustees and the rights of the beneficiaries will be ignored because in reality a trust never existed.¹⁸¹ According to De Waal to determine whether or not a trust is a sham has to do with the requirements of a valid trust.¹⁸² If a Court finds that the trust is a sham it could leave the trust assets exposed and vulnerable to attack from creditors. When a Court has to determine whether or not a trust is a sham the Court will examine the intention of the creators and trustee of the trusts. The Court will examine whether or not the creators of the trust had the intention to enter into a specific agreement or did they use the particular agreement as a disguise for something different.¹⁸³ A trust can be seen as a sham when the following elements are present.

- a) The absence of a "paper trail" suggesting that the trust has not been properly administrated.
- b) The founder and/or trustees are also beneficiaries.

¹⁷⁸ *Parker* case par 37.3. Du Toit 2015 *JCLS* 658.

¹⁷⁹ Stafford *A Legal-comparative study* 169.

¹⁸⁰ Joffe 2007 *De Rebus* 25. This has also been stated by De Waal 2012 *RJCIPL* 7.

¹⁸¹ Olivier, Strydom and Van den Berg *Trust Law and Practice* par 2.8.6.2. Joffe 2007 *De Rebus* 25, if a trust is seen as a sham trust the Court will not recognise the trust leaving it open to attack by third parties. Also see Rhoodie 2015 *Without Prejudice* 55.

¹⁸² De Waal 2012 *RJCIPL* 7. These requirements have been discussed in chapter 2.5.1.

¹⁸³ De Waal 2012 *RJCIPL* 3-4.

- c) The founder does not understand the nature of the trust and treats it like a company or personal bank account.
- d) Trustees blindly obey any and all instructions given by the founder.
- e) The use of a "letter of wishes" overrides the provisions of the trust instrument indicating that the founder never intended to divest himself of and hand over control of the trust assets and is in effect still controlling the assets.
- f) Decisions are made unilaterally without a majority decision or without the proper procedure being followed.
- g) The founder acts unilaterally without the written authority of the co-trustees.¹⁸⁴

If these elements are present in the trust the trust may be considered a sham. It was stated in *Van Zyl v Kaye*¹⁸⁵ that the trust was a sham, because it did not meet the criteria of an established trust and where it appeared that the criteria were met, it was forged and therefore a dissimulation and not valid. This meant that going behind the trust form was an equitable remedy for the third party and it is evident that the trustee used the trust property for his own personal benefit; therefore the trust was a sham trust. This was also stated in *Commissioner for the South African Revenue Service v NWK Ltd*¹⁸⁶ where it was argued that the loan account was a simulation. The Supreme Court of Appeal in this case held that the question in this case was what was intended by the transactions.¹⁸⁷ To answer this, the Court relied on numerous cases including *Zandberg v Van Zyl*.¹⁸⁸ The Court in this case made a distinction between the "real intention" and the "simulated intention" of the parties. In this regard the Court stated:

Now, as a general rule, the parties to a contract express themselves in language calculated without subterfuge or concealment to embody the agreement at which they have arrived. They intend the contract to be exactly what it purports; and the shape which it assumes is what they meant it should have. Not infrequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour 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. And when a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is; not what in form it purports to be.¹⁸⁹

The test to determine whether a transaction is a simulation is to determine what purpose the party seeks to achieve with the transaction.¹⁹⁰ The Court in *NWK* held that the test to determine if a transaction is a simulation should be extended to include an

¹⁸⁴ Olivier, Strydom and Van den Berg *Trust Law and Practice* 2-22.

¹⁸⁵ *Van Zyl* case p452. Du Toit 2015 *JCLS* 666.

¹⁸⁶ 2011 2 SA 67 (SCA) par 3 (*NWK* case). Also see De Waal 2012 *RJCIPL* 4.

¹⁸⁷ *NWK* case par 40. This was also mentioned by De Waal 2012 *RJCIPL* 4.

¹⁸⁸ 1910 AD 302 (*Zandberg* case).

¹⁸⁹ *Zandberg* case p309. Also see De Waal 2012 *RJCIPL* 4.

¹⁹⁰ *Zandberg* case p302. Also see De Waal 2012 *RJCIPL* 5.

examination of the commercial sense of the transaction to determine the transactions real substance and purpose.¹⁹¹ The Court in *NWK* found that if the purpose of the transaction is to evade certain contractual obligations it would be deemed as a simulation.¹⁹² The Court decided that the transaction was a simulation and should therefore the veil should be pierced.¹⁹³

It is important to understand that a trustee cannot protect his assets or trick the Court, a spouse or a creditor by placing assets in a trust. The Court will, if it deems the redistribution to be just and equitable, pierce the veil of the trust and redistribute the assets.¹⁹⁴ When a Court finds the redistribution of assets just and equitable it means that the Court finds that the redistribution of assets is reasonable and should be allowed. In order to decide whether a redistribution order is just and equitable, the facts of the case before the Court and the factors set out in the *Divorce Act*¹⁹⁵ must be considered.

2.6.3 Piercing the veil

The concept of piercing the veil¹⁹⁶ is a concept that has been developed by Company Law and has found itself into South African Trust Law. Piercing the veil is fairly new in South Africa but the South African Courts have accepted the concept of piercing the veil as a suitable remedy for instances where a trust has been abused or misused.¹⁹⁷ Piercing the veil of the trust will take place when the enjoyment and control of the trust assets get blurred to such an extent that the trust becomes the *alter ego* of the trustee or the founder.¹⁹⁸ Going behind the trust form entails accepting that the trust exists but

¹⁹¹ *NWK* case par 55. Also see De Waal 2012 *RJCIPL* 5.

¹⁹² *NWK* case par 55. The court also founded that the performance by the trustees does not indicate that the trust is not a simulation. The trustees may uphold a charade to mislead other parties to hide the transactions true intention. De Waal 2012 *RJCIPL* 6.

¹⁹³ *NWK* case par 86.

¹⁹⁴ S7(5) of the *Divorce Act*. Also see *Badenhorst* case 262J where the Court regarded the factors of S7(5) or the Act to determine if the redistribution was just and equitable. Also see *Jordaan* case 290D and Heaton 2015 *ISFL* 325.

¹⁹⁵ *Mellville v Busane and Another* 2012 1 SA 233 (ECP) Par 5. S7(5) of the *Divorce Act*. The Court in this case held that the reason it was just and equitable to liquidate the trust was because of the misuse of the trust. The just and equitable principle has been used by numerous cases including *Badenhorst* case p262F, *Jordaan* case p297I.

¹⁹⁶ The pierce the veil concept may also be referred to as going behind the trust form or piercing the veneer or disregarding the trust. De Waal 2012 *RJCIPL* 2.

¹⁹⁷ Du Toit 2015 *JCLS* 658. Also see Nel 2014 *Obiter* 570.

¹⁹⁸ Nel 2014 *Obiter* 575.

disregarding the trusts existence. This means that the Court may hold the trustees personally liable for any transaction they undertook in their capacity as trustees or use the trust assets as their own personal assets. The Court will regard a trust as a non-separate legal entity in order to reveal the true villain of the trust.¹⁹⁹ When a Court pierces the veil it does not apply the *Divorce Act* and neither the *MPA*, instead it applies a common law function.²⁰⁰ Piercing the veil means disregarding the dichotomy between the legal entity and the person who controls the entity.²⁰¹ Going behind the trust form entails that the Court may provide relief in situations where the trust has been abused and therefore the Court can reach the assets and redistribute them as the Court sees fit.²⁰² The Court in *Van Zyl* emphasised that South African Courts have the power to remedy the abuse of trustees and founders who do not adhere to trust principles by stating the following:

Going behind the trust form essentially represents the provision by a Court of an equitable remedy to a third party affected by an unconscionable abuse of the trust form. It is a remedy that will be afforded in suitable or appropriate cases... It is a remedy that will generally be given when the trust form is used in a dishonest or unconscionable manner to evade a liability, or avoid an obligation.²⁰³

When considering piercing the veil as a remedy, a Court will only go behind the trust form to grant relief when the Court is satisfied that the trustees abused the trust. A Court will lift the veil when the trust or any other legal entity is misused to cover fraudulent behaviour. The Court will also go behind the trust form when the trustee does not adhere to the principles of the trust. The piercing the veil may be seen as a basis on which trustees who abuse the trust form may be held liable for their actions.²⁰⁴

¹⁹⁹ Rhoodie 2015 *Without Prejudice* 55-56. Nel 2014 *Obiter* 570. This was also stated in *Knoop NO and Others v Birkenstock Properties (Pty) Ltd and Others* 2015 JOL 33788 (FB) Mini Summary.

²⁰⁰ *Parker* case par 37. The Court in the *Parker* case held that the Courts have the power and duty to develop the trust law by adapting the trust principle to South African Law. Also see Heaton 2015 *ISFL* 323.

²⁰¹ *Cape Pacific Ltd v Lubner controlling investments (Pty) Ltd and Others* 1995 4 SA 790 (A) p790H-I. Du Toit 2015 *JCLS* 666.

²⁰² Du Toit 2015 *JCLS* 665.

²⁰³ *Van Zyl* case par 22. Du Toit 2015 *JCLS* 666. Also see Heaton 2015 *ISFL* 325.

²⁰⁴ Du Toit 2015 *JCLS* 667. Also see Nel 2014 *Obiter* 571. S20(9) of the *Companies Act* regulates the position of piercing the veil and many authors have debated whether or not this section may be used to override the common law position of piercing the veil in trusts. Cassim 2013 *De Rebus* 35. Also see Mogashoa and Nyezi 2016 *Without Prejudice* 15. It has also been debated in courts. In *Ex parte Gore NO and Others NNO* 2013 2 All SA 437 (WCC) (*Gore* case) par 28 the Court held the veil of a company will be pierced if there was unconscionable abuse of the company. In common law piercing the veil is considered a drastic remedy. In the *Gore* case the court held that s20(9)

The main requirement for piercing the veil is that control over the assets must be vested in the trustee or any other third party to such an extent that the trust will be considered the *alter ego* of that person.²⁰⁵ The aim of piercing the veil of the trust is to protect third parties from parties who attempt to mislead them. When considering the piercing the trust veil a Court will evaluate the actions of the accused party and the Court will not pierce the veil if it is not satisfied that the piercing of the veil is just and equitable.²⁰⁶

When considering the practical aspects of the Sunstone Trust in the case study, it is evident that the trust is an *alter ego* of Mr Abbot. Mr Abbot met the requirements of a valid trust and therefore the trust was valid. Considering the claims that Mrs Abbot stated in her redistribution claim, that Mr Abbot controlled the assets of the trust for his own benefits, the trust can be considered as Mr Abbot's *alter ego*, therefore the court has the discretion to pierce the veil. If the Court pierces the veil, Mrs Abbot has a claim on the trust property that was bought within the trust.

2.7. Conclusion

The aim of this chapter is to understand the essence of a trust. A short history of trusts, the definition of a trust, the nature and legal personality of the trusts, the composition of trusts and the requirements of a valid trust are discussed. The discussion in this chapter answers the question of what is the essence of the trust, while the following chapter deals with trusts and the marriage dispensation system in South Africa.

The most important part of this chapter is the discussion of the concept of a trust as an *alter ego*, sham trusts and piercing the veil. The reason for their importance is the direct implication these concepts have on the research question: what a Court's discretion is to award trust assets in a redistribution order. In other words, what is the Courts discretion to pierce the veil of the trust and award the trust assets in a redistribution order?

introduces a flexible remedy for piercing the veil and should be used despite other remedies being available, *Gore* case par 34 and Cassim 2013 *De Rebus* 37.

²⁰⁵ Nel 2014 *Obiter* 581.

²⁰⁶ Nel 2014 *Obiter* 582. *Miller* case par 18.

CHAPTER 3: TRUSTS AND RELATIONSHIPS

3.1 Introduction

In chapter two the essence of a trust was discussed. This also relates to chapter three because trustees may also be parties in a marriage and/or a trust may include trustees who are married to each other. In this chapter the relationship between trusts, divorce and marriages will be made. In South Africa there are three dispensation systems to choose from when a couple decides to get married. One of these dispensation systems is marriage out of community of property which was also the dispensation system under which Mr and Mrs Abbot were married. The other dispensation systems are married out of community of property with the exclusion of the accrual and marriage in community of property. Trusts and relationships is an important aspect of this study. More importantly how the different dispensation systems in South Africa affect trusts. The question in this chapter is, what is the influence of trust assets in marriages and divorce. To answer this question the different marital dispensation systems in South Africa where a redistribution order is made in terms of the *Divorce Act* are explored. Marriages concluded out of community of property where the accrual system was not applicable, marriages where the accrual system was applicable and marriages concluded in community of property are assessed.

Traditionally, where one of the spouses in the divorce proceedings is a trustee of a trust, the trust assets were excluded from the determination of the patrimonial consequences of divorce.²⁰⁷ In some cases the trust deed may have included a clause to ensure that the assets in the trust are protected against the consequences of a marriage concluded in community of property or it may have state that the assets do not form part of the accrual of the marriage out of community of property. To determine whether the assets are out of the reach of any potential claims depends on when the trust was created, who created it and how the trust assets are administered.²⁰⁸

²⁰⁷ Du Toit 2015 *JCLS* 657.

²⁰⁸ Geach and Yeats *Trust Law and Practice* 222.

A very important aspect that needs to be considered when deciding whether or not trust assets should be included in the estate of one of the divorcing spouses came up in the *Miller* case. In this case, the parties were married out of community of property with the inclusion of the accrual. Mrs Miller pleaded that the trust was used as her husband's *alter ego* and should form part of his estate. She however failed to aver that the trust assets were in fact Mr Miller's property, nor did she claim that it was an invalid trust.²⁰⁹ Her case was simply that the trust was used as her husband's *alter ego* and the assets should be included in the determination of her husband's estate.²¹⁰

Mrs Miller's advocate supported her argument by referring to numerous cases like the *Badenhorst* case, where the Court held that the assets of the trust can be included in the redistribution order in terms of the *Divorce Act*, but failed to consider the differences between a redistribution order in terms of section 7(3) of the *Divorce Act* and an accrual claim in terms of section 3 of the *MPA*.²¹¹ A Court will not grant a redistribution order if it is not satisfied that such a redistribution is just and equitable by reason of fact that the party in whose favour the order is granted contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subdivision of the marriage.²¹²

In the case of an accrual claim, a Court is not required to assess what is just and equitable. A Court is only obligated to determine the amount equal to half of the difference between the accrual of the respective estates of the spouses.²¹³ The Court in this case held that there is no obligation in the *MPA* to have regard to assets that do not form part of his estate on the basis that it would be "just to do so".²¹⁴ The Court stated:

²⁰⁹ *Miller* case Mini Summary.

²¹⁰ De la Harpe 2014 <http://www.fanews.co.za/article/life-insurance/9/general/1202/divorce-redistribution-orders-and-trust-assets/16651> 2.

²¹¹ *Miller* case par 7. The difference between the *Divorce Act* and the *MPA* have also been discussed in the *Jordaan* case p297G-I. De la Harpe 2014 <http://www.fanews.co.za/article/life-insurance/9/general/1202/divorce-redistribution-orders-and-trust-assets/16651> 2.

²¹² S7(4) of *Divorce Act*.

²¹³ The accrual of an estate includes the net value of the spouse estates at the desolution of the marriage. S4 of the *MPA*. De la Harpe 2014 <http://www.fanews.co.za/article/life-insurance/9/general/1202/divorce-redistribution-orders-and-trust-assets/16651> 2.

²¹⁴ De la Harpe 2014 <http://www.fanews.co.za/article/life-insurance/9/general/1202/divorce-redistribution-orders-and-trust-assets/16651> 2.

The exceptions before me accept that if Mrs Miller pleaded that the assets of the trust are in truth her husband's property then her claim that those assets must be taken into account in determining the accrual of her estate would have been in order. The issue before me is whether assets owned by the trust can be taken into account in determining the accrual of the husband's estate in the absence of averments that the husband, and not the trust, is in fact the owner of such assets.²¹⁵

The exception of this claim was therefore upheld.

When one spouse is a trustee of a trust, that trust constitutes a separate estate that is excluded from the personal estate of the trustee-spouse and in the case of a marriage in community of property it is excluded from the joint estate. This seemingly simple legal position has increasingly been challenged in South African Courts.²¹⁶ When a trust becomes entangled in divorce proceedings or separations, delicate issues can arise not only for the divorcing parties, but also for the trustees.²¹⁷ The following discussion examines the position of the Courts in terms of South Africa's matrimonial dispensation systems.

3.2 Marriage out of community of property without accrual

It must be stated that the accrual system only came into effect after the implementation of the *MPA* of 1984. Before 1 November 1984²¹⁸ parties were either married in community of property (sharing everything in the marriage) or out of community of property (keeping everything separate in the parties' estates). Therefore, the *Divorce Act* included the redistribution of assets order in terms of section 7(3), which aims to restore the financial imbalance suffered by the spouse whose estate grew the least during the marriage.²¹⁹

A marriage out of community of property is a regime of complete separation of property owned by the spouses. Over the years it has become clear that this system can be prejudicial to the spouse who is in a weaker financial position. It sometimes happens that even though the party may have contributed financially or otherwise to the other spouse's estate, they may find themselves in an unfavourable position with regards to

²¹⁵ *Miller* case par 18.

²¹⁶ Du Toit 2015 *JCLS* 657.

²¹⁷ Clark 2012 *Personal Finance Newsletter* 4.

²¹⁸ Implementation date for the *MPA*

²¹⁹ De la Harpe 2014 <http://www.fanews.co.za/article/life-insurance/9/general/1202/divorce-redistribution-orders-and-trust-assets/16651> 1. Also see Du Toit 2015 *JCLS* 660.

their own estate at the desolation of the marriage. Spouses who find themselves in a position like this have no entitlement to a share of the other party's estate.²²⁰ When a couple is married out of community of property with the inclusion of the accrual system the parties in the divorce will rely on the *MPA*.²²¹ If the couple is married out of community of property without the accrual system, before the commencement of the *MPA*, they can still claim from their spouse's estate in terms of a redistribution order that is regulated by section 7 of the *Divorce Act*.²²² As was stated previously section 7(3)-(6) contain the provisions that relate to the redistribution of assets in divorce matters. In terms of these sections a Court may award a redistribution order in divorce matters if the parties were married with the complete separation of assets.²²³ Some of the provisions relating to section 7(3)-(6) is that the spouse may not have entered into a settlement agreement with the other spouse who seeks a redistribution order. They must have contributed to the maintenance or the increase of the other spouse's estate. One of the most important provisions is that the party must have been married with complete separation of assets.²²⁴

Section 7(3) of the *Divorce Act* deals with the situation where a marriage was concluded in terms of an antenuptial agreement which was entered into before the *MPA*.²²⁵ Section 7(3) of the *Divorce Act* provides that:

A Court granting a divorce decree in respect of a marriage out of community of property without the accrual system,

- a) Entered into before the commencement of the *MPA* in terms of an antenuptial contract by which community of property, community of profit and loss or any accrual in any form are excluded,
- b) May on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the Court may deem just, be transferred to the first-mentioned party.²²⁶

²²⁰ Du Toit 2015 *JCLS* 660. Also see Robinson 2007 *PER* 74.

²²¹ The *MPA* and especially section 3(1) of the Act is discussed in more detail in section 3.1.2.

²²² Dillon 1986 *CILSA* 271. Also see De la Harpe 2014 <http://www.fanews.co.za/article/life-insurance/9/general/1202/divorce-redistribution-orders-and-trust-assets/16651> 1.

²²³ Heaton 2015 *ISFL* 320. Also see Du Toit 2015 *JCLS* 663.

²²⁴ S7 of the *Divorce Act*. Also see Heaton 2015 *ISFL* 320 and Du Toit 2015 *JCLS* 663.

²²⁵ Dillon 1986 *CILSA* 271. S7(3) gives Courts a wide discretion when dealing with redistribution matters.

²²⁶ S7(3) of *Divorce Act*. Also see Dillon 1986 *CILSA* 271.

The effect of section 7(3) on a marriage is that a Court upon divorce has a discretion to award a redistribution order subject to section 7(4)-7(6).²²⁷ Section 7(4) of the Act state that an order in terms of subsection 3 will only be granted if the Court is satisfied that it is equitable and just in terms of the facts that the party in whose favour the order is granted contributed directly or indirectly to the maintenance or increase of the estate of the other party during the division of assets acquired during the marriage. Section 7(5) list the factors the Court will take into account when determining whether or not the assets should be transferred.²²⁸ These factors include:

- a) The existing means and obligations of the parties, including any obligation that a husband has to a marriage as contemplated in subsection (3)(b) of the *Divorce Act*.
- b) Any donation made by one party to the other during the subsistence of the marriage, or which is owing and enforceable in terms of the antenuptial contract concerned.
- c) Any order which the Court grants under section 9 of the *Divorce Act* or under any other law that affects the patrimonial position of the parties.
- d) Any other factor, which should in the opinion of the Court, be taken into account.

A spouse's assets in divorce matters may also include trust assets for the purposes of a redistribution order. If there is evidence that the party controlled the assets for his/her own benefit and the Court finds it to be just and equitable, the Court may take the trust assets into account.²²⁹ This has been proven in a few Court cases, such as *Badenhorst, Jordaan, Brunette v Brunette and Another*²³⁰, *Childs v Childs and others*.²³¹ There have also been cases that prove the contrary, as seen in *Maritz*.²³²

The facts of the *Badenhorst* case where that the parties were married out of community of property are as follows. The husband instituted divorce proceedings and the wife instituted a counter claim for a redistribution of the assets in terms of section 7(3) of the *Divorce Act*.²³³ These assets included the trust assets, which the wife argued needed to form part of the husband's estate. The respondent appealed to the Supreme Court of Appeal claiming that she was entitled to 50% of the net assets of the trust.

²²⁷ Dillon 1986 *CILSA* 271.

²²⁸ S7(5) of the *Divorce Act*. This was also stated in Dillon 1986 *CILSA* 281-283.

²²⁹ De la Harpe 2014 <http://www.fanews.co.za/article/life-insurance/9/general/1202/divorce-redistribution-orders-and-trust-assets/16651> 2.

²³⁰ *Brunette v Brunette and Another NO* 2009 5 SA 81 (SE) (*Brunette* case).

²³¹ *Childs v Childs and Others NNO* 2003 3 SA 138 (C) (*Childs* case).

²³² *Maritz v Maritz* 2006 JOL 16569 (T) 1 (*Maritz* case).

²³³ *Badenhorst* case p255. The facts of this case has also been stated by numerous authors including Du Toit 2015 *JCLS* 669-670, De Waal 2012 *RJCIPL* 1-2 and Joffe 2007 *De Rebus* 25-26.

The Supreme Court of Appeal held that even though the trust assets are vested in the trustees, it does not exclude those assets from being taken into account when making a redistribution order.²³⁴ The Court found that in order to succeed in such a claim, a party must show that the party in question controlled the trust and acquired and controlled the trust assets for their own benefit.²³⁵ It is also important to know that control over the assets were *de facto* and not *de iure*.²³⁶ In this case, the Court would have to examine the trust deed in order to see what was expected of the trustees, how the trustees controlled the assets and how the affairs of the trust were conducted during the marriage.²³⁷

In this case, the husband who was also a trustee, did not consult with the other trustees. He used the trust as a vehicle for his own business. He also had no regard for the difference between the trust assets and his own assets for example. He could also alter the terms of the trust and had total *de facto* control over the trust.²³⁸ The Court held that by adding a farm into the marriage, which increased the husband's estate significantly, the trust assets should have been added to the total value of the husband's estate.²³⁹

Van der Linde and Venter²⁴⁰ comment on the *Jordaan* case, which has similar facts as the *Badenhorst* case, and resulted in the same conclusion. They state that even though the Court did not find the trusts to be invalid, some of the assets of the family trust actually form part of the personal estate of the trustee. The Court's decision highlights the importance that founders should be willing to hand over full control over the assets to the trustees and the trustees then have a fiduciary responsibility to administer the trust property on behalf of the beneficiaries.

²³⁴ *Badenhorst* case p256.

²³⁵ If a party controls the asset for his own benefit then no trust will be formed. Thus there needs to be a *causa* in order to establish how the assets are controlled.

²³⁶ *De facto* control means that the party controlled the assets for his own benefit. *De iure* control means that the party controlled the assets in terms of the regulations of the trust deed or other legislation. Also see Honoré *The South African Law of trusts* 140 and Du Toit 2015 *JCLS* 670. Joffe 2007 *De Rebus* 26. De Waal 2012 *RJCIPL* 14. Rhodie 2015 *Without prejudice* 55.

²³⁷ *Badenhorst* case p261B - C.

²³⁸ *Badenhorst* case p261 H - I.

²³⁹ *Badenhorst* case p262 F. De Waal 2012 *RJCIPL* 13.

²⁴⁰ Van der Linde and Venter 2002 *De Jure* 358.

In the *Brunette* case, the applicant intended to amend her particulars of claim to include that the assets of two *inter vivos* trusts be regarded as the assets of two business partnerships.²⁴¹ The Court held that if the applicants' contentions were correct then the manner in which the trust had been administered in the past became highly relevant in determining whether or not they should be regarded as constituting partnership assets to be taken into account in any distribution order in terms of section 7(3).²⁴²

There have also been cases that found the contrary to the cases discussed above, for example the *Maritz* case. In 1979, the parties were married out of community of property in terms of an antenuptial contract. In 2003 the parties entered into divorce proceedings, which they settled, but some aspects were left to be determined by the Court. One of these aspects was the division of assets.²⁴³ The Court examined the trust deed in order to establish how the assets were controlled. The Court had to rule on the division of assets in terms of section 7(3) of the *Divorce Act*.²⁴⁴ The wife relied on the *Jordaan* case to support her case but Mojaelo AJ stated:

There is therefore, *ex lege* and in terms of the trust deed of the Maritz Trio Trust, which I have examined carefully, no obvious basis for regarding the assets of the trust as part of the assets of the plaintiff nor is there an obvious justification for taking the value of the trust assets into account in determining the value of the plaintiff's assets.

The plaintiff argued that it would be just and equitable to take the assets from the trust, because her husband had direct control over the assets. The Court found that the plaintiff had no direct interest in the trust assets and therefore no value was added to his estate by means of the trust. Therefore, no rational basis existed to justify a redistribution of the trust assets.²⁴⁵ In the *Maritz* case, the Court also mentions the *Jordaan* case in its concluding remarks stating that:

I pause to remark that none of the deceptive, dishonest and mean attributes in paragraph 3-6 above which were present in the *Jordaan* case are present in the case

²⁴¹ *Brunette* case p81.

²⁴² *Brunette* case p81. Also see De la Harpe 2014 <http://www.fanews.co.za/article/life-insurance/9/general/1202/divorce-redistribution-orders-and-trust-assets/16651> 2.

²⁴³ *Maritz* case Mini Summary.

²⁴⁴ Olivier, Strydom and Van den Berg *Trust Law and Practice* par 6.4.4.

²⁴⁵ *Maritz* case p19. She argues that the Court should the provisions of s7(5) of the *Divorce Act* into consideration with its decision.

before this Court. In contrast, *in casu*, the plaintiff has from onset embraced his obligations towards the defendant and the children and honoured them.²⁴⁶

The *Maritz* case is evidence that the Court is very strict when determining whether a redistribution of assets must be made. In the *Childs* case, the Court also examined the trust deed to see how the trust assets were controlled. The court found that the loan account that was responsible for some liabilities needed to be included in the calculation of the trust amount that needed to be redistributed. The Court held that the defendant must pay an amount, that was situated in the trust, to the plaintiff and was used to pay some liabilities in their marriage.²⁴⁷

It is important to remember that section 7(3) of the *Divorce Act* only applies to marriages out of community of property without the accrual entered into before the commencement of the *MPA* and to indigenous parties married out of community of property in terms of the *Black Administration Act*.²⁴⁸ The above Court decisions should be seen as a warning for spouses who transfer assets in the hopes of evading accrual and then continue to control the assets for their own benefit. If the trust is seen to be the *alter ego* of the founder or any of the trustees, the trust will be left exposed to spouses and any other party who has an interest in the trust's property. Above all, these cases state, in clear terms, that the Court will attach considerable significance to the extent of the founders or trustees *de facto* control of trust assets in assessing whether, in substance, a trust actually exists.²⁴⁹ A Court in divorce proceedings may order a redistribution of assets when they deem it to be just and equitable. Section 7 provides a wide discretion to Courts to deal with these situations.²⁵⁰ When the *MPA* was implemented it included a section that provided that a couple may marry out of community of property with the inclusion of the accrual system.²⁵¹ In the following section marriages out of community of property with the inclusion of the accrual system are examined.

²⁴⁶ *Maritz* case p19.

²⁴⁷ *Childs* case p148.

²⁴⁸ S7(3) of the *Divorce Act*. Also see Dillon 1986 *CILSA* 271.

²⁴⁹ De la Harpe 2014 <http://www.fanews.co.za/article/life-insurance/9/general/1202/divorce-redistribution-orders-and-trust-assets/16651> 1.

²⁵⁰ Du Toit 2015 *JCLS* 665. See also Dillon 1986 *CILSA* 275.

²⁵¹ S2 of the *MPA*.

3.3 Marriages out of community of property with the inclusion of the accrual system

Generally, it is well-known that a marriage out of community of property with the inclusion of accrual means that when a couple enters a divorce, the parties will be entitled to share equally in the growth of both spouses during the marriage. The accrual of an estate is the amount by which the total value of the spouse's estate at the dissolution of the marriage exceeds the total value of that spouse's estate at the commencement of that marriage. There is however no sharing of assets accumulated before the commencement of the marriage.²⁵² Section 3(1) of the *MPA* provides that:

At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.²⁵³

Simply put, the spouse with the smaller growth in their estate has a claim against the other spouse's estate.²⁵⁴ The accrual system of the *MPA* was not introduced retroactively, therefore a person who got married before the implementation of the of the Act will not have a claim in terms of section 3(1) of the *MPA*, but will have a claim in terms of section 7 of the *Divorce Act*.²⁵⁵

In most discretionary family trusts, ownership and control over the property in the trust are vested in the trustees for purposes of administration and management, however these trustees do not have beneficial interest in the trust property.²⁵⁶ Depending on the control over the trust assets by the trustees, if a trustee has too much control over the assets it could be regarded as their *alter ego*.²⁵⁷ Recent cases involving trust assets and

²⁵² Du Toit 2015 *JCLS* 661. De la Harpe 2014 <http://www.fanews.co.za/article/life-insurance/9/general/1202/divorce-redistribution-orders-and-trust-assets/16651> 1.

²⁵³ S3(1) of *MPA*.

²⁵⁴ Du Toit 2015 *JCLS* 661. De la Harpe 2014 <http://www.fanews.co.za/article/life-insurance/9/general/1202/divorce-redistribution-orders-and-trust-assets/16651> 1.

²⁵⁵ *Divorce Act*. Du Toit 2015 *JCLS* 663. The redistribution order in terms of s7 of the *Divorce Act* is discussed in section 3.1.1 above.

²⁵⁶ Pace and Van der Westhuizen *Wills and Trusts* par B5.4. Cameron, De Waal and Wunsh, *Honouré South African Law of Trusts Trust Law* 379.

²⁵⁷ Pace and Van der Westhuizen *Wills and Trusts* par B5.4. Olivier, Strydom and Van den Berg *Trust Law and Practice* par 2.8.6.2. Trustees should be aware that Courts are eager to strike down a trust that is a sham where there is no clear separation between beneficial ownership and the power to

divorce where the founder regarded the trust as his *alter ego* lead to the trust assets being taken into account in determining the redistribution order.²⁵⁸ In *Pringle v Pringle*²⁵⁹ the question before the Court was whether the assets of the Megaprop trust should be included as assets in the redistribution order in terms of section 7 of the *Divorce Act*.²⁶⁰ Erasmus J states the following:

Having regard to the fact that one of the considerations giving rise to the establishment of the trust was the protection which a trust would give the defendant against accrual claims by the plaintiff in the event of a divorce, and having further regard to the discretionary nature of the Trust, the defendant's *de facto* sole control of the affairs of the Trust and the fact that the Trust in essence consists of assets accumulated by the defendant, I am of the view that the net asset value of the Trust should be taken into consideration for purposes of determining the accrual of the defendant's estate.²⁶¹

Essentially, trust property should not be entwined with the trustee's personal assets. The duty of the trustees is to hold the trust property in such a manner that it is always recognisable as trust property.²⁶² The *Pringle* case is an important case and is distinguishable from other cases, because it is one of the first cases where a Court decided that if a trust is deemed to be an *alter ego* of a trustee, the trust assets should be included in the accrual claim of the spouse with the smaller estate against the spouse with the larger estate.²⁶³

The Court in *Miller* decided what needed to be included to succeed in a claim for trust assets as part of the accrual calculation upon divorce. The accrual claim is a factual calculation and not a calculation based on discretion. Although the trust was considered as the husband's *alter ego*, there was no other evidence that proved that the assets were the personal assets of the husband or that the trust was a sham. Due to the lack of additional evidence, the assets could not be included in the accrual claim.²⁶⁴

control the assets. If a Court finds that a trust is a sham it could lead to catastrophic income tax and estate duty consequences.

²⁵⁸ Olivier, Strydom and Van den Berg *Trust Law and Practice* par 2.8.6.2.

²⁵⁹ *Pringle v Pringle* (2009) ZAWCHC 207 (*Pringle* case). Also see Du Toit 2015 *JCLS* 670.

²⁶⁰ *Pringle* case par 1.

²⁶¹ *Pringle* case par 17.

²⁶² Pace and Van der Westhuizen *Wills and Trusts* par B15.1.5. Section 12 of the *Trust Act*. Cameron, De Waal and Wunsh, *Honoré South African Law of Trusts* 294-295.

²⁶³ Pace and Van der Westhuizen *Wills and Trusts* par B15.1.5.

²⁶⁴ *Miller* case Mini Summary. Pace and Van der Westhuizen *Wills and Trusts* par B15.1.5.

In the *BC v CC* and others²⁶⁵ case the court held that in matrimonial cases where it comes to the Courts attention that the trust was a sham in terms of that there was no intention to establish a trust or the beneficial owner of the trust assets were identified. The Court in this case had to establish whether the spouse in question was the *de facto* or beneficial owner of the trust assets and the plaintiff had to prove that the party in question had *de facto* control over the trust assets and that he received personal benefits from the trust assets. These acquisitions were proved and effectively the trust assets were included in the determination of the accrual claim.²⁶⁶

It is evident that a Court has broad discretion in determining what redistribution order must be made. A Court's discretion to issue a redistribution order is not only a discretionary power, but it is also designed to achieve a just patrimonial settlement between divorcing spouses. The Court confirmed this position in *Beaumont v Beaumont*.²⁶⁷

The feature of overriding importance in the exercise of the Court's discretion as to what proportion of assets is to be transferred in terms of subsection (3) is the Court's assessment of what would be 'just', having regard to the factors mentioned specifically and to 'any other factor which should in the opinion of the Court be taken into account.

The Legislature has seen fit to confer a wide discretion upon the Courts, and the flexibility in the application of subsection (3) thus created ought not, in my judgement, to be curtailed by placing judicial glosses on the subsection in the form of guidelines as to the determination of what would be a just redistribution order.²⁶⁸

In the *Jordaan* case, the Court explained that there is a difference between accrual and a redistribution order in terms of section 7(3).²⁶⁹ In terms of section 5 of the *MPA*, specific inheritances, legacies and donations are excluded from the accrual. Section 7(3) of the *Divorce Act* does not exclude these provisions.²⁷⁰ The decision in the *Jordaan* case emphasises that putting assets in a trust with the intention to protect the assets from other parties is not necessarily a safe way to protect the assets from a redistribution order.

²⁶⁵ 2012 5 SA 562 (ECP) p562 (*BC* case). Also see Pace and Van der Westhuizen *Wills and Trusts* par B15.1.6.

²⁶⁶ *BC* case p562. Pace and Van der Westhuizen *Wills and Trusts* par B15.1.5.

²⁶⁷ *Beaumont* case. Also see Dillon 1986 *CILSA* 271.

²⁶⁸ *Beaumont* case p991 E-H. This is also confirmed in the *Miller* case par 7 and various authors including Du Toit 2015 *JCLS* 664 and Olivier, Strydom and Van den Berg *Trust Law and Practice* par 6.4.7.

²⁶⁹ *Jordaan* case p297G.

²⁷⁰ Section 5 of the *MPA*. *Jordaan* case p297H.

Mr and Mrs Abbot were married out of community of property therefore their divorce was regulated by section 7(3) of the *Divorce Act*. The importance of this paragraph is that even if a couple is married out of community of property with the accrual a spouse may still claim for redistribution of the trust assets. In the next part of the discussion the position of marriages in community of property will be discussed.

3.4 Marriage in community of property

The marriage in community of property means the total and complete integration of the spouse's estates when the marriage is concluded. Therefore any spouse who is in a marriage in community of property may create a trust and appoint any trustee and beneficiary without the permission of the other spouse.²⁷¹ A trust may be created and the communal home may be used as the donation of the assets to create the trust²⁷² Chapter III of the *MPA* regulates the position of spouses married in community of property.²⁷³ When a marriage dissolves, the assets included in the trust will not form part of the joint estate of the parties, which can lead to a disadvantage for the party earning the least.²⁷⁴

In *Van Greune v Van Greune*,²⁷⁵ Mrs Van Greune instituted divorce proceedings against her husband. They were married in community of property and she claimed that a trust was founded for the sole purpose of concealing Mr Van Greune's assets and should therefore be seen as Mr Van Greune's *alter ego*.²⁷⁶ She claimed that the assets situated in the trust should be included in her and her husband's joint estate.²⁷⁷ The husband and a third trustee argued and raised the exception that the claim of the plaintiff was not valid, because she signed the trust deed and thus became a party to the *stipulatio alteri* and therefore, her claim should be scrapped.²⁷⁸ Potteril J found that the plaintiff's

²⁷¹ Klopper 1990 *SALJ* 703. Robinson 2007 *PER* 71.

²⁷² Section 14 of the *MPA*. Klopper 1990 *SALJ* 703.

²⁷³ Chapter III of the *MPA*.

²⁷⁴ S12 of the *Trust Act*. Klopper 1990 *SALJ* 703.

²⁷⁵ 2013 JDR 2366 (GNP) (*Van Greune* case).

²⁷⁶ Section 12 of the *Trust Act*. Klopper 1990 *SALJ* 703.

²⁷⁷ *Van Greune* case par 1. Olivier, Strydom and Van den Berg *Trust Law and Practice* par 6.4.6.

²⁷⁸ *Van Greune* case par 2. Olivier, Strydom and Van den Berg *Trust Law and Practice* par 6.4.6. A trust that is set up by a living founder (*inter vivos*) is a contract for the benefit of a third person (*stipulatio alteri*). Thus, a *stipulatio alteri* is a contract on behalf of a third party. Cameron, De Waal and Wunsh, *Honoré South African Law of Trusts* 34. Also see *Crookes* case p304 and *Wiid v Wiid* 1571/2006 Nel *Obiter* 2016 438.

claim comes down to the trust being terminated or declared void, or at the very least the trust deed had to be amended. The Court relied on the fact that the Court has very little authority to amend a trust deed or alter wills or contracts.²⁷⁹ The Court found that it could therefore not declare that the trust assets should be included in the redistribution order in divorce proceedings. The exception was held without cost.²⁸⁰

Assets that are situated in a trust *inter vivos*, will not form part of the joint estate and neither would the value of the assets when the marriage ends. This is where the inequality between the parties comes in. The spouses in a marriage in community of property share equally in their estate therefore if one of the spouses use the trust as an *alter ego* the other spouse will have a claim for the trust assets.²⁸¹ In *Pickles v Pickles* the Court held:

The mere fact that a wife was content in the past with a smaller amount for maintenance than she was entitled to, does not prevent her from obtaining an increase to what is reasonable, because an action is pending between the parties for a dissolution of the marriage. A wife married in community of property is entitled to an interdict against her husband where a reasonable apprehension is shown.²⁸²

In *WT*, the question before the Court was whether or not the assets of a discretionary family trust can be regarded as part of the assets of a joint estate of parties married in community of property.²⁸³ The facts of this case that was heard in the Supreme Court of Appeal was that the plaintiff used the trust as a financial vehicle for his own, as well as the joint estates', benefit.²⁸⁴

The Court *a quo* held that the assets in the trust formed part of the joint estate of the parties. The trial Court found that even though the property was the property of the trust, it was effectively agreed between the *WT* and *KT* that they would own the property equally as beneficial owners.²⁸⁵ The Appeal court held that:

²⁷⁹ *Van Greune* case par 5. Olivier, Strydom and Van den Berg *Trust Law and Practice* par 6.4.6. Also see Cameron, De Waal and Wunsh, *Honoré South African Law of Trusts* 515.

²⁸⁰ *Van Greune* case par 6-9.

²⁸¹ Kloppe 1990 *SALJ* 707. See also *Pickles v Pickles* 1947 3 SA 175 (W) (*Pickles* case).

²⁸² *Pickles* case p175.

²⁸³ *WT* case par 1.

²⁸⁴ *WT* case par 3.

²⁸⁵ *WT* case par 23. The Court *a quo* based its decision on the basis of criteria taken into account in *Standard Bank of South Africa Ltd and Another v Ocean Commodities inc and Others* 1983 1 SA 276 (A).

In contrast, when assessing the proprietary consequences of a divorce following a marriage in community of property as in the present case, the Court is generally confined merely to directing that the assets of the joint estate be divided in equal shares.²⁸⁶

The Court also held that in terms of section 12 of the *Trust Act* the assets in a trust does not form part of the joint estate and can therefore not be included for redistribution. The court in *WT* transferred the trust assets from the trust to the joint estate. The question regarding this was whether or not the wide discretion of the court envisaged in section 7(3) of the *Divorce Act* includes the discretion of the Court to simply transfer ownership of trust assets, rather than only including the value of trust assets as part of the personal estate of a trustee on the basis of piercing the veil.²⁸⁷ The Court in its judgement stated that because the parties were married in community of property anything and everything they owned should be included in their joint estate. The Court stated that:

The fundamental misdirection in this regard is simply that WT and KT had one joint estate pursuant to their marriage in community of property. Thus, even moneys in a bank account in her name obviously formed part of the joint estate. Therefore, her testimony pertaining to her monetary contributions to WT were as irrelevant as WT's inconsistent evidence relating to the manner in which he sought to allocate her financial 'contributions' from time to time. In the final analysis, any empathy for KT's case must in my view necessarily be coloured by the legal consequences of the election she had made with respect to her marital regime.²⁸⁸

The Courts specifically in this case warned couples who intend to marry in community of property by stating that the consequences of such a marital regime bears consequences that will affect both of the parties in the marriage. The appeal was upheld.

With regards to the position of the Court, the question arises what a spouse stands to do in a marriage in community of property where a trust was used as an *alter ego* of one of the spouses. The acquisition of assets by a trust is not regulated by section 15(1) of the *MPA* and any spouse may acquire assets without the knowledge of the other spouse. These assets then fall outside the joint estate. If the joint estate finances

²⁸⁶ *WT* case par 36. This was also stated by Robinson 2007 *PER* 72.

²⁸⁷ *WT* case par 36. The court in this case also commented on the difference between a marriage in community of property and out of community of property by comparing this case with the *Badenhorst* case.

²⁸⁸ *WT* case par 37.

the asset, the estate may have a claim for the amount of that asset and that amount must be divided between the two spouses.²⁸⁹

3.5 Conclusion

Mr and Mrs Abbot were married out of community of property with the inclusion of accrual. This means that if it is found that Mr Abbot used the trust for his own personal use then Mrs Abbot will have a claim in terms of section 7 of the *Trust Act*. This will mean that the assets that are situated in the Sunstone Trust may be included in the determination of the redistribution order.

The reason for this chapter in this paper is that the marriage dispensation systems in South Africa influence how a Court may do a redistribution order. Different dispensation systems affect the different legislation that must be used to make a redistribution order. In this chapter the question was asked: What is the influence of trust assets in marriages and divorce. It was answered by studying the different dispensation systems in South Africa. It is also important to understand the position of the trustee in a trust. The trustees have the responsibility to administer the trust with care and diligence. In the next chapter the relationship between trust and trustees will be discussed.

²⁸⁹ Klopper 1990 *SALJ* 708. Also see s14 of the *MPA*.

CHAPTER 4: TRUSTS AND TRUSTEES

4.1 Introduction

In the previous chapter the question was asked: what is the influence of trust assets in marriages and divorce and it was answered by examining the marital dispensation system in South Africa. In this chapter the relationship between trustees and trust assets pertaining to the *essentialia* of a valid trust, the powers of a trustee to act on behalf of a beneficiary with regards to the property and the consequences of not adhering to trust principles are examined. It is important to distinguish between the fiduciary duty of the trustee and the fiduciary responsibility the trustee has towards the beneficiaries.²⁹⁰ The aim of this chapter is to understand the relationship a trustee has with the trust and the trustees. This relationship is important to understand, because it highlights the responsibilities that a trustee has in terms of the trust's assets and beneficiaries. If a trustee does not adhere to the provisions set for them by the founder, the trust could be deemed as an *alter ego* trust or a sham trust, thereby leaving the trust's assets exposed.

4.2 Relationship of trustees and trust assets

When considering who should be a trustee, a founder has the responsibility to choose a person with the right qualifications. The office of trustee is governed by the *Trust Act* and by principles of common law. The *Trust Act* defines no specific qualifications for a person to be a trustee, but there are some criteria that may disqualify a person from being a trustee.²⁹¹ The following persons can be trustees of a trust:

- a) A minor with consent of their parent or guardian.
- b) A juristic person or a company.
- c) A woman who is subject to the marital power of her husband.
- d) An insolvent person who can provide adequate security.
- e) A prodigal with the aid of a curator.
- f) A person who is not a South African citizen.²⁹²

²⁹⁰ Kloppers 2006 *TSAR* 414. Also see the unreported case of *Wiid v Wiid* 1571/2006 Nel *Obiter* 2016 436.

²⁹¹ Oosthuizen *Suid-Afrikaanse Handelsreg* 614-615. Cameron, De Waal and Wunsh, *Honoré South African Law of Trusts* 213-214. Cassim *et al The law of business* 53-55.

²⁹² Oosthuizen *Suid-Afrikaanse Handelsreg* 614-615. Cameron, De Waal and Wunsh, *Honoré South African Law of Trusts* 213-214.

The instances where a person may be disqualified as a trustee are:

- a) Persons who wrote or witnessed a will in which they are appointed as a trustee.
- b) Persons who are not of sound mind.
- c) Persons who are disqualified in terms of the trust deed.
- d) A director of a company is incapable of being appointed a trustee for the holders of debentures in that company.²⁹³

The appointment of a trustee is normally made in terms of the trust deed. Generally, at the creation of the trust, the founder normally nominates the trustees. The trustees may also have the right to nominate a trustee, but must nominate a trustee in accordance with the trust deed. Beneficiaries may also have the power to nominate a trustee if the trust deed permits it. The Master of the High Court will also be able to nominate a trustee in terms of the common law. In addition, the High Court also has the power to nominate a trustee in terms of statutes.²⁹⁴ A trustee who accepted the appointment of trustee and who has been validly appointed by the founder, or any other person with the authority of appointing a trustee, accedes the office of trustee. However this trustee may only perform his duties as a trustee when he receives written authorisation in the form of a letter of authority by the Master.²⁹⁵

The question then arises what happens when the trustees act before they receive authorisation from the Master? This question was brought to the Courts attention in *Simplex (Pty) Ltd v Van der Merwe and Others*²⁹⁶ where the trustee entered into a contract before he received a letter of authorisation by the Master. This is in conflict with section 6 of the *Trust Act* and the Court in *Simplex* stated that this provision is an absolute precondition to a trustee's competency to act. Therefore if the trustee has no authorisation by the Master any action he takes will be null and void.²⁹⁷ A further question that could be asked is what happens when the trustee receives the valid authorisation after the transaction has already been made? Could the agreement be considered valid? The Court in the *Simplex* case in regards to this stated:

²⁹³ Oosthuizen *Suid-Afrikaanse Handelsreg* 614-615. Cameron, De Waal and Wunsh, *Honoré South African Law of Trusts* 213-214. Du Toit *South African Trust Law Principles and Practise* 55-56.

²⁹⁴ Du Toit *South African Trust Law Principles and Practise* 56-60.

²⁹⁵ S6(1) of the *Trust Act*. Also see Du Toit *South African Trust Law Principles and Practise* 61 and Du Toit 2001 *TSAR* 123.

²⁹⁶ 1996 1 SA 111 (W) p111 (*Simplex* case).

²⁹⁷ *Simplex* case p111. Also see Du Toit *South African Trust Law Principles and Practise* 62 and Du Toit 2001 *TSAR* 123.

The Court cannot validate acts which are expressly prohibited by statute: to do so would be to arrogate to the Court the power to override valid legislative Acts. The Court accordingly does not have the power to validate a contract concluded by a trustee in conflict with s 6(1) of the Act.²⁹⁸

The Court in *Kropman v Nysscher*²⁹⁹ had an opposing view to *Simplex* by stating that there was no reason that a Court cannot exercise its discretion to retroactively validate an agreement made by a trustee. The difference of opinion can be attributed to the interpretation of section 6(1) of the *Trust Act*. The Court in *Kropman* viewed section 6(1) as protection of trust beneficiaries, whereas the Court in *Simplex* found that this subsection also served the public interest by not only providing written proof to outsiders of the office of trustees but also by giving the Master the discretion to supervise the administration of trust property by trustees.³⁰⁰ The Courts and numerous authors have found the *Simplex* position to be correct.³⁰¹

The power a trustee has to administer a trust on behalf of the trust is a very important responsibility and must be acted out with the utmost care and diligence. The next part of this chapter examines the power a trustee has to Act on behalf of a beneficiary.

4.2 Powers of the trustee to act on behalf of the trustee

In *Metequity Ltd v NWN Properties Ltd* the Court held that the office of trustee is created by the relevant trust instrument and the office is filled in terms of that instrument.³⁰² Establishing a trustee in office is a three-step process, which includes the following:

- a) The office is created in terms of the trust instrument at hand.
- b) The trustee is appointed as such under the trust instrument, the master or the Court.
- c) The trustees accept the appointment.³⁰³

²⁹⁸ *Simplex* case p111G. Also see Du Toit *South African Trust Law Principles and Practise* 62.

²⁹⁹ 1999 2 SA 567 (T) p576F (*Kropman*). Also see Cameron, De Waal and Wunsh, *Honoré South African Law of Trusts* 220-221. Also see Du Toit 2001 *TSAR* 124.

³⁰⁰ Du Toit *South African Trust Law Principles and Practise* 63. Also see Cameron, De Waal and Wunsh, *Honoré South African Law of Trusts* 159.

³⁰¹ Du Toit *South African Trust Law Principles and Practise* 63.

³⁰² 1998 2 SA 554 (T) p557H (*Metequity* case). Du Toit 2007 *SLR* 470.

³⁰³ Du Toit 2007 *SLR* 470. Also see Cameron, De Waal and Wunsh, *Honoré South African Law of Trusts* 216 and Du Toit *South African Trust Law Principles and Practise* 61.

When the fiduciary duty is breached it does not matter whether the principle actually suffered damage or loss or even if the trustee acted honestly and responsibly.³⁰⁴ One of the main characteristics of the office of trustee is that it is fiduciary in nature. This means that that a trustee owes the utmost level of good faith towards the beneficiaries.³⁰⁵ It can be stated that the trustee occupies a fiduciary position or holds trust property in a fiduciary capacity.³⁰⁶ One of the important factors of the fiduciary relationship of trustees is the fiduciary duty imposed by the *Trust Act* and the principles of common law.³⁰⁷

The first and most important fiduciary duty of a trustee is the duty of care. This duty that is regulated by the *Trust Act* is one of the most fundamental provisions as to what is expected of a trustee with regards to trust administration. This fact arises from the view that a trustee's general fiduciary duty stems from, or is equivalent to, the duty of care. Section 9 of the *Trust Act* regulates the duty of care that is imposed on trustees.³⁰⁸ The act states that:

A trustee shall in the performance of his duties and the exercise of his powers, act with care, diligence and skill, which can reasonably be expected of a person who manages the affairs of another.³⁰⁹

This duty has been debated by numerous courts and authors.³¹⁰ The argument in the *Metequity* case was based on the fiduciary duties imposed on a trustee by section 9 of the *Trust Act*.³¹¹ Kloppers states that section 9(1) of the *Trust Act* confirms a trustee's fiduciary duty to the trust beneficiaries.³¹² A trustee's duty of care is the most important manifestation of the fiduciary nature of a trustee's office.³¹³ The duty of care imposed on a trustee means that the trustee must administer the trust in the utmost good faith and diligence. The standard of care that a trustee must act with is defined by the

³⁰⁴ *Phillips v Fieldstone Africa (Pty) Ltd* 2004 3 SA 465 (SCA) p1005-1006. Also see *Wiid v Wiid* 1571/2006 Nel *Obiter* 2016 437.

³⁰⁵ *Doyle v Board of Executors* 1999 2 SA 805 (C) p813 A-B (*Doyle* case). Also see *Wiid v Wiid* 1571/2006 Nel *Obiter* 2016 437.

³⁰⁶ *Doyle* case p812 J. Also see De Waal 2000 *SALJ* 548 and Du Toit 2007 *SLR* 471.

³⁰⁷ Du Toit *South African Trust Law Principles and Practise* 67. Also see Oosthuizen *Suid-Afrikaanse Handelsreg* 617.

³⁰⁸ Du Toit 2007 *SLR* 473. This was also been stated by

³⁰⁹ S9(1) of the *Trust Act*.

³¹⁰ Du Toit 2007 *SLR* 473

³¹¹ *Metequity* case p556I.

³¹² Kloppers 2006 *TSAR* 421. Also see Du Toit 2007 *SLR* 474.

³¹³ Du Toit *South African Trust Law Principles and Practise* 71.

common law concept of *bonus et diligens paterfamilias*.³¹⁴ The Court in *Saxville West v Nourse*³¹⁵ affirmed this standard by stating that a trustee must act with more care when dealing with trust assets even with more care than his own assets.

The second fiduciary duty imposed on a trustee is that the trustee must always act independently.³¹⁶ The Court in *Parker* held that an independent outsider, who must be included as a trustee, does not have to be a professional person, but must be someone with the proper realisation of the responsibilities of a trustee to ensure that the trust functions properly, that the trust deed is observed and that the conduct of the trustees is checked.³¹⁷ This duty boils down to the trustee who must be able to act independently and use his independent judgement in respect of the trust's administration. The trustee must not bow down to the founder, other trustees or beneficiaries.³¹⁸ A trustee also has the fiduciary duty to protect the interests of potential beneficiaries when an *inter vivos* trust is amended. Centlivres CJ indicated in the *Crookes* case that the amendment of an *inter vivos* trust is governed in South African law by the contractual principles generally applicable to the amendment of the *stipulatio alteri*.³¹⁹

Another fiduciary duty is the duty of accountability with regards to respecting the trust's administration. The common law gives authority to trust beneficiaries or co-trustees to request information from a trustee pertaining to the trust. The trustee is then obligated to deliver this information.³²⁰ Furthermore, the *Trust Act* grants regulatory powers to ensure the accountability of trustees.³²¹ A trustee's accountability is thereby preserved in their duty to separate the trust's property from their own personal property. The assets in a trust may never form part of the trustee's estate and must therefore always be identifiable as property of the trust. Complying with this duty facilitates trust

³¹⁴ Beinart 1980 *JLH* 9. This means that the trustee must invest and deal with the assets with diligence and safety. Also see Du Toit *South African Trust Law Principles and Practise* 70 and *Wiid v Wiid* 1571/2006 Nel *Obiter* 2016 437.

³¹⁵ 1925 AD 516 p533-534. Also see Du Toit *South African Trust Law Principles and Practise* 70.

³¹⁶ Pace and Van der Westhuizen *Wills and Trusts* par B15.1.7.

³¹⁷ *Parker* case par 36 and also see Pace and Van der Westhuizen *Wills and Trusts* par B15.1.7.

³¹⁸ Du Toit 2007 *SLR* 475.

³¹⁹ *Crookes* case p285 G-F. Also see Du Toit 2001 *TSAR* 126.

³²⁰ Du Toit *South African Trust Law Principles and Practise* 72. Also see Du Toit 2007 *SLR* 475 and Honoré *The South African Law of Trusts* 229.

³²¹ Du Toit *South African Trust Law Principles and Practise* 73. Also see s16 of the *Trust Act*.

administration and enables a trustee to effectively perform his administrative duties. Accountability also protects the trust's assets from third party claims against the trustees.³²² Section 11(1) of the *Trust Act* regulates this provision.³²³ In the *Doyle* case, with regards to the trustee's fiduciary duty to accountability, the Court held that:

The duty, which falls upon those who occupy a fiduciary position to keep proper accounts, is often said to be *sui generis*. The duties of good faith, which are owed by an agent to his principal, are no different in kind to those, which fall on a trustee. Inextricably bound up with this by no means exhaustive compendium of obligations is the agent's duty to give an accounting to his principal of all that he knows and has done in the execution of his mandate and with his principal's property.³²⁴

The final fiduciary duty is the duty of impartiality. This duty does not only imply the avoidance of a conflict of interest between the personal assets of the trustee and the assets owned by the trust, but also prohibits the trustee from making any undue profit from his trusteeship.³²⁵ In the *Jowell* case, the trustee entered into an agreement that created a conflict of interest between her as a co-trustee and her as a co-beneficiary.³²⁶ The Court in this case held that:

A trustee must, generally speaking, avoid as far as possible a conflict between her personal interests and those of the beneficiaries...I am satisfied that the allegations contained in the particulars of claim are capable of supporting evidence which would establish a breach of the trustee's fiduciary duty.³²⁷

The duty of care, the duty of independence, the duty of accountability and the duty of impartiality are the principal components of a trustee's general fiduciary duty. Although these four duties are considered the most important fiduciary duties, they do not exclude future additions to the list. The four main duties that are discussed above are the duties that the Court identifies as fundamentally possessive of fiduciary quality. The ambit of these fiduciary duties is not static and is subject to change depending on the facts of the case.³²⁸ Due to the fluid nature of fiduciary, it stands to reason that a

³²² Du Toit *South African Trust Law Principles and Practise* 69. Also see Du Toit 2007 *SLR* 475 and Honoré *The South African Law of Trusts* 232-233.

³²³ Du Toit *South African Trust Law Principles and Practise* 69.

³²⁴ *Doyle* case p812J, p813D, p813G. See also Du Toit 2007 *SLR* 476.

³²⁵ See *Hoppen v Shub* 1987 3 SA 201 (C) p210A-B. *Jowell v Branwell-Jones* 2000 3 (SA) 274 (SCA) p284G (*Jowell* case). *Daewoo Heavy Industries (SA) (Pty) Ltd v banks* 2004 4 SA 458 (C) p462-463. Du Toit 2007 *SLR* 474.

³²⁶ *Jowell* case p275.

³²⁷ *Jowell* case p284G, p284J-285A.

³²⁸ *Howard v Herrigel* 1991 2 SA 660 (A) 678B. *Gheri v Tiber Developments (Pty) Ltd* 2007 4 SA 536 (SCA) p544H-545B. Du Toit 2007 *SLR* 476.

trustee must ascertain what the rights and obligations of the office entails as well as the fiduciary nature of the position and then act according to these rights and obligations.³²⁹

The reason an examination of the trustees duties should be made is to understand how a trustee must act in the trust. If the trustee does not act in a certain way the trust may be declared invalid which leaves the trust exposed to potential third parties. If a Court understands what is expected of a trustee then the Court would be able to correctly identify whether or not the trust is a sham or *alter ego* and whether or not the spouse in a divorce matter is entitled to the trust assets.

4.3 Consequences of not adhering to trust principles

Throughout this discussion numerous Court decisions³³⁰ had one thing in common. In many cases the Court emphasises that the founder of the trust disregarded the basic principles of trusts and effectively gave way for the Court to consider the trust assets as part of the redistribution of assets.³³¹ The Courts also mentioned what the consequences were for not adhering to the principles of a trust. In *Parker*, the Court emphasised the separation of control and enjoyment over the assets in the trust:

The core idea of the trust is the separation of ownership or control from enjoyment. Though a trustee can also be a beneficiary, the central notion is that the person entrusted with control exercises it on behalf of and in the interests of another. This is why a sole trustee cannot also be the sole beneficiary. Such a situation would embody an identity of interests that is inimical to the trust idea, and no trust would come into existence.³³²

It is evident that when a Court finds a trust to be invalid, the assets in the trust will revert back to the original owners personal estate.³³³ Some parties believe that with the creation of a trust they are able to solve legal and impediment problems. These parties may be under the impression that their problems are solved, but in truth the trust that

³²⁹ Du Toit 2007 *SLR* 476. De Waal 2012 *RJCIPL* 16.

³³⁰ *Jordaan* case, *Parker* case, *Badenhorst* case, *WT* case, *Miller* case etc. Also see Olivier, Strydom and Van den Berg *Trust Law and Practice* par 6.4.

³³¹ *Jordaan* case p288. Also see Olivier, Strydom and Van den Berg *Trust Law and Practice* par 6.4.

³³² *Parker* case par 19D-F.

³³³ *Nieuwoudt NO v Vrystaat Mielies (Edms) Bpk* 2004 3 SA 486 (SCA) p486.

they use to solve these problems will be null and void.³³⁴ If it turns out that the trust is invalid, the trust property will revert back to the trustee's personal estate.

If a trustee fails to perform his duties, section 19 of the *Trust Act* provides that:

If any trustee fails to comply with a request by the trustee by the Master in terms of section 16 or to perform any duty imposed upon him by the trust instrument or by law, the Master or any person having an interest in the trust property may apply to the Court for an order directing the trustee to comply with such request or to perform such duty.³³⁵

If the trustee fails to adhere to the trust principles, it may leave the trust's assets exposed and vulnerable to attacks on the bases that the trust deemed an *alter ego* of the trustee. In the *Van Zyl* case, the Court held that:

Such cases are most likely to present in the context of an absence of the dichotomy between responsibility and interest that constitutes the 'core idea' of the legal concept of a trust.³³⁶

It is clear from this discussion on the fiduciary duty of the trustee that when the basic principles of a trust are not adhered to, the founder, trustee and beneficiaries may find themselves in an unfavourable position. Where a founder keeps control over the trust assets, whether it is indirect or direct control, it may result in the trust being deemed invalid and the assets will form part of the founder's estate. Trustees who act under instruction of the founder run the risk of being reprimanded by the beneficiaries for breach of their fiduciary duties as trustees. In order to protect the trust, the founder should be prepared to give up control over the trust's assets in favour of the trustees. In addition, the trustees must ensure that they have total control over the trust's assets and are not influenced by the founder or beneficiaries to make decisions regarding these assets.

If Mr Abbot and his fellow trustees used the trust for their own personal use then the trust would be exposed to Mrs Abbot asking for a redistribution of the assets. The Court will examine the fiduciary duty of the trustee and whether or not Mr Abbot acted in a fair manner in the administration of the trust's assets. If the Court is of the opinion that

³³⁴ Olivier 2001 *SALJ* 224.

³³⁵ S19 of the *Trust Act*. Also see Du Toit *South African Trust Law Principles and Practise* 74.

³³⁶ *Van Zyl* case p460B-C. Also see Stafford 2015 *News and Opinion* 1.

Mr Abbot used the trust for his own personal benefit, the Court may grant the redistribution order.

CHAPTER 5: CONCLUSION

The South African interpretation of trusts and the role trusts play in the determination of the patrimonial consequences of divorce may result in many unforeseen challenges. The first point that is discussed in this study is the way a trust works in the South African context.³³⁷ There have been many debates on what the exact definition of a trust is. Many authors have weighed in on the true definition, but the most important definition in the South African context is the definition as set out by the *Trust Act*.³³⁸ It is important to know what the legal nature of a trust is as well as how a trust is composed in order to fully comprehend its implications and consequences.

As discussed, section 12 of the *Trust Act* confirms the notion that trust assets do not form part of the personal estate of a trustee. In cases like *Parker* and *Thorpe* the Court emphasised the vital importance of the separation of control and enjoyment.³³⁹ In this study, the discretion a Court has to award trust assets in a redistribution order is also discussed. The factual circumstances the Court takes into account when it decides to include trust assets in the personal estate of a trustee, and awards those assets in a redistribution order (where the other spouse was not a beneficiary) are also examined. This problem was addressed in the *Badenhorst* case, who states that:

To succeed in a claim that trust assets be included in the estate of one of the parties to a marriage there needs to be evidence that such party controlled the trust and, but for the trust, would have acquired and owned the assets in his own name.³⁴⁰

The question of whether or not trust assets should be included in a redistribution order has been scrutinised by Courts more and more in recent years. In cases like the *Jordaan* case, the *Badenhorst* case and the *Parker* case, the Court was very strict in awarding a redistribution order. What is evident in all these cases is that the Court never directly comments on the validity of the trust. One of the consequences of not adhering to trust principles is that the trust is nullified. Thereby, the assets will revert to the original owner and be open to attack by spouses and other third parties. With regards to the cases discussed in this study, the Courts never held that a specific asset

³³⁷ Chapter 2.

³³⁸ S1 of the *Trust Act*.

³³⁹ *Parker* case par 19. *Thorpe* case par 17. De Waal 2012 *RJCIPL* 11. *Hague convention* 1985 Article 2.

³⁴⁰ *Badenhorst* case p260 I-J.

should be sold or that a specific asset should be handed to the aggrieved party. The Courts only held that there were enough funds to award a suitable redistribution.³⁴¹

The question of the redistribution order was answered by comparing the marital dispensation systems in South Africa. The Court in the *Miller* case held that the assets of the trust can be included in the redistribution order in terms of the *Divorce Act*, but failed to consider the differences between a redistribution order in terms of section 7(3) of the *Divorce Act* and an accrual claim in terms of section 3 of the *MPA*.³⁴² A Court will not grant a redistribution order if it is not satisfied that such a redistribution is just and equitable by the reason of fact that the party in whose favour the order is granted contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subdivision of the marriage.³⁴³ As discussed, it seems that section 7 of the *Divorce Act* opens the door for the party with the lowest growing estate to claim for the redistribution of trust assets.

When it comes to the discretion of the Court to award a redistribution order of the assets of the trust, the Courts have done everything possible to ensure that the trust form is not misused. This can be seen in *Parker* where the Court stated that:

The Courts have the power and the duty to evolve the law of trusts by adapting the trust idea to the principles of our law.³⁴⁴

Furthermore, it appears that sections 7(3) and 7(5) of the *Divorce Act* are not subject to section 12 of the *Trust Act* as well as section 5 of the *MPA*. An important aspect that can be criticised is that all the Courts in these cases did not add the *inter vivos* trust as a party in the case. The Court only applied sections (7)3 and 7(5) of the *Divorce Act*, and legally this is the wrong position. A trust is considered a legal person, so how can a Court make a decision without the entity being a party to the case? Erasmus J defends this position by stating that:

The finding that joinder of the trust was necessary, must be seen within the context of the particular facts of that case... The Court is in the present matter not required to make any order that will have the effect of divesting the trust of any of its assets.³⁴⁵

³⁴¹ Du Toit 2015 *JCLS* 698.

³⁴² De la Harpe 2014 <http://www.fanews.co.za/article/life-insurance/9/general/1202/divorce-redistribution-orders-and-trust-assets/16651> 2.

³⁴³ S7(4) of *Divorce Act*.

³⁴⁴ *Parker* case par 37. Also see the *Braun* case.

In some of the other cases³⁴⁶ the Courts first included the trust as a party to the case before a decision was made in terms of section 7 of the *Divorce Act*. The question that then arises is: Does section 12 of the *Trust Act* provide any protection to the trust assets when section 7 of the *Divorce Act* is applicable, while section 7(3) and 7(5) state that all factors need to be considered when making a redistribution order?

Considering the concept of piercing the veil, Courts do not have inherent jurisdiction to do so, as they may be only able to pierce the veil in a company in certain situations. Courts would rather look for a *causa* between the trust assets and the trustee's personal assets then attack the trust assets for the redistribution order in divorce matters. But as was seen in the cases in this study it is the hope that people that attempt to impair their spouse by vesting the property in a trust will know that a court will see the trust as the mere *alter ego* or sham of that spouse and that courts will pierce the veneer if the trust is used in an invalid way.³⁴⁷

Considering the negative aspects and the potential problems pertaining to trusts, *inter vivos* trusts in particular, a trust still has a lot of advantages and may still find relevant applications in various institutions, including estate planning.

When considering the case study Mr Abbot used the Sunstone Trust as his own personal vehicle and did not adhere to the principles set out by the *Trust Act*. Phillip abbot abused the Sunstone Trust for his own personal benefit. To ensure that the trust assets did not form part of Mr Abbot's estate he needed to vest the assets in the trustees and give equal control over the assets to the two remaining trustees. The trust assets should have been administered on behalf of the beneficiaries but because Mr Abbot was a beneficiary he saw it as a way to control the assets for his own personal use.

The objective of this study was to determine what the courts discretion is to award trust assets in a redistribution order in divorce matters. With regards to the research it can be concluded that the discretion of a court to award trust assets in the calculation of accrual when a couple divorces depend on the facts of the case. If the court is of

³⁴⁵ *Pringle* case par7-8.

³⁴⁶ *Badenhorst, Jordaan* case, etc.

³⁴⁷ Heaton 2015 *ISFL* 325.

opinion that the piercing of the veil is just and equitable it may include trust assets in the accrual.

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