

COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA TO THE DISCUSSION

PAPER SALRC DISCUSSION PAPER 160

PROJECT 100E – REVIEW ASPECTS OF MATRIMONIAL PROPERTY LAW

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A. INTRODUCTORY COMMENTS

The Issue Paper aims to change the terrain of South African Matrimonial Property Law. The paper is based on extensive research by properly qualified researchers, however we must take account that even research cannot be embarked upon with totally independent eyes and it will carry in and of itself the inherent bias of the researcher whether by text or context.

Legal Uncertainty

The nature of the legislation that the legislator seeks to amend in this case is extremely personal to the citizenry of South Africa. It affects their everyday lives and future choices and also their most intimate choices. The coercive power of the state will delve into the very personal lives of people as individuals, different cultures and greater society. The intimate nature of this legislation cannot be more emphasised as it serves to regulate marriages, universal partnerships for unmarried intimate partners, family assets even banking etc. We submit that the Law Reform Commission document in its current form will have far-reaching effects even for people who are dating (courting) and in shorter relationships.

It is not to say that the previous legislation did not do so however these changes are unprecedented. In an attempt to deal with the inequality created by marriage that upholds a greater structural inequality in our society the drafters run the risk of creating legal uncertainty.

Recommendation: Therefore, the most extensive kind of consultation should be embarked upon with the citizenry of South Africa.

The South African Law Reform Commission is attempting to bring some kind of equality to a Matrimonial Property regime that comes from a history where women were subjected to paternalistic control in their homes and over the joint assets in the joint estate.

We make the following general comments:

1. It is submitted that in spite of the marital regime chosen by the parties at the beginning of their marriage, there should be consultation with a properly qualified person to provide them with the proper information before entering into that marriage contract. Any system, be it in community of property/ out of community of property with/without accrual, should be accompanied by a proforma agreement setting out all the risks and the information related to the marital regime.

It is only with this kind of supportive education at the beginning of such a union that we can try to introduce some kind of equality in the case where there is stark differences in education/income etc.

2. It is submitted that when it cannot be proved on the face of it that an asset belongs to a particular spouse then that asset must automatically fall within the joint estate.

3. It is submitted that the state should not attempt to govern unmarried life partnerships. Drafters must have cognisance of the following issues:
- Some couples deliberately choose not to marry and in the contemporary world this is becoming a lifestyle;
 - Where there is cohabitation, minor children and a shared matrimonial home- these instances are sufficiently dealt with in legislation;
 - An attempt to govern the personal relationships of people to this degree is inappropriate because the cases that slip through the cracks are the exception and not the norm. Legislation must be drafted to provide a legal position for the norm and not the exception.
4. It is submitted that consideration must be given to the recognition of polyandry given the changing *boni mores* of our society in light of the equality of men and women.
5. Monogamist religious marriages: Hindu marriages should be expressly recognised in the legislation as it is recognised in other African jurisdictions like Kenya, to where the diaspora extends.

These marriages are marriages in Community of Property. Hindu especially Tamil Ethics can be found in the Thirukural dated between 300BCE and therein refers in the chapter of "Domestic Virtue XII Equity: Equity is the supreme virtue. It is to give each man his due". Therefore, community of property should remain as the matrimonial regime.

6. It is submitted that the new legislation should not act retrospectively because of the need for legal certainty and the constitutional right of the freedom to contract.

7. Career Assets should not be taken into account.

B. COMMENTS ON SPECIFIC CHAPTERS

1) Chapter 2:

The default matrimonial property system for monogamous marriages and life partnerships.

Paragraph 2.3.1 and paragraph 2.3.3 – Options 1 and 2

The default position of in community of property should not be retained and should be reconsidered strongly. Firstly, it seems to be the chosen form of marriage by many families from an unequal power base and who are in a disadvantaged position financially. Particularly where the assets are limited and one party has behaved recklessly in regard to financial affairs, incurring substantial debt (for example, by maxing out credit cards, loans, financial agreements and so on) a marriage in community of property substantially disadvantages the more responsible spouse. Both spouses, often with limited resources, are at risk of creditors irrespective of whom incurred the debt.

In practice in divorces, practitioners often have to deal with impossible orders relating to marriages in community of property that have been granted in the family courts. Where, for example, the parties jointly own a property covered by a mortgage bond, there are no provisions made as to what should happen to this property, who should

retain it, who pays the expenses relating to this property, if no agreement exists as to who should retain it, when should it be sold, how should it be marketed, how it should be transferred etc. They continue to hold assets jointly and debts are further incurred eventually resulting in hardship. This leads to a myriad of problems, particularly when one party remains in the property and does not understand how transfer should be effected to that party has carried the expenses of the property for a long time. The other party may be in a more impecunious position and may put the staying behind party at risk of creditors and claims. Often one party refuses to sign the transfer documents which leads to court applications, which parties can ill afford. It creates an untenable situation in practice and belabours disadvantaged families with high legal costs, little knowledge as to how to implement rights and protect themselves, and unfair outcomes, particularly for children who require stability.

Education is an issue in regard to marriages in community of property. Parties rarely understand the consequences relating to such marriages and also the ability to contract independently or not do so in such marriages. It does lead to unfairness and inequity on an ongoing basis, polarizes families and entrenches difference.

Similarly certain antenuptial contracts purporting to include the accrual regime can lead to enormous disadvantage. Unfortunately, antenuptial contracts are still drafted without the provision of adequate information to the prospective spouses and with troubling consequences. One example is where the commencement value assets are the same assets as the excluded assets – which obviously cannot be. Often couples are not interrogated about their commencement values and incorrect values or no values are inserted, the exclusions and the effect thereof are not fully canvassed, and the parties are not properly advised about their respective rights and the risks upon divorce (or death), as well as prospective outcomes in the interpretation of the

antenuptial contract and the application thereof. They are also not advised to log the exclusions and their morphing through other assets on an ongoing basis, as multiple transactions may occur during the marriage, and it becomes very difficult to prove the exclusions or the utilisation of the excluded asset, for example, a joint asset such as a home. This again leads to ongoing litigation and trauma in the family. It becomes essential that both parties be properly advised by separate lawyers upon entering into an antenuptial contract. The mobility of persons has also caused unforeseen outcomes. A South African antenuptial contract is not necessarily implemented throughout the world, for example, in England and Australia, and parties who intend to relocate and/or travel need to be advised that the antenuptial contract has to deal with broader legal systems than only SA perspective.

Sometimes a party excludes all such a party's assets, for example, *inter alia* shares in a company. All future dividends in regard to such a company will be excluded. The salary received is kept low and most of the income earned is declared by way of dividends, which will be excluded. The dividends are utilised to purchase properties or other assets, which in turn to that extent are excluded. A person may effectively so exclude all assets and all income earning assets at the beginning of a marriage, or all the assets are in trusts, although purportedly the antenuptial contract is couched in the terms of an accrual regime. This satisfies a spouse's hopes of a sharing regime, and it is only upon dissolution of the marriage, that the spouse realises that in actual fact the purport of the antenuptial contract is such that it excludes any form of accrual sharing. The so disadvantaged spouse may also in the interim have built an estate which would then be subject to an accrual sharing, resulting in double prejudice. Often the wealthy party's estate is structured in a sophisticated manner, leaving the assets and income from these assets untouchable (except in regard to maintenance claims

where access to funds are considered). However, if no maintenance claim exists, this again leads to an unjust outcome.

All in all, unless one lives in an ideal world where these documents are drafted correctly, spouses are advised correctly and are in a negotiation position where they can agree on an equal basis with level playing fields, antenuptial contracts are very difficult and may have completely unforeseen consequences.

Whilst the disadvantaged or spouse with a lesser negotiation power should be protected to have a just and equitable outcome, one can also understand that an established person with enormous financial resources, marrying at a late age, may want to protect the resources that have been built up.

It is vexed question.

Therefore, the factors to apply when a court exercises a discretion in redistribution of assets becomes crucially important.

It is suggested that the default position should perhaps be one of marriages automatically being out of community property (without an antenuptial contract having to be entered into) with a type of a s7(3) sharing regime applying, taking certain factors into account. These factors may be built out to cater for marriages where a party already has an established estate. Already there is a mass of case law regarding the application of the current s7(3) factors. Perhaps one can safeguard against the later marriage, where an estate has been substantially built up, by providing that one of the factors would be that such a spouse's estate at the commencement of the marriage would also be taken into account at the dissolution of the marriage.

The other alternative is that there could be a contracting out or opting out of the automatic application of the redistribution claim. The problem with such a position is

that one is, back to the argument in the latest Constitutional Court case where unequal playing fields cause unjust and inequitable consequences. It may therefore be best to carefully look at the factors and protect the situation by enumerating factors in the Act. Should there be an option out provision, this provision should still only be a factor to be considered by a court, and the court should still have an overacting redistribution discretion in cases where otherwise the outcome would be unjust and inequitable.

As far as religious marriages are concerned, the current Constitutional Court case should apply across the board in regard to all religious marriages not only Muslim marriages.

In summary consideration should be given to the position that all marriages are regarded as being out of community of property with a redistribution claim applying, taking into account certain factors in the discretion of the court.

As far as a customary marriage is concerned, one can, in the amendments to the relevant Acts, exclude customary family property from any sharing regime.

Ad Paragraph 2 – unmarried life partnerships (paragraphs 2.37 to 2.40)

Certain submissions have taken the point of view that the case law is sufficient to protect unmarried life partnerships.

Unfortunately, many of these relationships still fall through the cracks in the sense that there is factual disagreements about whether there is a partnership, the type of partnership, the assets falling within the partnership, and the consequences of such a relationship upon its dissolution. The onus of proof is difficult, the disadvantaged party does not have funds to litigate, nor the ability to relocate or be self-sufficient. These

relationships are often of long duration, but without the disadvantaged party earning an income or having been able to build up an estate.

Litigation is expensive. Often parties have been together for extended periods of time, they have children together, they live in a common home owned by the partner who is stronger financially, and the party who is in the lesser or disadvantaged financial position is often without any resources to run litigation, to find alternative accommodation and/or transport, to move with the children, to maintain herself / himself, and so on. The playing fields are often uneven and there are unjust and inequitable outcomes. It would be far simpler if there are certain automatic consequences to such relationships and instead of hooking the consequences of such a relationship on to a commercial universal partnership type principle there should be a redistribution claim again in terms of a type of s7(3) claim. Often parties cannot negotiate to marry as the one party is in a weaker position than the other. The principles of the recent Constitutional Court case would also apply to such relationships. The automatic position should be that specific factors apply to unmarried life partnerships to be considered by the court in its discretion in regard to considering a just and equitable redistribution claim. The factors could, for example, include reference to a spouse's financial position as at commencement of their relationship, their respective contributions, the duration of the relationship etc. Again an opting out principle could be considered, however subject to a court's overriding discretion to apply certain factors in considering a redistribution claim.

The default position should not be a division of 50/50 but should be based on a Court's discretion in taking into account the interpretation of and application of the factors to be considered.

2) Chapter 3 – Matrimonial Property Systems and Private International Law Rules

The Bar Council of Western Cape has recommended a certain structure to determine what marriage regime applies to foreign marriages and foreign marriages of South African citizens. The proposal is multi-tiered and may lead to factual disputes, be expensive to prove or disprove which regime should be applicable. Parties who marry later often cannot say what their agreement was at date of marriage. Many couples who are asked this question, at date of dissolution of the marriage, cannot explain which regime they thought would apply and there are often factual differences or it had simply not been discussed. The parties who marry sometimes do not have a common domicile or a common nationality. Whose domicile or nationality will weigh stronger? They may also not jointly connected to the same country, as the mobility of parties increase.

In England the courts apply English law. In Australia they apply Australian law. An ANC is a factor to be considered by the courts. So one can look around the world as to the application of the regimes relating to foreign marriages.

In order to save the costs of litigation and extended disputes, the question arises whether foreign marriages not be treated in the same way as South African marriages are treated for example in England. Should South African law not apply in that the marriage would be regarded as being one out of community of property with an overriding discretion to redistribute by the Courts taking into account certain factors (on the assumption the new proposals apply). Factors could cater for foreign marriages, for example, if the parties had entered into an antenuptial contract the

contents of such contract and the manner in which they entered into it, and their intention at the time of the marriage will *inter alia* factors which the court could take into account in the exercise of its discretion.

As practitioners these disputes in regard to which regime should apply have caused costs and trauma to families, on occasion resulting in jurisdiction races. If a party should relocate to South Africa, then they should investigate (as South Africans should do when relocating to another country) how their relocation will effect their matrimonial regime.

3) Chapter 4 – Deviations from the Default Matrimonial System

Whilst there is agreement that provision should be made for just and equitable outcomes, and for the courts to have an overriding discretion, even if parties have entered into antenuptial contracts, this situation may still be tortuous and will lead to litigation.

However, if it is felt that parties should still have the choice of antenuptial contracts regulating their marriage regimes, then there should certainly be an overriding discretion by a court to order a redistribution claim where otherwise the outcome would be unjust and inequitable.

The manner in which antenuptial contracts are concluded, should be strictly regulated by Statute.

The parties should sign an antenuptial contract at least a month before their marriage, both parties should have been advised by separate lawyers, or must expressly waive all legal advice, both parties must have disclosed to each other fully their financial

status, such disclosure should be filed or jointly exchanged for the parties' safekeeping, and the process of entering into and registering an antenuptial contract should be made far simpler and cheaper.

Certain explicit obligations and rights should be legislated and there is agreement in regard to paragraphs 18(i), (ii), (iii), (iv).

A Court should be able to have an overriding discretion where injustice and unfairness would result.

Antenuptial contracts, which fail to comply with formality requirements, should probably be treated as set out in para 22.

Ad Paragraph 2 – Judicial Discretion to Redistribute in marriage out of community of property without accrual (currently s7(3) of the Divorce Act) (Paragraphs 4.1 to 8, 4.1 to 9, and 4.130)

The court should have a discretion to redistribute and deviate from the applicable Matrimonial Property regime in all marriages, irrespective of the Matrimonial Property regime, taking into account certain factors when exercising their discretion. The forfeiture of benefits provision should no longer apply and should be deleted.

3. Changing the Matrimonial Property System during the subsistence of a marriage

The process should be simplified. The s21 Matrimonial Property Act procedure is extensive, delayed and expensive. A good way to amend a regime would be by way of post-nuptial agreement notarised and registered in the Deeds Office. Creditors should be notified before entering into such a post-nuptial agreement to avoid future issues. Similarly, the parties should sign it only thirty days after having agreed on the

terms, should receive separate legal advice and should disclose and exchange fully their respective financial affairs to each other before the entry into such a post-nuptial agreement. Such agreements would be subject to an overriding discretion to redistribute assets by a court in certain circumstances.

The existence of any post-nuptial agreements would be a factor to be taken into account by a Court in exercising its discretion to apply a redistribution claim.

Option 4 -Paragraph 26.4 may lead to all manner of disputes with its difficulty to prove. Expensive litigation may ensue. Again, the factors to be considered by a court in regard to a redistribution claim, whether in a marriage or a cohabitation relationship, should be sufficient to take care of disputes in this regard. To look at contributions which span many years may be difficult to prove, apart from the fact that in any event there may have been maintenance obligations between the parties. The question arises which contributions were maintenance, and which were capital contributions – for example repairs, maintenance, rates, taxes, insurance, and so on. There may be monetary and non-monetary contributions.

4) Chapter 5: Customary Marriages

Ad Paragraph 1 – conversion of customary marriage to civil marriage (paragraphs 5.48, 5.49, 4.50, and 4.51)

Court applications to change the civil marriage may be expensive and an extended process.

Ad Paragraph 3 – customary family property (paragraph5.5.5)

The recommendations are noted.

Ad Paragraph 4 – general

Customary marriages have been dealt with by the Constitutional Court. Is further regulation necessary?

Protective relationships, whether life partnerships or cultural, religious or of any other beliefs or convictions, should be treated the same way as set out above, in other words, subject to redistribution claims taking into account certain factors in the discretion of the courts.

5) Chapter 6: Religious marriages**Ad Paragraph 1 - Monogamist religious marriage (Paragraph 6.5.1, 6.5.2 and 6.5.3)**

The property regime should be deemed to be out of community of property and preferably subject to a s7(3) redistribution claim, taking certain factors into account in the discretion of the court. If this is not the final recommendation of the Commission, then the default marriage regime should at least be an accrual regime. In view of the recent Constitutional Court judgment the marriage contract should not exclude the application of the accrual regime. Difficulties arise, as pointed out above, where accrual is for all practical purposes excluded, but purportedly introduces an accrual regime on the fact of it.

The nil value referred to as a commencement value, should just be *prima facie* proof and evidence may be led in this regard. In practice this leads to problematic issues and there should be full financial disclosure prior to the marriage.

Ad Paragraph 2 Polygamist religious marriages (paragraphs 6.5.4, 6.5.5 and 6.5.6)

It is difficult to access a court in these marriages as a matter of course in view of legal advice spouses should obtain, the cost of litigation, and the lack of informed approaches to a court. It is agreed that there should be an equitable redistribution of marital assets in regard to the existing marriage and the subsequent marriage should again be out of community of property subject to an automatic redistribution claim, taking into account certain factors in the discretion of the court.

In the event of disputes a court should be approached. There should be full financial disclosure.

If the marriage is not terminated, then there should be some consequential effect to the party entering into a further polygamist marriage.

Ad Paragraph 3 – Civil and religious marriage (Paragraph 6.5.7 and 6.5.8)

The Constitutional Court case relating to Muslim marriages should apply to all religious marriages. The amendments to the Matrimonial Property Act should apply retrospectively, as the s7(3) claim in a 1984 applied retrospectively.

There are however differing views amongst various groups and attorneys to the effect that there should be freedom of contract and that contracts should not be set aside, nor should redistribution claims be made applicable retrospectively.

6) Chapter 7: Unmarried life partnerships

We refer to the comments above. There should not be a default position of equal rights to share in property. There should however be an automatic discretionary redistribution claim, based on certain factors. An equitable and just redistribution should be ordered, taking into account certain factors. There is case law already to indicate how these factors should be taken into account in a court's discretion. The factors may be extended or supplemented.

Ad Paragraph 2 – Options to codify the putative marriage doctrine (Paragraph 7.49, 7.50, 7.51 and 7.52)

The putative marriage doctrine is set out in common law and should perhaps remain in the realm of common law.

Ad Paragraph 3 – Universal partnerships for unmarried intimate partners and monogamist invalid marriages

We refer to the comments above and again suggest that the marriages or partnerships be regarded as out of community of property with a discretionary redistribution claim of the courts based on certain factors in the discretion of the court.

7) Chapter 8: Management of assets during marriage

Ad Paragraph I

(Paragraphs 8.42, 8.43 and 8.47)

The recommendations relating to paragraphs 50(A), (B) are agreed to. As far as the recommendation paragraph (C) are concerned, the disclosure should be made as an annexure to the divorce summons. A draft proposal is annexed hereto which is too comprehensive and needs to be refined. The income should also be disclosed as an annexure to the summons and again as an annexure to the plea and counterclaim of the other spouse.

8) Chapter 9: Technical issues of divorce

Ad Paragraph I

Ad Paragraph 1 – trusts:

We enclose herewith an opinion commissioned from Adv Bradstreet (**Annexure A**) regarding trusts and the current law applicable thereto, particularly the conflicting decisions in the latest SCA cases. It is so that trusts have become a very vexed issue and create unjust and inequitable consequences upon dissolution of the marriage. Perhaps we should be looking at English law and the way trusts are treated there, where the courts have a discretion to take certain trust assets into account. The problem arises as to what happens when a spouse's estate is minimal as all the assets are housed in a trust which was created during the course of the marriage or just prior to the marriage and all business is conducted in the trust through various subsidiaries, entities and is therefore safeguarded from any redistribution and/or accrual claims.

The next question that arises is, how does a court deal with this. Do the trustees have to be joined to the proceedings and get notice of the proceedings? What powers would a court, particularly in South Africa where the trusts are regarded as separate entities, have to make orders that will be binding on the trusts. The Trust law in South Africa is different from the Trust law in England.

Trusts are often located outside South Africa. How would these trusts be joined and how would the South African court's judgment be binding on these trusts. There are a host of practical and legal implications that will have to be discussed intensely in this regard. The investigation also does not end with the trust but also relates to the companies and/or entities in which the trust has an interest. Often the bulk of the assets are housed in these subsidiary entities.

The trust might be a minority share holder in the subsidiaries, which also has consequences.

Disclosure may be fraught.

Bank statements of these subsidiaries may have confidential information and the Protection of Personal Information Act and Financial Intelligence Centre Act may apply thereto.

Often the directors in these subsidiaries can control the flow of funds up to the trust, for example, the declaration of dividends as opposed to increasing the salaries of directors. A myriad of problems should be considered very carefully.

Sometimes, for example, a wife is only named as a beneficiary in a trust whilst the marriage endures. On other occasions she is a trustee in a trust but does not feature in any decision-making processes and proper meetings are often not held. Documents are thrust at her to sign such as resolutions without the financial

statements annexed or relevant documents annexed. Again you have the situation of unequal playing grounds a spouse wishing to preserve the marriage against all odds. Sometimes she is a beneficiary in the trust, but no distributions are made to her. Sometimes a loan account is created in her name (for tax purposes) and she is not even aware of the existence of the loan account. The question arises whether she has accepted her benefits in the trust or not. This has an effect on whether she can be removed as a beneficiary or not, pending the divorce. Provision should be made that she cannot be removed as a trustee or beneficiary pending the divorce. Her position as trustee or beneficiary will entitle her to information regarding the trust.

However, in principle, trusts should be in some or other manner feature in redistribution claims in divorces.

It is worthwhile to look at English law in regard to how trusts should be dealt with. The interests in a trust, whether as beneficial owner (a trustee or beneficiary) or not should be disclosed up front in the summons and the plea and counterclaim.

The financial disclosures should be confidential (as spouses often do not want to disclose financial information publicly), and some arrangements would have to be made in this regard, perhaps in the Statute to say, for example, that this information may not be disseminated to third-parties other than for the purpose of litigation and experts.

Ad Paragraph 2 – Career assets as property (Paragraphs 9.92, 9.93 and 9.94)

This is a very difficult question. These career assets should be taken into account. The future position is uncertain – a person may die, lose employment, the employer or entity may be bankrupted, all sorts of intervening factors may occur.

A redistribution claim and/or a personal maintenance claim should take care of the concerns raised in this paragraph. There should certainly not be a value placed on career assets as property.

Ad Paragraph 3 – Special provisions on a distribution of family homes (Paragraphs 9.124 and 9.125)

The family home should not be treated distinctly as a separate issue from a general redistribution claim in the discretion of a court. It should be a factor that is taken into account when a redistribution order is made, or agreement is reached.

One has to be realistic as well and look at affordability and what orders may be possible. Often the family home is very heavily geared and there is a limited income stream which then has to be split between two households. The best interests of the children have to be considered, but unfortunately one has to look at a wholistic picture at what is affordable in the circumstances.

Ad Paragraph 4 – Pensions

It is agreed that all state owned, or public sector retirements funds, must be taken into account. The issue of the living annuity needs to be dealt with as a capital asset and the calculation thereof should be legislated (such as for example an actuarial calculation). There should be a duty of disclosure. It is agreed that the pension benefit should not be realised once divorce proceedings are in process. The problem with the member spouse notifying the pension fund administrator is, that this may not happen – shouldn't the member spouse be forced to disclose it immediately and then both spouses can notify the pension fund administrator.

Ad Paragraph 5 – Settlement agreements (Paragraphs 9.219, 9.220, 9.221 and 9.222)

It is submitted that the court should continue to make settlement agreements and parenting plans orders of court, subject to the usual court rules and directives.

It is difficult to provide a certificate of independent legal advice, when parties cannot afford legal advice or don't obtain legal advice. Often settlement are mediated. Affordability is certainly an issue.

The court may scrutinise the document but should not interfere in the agreement the parties have reached, unless it affects the best interests of children or there is fraud or misrepresentation. Full financial disclosure should have been made.

C. COMMENTS ON TRUSTS AND LIVING ANNUITIES

Living annuities

Consideration should be given to achieving certainty where living annuities are concerned, for example, whether to reflect these as a capital asset or an income stream, and if a capital asset, how the value is to be calculated for purposes of divorce, whether legislative regulation should allow for splitting of the contractual right to the guaranteed income stream and what should happen upon death. It is problematic when a spouse dies and only the death benefits are available thus undermining the proprietary claims of a spouse on death. Where the annuity is a significant asset in the deceased spouse's estate, the surviving spouse is prejudiced if they are not the named beneficiary of the death benefits of the annuity or compelled to share with named beneficiaries. It will result in a delay in the death benefits being paid out until the estate

is wound up, but against the possible prejudice to a surviving spouse, the suspension may be warranted.

Trusts

Notice should also be taken of the unequal playing fields and discriminatory power relationships when parties enter into a trust during the marriage relationship. Similar to the situation when entering into an antenuptial contract as referred to in a recent Constitutional Court case often spouses are left with little choice but to agree to the creation of a trust where they are the trustees and beneficiaries as well. However, they have very little input in the trust and are often asked to sign resolutions and/or minutes without having been at a formal meeting and without having been informed of the content of such a meeting. So although they are aware that there is a trust, they have no knowledge of the assets held by the trust, the administration of the trust, and the exercise of the trustees discretion.

The other anomaly is a trust that has been funded by third party loans and is therefore a self-funding trust but which grows exponentially during the course of the marriage. These self-funding trusts, although not funded from monies earned in the marriage, if these trusts did not exist, the spouse would have lent money and would have developed these assets into successful growth. The fact that the spouse did not fund the assets in the trust should not be an exclusionary consideration.

D. DIVERSE PERSPECTIVES FROM THE LAW SOCIETY OF SOUTH AFRICA'S FAMILY LAW COMMITTEE

Comments arising from the Law Society of South Africa's Family Law Committee:-

1. Certain members were of the view that the redistribution claims should not be made retrospective or that a 24-month period should be given in which the automatic application of the distribution claim should be dealt with, and possibly an opt out consideration should be applicable.
2. Concerns were expressed regarding the rules of contract law and the over-riding discretion of a court perhaps nullifying the contractual freedom of parties. This goes back to 1984, when an automatic Section 7 (3) claim was introduced retrospectively to all marriages out of community of property.
3. Regarding unmarried partnerships, a view was expressed that parties should be able to opt out of the overriding discretion. The question remains whether the court should retain the overriding discretion using the opt out contract as a factor to be taken into account. It was discussed that each case should be treated on merit.
4. One view was that the contract should take precedence and only if breached, then the discretion should apply.
5. As far as foreign marriages were concerned, there was a view that the domicile or residency of the parties at time of dissolution of the marriage should be taken into account and dictate the marriage regime. There was another view that perhaps the country where the marriage was concluded should be determinative in regard to the marriage regime that should apply.

6. If a marriage regime was chosen in terms of the contract at date of marriage, a view was that this regime should apply and should be considered to be applicable by the court upon dissolution.
7. As far as a default situation in regard to South African marriages is concerned, there was a view that there should perhaps be an out of community of property regime with accrual, but with an opt out provision.
8. As far as postnuptial contracts were concerned, it was discussed that creditors should get notice and that the postnuptial contract will be binding on creditors, if they have received notice.
9. As far as a life partnership is concerned, there were various views. The concern was that, although there should be recognition of partnerships, it should not be over-regulated. One view was that there should not be protective relationships outside the regimes of marriage or civil unions.
10. As far as monogamous marriages are concerned, certain participants were of the view that the marriage default position should still be in community of property.
11. The difference between Muslim and Hindu relationships were pointed out.
12. There was a discussion as to whether religions marriages should be registered in terms of civil law. As far as religious marriages were concerned, certain of the members thought that option 1 should be given effect to.
13. As far as monogamous marriages are concerned, again a concern with over-regulation was raised. There was however consensus that all the relationships should be treated in a fair manner and that there should be fair and equitable outcomes upon dissolution.

14. Concerns were expressed at the different treatment of relationships in the issue paper.
15. As far as unmarried life partnerships are concerned, there was a divergence of opinion, with certain members of the view that there should not be automatic consequences and others that there should be automatic consequences, subject to certain factors being taken into account. There was agreement that the default position should not be 50/50.
16. As far the family home was concerned, the consensus was that it should be taken into account as part of a party's assets and liabilities and not be treated differently or specially.
17. As far as settlement agreements are concerned, it was reiterated that the parties should have autonomy and there should not be a certificate as proposed.
18. As far as career assets are concerned, it was pointed out that there should be a clear distinction between proprietary and maintenance claims that future income should not be treated as a career asset.

ANNEXURE A

POSSIBLE BASES FOR CLAIM AGAINST TRUST PROPERTY IN THE CONTEXT OF DIVORCE

1 Introduction

The English concept of the trust was received into the South African common law by common usage after the British occupation of the Cape.¹ Although now partially regulated by the Trust Property Control Act 57 of 1988 (“the TPCA”), much of the law in this area is based on English and Roman Dutch rules, as developed by the South African courts to take on a distinct South African form.² In line with the English law, a South African trust is a legal relationship created by agreement between the founder and one or more trustees.

Since a trust has no separate legal personality, ownership of trust assets vests in the trustee/s in an official capacity. The assets placed in trust and held in such capacity do not form part of the personal estate/s of the trustee/s. Trustees, generally responsible for managing the trust assets in the interests of the beneficiaries, do not have beneficial ownership, unless one or more trustees are also beneficiaries of the trust.³ The default position is that trust property “does not form part of the personal estate of the trustee, except in so far as he or she, as trust beneficiary, is entitled to the trust property”.⁴ Trusts thus generally exist separately from the founder, trustees and beneficiaries,⁵ subject to exceptions arising either where the trust form is abused, or where a court may – in specific circumstances – be empowered by a statutory provision to order a redistribution of trust assets.⁶

Where trusts are involved in divorce litigation involving matrimonial claims, the issue that arises is “whether assets held in trust should be included or excluded for the purpose of determining the estate of a party”.⁷ This note will consider the narrow issue of how the South African law deals with trusts when divorce is filed in so far as trust assets may be taken into consideration for determining maintenance obligations and accrual calculations. As a general rule, “if a trust has been properly formed (i.e. it is a valid trust and not a sham), then it is likely that none of the trust assets will form part of any divorce settlement or court order, and the assets will continue to be uninterruptedly held in trust”.⁸

There are broadly three instances where trust assets may be sought to be included in a claim brought by a spouse in this context. The first is where circumstances indicate that the trust was in fact⁹ a “sham”, in which case a valid trust will accordingly be found to have never come into

¹ Edwin Cameron et al *Honoré’s South African Law of Trusts* 5ed (2002) at 2.

² Edwin Cameron et al *Honoré’s South African Law of Trusts* 5ed (2002) at 2.

³ There are only two types of trust recognised in South African law, set out in s 1 of the Trust Property Control Act 57 of 1988, where “trust” is defined as “the arrangement through which the ownership of property of one person is by virtue of a trust instrument made over or bequeathed [either] (a) to another person, the trustee, in whole or in part [or] (b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, [in both cases] to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument for the achievement of the object stated in the trust instrument”.

⁴ *PAF v SCF* 2022 (6) SA 162 (SCA); Trust Property Control Act 57 of 1988, s 12.

⁵ Walter D Geach *Trust Law in South Africa* (2017) at 441.

⁶ Walter D Geach *Trust Law in South Africa* (2017) at 441.

⁷ LAWSA 7.2.6.

⁸ Walter D Geach *Trust Law in South Africa* (2017) at 440.

⁹ According to Binns-Ward J in *Van Zyl and Another NNO v Kaye NO & Others* 2014 (4) SA 452 (WCC) at para 19 [check], “[h]olding that a trust is a sham is essentially a finding of fact”.

existence. The second is where a court “pierces the veneer” of a trust, based on company law principles relating to piercing the corporate veil.¹⁰ These two instances give rise to distinct remedies, and ought not to be conflated.¹¹ The third is on the basis of the so-called *Badenhorst* principle, which enables a court to order payment based on the value of assets held in trust by a person with requisite control over the relevant trust(s). The analysis will then conclude with a brief discussion of the Roman Law *actio Pauliana* for the recovery of property alienated in fraud of a creditor.

2 “Sham” trusts

2.1 Nature of sham trusts

A trust that is “a sham” is one that does not exist, and consequently any “trust” assets will in reality not belong to the trust, but to someone else.¹² It has been suggested that this situation arises “when there is an intentional or unintentional omission of an essential element that is required for the formation of a valid trust”.¹³ The statutory definition of “trust” in section 1 of the trust Property Control Act 57 of 1988 “makes it clear that the trust founder must relinquish at least some of his or her control over the property to the trustee, which therefore requires that there must be a separation of ownership (or control) from the enjoyment of the trust benefits so derived”.¹⁴ Absent this essential element, it may be that the founder is in a position to deal with trust assets as if they were his/her own, the trust in effect being utilised as nothing more than an “alter ego” of its founder, this term being used here in a loose sense.

With regard to control, the court in *Van Zyl and Another NNO v Kaye NO & Others*¹⁵ held that it was not cogent in law to conclude that a trust is a sham based on allegations that de facto control was given to Kaye (whose estate was subject to a final order of sequestration) as a result of the trustees failure to discharge their responsibilities.¹⁶ This is because such “maladministration of an asset validly vested in a properly founded trust does not afford a legally cognisable basis to contend that the trust does not exist, or that the asset no longer vests in the duly appointed trustees”.¹⁷ According to Binns-Ward J, the factual inquiry involved in finding a trust to be a sham is whether “the requirements for the establishment of a trust [either] were not met, or . . . the appearance of having met them was in reality a dissimulation”.¹⁸

2.2 “Alter ego” trusts?

Although the term “alter ego” is sometimes used to describe trusts where a person exercises de facto control over trust property and/or deals with such property as though it were his/her own, or vice versa, it should be noted that the use of the term does not in legal reality describe the entity itself, but only the *nature of the control exercised* in respect of the trust assets. That someone is able to use a trust as an alter ego does not imply that the trust is a sham,¹⁹ although

¹⁰ *WT v KT* 2015 (3) SA 574 (SCA) at para 31.

¹¹ *PAF v SCF* 2022 (6) SA 162 (SCA) at para 26.

¹² *M v M* 2017 (3) SA 371 (SCA).

¹³ Walter D Geach *Trust Law in South Africa* (2017) at 443.

¹⁴ *MJ K v II K* [2022] ZASCA 116 at para 32; citing *Land Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA).

¹⁵ 2014 (4) SA 452 (WCC).

¹⁶ Para 18.

¹⁷ Para 18.

¹⁸ Para 19.

¹⁹ *Van Zyl and Another NNO v Kaye NO & Others* 2014 (4) SA 452 (WCC) at para 29.

it may be relevant “evidence to help establish a sham”.²⁰ A so-called “alter ego trust” may also suggest an abuse of the trust form, or simply maladministration of trust assets, the consequences in each depending on the circumstances.²¹

Smith draws a broad distinction between “sham” and “alter ego” trusts, with the latter referring to instances where courts “*may* be empowered” to go behind the trust.²² He says “*may*”, correctly, because going behind the trust requires more than evidence that a trust has taken on an alter ego character (fundamentally, as will be discussed below, it requires a court to establish the requisite degree of abuse). Considering what is said in the paragraph above, relying on *Van Zyl*,²³ it is important to note that the *alter ego* situation does *not* equate (as a sham situation does) to a *juridical basis for taking trust assets into account* for the purposes of patrimonial claims on divorce.

Whereas *Van Zyl* was decided in the Western Cape High Court, in *REM v VM*, the Supreme Court of Appeal found that “[t]he claim that the appellant used these trusts as his alter ego, necessarily involves an acceptance of the valid existence of the trusts”.²⁴ Also relying on *Van Zyl*,²⁵ Smith concludes that, in the circumstances of *REM v VM*, the basis for finding the relevant assets to be included in the respondent’s estate had to be based on proof that “they had never validly been transferred to the trust in the first place, [either] because the trust was a sham or because the transactions were simulated”.²⁶ It is submitted, therefore, that the term “alter ego” when used in a legal sense should properly be associated with the factual situation that arises outside of the context of sham trusts (although it is also, as will be discussed below, not a precondition for the court to take trust assets into account in the divorce context described).

2.3 Basis for finding a sham trust

To determine whether a trust is a sham, the crucial issue is the ascertainment of the founder’s true intention.²⁷ One of the essentials for the formation of a valid trust is “the intention on the

²⁰ *Official Assignee v Wilson* [2008] NZCA 122; [2008] NZLR 45 at para 63-74 (quoted in *Van Zyl* at para 28). The facts in the context of an “alter ego” trust may indicate that there was “no ‘making over’ of trust assets or no obligation imposed on the trustees”, these being essential elements for a trust’s formation, and thus “holding that a trust is a sham is essentially a finding of fact”. Walter D Geach *Trust Law in South Africa* (2017) at 444.

²¹ Walter D Geach *Trust Law in South Africa* (2017) at 441.

²² See Bradley S Smith ‘Perspectives on the juridical basis for taking (the value of) trust assets of alter-ego trusts into account for the purposes of accrual claims at divorce: *REM v VM*’ (2017) 4 *South African Law Journal* 715 at 718-9.

²³ Binns-Ward J states (at para 29) that “[e]ven if it were to be accepted that Kaye administered the Trust without proper regard to his fiduciary duties and in a sense treated it as his ‘alter ego’, that does not, in itself make the trust a sham.”

²⁴ Para 17; the court citing *Van Zyl* para 21, where Binns-Ward J makes use of the term “alter ego” in the context of distinguishing sham trusts from where the court goes behind the trust form. In discussing the latter remedy, he says that “[t]hose cases will generally be manifested by trustees seeking, usually dishonestly, to use their formal non-compliance with the terms of the trust deed opportunistically to evade liability to a third party. Such cases are most likely to present in the context of the absence of the dichotomy between responsibility and interest that constitutes the ‘core idea’ of the legal concept of a trust; in other words, in a context in which the trustees treat the property of the trust as if it were their personal property and use the trust essentially as their *alter ego*...”

²⁵ Para 15.

²⁶ Bradley S Smith ‘Perspectives on the juridical basis for taking (the value of) trust assets of alter-ego trusts into account for the purposes of accrual claims at divorce: *REM v VM*’ (2017) 4 *South African Law Journal* 715 at 719.

²⁷ Bradley S Smith ‘Sham Trusts in South Africa: Times Change, and We Change With Them’ (2019) 136 *South African Law Journal* 550 at 554.

part of the [founder] to create a trust”,²⁸ and this intention may be absent for one of two reasons: Either the founder mistakenly conveyed his intention to be the creation of a trust (where he/she may have intended to create, for example, a partnership),²⁹ or he/she rather – “used only the name and/or form of a trust to gain some or other advantage that the law does not otherwise bestow”.³⁰ In other words, the requirements for validly establishing a trust were not met because the founder has “given it the name or shape of a trust, [but without] the intention to express its true nature, but to disguise it”.³¹

While the latter will lead to a mere dissimulation of trust, the former, involving no nefarious intent, will not result in a sham trust, but instead “effect will simply be given to [the founder’s real] intention, and the parties’ respective rights will be determined accordingly”.³²

2.4 Consequences of sham trusts

Where the creation of a trust was merely a simulation, the founder’s intention being not to create “any particular legal institution”,³³ according to “the principle of ‘substance over form’ . . . the court will give effect to the ‘real character’³⁴ of the arrangement at issue”.³⁵ The consequences are thus that the transaction will have no legal effect, and the ostensible “‘founder’ will remain the owner of the ‘trust assets’ and neither the ‘trustee(s)’, nor the ‘beneficiaries’ will acquire any rights with regard to these assets”.³⁶ Similarly, in certain cases, the facts may lead a court to the conclusion that the trustees acquired property as agents of the their principal.³⁷ The trust will thus be ineffective, and such finding in the context of divorce will mean that the “trust assets” will be taken into account as assets in the spouse’s personal estate because the effect of finding a trust to be a sham would be that the assets had never been transferred out of it.

*Van Zyl v Kaye*³⁸ involved an application by the provisional trustees of an insolvent estate for orders declaring that certain immovable property (or the proceeds from any sale thereof) may be treated as assets in the insolvent estate.³⁹ The applicant sought to disregard the ordinary consequences of the trust form in order “to obtain standing to apply for the setting aside as a

²⁸ *Administrators, Estate Richards v Nichol* 1996 (4) SA 253 (C) at 258D-E, citing Honore and Cameron *South African Law of Trusts* 4th ed at 96 et seq. The others are “(b) the expression by him of that intention in a mode apt to create an obligation; (c) a definition with reasonable certainty of the property subject to the trust; (d) the definition with reasonable certainty of the trust object; and (e) a lawful trust object”.

²⁹ Bradley S Smith ‘Sham Trusts in South Africa: Times Change, and We Change With Them’ (2019) 136 *South African Law Journal* 550 at 555.

³⁰ Marius J de Waal ‘The abuse of the trust (or: “going behind the trust form”): The South African experience with some comparative perspectives’ (2012) 76 *The Rabel Journal of Comparative and International Private Law* 1085 at 1096-7.

³¹ *Van Zyl* para 19; Marius J de Waal ‘The Abuse of the Trust (or: “Going Behind the Trust Form”)’ (2012) 76 *Rabel Journal of Comparative and International Private Law* 1078 at 1084-5.

³² Bradley S Smith ‘Sham Trusts in South Africa: Times Change, and We Change With Them’ (2019) 136 *South African Law Journal* 550 at 554.

³³ Marius J de Waal ‘The abuse of the trust (or: “going behind the trust form”): The South African experience with some comparative perspectives’ (2012) 76 *The Rabel Journal of Comparative and International Private Law* 1085 at 1096-7.

³⁴ *Zandberg v Van Zyl* 1910 AD 302 at 309.

³⁵ Bradley S Smith ‘Sham Trusts in South Africa: Times Change, and We Change With Them’ (2019) 136 *South African Law Journal* 550 at 555.

³⁶ *PAF v SCF* 2022 (6) SA 162 (SCA) at para 26; citing *Van Zyl NO v Kaye NO* paras 16-22.

³⁷ Bradley S Smith ‘Sham Trusts in South Africa: Times Change, and We Change With Them’ (2019) 136 *South African Law Journal* 550 at 555.

³⁸ *Van Zyl and Another NNO v Kaye NO & Others* 2014 (4) SA 452 (WCC).

³⁹ Para 1.

voidable disposition”⁴⁰ a mortgage in respect of a property held in trust. This required the trust property in question “to be regarded as” an asset in Kaye’s personal (insolvent) estate. Although the case did not involve a claim brought in the context of divorce, the case is useful because it distinguishes between the finding of a trust to be a sham (and therefore non-existent) from the situation where the court exercises its common law power⁴¹ to merely “go behind” a valid trust (i.e. disregards or “pierces” its “vener”).⁴²

The court held that the only way in which the object of the application could be achieved was either if the trust was “declared to be non-existent, or by showing that as a matter of fact the property did not vest in the Trust”.⁴³ Binns-Ward J noted that “establishing that a trust is a sham and ‘going behind the trust form’ entail fundamentally different undertakings”⁴⁴ and that “when a trust is a sham, it does not exist and there is nothing to ‘go behind’”,⁴⁵ thus finding that by asking the court to pierce the trust’s veneer, the applicants had “confused and conflated the concepts in their founding papers”.⁴⁶ The Supreme Court of Appeal has expressed approval for the reasoning of Binns-Ward J, stating that:

“Binns-Ward J correctly noted . . . that there is often a conflation of the notion of proving that a trust is a sham (in the sense that it does not really exist) and ‘going behind’ the trust form, where there is a valid trust. The notion of a trust being a sham is premised upon not recognising the trust, whilst the ‘looking behind’ a trust veil implicitly recognises the validity of a trust in the legal sense, but challenges the control of the trust concerned.”⁴⁷

3 *Going behind the trust form (“piercing the veneer”)*

Where a trust has been validly established (and is not a “sham”), it may be that those responsible for administering it do so in a way that enables the founder or beneficiaries to take advantage of the trust form. There is nothing untoward about this, and the courts have recognized the value of trusts for the purposes of creditor protection, estate planning and tax avoidance. Indeed “[p]ersons are generally entitled to organise their financial affairs to maximum advantage without fear of opprobrium”.⁴⁸ It is when the form is abused that the court may disregard its separate existence for specific legal purposes.

3.1 *Nature of the remedy*

When a court “pierces the veneer” of a trust, it goes behind the trust form. This “entails accepting that the trust exists, but disregarding the *ordinary consequences* of its existence”,⁴⁹ the court “exercising a common law power to disregard the trust *for limited purposes* so as to provide a

⁴⁰ *Van Zyl and Another NNO v Kaye NO & Others* 2014 (4) SA 452 (WCC) at para 15.

⁴¹ Para 1.

⁴² citation

⁴³ Para 15.

⁴⁴ Citing, Marius de Waal ‘The Abuse of the Trust (or: “Going Behind the Trust Form”)’ (2012) 76 *Rabel Journal of Comparative and International Private Law* 1078 (available at <http://scholar.sun.ac.za/handle/10019.1/85023>) as giving “an illuminating analysis of the distinction”.

⁴⁵ Para 16.

⁴⁶ Para 16.

⁴⁷ *WT v KT* at para 31 fn 5.

⁴⁸ *DW v DV* 2014 JDR 0544 (GSJ) para 16.

⁴⁹ Walter D Geach *Trust Law in South Africa* (2017) at 444; *Van Zyl and Another NNO v Kaye NO & Others* 2014 (4) SA 452 (WCC) para 21.

remedy to the victim of an ‘unconscionable abuse’⁵⁰ of the trust figure’.⁵¹ Unlike the notion of sham trust, which is premised upon its non-existence, piercing the veneer of a trust “recognizes the validity of a trust in the legal sense, but finds that there may be a justification to disregard the ordinary consequences of its existence for a particular purpose”.⁵² The following description, taken from *Van Zyl*, has been endorsed by the Supreme Court of Appeal:

“Going behind the trust form . . . essentially represents the provision by a court of an equitable remedy . . . that lends itself to a flexible approach to fairly and justly address the consequences of an unconscionable abuse of the trust form in given circumstances. 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.”⁵³

The Supreme Court of Appeal has confirmed that the court’s power to pierce the veneer of a trust (or the so-called “corporate veil” of a company) “is derived from common law and not from any general discretion a court may have”,⁵⁴ and has stated, in the context of accrual determination on divorce, that it “is not based on the authority of the [Matrimonial Property Act] or in the exercise of a statutory discretion”.⁵⁵ Instead, the power arises “on the basis that *a factual inquiry has revealed trust form abuse*, upon which the piercing of the trust veneer follows”.⁵⁶ Whether there has been an abuse, and whether such abuse in any case is sufficiently “unconscionable” will necessarily depend on the factual circumstances. Thus, according to Smith:

“A context-specific approach is adopted that is generally aimed at holding the delinquent trustee(s) to an obligation or liability that they sought to evade by non-compliance with the principles of accepted trust administration.” Such remedial action has thus far been sought in a variety of contexts – and with limited degrees of success . . .”⁵⁷

3.2 What degree of abuse is necessary?

In explaining the nature of the abuse required in the context of trusts, the Supreme Court of Appeal in *M v M*⁵⁸ focused on the fundamental separation between ownership or control, and the enjoyment of the trust benefits emanating from the statutory definition⁵⁹ referred to previously:

“Although the trust form is debased where it ‘is employed not to separate beneficial interest from control, but to permit everything to remain “as before”, though now on terms that privilege those who enjoy benefit as before while simultaneously continuing to exercise control,’⁶⁰ this court has held that these dicta ‘pertaining to the importance of maintaining the functional separation between control (by trustees) and enjoyment (by beneficiaries) in family trusts, are premised upon the interests of third parties who transacted with the trust’.⁶¹ A fiduciary responsibility

⁵⁰ Citing the cases of *REM v VM* 2017 (3) SA 371 (SCA) para 17, read with *RP v DP* 2014 (6) SA 243 (ECP) para 41.

⁵¹ Bradley S Smith ‘Sham Trusts in South Africa: Times Change, and We Change With Them’ (2019) 136 *South African Law Journal* 550 at 555.

⁵² *PAF v SCF* 2022 (6) SA 162 (SCA) at para 26, citing *Van Zyl NO v Kaye NO* paras 16-22.

⁵³ *Van Zyl* at para 22; *WT v KT* at para 31; *REM v VM* at para 17; *PAF v SCF* at para 44; *M v M* 2017 (3) SA 371 (SCA).

⁵⁴ Per Alkema J in *RP v DP and Others* 2014 (6) SA 243 (ECP) at para 31; quoted in *PAF v SCF* at para 34.

⁵⁵ *PAF v SCF* 2022 (6) SA 162 (SCA) at 36.

⁵⁶ *PAF v SCF* 2022 (6) SA 162 (SCA) at 36. Emphasis added.

⁵⁷ Bradley S Smith ‘Sham Trusts in South Africa: Times Change, and We Change With Them’ (2019) 136 *South African Law Journal* 550 at 555.

⁵⁸ 2017 (3) SA 371 (SCA).

⁵⁹ Trust Property Control Act, s 1.

⁶⁰ *Land and Agricultural Bank of South Africa v Parker & others* 2005 (2) SA 77 (SCA) para 26.

⁶¹ *WT & others v KT* [2015] ZASCA 9; 2015 (3) SA 574 (SCA) para 33.

would be owed by the trustees to third parties who transacted with the trust, as well as beneficiaries of the trust.⁶² If the trust form is ‘debased’ in this sense, justice dictates ‘that the veneer of the trust be pierced in the interests of creditors’ and ‘[b]y analogous reasoning, unconscionable abuse of the trust form through fraud, dishonesty or an improper purpose will justify looking behind the trust form’.⁶³

In finding that the assets of the trusts in question were not to be taken into account for the purposes of determining estate accrual, the court in *M v M* required appeared to require a fairly significant degree of abuse. A key element of what was required is a fraudulent or dishonest purpose underling the above. The court explained as follows:

“Although the appellant administered the trusts with very little regard for his fiduciary duties as a trustee and without proper regard for the essential dichotomy of control and enjoyment essential to the nature of a trust and although such conduct may have justified his removal as a trustee, or the appointment by the Master of an independent co-trustee . . . , the evidence did not prove that he transferred personal assets to these trusts and dealt with them as if they were assets of these trusts, with the fraudulent or dishonest purpose of avoiding his obligation to properly account to the respondent for the accrual of his estate. In addition it was not established that the transfer of assets to these trusts by the appellant was simulated with the object of cloaking them with the form and appearance of assets of the trusts, whilst in reality retaining ownership.”⁶⁴

A court will “in appropriate cases ensure that the trust form is not abused”,⁶⁵ and will not tolerate abuse of the trust form in cases where the it used to “protect the trustees against fraud and dishonesty and to raise unscrupulous defences against bona fide third parties seeking to enforce the performance of contractual obligations”.⁶⁶ Remembering that piercing the veneer is an equitable remedy, the court’s power to do so “may have to be invoked to ensure that trusts function in accordance with principles of business efficacy, sound commercial accountability and the reasonable expectations of outsiders who deal with them.”⁶⁷

3.3 “*Alter ego*” trusts

Whereas sham trusts are determined with reference to the founder’s intention at the time of establishing the trust, what may be described as “alter ego behaviour” necessarily arises subsequently. Academic commentary may seem to equate the veneer piercing situation with alter ego trusts,⁶⁸ which is likely because of the general distinction that can be drawn based on intention and subsequent behaviour in relation to the trust (as discussed under this heading in relation to sham trusts).

⁶² Ibid para 32.

⁶³ *M v M* 2017 (3) SA 371 (SCA) para 19. Footnotes appear in original.

⁶⁴ *M v M* 2017 (3) SA 371 (SCA) at para 20. Emphasis added.

⁶⁵ *Land and Agricultural Development Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) at para 37, where Cameron JA went on to say 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”, citing *Braun v Blann and Botha NNO and another* 1984 (2) SA 850 (A) 859F-G, per Joubert JA.

⁶⁶ *Van der Merwe NO and Others v Hydraberg Hydraulics CC and Others, Van der Merwe NO and Others v Bosman and Others* 2010 (5) SA 555 (WC) at para 38.

⁶⁷ *Land and Agricultural Development Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) at para 34.

⁶⁸ See, for example LAWSA 7.2.6.4 and Bradley S Smith ‘Perspectives on the juridical basis for taking (the value of) trust assets of alter-ego trusts into account for the purposes of accrual claims at divorce: *REM v VM*’ (2017) 4 *South African Law Journal* 715 at 718.

In the context of an alter ego trust, understood as being necessarily distinct from a sham trust, it is submitted that going behind the trust is not the *only* juridical basis to take trust assets into account for the purposes of patrimonial claims on divorce: the *Badenhorst* principle (discussed below) appears to operate without the court needing to go behind the trust, although it may be that the principle applies only in relation to alter ego trusts. Moreover, considering that abuse of the trust form (forming a basis for a court go behind it) may not necessarily imply alter ego behaviour, it is submitted that the “alter ego” description is unhelpful and potentially confusing when used to refer to situations where the veneer is pierced.

3.4 Effect of piercing – comparison veil piercing

A question that arises is what the practical effect of the piercing of the veneer is – i.e. does property deemed to fall into the estate of a spouse become executable vis-à-vis all of the estate’s creditors or only for the purpose of the matrimonial claim at issue.

Considering that the legal principles pertaining to piercing the veneer of a trust “have in essence been transplanted from the arena of ‘piercing the corporate veil’ [in company law]”⁶⁹ the underlying policy considerations and common law principles (and difficulties in formulating clear rules) corporate veil piercing are unsurprisingly similar,⁷⁰ notwithstanding the fundamental differences arising from a company having separate legal existence. The Supreme Court of Appeal has suggested that the essence of what is required for a court to invoke its power to pierce the veil of a company is that “there must at least be some misuse or abuse of the *distinction between the corporate entity and those who control it which results in an unfair advantage being afforded to the latter*”.⁷¹

It appears from the case law that the use of the trust form to evade an obligation, whether relating to accrual or maintenance, will generally be sufficient for the court to pierce the veneer of the trust to similarly prevent abuse of the *form* of the trust that is considered to be unconscionable. Analysis has also referred to preventing the perpetrator(s) of abuse from obtaining an unfair advantage, while is congruent with the approach taken to piercing the corporate veil.⁷²

In the case of a trust, the policy consideration that separate legal personality should be protected, which weighs against piercing, does not weigh as heavily, and therefore it is submitted that the degree of abuse necessary to warrant piercing the veneer of a trust ought to be lower than piercing the corporate veil.⁷³

⁶⁹ *WT v KT* 2015 (3) SA 574 (SCA) para 31.

⁷⁰ See, for example, *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A).

⁷¹ *Hülse-Reutter v Gödde* 2001 (4) SA 1336 (SCA) at para 20. Emphasis added.

⁷² In company law, although the terms are often used interchangeably, a distinction is sometimes drawn between “piercing” and “lifting” the corporate veil – i.e. between where “the rights or liabilities or activities of a company” are treated as those of the shareholders (“piercing” the veil) and where the court “[has] regard to the shareholding in a company for some legal purpose” (“lifting” the veil, or looking behind it). *Atlas Marine Co SA v Avalon Maritime Ltd* [1991] 2 All ER 769 (HL) at 779. See also Cassim (ed) *Contemporary Company Law* 2ed (2018) at 46-47.

⁷³ In *Van der Merwe NO and Others v Hydraberg Hydraulics CC and Others, Van der Merwe NO and Others v Bosman and Others* 2010 (5) SA 555 (WC) at para 38, Binns-Ward J notes that “[t]he weight of the policy considerations arising from the need to respect corporate or juristic personality that make piercing the corporate veil a rare event is less, I venture, in the matter of disregarding the form of an example of the ‘newer type of trust’. In the latter type of case no question of disregarding juristic personality presents. On the contrary the issue in such cases of abuse of the trust form is whether or not it would be conscionable for a court to give credence to a natural person’s disguise of him or herself as a trustee of what is in reality treated by such person as his or her own property.”

The case law on piercing the veneer (in relation to trusts), particularly in so far as divorce matters are concerned, deals with situations where the court is being asked to take trust assets into account, deeming them *for specific purposes* to be the assets of someone else. When the veneer is pierced, the court inevitably seems to go behind the trust for the purposes of considering the assets in question, which in turn is done in order to legally justify a fair and just substantive order so that the abuse of the form does not result in an unfair advantage to the perpetrator.

When the corporate veil is pierced, a company may be treated as though it does not have separate existence. The effect of an order of court that pierces the veil, however, does so only for the particular transaction in question,⁷⁴ and it is submitted that the same would be the case when a court pierces the veneer of a trust.

4 The *Badenhorst* principle (“control test”)

4.1 Circumstances in which the remedy is available

There has emerged in the case law a “control test” to determine “whether assets should be taken into account when determining the patrimonial consequences of a marriage”.⁷⁵ The “test” was formulated by the Supreme Court of Appeal in *Badenhorst v Badenhorst*⁷⁶ before the coming into force of the Matrimonial Property Act 88 of 1984, which introduced the accrual system.

The test sets out, as a precondition “[t]o succeed in a claim that trust assets be included in the estate of one of the parties to a marriage”, that two requirements are met – viz. “[1] there needs to be evidence that such party [exercised *de facto* control over] the trust and [2] but for the trust would have acquired and owned the assets in his own name”.⁷⁷ Emphasis is on *de facto* control rather than *de jure* control, and “[t]o determine whether a party has such control, it is necessary to first have regard to the terms of the trust deed, and secondly to consider the evidence of how the affairs of the trust were conducted during the marriage”.⁷⁸ Where the test is satisfied, therefore, this will constitute a sufficient condition for taking trust assets into account in a determination of the proprietary consequences of a marriage, but not a necessary one.

It is submitted that the *Badenhorst* principle (or “control test”) laid down is essentially a test applied in the exercise of the court’s discretion to order an equitable distribution on divorce where spouses had not (and indeed could not have) agreed to subject their marriages to accrual. As such, this discretion was necessary to give effect to the same purpose that the accrual system gives effect to since the coming into force of the Matrimonial Property Act 88 of 1984. In relation to marriages concluded subsequent to this, it is no longer necessary. As will be clear from what follows, trust property may be taken into account for the purposes of accrual calculations, but this must be done on the basis of piercing the veneer of the trust.

4.2 Does application of the principle require the court to go behind the trust in question?

It is noteworthy that the test was not formulated in terms of piercing of the relevant trust’s veneer, which raises the question of how these two doctrines relate. In *MJ K v II K*, the Supreme Court of Appeal seems to confirm that the remedy provided by an application of *Badenhorst* principle

⁷⁴ Find case reference?

⁷⁵ *PAF v SCF* 2022 (6) SA 162 (SCA) at para 41.

⁷⁶ 2006 (2) SA 255 (SCA).

⁷⁷ *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA) para 9.

⁷⁸ *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA) para 9.

is entirely distinct from that which involves going behind the trust and any order pursuant to that. If the *Badenhorst* principle were to be treated as being an instance of veneer piercing,⁷⁹ conceptual difficulties arise, which is why van der Linde has opined that “[i]t is questionable whether [*Badenhorst*⁸⁰] can be used to say that *equity in general* is to be seen as the reason for piercing the veneer of the trust in [applications other than those dealing with distribution orders]”, noting that one must be mindful of the distinction between matters involving trusts generally, and “divorce matters where the possibility of redistribution orders . . . is specifically addressed by legislation”.⁸¹

Meeting the requirements of the *Badenhorst* “control test” entitles a party married before having the option of being married with accrual, and applying for a just and equitable distribution of assets in terms of s 7(3) of the Divorce Act⁸² to have the court take assets belonging to a trust into account when making a just and equitable order,⁸³ in the sense that the court was “justified adding the value of the [trust’s] assets to Mr Badenhorst’s estate for the purposes of assessing the extent of the redistribution order”.⁸⁴ Piercing the veneer of a trust, on the other hand, entails the court going behind a trust to *deem* certain amounts *to be part of* a party’s individual estate. A proper reading of the judgment thus makes it clear that the court did not find “that the relevant assets vested in the estate of one of the parties, but merely considered the fact that he used the trust as his alter ego as one of the factors which the court is entitled to take into consideration . . . for the purposes of determining the quantum of the transfer of assets. . .”.⁸⁵

4.3 Scope for application of principle

In *Badenhorst*, the appellant alleged that the trust in question was the “alter ego” of the respondent, and although the court below expressly disagreed with this contention, the appeal court did not use the term at all, but found the case to be “a classic instance of the one party . . . having full control of the assets of the trust and using the trust as a vehicle for his business activities”.⁸⁶ The judgment confirmed that the court, in determining a just and equitable distribution in terms of s 7(3), a *factor* that could be taken into account was that “certain substantial assets were held in trust by one of the parties who used such trust as his ‘alter ego’”.⁸⁷

It is important to emphasise that, as the Supreme Court of Appeal has pointed out, the *Badenhorst* principle was formulated in relation to a redistribution order in terms of s 7(3) of the Divorce

⁷⁹ Mabusa J, in the unreported judgment of *First Rand Limited trading inter alia as First National Bank v Britz and Others* (54742/09) [2011] ZAGPPHC 119 (20 July 2011) at para 69 held that “[i]t is as clear as crystal from the authorities of *Badenhorst Jordan v Badenhorst* and *Jordan v. Jordan* [*sic*] supra that where the founder of the trust has completely disregarded the basic principal [*sic*] of the trust, in the name of equity, a court is entitled to know the trust as separate entity and declare that the trust assets must be seen as part of the personal assets of the founder.” (emphasis added). It is respectfully submitted that this is not necessarily correct if veneer piercing is a distinct remedy from going behind the trust.

⁸⁰ *Jordaan*

⁸¹ Anton van der Linde ‘Debasement of the core idea of a trust and the need to protect third parties’ (2012) 75 *THRHR* 371 at 379; referring to ss 7(3), 7(4), 7(5) and 7(6) of the Divorce Act.

⁸² 70 of 1979.

⁸³ As was the case in *Badenhorst*, by having the total net asset value of a trust added to that of the parties individual estates when calculating a percentage that is appropriate in the circumstances See para 16.

⁸⁴ **FIND REFERENCE – SMITH/ BINNS-WARD**

⁸⁵ LAWSA 7.2.6.4.

⁸⁶ *Badenhorst* at para 10. The overwhelming majority of the trust’s activities were commercial in nature (see para 4(d)-(e)).

⁸⁷ LAWSA 7.2.6.; the author referring to *Jordaan v Jordaan* 2001 (3) SA 288 (C), which followed *Badenhorst* (see *Badenhorst* para 12).

Act before the accrual system was introduced into law,⁸⁸ and thus was created in the context of a court exercising its discretion to award a just and equitable share to a spouse of a marriage out of community of property, not subject to an accrual calculation on divorce.

The Supreme Court of Appeal has recently, in *obiter*, expressed the view that “there is no reason to confine this broad test” so as to exclude marriages subject to the accrual system, and aligned itself with the view that the test is applicable more broadly.⁸⁹ The authors of LAWSA, prior to this judgment took the view that “[t]he court has no similar discretion vested in it . . . to consider trust assets in determining the accrual, and the issue remains . . . whether or not such assets are *de facto* part of one of the estates to be determined for the purposes of an accrual claim”.⁹⁰ It is submitted that the latter view is preferable considering that the court no longer has a discretion to award an equitable distribution of assets, and the principle was essentially formulated as a test for the exercise of that discretion. The appropriate remedy in equity is available distinctly from the *Badenhorst* principle in the form of piercing the veneer of the trust, which must be resorted to in respect of marriages concluded after the coming into effect of Matrimonial Property Act 88 of 1984. The Supreme Court of Appeal, in *MJ K v II K*,⁹¹ suggests that application of the *Badenhorst* principle should be restricted to circumstances where parties were married without having the option of accrual, finding the court below’s reliance on *Badenhorst* to be misplaced:

“The issue in *Badenhorst* concerned a just and equitable distribution of assets in terms of s 7(3) of the Divorce Act 70 of 1979. The parties there were married out of community of property before the Matrimonial Property Act was enacted, and their marriage was therefore not subject to the accrual system.”⁹²

It therefore appears as though the *Badenhorst* principle was formulated to grant equitable relief in terms of a discretion that previously existed, which discretion has now been removed and replaced with the accrual system, which gives effect to the same equitable purpose. Spouses to marriages concluded after the coming into effect of the Matrimonial Property Act have the option of ensuring an equitable distribution generally in terms of the accrual system, and in so far as trusts may be concerned, in terms of the remedy of piercing the veneer.

5 *The actio Pauliana*

The *actio Pauliana* is a Roman law remedy applied in the context of fraud on creditors generally, where “the debtor had impoverished himself to the detriment of his creditors, e.g. by alienations, by incurring liabilities or allowing rights to lapse, but not for failing to acquire or paying just

⁸⁸ *MJ K v II K* (360/2021) [2022] ZASCA 116 para 35.

⁸⁹ *PAF v SCF* 2022 (6) SA 162 (SCA) at para 42. Although it may seem from a reading of the judgment in the subsequent decision of *MJ K v II K* [2022] ZASCA 116 (para 35 in particular) that the court preferred a narrow scope of application for the precedent set by *Badenhorst*, it is submitted that the reason for the court’s view that the high court had erred was that

⁹⁰ LAWSA 7.2.6.4. It should be noted that the authors of LAWSA appear, based on *WT and Others v KT* 2015 (3) SA 574 (SCA) to draw a simple distinction between sham trusts on the one hand, and “alter ego” trusts on the other, without reference to the doctrine of piercing the veneer. The author continues: “For such purpose, a specific declaratory order that the trust is a ‘sham’ and that the trust assets *de facto* vests in the estate of one of the parties must be sought and proved”, which cannot be correct if courts have been alive to the possibility of deeming assets to fall into individual estates by piercing a trust’s veneer. The authors seem to suggest that (in relation to considering whether a trust is a sham) the true ownership of assets can be determined by piercing the *corporate veil*, which appears to be misplaced.

⁹¹ *MJ K v II K* [2022] ZASCA 116

⁹² Para 35. This paragraph also seems to suggest that the *Badenhorst* principle only finds application where the court has *not* pierced the veneer to provide equitable relief in terms of that remedy.

debts”.⁹³ The remedy would be available in the context of a transfer of assets is made into trust by a spouse “with the intention of defrauding a marriage partner or his or her potential matrimonial claims in an impending divorce action”.⁹⁴

The action arises “where the fraudulent alienation has been made with the knowledge of the person to whom the alienation has been made, that is to say, where the latter has shared in the fraud.”⁹⁵ According to Harms, however, a creditor is able to recover property in terms of this common law remedy, even “from a person [not party to the fraud] who has acquired the property gratuitously or without proper consideration from someone who alienated it in fraud of the creditor”.⁹⁶

Being for the recovery of property, the *actio Pauliana* is distinguishable from remedies that enable trust assets to be *deemed* the assets of another, or *taken into account* for some purpose. The *actio* is therefore beyond the stated scope of this paper, but may be used to the same effect as the other remedies discussed where property, for example, is transferred to a trust for the purposes of defeating an accrual claim. In *PAF v SCF*, it was held that:

“Although the accrual claim only arises at the dissolution of the marriage, both spouses acquire a protectable contingent right against each other during the subsistence of the marriage, which the law will protect in circumstances of irregularity and a lack of bona fides. Thus upon vesting of such right, there is a legal obligation on both spouses to satisfy the accrual claim (and hence to share their respective gains) at the dissolution of their marriage.”⁹⁷

Thus, a spouse who transfers property to a trust to defeat an accrual claim on divorce, alienates such property to a third party in fraud of the other spouse’s contingent claim to share in the accrual, and would appear to meet the requirements for a claim under the *actio Pauliana*.

6 Conclusion

<<to be revisited once note is finalized?>>

In circumstances where assets have been placed in trust with the fraudulent intention of defeating a spouse’s claim, there appear to be two possible bases for these assets being taken into account, depending on when that intention manifested. If the trust was conceived in fraud, the “trust” assets, as a matter of fact, fall into the relevant spouse’s personal estate. This may be the case because assets ostensible placed in trust were transferred in terms of a simulated transaction without the genuine intention to cause a trust to be created. A finding of this nature will mean that the assets in question will for all purposes be treated as the assets of the relevant spouse, including accrual or maintenance calculations. Where the fraudulent intent only arose at the time of transferring assets, a spouse may be able to bring a claim, as a creditor of the personal estate, under the *actio Pauliana* to recover those assets placed in trust to which he/she has a legal right.

⁹³ WW Buckland and P Stein *A Text-book of Roman Law* 3ed (1966) 596.

⁹⁴ As would “the validity of the trust may be suspect due to the lack of *bona fides* on the part of the settler”. LAWSA 7.2.6.4, heading (ii)B.

⁹⁵ See, for example, *Visser v Hull and Others* 2010 (1) SA 521 (WCC) at para 13.

⁹⁶ LTC Harms *Amler’s Precedents of Pleadings* 9ed (2018) 22, citing *Commissioner of Customs & Excise v Bank of Lisbon International Ltd* 1994 (1) SA 205 (N) at 210C-D, *Kommissaris van Binnelandse Inkomste v Willers* 1999 (3) SA 19 (SCA), and *Commissioner, SA Revenue Service v Absa Bank Ltd* 2003 (2) SA 96 (W),

⁹⁷ *PAF v SCF* 2022 (6) SA 162 (SCA) at para 35.

Where there is a valid trust, trust assets may also be taken into account by disregarding the separate existence of the trust in the context of the trust form being abused, or (without needing to disregard the separate existence) where the *Badenhorst* principle finds application. Although fraud is not a legal requirement in either of these instances, fraudulent intent will likely be relevant to establishing the requisite abuse in the former case. If the court finds there to have been unconscionable abuse of the trust form such that forms a basis for it to invoke its common law power to pierce the veneer of the trust, it may go behind the trust form and deem certain trust assets to be a part of the relevant spouse's personal estate. It will do so where the trust form is intentionally being employed in a dishonest or unconscionable manner to evade a liability, or avoid an obligation. The effect of such "deeming" is restricted to the purposes of the order, which will generally be for calculating the relevant patrimonial claim.

In the context of a marriage concluded before 1984 (when the accrual system came into effect), where a trust over which the relevant spouse is in *de facto* control of trust assets (such that may enable him/her to utilize the trust as an alter ego), if those assets would have – but for the trust – fallen into the relevant spouse's personal estate, the court is empowered to take such assets into account based on the *Badenhorst* principle. Although there appears to be confusion in the case law about whether this principle has a broader application in the context of patrimonial claims on divorce more generally, it is submitted that since the court no longer has discretion in awarding an equitable distribution on divorce, and therefore this principle cannot apply.