WHETHER TRUST ASSETS FORM PART OF THE JOINT ESTATE OF PARTIES MARRIED IN COMMUNITY OF PROPERTY: COMMENTS ON "PIERCING OF THE VENEER" OF A TRUST IN DIVORCE PROCEEDINGS

***WT v KT* 2015 3 SA 573 (SCA)**

OPSOMMING

Ondersoek na die vraag of trustbates deel vorm van die gemeenskaplike boedel van partye getroud binne gemeenskap van goed: Opmerkinge aangaande "die lig van die sluier van die trust" in egskeidingsverrigtinge

Vroeër is daar reeds gewys op die ondergrawing van die basiese trust-idee in die administrasie van sommige trusts en die behoefte om derde partye te beskerm (*Nieuwoudt v Vrystaat Mielies (Edms) Bpk*). Dit wil voorkom asof daar weinig, indien enige, gevalle die afgelope tien jaar voorgekom het waar die "sluier van die trust" in effek onder sodanige omstandighede gelig is (*Van Zyl v Kaye*). Die Hoogste Hof van Appèl het nou in *WT v KT* vermelde remedie verder beperk, gesien die feite en omstandighede van die spesifieke geval. Hierdie en ander beslissings in die onlangse verlede, veral in egskeidingsaangeleenthede, word kortliks onder die loep genoem. Enkele voorstelle word aan die hand gedoen.

1 Introduction

In *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* 2004 3 SA 486 (SCA) para 17, Harms JA drew attention to the so-called "newer" type of trust. This occurs where someone, for estate planning purposes or to escape the constraints imposed by corporate law, forms a trust "while everything else remains as before". This was said in the context of one trustee not obtaining the authorisation or approval of his co-trustee(s) to act and proceeding to sign a contract with *outsiders* in a scenario where the founder/trustee and other trustee(s) were also the only beneficiaries. The "core idea" of the trust, namely, separation between ownership (control) and enjoyment is debased, because the trust form 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 benefits as before while simultaneously continuing to exercise control (*Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) para 26). In *Nieuwoudt*, Harms JA remarked (para 24) that this case should (because of the uncertainty as to whether the so-called *Turquand* rule should be applicable to trusts) "serve as a warning to everyone who deals with a trust to be careful". Similarly, the court noted in *Parker* that if the trust form is "debased", justice would dictate that the veneer of the trust be pierced in the interests of "creditors" (paras 37.1–37.3). Yet, exactly ten years later, Binns-Ward J in *Van Zyl v Kaye* 2014 4 SA 452 (WCC) para 23 came to the following startling, though valid, conclusion (see *Van der Merwe v Hydraberg Hydraulics CC* 2010 5 SA 555 (WCC); see also the list of cases in this regard in Van der Linde "Debasement of the core idea of the trust and the need to protect third parties" 2012 *THRHR* 371 fn 2; see, however, arguably, *Nedbank Ltd v Thorpe* [2008] JOL 2 2675 (N) and *RP v DP* 2014 6 SA 243 (ECP) paras 33 37): "I am not aware of any matter in

which a South African court has yet 'pierced the veneer' of a trust or gone behind it, although the court came close to doing so in *Van der Merwe*."

In *WT v KT* 2015 3 SA 573 (SCA) the Supreme Court of Appeal has now also limited (and to some extent excluded) "piercing of the veneer of a trust" as remedy in divorce proceedings. The question was whether or not assets of a discretionary family trust created before the parties got married could be regarded as part of the *assets* of the joint estate of parties married in community of property. The order by the court *a qu*o that the joint estate included the *assets of the trust* and that they were in fact the husband's personal assets (and accordingly formed part of the joint estate) was overruled and set aside on appeal.

2 Facts

WT (husband) who was married to KT (wife) in community of property in 2001, instituted action for a divorce. KT did not oppose the action, but filed a counter-claim relating to the extent of the assets of their joint estate. She submitted that assets of a trust established in 1999 formed part of the joint estate. She contended, firstly, that the husband made false representations to her that *inter alia*, the purchase of a dwelling was merely registered in the name of the trust to protect it from creditors and that both of them would be beneficiaries. Secondly, she averred that the trust was the alter ego of the husband, taking into account that *de facto* he controlled the trust having regard to the terms of the trust deed and the manner in which the affairs of the trust were conducted. But for the trust, the husband would have acquired and owned the assets of the trust. The trust was created by the husband's father, with the husband and his brother as trustees. The beneficiaries of the trust were children still to be born, something that was not even contemplated by the parties. It was amended at a later stage to include children of the brother. Some five years after meeting and two years after the property was acquired by the trust, the parties were married in community of property. After looking at the facts and circumstances, all the evidence indicated that for all intents and purposes, the husband's brother was supine in relation to the affairs of the trust and the trust was managed exclusively by the husband at all relevant times (para 20) an aspect that was for the sake of argument accepted by the Supreme Court of Appeal (para 32). (For a detailed discussion of the facts, see paras 2–22.) By all accounts the joint estate, controlled by the husband, enabled them to live a comfortable life. To the extent that he drew on moneys from the trust for their use, the joint estate received benefits from the trust during the course of the marriage (para 18). The affairs of the trust, the husband and other companies affiliated to him, were inextricably linked at all relevant times (para 19).

3 Judgment

The court *a quo* (see the full judgment in *TW v TK* case no 2010/2268 of 19/09/14), accepted that as a consequence of representations made by the husband, the wife believed that their assets formed a unit, that they effectively owned all property – including that of the trust – as beneficial owners, and that the marriage in community of property (entered into after the creation of the trust two years earlier) constituted a continuation of an existing situation between them (*WT* paras 23 24). Since he managed the trust as his alter ego, the husband had obviously structured his affairs through the trust (controlled exclusively by him) with a view to amassing wealth for no person other than himself. The *assets*

of the trust were found in fact to be the husband's personal assets and accordingly formed part of the joint estate between them (the court relied on *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA)). Argument before the Supreme Court of Appeal was limited to the trial court's assessment of the "factual basis" for the following averments in the wife's counterclaim: (a) The husband had deceived her and had falsely represented to her that the property was to be registered in the name of the trust, purely with a view to protecting it from his business creditors; and (b) the trust was established as the alter ego of the husband *inter alia,* by virtue of the fact that the husband controlled the trust for his personal benefit with a view to amassing wealth only for himself (para 27).

The Supreme Court of Appeal immediately dismissed the averment regarding deceit and misrepresentation by the husband on the basis of a lack of any evidence to this effect (paras 28 29). For purposes of this discussion, the author only reflects on the remarks by the court dealing with the applicability of "(l)ooking behind the veneer of the trust" as a remedy available to the wife. The court remarked (para 31) that the legal principles pertaining to "looking behind" the veneer of the trust as the alter ego of the husband, have in essence been transplanted from the arena of "piercing the corporate veil". If the trust form is "debased", justice would dictate that the veneer of the trust be pierced in the interests of creditors. By analogous reasoning, unconscionable abuse of the trust form through fraud, dishonesty or an improper purpose would justify looking behind the trust form (para 31). In this regard, the court (para 31 fn 5) immediately drew attention to the difference between the "sham trust" construction and that of "piercing the veneer of a trust" as correctly noted by Binns-Ward J in *Van Zyl v Kaye* para 16. (The distinction is discussed below para 4). The Supreme Court of Appeal then submitted that even if it was accepted that the trust form could not be separated from the personal affairs of the husband, and even if it was accepted that the husband did not act jointly with his brother in relation to the affairs of the trust, there was no legal basis for contending that either the husband or his co-trustee (brother), as trustees of the trust, owed any fiduciary responsibility to the wife. The reason was two-fold: The wife was not a defined *beneficiary* of the trust at any stage, nor was there any evidence that she had transacted with the trust as a *third party* at any stage before or after her marriage to her husband (my emphasis; *ibid*). The court emphasised that the wife was not an outsider or third party who transacted with the trust and stated (para 33):

> "Significantly, the dicta of Cameron JA in *Parker*, 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. KT is neither such a third party nor does she qualify as a beneficiary of the trust.* To the extent that it is relevant in this context, I also agree with Cameron JA that the frequent absence of the suggested dichotomy of control and enjoyment in family trusts may require legislative attention prescribing oversight by an independent outsider, with a view to ensuring adequate separation of control from enjoyment of trust affairs in every case. However, even if one accepts that courts can invoke the suggested supervisory powers to ensure that trusts function 'in accordance with the principles of business efficacy, sound commercial accountability and the reasonable expectation of outsiders who deal with them', for the reasons given, KT has no standing to challenge the management of the trust by her husband in the circumstances of the present case, *either as a beneficiary* of the trust *or as a third party*, who transacted with the trust" (my emphasis).

There was, in the circumstances, no *factual basis* for the finding by the court *a quo* that the trust was simply a continuation of the previous situation between the parties. The husband and wife never owned the property in equal shares prior to their marriage, nor was it established on the probabilities that they ever concluded any agreement relating to the purchasing of property. It was common cause that the husband had procured the establishment of the trust as well as the purchasing of the property prior to his marriage with his wife, without her participation and without any significant financial contribution from her side (para 34).

In contrast with section 7(3) of the Divorce Act 70 of 1979, where courts have a wide discretion when making a redistribution order in relation to a marriage with complete separation of property entered into prior to 1984, courts do not have a similar discretion when assessing the proprietary consequences of a divorce following a marriage *in* community of property. The court, as in the present case, was generally confined merely to directing that the assets of the joint estate be divided in equal shares. The court thus had no comparable discretion as envisaged in section 7(3) to include the assets of a third party (the trust) in the joint estate (para 35; see s 12 of the Trust Property Control Act 57 of 1988). What the court *a quo* did, amounted to a *transfer of the trust's assets* to the joint estate (para 36).

4 Discussion

4 1 Distinguishing between the "sham trust" and "piercing the veneer" of a trust – point of departure

The Supreme Court of Appeal (para 31 fn 5) immediately confirmed the timely and welcome exposition by Binns-Ward J in *Van Zyl v Kaye* para 16 of the difference between the "sham trust" and "piercing the veneer". When a trust is a "sham", it does not exist and there is nothing to go behind (*Van Zyl* para 16). With reference to an illuminating analysis by De Waal ("The abuse of the trust (or: 'Going behind the trust form')" 2012 *The Rabel J of Comp and Int Private L* 1078, accessible at http://bit.ly/1jqVc4t; hereinafter "*Rabel Journal*"), Binns-Ward J confirmed that establishing that a trust is a "sham" and "going behind the trust form" entail fundamentally different undertakings (*Van Zyl* para 16). Holding that a trust is a "sham" is essentially a finding of fact. Inherent in any determination that a trust is a "sham" must be a finding that the requirements for the establishment of a valid trust were not met, or that the appearance of having met them was in reality a dissimulation. "Going behind the trust form", on the other hand, entails accepting that the trust exists, but disregarding for given purposes the ordinary consequences of its existence. This might entail holding the trustees personally liable for an obligation ostensibly undertaken in their capacity as trustees, or holding the trust bound to transactions ostensibly undertaken by the trustees acting outside the limits of their authority or legal capacity as such (*Van Zyl* para 21). In *Van Zyl* the court held:

> "Those 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 an 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 – an all too frequent phenomenon in certain family and business trusts in which the trustees are both the

> effective controllers as well as the beneficiaries. The remedy might entail the making of a declaration that a trust asset shall be made available to satisfy the personal liability of a trustee, but it does not detract from the character of the asset as one of the trust and not that of the trustee; the existence of the trust remains acknowledged" (*ibid*).

Conversely, however, three months later Alkema J in *RP v DP* 2014 6 SA 243 (ECP) without reference to *Van Zyl*, made the following valid comments, although he then proceeded to make submissions that can be described as "confusing". This case dealt with the determination of an accrual claim in the event of a marriage out of community of property. He confirmed that having regard to the fact that a trust is not a separate legal personality such as a company, "piercing the veil of a trust" as a metaphor is in this strict sense misleading. Rather, what is pierced in the trust context is the veil which separates the trust assets from the personal assets of the trustee (para 21). I agree with this argument, provided as indicated by the court in *Van Zyl*, that the assets remain trust assets although disregarding for given purposes the ordinary consequences of its existence. The court in *RP*, however, then submitted (para 22) that this (piercing the veneer) will happen, for instance, "in cases where the trust is a *sham* and for all practical purposes is the *alter ego* of the founder or trustee". In my view, with reference to *Van Zyl* (see also De Waal *Rabel Journal* 1078 1080) one cannot speak of a "sham trust" and equate it with an "alter ego" trust using "piercing the veneer" as the suggested solution. De Waal, in distinguishing between the abuse of the trust, or "going behind the trust form" ("piercing") and a "sham" trust stated (1080) that "the 'sham' trust issue is one that plays itself out in quite a different context, and . . . it is important from both a theoretical and a practical perspective to keep the two issues *apart*" (my emphasis).

Despite the abovementioned criticism, Alkema J, then correctly submitted:

> "All that is required is to make an order . . . namely that the value of those assets be taken into account when determining accrual *because in law and in fact they are, and always have been, assets in the personal estate of the trustee*" (para 52; my emphasis).

This, however, is only possible if the trust is found to be a "sham trust", or where the assets, as the court put it, "were proven to be the subject of simulated transactions" (para 53). The court in *RP* then held that if the evidence showed that the trust in question was effectively the alter ego of one of the parties, certain or all of the trust assets ought to be included in the estate for determination of the accrual. In "piercing the trust veil", the court was not exercising a discretion under any act, but a power under the common law (para 41). To regard such action as "piercing of the veneer" seems, in view of *Van Zyl* and the exposition by De Waal *Rabel Journal* 1078, to be incorrect (see also the judgment in *MM v JM* 2014 4 SA 384 (KZP) a few months earlier – see discussion below). (See, however, Stafford *A legal comparative study of the interpretation and application of the doctrines of the sham and the alter-ego in the context of South African trust law: The dangers of translocating company law principles into trust law* LLM dissertation (2010) Rhodes. In chs 3–5 he criticises judgments such as *Badenhorst*, *Parker* and *Van der Merwe* for suggesting that the veneer of the trust should, in principle, be pierced under the circumstances of the specific cases. He submits that only in the case of a "sham trust" where the shamming intention was held by all the contracting parties can the veneer of the trust be "pierced".)

The position held in *Van Zyl*, in my view, has now been confirmed by the Supreme Court of Appeal, if not explicitly (para 31 fn 5), then implicitly. Taking this exposition as point of departure, the Supreme Court of Appeal correctly described the court *a quo*'s decision as a "transfer of assets", which cannot be done. It is my submission that in effect (in view of *Van Zyl*) it is only possible to regard such trust assets as assets of initially the husband and then upon marriage as that of the joint estate, if the trust is to be regarded as a "sham" and thus invalid. The assets would then be regarded as belonging to the husband since no trust ever came in existence.

However, the court *a quo* based its decision on the view that it had a discretion (similar to that in *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA)). This was rejected by the Supreme Court of Appeal. The latter in *WT* clearly stated (para 35) that in contrast to this discretion in terms of section 7(3) of the Divorce Act in relation to redistribution orders, the court in assessing the proprietary consequences of a divorce following a marriage in community of property, as in the case of *WT*, generally was *confined merely to directing that the assets of the joint estate be divided in equal shares* (my emphasis). This conclusion seems to follow the line of reasoning held earlier by Ploos van Amstel J in *MM v JM* 2014 4 SA 394 (KZP), which, as did the case of *RP*, dealt with the determination of an accrual claim. The defendant pleaded that the trust was the alter ego of the husband and that the trust assets should be *deemed* to form part of his assets for purposes of calculating accrual. Ploos van Amstel J stated (para 12):

> "There is however a fundamental difference 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. *In the case of an accrual claim the Court is not required to make an assessment of what it deems to be 'just'.* It is required to determine, on the evidence before it, the amount equal to half of the difference between the accrual of the respective estates of the spouses. *It is a factual enquiry.* The determination is made in accordance with sections 4 and 5. Section 4(1)(a) provides that the accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage" (my emphasis).

I submit that Ploos van Amstel J thus correctly (in view of an analogous interpretation and application of *WT*) indicated that in order to include such assets for purposes of determining accrual, the defendant (wife) had to aver that the trust assets were in fact the husband's property or part of his estate or that the trust was not a genuine (valid) one, and thus a "sham" (*MM* para 21).

A question that arises is whether the court *a quo*'s judgment would have been in order if the court stated that the mere "*value* of the trust assets" were to be taken into consideration for purposes of calculating the "value" of the joint estate, as opposed to a "transfer of assets". In *Badenhorst* paragraph 13 the Supreme Court of Appeal correctly remarked: "In my view the *value* of the trust assets should have been added to the *value* of the respondent's [husband's] estate" (my emphasis; see in this regard *WT* paragraph 36 where the Supreme Court of Appeal criticises the order of the court *a quo* on the transfer of trust assets to the joint estate. In *WT* the Supreme Court of Appeal remarked that it is arguable whether even the wide discretion of the court envisaged in section 7(3) of the Divorce Act, incorporated the discretion simply to "transfer" ownership of trust assets, rather than merely including the "value" of trust assets as part of the personal estate of a trustee on the basis of piercing the corporate veil). The answer to this question seems to be "no": The court does not have any discretion

in terms of the Divorce Act or Matrimonial Property Act, similar to that in terms of section 7(3) of the Divorce Act regarding redistribution orders (*WT* para 35), to transfer assets, or more correct, taking the "value" of such assets into consideration (see *WT* para 36). Could the assets of the trust, secondly, not be seen as "deemed assets" of the husband for purposes of determining the value of the joint estate? In other words, only for a "given purpose" (in view of *Van Zyl*) namely, determining the value of the joint estate (although they remained trust assets for all other purposes)? In my view, such an order would only be possible upon a finding that "piercing the veneer" is an acceptable remedy. The Supreme Court of Appeal has now decided that it is not available to a spouse in the position of KT, since she was not a beneficiary or third party dealing with the trust (paras 32 33). In the event of an unconscionable abuse of the trust form through fraud, dishonesty or an improper purpose, or in the event of the spouse being a beneficiary, the outcome may be different.

4 2 An equitable remedy – nature of?

In *Van Zyl*, Binns-Ward J described the nature of "piercing the veneer" as a remedy. Going behind the trust form (or "piercing the veneer") represents the provision by a court of an "equitable" remedy to a *third party affected* by an unconscionable abuse of the trust form (see *Parker* para 37.3). Binns-Ward J acknowledged that, rather like the position with "piercing of the corporate veil" in the case of companies, closely defining the applicable principles in the cases in which it is afforded or withheld may prove *elusive*. He therefore described it as an equitable remedy in the ordinary, rather than technical, sense of the term; one 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 (para 22). The statement by Binns-Ward J (para 22) that identifying specific cases in which this remedy of "piercing the veneer" would be afforded or withheld might prove *elusive*, proved to be prophetic one year later in view of *WT*. The Supreme Court of Appeal has (to a large extent based on the facts) limited the application of this remedy to situations where beneficiaries and *third parties contracting* or transacting with the trustees needed protection. The court emphatically stated (para 32) that even if one accepted in the present case (*WT*) that the trust form could not be separated from the personal affairs of WT (the husband), and even if one accepted further that the husband did not act jointly with his brother in relation to affairs of the trust, as contemplated in the trust deed, there was no legal basis for contending that either the husband or his brother, as trustees of the trust, owed any fiduciary responsibility to the wife. This is simply because the wife did not qualify as a defined beneficiary of the trust at any stage, nor was there any evidence that she had *transacted* with the trust as a third party at any stage before or after her marriage to the husband (paras 32 33).

The alarming, although valid, statement by Binns-Ward J in *Van Zyl* para 23 that he was not aware of any matter in which a South African court has yet "pierced the veneer" of a trust or gone behind it (although he conceded that the court had come close to doing so in *Van der Merwe*) has now received even more impetus in *WT*. Although I am hesitant in criticising the judgment, one wonders whether the Supreme Court of Appeal should not have made use of the opportunity to curb the abuse of trusts that has become so prevalent in the last

two decades. Binns-Ward J referred to the remedy as "the provision by a court of an equitable remedy to a *third party affected* by an unconscionable abuse of the trust form" (*Van Zyl* para 22, my emphasis). He also referred to it as a "flexible approach" in order to fairly and justly address an abuse situation. Could it not be argued that on a flexible interpretation of the terminology in *Nieuwoudt* and *Parker*, the wife in *WT* could be seen as "a third party who was affected" by the abuse of the trust? Is the description of the equitable remedy as a "flexible approach to fairly and justly address" the abuse of the trust, and one that will "generally" be given if someone in a dishonest or unconscionable manner evaded a liability or avoided an obligation, not wide enough to assist a spouse under such circumstances? Evidence, however, to the extent that the husband was dishonest and attempted to deceive the wife was lacking in *WT*. Earlier, Ploos van Amstel J in *MM* para 21 submitted that in the case of an accrual claim the court is not required to make an assessment of what it *deems to be just* because it did not have a discretion in this regard. Are *MM* and *WT* yet again examples of matters where law and equity cannot concur resulting in the law prevailing? (See the remarks by Binns-Ward J in *Van der Merwe v Hydraberg Hydraulics CC* para 42.)

To the extent that section 13 of the Trust Property Control Act 57 of 1988 might be relevant and applicable, depending on the facts and circumstances of a particular case, a consideration of this section seems appropriate. Provided that the requirements of section 13 are met, a court may on application of a person who has "sufficient interest" in the trust property, make an order which the court "deems just". If the trust instrument contains any provision which brings about consequences, which in the opinion of the court the founder of a trust did not contemplate or foresee and which, *inter alia*, are in conflict with the "public interest", the court may make such an order. "Sufficient interest", arguably, is a wider concept than "being a party contracting with the trust" and it should under applicable circumstances be possible for a spouse in the context of divorce proceedings to have an "interest" in how an alter ego trust is dealt with. "Public interest", often regarded as a synonym for "public policy" (*Syfrets v Minister of Education* 2006 4 SA 205 (C) para 24), imports the notions of fairness, justice and reasonableness. Accordingly, in view of the provisions of section 13, the court may make an order with regard to the trust assets which is "just". If circumstances permit, section 13 could be a possible solution.

5 Conclusion

Certain general principles have now, in my view, been confirmed by the Supreme Court of Appeal. The exposition in *Van Zyl v Kaye* regarding the distinction between the "sham" trust and "piercing the veneer of a trust" has been accepted. In order to regard trust assets as assets of one of the parties, or that of the joint estate, a claimant has to aver and prove that the trust was a "sham", and thus not a genuine one (*Van Zyl*; *MM*). That is no easy task. In *WT*, interestingly, in so far as the issues on appeal were concerned, the allegations made by the wife in her counterclaim pertaining respectively to the husband not having any true intention to establish the trust and the trust not being in reality a trust at all, were not pursued, probably for exactly this reason (*WT* para 27). Instances of a trust being a "sham" are few (see *Khabola v Ralitabo* 2011 ZAFSHC of 24/03/2011; De Waal *Rabel Journal* 1078 1080–1086 on the "sham" trust issue). It appears as though the court also does not have a general discretion to include the (value) of trust assets in the determination of the value of the joint estate (*KT* para 35),

and by analogy it seems, in the determination of an accrual claim in a marriage out of community of property similar to that in section 7(3) of the Divorce Act. This will equally be true of a marriage or civil partnership in terms of the Civil Union Act 17 of 2006 and customary marriages. The Supreme Court of Appeal has now, lastly, also excluded the applicability of "piercing the veneer" in divorce proceedings (even if it was accepted that the trust form could not be separated from the personal affairs of the husband, and even if it was accepted that the husband did not act jointly with his brother in relation to the affairs of the trust), under circumstances where the spouse concerned was neither a beneficiary, nor a third party contracting with the trust. In so far as this situation is to be regarded as unsatisfactory, a possible solution can be a legislative amendment to the Divorce Act to incorporate a provision on "Deemed assets for purposes of calculating the value of assets in a joint estate or in a marriage subject to the accrual system", similar to that of section 3(3)(d) read with section 3(5)(b)(i) and (ii) of the Estate Duty Act 44 of 1955, or awarding the court a general discretion similar to that in terms of section 7(3), (4) and (5) of the Divorce Act. An amendment to the Divorce Act can possibly be worded in the following terms:

> "Property which is *deemed* to be properly of the parties includes –
> (a) property of which any party was immediately prior to the divorce *competent to dispose for his own benefit or for the benefit of his estate.*
> (b) For purposes of paragraph (a) a person shall be deemed to have been competent to dispose of assets if (i) he had such power as would have enabled him, if he were *sui generis*, to appropriate or dispose of such property as he saw fit whether exercisable by will, power of appointment or in any other manner; or (ii) if under any deed of donation, settlement, *trust* or other disposition made by him he retained the *power to revoke or vary the* provisions thereof relating to such property."

Furthermore, in the event of a marriage or civil partnership out of community of property with the inclusion of the accrual system, drafters of antenuptial contracts should advise clients on the importance of a stipulation including or excluding the value of trust assets explicitly, upon determination of the accrual upon divorce or death. Alternatively, informed spouses should make it a term of the trust deed that the trust will dissolve upon divorce and the trust assets and liabilities would be shared, taking into consideration the interests of creditors. Trust assets (or the value thereof) in the event of alter ego trusts, or even trusts properly administered in terms of basic principles of the law of trusts, would then be taken into consideration in view of either legislative measures or contractual provisions. In view of "piercing of the veneer" being limited to beneficiaries and third parties dealing with trusts and the limited (if any) application thereof as indicated above, one may ask whether this remedy has not become a mere "pie in the sky".

A VAN DER LINDE
University of Pretoria