



## TRUST ASSETS AND DIVORCE

The division of the property of divorcing spouses is normally determined by the matrimonial property regime that governed their marriage. It will therefore depend on whether they were married in community of property or out of community of property with or without the application of the accrual system.

The existence of a trust can have a material effect on the division of property upon divorce, as trust assets do not form part of the personal estate of the spouse who benefits from or has control over the trust.

This may have unfair consequences for the other spouse and in a number of cases the courts were asked to ignore the separation of the estate of the trust and the spouse who benefits from the trust, so that the trust assets could be taken into account for purposes of the division of the property of the spouses.

The opportunity to attack a trust and to “pierce the veneer of a trust” was severely limited in 2015 by the decision of the Supreme Court of Appeal in *WT vs KT*. The court held that a spouse has no standing to challenge a trust, unless such spouse was a trust beneficiary or had transacted with the trust as a third party.

In 2017 the Supreme Court of Appeal however reversed its earlier finding in *WT vs KT* and decided that trust assets can be included in the estate of a spouse for purposes of calculating the value of his estate, if it can be proved that such spouse transferred personal assets to the trust and dealt with those assets

as if they were trust assets, with the fraudulent or dishonest purpose of avoiding his obligation to properly account for his estate and thereby to evade payment of what was due to his spouse.

The question to be determined is therefore whether a spouse's unconscionable abuse of a trust through fraud, dishonesty or an improper purpose prejudices the enforcement of an obligation towards his spouse.

It is therefore possible to challenge the separation of the estates of a trust and a spouse, but it is important to note that the courts do not have a general discretion in this regard and that it is limited to cases where it is possible to prove fraud, dishonesty or improper purpose on the part of a spouse, which is generally difficult to do.

Making or resisting a claim in respect of trust assets within the context of a divorce is extremely complicated and requires the assistance of an attorney with a good understanding of not only divorce law, but also trust

law, property law and commercial law in general. At Claassen Attorneys we are able to ably assist you in this regard and you are welcome to contact us with any enquiries regarding trusts.