

# ABUSE OF TRUSTS IN DIVORCE

BY AMANDA CATTO

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# THE FAMILY TRUST:

- As a sham;
- As an alter ego;
- Who is the beneficial owner of its assets?



# BLOCK V BLOCK – A HYPOTHETICAL TRUST DIVORCE

- Married 1990 by ANC with an accrual;
- Two *inter vivos* trusts established in 2000: one for business one for family;
- Underlying intention: estate planning, asset protection, divorce;
- Wealth generated within trusts, apparently controlled by the husband;
- The marriage ends;
- The wife claims inclusion of the trust assets in the calculation of the accrual;



# THE ESSENCE OF A TRUST

- The arrangement through which control and ownership in property is by virtue of a trust instrument made over or bequeathed to another person or persons (the trustee(s)) for the benefit of beneficiaries.
    - Written trust instrument;
    - One trustee and one beneficiary;
    - Trust property to be made over to the trustees to be held for the benefit of the beneficiaries;
    - Trustees have bare ownership of assets held and are required to act in accordance with the trust deed, to actively participate objectively and independently;
    - There must be a separation between control and enjoyment of trust assets.
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# FORM VS SUBSTANCE OF A TRUST

- What is not essential to the existence of a trust:
  - The designation or acceptance of the designation of a trustee;
  - That trust property should be transferred to the trustee;
  - Official authority over the trust formation;
- What is essential to the establishment of a trust:
  - The founder must indent to create a trust;
  - The founders intention must be expressed in a mode appropriate to create an intention;
  - The property subject to the trust must be defined with reasonable certainty;
  - The trust object must be lawful.



## THE FAMILY TRUST: AS A SHAM

- In a family trust the intention is often to actually carry on controlling and owning assets ostensibly held in the trust and to carry on enjoying the trust assets as if they are the trust planners' own;
- There is no real intention to create a trust but rather to avoid death duty, protect assets from creditors or to avoid a spouses claim;
- What has been established? It's not a trust.



# THE FAMILY TRUST: AS AN “ALTER EGO”

- A valid trust is established;
- Assets are placed or acquired in the trust;
- Ownership and control are exercised by someone other than as is intended in the trust deed;
- Is this an alter ego or merely that the assets belong to the person who benefits and controls the assets?
- Jordaan v Jordaan; Badenhorst v Badenhorst and Smith v Smith



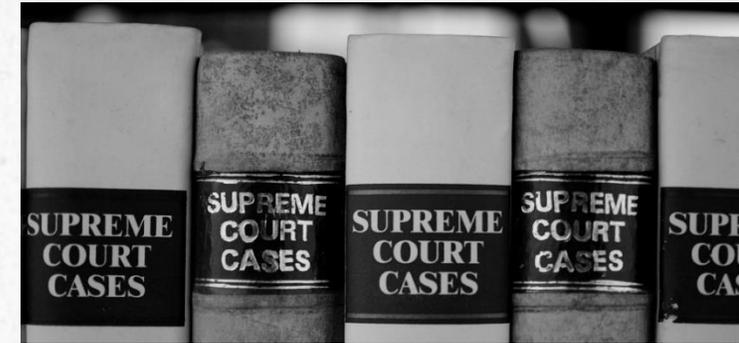
# CAN THE FAMILY TRUST SURVIVE PARKER

- The core idea of a trust is separation of ownership (or control) from enjoyment;
- If this is not respected the trust does not come into existence other than in form;
- In substance it is a sham;
- This “newer form of trust” where for estate planning purposes were to escape the constraints imposed by corporate law, assets are put into a trust ‘while everything else remains as before’, though now on terms that privilege those who enjoy benefit as before while simultaneously continuing to exercise control;
- The role of the court: to ensure that the trust form is not abused;



# THE CASE LAW

- Van Der Merwe NO and Others v Hydraberg Hydraulics CC;
- BC v CC and Others;
- Jordaan, Badenhorst and Smith;
- Taute v Taute;
- Van Zyl NO v Kaye NO;
- Official Assignee v Wilson (New Zealand);
- RP v DP and Others;
- MM v JM;
- YB v SB and Others NNO;



# CONCLUSION / CONFUSION / CONFLATION

- Can there be a valid family trust that will escape scrutiny on divorce?
  - The alternative claim for damages:
    - JC v DA;
    - *“Spouses marrying under an accrual system tacitly or impliedly assume reciprocal obligations not to frustrate or contradict the rationale of that regime, i.e that they will build up a pool of wealth during their life together which though under separate control in their distinct estates ,is available to be shared. In this sense, an accrual is never a fortuitous windfall. A deliberate disposition by one to prejudice the other is a frustration of that tacit obligation”*
  - Legislative intervention is required for certainty.
  - Trusts in the context of universal partnerships
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