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MAY 2015

Your House In A Family Trust – What Happens To It On Divorce?

*“..... trust assets held by a trustee in trust, do not form part of the personal property of such trustee as a matter of law”
(extract from judgment below)*

What happens if your home is registered in the name of a trust and you get divorced? Do you get a share of the house's value?



A trust attacked

A recent Supreme Court of Appeal (SCA) judgment illustrates –

- A husband and wife had married in community of property.
- On divorce, the wife claimed a 50% share in their matrimonial home on the basis that it fell into the joint estate.
- The husband countered that the house belonged to a discretionary family trust of which he and his brother were the trustees, the beneficiaries to be chosen by them from amongst his children.
- Before they were married, the parties had moved into the house. The trust had bought it 2 years after that.
- The parties married a year later, and lived on in the house for another 9 years until divorce.
- The wife argued that the trust's assets fell into the joint estate because –

- o Her husband had deceived her, saying that the property was registered in a trust purely to protect it from his business creditors, that they would agree on who would be beneficiaries, and that she would get 50% on divorce
 - o The trust was her husband's "alter ego" in that he controlled it for his personal benefit in order to amass his own wealth.
- The High Court agreed with the wife and ordered that the trust's assets fall into the joint estate.
- The SCA however allowed the appeal on the basis that -
 - o There was on the facts no evidence to support any of the wife's assertions of deceit
 - o Even if the trust was the husband's "alter ego" (the Court made no finding on this) the wife was neither a beneficiary nor a transacting third party – she therefore had no standing to challenge her husband's management of the trust.
- The end result - the trust keeps its house, leaving the ex-wife to pay some (no doubt substantial) legal costs.

Lessons for trustees and spouses

A critical factor here was that the parties were married **in** community of property, the court in such a case being as a general rule confined to ordering a 50/50 split between the spouses.

In contrast, with a marriage **out** of community of property, a divorce court has a wide discretion to redistribute assets between the parties and to order that a particular asset (including an asset of a third party like a trust) belongs to one or other of the parties. Had the parties in this case been married out of community of property, the wife's allegations of mismanagement of the trust would have been relevant and could have changed the outcome.

Two things to take away from this case –

1. Before you get married, take advice on whether being married in community of property is your best option – for many couples, marriage out of community (with or without accrual) is likely to be a better choice. That certainly would have given the wife in this case a much better shot at getting a share in the house. Your ante-nuptial contract should record your respective rights to any assets (including any interests in trusts, companies etc) in the event of divorce.
2. As a trustee, ensure that you establish and manage your trust strictly as required by law, with particular reference to the requirement that control of the trust's assets be clearly separated from enjoyment of them. Failure to do so greatly increases the chance of attack by creditors and ex-spouses.

When CIPC Deregisters Your Company . . .

If, for whatever reason, the Companies and Intellectual Property Commission (CIPC) did not receive your company (or CC)'s annual return on due date, it will assume that the company is inactive and will start the deregistration process – the legal effect of which is that **the company ceases to exist**.



Deregistration is disastrous

That has serious consequences –

- Anything you do as a director is automatically void (putting both you personally and your company at significant risk), and
- All the company's assets automatically become owned by the State.

Although CIPC says it will notify you before deregistration, clearly many companies are deregistered without their knowledge. Our courts have been faced with many disputes arising from such companies innocently continuing business when no one - neither the directors nor the third parties with whom they transacted - had the faintest clue that the company had in fact ceased to exist.

Reinstatement – the pitfalls

If it happens to you, apply for re-instatement of your company immediately. You are in for cost, hassle and delay. More seriously, you risk failure - for example interested third parties must be given the opportunity to object to the reinstatement (you have to advertise, giving 21 days' notice of your application).

Is reinstatement retrospective? The SCA has spoken

Does a reinstatement order validate contracts, sales etc entered into by a deregistered company during its period of non-existence? It's an important question, with for example directors risking personal liability for "corporate actions" whilst no company actually existed, innocent buyers of company assets at risk of losing them, etc. Until recently, conflicting High Court decisions led to much concern and confusion in this regard.

Fortunately the Supreme Court of Appeal (SCA) has now settled the matter - reinstatement is fully "retrospective", the company's actions during deregistration are automatically validated, and its assets automatically revert in it.

Inevitably though, trading in a non-existent company leaves a mess which may require more clean up than just simple reinstatement. For example if anyone has been prejudiced, you or an affected third party may have to apply for a special court order to remedy the situation.

Directors – your essential action list

Don't risk all that uncertainty, delay and expense in the first place. You certainly don't want to be trying to run your business in a non-existent company with the millstone of a prolonged and uncertain reinstatement application round your neck!

Do these two things now -

1. Ensure that you have in place a rock-solid process for always lodging your annual returns with CIPC every time, on time; and
2. Check that your company's status is reflected by CIPC as "In Business" on www.cipc.co.za (use the "Name/Enterprise Search" section).

Unmarried Fathers - Rights And Responsibilities

When and how does a child's unmarried biological father acquire full parental rights and responsibilities? A recent Supreme Court of Appeal (SCA) decision illustrates.



Out of Africa – a baby taken overseas without the father’s consent



1. The mother of a four month old child relocated with him to England without either informing, or seeking permission from, the father
2. The parents had never been married to each other, nor did they cohabit or live together in a permanent life partnership
3. The father applied to the English courts for an order that the child be returned to South Africa, and a local High Court had to determine whether or not the child’s removal was lawful
4. On appeal, the SCA agreed with the High Court that the removal was unlawful in that it had breached the father’s rights as a guardian - you need permission from all of a child’s guardians, or from a court, to get a child’s passport or to take it out of the country.

The three requirements to become a guardian

In summary, our Children’s Act automatically recognises an unmarried father as a guardian if he –

1. Consents to be identified as the child’s father,
2. Contributes, or attempts in good faith to contribute, to the child’s upbringing for a reasonable period, and
3. Contributes, or attempts in good faith to contribute, towards expenses in connection with the maintenance of the child for a reasonable period.

The mother, held the Court, had actively frustrated the father’s efforts at fatherhood, refusing for example to allow him to be present at the birth and then restricting his access to the child. Moreover the father had visited and interacted with the child regularly, introduced him to his extended family, taken out an endowment policy to cater for his future upbringing, and contributed financially.

On these facts, the father was indeed a co-guardian with full parental rights and responsibilities, and accordingly the child’s removal from South Africa had been unlawful.

Employers And Your Annual Recon: Get Started Now

Your EMP501 reconciliation for the period 1 March 2014 to 28 February 2015 must be lodged with SARS by Friday 29 May. **Do it now** – leave yourself plenty of time to resolve any queries or discrepancies.



Make sure you have the latest version of “e@syFile Employer” from the SARS website at <http://www.sars.gov.za/TaxTypes/PAYE/Pages/Employer-Interim-Reconciliation.aspx> (the page also has a full guide on completing your return).

Drivers: Protect Your Children!

From 30 April any “infant” under the age of three travelling in your car must be seated on “an appropriate child restraint”.

For more on choosing the correct child restraints/baby seats/booster seats/car seats for different age groups, see “Child Restraints and Road Safety” on the Arrive Alive website at <https://www.arrivealive.co.za/Child-Restraints-and-Road-Safety>.



The May Website: Your Dead Laptop – What To Do With It?

“This parrot is no more. It has ceased to be. It’s expired and gone to meet its maker. This is a late parrot. It’s a stiff. Bereft of life, it rests in peace. If you hadn’t nailed it to the perch, it would be pushing up the daisies. It’s rung down the curtain and joined the choir invisible. This is an ex-parrot.” (Monty Python’s Flying Circus)



If your laptop/PC/TV/tablet or cell phone is as dead as John Cleese’s parrot, don’t just throw it away. “E-waste” (electronic and electrical waste) contains both **valuable** and **hazardous** material, and should always be recovered by specialists.

Don’t dispose of e-waste in your normal rubbish collection - contaminants such as lead, cadmium, beryllium and the like pose significant health risks to individuals and communities – but what then do you do with it?

Here’s a website with an easy answer. Find your nearest Collection Sites, Recyclers and Refurbishers on the e-Waste Association of South Africa website www.ewasa.org – look for the drop down menu “Recycling” to see what’s what in your area.

We’re talking “anything that runs on electricity” here - discarded computers, entertainment electronics, mobile phones, household appliances, spent fluorescent tubes, batteries, battery-operated toys etc.

Security Note: Remember to wipe all memory and hard drives thoroughly before disposal – otherwise your sensitive information (think account details, credit card numbers, company secrets etc) could easily end up in the hands of criminals.

Bonus Website: Load Shedding Alerts So You Aren’t Caught On The Hop

“To be prepared is half the victory” (Miguel de Cervantes)

There’s nothing worse than unexpectedly being plunged into load shedding. Be prepared – register now for Sharenet’s free alerts on their website at <http://www.sharenet.co.za/loadshedding/>. Look also for a link to their Android App at the end of your registration process.



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