



## Providing specialist trust and fund services

**NOVEMBER 2011**

### **THE STATUS OF TRUST ASSETS ON DIVORCE**

It is trite law that, by establishing a trust, the Settlor divests himself of ownership of the Trust fund, which vests in the trustees for the benefit of the beneficiaries. However, despite the fact that the settlor no longer owns the assets, there are circumstances, particularly in divorce litigation, that the courts are able to look past the trust and deem the assets to be those of the Settlor.

#### **South African Law:**

In South Africa, the case of *Jordaan v Jordaan* 2001 (3) SA 288 (C) has given some guidance on the determination of the ownership of trust assets. It was held by the court that one of the factors to be taken into account when determining ownership is whether the trust is merely a sham, being the alter ego of the settlor. If there is de facto control over the trust assets by the settlor, the trust assets will be deemed to be included in his personal estate and therefore subject to divorce proceedings.

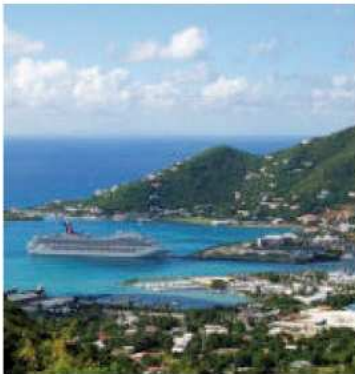
Other factors to be taken into account include:

1. Is the trust a real trust or a corporate veil?
2. When was the trust created?
3. Were the trust assets donated or sold to the trust? Is there a loan account in favour of the settlor?
4. What was the intention of the settlor/founder of the trust?
5. What is the nature of the trust?
6. Is there an independent trustee?
7. Is the trust properly administered? Are the accounting records, minutes and resolutions properly attended to?

#### **English Law:**

English law takes a different approach in divorce proceedings. In the recently decided case of *Whaley v Whaley* [2011] EWCA Civ 617, the court had to evaluate whether the assets held in two Jersey-based trusts, established by Mr Whaley's father, could be deemed to form part of Mr Whaley's estate. Mr Whaley was a beneficiary of one of the trusts, but was not a beneficiary of the other trust at the time of the divorce proceedings. The court held that it was not necessary to look at whether an individual was a beneficiary of a trust or not, but whether the individual could potentially be added as such and whether the trustees were likely to advance capital to him, upon his request, as had been the case with Mr Whaley.

This decision confirms the English Law approach of looking at the resources available to a divorcing spouse, rather than the assets actually owned by him. In respect of a trust, the courts will look at the spouse's access to the trust assets, rather than his possible control of them.



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**Conclusion:**

Trusts are an excellent tool for asset protection and succession planning, and with a corporate trustee, such as Osiris International Trustees Limited, ensuring that the administration of the trust is in good order and is legally and factually independent from all individuals, including the settlor, there is a reduced risk that the trust assets would be included in an individual's estate during divorce proceedings. However, this will depend on the law in terms of which the divorce proceedings are governed and it is therefore preferable to take this into account, and receive proper advice, when establishing a trust.

**Key Contact:**

If you require advice or assistance in regard to any of the matters raised in this article, please contact your usual contact or

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