South African Law Reform Commission

ISSUE PAPER 41

EXTENSION OF THE CONSULTATION PROCESS: REVISED ISSUE PAPER 34

PROJECT 100E

REVIEW OF ASPECTS OF MATRIMONIAL PROPERTY LAW

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INTRODUCTION

The South African Law Reform Commission (Commission) was established by the South African Law Reform Commission Act 19 of 1973 (SALRC Act).

The members of the Commission are:

Judge N (Jody) Kollapen (Chairperson)
Mr IBW (Irvin) Lawrence (Vice-chairperson)
Professor M (Mpfariseni) Budeli-Nemakonde
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Advocate MH (Retha) Meintjes SC
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Advocate T (Tshepo) Sibeko SC

The members of the advisory committee for this project are:

Judge D van Zyl (Chairperson)
Mr Irvin Lawrence (Project Leader);
Professor Elsje Bonthuys (University of the Witwatersrand)
The following members were appointed on 17 April 2021:
Professor Lea Mwambene (University of the Western Cape)
Associate Professor Anthony Diala (University of the Western Cape)
Ms Helen Kruuse (Rhodes University)
Associate Professor Waheeda Amien (University of Cape Town)

The Secretary of the Commission is Mr TN Matibe. The project leader for this investigation is Mr Irvin Lawrence. The researcher assigned to this investigation is Ms Maureen Moloi.

All enquiries about the investigation may be directed to Ms Maureen Moloi.

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https://www.justice.gov.za/salrc/ipapers.htm

PREFACE

This Revised/Supplementary issue paper replaces the Commission's initial Issue Paper 34 published on 28 August 2018. The revision is necessary in light of recent case law since the issue paper was published,[1] as well as statutory[2] and common law changes.[3] The following new issues have been added:

- Religious marriages in light of recent case law and developments in Project 144: Single Marriage Statute.
- Unmarried life partnerships were originally excluded but must now be considered in light of developments in case law and progress in Project 144: Single Marriage Statute.
- While customary marriages were originally partly included, the Commission has had to grapple more fully with recent amendments and case law.

The Commission wants to hear your views on the issues raised and questions posed throughout this document. The issues raised need to be debated thoroughly. The comments of all parties who are interested in these issues are of vital importance to the Commission. Unless indicated otherwise by a respondent, the Commission assumes that respondents agree to the Commission quoting from or referring to comments and attributing comments to the relevant respondents.

Respondents who prefer to remain anonymous should mark their representations "Confidential". In any event, respondents should be aware that the Commission may be required under the Promotion of Access to Information Act 2 of 2000 to release information contained in the representations. Respondents are requested to respond as comprehensively as possible, and are invited to raise additional issues which are not covered in the questions, should they wish to do so.

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1 *CM v EM* (1086/2018) [2020] ZASCA 48; [2020] 3 All SA 1 (SCA); 2020 (5) SA 49 (SCA) (5 May 2020); *Jane Bwanya v The Master of the High Court, Cape Town* Case Number: CCT 241/20. The matter was heard on 16 February 2021; *Sithole and Another v Sithole and Another* (CCT 23/20) [2021] ZACC 7; 2021 (6) BCLR 597 (CC) (14 April 2021).

2 Judicial Matters Amendment Act 21 of 2020; Recognition of Customary Marriages Amendment Act 1 of 2021.

3 The common law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it excludes Muslim marriages in *President of the RSA and Another v Women's Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others* (612/19) [2020] ZASCA 177; [2021] 1 All SA 802 (SCA); 2021 (2) SA 381 (SCA) (18 December 2020). The matter was heard by the Constitutional Court on 5 August 2021.

In keeping with its enabling legislation and modus operandi, the Commission intends to consult extensively during the course of this inquiry. In addition to soliciting inputs through this issue paper, it plans to host workshops, seminars and roundtable discussions to further explore the issues raised in this inquiry.

The Commission will also publish a discussion paper setting out preliminary proposals and draft legislation, if such legislation is deemed necessary to give effect to the Commission's recommendations. The aforesaid discussion paper will consider the responses to this issue paper and those generated through consultation processes referred to above. On the strength of responses to the discussion paper, a report will be prepared which will present the Commission's final recommendations. The Commission's report, with draft legislation, if necessary, will be submitted to the Minister of Justice and Correctional Services for consideration.

Respondents are requested to submit written comments, representations or requests to the Commission by 30 November 2021 at the address appearing on the previous page. Any request for information and administrative enquiries should be addressed to the Secretary of the Commission or the researcher allocated to this project, Maureen Moloi.

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1 OVERVIEW

A Background

1.1. The South African Law Reform Commission (SALRC) is currently involved in an investigation titled Review of Aspects of Matrimonial Property Law (Project 100E).

1.2. The investigation was initiated when the Commission for Gender Equality raised concerns about possible discrimination in the banking industry as a result of married couples not being allowed to open joint accounts with both partners enjoying equal status as account holders. The Commission at the same time took cognisance of a number of concerns raised and suggestions for reform of the Matrimonial Property Act 88 of 1984 (the Matrimonial Property Act), being made in public by the attorney's profession. An investigation on review of aspects of matrimonial property law was included in the Commission's programme.

1.3. The Matrimonial Property Act was passed in order to deal with shortcomings in the matrimonial property law at the time. The Act came into operation on 1 November 1984 and has been in place for more than 30 years. Apart from certain ad hoc issues which have in particular been brought to the attention of the SALRC, a number of social and legal changes since 1984 suggest that a review of the law with regard to matrimonial property is necessary to ensure that it meets current needs.

1.4. Issue Paper 34 was published on 28 August 2018. The closing date for comments was 16 November 2018. The issue paper is presented in the form of a questionnaire, covering issues relating to the current matrimonial property systems in South Africa, as well as the financial consequences of divorce. Issue Paper 34 did not elicit wide public interest judging by the few comments received.

1.5. The Minister appointed the additional members of the advisory committee (Committee) on 17 April 2021. The Committee held its first meeting on 09 June 2021 and raised the following concerns:

- The relatively poor response by stakeholders to Issue Paper 34.

- The need and importance for further and better stakeholder views.
- The likelihood that potential responders to this issue paper have focussed on the SALRC's Discussion Paper 152 (on the single marriage statute) to the potential detriment of the work on this issue paper. In other words, multiple papers in the family law domain (including the family mediation paper) have meant that stakeholders have had to divide their attention.
- The need to keep up with the fast-moving pace of court decisions regarding life partnerships and Muslim marriages generally, together with the Recognition of Customary Marriages Bill which was passed as Act 1 of 2021.
- The way in which questions were crafted in Issue Paper 34 did not encourage the involvement of all relevant stakeholders. The questions may have been too complicated for an ordinary person to understand.

1.6. The Committee requested the Commission to extend the consultation process for purposes of supplementing the paucity of comments on Issue Paper 34. Furthermore, the Committee requested the Commission to re-publish Issue Paper 34 with a modified questionnaire.

B. Motivation for the investigation

i. The need for equality and fairness and the prohibition of discrimination on the based on gender, race, religion and marital status

1.7. South African matrimonial property law contains certain default statutory provisions which purport to apply to all marriages unless the spouses enter into antenuptial contracts. However, the applicable rules often result in substantive gender inequality leaving women (and the children for whom they are responsible) destitute at the end of the marriage.[4]

[4] See in general Jacqueline Heaton "Striving for substantive gender equality in family law: Selected issues" *South African Journal on Human Rights* 2005 (21):4 547 et seq.

1.8. In addition, the different property regimes applicable to customary and Muslim marriages and piecemeal changes in matrimonial property regimes effected by the courts as a result of litigation since the adoption of the final Constitution created different systems of property administration and distribution for different marriages. The differences may depend on the dates when couples entered into marriage, whether they were African, whether they were married in terms of legislation applicable in the former Apartheid homelands, and so forth.

1.9. Spouses in marriages that receive no legal recognition, including those in religious marriages, and people who, knowingly or unwittingly, have not entered into any formal marriages have no statutory rights to share in property which has been amassed during their relationships. The negative impact of this lack of legal rights falls mainly on women, who may have contributed to their partners' estates, but yet are left destitute when relationships end.

1.10. Section 9 of the Constitution protects the right to equality and not to be discriminated against on a number of grounds including sex, gender, sexual orientation, race, religion and marital status. Several of the statutory provisions currently treat certain marriages differently from others on these bases, without advancing any clear or rational state interest. They therefore discriminate directly on the bases of race, religion and marital status.

1.11. Moreover, Constitutional Court decisions over the years make it clear that substantive rather than formal equality is required.[5]

1.12. In the context of marriage and divorce if substantive gender equality is to be achieved, laws relating to matrimonial property must, among others, seek to place spouses in an equal position – considering the impact of factors like the unequal division of domestic and family-care responsibilities between wives and husbands, and differences in bargaining power between men and women.

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[5] See on the substantive equality approach in South African courts Cathi Albertyn and Beth Goldblatt, "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14 *South African Journal on Human Rights* 248.

Question

1.13 What specific steps should the legislature take to achieve substantive gender equality in the division of matrimonial property on divorce? How will these steps assist in achieving the desired outcome?"

1.14 Other than what is contained in this issue paper, are there further steps that should be taken to achieve gender equality?

C. Matters not covered in this paper

1.15. The current investigation deals with the narrow issue of marital property and its regulation before, during and after marriage (i.e., on termination of marriage by divorce). The investigation does not address related issues of divorce, such as the provision for care of- and contact with children and maintenance. These two issues are currently dealt with under separate investigations by the SALRC under its broader project on Family Law (Project 100).

1.16. The SALRC's review of the Maintenance Act 99 of 1998 (the Maintenance Act) investigates certain problematic issues in the Act at the request of the Minister of Justice and Constitutional Development. It is however envisaged that the investigation will also address possible outstanding aspects from an SALRC investigation which preceded the current Act and in respect of which the Commission reported in 1998.[6] An Issue Paper was published in September 2014 on this matter. The closing date for comments was end November 2014. A Discussion Paper with preliminary recommendations is currently being developed for public comment.

1.17. The Commission's investigation into Family Dispute Resolution: Care of and Contact with Children, deals with an integrated approach of family disputes with specific reference to disputes relating to the care of and contact with children after

6 SALRC *Issue Paper 28 -Project 100: Review of the Maintenance Act 99 of 1998* (September 2014).

the relationship breakdown of the parents. The aim of the investigation is to develop recommendations for the further development of a family justice system orientated to the needs of children and families with a view to early resolution of disputes and minimising family conflict. An Issue Paper on this matter was published in February 2016.[7] A discussion paper on mandatory mediation was published in June 2019.[8]

1.18. Although the three issues (matrimonial property; maintenance; and care of and contact with children), are reviewed under different investigations, the interrelatedness between property division on divorce, care of and contact with children, and post-divorce maintenance are acknowledged.

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7 SALRC *Issue Paper 31 - Project 100D*: *Family dispute resolution: Care of and contact with children* (February 2016).

8 SALRC *Discussion Paper 148* - *Project 100D: Alternative Dispute Resolution in Family Matters* (June 2019).

2. DEFAULT MATRIMONIAL PROPERTY SYSTEM

2.1. In South Africa the primary matrimonial property system has always been, and still is, the system of universal community of property.[9] If the parties fail to elect their matrimonial property system before they enter into a marriage, the default matrimonial property system applicable to their marriage is in community of property.[10]

2.2. The default system applies to civil marriages in terms of the Marriage Act 25 of 1961. Our current default property system derives from the Roman-Dutch concept of universal community of property.[11] This is also the system that applies to civil partnerships/marriages in terms of the Civil Union Act.[12] Monogamous customary marriages are now treated as being in community of property[13] while polygamous[14] customary marriages can be said to be a version of marriage in community of property, but adapted in the light of customary norms.[15] However, Muslim marriages not solemnised in terms of the Marriage Act are currently treated as being out of community of property by default.[16]

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9 DPS Cronje et al in *LAWSA vol 16* Marriage First Reissue (1998) para 63.

10 DPS Cronje and J Heaton *South African Family Law* 2 ed (2004) 70-71; Visser PJ & Potgieter JM *Introduction to Family Law* 2 ed (1998) 94-95.

11 J Sinclair "Marriage" in B van Heerden et al (eds) *Boberg's Law of Persons and the Family.*

12 Section 13 of the Civil Union Act 17 of 2006.

13 See the recently amended s 7(2) of the Recognition of Customary Marriages Act 120 of 1998 in terms of the Recognition of Customary Marriages Amendment Act 1 of 2021.

14 We recognise the differences between the words *polygamous* and *polygynous* but in this paper, we use them interchangeably.

15 Section 7(1) of the Recognition of Customary Marriages Act 1998 in terms of the Recognition of Customary Marriages Amendment Act 1 of 2021. For a criticism of the bill which eventually amended the Act in this way, see F Osman 'The Recognition of Customary Marriages Bill: Much ado about nothing?' (2020) 137 *South African Law Journal* 389.

16 See para 9.1.1 of the order of court in *President of the RSA and Another v Women's Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others* 2021 (2) SA 381 (SCA).

2.3. Despite its colonial heritage, the community of property system is arguably the system that most realises a substantive version of equality.[17]

Questions

2.4. Should there be a default property system across different marriages and unmarried life partnerships?

2.5. If the answer to 2.4 is positive, what should the default be?

2.6. Should there be a default property system for all marriages in which there are antenuptial contracts?

2.7. If the answer to 2.6 is positive, what should this default be?

2.8. In the light of the different default positions, is there value in providing for one default position across all marriages?

2.9. Is there a reason to believe an alternative default version would better serve spouses in marriages?

[17] This is because there is equal ownership of community of property, regardless of the actual economic contribution each spouse makes to the community; see WQ De Funiak and MJ Vaughn *Principles of Community Property* 2 ed (1971) 2-3.

3. MATRIMONIAL PROPERTY SYSTEMS WHICH APPLY TO FOREIGN MARRIAGES AND FOREIGN MARRIAGES OF SOUTH AFRICAN CITIZENS (PRIVATE INTERNATIONAL LAW RULES)

3.1. Marriages between parties from different nationalities are increasing. Couples also often live and work in different countries so that they do not share the same matrimonial home at all times during their marriage. While the latter type of marriages may well be the exception, there is a definite increase in global immigration as married couples, or spouses, travel across the world in search of better employment opportunities. These are complicating factors in divorce cases.[18]

3.2. The established law is that, unless the parties in their ante-nuptial contract chose another legal system to apply,[19] the proprietary consequences of a marriage are determined by the *lex domicilii matrimonii*, which is the domicile of the husband at the time of marriage.[20] This is the position in spite of the fact that married women no longer automatically acquire the domicile of their husbands upon marriage (a married woman can acquire her own domicile of choice).[21]

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18 E Schoeman "A legal discussion of the development of the South African conflict rule for proprietary consequences of marriage: Learning from the German experience" *Journal of South African Law* 2004 (1) 115.

19 Christian Schultze "Conflict of Laws" in *The Law of Divorce and Dissolution of Life Partnerships in South Africa* edited by J Heaton Juta 2014 648 and the sources quoted by the author; J Neelson J and M Werthman-Lemmer "Constitutional values and the proprietary consequences of marriage in Private International Law – Introducing the *lex causae proprietatis matrimonii*" *Journal for South African Law* 2008 (3) 587; C Roodt Conflict of Law(s) and autonomy in ante-nuptial agreements (1)" *Journal for Contemporary Roman-Dutch Law* 2006 (69):2 224; van Niekerk *Patrimonial Litigation* par 8.2; AB Edwards "Conflict of laws" in *The Law of South Africa (LAWSA)* Vol 2 Part 2 Lexis Nexis 2003 par 309.

20 *Sperling v Sperling* 1975 (3) SA 707 (A). See generally Schultze in *The Law of Divorce*.

21 Domicile Act 3 of 1992 sec 1(1). (Enacted subsequent to the SALRC's *Report on Domicile* 1990. The SALRC at the time did not recommend the reform of the rule relating to the patrimonial consequences of marriage (see par 6.2 to 6.8 of the report)). See the discussions by Neels and Werthman-Lemmer *TSAR* 2008 587; Schoeman *TSAR 2004* 116; Edwards in *LAWSA)* Vol 2 Part 2 par 309.

3.3. The continued application of the *lex domicilii matrimonii* rule has, however, become problematic as a result of subsequent legal developments.

3.4. First, same-sex marriages in terms of the Civil Union Act could either involve more than one husband, or, where both spouses are women, no husbands. It then becomes impossible to designate the *lex domicilii matrimonii*.[22]

3.5. Even in opposite sex marriages, the invariable choice of the husband's domicile as the applicable legal system can be said to discriminate on the bases of sex and gender by conferring a benefit – familiarity with the applicable legal rules, or at least, ease of ascertaining what the applicable matrimonial property system would be on husbands, but not wives for no justifiable reason, other than the need to designate one legal system which will govern the proprietary consequences of the marriage.[23]

3.6. A further objection is that in the light of the increased global migration of couples or spouses, the exclusive use of domicile as the connecting factor to establish the proprietary consequences of the marriage needs to be reassessed.[24] In fact, it has been submitted that the time for reform of the conflict rule for the proprietary consequences of marriage is overdue.[25]

3.7. A South African court can grant a divorce in respect of a marriage which is not governed by South African law if one or both spouses are domiciled or ordinarily

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[22] C McConnachie "With such changes as may be required by the context": the legal consequences of marriage through the lens of section 13 of the Civil Union Act *South African Law Journal* 2010 (127) 424.

[23] The rule constitutes discrimination on the basis of gender and is therefore in conflict with section 9(3) of the Constitution which provides that "(T)he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including ... gender …". See Schultze in *The Law of Divorce* 658; Schoeman *TSAR* 2004 116 et seq; Neels and Werthman-Lemmer *TSAR* 2008 587 et seq.

[24] For a discussion of the objections against the current rule see in general Schultze in *The Law of Divorce* 658 et seq; Neelson and Werthman-Lemmer *TSAR* 2008 587 – 588; Schoeman *TSAR* 2004 116 et seq.

[25] Schoeman *TSAR* 2004 115.

resident in the area of the court's jurisdiction at the time of the divorce.[26] Section 2(3) of the Divorce Act determines the *lex fori*, in other words South African law will apply to a divorce heard by a South African court where one or more of the spouses are not domiciled in South Africa.

3.8. Nevertheless, section 7(9) of the Divorce Act determines explicitly that:

> When a court grants a decree of divorce in respect of a marriage the patrimonial consequences of which are according to the rules of the South African private international law governed by the law of a foreign state, the court shall have the same power as a competent court of the foreign state concerned would have had at that time to order that assets be transferred from one spouse to the other spouse.

3.9. A South African court must therefore apply foreign law to determine whether or not it has judicial discretion to redistribute marital assets in a divorce in which the matrimonial property consequences are determined by a foreign legal system.

Questions

3.10 Which country's legal rule should determine the proprietary consequences of a marriage?

3.11 Should there be a single designated country's legal rule, or should there be a choice of different legal systems?

3.12 Should the same law apply to both movable and immovable property?

3.13 Individuals would have ordered their affairs over many years in terms of the existing rule. In the event of the rule being changed by the legislature, what could be done so as not to disturb vested rights in terms of the old rule?

3.14 Are the rules relating to divorce and the application of judicial discretions in marriages in which the proprietary consequences are determined by foreign law satisfactory or do they need to be amended?

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[26] Divorce Act s 2(1). In the case of spouses who are ordinarily resident in an area, there is also a requirement that they must have been resident in South Africa for at least one year before the institution of divorce.

4. DEVIATIONS FROM THE DEFAULT MATRIMONIAL PROPERTY SYSTEM

A. Antenuptial contracts

4.1. To deviate from the default matrimonial property system, South African common law has historically allowed prospective spouses to enter into antenuptial contracts. Theoretically, prospective spouses are allowed to include any terms in their antenuptial contract and structure their matrimonial property system in any way they see fit, as long as the terms of the contract are not illegal, and specifically, contrary to public policy.[27] In practice, however, spouses tend to choose one of the two forms of marriage out of community of property. The first default form of marriage out of community of property includes the accrual system, while the other does not include the accrual system.[28]

i. Requirements and procedural safeguards for antenuptial contracts

4.2. Because antenuptial contracts are concluded between parties who envisage lifelong commitment and a happy future together and because of the gendered inequalities in bargaining power which often underlie such contracts,[29] there may be a need for procedural requirements or formalities which aim specifically to protect the economically weaker party from entering into a disadvantageous and unfair contract. Currently South African law requires attestation and notarial registration of a written antenuptial contract.[30]

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27 E Bonthuys "Public Policy in Family Contracts Part II: Antenuptial Contracts" 2021 (32) *Stell LR* 3-23.

28 J Heaton "The Proprietary Consequences of Divorce" in J Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 57 59.

29 Bonthuys *Stell LR 2021 (32)* 5, 6.

30 Deeds Registries Act 47 of 1937 s 87; *Ex Parte Moodley; Ex Parte Iroabuchi* 2004 1 SA 109 (W).

Questions

4.3. Generally speaking, a spouse's estate, or if the parties are married in community of property, the joint estate, consists of all the assets and liabilities of the spouse or spouses. Should it be a requirement for antenuptial contracts that parties fully disclose their respective financial positions in the utmost good faith at the time of entering into these contracts?

4.4 Should both spouses who enter into antenuptial contracts be required to receive separate legal advice?

4.5 Should lawyers who draft antenuptial contracts have a duty to fully explain the nature and consequences of the antenuptial contracts, both at the time of concluding the marriage and at the time when the marriage is dissolved?

4.6 Are there any other procedural safeguards which should be considered for antenuptial contracts?

4.7 Should notarial registration remain a requirement for a valid antenuptial contract?

ii. Enforcement of antenuptial contracts which do not meet formal requirements

4.8. In order to be valid as against third parties who contract with the spouses, an antenuptial contract must be notarially registered. However, an unregistered antenuptial contract will, according to the authority be valid and enforceable between the spouses who entered into it.[31]

[31] *Odendaal v Odendaal* 2002 (1) SA 763 (W).

Questions

4.9 Are there any reasons why the current treatment of unregistered antenuptial contracts (as valid and enforceable as between spouses) should be reconsidered?

4.10 If the answer is positive, how should it be treated?

B. Mechanisms which allow spouses to deviate from the applicable matrimonial property system at dissolution of the marriage

4.11. In principle, parties are bound to the chosen matrimonial property system, which determines how property will be divided when the marriage ends. There are, however, three mechanisms to deviate from the property regime at divorce. These are the award of spousal maintenance (not covered in this issue paper), judicial discretion to redistribute property and an order of forfeiture of benefits.

i. Judicial discretion to redistribute in marriages out of community of property without accrual (currently section 7(3) of the Divorce Act)

4.12. The Matrimonial Property Act created a judicial discretion to redistribute assets in marriages out of community of property entered into before 1984 at the same time as creating the accrual system as the default marriage out of community of property.

4.13. Parliament's aim in introducing the discretion was:[32]

> To make it possible for parties who did not previously have the choice of accrual to ease their position through the reallocation of assets by the court. The provision was only meant to be an outlet valve to alleviate the unfairness in

[32] Law Commission Report on the Review of the Law of Divorce: Amendment of Section 7(3) of the Divorce Act, 1979 (1990) paras 1.3.4, 1.3.5.

> existing marriages that had been made subject to the rigid predetermined matrimonial property systems.

4.14. The discretion was therefore only available for those spouses married out of community of property before the commencement date of the legislation in 1984. It was subsequently also applied to civil marriages which took place before 1988 between African spouses.

4.15. Subsequently, the judicial discretion was extended to civil marriages out of community of property conducted in terms of the Transkei Marriage Act 21 of 1978, from commencement of the RCMA to 2000 when the Transkei Marriage Act was repealed.[33]

4.16. As a result of *Holomisa v Holomisa*, an additional category of marriages was included in the discretion to redistribute assets under section 7(3)(c) of the Divorce Act.[34] They are marriages:

> …entered into in terms of any law applicable in a former homeland, without entering into an antenuptial contract or agreement in terms of such law,

4.17. The discretion will be exercised:[35]

> …if it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services, or the saving of expenses which would otherwise have been incurred, or in any other manner.

4.18. However, the Constitutional Court created another judicial discretion which applies to customary marriages irrespective of the date on which they were concluded and irrespective of the matrimonial property system in:

> …every divorce court granting a divorce decree relating to a customary marriage has the power to order how the assets of the customary marriage

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33 *Holomisa v Holomisa* 2019 (2) BCLR 247 (CC).

34 Section 1 of the Judicial Matters Amendment Act 12 of 2020.

35 Matrimonial Property Act s 7(4).

> should be divided between the parties, regard being had to what is just and equitable in relation to the facts of each particular case.[36]

4.19. Finally, in *President, RSA v Women's Legal Centre Trust* [37] the Supreme Court of Appeal ordered that:

> Section 7(3) of the Divorce Act is inconsistent with sections 9, 10 and 34 of the Constitution insofar as it fails to provide for the redistribution of assets, on the dissolution of a Muslim marriage, when such redistribution would be just.

4.20. Although the declaration of unconstitutionality was suspended for a period of two years to enable Parliament to adopt legislation to remedy the constitutional defect, this creates yet another category of marriages to which the judicial discretion will apply, irrespective of the dates of the marriages.

4.21. There are therefore several different dates which determine whether the discretion in section 7(3) would be available to a marriage out of community of property and few bear any relation to the original purpose of the legislature. Moreover, these different rules relating to the availability of the discretion can be said to discriminate on the basis of marital status, race and religion.

4.22. Access to the redistribution discretion has been described as "the benefits of a possible just transfer of assets".[38] As a result, the lack of such discretion can be said to impact disproportionately on mainly wives in marriages where they have contributed to the growth of their husbands' estates, but cannot claim a share of the assets.

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36 *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC).

37 2021 (2) SA 381 (SCA) par 1.3 of the order.

38 *Holomisa v Holomisa* 2019 (2) BCLR 247 (CC) para 23.

Questions

4.23 Should a redistribution discretion be available in all marriages out of community of property without the accrual system irrespective of the dates on which these marriages were concluded?

4.24 Which factors should a court consider to decide whether to exercise the discretion?

4.25 Should non-financial contributions, like childrearing and housekeeping be considered when deciding a redistribution order?

ii. Forfeiture of benefits in marriages in community of property and marriages out of community of property with accrual

4.26. In marriages in community of property and marriages out of community of property but subject to accrual, section 9(1) of the Divorce Act determines that a court may:

> …make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.

4.27. The aim of forfeiture is to prevent undue benefit to one spouse, but Heaton argues that[39]

> a forfeiture order often is rather an empty remedy … It is arguable that restricting the scope of forfeiture to a spouse's claim to share in the matrimonial property the other spouse contributed amounts to indirect gender discrimination. Wives generally own and acquire fewer assets and therefore contribute less matrimonial property than husbands do.

4.28. The reason for this criticism is the interpretation by the courts that a spouse cannot be ordered to forfeit wealth which he or she has brought into the marriage and the

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[39] Heaton *SAJHR* 2005 at 557-558.

result is that forfeiture is generally ordered against wives, but not against husbands.

4.29. Another question is whether the factors which are considered in the decision to order forfeiture themselves amount to gender discrimination. It has been argued that courts' interpretations of misconduct often reflect patriarchal norms about appropriate behaviour by husbands and wives and that failure to take account of the kinds of non-financial homemaking and caring contributions [40] usually made by wives contributes to the disproportionate impact of forfeiture orders on women.

Questions

4.30. Should forfeiture orders remain available in marriages in community of property and in marriages out of community of property subject to the accrual system?

4.31. If the answer to the previous question is positive, what factors should courts consider to determine whether to order forfeiture of benefits?

4.32. Should forfeiture only be available against the spouse who had contributed less to the financial wealth of the marriage?

4.33. Should the separate remedies of forfeiture of benefits on the one hand, and redistribution orders on the other hand, be replaced with a single redistributive discretion at divorce based on fairness?

4.34. If the answer to the previous question is positive, which factors should a court consider to order redistribution in all marriages?

[40] Bonthuys *SALJ* 2014 at 456.

C. Universal partnerships within marriages[41]

5. CUSTOMARY MARRIAGES

5.1. The Recognition of Customary Marriages Act 120 of 1998 (RCMA) came into force on 15 November 2000. All "customary marriages"[53] entered into after 2000 are a hybrid of concepts of civil marriages[54] and customary marriages.[55] By extending certain provisions of the Divorce Act and the Matrimonial Property Act to customary law marriages, the RCMA has given the courts the same powers to deal with matrimonial property that they have in respect of civil marriages.[56]

5.2. The RCMA differentiates between monogamous and polygamous marriages. Prior to the Constitutional Court's decisions in the *Gumede* and *Ramuhovhi* cases, the patrimonial consequences of customary marriages also differed depending on whether the marriage was concluded before or after the coming into operation of the Act.[57]

5.3. Currently, (i e subsequent to the decision in the *Gumede* case),[58] the matrimonial property system in monogamous customary marriages (entered into before or after

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41 Also discussed at par 7 below.

53 A marriage that is "concluded in accordance with customary law" (sec 1 of the Customary Marriages Act).

54 Meaning marriages entered into in accordance with the common law and the Marriage Act 25 of 1961.

55 Himonga in *The Law of Divorce* 232.

56 Ibid 245. See also sections 8 (4) (a) of the Customary Marriages Act.

57 *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC). See Heaton in *SA Family Law* par 17.4; Himonga in *The Law of Divorce* 246 – 247.

58 In terms of sec 7(1) of the Customary Marriages Act all customary marriages entered into before the commencement of the Act is governed by customary law (in terms of which, broadly speaking, the husband owned and controlled all family property and the wife had no claim to family property during the marriage and on its dissolution). In terms of sec 7(2) all monogamous customary marriages entered into after the coming into operation of the Customary Marriages Act is automatically in community of property unless the parties entered into an ante-nuptial contract (i e the latter type of marriages are governed by the same rules as civil marriages). In the *Gumede* case, the Constitutional Court held that depriving wives in

the coming into operation of the RCMA), is determined by the same rules that apply to civil marriages: parties are automatically married in community of property unless they enter into an ante-nuptial contract, in which case the contract then determines their matrimonial property system.[59] With the new regime, spouses who marry out of community of property may subject their matrimonial property system to the accrual system.[60] Thus, unless parties who marry out of community of property exclude the accrual system in their ante-nuptial contract, it applies by default.[61]

5.4. The *Gumede* decision did not change the position with regard to polygamous customary marriages contracted before the coming into operation of the RCMA. In a subsequent case, the Limpopo High Court in 2016 held that section 7(1) of the Act is also unconstitutional with regard to its application to polygamous marriages entered into before the coming into operation of the Act.[62] The Court ordered that pending intervention by the legislature, wives in old polygamous customary marriages should enjoy equal rights in the matrimonial property between each of them and their husband.[63] Therefore, those wives will have the rights to equally manage and control matrimonial property. The Court in its effort to retain the customary concept of a polygamous marriage ensured that a distinction is maintained regarding house property, family property and personal property. Since separate property often arises in polygamous marriages, the Court ensured that

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some monogamous customary marriages of a claim to family property because of the date on which they entered into their marriage is unconstitutional (with the result that all monogamous customary marriages – and not only those entered into after coming into operation of the Act – can now be regarded as being in community of property unless an ante-nuptial contract has been entered into). The Court also declared sec 7(1) unconstitutional to the extent that it related to monogamous customary marriages (see the discussion in Heaton *SA Family Law* par 17.4.1).

59 Sec 7(2) of the Customary Marriages Act (in light of the *Gumede* decision referred to above). Heaton in *SA Family Law* par 17.4.2; Himonga in *The Law of Divorce* 246 et seq.

60 Himonga in *The Law of Divorce* 247 – 248.

61 Ibid.

62 *Ramuhovhi v President of the Republic of South Africa* 2016 (6) SA 210 (LT). See the discussion by L Kohn "*Ramuhovhi v President of the Republic of South Africa*: A bittersweet victory for women in 'old' polygamous customary marriages" *South African Journal on Human Rights* 2017 (33):1 120 – 137

63 Maliseha and Radebe "I do, I do, I also do: Equal right to matrimonial property *De Rebus* 2017 16 – 17; and Kohn *SAJHR* 2017 133 – 134, referring to the *Ramuhovhi* decision.

only the husband and the wife of the property concerned jointly enjoy equal rights to the benefit of the house.[64] Recently, the Constitutional Court confirmed the High Court order declaring section 7(1) of the Act inconsistent with the Constitution, in that it discriminates unfairly against women in polygamous customary marriages contracted before the commencement of the Act on the bases of first gender, and second race, ethnic or social origin.[65]

5.5. Polygamous customary marriages entered into after the coming into operation of the RCMA are regulated by a contract that parties are required to conclude in terms of section 7(6) of the Act.[66] Section 7(7) requires the court to terminate the matrimonial property system if the existing marriage is in community of property or subject to the accrual system. The Act does not provide for the consequences of non-compliance with section 7(6), and the position in this regard is still unclear.[67]

5.6. Succession in polygamous marriages is often organised according to 'houses' or 'kitchens,' and in accordance with the male primogeniture rule.[68] Accordingly, many traditional communities distinguish between general and house property. Each wife and her children constitute a 'house,' with the husband as the common spouse of all the houses.[69] Furthermore, many communities regard the family house as the site of communication between the spiritual (ancestral) and material worlds.[70] Thus, it does not form part of matrimonial property, even where the couple

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64 Ibid.

65 *Ramuhovhi and Others v President of the Republic of South Africa and Others* [2017] ZACC 41.

66 See the discussion by Himonga in *The Law of Divorce* 248 – 249. Osman F The Recognition of Customary Marriages Amendment Bill: Much ado about nothing? 2020 *SALJ* 389.

67 Ibid.

68 This rule stipulates that inheritance is through the eldest male child. See I Schapera *A handbook of Tswana law and custom* (1970) Frank Cass 15; T Venter and J Nel "African customary law of intestate succession and gender (in) equality" *TSAR* (2005) 86-105.

69 TW Bennett *A sourcebook of African customary law for Southern Africa* (1991) JUTA 401.

70 H Kuper *The Swazi* (1952) International African Institute 43; ME Lebaka "Ancestral beliefs in modern cultural and religious practices –The case of the Bapedi tribe" (2019) 75(1) *HTS: Theological Studies* 1-10.

live exclusively in it.[71] In this context, the division of matrimonial property is problematic in situations where a spouse contributed to the development of the family house.

5.7. Furthermore, section 10 of the RCMA recognises legal pluralism by allowing parties to marry under both customary law and the Marriage Act.[72] However, it "does not adequately regulate the interface between the couple's customary marriage and the subsequent civil marriage".[73] For example, it stipulates the consequences of a civil marriage – that it is in community of property unless such consequences are excluded in an ante nuptial contract – but fails to stipulate the consequences of a customary marriage.

5.8. Several questions arise regarding section 10(2): can spouses whose customary law marriage is in community of property conclude an ante-nuptial contract in terms of a civil law marriage? If this is possible, what would be the property status of their marriage, considering that their first marriage was in community of property and the second is out of community of property? Would an ante/post nuptial contract before the civil marriage not amount to a change of the marital system? If section 10(2) envisages a marital change, would that not be a violation of section 7(5) of the RCMA and section 21 of the Matrimonial Property Act, both of which require court intervention for a change of the marital system to be effective?"[74]

5.9. More concerning is the fact that section 10(2) could provide an unfair advantage to spouses who convert their customary marriage, since those who do not convert theirs are, in terms of section 7(1) and (2) of the RCMA (as amended by the

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71 JC Bekker; JMT Labuschagne; LP Vorster *Introduction to legal pluralism in South Africa: Part 1. Customary law* (2002) Louis Petrus 54-56.

72 See section 10(1) of the RCMA.

73 J Heaton and H Kruger *South African Family Law*, 4th Ed. pp236-7.

74 F Osman "The Million Rand Question: Does a Civil Marriage Automatically Dissolve the Parties' Customary Marriage?" *Potchefstroom Electronic Law Journal 2019 22*(1), 1-25. https://dx.doi.org/10.17159/1727-3781/2019/v22i0a4337 accessed 23 August 2021. Similarly comments forwarded from Project 144: Single Marriage Statute.

Gumede case), required to comply with the provisions of section 21 of the Matrimonial Property Act.[75]

5.10. Also, the fact that section 10(2) does not stipulate how couples should divide their property is problematic. Due to women's unequal bargaining power and poor knowledge of their legal positions, they could be prejudiced by the ante/post nuptial contract that accompanies a switch to a civil marriage.[76] Perhaps adopting the rules of matrimonial property system outlined under section 7(6), as read with 7(7) of the Act, one may conclude that the rules regulating a customary marriage operates until the civil marriage consequences come into being.

5.11. Lastly, indigenous norms of matrimonial property division do not recognise community of property. Significantly, these norms emerged in agrarian, patriarchal social settings, where family wealth was generated collectively.[77] In these settings, women lacked matrimonial property rights because their legal rights (and liabilities) were subsumed by their husbands in a philosophy similar to the English notion of *feme covert* (married woman).[78] Conversely, both the RCMA and the Marriage Act are individualistic in nature. Accordingly, where it is unclear which laws apply during divorce, women who contributed to matrimonial property through their independent income could be disadvantaged.

Questions

5.12. What is the current property regime in monogamous customary marriages in your community?

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[75] See Magdaleen de Klerk "I don't want your money honey – Recognition of Customary Marriages Act" *De Rebus 2015* 42 see https://www.derebus.org.za/dont-want-money-honey-recognition-customary-marriages-act/ accessed on 23 August 2021.

[76] *Tumelo Mphosi v Theophilus Mphosi* Unreported High Court Case No 1142/2014 High Court of South Africa, Limpopo Division, Polokwane.

[77] AC Diala "Legal pluralism and the future of indigenous family laws in Africa" *International Journal of Law, Policy and the Family 2021* pp. 1-17 at 3-5.

[78] AC Diala "The shadow of legal pluralism in matrimonial property division outside the courts in Southern Nigeria" *African Human Rights Law Journal* 2018 pp. 706-731 at 710-711.

5.13. What are the types of property regimes in polygamous customary marriages in your community?

5.14. What are the differences between personal, house, and family property in customary marriages in your community?

5.15. How should a spouse be compensated for substantial renovations to a family house that does not form part of matrimonial property?

5.16. How should customary property be distributed if parties are married under both customary and civil law?

5.17. Are the proprietary consequences of customary marriages in the RCMA serving the needs of communities?

5.18. What can be done to protect the property rights of spouses in customary marriages?

5.19. In what ways do the RCMA protect the matrimonial property rights of rural women?

5.20. How should matrimonial property be regulated in customary marriages?

5.21. Should spouses who convert their customary marriage be required to comply with the provisions of section 21 of the Matrimonial Property Act?

6. RELIGIOUS MARRIAGES

6.1. Until recently, religious marriages were not legally recognised or regulated in South Africa.[79] As demonstrated in case law, non-recognition of religious marriages has left many women who are parties to only a religious marriage in an invidious position.

6.2. One such case illustrating the negative impact on women in Muslim marriages is *Ryland v Edros*,[80] which involved a monogamous Muslim marriage where the husband and wife were married to- and divorced from each other by Muslim rites only. The Cape High Court (as it then was) recognised the Muslim marriage as an enforceable contract.[81] However, in the absence of a written contract, the Court relied on the views of the Muslim community where the parties resided, as an indication of the Islamic law position regarding division of marital assets. For example, the wife in the *Ryland* case contended that she was entitled to an equitable division of her husband's estate. She relied on Malaysian law, to substantiate her argument.[82] Malaysian law is influenced by the *Shafi'i* school of thought, which is the same school of thought that is predominant in the Western Cape where the parties resided while they were married to each other. The husband in the *Ryland* case, however, argued that the Muslim community where they resided in the Western Cape does not permit community of property and only compensates a spouse for tangible contributions made to the other's estate. The Court found that it needs to be guided by the practices of the Muslim community within which the parties resided and in the absence of evidence indicating tangible contributions made by the wife to the husband's estate, the Court found in favour of the husband and did not grant the wife's claim to an equitable division of her husband's estate.

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79 See for example, *Ismail v Ismail* 1983 (1) SA 1006 (A); *Singh v Ramparsad*. 2007 (3) SA 445 (D); *Taylor v Kurtstag* 2005 (1) SA 362 (W).

80 1997 (2) SA 690 (C).

81 At 710D-E.

82 At 715D-J. See section 58 of the Malaysian Islamic Family Law (Federal Territory) Act 303 of 1984.

6.3. In the Hindu and Jewish contexts, while many South African Hindus and Jews enter civil marriages along with their religious marriages, in those instances where they enter only a religious marriage, women especially could be left financially vulnerable. This was illustrated in *Singh v Ramparsad*[83] where the parties were married by Hindu rites only. When the marriage between the parties broke down, the wife asked the Durban High Court (as it then was) to recognise her marriage as a civil marriage under the Marriage Act and to grant her a divorce under the Divorce Act. This was to enable the recognition of a joint estate so that their combined estates could be divided equally between them. Because the South African Hindu community does not recognise Hindu divorce, the Court did not grant the wife's claims for among others, a civil divorce and division of a joint estate.

6.4. Even where parties conclude both a religious and a civil marriage, the wife could still be disparately affected due to the non-recognition of their religious marriage. For instance, many wives in religious marriages have difficulty in accessing a religious divorce. In a Jewish context, this was illustrated in *Amar v Amar*,[84] which involved parties who were married by Jewish and civil law.

6.5. However, progress is being made regarding the recognition of religious marriages, starting with Muslim marriages. On 18 December 2020, the Supreme Court of Appeal in the case of *President of the RSA and Another v Women's Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others* ('Women's Legal Centre Trust case')[85] declared the common law definition of marriage to be unconstitutional to the extent that it does not include Muslim marriages. The Court also found the Marriage Act and the Divorce Act to be inconsistent with sections 9 (equality), 10 (dignity), 28 (best interests of the child) and 34 (access to courts) of the Constitution to the extent that they neither recognise Muslim marriages nor regulate the consequences of such recognition.[86]

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83 2007 (3) SA 445 (D).

84 1999 (3) SA 604 (W).

85 1 All SA 802 (SCA).

86 Para 1.1 of the order in *President of the RSA and Another v Women's Legal Centre Trus*t.

6.6. As noted earlier in this issue paper, the Court found sections 7(3) and 9(1) of the Divorce Act to be inconsistent with sections 9, 10 and 34 of the Constitution.[87] Section 7(3) of the Divorce Act provides for a redistribution of assets if such redistribution would be just, and section 9(1) of the Divorce Act makes provision for the forfeiture of the patrimonial benefits of a civil marriage.

6.7. The declarations of invalidity of the above provisions of the Marriage Act and the Divorce Act are suspended until 18 December 2022, to give Parliament an opportunity to amend existing legislation or to pass new legislation to address the constitutional inconsistencies.

6.8. There are two parallel processes underway to afford legislative recognition to religious marriages. The one process is spearheaded by the Department of Home Affairs, which produced a Green Paper on Marriages in South Africa.[88] The other process is initiated by the Commission's Advisory Committee on Project 144, which published an Issue Paper[89] and a Discussion Paper[90] on the *Single Marriage Statute*.

6.9. The Advisory Committee on Project 144 indicates that it will draft legislation to only recognise and regulate the registration of different forms of protected relationships or marriages and life partnerships. It intends for the regulation of the consequences of protected relationships or marriages and life partnerships to be undertaken through the introduction of new legislation where applicable and the amendment of existing legislation such as the Matrimonial Property Act, Divorce Act, Children's Act 38 of 2005, Maintenance Act 99 of 1998, Intestate Succession Act 81 of 1987, and Maintenance of Surviving Spouses Act 27 of 1990 etc.

6.10. In reviewing the Matrimonial Property Act, the question arises as to which matrimonial property regime should apply to religious marriages?

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87 Par 4.19 above. Paras 1.3 and 1.4 of the order in *President of the RSA and Another v Women's Legal Centre Trus*t.

88 Home Affairs Gazette No. 44529 with Government Notice No. 398 published on the 4th of May 2021.

89 SALRC *Issue Paper 35 - Project 144: Single Marriage Statute* (April 2019).

90 SALRC *Discussion Paper 152 - Project 144*: Single Marriage *Statute* (January 2021).

Questions

6.11. Should a default matrimonial property regime apply to a monogamous religious marriage? Why or why not?

6.12. If your answer to the previous question (6.11) is no, how should the matrimonial property regime of a monogamous religious marriage be decided and regulated?

6.13. If your answer to the previous question (6.11) is yes, which of the following default matrimonial property regimes should apply to a monogamous religious marriage, and why:

a) In community of property with profit and loss
b) Out of community of property with accrual
c) Out of community of property without accrual
d) Any other – specify

6.14. If a monogamous religious marriage is treated as out of community of property without accrual, should there be judicial discretion to compensate spouses for contributions made to the growth of the other's estate?

6.15. Should a default matrimonial property regime apply to a polygynous religious marriage? Why or why not?

6.16. If your answer to (6.15) above is no, how should the matrimonial property regime of a polygynous religious marriage be decided and regulated?

6.17. If your answer to (6.15) above is yes, which of the following default matrimonial property regimes should apply to a polygynous religious marriage, and why:

a) In community of property with profit and loss
b) Out of community of property with accrual
c) Out of community of property without accrual
d) Any other – specify

6.18. If a polygynous religious marriage is treated as out of community of property without accrual, should there be judicial discretion to compensate spouses for contributions made to the growth of the other's estate?

6.19. Should the religious marriage contract be regarded and have the same status as an antenuptial contract? For example, should provisions in a Muslim marriage contract (*nikahnāmah*) relating to spousal maintenance obligations (*nafaqah*), payment of dower (*mahr*), agreement about divorce options (such as *tafwīd-ul-talāq*, *khul'a*) etc. and provisions of the Jewish marriage contract (*ketubah*) such as spousal consent to obtain a Jewish divorce (*get*) etc. be regarded as terms of an antenuptial contract?

6.20. How should potentially discriminatory terms of religious marital contracts be dealt with in an antenuptial contract?

6.21. Should the same formalities and requirements apply for antenuptial contracts in religious marriages as in other types of marriages?

6.22. If an antenuptial contract is expected to be registered by only a marriage officer, which formalities should apply?

6.23. In the event that parties enter simultaneously into a religious marriage and a civil marriage, which marriage's matrimonial property regime should apply if they are not the same?

7. UNMARRIED LIFE PARTNERSHIPS

A. Introduction

7.1. A large number of South Africans live together in intimate relationships without marrying. These relationships have never been fully legally recognised, although there is a mistaken belief that they are “common law” marriages. There is, however, no such thing as a “common-law marriage” in South Africa. [91]This means that a large category of people cannot access the law and the courts when their relationships dissolve. They are denied fair access to assets accumulated during the relationship, maintenance and other benefits that people who are married are accorded by the law.[92] The inescapable fact is that women, particularly black women are most vulnerable to the adverse effects of the no-recognition of these relationships.[93]

7.2. Couples in unmarried life partnerships have very few legal rights, except for the occasional cases granting rights to share in partnership assets on the basis that the partners had concluded tacit partnership agreements.[94] The Court recognised a right to mutual support for opposite-sex intimate partners who had undertaken the duties in the context of a claim against a third party for the loss of support.[95] In

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91 SALRC *Project 118: Report on Domestic Partnerships* (2006) 12.

92 Heaton *SA Family Law* 243-244; Smith in *The Law of Divorce* 389 – 394; Barratt *Stell LR* 2015 110.

93 Women's Legal Centre in B*wanya v Master of the High Court, Cape Town and Others [*2020] ZAWCHC at par [67].

94 South African Law Reform Commission (SALRC) http://www.justice.gov.za/salrc/ipapers.htm (accessed 30 August 2021) 36. See generally Bonthuys Elsje ‘Exploring universal partnerships and putative marriages as tools for awarding partnership property in contemporary family law’ 2016 *PELJ* 19; Barratt Amanda ‘Whatever I acquire will be mine and mine alone: Marital agreements not to share in constitutional South Africa’ 2013 *SALJ* 688 – 704.

95 *Paixão v Road Accident Fund* 2012 6 SA 377 (SCA).

the Constitutional Court Skweyiya J in *Volks v Robinson*[96] has, however, precluded the wholesale extension of marriage-like rights to opposite-sex unmarried cohabitants on the basis that differentiating between rights of married and unmarried couples is fair because the Constitution and international law recognises the importance of marriage as a fundamental social institution. It must be noted that, as a result of litigation in respect of same-sex unmarried partners which preceded the adoption of the Civil Union Act, the courts have extended stronger rights to same-sex unmarried partners than is available for opposite sex unmarried partners. These rights continue to exist for same-sex intimate partners, despite the fact that they can now marry under the Civil Union Act.[97]

7.3. Nevertheless, recently, in September 2020 the Court in *Bwanya v Master of the High Court, Cape Town and Others*[98] ruled in a case that involved heterosexual life partners that 'there is no reason why, in section 1(1) of the ISA [Intestate Succession Act] wherever the words "spouse" is found the words "or partner in a permanent opposite-sex life partnership in which the partners has undertaken reciprocal duties of support" should not be read into the Act giving substantive relief to the Applicant and to those in similar circumstances'.[99] Magona AJ's judgment is now subject to confirmation by the Constitutional Court under section 172(2)(a) of the Constitution and the matter was heard on 16 February 2021.[100]

7.4. The lack of a statutory remedy to claim a share of partnership property outside of valid marriages, is a problem with significant gendered consequences, potentially leading to the social and economic vulnerability of women (and often children) when intimate relationships end.[101] Although the law has been developed by the courts to provide life partners with the possibility of entering into a universal

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96 *Volks v Robinson* 2005 5 BCLR 446 (CC) paras 50 – 57.

97 Gory v Kolver 2007 4 SA 97 (CC); Laubscher v Duplan 2017 2 SA 264 (CC).

98 *Jane Bwanya v The Master of the High Court, Cape Town* (20357/18) [2020] ZAWCHC 111; 2020 (12) BCLR 1446 (WCC); 2021 (1) SA 138 (WCC) (28 September 2020).

99 Ibid at Par [225] see http://www.saflii.org/za/cases/ZAWCHC/2020/111.pdf accessed 23 August 2021.

100 *Jane Bwanya v The Master of the High Court, Cape Town* Case Number: CCT 241/20. The matter was heard on 16 February 2021.

101 Bonthuys *SALJ* 2017 263.

partnership, disputes about the existence and the terms of universal partnerships in the context of cohabitation are common; and the need for a statutory framework to bring clarity with regard to the position of cohabitants has been increasingly emphasised by academic commentators.[102]

B. Putative marriages

7.5. People can be in unmarried life partnerships because they enter into invalid marriages. The reason for invalidity could be the failure to comply with formal requirements, for instance not having a duly appointed marriage officer to conduct the marriage, or it could be that the marriage fails to comply with substantive requirements, for instance where the so-called marriage is bigamous or the so-called marriage is between people who are related to one another in the prohibited degrees.

7.6. In such cases, the doctrine of putative marriage can assist the spouses to share in the assets amassed during their relationships where one or both spouses were unaware of the impediments which affect the validity of their marriage. If both parties were in good faith, the matrimonial property system which they intended to apply to their marriage will be implemented. If only one party was in good faith a court will usually divide the property in terms of the matrimonial property regime which most favours the *bona fide* party.

7.7. Although there have been cases in which bigamous marriages were regarded as putative marriages in favour of the bona fide spouse,[103] in *Zulu v Zulu*[104] (where the existing marriage was in community of property) the Court held that there was no property which could become part of a joint estate in the putative (second) marriage. Only those assets which had been excluded from the joint estate of the (first) legal marriage could have formed part of a joint estate in the putative

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[102] Bonthuys *SALJ* 2015 98 – 99; Barratt *Stell LR* 2015 112, 130 – 131; Rule *Stell LR* 2016 632 – 633; Bonthuys *SALJ* 2017 264, 273; 12 See in general on the current different marriage regimes Heaton in *The Law of Divorce* 59 – 67; Heaton *SA Family Law* par 6.1 – 6.5.6, and 7.1 – 7.5.4; Sonnekus in *Family Law* par B1, B7 – B14 and B18 – B20.

[103] *H (wrongly called C) v C* 1929 TPD 992; *Potgieter v Bellingan* 1940 EDL 264; *Prinsloo v Prinsloo* 1958 3 SA 759 (T); *Ngubane v Ngubane* 1983 2 SA 770 (T).

[104] 2008 4 SA 12 (D).

marriage. It is further not clear whether putative marriages can exist where there are existing marriages out of community of profit but including the accrual system. The application for a putative marriage may therefore not enable a bona fide party to share in property in certain bigamous marriages.[105]

7.8. In customary marriages the possibility of invalidity is even greater, due to the requirement in the RCMA that "the marriage must be negotiated and entered into or celebrated in accordance with customary law."[106] The uncertainty arising from this provision jeopardises the validity of customary marriages, as does the consequences of the decision in *MM v MN*[107] that a second customary (Tsonga) marriage which was concluded without first obtaining the permission of the first wife was invalid. The doctrine of putative marriage has not been applied to customary marriages.[108]

C. Universal partnership agreements

7.9. Another avenue to obtain property sharing in invalid marriages is by way of the universal partnership contract. This is also available to those in unmarried life partnerships who did not enter into any form of marriage and to religious marriages which are not legally valid and therefore do not qualify as putative marriages.[109]

7.10. Recent cases in the Supreme Court of Appeal awarded rights to share in partnership property to unmarried intimate partners on the basis of universal partnership contracts. These cases are significant because they confirm that universal partnership contracts can be entered into tacitly and that partnership

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105 Smith B "The Interplay Between Registered and Unregistered Domestic Partnerships Under the Draft Domestic Partnerships Bill, 2008 and the Potential Role of the Putative Marriage Doctrine" 2011 *SALJ* 560-593 569, 570 criticises the outcome of this case.

106 Act 120 of 1998 s 3(1)(b).

107 *MM v MN* 2013 4 SA 415 (CC). Also reported *as Mayelane v Ngwenyama* 2013 8 BCLR 918 (CC).

108 Mwambene L and Kruuse H "Form over function? The practical application of the Recognition of Customary Marriages Act 1998" in South Africa" 2013 *Acta Juridica* 292−317 314-316.

109 Hager, Liesl. *The dissolution of universal partnerships in South African law: Lessons to be learnt from Botswana, Zimbabwe and Namibia* 2020 *De Jure 53*, 123-139 https://dx.doi.org/10.17159/2225-7160/2020/v53a9 accessed on 31 August 2021.

assets could also encompass non-financial benefits. It has also been held that women typically make non-financial contributions, like child-care and home-making, which should also be taken into account in determining the existence and extent of a universal partnership. Indeed, Brand JA expressly mentioned the 'greater awareness in modern society of the value of the contribution of those who are prepared to sacrifice the satisfaction of pursuing their own careers, in the best interests of their families.' [110]

7.11. We have referred above to the question whether a universal partnership contract can be concluded between spouses in marriages out of community of property without accrual. This raises the similar issue of whether the existence of an Islamic marriage contract would preclude a Muslim wife from relying on a universal partnership. It could be argued that the express marriage contract, with its implication of separate spousal estates, would render the conclusion of a tacit universal partnership agreement unlikely.

7.12. Although the use of universal partnership contracts represents an advance on the previous legal situation for unmarried life partners, every individual litigant who claims a share of the partnership assets needs to prove the existence of such a contract. This is not feasible for many partners who lack the means to approach the courts to enforce their contractual rights.

Questions:

7.13. Should a universal partnership agreement apply to polygamous customary marriages where the existing marriages are in community of property?

7.14. Should the doctrine of putative marriage be available in bigamous marriages where an existing marriage is in community of property?

7.15. If the answer to the previous question is positive, how should a court distribute the property?

[110] *Butters v Mncora* 2012 (4) SA 1 (SCA) para 22.

7.16. Should spouses in Muslim marriages and in other civil marriages out of community of property without the accrual system be able to rely on universal partnership contracts to lay claim to partnership property?

7.17. Should unmarried life partners have to rely on universal partnership contracts to claim a share of the assets built up by their partners or should there be a statutory presumption that property acquired during the relationship is to be shared equally by both partners?

8. MANAGEMENT OF ASSETS DURING MARRIAGE

A. Management of the joint estate and unauthorized transactions in marriages in community of property

8.1. Where parties are married in community of property, they can jointly manage their matrimonial estate. Current provisions require spouses to obtain consent from the other spouse (by way of written, attested, oral, and tacit) for certain transactions involving the joint assets. Where a spouse does not obtain the consent of his or her spouse, the transaction will not be valid. However, there is an exception created to protect bona fide third parties transacting with spouses. This exception sets out that where a third party did not know and could not have reasonably known that a contracting spouse did not have the requisite consent, then consent will be deemed, and the transaction will be deemed to be valid.[111] If the transaction is deemed valid, the non-consenting spouse has the right to an adjustment in their favour in terms of section 15(9)(b) of the Matrimonial Property Act

8.2. Academic writers have argued that the non-consenting spouse and the bona fide third party are variously favoured in protection, and this protection should shift more clearly in favour of the non-consenting spouse or the third party.[112]

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111 Section 15(9)(a) of the MPA.

112 See the comment by Mocumie JA in *Vukeya v Ntshane and Others* (Case no. 518/2019) [2020] ZASCA 167 11 December 2020) at para 27: 'Section 15… seeks to strike a balance between the interests of the non-consenting spouse, on the one hand, and the bona fide third party, on the other. Whether the legislature has struck an appropriate balance has been fiercely debated by academic writers ... '.See for example, NN Zaal "Marital milestone of gravestone the Matrimonial Property Act 88 of 1984 as reformative half-way mark for the eighties" (1986) *Journal of South African Law* 57; JJ McLennan "The Perils of Contracting with Persons Married in Community of Property" (2000) 117 *South African Law Journal* 367; LL Steyn "When third party cannot reasonably know that spouse's consent to contract is lacking" 119 (2002) *South African Law Journal* 253; A Barratt, 'Clarifying Protection of Spouses Married in Community of Property - [Discussion of Visser v Hull 2010 1 SA 521 (WCC) and *Bopape v Moloto* 2000 1 SA 383 (T)]' (2011) 22 *Stellenbosch L Rev* 272; M de Jong and W Pintens "Default Matrimonial Property Regimes and the Principles of European-South African comparison (part 2)" 2015 *TSAR* 551.

8.3. Another issue that has arisen in this context is whether the provision dealing with the bona fide nature of the third party's actions should be further clarified/spelt out. On the one hand, a clearer direction from the legislature as to what a third party needs to prove may make for better guidance and protection. On the other hand, three recent cases in the Supreme Court of Appeal suggest that the current 'reasonable belief' wording in the provision may be sufficient, or even preferable, in that it is flexible enough to take into account the specific circumstances of the transaction in issue.[113]

Questions:

8.4. Does section 15 strike the appropriate balance in protecting the interests of the non-consenting spouse, on the one hand, and the bona fide third party on the other?

8.5. If the answer to the previous question is no, how should the legislation be amended to provide for the appropriate balance of protection?

8.6. Is the reference to 'reasonable belief' in the legislation clear enough or should there be explicit guidelines that third parties should undertake in order to receive protection?

B. Dissipation of assets pending divorce

8.7. When spouses become aware that a divorce will soon take place, some of them may want to alienate or hide assets in order to prevent sharing these assets with the other spouse at divorce.[114] Women are often disadvantaged by these practices,

[113] *Marais N.O. and Another v Maposa and Others* (642/2018) [2020] ZASCA 23; *Vukeya v Ntshane and Others* (Case no. 518/2019) [2020] ZASCA 167 (11 December 2020; and *Mulaudzi v Mudau and Others* (1034/2019) [2020] ZASCA 148 (18 November 2020).

[114] A van Aswegen "The protection of a Spouse's Right to Share in the Joint Estate or Accrual" (1987) 230 *De Rebus* 59 at 63.

because they often leave the finances to their husbands and are thus unaware of financial matters.[115]

8.8. As set out in the previous section (8(a)), section 15 of the Matrimonial Property Act provides some protection in marriages in community of property by designating certain transactions in respect of the joint estate for which formal consent of both spouses is required.

8.9. However, not all financially significant transactions are covered by these provisions. Section 15(7) determines that:

> *Notwithstanding the provisions of subsection (2) (c), a spouse may without the consent of the other spouse-*
> *(a) sell listed securities on the stock exchange and cede or pledge listed securities in order to buy listed securities;*
> *(b) alienate, cede or pledge-*
> *(i) a deposit held in his name at a building society or banking institution;*
> *(ii) building society shares registered in his name.*

8.10. Furthermore, rights to prevent dissipation of assets by way of interdict, to challenge transactions with third parties and to claim an adjustment upon divorce can only be exercised if the injured spouse becomes aware of and is able to prove this conduct by the other spouse.

8.11. There are also few effective statutory provisions preventing a spouse from hiding or dissipating assets in a marriage out of community of property subject to the accrual system in order to reduce the amount of accrual which will be awarded to the other spouse at divorce.[116] Despite the legal obligation to "furnish full particulars of the value of that estate" at the time of divorce,[117] a spouse who expects to institute or be sued for a divorce in the near future may hide or dissipate assets beforehand. However, upon becoming aware of this conduct the other spouse may apply for an order for the immediate division of the accrual in terms of section 8 of

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[115] De Jong, M "The need for new legislation and/or divorce mediation to counter some commonly experienced problems with the division of assets upon divorce" 2012 *Stell LR* 225 232.

[116] The courts have commented on these challenges recently in *ND v MD* ZAGPJHC 228; [2021] 1 All SA 909 (GJ) (16 September 2020) paras 17 and 25 and before in *BM v NM* ZAGPJHC 76; [2010] (3) SA 220 (GSJ) (25 August 2009) para 26.

[117] Matrimonial Property Act s 7.

the Act. The effectiveness of this section depends again on obtaining information about the proposed behaviour by the other spouse.

Questions

8.12. Do the mechanisms aimed at preventing spouses from concealing and dissipating assets pending a divorce provide adequate protection for spouses in marriages:

- In community of property?
- Out of community of property but subject to the accrual system?

8.13. What other measures could be taken to improve this situation?

9. TECHNICAL ISSUES AT DIVORCE

A. Trusts

9.1. The creation of family trusts and the transfer of marital assets into the trust is one way in which spouses in wealthier families exclude those assets from being shared with the other spouse at divorce. Because men are usually in charge of family finances, especially where large amounts of money are at stake, this practice usually affects wives detrimentally. It is unclear whether the courts will allow assets in a family trust to be distributed to spouses at divorce and whether they will "pierce the veil" of the trust to consider this avenue.

9.2. In *Badenhorst,* [118] the Supreme Court of Appeal held that the assets of a trust could be taken into account for the purposes of a redistribution order in terms of section 7 (3) of the Divorce Act, if it could be shown that one spouse controlled the trust and would, but for the trust, have acquired or owned the assets in his or her own name. However, In *WT v KT*[119] the same court distinguished between marriages in community of property and those out of community of property to conclude that a court lacked the discretion to determine whether the trust assets should be taken into account for division of the joint estate in a marriage in community of property.

9.3. Even where courts are prepared to go beyond the trust to distribute assets, it is often difficult for financially weaker parties to obtain information and evidence about family trusts which would enable them to claim a share of such assets.

9.4. In a narrower context, there are calls for the inclusion, in certain cases, of trust assets as part of the assets of a spouse in matrimonial proceedings. The Trust Property Control Act 57 of 1988 provides that trust property shall not form part of the personal estate of the trustee. Courts are, however, often required to decide whether trust assets, when one of the spouses is a trustee of the trust, should be

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[118] *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA).

[119] 2015 (3) SA 754 (SCA).

regarded as part of the parties' joint estate. In divorce proceedings, one of the spouses (usually the husband) invariably pleads that trust assets are not owned by him and that they are not to be taken into account in determining the value of his estate. This approach is inequitable where the husband's own estate has been impoverished by his contributions to the trust during the course of the marriage. It is often difficult for a wife to establish the facts in support of her claim that trust assets form part of the husband's estate. Proponents of this view therefore suggest that legislation should provide that on the termination of a marriage (whether by death or divorce), assets acquired by a trust from a spouse during a marriage – which would but for the trust have been owned by such spouse - should form part of such spouse's estate.[120]

Questions

9.5. Should courts retain/have a discretion to go behind the trust form and distribute trust assets where a spouse can show that the other spouse has used the trust assets as his or her personal assets?

9.6. If the answer to the previous question is positive, should this apply to all trusts, or only certain trusts? Should this also apply in customary marriages?

9.7. What factors should the courts take into account when exercising this discretion?

9.8. Should there be a rebuttable legal presumption that family trusts contain assets which would have been the personal property of the spouses and would, therefore, otherwise have been available for distribution at divorce?

9.9. Are there any legal mechanisms which would assist financially weaker parties to obtain information and evidence about family trusts which would enable them to claim a share of such assets?

9.10. What other problems are currently encountered in practice with regard to trust assets upon divorce and how should they be resolved?

[120] Alick Costa "A Plea for enlightened reform" *De Rebus* May 2003 23.

B. Career assets as property

9.11. Generally speaking, a spouse's estate, or if the parties are married in community of property, the joint estate, consists of all the assets and liabilities of the spouse or spouses.[121] It is the balance of these assets and liabilities that is then distributed at the dissolution of the marriage in accordance with the particular matrimonial property regime applicable.

9.12. While assets are traditionally associated with immovable and movable property such as vehicles, money, jewellery, and other physical assets,[122] our courts have recognised and held as divisible non-traditional forms of assets, for example, enterprise goodwill.[123]

9.13. From this analogy comes the question: should our courts recognise personal goodwill / career assets? Career assets can be described as "human skills, knowledge, and experience acquired or increased through investments of time, energy and money in an individual as a form of wealth enhancing future income."[124] Examples of career assets include professional licences or degrees, (enhanced) earning capacity, and personal (professional) goodwill.[125] Currently, these assets are not considered as assets subject to distribution upon dissolution of marriage.[126]

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121 Heaton in *The Law of Divorce* 70 et seq. There are certain exceptions which apply in respect of marriages in community of property and marriages subject to the accrual system (Ibid.).

122 Heaton *The Law of Divorce* 71.

123 See for eg, *L W v C W and Others* (12866/2014) [2020] ZAWCHC 86 (26 August 2020).

124 A Kelly "The marital partnership pretence and career assets: the ascendancy of self over the marital community" (2001) *Boston University Law* Review 59 at 77.

125 Ibid. For a recent example of a court considering career assets, particularly a university degree, see the recent Malawian decision in *Tewesa v Tewesa* (Matrimonial Cause Number 9 of 2012) [2020] MWHC 28 (31 August 2020).

126 Heaton *SAJHR* 2005 at 571 – 572 and Bonthuys 2001 64(2) *THRHR* 192 at 200.

Questions

9.14 Do you think it would be more equitable for career assets to be included as property capable of division at the dissolution of marriage? If so, why? If not, why not?

9.15. Should the legislature intervene in the current interpretation of the concept of "property" on divorce, by formally defining it in relevant legislation? Or should the interpretation of this concept be left to the courts depending on the circumstances of an individual case? Please motivate your response?

9.16. If you believe that the redefinition of the concept of "property" for purposes of divorce is inadvisable, are there other ways in which "intangible / non-traditional" marital property such as career assets can be taken into account in the distribution of assets on divorce?

C. Pensions

9.17. Pension or retirement benefits are often the largest assets in divorces, apart from marital homes. Traditionally, a pension benefit was not included in a spouse's estate (or the joint estate) upon divorce. Pursuant to the recommendation of the South African Law Commission (as it was then) the Divorce Act was amended to enable non-member spouses to claim portions of their member spouses' pension benefits on divorce. This led to the introduction of the phrase 'pension interest', which was deemed to be an asset in the member spouse's estate for the purposes of divorce. Depending on the matrimonial property system applicable to the parties' marriage, the non-member spouse derived the right to claim the benefit when the parties divorced. However, this right only vested in the spouse when he or she retired, resigned or was dismissed or retrenched. Since 1989, section 7 of the Divorce Act allowed a divorced spouse to share in the pension interests of the other spouse even though they were not yet payable.[127] In light of the 2007[128] and

[127] Sec 7(7) and (8) of the Divorce Act, and sec 37D(1)(d) of the Pension Funds Act 24 of 1956 (as amended).

[128] Pension Funds Amendment Act 11 of 2007

2011[129] amendments to statutes dealing with pensions, the clean break principle was introduced to allow non-member spouses to claim and receive their portions of the member spouses' pension interests on the date of divorce. Spouses' pension interests are therefore included for purposes of dividing their assets upon divorce. This also applies to partners in a civil union. The only situation where it does not apply is where the spouses or partners were married on or after 1 November 1984 in terms of an ante-nuptial contract by which community of property, community of profit and loss and the accrual system are excluded.[130]

9.18. Pension "interest" should be distinguished from pension "benefit". A pension "interest" refers to an interest which has not yet accrued by the time of the divorce, while a pension "benefit" relates to a benefit which has accrued (during the subsistence of the marriage). It has been argued that the provisions of the Divorce Act regarding pension sharing relate only to a pension "interest".[131] A pension interest is thus that amount a member of a pension fund would have received had he or she resigned as a member of the fund on the date of divorce. Where the pension benefit has accrued because the relevant spouse or partner has already retired or resigned from the fund, the pension benefit must be dealt with as an asset according to the ordinary rules of the matrimonial property regime under which the parties were married, or a settlement, if there is one.[132] However, the correctness of this position is disputed. [133]

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129 Government Employees Pension Law Amendment Act 19 of 2011.

130 See in general Heaton *SA Family Law* par 12.3.2; Heaton in *The Law of Divorce* 74 – 80; Van Niekerk *Divorce Litigation* par 7.2.4 – 7.2.4.5; Glover in *Family Law* par D8; Marumoagae *PELJ* 2014 2488 et seq; Marumoagae *Obiter* 2016 312 et seq. Sec 7(7) refers to patrimonial benefits, and not to maintenance which is not a patrimonial benefit (van Niekerk *Divorce Litigation* par 7.2.4).

131 Heaton *SA Family Law* par 12.3.1; Eskom Pension and Provident Fund v Krugel and Another (689/2010) [2011] ZASCA 96; [2011] 4 All SA 1 (SCA); 2012 (6) SA 143 (SCA).

132 Glover in *Family Law* par D8.

133 See MC Marumoagae 'An Argument for the Necessary Amendments to the Legislative Provisions Regulating the Sharing of Retirement Savings in South Africa (2018) 30 (2) *SA Merc LJ* 280-301.

9.19. In 1999 the SALRC in 1999 submitted a report to the Minister of Justice[134] proposing, amongst other measures, that pension benefits should not be regarded as matrimonial assets and suggesting a radically different formula to calculate these benefits.[135] More than twenty years later, these proposals have not been implemented.

9.20. In the meantime, the Pension Funds Amendment Act 11 of 2007 addressed some of these problems by providing that the pension interest be calculated and paid out to the non-member spouse at the time of the divorce.[136] This Act is, however, applicable to private pension funds only. Hence, members of the other pension funds have approached the courts to force their funds to implement similar changes. This discrepancy was addressed with regard to government employees in 2011; and with regard to employees of the National Post Office in 2013.[137] Unfortunately there are other retirement funds for which no litigation has been undertaken and which still fall outside the scope of the Pension Funds Amendment Act of 2007. This can have a negative impact on financially weaker spouses, who are mostly women.

9.21. Another issue which has a serious impact on financially weaker spouses, who are generally women, is that the law currently allows retirement fund members to hide retirement benefits and take them out of reach of non-member spouses by converting pension benefits to living annuities.[138] In *ST v CT*[139] the Supreme Court of Appeal held that the rights to claim in terms of a living annuity belonged to the

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134 SALRC *Report on Sharing of Pension Benefits* 1999.

135 Ibid 44 et seq. See also the discussion of the SALRC's recommendations by Marumoagae *Obiter* 2016 317 et seq.

136 Glover in *Family Law* par D8. (Refer to the amended sec 37D(4) of the Pension Funds Act 24 of 1956.).

137 Sec 21 of the Government Employees Pension Laws Amendment Act 19 of 2011; and sec 10E of the Post and Telecommunications Matters Act 1958 (as amended by the South African Post Office SOC Ltd Amendment Act 38 of 2013). See Glover in *Family Law* par D8; and the extensive discussion by Marumoagae *PELJ* 2014 2488 et seq.

138 Marumoagae, MC 'The need for legislative intervention regarding living annuities purchased through retirement benefits when spouses are divorcing' (2021) 84 *THRHR* 37.

139 2018 (5) SA 479 (SCA).

insurer, and that they did not fall into the estate of the spouse for purposes of calculating the accrual at the end of marriage. This was confirmed in *CM v EM*[140]:

> The proceeds or annuity income does not fall within the ambit of 'pension interest' as defined in the Divorce Act, hence the parties' agreement in this regard. Thus, an annuitant cannot give part or all of the living annuities to an ex-spouse in terms of a divorce order or agree to split the annuity income with the ex-spouse.

Questions

9.22. Should courts be able to use their discretion to redistribute pension benefits in marriages out of community of property without the accrual system?

9.23. Which pension funds fall outside the scope of the Pension Funds Amendment Act 11 of 2007 and what are the consequences of this for divorcing spouses?

9.24. Should the provisions of the Pension Funds Amendment Act 11 of 2007 relating to the payment of pension benefits at divorce apply to all pension funds?

9.25. Should living annuities be treated as assets in the estate of the spouse entitled to these annuities for the purposes of calculating the accrual?

9.26. Should living annuities be treated as pension benefits at the time of divorce?

9.27. Commentators are invited to point the Commission to any other problems with regard to pension interests which need clarity or reform

[140] 2020 (5) SA 49 (SCA).

D. Special provisions on the distribution of family homes

9.28. Family or marital homes are often the most financially valuable assets at divorce. South African divorce law contains no special legal rules or practices dealing with the marital home.[141]

9.29. In marriages out of community of property, the home could be registered in the name of the husband, due to the gendered division of labour, which regards financial management as a typically male responsibility. [142] Wives who have contributed to mortgage payments or made substantial financial and non-financial contributions to the acquisition and maintenance of the home may not be entitled to a share of the home (unless they qualify for a redistribution in terms of section 7(3) of the Divorce Act) and husbands who own homes may be able to evict wives from the home. [143]

9.30. In marriages subject to accrual or in community of property, family homes may be sold at divorce and the proceeds divided between the spouses, leaving wives, who are custodian parents of young children, vulnerable.

9.31. In customary marriages and civil marriages between African couples' urban homes which are regarded as the family homes of the natal family of one spouse (usually the husband) and which can be used to house vulnerable kin and extended family members could be registered as the private property of that spouse.[144] In that case

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141 Previous chapter.

142 Chenwi L and Mclean K "A Woman's Home Is Her Castle?" – Poor Women and Housing Inadequacy in South Africa' 2009 *SAJHR* 517 at 532.

143 Sonnekus, JC 'The Personal Consequences of Divorce' in Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 33 at 51.

144 Maxim Bolt and Tshenolo Masha (2019) 'Recognising the family house: A problem of urban custom in South Africa' 35 *SAJHR* 147 1.

the other spouse (usually the wife) could lay claim to a part of the property at divorce,[145] resulting in problems.[146]

Questions:

9.32. Should family homes be treated exactly like other assets at divorce or should special rules apply to them?

9.33. Should courts have a specific discretion to award family homes to parents who are primary caretakers of young children?

9.34. Should courts take account of financial and non-financial contributions to the family home in considering how it should be distributed at divorce?

9.35. Should homes which are part of customary family property be treated differently at divorce from family homes which are individually owned by the spouses?

E. Settlement agreements

9.36. Currently divorcing spouses are permitted to regulate the division of their property in a settlement agreement, which the court may incorporate into the divorce order in terms of the Divorce Act on condition that the agreement is in writing.[147] The terms of the agreement must not be impossible, illegal, *contra bonos mores* or contrary to public policy.[148] If the agreement or its terms are not made an order of court, the agreement is merely a contract and cannot be

[145] Moore, E & Himonga, C "What Happens when Customary Marriage goes Wrong?" GroundUP (March 2016) https://www.groundup.org.za/article/what-happens-when-customary-marriage-goes-wrong/ [Accessed 29 May 2020].

[146] See Question 5.16 above.

[147] Sec 7(1) of the Divorce Act. See in general Heaton in *The Law of Divorce* 86 – 90; Heaton *SA Family Law* 123 – 125.

[148] Heaton in *The Law of Divorce* 87.

enforced in the same way as an order of court.[149] A settlement agreement that has been made an order of court binds only the parties to the divorce proceedings.[150]

9.37. The main advantage of a settlement agreement is that parties can tailor the agreement in accordance with their particular circumstances. In most divorces the parties enter into a settlement agreement. They can regulate matters such as the division of their assets, payment of maintenance, the allocation and exercising of parental responsibilities and rights, and liability for the cost of the proceedings. Parties may thus agree on a division of their assets and liabilities which deviates from the common law or statutory rules which govern their matrimonial property system.[151]

9.38. The court is not compelled to make an order in accordance with the settlement agreement but has discretion in the matter and could also incorporate parts of the agreement only.[152]

9.39. It has been submitted, however, that courts generally do not afford settlement agreements the necessary scrutiny.[153] Commentators suggest that the court should be compelled by legislation to properly investigate settlement agreements and to take the circumstances in which each agreement was concluded into account.

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149 Heaton in *SA Family Law* par 12.2; Heaton in *The Law of Divorce* 89.

150 Heaton in *The Law of Divorce* 88 – 89. It has come to the Commission's attention, for instance, that where the settlement agreement has not been made an order of court in the case where transfer of property was part of the agreement, the claim for transfer of the property could be subject to prescription should the property not be transferred as agreed.

151 Ibid 87; Heaton in *SA Family Law* par 12.2.

152 Heaton in The Law of Divorce 87 – 88.

153 Ibid 568 – 569.

Questions

9.40. Does the current practice with regard to settlement agreements lead to problems, and if so, what are those problems and why do they occur?

9.41. If you believe that change is necessary to deal with those problems, how should legislation deal with settlement agreements, and should such change be dealt with in the Divorce Act or the Matrimonial Property Act?

9.42. Are there any special statutory safeguards which should be applied to settlement agreements (for instance, legal representation of the parties)?

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