SOUTH AFRICAN LAW COMMISSION

WORKING PAPER 13

PROJECT 22

REVIEW OF THE LAW OF SUCCESSION

The introduction of a legitimate portion or the granting of a right to maintenance to the surviving spouse

May 1986

INTRODUCTION

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

The members of the Commission are -

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PREFACE

This working paper has been prepared by the research staff of the Commission to serve as a basis for the Commission's deliberations. The points of view, conclusions and recommendations contained herein should not at this stage be regarded as those of the Commission. The working paper is being published in full to furnish persons and bodies wishing to comment or to make suggestions for the development, improvement, modernisation or reform of this particular branch of the law with sufficient background information to enable them to place substantiated submissions before the Commission.

Any person or body wishing to make oral representations to the Commission should submit a brief résumé of his or its proposed representations, together with a request to be heard by the Commission, to the Commission in writing.

It would be appreciated if written comments, representations or requests could reach the Commission not later than 19 September 1986. Please refer to the previous page for the address to which correspondence should be directed.

The researcher responsible for the project who may be contacted for further information is Mr M Schutte.

HIERDIE STUK IS OOK IN AFRIKAANS BESKIKBAAR.

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1. INTRODUCTION

1.1 There is concern about the fact that a first-dying spouse is able to disinherit the surviving spouse in circumstances leaving the surviving spouse destitute. This concern is apparent from the contributions of writers,[1] and also from other sources.[2] It was also expressed in the parliamentary debate[3] on the Matrimonial Property Bill.[4] It was clear that speakers considered that the matter justified investigation. On the occasion of that debate the Minister of Justice announced that the Commission had been requested to consider the introduction of a legitimate portion for or the granting of a right to maintenance to the surviving spouse as part of the Commission's review of the law of succession.[5] The Commission took note of the request, and the investigation into the law of succession was extended accordingly.

1.2 This Working Paper deals with the possible introduction of a legitimate portion or the granting of a right to maintenance to a surviving spouse, and with other relevant matters.

2. THE SOUTH AFRICAN LEGAL POSITION

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1 Barnard et al Die Suid-Afrikaanse persone- en familiereg Durban: Butterworths 1986 175; Beinart "Liability of a deceased estate for maintenance" 1958 Acta Juridica 111; Hahlo "The sad demise of the Family Maintenance Bill 1969" 1971 SALJ 201 et seqq; Lee & Honoré Family, things and succession 2nd edition Durban: Butterworths 1983 121; Rowland "Freedom of testation in South Africa" 1970 (2) Codicillus 8; Van der Merwe & Rowland Die Suid-Afrikaanse erfreg 4de uitgawe Pretoria: J P van der Walt & Seun 1983 602.

2 Cf: South African Law Commission Report pertaining to the matrimonial property law Pretoria: Government Printer 1982 28-29; South African Law Commission Law of Succession: intestate succession Working Paper 2 Pretoria: South African Law Commission 1983 1 (response to an invitation to various bodies to identify deficiencies in the area of the law of succession).

3 1984 Hansard 8588 8612-8613 8757 9009-9010.

4 Now the Matrimonial Property Act 88 of 1984.

5 1984 Hansard 8584.

2.1 There were no great problems in Roman-Dutch law regarding a surviving spouse left unprovided for, mainly because marriage in community of property was so common in Roman-Dutch times. The practice of providing for bequests to spouses in antenuptial contracts also accounted for the absence of problems. Consequently there is no clear analogy to be found in Roman-Dutch law regarding the protection of a disinherited surviving spouse. A maintenance claim, as the concept is understood today, against the estate of a first-dying spouse did not exist in Roman-Dutch law.[6]

2.2 It has been argued that a disinherited widow should have a claim against her deceased husband's estate in South African law on the strength of Justinian's Novels 53.6 and 117.5.[7] Novel 53.6 made the indigent widow (married without dos or donatio antenuptialis who had received nothing from her well-off husband's estate) an heir of that husband. After the amendment of Novel 53.6 by Novel 117.5, the position was that a widow was entitled to a quarter of the estate (but only up to an amount of 100 pounds of gold) where the deceased had no more than three children, including children from a previous marriage. In cases where there were more than three children, the widow was entitled to inherit per capita with them, provided the children were not the issue of her marriage to the deceased. If the children were indeed her and the deceased's children, she only received the usufruct of her share, with ownership vesting in the children.[8] However, the Appellate Division[9] could not be persuaded that

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6 Glazer NO v Glazer 1962 2 SA 548 (W) 552; Beinart 1958 Acta Juridica 105; Beinart "The forgotten widow: provision by a deceased estate for dependants" 1965/66 Acta Juridica 301; Boberg The law of persons and the family Cape Town: Juta & Co 1977 284; Hahlo The South African law of husband and wife 5th edition Cape Town: Juta & Co 1985 327.

7 Glazer v Glazer NO 1963 4 SA 694 (A) 702-703.

8 Glazer v Glazer NO 1963 4 SA 695 (A) 703; Beinart 1965/66 Acta Juridica 288; Carey Miller "Rights of the surviving spouse: a distinct system in Scotland and developments in England" 1980 Acta Juridica 53; Dannenbring "Die kwart van die arm weduwee" 1966 THRHR 19-20.

(Footnote Continued)

these Novels formed part of the law of Holland, since this did not appear clearly from common law sources, and common law authority to the contrary did exist.

2.3 Moreover, the approach of the Appellate Division[10] was that the fact that the Novels had never been applied in South Africa indicated that they had been abrogated by disuse, even if it were assumed that the Novels had formed part of the Roman-Dutch law. The Appellate Division pointed out that it was arguable that the wording of the legislation[11] abolishing legitimate portions in the various provinces extended no further than the legitimate portions of children, parents, relatives or descendants, and left whatever claim a widow may have had unaffected. The Court also found support in this argument for the view that the Novels had been abrogated by disuse. The Court's view was that the lawgivers would also have done away with this claim of the widow, if it did exist, in view of the policy to further freedom of testation.

2.4 Since Roman-Dutch law therefore does not provide support for a disinherited surviving spouse's claim to part of the deceased spouse's estate,[12] it was argued by analogy of the child's claim to maintenance against his deceased parent's estate that such a claim is also due to the surviving spouse.[13] A parent must support his child. Ordinarily a duty of support is terminated by the death of the person on whom it rests.[14]

(Footnote Continued)

9 Glazer v Glazer NO 1963 4 SA 694 (A) 705; however, cf Beinart 1965/66 Acta Juridica 301.

10 Glazer v Glazer NO 1963 4 SA 694 (A) 705-706.

11 Sec 2 of The Succession Act 23 of 1874 (Cape); sec 1 of Law 7 of 1885 (Natal); sec 128 of the Administration of Estates Proclamation 28 of 1902 (Transvaal); sec 3 of Chapter 92 of the Law Book (OFS).

12 Cf: Carey Miller 1980 Acta Juridica 52 & 53; Hahlo "The case against freedom of testation" 1959 SALJ 436.

13 Glazer NO v Glazer 1962 2 SA 548 (W) 551.

14 Lee & Honoré Family, things and succession 188.

However, in 1906 the Cape Court[15] allowed a maintenance claim by children against their father's estate. According to some writers, the decision rested upon an erroneous interpretation of a passage in a Roman-Dutch source.[16] This precedent has nevertheless been followed and the child's claim to maintenance against his deceased parent's estate is now generally accepted as settled law.[17] It might now be argued that it would be illogical not to allow a claim to maintenance against the estate of any person who, if living, would have been under a duty of support.[18] Such a claim should therefore also be allowed against the estate of the first-dying spouse, since living spouses are under a duty to support each other. The Appellate Division was not prepared to accept, however, that a principle based upon an erroneous interpretation of Roman-Dutch law should be extended to the case of the disinherited widow.[19] It is now generally accepted that the surviving spouse does not have an ex lege claim to future maintenance against the estate of the deceased spouse.[20]

2.5 It is evident that a testator is able to disinherit his surviving spouse without the spouse's having any recourse against the estate of the

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15 Carelse v Estate De Vries (1906) 23 SC 532.

16 Beinart 1958 Acta Juridica 96 & 106; Hahlo 1959 SALJ 436.

17 Boberg The law of persons and the family 279; Corbett et al The law of succession in South Africa Cape Town: Juta & Co 1980 35; Hahlo "Widow's claim to maintenance out of deceased husband's estate" 1962 SALJ 361; Lee & Honoré Family, things and succession 188; Van der Vyver & Joubert Persone- en familiereg 2de uitgawe Kaapstad: Juta & Kie 1985 629-630; however, cf the (unduly) careful wording of a statement in this regard in Spiro Law of parent and child 4th edition Cape Town: Juta & Co 1985 390.

18 Lloyd v Menzies NO 1956 2 SA 97 (D) 102.

19 Glazer v Glazer NO 1963 4 SA 694 (A) 707; also see: Barnard NO v Miller 1963 4 SA 426 (C) 428; Glazer NO v Glazer 1962 2 SA 548 (W) 551-552.

20 Boberg The law of persons and the family 250 & 281; Bouwer Die beredderingsproses van bestorwe boedels 2de uitgawe Pretoria: J P van der Walt & Seun 1978 346; Hahlo The South African law of husband and wife 327; Lee & Honoré Family, things and succession 121; Van der Merwe & Rowland Die Suid-Afrikaanse erfreg 602; Van der Vyver & Joubert Persone- en familiereg 690.

testator.[21] The question is whether this position creates a need for reform.

3. THE NEED FOR REFORM

Matrimonial property law

3.1 Where a marriage is contracted without an antenuptial contract, the matrimonial property regime which applies is one of community of property and community of profit and loss. However, if the parties are Blacks, the marriage is out of community of property and of profit and loss, unless the parties make a joint declaration before the marriage that they wish the marriage to be in community of property.[22] A consequence of marriage in community of property and of community of profit and loss is that the surviving spouse receives his or her half of the joint estate where the marriage is dissolved by death. In most cases this would result in the surviving spouse's being cared for after the death of the first-dying spouse. However, it is not inconceivable that cases may occur where the surviving spouse's share is inadequate to provide for his support, while supplementation from the deceased's share of the estate could have solved the problem.[23]

3.2 Prospective parties to a marriage may determine the terms, conditions and matrimonial property regime of their marriage themselves by means of an antenuptial contract. One possibility is to provide in the antenuptial contract for the devolution of the first-dying spouse's property upon the surviving spouse. Provisions regarding succession are apparently

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21 Corbett et al The law of succession in South Africa 34.

22 Sec 22(6) of the Black Administration Act 38 of 1927; Ex parte Minister of Native Affairs in re Molefe v Molefe 1946 AD 315; however, cf South African Law Commission Marriages and customary unions of black persons Working Paper 10 Pretoria: South African Law Commission 1985 182-183 where changes are envisaged in this regard which would result in the position of Blacks not differing from the general position.

23 Cf: Van der Vyver & Joubert Persone- en familiereg 690.

rare in antenuptial contracts. By means of marriage settlements the antenuptial contract can also be used to meet a prospective couple's specific requirements. One could, for example, contract to provide an income for the other. A problem in this regard is that it is difficult to decide on a realistic marriage settlement before contracting a marriage since the parties do not know what the future holds for them.[24] A marriage settlement that attempts to provide for the surviving spouse could therefore at a later stage prove to be inadequate.

3.3 The normal type of antenuptial contract which had been in general use before the Matrimonial Property Act 88 of 1984 came into operation on 1 November 1984 excluded community of property and community of profit and loss. The result of such a matrimonial property regime is that each spouse retains his or her separate estate, including assets and liabilities acquired or incurred after the marriage was contracted. If one spouse dies the other has his own estate to live on. It is precisely in this situation that the possibility of an indigent surviving spouse arises. It is still customary for one spouse (usually the man) to act as breadwinner, while the other keeps house. Because the wife does not amass an estate of her own, she is not able to support herself. If the husband disinherited her on purpose or inadvertently, she would have to seek help elsewhere. Considering that marriage by antenuptial contract has been reasonably popular in South Africa,[25] and that marriage out of community of property and of profit and loss is the marital property regime applying to Blacks by law, the possibility of a disinherited surviving spouse's being left indigent becomes even greater.

3.4 All marriages out of community of property and of community of profit and loss contracted after 1 November 1984, however, are subject to the accrual system, except in so far as the accrual system is expressly

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24 Hahlo The South African law of husband and wife 257 261 & 278-279; Van der Vyver & Joubert Persone- en familiereg 570-574.

25 Cf: Hahlo "New look in community systems" 1967 SALJ 89; Sinclair "Financial provision on divorce - need, compensation or entitlement?" 1981 SALJ 479; South African Law Commission Report pertaining to the matrimonial property law 20.

excluded by the antenuptial contract.[26] Under the accrual system each spouse retains his or her separate estate, but at the dissolution of the marriage the spouse whose estate shows the smaller accrual acquires a claim to an amount equal to half of the difference between the accrual of the respective estates.[27] The first-dying spouse would not be able to nullify the surviving spouse's claim under the accrual system by means of a will.[28] Notwithstanding the fact that the accrual system does much to ensure that a surviving spouse will be left provided for, some writers still seem to think that further protection of a disinherited surviving spouse is necessary.[29] Reasons[30] for this view are, first, that the accrual system does not always ensure adequate support for the surviving spouse. Say, for example, the first-dying spouse was an affluent man at the time the marriage was contracted, but that his estate showed no accrual after that date: In such a case the widow would receive nothing from her husband under their matrimonial property regime. Secondly, prospective parties to a marriage can still exclude the accrual system. According to statistics collected by the Department of Justice from the various registrars of deeds a total of 21 471 antenuptial contracts were registered for the period December 1984 to December 1985. In 13 242 cases the accrual system applies, in other words in 61 % of the cases. The period July 1985 to December 1985 shows a 4 % increase in the number of cases where the accrual system applies, compared with the period December 1984 to June 1985. Nevertheless there are still many cases where the accrual system is excluded. Thirdly, the accrual system does not apply to marriages contracted before 1 November

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26 Sec 2 of the Matrimonial Property Act 88 of 1984.

27 Sec 3(1) of the Matrimonial Property Act 88 of 1984; Van der Vyver & Joubert Persone- en familiereg 567.

28 Sec 4(2) of the Matrimonial Property Act 88 of 1984.

29 Cf: Corbett et al The law of succession in South Africa 35; Lee & Honoré Family, things and succession 119 & 121; Sinclair 1981 SALJ 479; contra Sonnekus "Legitieme porsie of verlengde onderhoudsaanspraak" 1984 De Rebus 120.

30 Corbett et al The law of succession in South Africa 35; Hahlo The South African law of husband and wife 31; Lee & Honoré Family, things and succession 119.

1984. The parties to such a marriage in which community of property and of profit and loss are excluded can, however, make the accrual system applicable to their marriage. This is done by the execution and registration of a notarial contract, but it must be done before 1 November 1986.[31] Prof June Sinclair[32] predicts that the option of changing a matrimonial property regime will be exercised by relatively few spouses: While the couple remain happily married they will pay little attention to the financial implications of their marriage, and if they are contemplating divorce, the one who would be prejudiced by the accrual system will not want to co-operate. The statistics referred to above show that 1005 couples used this procedure to apply the accrual system to their marriages during the period December 1984 to December 1985. It will be interesting to see whether the figures show an increase as 1 November 1986 approaches.

Intestate succession

3.5 Where the first-dying spouse has no will, or dies partly intestate, section 1 of the Succession Act 13 of 1934 provides that the surviving spouse is an intestate heir of the deceased. The amount the surviving spouse would inherit would depend on which other intestate heirs survived the deceased and on the matrimonial property regime which applied. The Succession Act 13 of 1934[33] results, however, in the surviving spouse's receiving at least R50 000 (if, of course, the estate is large enough) before other heirs begin to share in the estate. If recommendations made by the Commission[34] are accepted, the above-mentioned amount will be increased to R100 000, and the Minister of Justice will be entitled to adjust the amount from time to time by notice in the Government Gazette.

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31 Sec 21(2)(a) of the Matrimonial Property Act 88 of 1984: also see sec 21(1) allowing a married couple to approach the court at any time for leave to change their matrimonial property system.

32 1981 SALJ 479.

33 Sec 1.

34 South African Law Commission Report on the review of the law of succession: intestate succession Pretoria: South African Law Commission 1985 33-34.

Other sources of support

3.6 Even the disinherited surviving spouse who has no estate of his or her own can be left provided for as a result of the possibilities of, for example, life insurance and pension schemes. It is precisely because of such possibilities that some writers question the justification for protective measures for the disinherited surviving spouse in the USA.[35] These doubts should be viewed against the background of the American system:[36] Most states in the USA give the surviving spouse the right to elect between a testamentary benefit from the first dying spouse, or a fixed statutory share of the estate of the first dying. The size of the statutory share often corresponds with what the surviving spouse would have inherited had the deceased died intestate. The objection is therefore more against the inflexibility of the system which does not take the actual needs of the surviving spouse into account.[37] On the other hand the introduction of a family maintenance system in Washington was also advocated,[38] notwithstanding the fact that Washington already had a matrimonial property system of community of property[39] at that stage.

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35 Chaffin "A reappraisal of the wealth transmission process: the surviving spouse, year's support and intestate succession" 1976 Georgia Law Review 469; Clark "The recapture of testamentary substitutes to preserve the spouse's elective share" 1970 Connecticut Law Review 545.

36 Benson "Totten trusts - rights of surviving spouse prevail over illusory transfers" 1974 De Paul Law Review 1248-1249; Chaffin 1976 Georgia Law Review 459; Clark 1970 Connecticut law review 514 & 517; Hardgrove "Protection of the base for the surviving spouse's election" 1978 Capital University Law Review 423; Haskell "The power of disinheritance: proposal for reform" 1964 The Georgetown Law Journal 503; Pierce "The protection of the surviving spouse against disinheritance" 1975 Georgia Law Review 948 & 954; Schmidt "Family protection under the Uniform Probate Code" 1973 Denver Law Journal 145.

37 Cf: Chaffin 1976 Georgia Law Review 464; Clark 1970 Connecticut Law Review 545.

38 Rein "A more rational system for the protection of family members against disinheritance" 1979 Gonzaga Law Review 47.

39 In respect of property obtained during the marriage - Rein 1979 Gonzaga Law Review 38.

The incidence of disinheritance of surviving spouses

3.7 Data on the number of surviving spouses left indigent by disherison are somewhat scanty. Apparently this kind of case is thought to be an exception, but it does occur.[40] That it is the exception, is confirmed by a limited sample of 1 000 estates which were reported to the Master of the Supreme Court, Pretoria, from 1 January 1979 to 15 October 1979.[41] In 788 cases of the sample, the estates devolved under a will. In 64 % of the cases there was a surviving spouse and in 82 % of these cases the surviving spouse was the sole heir. Of the 71 cases where the surviving spouse was not the sole heir, there were only 10 where the surviving spouse inherited nothing and got nothing under the matrimonial property law. On closer investigation it emerged that in seven of the 10 cases the surviving spouse was a man. Since most men have an income of their own, these men were probably not left indigent. In one case it appeared that the widow had probably been provided for from other sources. In the remaining cases it was not possible to deduce whether or not the widow had been left indigent. In a few cases the widow, who had been married out of community of property, received very little and acquired no usufruct, while the estate was large enough to be able to make better provision for her needs. In these cases it was not possible either to deduce whether the widow was in a position to provide for her own needs, despite being disinherited.

3.8 The conclusion is drawn from a 100 wills which were filed at the Principal Probate Registry in London during 1963 that the disherison of spouses is rare, even though it could not be said with certainty that cases occurred in which the testator was survived by his spouse, but the spouse was not mentioned in the will. One such case of disherison was

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40 Hahlo 1959 SALJ 444; Hahlo 1971 SALJ 202; South African Law Commission Report pertaining to the matrimonial property law 84-85; cf also Glazer NO v Glazer 1962 2 SA 548 (W) - however, the court did not find it necessary to investigate the plaintiff's assertion that she was not in a position to support herself.

41 South African Law Commission Law of Succession: intestate succession Working Paper 2 10-11 & 35-38.

encountered, but the surviving spouse was apparently well cared for.[42] In 1978, 507 claims came before the British Courts under the Inheritance (Provision for Family and Dependants) Act of 1975. However, this Act also allows certain other persons besides a surviving spouse to submit a claim for maintenance. Of the 7 cases which were reported in 1978 not one dealt with a surviving spouse's claim.[43]

3.9 The conclusion is drawn from 223 estates recorded in the administration of estates registers of a part of Michigan (USA) for the year 1963 that the assumption that the greater majority of testators will provide for their widows, even in the absence of obligations imposed by legislation, is correct.[44] A writer[45] who reviewed the available statistics in the USA reaches the conclusion that there are few cases of the testator wanting to revenge himself on the surviving spouse after death. In the hundred years in which a surviving spouse could elect to take a statutory share case law in Connecticut in the USA produced only one case in which a man disinherited his wife.[46] It would have been interesting to know to what extent the existence of a compulsory statutory share influenced testators in the USA in deciding on bequests.

3.10 In Manitoba (Canada) there were at least 28 claims under the Testators Family Maintenance Act for the period 1947 to 1983, five of which were unsuccessful. However, under this Act other persons besides the surviving spouse can also bring a claim against the testator's estate.[47]

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42 Browder "Recent patterns of testate succession in the United States and England" 1969 Michigan Law Review 1304 & 1354-1355.

43 Hand "Family provision: are the right people receiving it?" 1980 Family Law 141.

44 Browder 1969 Michigan Law Review 1304 & 1311.

45 Plager "The spouse's nonbarrable share" 1966 The University of Chicago Law Review 715.

46 Clark 1970 Connecticut Law Review 543.

47 Law Reform Commission (Manitoba) Report on "The Testators Family Maintenance Act" Manitoba: Law Reform Commission 1985 8.

The claimants in the 28 cases were therefore not necessarily surviving spouses.

Conclusion

3.11 In theory a surviving spouse can be left destitute by disinheritance. Although scanty, statistics for South Africa, England, Canada and the USA support the view that prejudicial disinheritance of a surviving spouse is the exception. This paper will proceed on the assumption that such disinheritance is indeed the exception.

3.12. It therefore appears that the area in which there is a need for reform is of limited scope.

4. POLICY CONSIDERATIONS

4.1 It would seem to be the norm in our society that surviving spouses should not be left unprovided for. The law often supports a social norm. For example, the norm is that a parent should support his child, and the law supports that norm by compelling those who do not conform to it, to do so. Seen in this light, the fact that prejudicial disinheritance is the exception should rather serve as an indication that the law should intervene to accommodate the surviving spouse than as an indication that because it is an exception intervention is unnecessary.[48]

4.2 The principle of freedom of testation applies in South Africa, but certain exceptions to the principle are acknowledged.[49] It may be assumed that absolute freedom of testation is undesirable, mainly because the social control that ensures that most living persons conform to the norms of society is absent in a decision on something that is to happen after one's death. Provisions in wills can therefore affect persons in a morally

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48 Cf Carey Miller 1980 Acta Juridica 60.

49 Van der Merwe & Rowland Die Suid-Afrikaanse erfreg 596.

unacceptable way.[50] The question is to what extent freedom of testation should be limited. It is said that South Africa takes the principle of freedom of testation further than any other Western legal system by not protecting the surviving spouse against disherison.[51] Western legal systems either allow the surviving spouse a claim for maintenance against the deceased spouse's estate or provide for a fixed inheritance, and often use the matrimonial property law to protect the surviving spouse.[52]

4.3 The argument that the surviving spouse has a moral right to take a share of the deceased spouse's estate[53] is probably based on the view that both spouses contribute to the income of the marriage, even if one of them keeps house to enable the other to be the breadwinner.[54] It is a principle of our law that prospective parties to a marriage are free to choose a suitable matrimonial property regime.[55] The choice excluding community of property and of profit and loss has been frequent, even in cases where the surviving spouse could have been prejudiced thereby. The argument that spouses have only themselves to blame if they are prejudiced by their choice of a matrimonial property regime has been considered

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50 Cf: Beinart 1965/66 Acta Juridica 312-313; Rowland "Controlling the dead hand" 1967 (2) Codicillus 30.

51 Beinart 1958 Acta Juridica 92; Corbett et al The law of succession in South Africa 33; Hahlo "Maintenance out of a deceased estate: an epitaph" 1964 SALJ 2.

52 Clark 1970 Connecticut Law Review 514; Hahlo "The case for family maintenance in Quebec" 1970 McGill Law Journal 536; Hahlo 1971 SALJ 204; Hahlo "Recent trends in family law: a global survey" 1983 Acta Juridica 10; Hahlo The South African law of husband and wife 328; Hardgrove 1978 Capital University Law Review 423; Law Reform Commission (Manitoba) Summary of report on an examination of "The Dower Act" Winnipeg: Queen's Printer 1984 5; Lee & Honoré Family, things and succession 119; Sherrin "Disinheritance of a spouse: a comparative study of the law in the United Kingdom and the Republic of Ireland" 1980 Northern Ireland Legal Quarterly 21; Van der Merwe & Rowland Die Suid-Afrikaanse erfreg 607; Van der Vyver & Joubert Persone- en familiereg 566-567.

53 Pierce 1975 Georgia Law Review 958.

54 Van der Vyver & Joubert Persone- en familiereg 562-563.

55 Van der Vyver & Joubert Persone- en familiereg 565.

somewhat unreasonable in the South African context: In the past, marriage out of community of property was thought to be a good thing in a broad sense, and this view could have misled young couples.[56] This view of marriage out of community of property is probably due to objections levelled against marriage in community of property (applying ex lege) - for example that it restricts the woman's contractual capacity. The Matrimonial Property Act 88 of 1984[57] eliminated some of the objections against marriage in community of property by, for example, abolishing the marital power. The Act also gives an indication of a preferable matrimonial property regime where the marriage is out of community of property by prescribing the accrual system by operation of law.[58] If, in these circumstances, one were to disregard the choice of the prospective parties to a marriage not to share in each other's estate by giving the surviving spouse the right to do so the principle of freedom of choice of a matrimonial property regime would be interfered with. Prof J C Sonnekus[59] even feels that those who contracted a marriage out of community of property before the new Act also accept the risk of possible prejudicial disinheritance if they elect not to make the accrual system applicable to their marriages.[60] The moral right of a surviving spouse to share in the estate of the first-dying spouse should therefore not serve as a basis for the protection of the unprovided-for surviving spouse. The basis should rather be sought in the social norm that requires that surviving spouses should not be left unprovided for.

4.4 Prof Sonnekus[61] submits that there is no adequate juridical reason why a healthy adult who is capable of working to support himself or herself should be able to lay claim to part of the estate of the deceased with whom he or she happened to have been married. This view is in like

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56 Rowland 1970 (2) Codicillus 11.

57 Chapter II.

58 Sec 2 of the Matrimonial Property Act 88 of 1984.

59 1984 De Rebus 120.

60 In terms of sec 25(2) of the Matrimonial Property Act 88 of 1984.

61 1984 De Rebus 120.

with the trend that spouses are expected to become self-supporting as soon as possible after divorce.[62] Nevertheless, a spouse at least has the possibility of receiving maintenance on divorce until she (or he) is able to earn a living again.[63] In cases where the marriage is dissolved by death it is furthermore often unrealistic because of the advanced age of the surviving spouse to expect him or her to be self-supporting.[64] The choice not to share in the other spouse's estate made before the marriage might therefore result in the disinherited surviving spouse's being forced to live at a standard far below that to which he or she was accustomed. It could even happen that the surviving spouse becomes dependent on State aid. It does indeed seem illogical not to allow a duty of support which existed during the marriage to continue after death in circumstances in which the surviving spouse is not, and cannot be, self-supporting, while the source of the surviving spouse's support still exists.[65] It seems inappropriate to place the burden on the exchequer.[66]

4.5 In 1969 the Select Committee on the Family Maintenance Bill[67] rejected the Family Maintenance Bill.[68] The Committee's reason for this was inter alia that they did not deem it to be in the public interest to enact legislation which would make a serious inroad upon the well-established

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62 Hahlo 1983 Acta Juridica 5-6; Sonnekus 1984 De Rebus 120.

63 Sec 7 of the Divorce Act 70 of 1979.

64 Institute of Law Research and Reform (Alberta) Family relief report No 29 Edmonton: The University of Alberta 1978 26.

65 Cf in general: Freilicher "The rights of the surviving spouse" 1966 Trusts and Estates 107; Law Reform Commission (Manitoba) Report on "The Testators Family Maintenance Act" 49; Law Reform Commission of British Columbia Report on statutory succession rights LRC 70 Victoria: Queen's Printer 1983 82; Van der Merwe & Rowland Die Suid-Afrikaanse Erfreg 605.

66 Cf: Boberg The law of persons and the family 284; Law Reform Commission (Manitoba) Report on "The Testators Family Maintenance Act" 1.

67 Report (SC 9-'69) as quoted in Hahlo 1971 SALJ 209.

68 AB 27-'69.

principle of freedom of testation merely to provide for the exceptional case. The said Bill would have granted the surviving spouse, a minor child, brother or sister, and, in certain circumstances, a divorced spouse, major child, brother or sister, and a parent a claim to maintenance against the estate.[69] If only a needy surviving spouse were to be granted a claim to maintenance the practical effect on freedom of testation would be slight precisely because the social norm that the first-dying spouse should provide for the surviving spouse is not often disregarded.

4.6 The conclusion is that it is justifiable to infringe upon the principle of freedom of testation by providing for the maintenance of a needy surviving spouse out of the estate of the deceased spouse, because the social norm requires that a surviving spouse should not be left unprovided for.

5. METHODS OF PROTECTING THE SURVIVING SPOUSE

5.1 The choice of a way of providing for a disinherited surviving spouse clearly lies between a claim to maintenance and a legitimate portion. A claim to maintenance is analagous to a child's claim to maintenance against the estate of its deceased parent, while the legitimate portion has been said to have had a long and honourable history.[70] Although the widow's right under Novels 53.6 and 117.5 is sometimes referred to as a legitimate portion,[71] and this right does correspond to the legitimate portion in some respects, it differs from the legitimate portion. It has been suggested that the widow's right should rather be described as a statutory legacy or as maintenance ex lege.[72] Sentimental reasons from the past therefore do not compel one to see the legitimate portion as the solution.

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69 Clause 2(1) read with the definition of "dependant" in clause 1 of the Family Maintenance Bill (AB 27-'69).

70 Van der Merwe & Rowland Die Suid-Afrikaanse erfreg 611.

71 Beinart 1965/66 Acta Juridica 290-291.

72 Glazer v Glazer NO 1963 4 SA 694 (A) 705; Beinart 1965/66 Acta Juridica 290-291; Dannenbring 1966 THRHR 20.

5.2 It has been submitted that it would be more correct, dogmatically speaking, to choose the legitimate portion as the solution since matrimonial obligations normally terminate on the dissolution of a marriage, but it has also been pointed out that this principle has not been adhered to strictly, as may be seen inter alia from the possible continuation of a duty of support after divorce.[73] Prof H R Hahlo[74] has correctly argued that the legitimate portion is the solution if one wants to protect the surviving spouse's moral right to share in the estate of the deceased spouse. However, if the idea is to enforce the deceased's moral duty to provide for the surviving spouse, a claim to maintenance is the solution. In paragraph 4.3 it was argued that the South African matrimonial property system does not justify the enforcement of a moral right to share in the estate. Since the approach is that the surviving spouse should be provided for, a claim to maintenance is the appropriate choice.

5.3 A surviving spouse who is left destitute is the exception. If the institution of a legitimate portion is chosen as the solution, all surviving spouses would benefit from it, instead of only a few. It might indeed be argued that such a step would constitute unjustifiable infringement upon freedom of testation. It appears that on grounds of principle a claim to maintenance provides the obvious solution.

5.4 It is also necessary to weigh up practical aspects. The greatest single advantage a claim to maintenance has over the legitimate portion is its flexibility.[75] The legitimate portion does not normally take the actual needs of the surviving spouse into account,[76] whereas a claim for maintenance can specifically be adjusted to do so by taking the claimant's

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73 Rowland 1970 (2) Codicillus 9.

74 1959 SALJ 444; cf Kurtz "The augmented estate concept under the Uniform Probate Code: in search of an equitable elective share" 1977 Iowa Law Review 1010.

75 Beinart 1965/66 Acta Juridica 318; Laufer "Flexible restraints on testamentary freedom - a report on decedents' family maintenance legislation" 1955 Harvard Law Review 314.

76 Beinart 1965/66 Acta Juridica 314.

financial position into account. That would include benefits received by the surviving spouse from the deceased spouse before the death of the latter. It is of course possible to enact legislation providing for a legitimate portion to be reduced commensurately with such benefits. However, that could impose on the surviving spouse the burden of having to prove which part of her (or his) estate is not derived from the deceased spouse. It seems simpler merely to ascertain the surviving spouse's financial position, without having to refer to the sources of the income. Furthermore, the fact that the surviving spouse is financially independent in his or her own right would not be taken into account in the case of the legitimate portion. The fact that the fixed portion of many states in the USA does not always produce equitable results is ascribed to its inflexibility.[77] Since the legitimate portion is usually fixed at a fraction of the estate, it may easily fail to achieve its aim of providing the surviving spouse with maintenance. If one circumvents this objection by prescribing a minimum amount in the case of smaller estates (as in the case of intestate succession) one again comes up against the argument of unjustifiable interference with the freedom of testation.

5.5 The advantage of flexibility, however, also gives rise to criticism of a claim to maintenance as the solution.[78] If a claim to maintenance is based on need, there can hardly be objection to its discretionary nature. The measure of discretion inherent in any claim to maintenance obviously does not present problems in practice. Furthermore quite a few guidelines on the subject have been placed on record in case law, which weaken[79] the objection that discretion creates uncertainty.[80]

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77 Clark 1970 Connecticut Law Review 542.

78 Law Reform Commission of British Columbia Report on statutory succession rights 74.

79 Cf Laufer 1955 Harvard Law Review 314.

80 Cf: Kurtz 1977 Iowa Law Review 1011; Sonnekus 1984 De Rebus 120.

5.6 An objection levelled against family maintenance systems is that the claimant has to go to court.[81] This is sometimes an important reason why a fixed portion is considered preferable in the USA.[82] In the first place the costs attached to a court case are seen as a problem.[83] In fact, it is apparently this very problem which persuaded some[84] to prefer the legitimate portion to a claim for maintenance. This problem can be overcome by not requiring that the claim for maintenance must be brought in a court, the court being involved only in the event of a dispute.[85] Another possibility is to give the lower courts the necessary jurisdiction.[86] Secondly, the work a claim for maintenance would create for the courts is seen as a problem.[87] Were the courts to be involved only in the event of a dispute, the work-load should not present insurmountable problems. Thirdly, the embarrassment of a public court case in which the surviving spouse's financial position is laid bare is referred to.[88] This does not appear to be sufficient reason for rejecting the claim for maintenance as a solution. Fourthly, there is the delay in the administration of the estate which a claim for maintenance would cause.[89] Such delays could also occur even if it were not necessary to go to court. Prof Hahlo[90] pointed out that there has been no public protest in Australia, New Zealand or Canada regarding hardships experienced by heirs as a result of delays brought

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81 Law Reform Commission of British Columbia Report on statutory succession rights 74.

82 Cf: Chaffin 1976 Georgia Law Review 463; Clark 1970 Connecticut Law Review 543.

83 Beinart 1965/66 Acta Juridica 318.

84 Lee & Honoré Family, things and succession 121.

85 See par 6.14 & 6.15.

86 Rowland 1970 (2) Codicillus 10.

87 Van der Merwe & Rowland Die Suid-Afrikaanse erfreg 613.

88 Van der Merwe & Rowland Die Suid-Afrikaanse erfreg 613.

89 Report (SC 9-'69) of the Select Committee on the Family Maintenance Bill (AB 27-'69), as quoted in Hahlo 1971 SALJ 209.

90 1970 McGill Law Journal 540.

about by family maintenance systems in those countries, and that no complaints are made in this country about inordinate delays brought about by children's maintenance claims against their parents' estates.[91] The prevention of unacceptable delays is something that should be borne in mind in the drafting of legislation, rather than be taken as pointing to the legitimate portion as the solution.

5.7 Any attempt to institute a legitimate portion which would be equitable in as many cases as possible, would involve very complicated legislation. Moreover it has been submitted[92] that the complexity of the law developing around the legitimate portion elsewhere is an argument against it.

5.8 It seems that practical objections against a claim to maintenance should not affect its choice as the solution on grounds of principle. On the other hand practical objections against the legitimate portion rather point to a claim to maintenance as the obvious solution. Certain writers[93] also prefer a claim to maintenance to a legitimate portion. The view taken in a South African textbook that a combination of a claim to maintenance and a legitimate portion presents the solution would probably now be influenced by the accrual system which has been introduced in the mean time.[94]

5.9 Another possible solution is to grant the court the power to order a redistribution of the estate. The Select Committee on Matrimonial Property Law[95] included a clause with this object in their recommended legislation. It empowers the court (on the application of the surviving spouse) to order that an equitable share of the deceased spouse's estate be

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91 Hahlo 1971 SALJ 203.

92 Van der Merwe & Rowland Die Suid-Afrikaanse erfreg 612: in the context of relations other than surviving spouses.

93 Beinart 1958 Acta Juridica 111; Hahlo 1970 McGill Law Journal 538; contra Lee & Honoré Family, things and succession 121.

94 Van der Merwe & Rowland Die Suid-Afrikaanse erfreg 604 and cf 607.

95 Report SC 11-'83 Pretoria: Government Printer 1983 22 24 & 26.

made over to the surviving spouse. This power operates with regard to marriages out of community of property where the deceased disposed of his property by will. However, the equitable share is restricted to a child's share or a quarter of the estate, whichever is the greater.

5.10 Prof Sonnekus[96] believes that the "equitable share" was derived from the "reasonable financial provision" of the English Inheritance (Provision for Family and Dependants) Act, 1975, and rightly says that borrowing from the English law is inappropriate in this case. Section 1 of the said Act allows the surviving spouse a claim for reasonable financial provision, whether or not this is needed for maintenance. This must be seen against the background of the matrimonial property regime (excluding community of property) operating in England.[97] The idea is rather to provide for the moral right of the surviving spouse to share in the estate of the deceased spouse.[98] This brings one to the main objection against the redistribution of an estate on death in the South African context - it is not based purely on the principle of providing for the surviving spouse. Moreover, restricting the "equitable share" to a fraction can easily result in the fraction being too small to meet the surviving spouse's needs.

5.11 The court's discretion is not fettered by guidelines laid down for maintenance, since the redistribution of an estate is also based on the idea that the surviving spouse has a moral right to share in the estate.[99] The uncertainty as to what a court will do is much greater than in the case of maintenance, since a decision on whether such a moral right exists must to

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96 1984 De Rebus 119.

97 Hahlo 1983 Act Juridica 11.

98 Cf Law Commission Family law: second report on family property: family provision on death Law Com No 61 London: Her Majesty's Stationery Office 1974 70.

99 Cf clause 22(3)(g) of the recommended legislation in Select Committee on Matrimonial Property Law Report 24, authorising the court to "take into account ... any other factor (in addition to those listed in clause 22(3)) which should in the opinion of the court be taken into account".

a large extent depend on a subjective opinion.[1] Because the deceased is not able to state his (or her) side of the case, evidence before court as to what would be equitable will often be one-sided. On grounds of principle and because of the greater uncertainty it would create, as redistribution of an estate cannot be supported as the solution.

6. PROPOSED CLAIM TC MAINTENANCE OF A SURVIVING SPOUSE

6.1 The idea is to place a duty of support by operation of law on the estate of a person in favour of that person's surviving spouse.

Basis of the claim to maintenance of a surviving spouse

6.2 The general line of approach in South African law is that a person is entitled to maintenance from another only if in need of support.[2] In the only case where a claim for maintenance against the estate of a deceased is at present allowed by law (the claim of a child against the estate of his parent), the approach is also that the person entitled to maintenance should be in need of support.[3] It is submitted in paragraph 4.3 that the moral right of one spouse to share in the other spouse's estate should not serve as a basis for the surviving spouse's claim to maintenance. The aim is merely to prevent a person from being left destitute. The proper basis of a claim to maintenance of a surviving spouse appears to be a need for support.[4]

6.3 A need for support is most likely to arise in cases where the deceased did not provide for the surviving spouse in a will, and the parties were married out of community of property and with the exclusion of profit

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1 Cf Law Reform Commission of British Columbia Report on statutory succession rights 153.

2 Van der Vyver & Joubert Persone- en familiereg 632 & 691.

3 Van der Vyver & Joubert Persone- en familiereg 630.

4 This is also the view of: Rowland 1970 (2) Codicillus 10; Sonnekus 1984 De Rebus 121; Van der Merwe & Rowland Die Suid-Afrikaanse erfreg 605.

and loss and the accrual system. In cases where another matrimonial property regime applies, the surviving spouse can, however, still be in need of support in exceptional cases.[5] It therefore seems desirable to allow a claim for maintenance irrespective of the matrimonial property regime applying to the marriage. It is interesting that the Law Reform Commission of Manitoba[6] recommended that the protection of a disinherited surviving spouse should continue to exist in addition to the new matrimonial property system of deferred community of property which they recommended.

6.4 There are legal systems where the mechanisms to prevent a surviving spouse from being left indigent are also applicable to intestate estates.[7] The approach should rather be to keep the intestate portion of the surviving spouse realistic, which would make further protection redundant. If the first-dying spouse dies partially intestate, the possibility still exists that the part of the estate devolving by intestate succession would not be large enough to provide for the surviving spouse's needs. Should the claim for maintenance not be available in cases where an estate devolves partially intestate, the possibility of evading it is also only too obvious. A testator could leave a nominal amount to the surviving spouse, thus defeating a claim for maintenance, and the surviving spouse would still be left destitute. Legislation should therefore at least provide for a claim for maintenance in cases where a surviving spouse does not receive the minimum amount prescribed by the law of intestate succession, and where this is due to partially testate devolution of the estate. On the other hand legislation would be simpler if a claim for maintenance were granted throughout, irrespective of how the estate devolves. If intestate portions for surviving spouses are kept realistic, claims for maintenance should seldom (if ever) occur in estates devolving wholly intestate, because

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5 See par 3.1 & 3.4.

6 Report on "The Testators Family Maintenance Act" 5.

7 E g in England (sec 1(1) of the Inheritance (Provision for Family and Dependants) Act, 1975; Sherrin 1980 Northern Ireland Legal Quarterly 29) and Canada (Institute of Law Research and Reform (Alberta) Family relief 27; Law Reform Commission (Manitoba) Report on "Testators Family Maintenance Act"8).

a claim for maintenance would be based on the need for support. It therefore seems more desirable to grant a claim for maintenance throughout, regardless of whether an estate devolves under a will or under the law of intestate succession.

6.5 Basing a claim to maintenance on a need for support implies that the person entitled to support should be unable to support himself or herself. Consequently everything falling into the estate of the surviving spouse should be taken into account to determine whether the surviving spouse has a claim to maintenance against the estate of the first-dying spouse. Amounts due to the surviving spouse on account of the matrimonial property regime which applied, a bequest by the deceased, a usufruct on the property of the deceased, life insurance, pension schemes and a settlement by the deceased during his lifetime, must therefore all be taken into account. The capital of the surviving spouse should also be exhausted before a need for support can be said to exist. It is true that it has been held that a child (claiming maintenance from the estate of his deceased parent) does not have to consume his capital to support himself,[8] except where that capital derives from a bequest by the estate claimed against.[9] The tendency to protect a child's capital is a continuation of the protection afforded to that capital during the parent's lifetime. For instance, during the parent's lifetime only the child's income is taken into account to ascertain whether a child is capable of supporting himself.[10] There is no reason to afford the surviving spouse this protection of capital as well. If the surviving spouse is capable of being self-supporting by going out to work, there is no need for support either. Because it is a principle of our law that maintenance is not granted where the person entitled to such maintenance is capable of supporting himself,[11] it seems unnecessary to

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8 Goldman NO v Executor Estate Goldman 1937 WLD 64 69; Boberg The law of persons and the family 287.

9 Ex parte Jacobs 1982 2 SA 276 (O) 278; In re Estate Visser 1948 3 SA 1129 (C) 1137; Ex parte Zietsman: in re Estate Bastard 1952 2 SA 16 (C) 21; Spiro Law of parent and child 390-391.

10 Cf Boberg The law of persons and the family 261.

11 Van der Vyver & Jouber Persone- en familiereg 691 & 692.

spell out the above-mentioned aspects in legislation, provided it is clear from the legislation that the claim for maintenance is based upon the existence of a need for support. On the other hand it can only contribute to the clarity of such legislation if these aspects are mentioned, as is indeed done in the proposed legislation in Annexure A.

The claimant

6.6 The question is whether a person who had divorced the deceased should also be entitled to maintenance. The court granting a decree of divorce may make an agreement between the parties with regard to the payment of maintenance an order of court.[12] Such an order may at any time be varied by the court.[13] The person entitled to maintenance has a claim against the estate of the other party, unless the agreement upon which the order was granted provided otherwise.[14] If the parties were unable to agree on maintenance, the court may make an order in respect of the payment of maintenance.[15] Whether such an order can continue after the death of the debtor is controversial.[16] The position is thus that a person who is dependent on support from a former spouse may find that that support dries up at the death of that spouse.

6.7 The approach is to restrict infringement upon freedom of testation to the minimum. This is done by providing only for the immediate family out of the deceased's estate. If a former spouse is involved, it can justifiably be argued that it is unjust not also to grant a parent, brother or sister who had been supported by the deceased a claim to maintenance.

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12 Sec 7(1) of the Divorce Act 70 of 1979.

13 Sec 8(1) of the Divorce Act 70 of 1979.

14 Van der Vyver & Joubert Persone- en familiereg 694.

15 Sec 7(2) of the Divorce Act 70 of 1979.

16 Compare Copelowitz v Copelowitz NO 1969 4 SA 64 (C) 69-71 with the views of: Hahlo The South African law of husband and wife 357; Lee & Honoré Family, things and succession 138; Van der Vyver & Joubert Persone- en familiereg 694.

The approach is to grant only the surviving spouse the claim to maintenance.

Order of precedence of the claim for maintenance

6.8 The courts correctly[17] regard the duty of a deceased parent's estate to support a child as a sui generis debt of the estate.[18] Consequently the claims of ordinary creditors have to be met first, thereafter the claim of a maintenance claimant and only then legacies and bequests are settled.[19] It seems appropriate that the debt of an estate for the maintenance of the surviving spouse should rank equally.[20]

6.9 A more difficult question is whether the surviving spouse's claim or the child's claim should take precedence. Mindful of the fact that the surviving spouse is entitled to maintenance only if he or she needs it, the solution might be to place the surviving spouse and the child on an equal footing. They should therefore share proportionately in the amount available in the estate for maintenance in cases where the estate is too small to satisfy all claims fully. This should be spelt out in legislation.

Criteria for determining the amount of maintenance

6.10 The amount of maintenance to which a party to a marriage can lay claim depends on the standard of living (which usually also gives an

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17 Cf Beinart 1958 Acta Juridica 110.

18 Davis' Tutor v Estate Davis 1925 WLD 168 172; Goldman NO v Executor Estate Goldman 1937 WLD 64 69; Lloyd v Menzies NO 1956 2 SA 97 (D) 102; Ex parte Estate Pitt-Kennedy 1946 NPD 776 779; Ritchken's Executors v Ritchken 1924 WLD 17 23; In re Estate Visser 1948 3 SA 1129 (C) 1135; Ex parte Zietsman: in re Estate Bastard 1952 2 SA 16 (C) 21.

19 Christie NO v Estate Christie 1956 3 SA 659 (N) 661-662; Ex parte Insel 1952 1 SA 71 (T) 74; see sources in the previous footnote.

20 Van der Merwe & Rowland Die Suid-Afrikaanse erfreg 606.

indication of the social standing of the parties) of the family.[21] The court granting an order with regard to the payment of maintenance on divorce must have regard to the standard of living of the parties prior to the divorce.[22] The ideal that maintenance should enable a person to maintain his or her standard of living is subordinated to the principle that the person under a duty to support must be able to pay maintenance on such a scale.[23] In the case of a child's claim for maintenance against the estate of his deceased parent, too, the amount of maintenance is determined with reference to the standard of living of the family (and therefore that of the child) before the death of the parent, in so far as the size of the estate allows this.[24] In like with this approach of the law, legislation should provide that the amount of maintenance must be determined with reference to the standard of living of the surviving spouse before the death of the first-dying spouse. The fact that the size of the estate will limit the amount of maintenance is so obvious that it is unnecessary to provide therefor in legislation.

6.11 The Divorce Act 70 of 1979 lists the following factors to which the court may have regard when making an order with regard to the payment of maintenance:[25]

(a) the existing or prospective means of each of the parties;

(b) the parties' respective earning capacities;

(c) the parties' financial needs and obligations;

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21 Cf: Hahlo The South African law of husband and wife 135; Lee & Honoré Family, things and succession 183.

22 Sec 7(2) of the Divorce Act 70 of 1979.

23 Van der Vyver & Joubert Persone- en familiereg 632.

24 Bank v Sussman 1968 2 SA 15 (O) 17; Davis' Tutor v Estate Davis 1925 WLD 168 173; Ex parte Insel 1952 1 SA 71 (T) 74; Ex parte Jacobs 1982 2 SA 276 (O) 277; Lloyd v Menzies NO 1946 2 SA 97 (D) 102; In re Estate Visser 1948 3 SA 1129 (C) 1136.

25 Sec 7(2) of the Divorce Act 70 of 1979.

(d) the age of each of the parties;

(e) an order regarding the transfer of assets from one party to the other;

(f) the duration of the marriage;

(g) the parties' conduct in so far as it may be relevant to the break-down of the marriage;

(h) any other factor which in the opinion of the court should be taken into account.

It might be argued that on principle no distinction should be made between the factors taken into account on the dissolution of a marriage by death and those taken into account on the dissolution of a marriage by divorce.[26] Factors (a) to (e) relate to the need for support and whether the person who has a duty of support is able to pay maintenence. These factors are naturally of importance.[27] Factors (f) to (h), however, introduce a moral judgment into the decision regarding the payment of maintenance. Factors necessitating a moral decision regarding the amount of maintenance (or even whether maintenance should be granted at all) should be avoided. The approach of the legislation should be pragmatic. It is not a question of whether the surviving spouse has any right to share in the estate of the first-dying spouse. It is merely a matter of a person in need of support losing his or her source of support. Instead of burdening the Exchequer the original source of support is placed at the continuing disposal of the surviving spouse. The duration of the marriage, the conduct of the surviving spouse (including the fact that the spouses had separated) and statements of the first-dying spouse on reasons for disinheriting the surviving spouse should therefore not be taken into account. If the surviving spouse has been disinherited because he or she is provided for

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26 Sonnekus 1984 De Rebus 120.

27 Cf par 6.5.

from other sources, the testator's will would in any case prevail, even if his statements were ignored, since the surviving spouse would not be in need of support. The argument might be advanced that it is unjust to grant a surviving spouse who left the first-dying spouse before his death the benefit of a claim to maintenance, while the divorced wife has no such claim. However, this argument has been weakened by the introduction of the irretrievable break-down of a marriage as a ground for divorce,[28] as a result of which the law can no longer prevent parties who want to get divorced from doing so by unnecessary formalism.

The lodging of the claim

6.12 In the case of a child's claim for maintenance against the estate of his deceased parent, a written agreement is concluded between the child's guardian and the executor of the estate. The agreement is then submitted to the Master of the Supreme Court for his consideration. The Master decides whether the agreement is acceptable or whether it should be submitted to the court for ratification. The general rule is that the court as upper guardian of all minors has the final say. If the Master is satisfied that the agreement is the best under the circumstances (for example, the whole of the remainder of the estate is to be paid into the Guardian's Fund for the child's benefit), he himself approves the agreement.[29] The underlying reason why the court is approached, is the fact that the person concerned is a child who is unable to look after its own interests.

6.13 This reason does not exist in the case of a surviving spouse (who is a major). Instead of copying overseas family maintenance systems and forcing the surviving spouse to apply to court, the South African example could rather be followed.[30] Legislation could merely provide that the

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28 Cf sec 4 of the Divorce Act 70 of 1979.

29 Bouwer Die beredderingsproses van bestorwe boedels 329-330; also see Davis' Tutor v Estate Davis 1925 WLD 168.

30 Cf Beinart 1965/66 Acta Juridica 321.

surviving spouse has a claim to maintenance against the estate. The provisions of the Administration of Estates Act 66 of 1965 would then apply to such claim. Any person interested in the estate would be able to lodge any objection with the Master to the provision of maintenance for the surviving spouse. On the strength of such an objection, but also of his own accord, the Master would be able to give the executor such directions as he might think fit. Any person aggrieved by the Master's decision would be able to approach the court.[31]

6.14 The approach outlined in paragraph 6.13 would in practice result in the executor's and surviving spouse's deciding by agreement in most cases on the provision of maintenance. (If the surviving spouse also happens to be the executor, the present law relating to executors as creditors[32] should adequately deal with any problems which may arise.) Even if such an agreement proves to be unacceptable to anyone, it would still be unnecessary to approach the court in view of the Master's powers. Legal costs and the delay in winding up the estate caused by a court case would therefore arise only if the Master's decision were unacceptable to an interested party.

6.15 A matter to be considered is whether a time limit should be set for the lodging of a claim for maintenance by the surviving spouse. In the case of a child's claim for maintenance against the estate of a deceased parent, the child may institute the condictio indebiti against the heirs after the estate has already been distributed.[33] Two cases can be distinguished here. In the first case the surviving spouse may already be in need of support on the death of the deceased. The surviving spouse will hardly fail to lodge a claim where he or she is aware of the right to maintenance and of the other spouse's death. In cases where the surviving spouse is dependent on support from the first-dying spouse, the death of the person

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31 Sec 35(7) to (10) of the Administration of Estates Act 66 of 1965.

32 Cf Bouwer Die beredderingsproses van bestorwe boedels 371-372.

33 Bank v Sussman 1968 2 SA 15 (O) 17; Couper v Flynn 1975 1 SA 778 (R) 779.

providing support could hardly fail to come to the surviving spouse's attention. In practice the indigent surviving spouse would probably inquire about support from the estate, so that the right to maintenance would come to the surviving spouse's attention. It therefore seems unnecessary to provide for failure to claim.

6.16 The second case is where the need for support does not arise until some time after the death of the first-dying spouse. It seems to be unfair to the heirs to provide for the institution of a claim under these circumstances. An heir could be surprised by a claim for maintenance years after receiving his bequest. Nor does it seem appropriate to provide at the time of death that provision may be made for a need for maintenance which might arise in the future. Such a claim for maintenance would be based upon hypotheses and speculation.

6.17 The conclusion is that the surviving spouse's claim for maintenance should be lodged before distribution of the estate. Ideally, of course, the claim should be lodged before the final liquidation and distribution accounts are drawn up. It is only necessary for legislation to provide that the claim cannot be lodged after distribution of the estate - the exact time of lodging the claim will be governed satisfactorily by the general rules regarding the lodging of claims.

ANNEXURE A: DRAFT LEGISLATION

BILL

To provide for the future maintenance of a surviving spouse, and for matters incidental thereto.

To be introduced by the Minister of Justice

BE IT ENACTED by the State President and Parliament of the Republic of South Africa, as follows:-

Claim for maintenance by surviving spouse.

1. (1) When a marriage recognised by law is dissolved by the death of one of the spouses after the commencement of this Act, the surviving spouse, if unable to support himself or herself according to the standard of living of the spouses before the dissolution of the marriage, has a claim for future maintenance against the estate of the deceased.

(2) In the determination of whether a surviving spouse is incapable of thus supporting himself or herself, the existing and prospective means, including any benefit from the estate of the deceased under the law of succession and any amounts due to the surviving spouse under the matrimonial property system which applied to the marriage, the earning capacity and the financial needs and obligations of the surviving spouse shall be taken into consideration.

Order of pre=cedence and settlement.

2. (1) The claim referred to in section 1 shall occupy the same order of precedence vis-à-vis other creditors of the estate of the deceased as the claim for future maintenance which a child has against the estate of its deceased parent.

(2) If the estate of the deceased is unable to settle both the claim referred to in section 1 and a claim for future maintenance of a child against the estate of the deceased, that part of the estate of the deceased which is available for maintenance shall be applied in payment of such claims in proportion to the amount of each such claim.

Time limit on lodging.

3. The claim referred to in section 1 shall not be lodged after the distribution of the estate.

Short title.

4. This Act shall be called the Maintenance of Surviving Spouses Act, 19__.