South African Law Reform Commission

DISCUSSION PAPER 160

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:

The Honourable Mr Justice Narandran (Jody) Kollapen (Chairperson)
Mr IBW (Irvin) Lawrence (Vice-chairperson)
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Advocate JB Skosana (Full-Time Commissioner)

The members of the advisory committee for this project are:

Judge D van Zyl (Chairperson, resigned August 2022)
Mr Irvin Lawrence (Project Leader)
Professor Elsje Bonthuys (University of the Witwatersrand)
The following members were appointed on 17 April 2021:
Assoc Professor Helen Kruuse (Rhodes University) Chairperson from 30 September 2022
Professor Lea Mwambene (University of the Western Cape)
Assoc Professor Anthony Diala (University of the Western Cape)
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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.

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This document is available on the website of the SALRC at:
https://www.justice.gov.za/salrc/ipapers.htm

PREFACE

This discussion paper is the second paper that the SALRC has published on this investigation. The first paper *Issue Paper* 41, was published in October 2018 (as *Issue Paper* 34) but extended in September 2021. This discussion paper is prepared considering the comments the Commission received on *Issue Paper* 41. The discussion paper serves to elicit responses and to serve as a basis for the Commission's further deliberations. It contains the Commission's **preliminary proposals**. The views, conclusions and recommendations which follow should therefore not be regarded as the Commission's final views on this investigation.

This discussion paper is published in full to provide persons and bodies wishing to comment with enough background information to enable them to place focused submissions before the Commission. Responses to the discussion paper will be collated and evaluated to prepare a report setting out the Commission's final recommendations. The report (with draft legislation) will be submitted to the Minister of Justice and Correctional Services.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Promotion of Access to Information Act 2 of 2000.

Respondents are requested to submit written comments and representations to the Commission by 30 September 2023 at the address appearing on the previous page. Comments can be sent by post or fax, however, comments sent by e-mail in electronic format are preferable.

This discussion paper is available on the internet at http://www.justice.gov.za/salrc/discpapers.htm.

Any enquires should be addressed to the Secretary of the Commission or the researcher allocated to the project, Ms Maureen Moloi. Contact particulars appear on page ii.

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EXECUTIVE SUMMARY

A Introduction

1 When the Matrimonial Property Act 88 of 1984 (the Matrimonial Property Act) was passed, it was seen as a significant and long-awaited step to address shortcomings in matrimonial property law at the time. However, the Matrimonial Property Act is almost 40 years old. In this time, South Africa has undergone significant social change.

2 In light of the significant social change, and to ensure that section 9 of the Constitution is realised in the relationship sphere, this discussion paper makes a variety of proposals. These proposals are made to ensure that legislation around matrimonial property distribution is not discriminatory on the basis of, among others, sex, gender, sexual orientation, race, religion and marital status.

3 *Issue Paper* 41 explains how certain default statutory provisions in South Africa's matrimonial property law apply to all marriages unless the spouses enter into antenuptial contracts. However, it notes that 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. In addition, the courts have effected piecemeal changes to various matrimonial property regimes (including Muslim and customary marriages) due to litigation since the adoption of the final Constitution. These changes resulted in different matrimonial property regimes applying to different marriages based on arbitrary or/and discriminatory grounds such as the dates when couples enter into marriage, whether they are in customary marriages, whether they have a religious marriage and so forth. This difference exists without advancing any clear or rational state interest. For example, the non-recognition of religious marriages prevents parties to those marriages from accessing statutory benefits that parties in civil and customary marriages have access to.

4 Another major concern raised in *Issue Paper* 41 is the continuing unregulated treatment of the intimate relationships of a large number of South Africans who live together without marrying. These relationships were never fully legally recognised. This means that a large category of people cannot access the law and the courts when their

relationships dissolve. As a result, there is a need for a statutory framework to bring clarity to the position of cohabitants.

5 The proposals / recommendations made in this discussion paper mirror the topics raised in *Issue Paper* 41. However, there are a number of important themes and recommendations that follow directly due to the importance placed on these issues by respondents.

B Summary of recommendations

1 In general:

6 The Commission notes that respondents were particularly concerned about the different treatment of parties in marriages, including life partnerships, the lack of proper financial disclosure rules upon divorce and the need for the state to run campaigns to better educate South African society about substantive equality in the family setting.

7 In general then, the Commission proposes renaming the Matrimonial Property Act to better reflect the intention to regulate the property of all life partnerships, not only those who are married in terms of the Marriage Act, Civil Union Act, and the Recognition of Customary Marriages Act (par 7.9). The Commission sets out some possibilities in this regard such as: the Protected Relationships Act *or* the Intimate Relationships and the Matrimonial Property Act.

8 There is also a question of whether any, all or some of the suggested amendments should be prospective or retrospective in application. The particular question of prospective/retrospective application is not set out in this summary but is canvassed in the chapters that follow.

C Chapter 2: The default matrimonial property system for monogamous marriages & life partnerships

9 The Commission provisionally recommends that option 2 should be adopted among the two options as follows:

1 Option 1 (Par 2.31)

10 For all monogamous marriages without an antenuptial contract:

10.1 Maintain the default regime as in community of property.

10.2 The joint estate of a customary marriage in community of property does not include customary family property.

11 For all monogamous marriages with an antenuptial contract:

11.1 Maintain the default regime as out of community of property with accrual, unless accrual is explicitly excluded.

11.2 Accept that a religious marriage contract is akin to an antenuptial contract and import accrual as the default unless explicitly excluded, while still maintaining the formalities for the *nikāh*.

11.3 Where spouses in a customary marriage enter into an antenuptial contract, customary family property is considered as an excluded asset.

2 Option 2 (Par 2.33)

12 For all monogamous marriages without an antenuptial contract:

12.1 Introduce accrual as the default regime.

12.2 If there is no antenuptial contract entered into, then the commencement value is deemed to be zero.

12.3 Customary family property is excluded from the accrual calculation.

12.4 Religious marriage contracts are considered to include accrual unless it is explicitly excluded.

3 Unmarried life partnerships (Pars 2.37- 2.40)

13 **For unmarried life partnerships**, the Commission recommends option 1 from the following options:

(a) **Option 1:** In the absence of an agreement to the contrary which includes a universal partnership agreement, unmarried intimate partners shall have equal rights to share in any property amassed during the partnership.

(b) **Option 2:** In the absence of an agreement to the contrary which includes a universal partnership agreement, unmarried intimate partners shall have no rights to share in any property amassed during the partnership.

14 A court shall have a discretion at the end of the partnership to order an equitable redistribution of the partnership assets taking into account the factors set out in par 2.41 below.

D Chapter 3: Matrimonial property systems and private international law rules

15 In relation to the matrimonial property systems that apply to foreign marriages and foreign marriages of South African citizens (private international law rules), the Commission recommends that:

a. The Commission recommends that the proprietary consequences of a marriage that is not governed by South African law will be determined by a single legal system for both moveable and immoveable property.

b. The rule that the *lex domicilii matrimonii* determines the property consequences of such marriages should be replaced (par 3.34) given that it is arguably unconstitutional and it is clearly unworkable in the case of same-sex marriages.

c. In its stead, the Commission proposes that the system that the parties designate by agreement before or at the time of the marriage, irrespective of their domicile, nationality or habitual residence at the time of the marriage should apply.

d. In the absence of an agreement between the spouses, the law of the country of the common domicile of the spouses at the time of marriage applies.

e. In the absence of an agreement or a common domicile, the law of the country of common habitual residence of the spouses at the time of the marriage applies.

f. In the absence of any of the previous factors, the law of the country of common nationality of the spouses at the time of the marriage applies.

g. In the absence of any of the previous factors, the law of the country to which the spouses are jointly and most closely connected at the time of marriage applies.

E Chapter 4: Deviations from the default matrimonial property system

16 The current rules aim to protect third parties, but contains insufficient mechanisms to ensure that spouses are protected against unfair antenuptial contracts – both at the time when they are concluded and when they are enforced. The Commission therefore includes two sets of recommendations: first, ensuring that parties who enter into antenuptial contracts have adequate information to understand the consequences of their contracts and, second, recommendations which enable courts to deviate from the chosen property regime to ensure equity when the relationship is dissolved. The Commission also recommends mechanisms to make it easier for spouses to change their matrimonial property regime after the marriage on the basis that creditors are protected.

1 Antenuptial contracts (Pars 4.54, 4.57, 4.58, 4.59 4.65, 4.70, 4.73, 4.74, 4.75 and 4.76)

17 Spouses may, by way of a written antenuptial contract, regulate the status, ownership and division of their estates during marriage.

18 Common law obligations and certain rights should be legislated explicitly including that:

i. No antenuptial contract may contain a provision which limits the rights to spousal or child support during or after the end of the marriage/relationship. Any such provision in an antenuptial contract will not be enforceable.
ii. Any antenuptial agreement or term in an antenuptial contract which has the purpose or effect of defeating the claims of creditors of either spouse will be void.
iii. Any antenuptial agreement or term in an antenuptial contract which offends public policy or the *boni more*s is void and unenforceable.
iv. An antenuptial contract does not affect family property in customary law unless the parties expressly refer to such property.

19 The Commission proposes that there should be a duty of utmost good faith to fully and accurately disclose financial information (as set out in par 4.57) when entering into an antenuptial contract and that failure to accurately disclose listed information should attract negative consequences for the spouse who failed to disclose as set out at par 4.59).

20 The Commission proposes that every antenuptial contract must be preceded by independent legal advice provided separately to each spouse.

21 Irrespective of the matrimonial property regime which an antenuptial contract introduces, a court may refuse to enforce such an agreement or a term in such an agreement at divorce or separation if its enforcement **would cause serious injustice or undue hardship**. In deciding whether serious injustice or undue hardship will result from enforcement of the antenuptial contract, a court should consider a list of factors.

22 Antenuptial contracts which fail to comply with formality requirements, including independent legal advice:

22.1 **Option 1:** are enforceable between the spouses when the marriage is dissolved subject to a court's discretion to deviate from the terms of the contract.

22.2 **Option 2:** are voidable at the instance of either spouse where the non-compliance is a failure to obtain independent legal advice.

22.3 **Option 3**: are null and void with the result that parties will be married according to the default matrimonial property system.

2 Judicial discretion to redistribute in marriages out of community of property without accrual (currently section 7(3) of the Divorce Act) (Pars 4.128, 4.129 and 4.130)

23 The Commission lists a variety of options in this part of the chapter but supports the proposal that a court be given the discretion to deviate from the applicable matrimonial property regime in all marriages, irrespective of the matrimonial property regime. A court must take into account certain factors (listed at Pars 4.129 and 4.130) when exercising this discretion. If this option is preferred, then it would obviate the need for a forfeiture of benefits provision with the result that a forfeiture of benefits order need not be a factor to be taken into account in the exercise of a general discretion to deviate from the chosen matrimonial property regime.

3 Changing the matrimonial property system during the subsistence of a marriage

24 The Commission proposes a number of options which may simplify a change to their matrimonial property system during the subsistence of the marriage:

24.1 **Option 1:** Spouses may change their matrimonial property regime after the conclusion of a marriage by way of a postnuptial agreement, which is duly notarised and registered in the Deeds Office. Such a postnuptial contract shall be valid as between the spouses, but does not affect the rights of creditors, unless the spouses can prove that the creditors knew of the existence of the agreement and its essential terms.

24.2 **Option 2:** Spouses may change their matrimonial property regime after the conclusion of a marriage by way of a postnuptial agreement which is duly notarised, registered in the Deeds Office or digitally registered. In addition, the intention to enter into a postnuptial agreement, together with the proposed terms of the agreement must be sent, by registered mail to all creditors who may in writing notify the notary of any objections to the contract. No contract may be registered unless creditors agree.

24.3 **Option 3:** Spouses may change their matrimonial property regime by way of a notarially registered amendment to their antenuptial contract, which shall be digitally registered in the Deeds Office.

24.4 **Option 4:** No change should be effected to the current system contained in section 21 of the Matrimonial Property Act.

25 In respect of options 1-3, no postnuptial contract shall be registered unless it complies with the formalities and duties to disclose, which applies to antenuptial contracts set out in paragraph 4.57 of this discussion paper.

26 Where postnuptial agreements between the parties do not comply with the existing or proposed provisions in this discussion paper, including a universal partnership agreement, the Commission proposes:

26.1 **Option 1**: Such agreement will be enforceable as between the parties to the agreement after the satisfaction of the claims of all creditors.

26.2 **Option 2:** A postnuptial agreement which does not comply with the provisions of this section shall not be enforceable.

26.3 **Option 3:** If a general judicial discretion to deviate from the applicable matrimonial property regime is granted to courts at divorce, the existence of

postnuptial agreements that do not comply with the provisions in this section or universal partnerships can be taken into account in deciding the distribution of matrimonial property.

26.4 **Option 4:** Spouses who had, during the subsistence of a marriage, entered into a general universal partnership agreement or a universal partnership agreement in respect of a specific commercial enterprise are both entitled to a share of the partnership assets, which is determined by agreement between the parties. In the absence of such agreement, the share of each party shall be determined by the extent of their respective contributions.

F Chapter 5: Customary Marriages

27 The Commission proposes the following in relation to the issues identified:

1 Conversion of Customary Marriage to Civil Marriage (Pars 5.48, 5.49, 4.50, and 4.51)

28 The property regime of the customary marriage remains the property regime of the subsequent civil marriage unless the parties change the property regime of the civil marriage in the following ways:

28.1 **Option 1:** By changing the property consequences of the civil marriage by making a court application in terms of section 21 of the Matrimonial Property Act

28.2 **Option 2:** By changing the property consequences of the civil marriage in terms of the recommendations made in par 4.194 below. The Commission prefers this option.

28.3 **Option 3:** By concluding an antenuptial contract regulating the property consequences of the civil marriage.

28.4 **Option 4:** If there is uncertainty regarding the applicable regime at divorce, the parties must choose which regime should apply to their matrimonial property, failing which the court will decide for them, considering the interest of creditors.

2 Non-fulfilment of section 7(6) and polygynous marriages (Pars 5.53 and 5.54)

29 If any of the polygynous marriages are dissolved by divorce, and the husband has not complied with section 7(6) of the Recognition of Customary Marriages Act:

(a) Option 1

30 Each wife should retain the right of use over property in her own “house”. The husband retains control over family customary property, if any. Personal property is retained individually by the spouses.

(b) Option 2

31 The husband and all his wives share property in community, excluding family property but subject to the court’s discretion to deviate from equal distribution and considering the factors set out in par 4.130.

3 Customary Family Property (Par 5.55)

32 Customary family property denotes the ancestral home or communal land held by the extended family of either spouse.

33 Customary family property does not form part of matrimonial property in the customary or civil marriage of spouses who are subject to customary law.

34 The Commission recommends that a spouse should be compensated for substantial renovations to a customary family property that does not form part of matrimonial property upon dissolution of the marriage. Such compensation should be adjusted for inflation and supported by oral and/or documentary evidence provided by the party who asserts it.

4 General

35 Although not directly concerned with matrimonial property, the Commission suggests that consideration should also be given to the registration of customary marriages. Since registration of a customary marriage seems to be a cumbersome process for spouses (especially women living in patriarchal communities), this challenge

could be mitigated by encouraging traditional leaders to facilitate the registration of customary marriages.

36 Law reform to provide for the registration of life partnerships (which include customary marriages) is underway. *Discussion Paper* 152 recommended a draft Bill which seeks to rationalise the laws on marriage and marriage-like relationships. Among others, the Bill provides for the recognition of protected relationships entered into by parties regardless of their religious, cultural or any other beliefs or convictions, or how the protected relationship was entered into to provide for the requirements of a protected relationship, for the registration of a protected relationship and for the taking effect of the legal consequences of a protected relationship.

G Chapter 6: Religious marriages

37 In relation to religious marriages, the Commission offers the options below as default matrimonial property systems for the following types of religious marriages. For monogamous religious marriages, the Commission favours option 1.

1 Monogamous religious marriages (Pars 6.51, 6.52 and 6.53)

(a) Option 1

38 In the case of monogamous religious marriages, which include a marriage contract,

38.1 the matrimonial property regime is deemed to be out of community of property with accrual, unless a term in the marriage contract excludes accrual.

38.2 In the absence of a term in the marriage contract recording the commencement values of each spouse's estate, the net value of each estate is deemed to be nil.

38.3 To ensure an equitable distribution of the estates, judicial discretion may be exercised in the crafting of a redistribution order, as discussed at par 4.128 of this discussion paper.

(b) Option 2

39 In the case of monogamous religious marriages, which include a marriage contract,

39.1 the matrimonial property regime is deemed to be out of community of property without accrual.

39.2 To ensure an equitable distribution of the estates, judicial discretion may be exercised in the crafting of a redistribution order, as discussed at par 4.128 of this discussion paper.

(c) Option 3

40 In the case of monogamous religious marriages, which include a marriage contract,

40.1 The matrimonial property regime is deemed to be in community of property.

40.2 To ensure an equitable distribution of the joint estate, judicial discretion may be exercised in the crafting of a redistribution order, as discussed at par 4.128 of this discussion paper.

2 Polygynous religious marriages (Pars 6.54, 6.55 and 6.56)

41 In the case of polygynous religious marriages,

41.1 A spouse who wishes to enter a subsequent religious marriage must apply to court to approve a written contract for the regulation of the future matrimonial property system of their marriages.

41.2 The court must terminate the matrimonial property system of the existing marriage and make an equitable distribution of the marital estate/s.

41.3 Subsequent matrimonial property regimes of polygynous religious marriages are deemed to be out of community of property without accrual, subject to judicial discretion being exercised in the crafting of a redistribution order, as discussed at paragraph 4.128 of this discussion paper.

41.4 If the husband does not obtain court approval as set out in 6.54.1, the court must redistribute equitably considering the factors listed at paragraph 6.54.4.

41.5 If one of the wives becomes aware of the subsequent marriage, she can approach a court for an equitable distribution of the marital estates.

3 Civil and religious marriages (Pars 6.57 and 6.58)

42 If parties enter a civil and religious marriage prior to amendments addressing religious marriages in the Matrimonial Property Act, the matrimonial property system of a civil marriage will apply.

43 If parties enter a civil and religious marriage after the amendments addressing religious marriages in the Matrimonial Property Act, they can decide which matrimonial

property system of either a civil marriage or religious marriage applies. In the absence of the parties exercising a choice regarding matrimonial property system, the court has discretion to apply the matrimonial property regime of either the civil marriage or religious marriage entered by the parties, which renders the most equitable distribution of the estates between the parties.

H Chapter 7: Unmarried life partnerships

44 The Commission recommends the following in relation to unmarried life partnerships:

1 A judicial redistribution discretion (Pars 7.33 and 7.34)

45 That courts should have a limited discretion to order the redistribution of partnership assets at the end of an unmarried intimate partnership (where no agreement between the parties exists) and puts forward two starting points from which the redistribution departs. The Commission recommends option 1 from the following options:

(a) **Option 1:** In the absence of an agreement to the contrary, which includes a universal partnership agreement, unmarried intimate partners shall have equal rights to share in any property amassed during the partnership.

(b) **Option 2:** In the absence of an agreement to the contrary which includes a universal partnership agreement, unmarried intimate partners shall have no rights to share in any property amassed during the partnership.

46 A court shall have a discretion at the end of the partnership to order an equitable redistribution of the partnership assets taking into account the factors set out in paragraph 7.36 below.

2 Options to codify the putative marriage doctrine (Pars 7.49, 7.50, 7.51 and 7.52)

47 The Commission recommends the following relating to putative marriages:

(a) **Option 1:** The first option is that the putative marriage doctrine is not codified and it remains in the common law. In this instance, an explicit provision in legislation

should set out that the doctrine applies to putative customary and religious marriages. If the reason for voidness is an existing marriage between a partner to the putative marriage and a third party, and if the existing marriage to the third party is either in community of property or subject to the accrual system, then the property will be divided as set out at paragraph 7.51 of this discussion paper.

(b) **Option 2:** The second option is that the putative marriage doctrine and its requirements is codified in the manner set out in paragraph 7.52 of this discussion paper.

3 Universal partnerships for unmarried intimate partners and monogamous invalid marriages

48 **Option 1:** The Commission recommends that the existing common law rules be codified and amplified as suggested in paragraph 7.64 of this discussion paper.

49 **Option 2:** The existing common law position should be retained without being codified as set out in paragraph 7.65 of this discussion paper.

I Chapter 8: Management of assets during marriage (Pars 8.42, 8.43 and 8.47)

50 The Commission recommends that:

(a) Whenever divorce is threatened, instituted or pending, parties should be barred from encumbering or alienating valuable property except in the ordinary course of business or for the purpose of subsistence. This prohibition should continue until the divorce is determined.

(b) Dissipation of assets shall include alienation of assets at disproportionate value or that have a significant effect on the division of assets at the dissolution of marriage.

(c) Shortly after the issue of divorce summons or receiving a divorce summons, both parties should make a complete and full disclosure of their assets and liabilities, as well as their income over the previous 12 months predating the commencement of divorce proceedings. Parties are then required to detail their

assets in a disclosure form as discussed at paragraph 9.46 of this discussion paper.

J Chapter 9: Technical Issues at divorce

51 The Commission proposes the following in relation to technical issues at divorce:

1 Trusts:

(a) Proposals: inter vivos trusts at divorce (Par 9.37)

52 It is proposed that irrespective of the matrimonial property regime, a court should take the assets of *inter vivos* trusts into account in calculating and distributing assets upon divorce or separation or in making redistributive orders if the *effect* of a trust is to frustrate or circumvent a matrimonial property claim by a spouse.

53 Whether the effect of a trust is to frustrate or circumvent a matrimonial property claim is determined by considering the factors as set out in paragraph 9.39 of the discussion paper below.

(b) General duty to disclose at the time of divorce (Par 9.45)

54 The Commission proposes the imposition of a general duty to accurately and in good faith disclose financial information, including information about trusts, pensions and other assets when a marriage breaks down, irrespective of the matrimonial property regime and when a marriage or antenuptial contract is concluded.

55 The type of information that should be disclosed is listed in paragraph 9.46 below.

(c) Consequences of failure to disclose fully and accurately (Pars 9.49 and 9.50)

56 **Option 1:** Where a court finds that a spouse failed to accurately and fully disclose financial information it may draw an adverse inference that the spouse had done this to hide assets and / or

57 **Option 2:** Where a court finds that a spouse failed to accurately and fully disclose financial information, this should be taken into account in ordering an equitable redistribution of assets.

(d) Protection of disclosed financial information (Pars 9.51 and 9.52)

58 The Commission notes that the duty to disclose could lead to disclosure of spouses' financial information to members of the public. However, the Commission notes further that section 12 of the Divorce Act would cover this information.

(e) The stage in divorce proceedings when information should be disclosed (Pars 9.54 and 9.55)

59 It is important that the duty to disclose arises early enough in divorce proceedings to prevent spouses from seizing an opportunity to hide assets from each other. The Commission identified two options:

i. **Option 1:** After issuing summons, a spouse may bring an application against the other spouse pending divorce for disclosure of financial information. This spouse may change her pleadings or amend her claims as a result of information obtained.
ii. **Option 2:** Every summons in a divorce action must contain a form which both parties must complete in writing within a period of 40 days from the date of service of summons, disclosing fully and accurately the financial information as set out at paragraph 9.46 of this discussion paper.

2 Career assets as property (Pars 9.92, 9.93 and 9.94)

60 The Commission supports the recognition of career assets as property and asks respondents whether they agree. If yes, respondents are asked consider two options to value such career assets.

60.1 **Option 1: A 'return *of* investment' model:** This model broadly entails compensating the spouse for the cost they incurred investing in enhancing the earning capacity of the other.

60.2 **Option 2: A 'return *on* investment' model**: This model recognises that a spouse has invested in the enhanced earning capacity of the other spouse in a marriage. In the divorce then, that spouse gives up their ability to share in the fruits flowing from the other spouse's enhanced earning capacity.

61 Should respondents feel that career assets should not be valued as property *per se*, then it should be included in a general discretion provision (as set out in chapter 4 above). In other words, whether the spouse contributed to the career assets of the other spouse during the marriage would be a factor that the court would take into account in dividing the matrimonial property in terms of their discretionary powers as recommended in paragraph 4.129.

3 Special provisions on the distribution of family homes (Pars 9.124 and 9.125)

62 **Option 1:** Courts which exercise the general judicial discretion to redistribute assets should take account of the factors relating the family home which are set out in par 9.124 below.

63 **Option 2:** Factors relating to the family home could be contained in a separate section in the Divorce Act as described in par 9.124 below.

64 In addition, the occupation of the family home may also become an issue pending a divorce. It is proposed that the same or similar discretion be included in rule 43 proceedings to protect the interests of children and other dependents pending the final divorce.

(a) The family home in unmarried families

65 At par 7.32 of this discussion paper, the Commission proposes a judicial discretion to order redistribution of partnership property when an unmarried intimate partnership comes to an end. Such a provision could direct the court to consider granting the family home to the parent who has the responsibility of the daily care of any children from the relationship if this is feasible and in the interests of children. (Par 9.129)

(b) Family home/property in customary law (Pars 9.136 and 9.137)

66 The Commission proposes that family homes/property in customary law should be treated differently from individual property or “house property” because they represent an asset and a refuge not just for the individual household but for vulnerable members of the extended natal family to whom the home belongs (Pars 9.136 and 9.137).

(c) Improvements to family homes in customary law (Par 9.139)

67 The Commission recommends that, upon dividing the matrimonial assets, a court shall award reasonable compensation to the spouse who contributed to repairing or improving the family home of the other spouse (Par 9.139).

4 Pensions

(a) Applying the clean break principle to all pension funds (Pars 9.169, 9.170, 9.171 and 9.172)

68 It is proposed that the clean break principle is made applicable to all pension funds regardless of their provenance. (Par 9.168). This could happen in terms of two options as set out below:

68.1 **Option 1:** The legislature must include all state owned/public sector retirement funds in a new definition of retirement funds under the Pension Funds Act. All these funds must be registered/licensed in terms of the Act.

68.2 **Option 2:** By way of a general amendment act, the legislature must amend each public fund's guiding statute to provide for payment of the pension interest at the date of divorce.

(b) Disclosure of pension fund information at an early stage of divorce proceedings (Pars 9.173 and 9.174)

69 The Commission recommends that a duty of disclosure of certain information regarding the pension fund should be mandatory. Options relating to disclosure as discussed in Chapter 4 paragraph 4.57 are also applicable here. (Par 9.174)

(c) Living annuities and the right to share (Pars 9.183, 9.184 and 9.185)

70 The Commission recommends option 1 out of the two options set out below:

70.1 **Option 1**: An amendment to the Pension Funds Act and the Income Tax Act to provide for the valuation of the non-member's share of the right to a future income stream in the form of a lump sum payment.

70.2 **Option 2:** A living annuity should be treated as a capital asset of the member spouse for purposes of division of assets.

(d) Protecting non-member spouses where member spouses get dismissed, retire, are retrenched, or resign before the divorce is finalised. (Pars 9.187, 9.188 and 9.189)

71 The Commission proposes that where divorce proceedings are in process, any accrual of the pension benefit must be deemed to have taken place *after* the date of the divorce order, in order to protect the non-member's right to a pension interest. (Par 9.187)

72 In order to facilitate this, when a divorce summons is issued, the member spouse must notify the pension fund administrator and that pension fund administrator must endorse that spouse's records to prevent payment until the divorce is finalised. (Par 9.188)

73 The Commission also recommends a requirement that pension fund administrators be notified when a divorce summons is issued, with a view to endorsing the pension fund records and potentially preventing an attempt to dissipate any pension interest. (Par 9.189

5 Settlement agreements (Pars 9.219, 9.220, 9.221 and 9.222)

74 The Commission proposes that the Chief Justice should be notified of the issues arising in divorce matters and a comprehensive training brief should be submitted to the South African Judicial Education Institute ("SAJEI") to cover matters which courts are required to consider before making settlement agreements an order of court. (Par 9.219). The Commission further proposes the following options, with a preference for option 2 or 3:

74.1 **Option 1:** The Commission proposes that courts should continue to make settlement agreements orders of court subject to the usual court rules and directives.

74.2 **Option 2:** Parties must provide a certificate of independent legal advice when requesting the court to make their settlement agreement an order of court. The certificate must set out that the parties received independent legal advice on the consequences and prudence of entering into the terms set out in the agreement. (Par 9.221)

74.3 **Option 3:** When deciding whether to incorporate a settlement agreement into the divorce order, the court should consider the factors listed at paragraph 9.222 of this discussion paper.

CHAPTER 1: OVERVIEW

A Background to the investigation

1.1. This investigation is the Review of Aspects of Matrimonial Property Law (Project 100E). It was initiated when the Commission for Gender Equality raised concerns about possible discrimination in the banking industry, which did not allow married women to open bank accounts in certain circumstances. The Commission also took account of concerns raised by the attorney's profession about numerous social and legal changes which had occurred since the adoption of the Matrimonial Property Act 88 in 1984 (Matrimonial Property Act).

1.2. *Issue Paper* 34[1] was published on 28 August 2018, taking the form of a questionnaire which covered various issues relating to the current matrimonial property systems in South Africa and the financial consequences of divorce. *Issue Paper* 34 did not elicit wide public interest and few comments were received.

1.3. After several members of the advisory committee on the Review of Matrimonial Property Law stepped down from the advisory committee, the Minister appointed additional members in April 2021. At its first meeting in June 2021, the reconstituted advisory committee (Committee) raised the following concerns:

(a) The relatively poor response to *Issue Pape*r 34.

(b) The need to elicit further stakeholder views.

(c) The possibility that members of the public had focused on other SALRC issue and discussion papers in the family law domain, including papers on family mediation and the single marriage statute, with the result that attention was diverted from the current investigation.

(d) The need to keep up with numerous Constitutional Court decisions which fundamentally affect the law on unmarried life partnerships, Muslim marriages and customary marriages.

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1 South African Law Reform Commission, *Issue Paper 34: Review of Aspects of Matrimonial Property Law,* Project 100E, (2018).

1.4. The Committee therefore requested the Commission to extend the consultation process for purposes of supplementing the dearth of comments on *Issue Paper* 34 and to re-publish the issue paper, with the inclusion of new issues which had arisen since the last publication.

1.5. As a result, the amended issue paper, now *Issue Paper* 41,[2] was published for general information and comment on 6 September 2022. The closing date for comment was initially 30 November 2021.[3] By mid-November 2021, individuals and organisations requested an extension of the closing date for comment. The SALRC prepared a media statement which was posted on its website on 23 November 2021,[4] which announced that the closing date was extended to 14 January 2022. The Committee received more than 50 substantive responses from individuals affected by divorce, family law practitioners, accountants, NGOs, banking and pension fund institutions.

B Motivation for the investigation

1.6. The religious and cultural diversity of the South African population reflects the many different forms of marriages into which people enter, ranging from civil marriage, civil unions, multiple religious marriages and customary marriages. Nevertheless, figures released by Statistics South Africa show a steady decline in the numbers of registered marriages in the past 10 years and a concomitant increase in the numbers of divorces.[5] The increased divorce statistics underpin the need for an investigation into the

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2 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 (2021).

3 "Public input on Review of Aspects of Matrimonial Property Law" available at https://pmg.org.za/call-for-comment/1108/

4 Deadline Extended for Comments on Review Oof Matrimonial Property Law *posted on* 25 November 2021 *by* Schalk Joubert available at https://www.moonstone.co.za/deadline-extended-for-comments-on-review-of-matrimonial-property-law-2/ and accessed on 26 February 2023; Media Statement*: Issue Paper 41* (Project 100E) Review of Aspects of Matrimonial Property Law. Extension of closing date for comment until 14 January 2022 available at https://www.justice.gov.za/salrc/media/20211123-ip41-prj100E-MatrimonialPropertyLawReview.pdf and accessed on 26 February 2023.

5 Statistics South Africa *Marriages and Divorces 2019* (2021) Table 11. See also Department of Home Affairs Green Paper on Marriages in South Africa Government Gazette no 44557 of 11 May 2021 p35-39 on declining marriage figures; Department of Home Affairs White Paper on Marriages in South Africa, available at Available at http://www.dha.gov.za/images/PDFs/White-Paper-on-Marriage-in-SA-5-May2022.pdf last accessed on 2 August 2022 and at https://forsa.org.za/slug/white-paper-on-marriages-in-south-africa/ accessed on 5 April 2023 p 20-21 for an increase in divorce statistics.

distribution of matrimonial property upon dissolution of these relationships, since increasing numbers of people are affected by this area of law. However, these figures do not necessarily indicate a decline in family life, but instead show that many families do not involve legally recognised marriages.

1.7. The lack of legal remedies for certain unrecognised marriages and unmarried intimate partners can be said to be the legacy of the colonial and Apartheid regime's disregard of certain marriages and intimate relationships.[6] This disregard had a particularly detrimental impact on women and the children for whom they tend to assume sole caring responsibilities after relationships break down. The reason for this result is that, despite the abolition of formally discriminatory measures like the marital power,[7] in practice, gender inequality persists within marriages and unmarried intimate relationships.

1.8. As a result of prevailing social and religious norms and stereotypes, many South African women and girls continue to perform a disproportionate share of caring, cleaning, cooking and other onerous daily chores within households. The International Labour Organisation estimates that the economic value of women's unpaid care work comprises 6.3 per cent of South Africa's gross domestic product.[8]

1.9. The above work is unpaid, and it also limits women's abilities to participate in waged labour on an equal footing with men. In the context of intimate partnerships, this reality benefits male partners by allowing them the time to focus on wage work and to advance their careers.[9] When marriages or unmarried relationships end, women's investment into the welfare of men and children during relationships remains

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6 See Debbie Budlender and Francie Lund 'South Africa: A Legacy of Family Disruption' 2011 (42) *Development and Change* 925.

7 Women, Business and the Law: Challenging entrenched marital power in South Africa October 2021 accessed on 20 January 2022 and available at https://openknowledge.worldbank.org/handle/10986/37817?locale-attribute=es

8 International Labour Organization *Care Work and Care Jobs for the Future of Decent Work* (2018) 50. See also Gálvez-Muñoz, Rodrígues-Modroño & Domínguez-Serrano 'Work and Time Use by Gender: A New Clustering of European Welfare Systems' 2011 *Feminist Economics* 125.

9 "Non-standard employment around the world: Understanding challenges, shaping prospects"– Geneva: ILO. 2016; International Labour Conference, 98th Session, 2009 Report VI "Gender equality at the heart of decent work".See also Gaëlle Ferrant, Luca Maria Pesando and Keiko Nowacka "Unpaid Care Work: The missing link in the analysis of gender gaps in labour outcomes" *OECD* 2014 9.

uncompensated, unless they have access to a fair share of marital and family property.[10]

1.10. In addition, because many women are financially dependent on their male partners, they are often at a disadvantage during the process of divorce or separation.[11] Men may use their economic advantage and their control over family finances to hide assets in anticipation of divorce, to prolong expensive litigation, and refuse to comply with their child maintenance obligations.[12] Together with threats by men to "take their children away" and the high prevalence of gender-based violence in marriages and intimate relationships,[13] these factors may compel women to agree to unfair divorce settlements which continue to affect their welfare and those of their children after divorce.

1.11. One motivation for this project is therefore the need to ensure a legal framework that does not discriminate on the basis of sex or gender, or excludes certain women from legal relief because of the nature of their marriages and unmarried intimate relationships.

1.12. These concerns have been central to a range of judgments, including by the Constitutional Court, that have extended legal rights to a wide range of marriages and unmarried relationships since democratisation on a case-by-case basis.

1.13. Recently, the Constitutional Court declared that the Marriage Act[14] and the common law definition of marriage was unconstitutional for excluding and failing to give legal effect to Muslim marriages.[15] This case follows upon a line of judgments in which common law and statutory consequences of civil marriage were extended to spouses in monogamous and polygynous Muslim marriages.[16]

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10 Efe CJ & Eberechi OE "Property Rights of Nigerian Women at Divorce: A Case for a Redistribution Order" *PER / PELJ* 2020(23) - DOI http://dx.doi.org/10.17159/1727-3781/2020/v23i0a5306.

11 Penelope E Bryan 'Re-asking the Woman Question at Divorce' (2000) 75 *Chi.-Kent L. Rev.* 713.

12 Penelope E Bryan 'Re-asking the Woman Question at Divorce' (2000) 75 *Chi.-Kent L. Rev.* 713.

13 Statistics South Africa. (2016). *South Africa Demographic and Health Survey 2016: Key Indicator Report.* Available at: https://www.statssa.gov.za/publications/Report%2003-00-09/Report%2003-00-092016.pdf (accessed 19 April 2023).

14 Marriage Act 25 of 1961.

15 *Women's Legal Centre Trust v President of the Republic of South Africa* 2022 (5) SA 323 (CC).

16 See for instance *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA); *Daniels v Campbell* 2004 7 BCLR 735 (CC); *Hassam v Jacobs* 2009 (5) SA 572 (CC); *Moosa v Minister of Justice and Correctional Services* 2018 (5) SA 13 (CC).

1.14. Several Constitutional Court cases also expanded the proprietary rights of wives in customary marriages, necessitating piecemeal changes to the Matrimonial Property and Divorce Acts to reflect the changed legal position.[17]

1.15. Finally, there is a series of cases extending marriage-like rights and protections to same-sex and opposite sex unmarried cohabitants.[18] These cases culminated in *Bwanya v Master of the High Court, Cape Town,*[19] which extended rights to intestate succession[20] and for opposite sex unmarried life partners to claim in terms of the Maintenance of Surviving Spouses Act[21]. Another significant development is the extension of rights to share in property amassed during unmarried relationships on the basis of universal partnership contracts.[22]

1.16. These developments mean that existing legislation on matrimonial and partnership property needs to be amended from time to time to reflect changed legal rights. The failure to do so leads to piecemeal law reform and an incoherent, complicated legal framework that is inaccessible to members of the public.[23] Some developments, particularly those relating to unmarried partnerships were developed by the courts and are not yet contained in legislation. The downside of this type of development is that it requires knowledge of such court development and costly litigation. The result is that it is only really those with sufficient financial means that can properly pursue the enforcement of their legal rights.

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17 *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC); *Ramuhovhi v President of the Republic of South Africa* 2018 (2) SA 1 (CC); *Holomisa v Holomisa* 2019 (2) BCLR 247 (CC); *Sithole v Sithole* 2021 (6) BCLR 597 (CC).

18 For example for extending intestate succession rights to same sex couples, see *Gory v Kolver NO* 2007 (4) SA 97 (CC); *Laubscher v Duplan* 2017 (2) SA 264 (CC).

19 *Bwanya v Master of the High Court, Cape Town* 2022 3 SA 250 (CC).

20 In terms of the Interstate Succession Act 81 of 1987.

21 Maintenance of Surviving Spouses Act Act 27 of 1990.

22 *Butters v Mcora* 2012 (4) SA 1 (SCA) 29.

23 This issue is currently being investigated by the SALRC project on a Single Marriage Statute, which may take time to complete and inevitably will not result in immediate legislative action. In the interim, it is, however, both possible and advisable to undertake the current investigation.

C Main themes of this Discussion Paper

1.17. Flowing from the discussion in the previous section, it is clear that the first and central aim of this discussion paper is the need to integrate proprietary consequences for the different forms of marriages and unmarried intimate partnerships. This integration will assist in protecting the rights to equitable sharing of resources by financially vulnerable partners. The discussion paper therefore has discrete sections focusing on the property entitlements in customary and religious marriages and in unmarried intimate relationships.

1.18. Three main themes emerge from the responses *to Issue Paper* 41. These themes pertain to all marital forms, including marriage in terms of the Marriage Act and Civil Union Act.[24] These themes relate to (1) providing courts with a general discretion to distribute matrimonial property on divorce, (2) improved duties of disclosure before and at all stages of the divorce process, and (3) general education about matrimonial property regimes.

1 A general discretion

1.19. Although respondents were not unanimous, there was widespread agreement on the need to provide courts which dissolve marriages with a general discretion to depart from the agreed-upon marital property regime in circumstances where the usual form of property division would be inequitable and unfair. This agreement was especially true, but not limited to, respondents amongst legal and gender-related non-profit organisations and academic commentators.

1.20. Currently the Divorce Act allows for redistribution orders under section 7(3) in marriages out of community of property without accrual, but it is not equally available in all such marriages. For instance, there are different cut-off dates for marriages and there are various factors to be considered in, for example, customary law such as customary family property. In marriages in community of property and subject to the accrual system, section 9 allows for an order of forfeiture of benefits, applying another set of criteria.

1.21. Respondents agree that a simplified general judicial discretion, as found in other

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24 Civil Union Act 17 of 2006.

jurisdictions, is necessary. However, there is also general agreement that this discretion should not be unqualified, but guided by a list of factors that courts should consider, irrespective of the kind of marriage, the date on which it was concluded, or the matrimonial property regime.

1.22. Although it is arguable that such a discretion may contribute to legal uncertainty and would curb the autonomy of spouses and partners to determine the consequences of their relationships, respondents agree that the need to ensure equitable treatment, especially on the basis of gender, outweigh these possible disadvantages.

2 Duties to fully disclose

1.23. Another concern, raised mainly by legal professionals, is the way in which some litigants abuse their stronger financial positions and greater knowledge of the couple's financial affairs to avoid sharing marital assets with their spouses. This regularly happens through dissipation of assets pending divorce, through - amongst other efforts - secreting joint and personal assets in *inter vivos* trusts, and evading provisions for sharing pension benefits.

1.24. Respondents thus raised the need for more extensive duties of financial disclosure in addition to considering measures to close statutory loopholes relating to these practices.

1.25. Current duties to disclose in divorce matters only arise in the context of Rule 43 applications and after the close of pleadings in divorce actions.[25] Where the marriage is out of community of property but with accrual, section 7 of the Matrimonial Property Act also provides for disclosure, but there is no procedural rule governing this. These duties may be too limited in their extent and be imposed too late in the divorce process to have much effect.

1.26. Lack of accurate information not only prejudices some spouses, while allowing others to obtain unfair financial advantage but it increases litigation and undermines fair settlements between the spouses.

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[25] Rule 35 of the Uniform Rules of Court (the duty to discover).

1.27. The discussion paper therefore suggests duties to disclose financial information at various stages – starting with the antenuptial agreement (see paragraph 4.57 of this discussion paper), to divorce (see paragraph 9.45 of this discussion paper). It also investigates appropriate sanctions to encourage parties to disclose properly.

3 General education about choice of matrimonial property regimes

1.28. While "general education" does not require legislative reform per se, respondents to the *Issue Paper* were in general agreement that the challenges faced by vulnerable parties in the matrimonial property sphere mirrored challenges in the greater South African society. Respondents suggested that South Africa – as a society in general – is deeply patriarchal, and that the law is used as a tool to enforce a heteronormative structure onto our society.

1.29. Thus, respondents suggested that general education, promoted by the state, could go some way towards greater awareness and challenges by ordinary people in dealing with these issues. In the context of this discussion paper, this general education is focused on the family form.

1.30. Suggestions are that education should take place from school level onwards through various institutions in an effort to inform and educate society about the need to promote substantive gender equality in the family. Training and information sessions should be available, for example, at schools, educational institutions, health providers, social services, courts, etc. The Department of Justice and Social Development should prepare information and educational rollouts at, for example, popular events such as sporting and cultural events, schools and educational institutions. It would also be useful for the Department of Home Affairs to display posters in offices setting out information about registration and protection.

D Matters not covered in this paper

1.31. The current investigation deals with the narrow issue of marital property and its regulation before, during and after marriage (ie 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).[26]

1.32. 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 then Minister of Justice.[27] 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.[28] An issue paper was published in September 2014 on this matter.[29] The closing date for comments was end November 2014. A discussion paper with preliminary recommendations was published in May 2022 for public comment with the closing date for comments as at 30 June 2022.[30]

1.33. 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 the relationship breakdown of the parents.[31] 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.[32] An issue paper on this matter was published in February 2016.[33] A discussion paper on mandatory mediation was published in June 2019.[34] The SALRC made a renewed call for comment on its *Discussion Paper* 148 by 31 July 2022.[35]

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26 SALRC Issue Paper 41 at par 1.15.

27 SALRC Issue Paper 41 at par 1.16.

28 SALRC *Issue Paper* 28 -*Project 100: Review of the Maintenance Act 99 of 1998* (September 2014. See also SALRC Issue Paper 41 at par 1.16.

29 SALRC *Issue Paper* 28 of 2014.

30 SALRC *Discussion Paper* 157, *Project 100B: on the Review of the Maintenance Act 99 of 1998* (June 2022).

31 SALRC *Issue Paper* 41 at par 1.17.

32 SALRC *Issue Paper* 41 at par 1.17.

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

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

35 Media Statement: Project 100D: Alternative Dispute Resolution in Family Matters renewed call for comment by 31 July 2022.

1.34. 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.[36]

E Current matrimonial property regimes in South Africa

1.35. The Matrimonial Property Act regulates the matrimonial property system in South Africa. It moved away from the administration of the joint estate by the husband to a system of concurrent administration.[37] At present in South African law, there are practically three categories of matrimonial regimes: Marriages in community of property, marriages out of community of property and a variation of marriages out of community, namely the inclusion of accrual.[38] The chosen regime governs the position during subsistence of the marriage and determines how the spouses' property is divided upon dissolution of the marriage.[39]

1.36. In the absence of an antenuptial contract providing otherwise, marriage *ex lege* creates a community of property and of profit and loss – *communio bonorum*.[40] Community comes into being by operation of law as soon as the marriage is solemnised. It can be described as a universal economic partnership of the spouses in which all their assets and liabilities are merged in a joint estate in which both spouses, irrespective of the value of their contributions hold equal shares.[41]

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36 SALRC *Issue Paper* 41 at par 1.18.

37 SALRC *Issue Paper* 34 at 5.

38 See B Clark & J Church *LAWSA* vol 28(2) Marriage 3 ed (2020) par 66; J Heaton & H Kruger *South African Family Law* 4 ed (2015) 61.

39 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.

40 Marumoagae C "The beginning of the end –dissolution of marriage under accrual system" *De Rebus* 2015 July 35. See also JA Robinson "Matrimonial Property Regimes and Damages: The Far Reaches of the South African Constitution" (2007) 10 3 *PER* 70 at 71.

41 Robinson, Human and Boshoff *South African Family Law* 97. Also see JA Robinson "The Grounds for Divorce" (Chapter 2) in J Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014)

1.37. In *Estate Sayle v Commissioner for Inland Revenue*,[42] the Court held that a marriage in community of property means that the spouses become joint owners in undivided half shares of the assets they possess at the time of their marriage as well as of all assets acquired by them during the subsistence of their marriage. The merging of the properties takes place automatically by virtue of the parties being married in community of property.[43]

1.38. Where the parties are married in community of property, the joint estate of the spouses is generally shared equally, subject to limited exceptions.[44] During the marriage, the parties have equal powers managing the joint estate.

1.39. When persons get married in community of property, they should be aware that "marriage in community of property can be described as a universal economic partnership of the spouses in which all their assets and liabilities are merged in a joint estate in which both spouses, irrespective of the value of their contributions, hold equal shares."[45]

1.40. Marriage in community of property has certain advantages and disadvantages.[46] The main advantages of this regime include the fact that it applies by operation of law and without the execution of an antenuptial contract.[47] It is the default matrimonial property system in South African law[48] making it effortless and a less costly experience for the spouses. All assets accrued during the subsistence of the marriage are

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42 *Estate Sayle v Commissioner for Inland Revenue* 1945 AD 388. See also *Rabalao v Mogoje* (3113/2019) [2020] ZALMPPHC 101 par 20 ff.

43 *Estate Sayle supra*.

44 Some assets are regarded as the separate property of one of the spouses for purposes of *inter partes* spousal division – eg, assets received from a third-party estate/donor, where they were excluded from the joint estate by the will or donation (Heaton & Kruger *South African Family Law* 61 ff).

45 J A Robinson "The Grounds for Divorce" (Chapter 2) in *The Law of Divorce and Dissolution of Life Partnerships in South Africa* edited by J Heaton Juta 2014.

46 *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C).

47 Robinson *PER* 2007 at 71.

48 Heaton South African family law 101.

automatically shared by the spouses.[49] Spouses also share credit-worthiness during the subsistence of the marriage, which may be an advantage or a disadvantage.[50]

1.41. One of the main disadvantages of the system is the fact that spouses are not protected from each other's creditors due to the joint liability of debts.[51] Furthermore, spouses cannot recover delictual damages (patrimonial damages) from each other's insurers or from each other, unless the damages are payable because of personal injury.[52]

1.42. With respect to marriages out of community of property, there are broadly two possibilities:[53]

1.42.1. Marriages subject to accrual (all marriages entered into after 1984 in terms of an antenuptial contract are automatically subject to the accrual system unless the accrual system is explicitly excluded).[54] This is a system of deferred sharing of gains, with the relationship during marriage being the same as with a marriage out of community of property. Operation of the accrual system takes effect only on dissolution of the marriage. Each party's estate is given a net commencement value (which may be inserted in the antenuptial contract). On dissolution, the net value is determined again. Accrual is the amount by which the value at dissolution exceeds the commencement value (which is adjusted according to the consumer price index). The spouse whose estate shows the smaller accrual has a claim – for half of the difference between the accruals of the respective estates – against the spouse whose estate shows the larger accrual.[55] This system does not compel sharing of property acquired

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49 Heaton in SA Family Law par 6.2 pointed out that "*Community of property is a universal economic partnership of the spouses. All their assets and liabilities are merged in a joint estate, in which both spouses, irrespective of the value of their financial contributions, hold equal shares".*

50 *V v V* (3389/2017) [2020] ZAGPPHC 154 (4 March 2020).

51 See *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A).

52 Section 18(a) of the MPA was amended after the CC judgment of *Van der Merwe v Road Accident Fund and Another* 2006 (4) SA 230 (CC) to allow spouses in community of property to recover non-patrimonial damages from each other. These damages must arise during the course of the marriage, see *LH v ZHM* 2022 (1) SA 384 (SCA).

53 Before 1984 marriages were either in or out of community of property – the option of accrual did not exist. The Matrimonial Property Act also abolished the marital power.

54 SALRC *Issue Paper* 34 at 6.

55 *Ibid*. Example: Larger estate = R100 000; smaller estate = R70 000; difference = R30 000. Half of R30 000 = R15 000

prior to marriage; and certain items are excluded from the accrual (for example, an inheritance received from a third party). On divorce, the court may order forfeiture in whole or in part of the right of a party to share in the accrual of the other if failure to make the order would unduly benefit the one party.[56]

1.42.2. The law has tried to guard against one spouse potentially being in a weaker financial position by the inclusion of the accrual system. Spouses are not mandated to have this included, but spouses should stipulate in an antenuptial contract if they do not want the accrual system included into their matrimonial property system.[57] The accrual system was established on the concept that, upon the dissolution of a marriage out of community of property and community of profit and loss, both spouses must share in the growth of their estates during the subsistence of the marriage. The accrual system was introduced by the Matrimonial Property Act in terms of chapter 2.[58] The accrual system was established as a way to protect spouses who enter into an antenuptial contract, excluding community of property.

1.43. The discussion under the topic “Current matrimonial property regimes in South Africa” gives a brief overview of the law currently in force on marital property regimes. There will be a more detailed discussion of some of the areas of the current matrimonial property regime that need to be reformed in subsequent chapters.

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56 Section 9 of the Divorce Act. See also the discussion on forfeiture of benefits under Chapter 4 below.

57 Heaton South African family law 92.

58 Heaton The law of divorce and dissolution of life partnerships in South Africa 63.

CHAPTER 2: DEFAULT MATRIMONIAL PROPERTY SYSTEM

A Background

2.1. In South Africa the primary matrimonial property system has always been, and still is, the system of universal community of property.[59] 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.[60] De Jong and W Pintens,[61] state that community of property is referred to as the primary matrimonial property system of South Africa.

2.2. The default system applies to civil marriages in terms of the Marriage Act.[62] This default property system derives from the Roman-Dutch concept of universal community of property.[63] This is also the system that applies to civil partnerships/marriages in terms of the Civil Union Act.[64] According to the Recognition of Customary Marriages Act,[65] monogamous customary marriages are now treated as being in community of property,[66]

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59 SALRC *Issue Paper* 41 at par 2.2. G Lowdes "The need for a flexible and discretionary system of marital property distribution in the South African law of divorce" submitted in partial fulfilment of the requirements for the degree of Master of Laws at the University of South Africa 2014 at 8.

60 Heaton & Kruger *South African Family Law* (2015) 70-71. Thus in *Edelstein v Edelstein* 1952 3 SA 1 (A) 10 referring to Voet 23 2 91 the Appellate Division (as it then was) held that there is a rebuttable presumption that all civil marriages are deemed to be in community of property by default. In other words, should a couple not conclude an antenuptial contract before they get married, their marriage will automatically be in community of property. See also *Brummund v Brummund's Estate* 1993 2 SA 494 (NmHC) 498.

61 De Jong and W Pintens, "Default Matrimonial Property Regimes and the Principles of European Family Law- European and South African comparison" 2015 *TSAR* 551.

62 Act 25 of 1961. See also SALRC *Issue Paper* 41 at par 2.2.

63 SALRC *Issue Paper* 41 at par 2.2. See also J Sinclair "Marriage" in B van Heerden et al (eds) *Boberg's Law of Persons and the Family.*

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

65 Act 120 of 1998.

66 See the recently amended section 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 as well as the discussion at par 2.2 of the SALRC *Issue Paper* 41.

while polygynous[67] customary marriages are said to be a version of marriages in community of property, but adapted in the light of customary norms.[68] However, Muslim marriages not solemnised in terms of the Marriage Act are currently treated as being out of community of property by default.[69]

2.3. Despite its colonial heritage, it is argued that the community of property system is the system that most realises a substantive version of equality.[70] On the other hand, an in community of property default regime is seen as financially perilous given that both spouses are jointly liable for each other's debts. As a result, many other jurisdictions adopt a default regime that is out of community of property but is coupled with a judicial discretion upon divorce to ensure an equitable division on divorce.

2.4. Despite the quest for equality/uniformity, the Cape Bar Council set out that it is not viable to apply the same default property system across all different marriages and unmarried life partnerships. Some of the difficulties of a general default system are highlighted below:

2.4.1. It seems legally difficult to apply community of property to a polygynous marriage, since this property system entails that each spouse obtains an undivided and indivisible half-share in all property acquired and all liabilities incurred by each spouse. Heaton & Kruger[71] state that it could surely not be argued that the husband in a polygynous marriage should get one undivided half-share and all his wives should jointly get the other half share. Nor could a

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

68 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. She argues that the Amendment Bill concretises uncertainty as to the nature of rights, and incorporates ambiguous terminology with minimum definition. According to her this amendment then may ultimately have the perverse effect of undermining women's rights. She argued that expediency in passing the Bill must not be prioritised over clarity, and the Amendment Bill ought to be substantially revised before it is passed. See also SALRC *Issue Paper* 41 at par 2.2.

69 See par 1.7 (a) of *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2022 (5) SA 323 (CC). See also *Issue Paper* 41 at 61.

70 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.

71 Heaton and Kruger *South African Family Law* (2015) 255.

separate joint estate be formed for each marriage, for how would the husband's property and debts be divided between the various joint estates?

2.4.2. It is so that Van Schalkwyk[72] argues that community of property can operate in polygynous marriages if all the assets and liabilities of the husband and all of his wives, at the time of the conclusion of the further marriage, are excluded from the joint estate. A single joint estate which excludes all the spouses' antenuptial assets and liabilities is then created when the further marriage comes into existence. When the joint estate is terminated, which presumably has to happen when the husband's customary marriage with one of his wives is terminated, the estate is divided equally between the husband and all the wives. Heaton & Kruger,[73] however, point out that Van Schalkwyk's view entails that if one customary marriage is terminated, the matrimonial property regime which operates in all the other marriages is also terminated. This begs the following questions: What matrimonial property system would apply to the remaining marriages? Does the old matrimonial property contract continue to operate subject to a new joint estate being created between the husband and the remaining wives?

2.4.3. Heaton & Kruger are of the view that a complete separation of property seems to be the only viable option in respect of polygynous customary marriages.[74]

2.4.4. Section 7(1) of the Recognition of Customary Marriages Act (RCMA) as amended[75] now provides for spouses in polygynous customary marriages concluded before the commencement of the RCMA to have joint rights of ownership, management and control over marital property. Osman[76] argues that the amendment creates uncertainty by failing to explain what is meant by joint rights of ownership and control. This uncertainty is exacerbated by the incorporation of the terms "marital", "personal", "house" and "family" property without concrete definitions of these terms. She further argues that the amendments are not reconciled within the existing legal framework and that women in polygynous marriages concluded before the commencement of the

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72 Van Schalkwyk "Law reform and the recognition of human rights within the South African family law with specific reference to the Recognition of Customary Marriages Act 120 of 1998 and Islamic marriages" (2003) *De Jure* 289 306-307.

73 Heaton & Kruger 255.

74 *Supra*.

75 Recognition of Customary Marriages Amendment Act 1 of 2021.

76 F Osman "The Recognition of Customary Marriages Bill: Much ado about nothing?" (2020) 137 *SALJ* 389.

RCMA may, counter-intuitively, have greater rights than those women in polygynous marriages concluded after the commencement of the RCMA.[77]

2.4.5. Further, applying community of property as a default system to unmarried life partnerships[78] is problematic, especially considering that the current proposed legislation aimed at regulating life partnerships provides for recognition of unregistered life partnerships. As stated by the Constitutional Court in *Volks NO v Robinson and Others*,[79] "[r]espect for human autonomy undoubtedly implies that the law must honour the choices that people make."[80] As Sinclair argues, freedom of choice demands that cohabitation be preserved as an alternative to marriage and that it not simply become a different type of marriage.[81]

B Comments on *Issue Paper* 41

2.5. *Issue Paper* 41 asked if there should be a default property system across different marriages and unmarried life partnerships. It is important to note that respondents who support a default property system across different marriages and unmarried partnerships cite different reasons. The Centre for Human Rights, University of Pretoria reminds the Commission that General Comment 6 on article 7(d) of the Maputo Protocol[82] recommends that member states should endeavour to have a unified and harmonised legal standard consistent with the provisions of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.[83] In doing this, member states seek to eliminate discrimination. The respondent submits that the Maputo Protocol recommends having the same rights afforded to all women including those in customary unions, religious marriages, and *de facto* marriages. In addition, member states are encouraged to eliminate the co-existence of multiple standards of marriage that cause

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77 See discussion under Customary Marriages below at Chapter 5.

78 The SALRC need to publish the report on the Single Marriage Statute for the Committee to refer properly to the issues.

79 *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

80 *Volks NO v Robinson* at 154.

81 JD Sinclair T*he Law of Marriage*: Based on HR Hahlo: *The South African Law of Husband and Wife* Vol 1 1996 at 292, as referred to in Volks *NO* v *Robinson supra* at 155.

82 The General Comment No. 6 on article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('the Maputo Protocol'').

83 South Africa has ratified the the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa in June 2017.

disadvantage to women as well as to harmonise family and civil codes with the Maputo Protocol especially around marriage and divorce.

2.6. The Legal Resources Centre (LRC) agrees on a single default marriage regime, but submits that the default must be supplemented by substantive equality reform measures such as statutory and discretionary powers to reallocate property on divorce or death. Sandra van Standen submits that it would be ideal to have one default system across the different marriages, but suggests that one single default property system may be unworkable given, for example, the recognition of polygynous marriages in certain instances. The Women's Legal Centre (the WLC) states that the majority of women that the Centre consults with understands that there is currently a default system in place. Women are aware that the default position for those married in terms of the Marriage Act is a marriage in community of property. However, the WLC suggests that women married in terms of customary law are often confused by the matrimonial property system that regulates their marriages. Keneilwe Mabapa suggests that there should be one default matrimonial property regime. Mabapa suggests that every South African knows that marriage in South Africa is automatically in community of property, even though they may be ignorant about specific legal aspects of marriage.

2.7. Although the Banking Association of South Africa (BASA) points out that a default system appears appropriate from a procedural and policy perspective, the respondent advises that cognisance should be taken of the purpose of *Issue Paper* 41 (to achieve substantive gender equality) and that the achievement of this goal should not take away from the need to recognise parties' freedom to choose their own regime. BASA also suggests that "any default system should be sensitive to the differences between different types of partnerships in that marriage is not a one size fits all, there are vast differences in cultures, religions etc." In spite of the quest for equality/uniformity, the Cape Bar Council believes that it is not feasible to apply the same property system to all marriages and unmarried partnerships.

2.8. The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (the CRL Commission) does not agree that there should be one default system across all marriages.[84] Instead, it submits that each couple in a relationship should choose which property system they want to enter into. Marriage is a contractual relationship, and parties to the marriage should be required to make a

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84 The respondent is supported by Mariette Englebrecht and Teboho Hlapolosa.

decision on what contract they want to institute before entering into the marriage. On this basis, it argues that a default is not required. The United Ulama Council of South Africa (the UUCSA), supported by Sunni Ulama Council Gauteng and Islamic Forum Azaadville, believes that a default property system across all marriages, with or without antenuptial contracts, will be in violation of the rights of all Muslims to freely practice the Islamic proprietary marital regime as protected by section 15(1) of the Constitution. UUCSA suggests that a default system would, in addition, be in violation of the rights of all Muslims to freely associate on a reasonable basis as protected by section 18 of the Constitution. The respondent therefore proposes that there be no default proprietary marital system with or without antenuptial contracts.

2.9. Miller du Toit Cloete and Family Law Forum emphasise that the in community of property regime does not, unfortunately, provide substantive equality in practice. The respondents support a default property system akin to the system set out in section 25 of the English Matrimonial Property Act and/or section 7(3) of the South African Divorce Act.

2.10. Dave de Klerk is not certain whether there should be any choice at the time of marriage, eg "in community of property" or antenuptial, with or without accrual. A wrong choice at the date of marriage can have unintended consequences for both parties and lead to unfairness at dissolution of the marriage.

2.11. With regard to unmarried life partnerships, Keneilwe Mabapa submits that it would be difficult to create a default system taking into account the following:

2.11.1. Different forms of life partnerships and the fact that some of the parties to the relationships choose not to get married to avoid the consequences of marriage. Instituting a default system in this regard would be tantamount to forcing people into marriage when they would rather not be married.

2.11.2. The fact that there is no clear definition of what constitutes a life partnership. While the Constitutional Court in *Bwanya v Master of the High Court, Cape Town and Others,*[85] found that a life partnership existed where partners undertook a duty of support, it acknowledged the difficulties with defining exactly what that means and how they would be identified.

2.11.3. Currently, there appears to be two categories of life partnerships ie life partnerships in which the partners undertake reciprocal duties of support

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85 *Bwanya v Master of the High Court*, Cape Town and Others (CCT 241/20) [2021] ZACC.

towards each other and life partnerships where there is no undertaking to support each other. This raises a number of questions with regard to life partnerships, particularly, which of the different life partnerships should be provided for in the law and how they should be identified.

2.12. Sandra van Standen submits that parties who are in an unmarried life partnership would have made a conscious choice not to be married (either both parties or one of the parties) and, as a result, imposing a default property system on unmarried life partnerships will interfere with their freedom of choice. She suggests that the Constitutional Court decision in *Volks v Robinson* supports this view, in that the law must honour the choices that people make. It is therefore not advisable to impose a default property system on unmarried life partnerships.

2.13. Where respondents support a default regime across different marriages and unmarried life partnerships, they[86] prefer that the default system should remain in community of property. They believe that this default system reflects the popular understanding of marriage. In particular, it reflects the spouses' commitment to pooling their resources, and their expectations that they will share in the benefits and disadvantages of married life. These respondents suggest that women in particular benefit from a default position that recognises their positionality within society and ensures that they are in a position to protect their rights. The Muslim Personal Law Network (MPL Network) proposes a default marital property regime of either in community of property or an out of community of property system with the accrual regime, provided the substantive equality lens is used in the judicial determination of how a marital estate is divided. The Association of Muslim Accountants and Lawyers (AMAL) and Karen Botha proposes a default regime of out of community of property without accrual, except that Botha suggests that such a default regime should be coupled with an equitable redistribution provision.

2.14. Another question asked in the issue paper was whether there should be a default property system for all marriages in which there are antenuptial contracts, and if yes, what should that be? Most respondents[87] see no cogent reason why the default accrual system currently applicable to marriages governed by antenuptial contracts should

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86 Legal Aid SA, WLC, LRC, Keneilwe Mabapa and Pitse Mamabolo.

87 Cape Bar Council, Teboho Hlapolosa, Legal Aid SA, CRL Commission, BASA, UUCSA, Sunni Ulama Council Gauteng and Islamic Forum Azaadville.

change or require legislative reform. The Commission suggests that antenuptial contracts are specialised notarial deeds that define out of community of property marriages with or without the inclusion of the accrual system so, as a result, there can be no confusion or default in this regard.

2.15. However, some respondents suggest that the finalisation of these contracts may lead to practical consequences of gender inequality. In this regard, Sandra van Standen suggests that a way to mitigate this issue is to give the courts an overarching discretion to divide the assets upon divorce, notwithstanding the antenuptial contract, where it is just and equitable to do so.[88]

2.16. Keneilwe Mabapa agrees with the suggestion of a general court discretion,[89] but she submits that many issues could be resolved if it was mandatory for parties to be given advice about the different matrimonial property regimes and their implications prior to signing their antenuptial contract. In this way, she suggests that the parties will be able to make informed choices.

2.17. *Another question posed in the issue paper was whether respondents found value in providing for one default position across all marriages?* AMAL agrees, whether the default is in community of property or out of community with accrual, the underlying principle is the same: such arrangement will protect vulnerable spouses, particularly women, from entering into property systems without fulling appreciating or being aware of the consequences of such systems.[90]

2.18. The Cape Bar Council and CRL Commission are of the view that, despite the quest for equality/uniformity, it is not viable to apply the same default property system across all different marriages and unmarried life partnerships. They highlight some of the difficulties of a general default system. For example, they argue that it seems legally difficult to apply community of property to a polygynous marriage, since this property system entails that each spouse obtains an undivided and indivisible half-share in all property acquired and all liabilities incurred by each spouse.

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88 LRC agree, pointing out that there needs to be substantive equality reform measures.

89 She is supported by AMAL.

90 The respondent is supported Karen Botha and Sandra van Standen.

2.19. According to the WLC, the default position in law in respect of marriages concluded under the Marriage Act, the Recognition of Customary Marriages Act and the Civil Union Act is already in community of property. So, in essence, there is a common default position across all marriages in South Africa. This position is accepted, with the result that there is certainty in our family law framework. However, the WLC recognises arguments that certain religious marriages such as Hindu and Islamic marriages are out of community of property, and should – when codified – be treated as such. The WLC believes that the marital property regimes within these religious structures are much more complex and far removed from the legal concepts of in or out of community of property as it is understood within our legal framework.

2.20. The LRC thinks that there should be default systems for marriages with and without antenuptial contracts. However, they also believe that in polygynous marriages, all the parties should enter into antenuptial contracts to ensure the equal and fair division of assets.

2.21. *Another question in Issue Paper* 41 *was whether there is a reason to believe an alternative default version would better serve spouses in marriages?* The WLC does not agree and explains that, given the presence of patriarchy throughout South African women's lives, women experience discrimination in all aspects of their lives. It is therefore important to recognise that, in too many aspects, women are placed on the back foot in our society, including in decision-making regarding the matrimonial property regime that governs their marriages or intimate relationships. Legal Aid SA, Karen Botha and Pitse Mamabolo agree that the default should remain in community of property but it should be across all different marriages. Botha and Mamabolo suggest, in addition, that the court has a general distribution discretion to protect the spouse who is financially worse off than the other spouse, usually the wife. The LRC states that it will be pleased to engage on alternative default matrimonial regimes that would better serve spouses in marriages.

C Evaluation

2.22. In evaluating the different responses and suggestions put forward, the starting point (and motivation for this investigation) must be the realisation of substantive

equality. Indeed, as Robinson points out,[91] the Constitution forbids unfair discrimination. Section 9(1) provides that everyone is equal before the law and has the right of equal protection and benefit of the law. Section 9(2) reads that equality include the full and equal enjoyment of all rights and freedoms and that the promotion of equality may be achieved by legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination. In terms of section 9(3) and (4) of the Constitution the state or a person may not unfairly discriminate directly or indirectly inter alia on the ground of marital status.

2.23. In line with the above constitutional mandate, courts have denounced unfair discrimination in the treatment of spouses across the different matrimonial property regimes, whether it relates to a claim for non-patrimonial damages against each other,[92] or whether it relates to the race and gender of spouses.[93]

2.24. When asked about a default matrimonial property regime, most respondents seem to agree that in South Africa, the default in community of property regime cuts across different marriages, ie, civil, customary, as well as civil unions. Arguably, and as pointed out by the Centre for Human Rights, University of Pretoria, this approach also seems to be in line with the provisions of the Maputo Protocol which encourages member states to eliminate the co-existence of multiple standards of marriage that cause disadvantage to women as well as to harmonise family and civil codes with the Maputo Protocol, especially around marriage and divorce.

2.25. However, the respondents also highlight the fact that adopting a uniform default in community of property system may not necessarily translate into "substantive equality" for a variety of reasons, depending on the type of marriage or unmarried partnership. As such, respondents propose that in order to achieve "substantive equality" in the community default property system across different marriages and unmarried life relationships, several issues need to be determined, namely:

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91 Robinson JA 'Matrimonial property regimes and damages: The far reaches of the South African Constitution' [2007] *PER* 12.

92 *Van der Merwe v Road Accident Fund* 2006 4 SA 230 (CC).

93 *Sithole and Another v Sithole and Another* [2021] ZACC 7. In this matter the Constitutional Court found that section 21(2)(a) of the Matrimonial Property Act was constitutionally invalid to the extent that it maintained and perpetuated racial and gender discrimination of African women.

2.25.1. What type of a relationship, ie civil marriage, customary marriage, religious marriage, or life partnership?

2.25.2. If it is a customary marriage, is it monogamous or polygynous?

2.25.3. If it is a monogamous customary marriage, can in community of property apply to family property?

2.25.4. If it is a religious marriage, is it solemnised according to the Marriage Act or does it follow religious rules only?

2.25.5. If it is a civil marriage or customary marriage, or civil union, is there an antenuptial contract?

2.25.6. If it is a life partnership, is there an express intention to have a default in community of property/universal partnership?

2.26. Looking at these issues, BASA advises that since "marriage is not a one size fits all, the differences in cultures, religions etc. should be understood before imposing a default property system across different marriages and relationships." Sandra van Standen, on the other hand, submits that whilst it would be ideal to have one default system across the different marriages, one has to consider whether the same default property system would be workable in both and to supplement the monogamous and polygynous marriages. The Cape Bar Council believes that, in spite of the quest for equality/uniformity, it is not feasible to apply the same property system to all marriages and unmarried partnerships.

2.27. In order to achieve substantive equality in the default community of property system, respondents suggest that the default must be supplemented by substantive equality reform measures such as statutory and discretionary powers to reallocate property on divorce or on death. This call is supported in the academic commentary on the subject, for example, De Jong and Pintens, Bonthuys, Barratt, and Heaton. These scholars advocate the introduction of a broad judicial discretion regarding the division of matrimonial property upon divorce.[94] Generally, they argue that it can no longer be

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94 See generally discussions by M De Jong and W Pintens, 'Default Matrimonial Property Regimes and the Principles of European Family Law- European and South African comparison 2015 *TSAR* 555. The authors make reference to the works of E Bonthuys "The rule that a spouse cannot forfeit at divorce what he or she has contributed to the marriage: an argument for change" (2014) *SALJ* 439 at 459; A Barratt "'Whatever I acquire will be mine and mine alone': Marital agreements not to share in constitutional South Africa" (2013) *SALJ* 688 at 704; and J Heaton "Striving for substantive gender equality in family law: selected issues" (2005) *SAJHR* 547 at 556 and 562. *Cf* Sonnekus "Die onbehoorlike van huweliksvoordele en pacta sunt servanda" 1993 *TSAR* 774.

assumed that dividing property in accordance with the matrimonial property regime applicable to a marriage will lead to a fair and just distribution.[95]

2.28. Moreover, and in terms of section 8(4) of the Recognition of Customary Marriages Act, De Jong and Pintens reminds us that upon the dissolution of a customary marriage in community of property through divorce, the joint estate need not necessarily be divided equally between the parties. According to the Constitutional Court decision in *Gumede v President of the Republic of South Africa*, the power of the court to redistribute assets equitably upon divorce under section 8(4)(a) applies to all customary marriages. In customary marriages, therefore, a general redistributive power already co-exists with the default system of community of property to ensure fairness between the parties upon divorce. However, no such discretion to redistribute assets exists for civil marriages or civil unions concluded in community of property.[96]

2.29. In essence, therefore, respondents seem to agree that the default community of property system may not achieve substantive equality if it is to be uniformly applied, especially if no judicial discretion to equitably distribute is introduced across marriages. Moreover, when it comes to unmarried partnerships, the default community property system might interfere with other rights, such as the right to choice.

D Proposals

2.30. The Commission provisionally recommends that option 2 should be adopted among the two options as follows:

Option 1

2.31. For all monogamous marriages without an antenuptial contract:

2.31.1 Maintain the default regime as in community of property.

2.31.2 The joint estate of a customary marriage in community of property does not include customary family property.

2.32. For all monogamous marriages with an antenuptial contract:

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95 M De Jong and W Pintens "Default Matrimonial Property Regimes and the Principles of European Family Law- European and South African comparison" 2015 *TSAR* 555-5.

96 De Jong and Pintens at 555.

2.32.1 Maintain the default regime as out of community of property with accrual, unless accrual is explicitly excluded.

2.32.2 Accept that a religious marriage contract is akin to an antenuptial contract and import accrual as the default unless explicitly excluded, while still maintaining the formalities for the *nikāh*.

2.32.3 Where spouses in a customary marriage enter into an ANC, customary family property is considered as an excluded asset.

2.32.4 Where a customary marriage is polygynous in nature, a court will consider the following factors in determining how to determine the regime applicable:

(a) Knowledge of husband

(b) Knowledge of wives

(c) Respective contributions

(d) *Lobolo*

- Transferred during the marriage
- Returned at the dissolution
- Agreement by families on return at the dissolution

Option 2

2.33. For all monogamous marriages without an antenuptial contract:

2.33.1 Introduce accrual as the default regime.

2.33.2 If there is no ANC entered into, then the commencement value is deemed to be zero.

2.33.3 Customary family property is excluded from the accrual calculation.

2.33.4 Religious marriage contracts are considered to include accrual unless it is explicitly excluded.

Options for polygamous marriages

2.34. here a customary marriage is polygynous in nature, a court will consider the following factors in determining how to determine the regime applicable:

2.34.1 Knowledge of husband

2.34.2 Knowledge of wives

2.34.3 Respective contributions

2.34.4 *Lobolo*

(a) Transferred during the marriage

(b) Returned at the dissolution

(c) Agreement by families on return at the dissolution

2.35. Default options for polygynous marriages include:

2.35.1 All the wives share the community to the exclusion of the husband where it is clear that he intentionally failed to adhere to customary and/or statutory provisions.

2.35.2 Husband and wives all share community equally.

2.35.3 Wives share the half share in proportion (eg 3 wives – 10 years, 5 years, 1 year)

2.35.4 Husband and wives share in proportion (but with the husband not getting an equal share – for example, 10 years, 5 years, 1 year wives – Husband 16 years (mala fide): make it out of 1/17 or 1/18?)

2.36. **In addition,** respondents **are asked to consider the following related issues:**

2.36.1 If the default marriage regime is changed, should these changes be retrospective or prospective? In considering this question, it is useful for respondents to be reminded about the current default matrimonial property regime of in community of property for the following marriages:

(a) Muslim Marriages: In *WLC v President of SA*, the Court found that a Muslim marriage would be dealt with as default out of community of property, but a court has a discretion to redistribute.

(b) Customary Marriages: While section 7(6) of the RCMA provides that a court should order the future marriage regime, it is not clear what the default regime is if the husband fails to comply with this section. Case law suggests that, currently, the second marriage is default out of community of property without accrual.[97]

Given the lack of case law, how would a court deal with a polygamous marriage upon the section 7(6) application where parties did not enter into an ANC?

[97] In the SCA judgment of *Ngwenyama v Mayelane* 2012 (4) SA 527 (CC) par 38, Ponnan JA (in a separate judgment which was concurred by all) held that where a husband had not complied with section 7(6), this marriage would have to be one out of community of property: "It plainly cannot be a marriage in community of property as that would imply the existence of two joint estates, which it is clear cannot co-exist." The Constitutional Court judgment (2013 (4) SA 415 (CC) did not explicitly deal with this dicta.

E Option: Unmarried life partnerships

2.37. **For unmarried life partnerships**, the Commission recommends option 1 from the following options:

Option 1

2.38. In the absence of an agreement to the contrary which includes a universal partnership agreement, unmarried intimate partners shall have equal rights to share in any property amassed during the partnership.

Option 2

2.39. In the absence of an agreement to the contrary which includes a universal partnership agreement, unmarried intimate partners shall have no rights to share in any property amassed during the partnership.

2.40. A court shall have a discretion at the end of the partnership to order an equitable redistribution of the partnership assets taking into account the factors set out below.

2.41. **Specific factors to consider when** considering **the distribution of assets:**

- 2.41.1 Did the parties go through some form of marriage ceremony or event acknowledging the relationship?
- 2.41.2 Whether the parties in good faith believed they were in a valid marriage?
- 2.41.3 Was there an agreement regarding property during the course of the relationship?

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

A Background

3.1. Marriages between parties from different nationalities are increasing.[98] 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.[99]

3.2. Under the common law, unless the parties in their antenuptial contract chose another legal system to apply,[100] the matrimonial property regime is determined by the

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98 C Kavuro "Marriages of convenience through the immigration lens: concepts, issues, impact and policies" (2021) 25 *Law, Democracy and Development* 51. See also *Issue Paper* 41 at 8.

99 E Schoeman "A legal discussion of the development of the South African conflict rule for proprietary consequences of marriage: Learning from the German experience" 2004 *TSAR* 115; Thulelo Mmakola Makola *Comparative Legal Analysis of the Effects of Divorce on Marital Property* (2018) LLM, Unisa. CF Forsyth *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* 5 ed (2012) 295. As disclosed in *Issue paper* 41 at 8.

100 *Frankel's Estate & another v The Master & Another* 1950 (1) SA 220 (A) at 241; *Sperling v Sperling* 1975 (3) SA 707 (A) at 716 F-G; *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C) at 494C-D; Forsyth *Private International Law* (2012) 295. See also recently *DB v MB* (10019/2014) [2014] ZAWCHC 178 (2 December 2014) at par 6. See also Christian Schultze "Conflict of Laws" in J Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 648 and the sources quoted by the author; J Neelson and M Werthman-Lemmer "Constitutional values and the proprietary consequences of marriage in Private International Law – Introducing the *lex causae proprietatis matrimonii*" 2008 *TSAR* 587; C Roodt "Conflict of Law(s) and autonomy in antenuptial agreements (1)" (2006) *THRHR* 224; PA van Niekerk *A Practical Guide to Patrimonial Litigation in Divorce Actions* (1999) par 8.2; AB Edwards "Conflict of laws" in *The Law of South Africa (LAWSA)* Vol 2 (Part 2) 2003 par 309.

law applicable in the husband's country of domicile at the time of the marriage.[101] The rationale for this rule, according to the Roman Dutch and Civilian authorities, is that the parties are assumed in the absence of any indication to the contrary, to have intended to establish their matrimonial home in the country where the husband was domiciled at the time of the marriage and to have submitted themselves to the matrimonial regime obtaining in that country.[102] In other words, the proprietary consequences of a marriage are determined by the *lex domicilii matrimonii* rule.[103] In spite of the fact that married women no longer automatically inherit their husbands', domiciles upon marriage, this still holds true (a married woman but can acquire her own domicile of choice).[104]

3.3. Legal developments have, however, compromised the continued application of the *lex domicilii matrimonii* rule.[105]

3.4. In terms of section 13(1) and (2) of the Civil Union Act,[106] the Matrimonial Property Act is applicable to civil unions. In instances where one of the same-sex civil union partners is domiciled in a foreign country the regulation of the proprietary consequences becomes problematic.[107] In the absence of an express antenuptial agreement, the patrimonial consequences of marriage are governed by the husband's *lex loci domicilii* at the time of marriage. [108]However, in a same-sex civil union it is impossible to determine who the "husband" is and which legal system will regulate the patrimonial consequences of a same-sex civil union. The *lex loci domicilii*-rule can therefore not be applied to same-

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101 *Sperling v Sperling* 1975 (3) SA 707 (A) at 716 F-H.

102 *L v L* (120/13) [2013] ZASCA 204 (2 December 2013) at par 10.

103 The matrimonial domicile is the law of the domicile of the spouses at the date of the marriage.

104 A.*V v W.V* (5881/17) [2017] ZAGPPHC 324 (6 July 2017). Sec 1(1) of the Domicile Act 3 of 1992 provides that:"Every person who is of or over the age of 18 years and every person under the age of 18 years who by law has the status of a major ... shall be competent to acquire a domicile of choice regardless of such a person 's sex or marital status*".* This provision was 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 2008 *TSAR* 587; Schoeman *TSAR 2004* 116; Edwards in *LAWSA* Vol 2 Part 2 par 309.

105 *L v L* (120/13) [2013] ZASCA 204 (2 December 2013) at par [10]. See also De Ru "The Civil Union Act 17 of 2006: A transformative act or a failed conciliation between social legal and political issues?" 2010 *THRHR* 553.

106 17 of 2006.

107 De Ru *Fundamina* 2013 at 247.

108 *Frankel's Estate v The Master* 1950 (1) SA 220 (A); *Sperling v Sperling* 1975 (3) SA 707 (A).

sex civil unions.[109] First, same-sex marriages in terms of the Civil Union Act could either involve more than one husband, or, where both spouses are women,[110] no husband. It then becomes impossible to designate the *lex domicilii matrimonii*.[111] The rule unfairly discriminates against same-sex civil union partners on the ground of their sexual orientation in terms of section 9(3) and (5) of the Constitution.[112]

3.5. *Issue Paper* 41 states that "Even in opposite sex marriages, the invariable choice of the husband's domicile as the applicable legal system discriminates 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. There appears to be no justifiable reason for the different treatment of husbands and wives other than the need to designate one legal system which will govern the proprietary consequences of the marriage".[113]

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.[114] In fact, it has been submitted that the time for reform of the conflict rule for the proprietary consequences of marriage is overdue.[115]

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109 De Ru *Fundamina* 2013 at 247.

110 *Steyn v Steyn* (6427/2010) [2010] ZAWCHC 224 (27 October 2010).

111 *Hillard v Hillard* (1464/2007) [2008] ZAFSHC 135 (4 December 2008).

112 *L v L* (120/13) [2013] ZASCA 204 (2 December 2013). See also 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" (2011) *SALJ* 424.

113 *Issue Paper* 41 at 9. 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. See also *Issue Paper* 41 at 9.

114 SALRC *Issue Paper* 41 at par 3.6. 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.

115 SALRC *Issue Paper* 41 at par 3.7. Schoeman "The South African conflict rule for proprietary consequences of marriage: learning from the German experience" 2004 *TSAR* 140. For proposals regarding a suitable replacement for the rule see Stoll and Visser "Aspects of the reform of German (and South African) private international family law" 1989 *De Jure* 330; Neels "Die internasionale privaatreg en die herverdelingsbevoegdheid by egskeiding" 1992 *TSAR* 336; Heaton and Schoeman "Foreign marriages and section 7(3) of the Divorce Act 70 of 1979" 2000 *THRHR* 141 and Neels and Wethmar-Lemmer "Constitutional values and the proprietary consequences of marriage in private

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 resident in the area of the court's jurisdiction at the time when summons is issued in a divorce.[116] Section 2(3) of the Divorce Act determines that 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. This means that a South African court which has jurisdiction to hear a divorce in which one spouse is not South African, will nevertheless apply South African law to determine whether the marriage has irretrievably broken down and in some other ancillary matters.

3.8. Nevertheless, there are special rules for determining the proprietary consequences of non-South African marriages.[117] 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.[118]

B Comments on *Issue Paper* 41

3.10. The Commission requested respondents to comment on specific questions relating to the South African conflict rule for proprietary consequences of marriage in *Issue Paper* 41. We asked which country's legal rule should determine the proprietary consequences of a marriage. Most commentators consider the use of the *lex domicilii matrimonii*

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international law – introducing the *lex causae proprietatis matrimonii*" 2008 *TSAR* 587; Schoeman *TSAR* 2004 115.

116 *OB v LS* 2021 (6) SA 215 (WCC); Divorce Act section 1(2), 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.

117 SALRC *Issue Paper* 41 at 10.

118 SALRC *Issue Paper* 41 at 10. Makola 2018 at 46.

discriminatory and impractical because wives no longer follow their husbands' domiciles and because the concept cannot work in the case of same-sex marriages.[119] Some commentators suggested that the country where the marriage was concluded and registered *or* the country in which the spouses resided together the longest during their marriage should govern the proprietary consequences of a marriage.[120] One commentator suggested that domicile should be established where the parties are resident at the time of their marriage, but argues that there will still be problems if they live in different countries. Furthermore, the commentator suggested that the place of the marriage could be an option, but she was uncertain about the situation where a couple lives in South Africa but travels to another country for the ceremony.[121] According to another commentator, consistency is crucial in ensuring certainty in law.[122]

3.11. Other commentators[123] proposed a five-stage model for determining the legal regime applicable to the proprietary consequences of a marriage suggested by Stoll and Visser[124] and supported by Neels and Wethmar-Lemmer[125] based on the following:

(a) The law of the country indicated by the express or implied intention of the spouses in an antenuptial contract.
(b) In the absence of (a), the law of the country of the common domicile of the spouses at the time of marriage.
(c) In the absence of (b), the law of the country of the common habitual residence of the spouses at the time of marriage.
(d) In the absence of (c), the law of the country of which both spouses are national at the time of marriage.
(e) In the absence of (d), the law of the country to which the spouses are jointly and most closely connected at the time of marriage.

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119 LRC, Cape Bar Council, Sandra van Standen, Family Law Forum, Western Cape and Miller du Toit Cloete, Legal Aid SA, BASA , Legal Aid SA and Prof Boniface.

120 BASA, CRL Commission and Karen Botha.

121 Prof Boniface.

122 CLR Commission. The Cape Bar also picks up on the situation where the spouses have different domiciles at the time of marriage.

123 Cape Bar Council and LRC.

124 H Stoll & PJ Visser "Aspects of the reform of German (and South African) Private International Family Law" (1989) 22 *De Jure* 330.

125 JL Neels & M Wethmar-Lemmer "Constitutional Values and Proprietary Consequences of Marriage in Private International Law" (2008) 3 *Tydskrif van die Suid-Afrikaanse Reg* 587.

3.12. In addition to suggesting that the matrimonial property system should be determined either by the law of the country where both spouses have lived for the longest time, some commentators suggest stipulating a certain period after marriage, for example, where they have lived mainly in the last two years.[126] There was also a suggestion that parties should have a choice and agree on the country's legal rule that will determine their proprietary consequences, and this must be recorded.[127] As with contracts, Prof. Boniface envisions that an antenuptial contract might specify the law that applies to the marriage. This does not cater for situations in which spouses do not conclude an antenuptial contract. In such cases, she suggests that a marriage officer could ascertain the parties' choice and indicate it on the marriage certificate. However, there are questions about whether the parties fully understand the implications of their choice and whether marriage officers understand the implications of these choices and are able to explain it to the parties.

3.13. *Issue Paper* 41 enquired if there should be a single designated country's legal rule, or if there should be a choice of different legal systems. Legal Aid SA reiterates the view that *the lex domicilii matrimonii* rule is an outdated concept and does not take the current realities of same sex marriages into account. One view is that it is important to recognise how diverse our country is and the people who live in it.[128] The respondent suggests that the legislation must reflect people's lived realities and their choices. Furthermore, these choices place validity on the various intersectional identities and would confirm that people have agency for their lives and the choices they make without being restricted into falling within a specific bureaucratic category.

3.14. Another question was whether movable and immovable property should be subject to the same law. Most respondents suggested that only one legal system should apply to both moveable and immovable property to bring about legal certainty and uniformity,[129] because treating moveable and immoveable property differently could lead to arbitrary

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126 Family Law Forum, Western Cape, Miller du Toit Cloete and BASA. For example, BASA suggest that this could be: (a) the country where the marriage was concluded and registered; and (b) the country in which the spouses resided together the longest during their marriage.

127 Legal Aid SA and CRL Commission

128 WLC.

129 Keneilwe Mabapa, AMAL, Sandra van Standen, LRC, Legal Aid SA, Family Law Forum, Western Cape and Miller du Toit Cloete, Cape Bar Council.

and confusing outcomes.[130] One respondent suggested that there is no compelling reason to change the well-established common law unity doctrine according to which spouses' entire estates, movable as well as immovable property, are governed by the same matrimonial property law. However, there was a minority view that the rules relevant to immovable property where the property is situated should apply to that property.[131]

3.15. Another question was whether retrospective legislative changes should be made to existing private international rules governing the proprietary consequences of marriages. Some respondents[132] suggested that retrospective changes would be appropriate, given that spouses are not aware of the existing rule relating to *lex domicilii matrimonii*. Nevertheless, most respondents state that it is advisable that, should the rule be changed by the legislature, it should not apply retrospectively.[133] However, partners to which the existing rule applies should have the option to change this during their marriage or during a set time period to be determined by the legislature once the rule changes.[134] Thus, the new rule should only apply to marriages entered into after its entry into force, with the option for current partners to change the legal system that applies to their relationship.[135]

3.16. In addition, the issue paper asked whether the rules relating to divorce and the application of judicial discretion in marriages where the proprietary consequences are determined by foreign law are satisfactory or should be revised. The Cape Bar Council is of the view that the provisions of section 7(9) of the Divorce Act, as well as the law of matrimonial domicile (amended as suggested), are satisfactory and sufficiently confer a discretion on our courts to apply foreign matrimonial property systems in those cases

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130 LRC.

131 Karen Botha.

132 Family Law Forum, Western Cape and Miller du Toit Cloete

133 LRC, BASA, Sandra van Standen, AMAL.

134 The respondent advises that consideration may, for example, be given to protecting 'existing rights' by providing for a prescribed transition period (similar to the provisions of section 21(2) of the Matrimonial Property Act 88 of 1984) within which spouses who had different domiciles at the date of marriage would have the option to choose the law of the husband's domicile at the date of marriage to continue governing the proprietary consequences of their.

135 For example, AMAL justifies its view against retrospective application with reference to the Interpretation Act which prohibits retroactive interpretation of legislation unless specifically stated otherwise. In line with other respondents, AMAL suggests the insertion of transitional provisions to allow for change. Kenelwe Mabapa and Legal Aid also support transitional provisions.

where the proprietary consequences of marriage are governed by foreign law. Legal Aid SA holds the view that currently the rule does not have regard to the new realities, for example, same sex marriages. While Sandra van Standen submits that the current rules appear satisfactory and there seems to be no reason to amend it, the WLC highlights the fact that the law governing a foreign marriage is currently and should remain the law of the country in which the marriage was concluded. This should not and does not remove the judicial discretion that judicial officers have to ensure that the constitutional rights of the parties which they may have in South Africa are not violated in the process.

3.17. UUCSA's response in this section is limited to Islamic Law only. UUCSA suggests that Islamic Law is the same in all jurisdictions. As a result, it argues that the "domicile of the husband" rule does not apply in Islamic Law. However, in those jurisdictions where there may be a variation of that practiced in South Africa, the intention of the parties must be followed. They are supported by the Islamic Forum Azaadville and SUNNI Ulama Council Gauteng.

C Evaluation

3.18. When people who are nationals of different countries marry, or where people marry in countries in which they do not usually reside, there are a range of issues determined by the rules of private international law and other statutory and common law rules. These include:

(a) Which court has jurisdiction to hear the divorce and ancillary matters?
(b) Which legal rules determine the validity of a marriage?
(c) Which legal rules determine the personal consequences of a legal marriage?
(d) Which legal rules determine the property consequences of a legal marriage?

3.19. This investigation is concerned with and invited comments **only on the last question** – it is not concerned with the rules of private international law dealing with other issues, nor is it concerned with the question whether a South African court would have jurisdiction to hear a divorce action, the latter which formed the substance of several comments. Instead, the questions addressed which legal system should be applied with respect to matrimonial property *by a South African court which has jurisdiction to hear the divorce*. The remainder of the discussion deals with this issue.

3.20. Although South Africa is not a party to the Hague Convention on the Law Applicable to Matrimonial Property Regimes (the Convention),[136] and although there are few parties to the Convention,[137] it is useful to take account of the provisions of the Convention. The Convention allows spouses in a marriage to decide which jurisdiction's laws will apply to their property. The Convention provides that they may select the laws of any State of which one of the spouses is a national at the time of selection, the laws of any state in which one of the spouses has his or her "habitual residence" at the time of selection, or the law of the first state in which one of the spouses establishes a new habitual residence after the marriage.[138] If no such selection is made, the laws of the first state in which the couple had their habitual residence after marriage govern the property.[139] There seems to be general consensus that the *lex domicilii matrimonii* is unconstitutional and that it fails to cater for same-sex marriages. The respondents[140] and the academic literature[141] therefore agree that it is time for a new rule to be formulated.

3.21. All commentators agree that the spouses should be able to designate a country in an antenuptial contract and that this choice should be respected. One question which arises is whether they can designate any country, or whether their designation should be limited to certain countries to which they have some legal or physical connection.

3.22. Article 3 of the Hague Convention contains the following provision:

> The matrimonial property regime is governed by the internal law designated by the spouses before marriage.
>
> The spouses may designate only one of the following laws –
>
> (1) the law of any State of which either spouse is a national at the time of designation;

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136 Hague Convention on the Law Applicable to Matrimonial Property Regimes, concluded on 14 March 1978, accessed on 16 November 2022 from https://www.hcch.net/en/instruments/conventions/full-text/?cid=87

137 Of the five signatory countries to this Convention, three subsequently ratified it: France, Netherlands and Luxembourg. It entered into force on 1 November 1992.

138 Article 2 of the Hague Conference on Private International Law. Convention on the Law Applicable to Matrimonial Property Regimes. The Hague, 1978.

139 *Ibid*, Article 3.

140 Family Law Forum, Western Cape and Miller du Toit Cloete,Legal Aid SA, BASA, Sandra van Standen, Cape Bar Council, Keneilwe Mabapa, LRC, CRL Commission and Karen Botha.

141 Neels and Wethmar-Lemmer 2008 TSAR 588; McConnachie 2010 SALJ 435; Thomashausen 1984 *CILSA* 78-91; Stoll and Visser 1989 De Jure 335; Schoeman 2001 TSAR 80-81; Schoeman 2004 *TSAR* 133.

(2) the law of the State in which either spouse has his habitual residence at the time of designation;
(3) the law of the first State where one of the spouses establishes a new habitual residence after marriage.

3.23. It would be sensible to allow spouses to choose the applicable matrimonial property system, because that would ensure that spouses are aware of the consequences of their marriages. However, problems arise when spouses do not conclude an antenuptial contract which indicates a choice. In such cases, there should be default rules to designate an appropriate property system. Because circumstances differ from one case to another, the various connecting factors should cater for various possibilities.

3.24. Some respondents suggested that one of the connecting factors indicating an applicable legal system should be where the spouses lived during their marriage. This is not feasible because of the need for stability and legal certainty about the applicable proprietary system *during* the marriage – necessary both to the spouses and to third parties who interact with them about matrimonial property. This is reflected in the immutability principle which entails that the designation of a proprietary system should be made at the start of the marriage, rather than at the end of the marriage and not be easily or informally changed during the marriage, unless the designated matrimonial property system allows for a postnuptial change.[142]

3.25. There is support amongst academic writers and some commentators for Stoll and Visser's four-step process to apply various connecting factors in the absence of an antenuptial contract designating a proprietary regime as set out in paragraph 3.11 above.[143]

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142 Christian Schultze "Conflict of Laws" in Heaton (ed) The Law of Divorce and Dissolution of Life Partnerships in South Africa 2014 631 at 649.

143 Stoll & Visser "Aspects of the Reform of German (and South African) Private International Law 1989 *De Iure* 330 at 335, broadly supported by Neels & Werthman-Lemmer "Constitutional Values and the Proprietary Consequences of Marriage in Private International Law – Introducing the *Lex Causae Proprietas Matrimonii*" 2008 *JSAL* 587; Schoeman "The Connecting Factor for the Proprietary Consequences of Marriage" 2001 *JSAL* 72; Jan Neels "The Law Applicable to the Proprietary Consequences of Marriage in South Africa – The Influence of German Private International Law" 115 in Charl Hugo & Thomas MJ Möllers (eds) *Transnational Impacts on Law: Perspectives from South Africa and Germany* (2017)); Thulelo Mmakola Makola "Comparative Legal Analysis of the Effects of Divorce on Marital Property" (2018 LLM, Unisa. Forsyth *Private International Law* (2012) 295.

3.26. There is some disagreement about the final connecting factor (viz the country to which the spouses are jointly most closely connected at the time of marriage). According to Forsyth[144] and Schultze,[145] the application of this factor would lead to uncertainty. Forsyth suggests the *lex loci celebrationis* (the law of the place where the marriage was concluded) as an alternative but Schultze disagrees, indicating that this may have no connection to the couple's lives when they have a "destination wedding".

3.27. Stoll and Visser's connecting factors assume that the prospective spouses share a domicile, residence or nationality. This is not necessarily always the case and there needs to be connecting factors to indicate the proprietary regime where there is no common domicile, residence or nationality. Different possibilities exist:

a) the law of the State in which both spouses establish their first habitual residence after marriage (Hague Convention article 4);
b) the law of the State in which the spouses intend to establish their first habitual residence after marriage;
c) the *lex loci celebrationis*; and
d) the law of the state with which the marriage is most closely connected at the time of the marriage.

3.28. Choosing a single state to designate the proprietary consequences has the advantage of reducing complexity when the marriage is dissolved and avoiding the potential of conflicting rules where more than one system is chosen. Current South African law does not allow the designation of more than one country or property system to govern the matrimonial property regime of a marriage. There were no comments in favour of allowing spouses to choose more than one matrimonial property system to apply to their marriage.

3.29. One exception to the rule requiring a single legal system to regulate the proprietary consequences of a marriage is the *lex situs* (the place where the property is situated). It is arguable that the *lex situs* may be more appropriate as a connecting factor for immoveable property. This is not currently the position in South African law, but some argue that it may make more practical sense for the *lex situs* to apply, as this would ease

144 Forsyth *Private International Law* (2012) 302.

145 Christian Schultze "Conflict of Laws" in Heaton (ed) The Law of Divorce and Dissolution of Life Partnerships in South Africa 2014 631 at 661.

issues around registration and transfer of ownership. However, only one comment was received in favour of having the *lex situs* apply to immovable property. It appears that practical issues of registration and transfer of ownership of immoveable property have not caused insurmountable difficulties under the existing rule, which treats moveable and immovable property alike. Also, applying the *lex situs* to immoveable property, while another system may apply to other property, could lead to considerable confusion and complexity when the marriage is dissolved. It could also provide unscrupulous spouses with opportunities to disadvantage the other spouse by evading any detrimental provisions of the applicable matrimonial property system.

3.30. Even if it could be argued that the majority of spouses in a subsisting marriage married outside the country are unaware of the complexities of private international law and unaware that their marriage may be regulated by the rules of another legal system, some spouses would be aware of the legal situation and may have conducted their financial affairs on the basis of the applicable legal rules. Any change to the rules will have an effect on this latter group and on any creditors or third parties who conducted business with them. The majority of the commentators therefore agree that it would be inadvisable simply to change the connecting factors which determine the matrimonial property regime retrospectively without giving spouses sufficient notice or an opportunity to choose the applicable system.

3.31. On the other hand, as stated by most of the commentators,[146] there is a strong argument that the use of the *lex domicilii matrimonii* is unconstitutional and it is clearly unworkable in the case of same-sex marriages.[147] A court applying this system would therefore either be applying discriminatory law, or in the case of same sex couples, would not be able to establish the *lex domicilii matrimonii*.[148]

3.32. The courts are constitutionally obliged to apply the law in ways which do not discriminate, including on the bases of sex, race, gender, culture, religion and sexual orientation. The rules of a foreign legal system, which determines the matrimonial

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146 LRC, Legal Aid SA, BASA, Cape Bar Council

147. In *Steyn v Steyn* (6427/2010) [2010] ZAWCHC 224 (27 October 2010) Gamble J said "Of course, that principle is incapable of application in same-sex marriages. Further, it is likely to fall foul of the equality provisions entrenched in Section 9 of the Constitution, 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" 127 *South African Law Journal* (2010) 424.

148 McConnachie *SALJ* 2010 at 424.

property system of the parties, may or may not contain a general judicial discretion to redistribute property on an equitable basis when the marriage ends. The question then is whether, when applying a set of foreign legal rules which determines that a marriage involves no property sharing, a South African court should exercise a general discretion to redistribute assets between the spouses on an equitable basis, akin to the redistribution discretion, which is currently contained in section 7(3) of the Divorce Act.

3.33. The argument in favour of exercising such a general discretion is that a South African court may not discriminate on the basis of sex or gender and the absence of an equitable discretion could amount to discrimination. On the other hand, it could be argued that a court dissolving a marriage according to the rules of a foreign legal system is not applying South African law and should not exercise any discretion, which is not contained in the applicable legal system.

D Proposals

3.34. The above results in the following preliminary recommendations to replace the current *lex domicilii matrimonii* rule:

The Divorce Act should be amended by the insertion of the following provision as section 2(5): The proprietary consequences of a marriage which is not governed by South African law will be determined by a single legal system for both moveable and immoveable property.

(a) This legal system is designated by:

(i) the agreement between the spouses before or at the time of the marriage (spouses may agree that any legal system apply to the proprietary consequences of their marriage, irrespective of their domicile, nationality or habitual residence at the time of the marriage).

(ii) in the absence of an agreement between the spouses, the law of the country of the common domicile of the spouses at the time of marriage;

(iii) in the absence of any of the previous factors, the law of the country of common habitual residence of the spouses at the time of the marriage;

(iv) in the absence of any of the previous factors, the law of the country of common nationality of the spouses at the time of the marriage;

(v) in the absence of any of the previous factors, the law of the country to which the spouses are jointly most closely connected at the time of marriage.

3.35. In determining whether the new rule should apply retrospectively to existing marriages, the Commission puts forward the following options:

Option 1

3.36. That the new rules only apply prospectively ie to marriages concluded after the adoption of the legislation which changes the law.

Option 2

3.37. That the new rules apply prospectively but that spouses in existing marriages be given a window period of two years within which they can opt into the new rules by way of a formal written agreement.

Option 3

3.38. That the new rules apply prospectively but that spouses in existing marriages be given a window period of two years within which they can opt into the new rules by way of a formal written agreement. However, in the case of same-sex marriages, which were concluded before the operation of the adoption of the legislation, the new rules operate retrospectively.

3.39. Commentators are asked for their opinions on:

1. Whether the connecting factors described in the draft clause are adequate or should be changed in any way.
2. Whether spouses should be allowed to designate any legal system to govern their matrimonial property, as suggested in clause 2(5)(a)(i) or whether they should be limited to legal systems with which one or both has a connection like domicile, residence or citizenship,
3. The best option relating to retrospectivity of the provision.

3.40. Which of these options would be preferable, or whether there are other options which would should be considered.

CHAPTER 4: DEVIATIONS FROM THE DEFAULT MATRIMONIAL PROPERTY SYSTEM

A Antenuptial contracts

1 Background

4.1. The main way for parties to deviate from the default matrimonial property regime is by concluding antenuptial contracts. An antenuptial contract is a written agreement that is signed prior[149] to a civil marriage to determine how property will be handled during the marriage and how it will be divided in the event of divorce or the death of a spouse.

4.2. 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, provided that the terms of the contract are not illegal, and specifically, are not contrary to public policy.[150]

4.3. In practice, however, spouses tend to choose one of the two forms of marriage out of community of property.[151] The first form of marriage is out of community of property with the inclusion of the accrual system, while the other does not include the accrual system.[152] Where spouses do not specify the form of out of community of property in the antenuptial contracts, the default is out of community of property with accrual.

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149 *Mathabathe v Mathabathe* 1987 (3) SA 45 (W); R Jordaan "Oordrag van bates in geval van egskeiding ingevolge artikel 36 van die Wet op Huweliksgoedere 88 van 1984 : *Mathabathe v Mathabathe* 1987 (3) SA 45 (W); *Milbourn v Milbourn* 1987 (3) SA 62 (W)" (1988) 51 *THRHR* 109; Seodi Bernhartina Mosaka *Post-Divorce Rights of the South African Women to the Accrued Estate* (2005) LLM, UNW.

150 E Bonthuys "Public Policy in Family Contracts Part II: Antenuptial Contracts" 2021 (32) *Stell LR* 3. See also SALRC *Issue Paper* 41 at par 4.1.

151 SALRC *Issue Paper* 41 at par 4.1.

152 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. See also *Issue Paper* 41 at 11.

4.4. These contracts have significant consequences because they not only affect the ownership of individual assets during marriage but determine the disposal of spouses' entire estates, during marriage and when marriage ends through death or divorce.

4.5. It is important to remember that the purpose of antenuptial contracts is to deviate from the default matrimonial property regime of joint ownership and equal sharing in marriages. By their nature, antenuptial contracts which exclude all forms of sharing, including accrual, would therefore benefit the spouse who has more assets before the marriage or whose assets show the largest increase during the marriage – the wealthier spouse. We know that in South Africa men tend to be wealthier than women.[153] These existing financial inequalities, together with strong social expectations that women should not pursue their own financial advantage in marriage or intimate relationships[154] mean that gendered inequalities in bargaining power often underlie such contracts.[155]

2 Requirements and procedural safeguards for antenuptial contracts

4.6. Given the significance of antenuptial contracts, formalities and safeguards should ensure that parties know and understand their legal rights and enter these contracts on an equal footing.[156] However, South African law only requires attestation and notarial registration of a written antenuptial contract.[157]

4.7. There are no requirements which aim to ensure substantive fairness of the contract between the parties and none which ensure that the parties actually understand the

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153 M Rogan 'Gender and multidimensional poverty in South Africa: Applying the global multidimensional poverty index (MPI)' (2016) 126 *Soc Indic Res* 987 at 995; Statistics South Africa *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) fig 2.3; International Labour Office *Global Wage Report 2018/19* figures 14, 1.

154 Sharon Thompson "In Defense of the 'Gold-Digger'" (2016) 6 *Oñati Socio-Legal Series* 1225.

155 See generally Gail Frommer Brod 'Premarital Agreements and Gender' 1994 *Yale J of Law and Feminism* 229; Amanda Barratt '"Whatever I Acquire Will be Mine and Mine Alone': Marital Agreements not to Share in Constitutional South Africa" (2013) 130 *SALJ* 688 at 695; Sharon Thompson *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power and Theory in Practice* (2015)149.

156 Elsje Bonthuys "Public Policy in Family Contracts Part II: Antenuptial Contracts" *Stell LR* (2021) 23 *Stell Law Rev* 3.

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

nature and effect of the agreement. There are also no safeguards to ensure that parties have accurate information about their respective financial positions to make informed decisions. Only the common law remedies for duress and undue influence protect against pressure to enter into detrimental agreements. These remedies tend to be very difficult to prove, especially many years after the contract has been entered into.

4.8. The main aim of the statutory requirements for antenuptial contracts therefore appears to be the protection of the interests of creditors and third parties who interact with spouses.[158]

4.9. In the latest Code of Conduct for Legal Practitioners in South Africa,[159] rule 59(2) sets out the following:

> A legal practitioner may act for two or more adversaries in drawing a settlement agreement to capture their agreement, but must advise the parties of their rights to independent legal advice. Moreover, in any matter involving a settlement of a matrimonial dispute or a matter involving the regulation of care and residence of children, the legal practitioner shall take active steps to ensure that all aspects of any contemplated settlement is equitable to all parties and in the best interests of the children.

4.10. Presuming that "adversaries" include parties to an antenuptial contract, then this rule goes some way to protecting parties. However, the rule only affects any disciplinary action against the legal practitioner(s) involved and will not affect the validity of the agreement itself or the court's power to deviate from its terms.

4.11. The case law contains numerous instances of unconscionable and unfair terms in antenuptial contracts. Two examples suffice. In *W v H*,[160] an antenuptial agreement was concluded between a non-South African wife, aged 28 and a husband aged 53, who was an advocate. The Court noted that the contract

> contains clauses and provisions which are difficult to imagine any right thinking woman would have agreed to have incorporated in'[161] and '[n]o self-respecting South African attorney who is familiar with the provisions of the Matrimonial Property Act and who practised in that field would have allowed his client to sign

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158 Bonthuys *Stell LR* 2021 3.

159 Published in terms of section 36(1) of the Legal Practice Act 28 of 2014 in GG 42364, GN 198 (29 March 2019). The full name of this code is the: *Code Of Conduct For All Legal Practitioners, Candidate Legal Practitioners And Juristic Entities.*

160 *W v H* 2017 (1) SA 196 (WCC). See the partially successful appeal decision in *ST v CT* 2018 (5) SA 479 (SCA).

161 *W v H* at par [7].

> a document such as I am asked to accept as a binding agreement between the parties in respect of their marriage to each other.[162]

4.12. The court in *Barnard v Barnard*[163] upheld an antenuptial contract between Karen Barnard, aged 24 and the twice-divorced heart surgeon Chris Barnard which was signed two days before the wedding. The contract was drafted by the husband's attorneys and the wife had not received any independent legal advice. The parties became engaged when the wife was only 20, and their relationship must therefore have started when she was even younger.

3 Enforcement of antenuptial contracts which do not meet formal requirements

4.13. In order to be valid as against third parties who have a contract with the spouses, an antenuptial contract must be notarially registered.[164] However, an unregistered antenuptial contract is valid and enforceable between the spouses who entered into it.[165]

4 Comparative perspectives

4.14. In those jurisdictions which allow spouses to regulate some aspects of their marriages by way of contract, the trend is to recognise that these contracts have far-reaching consequences and could allow opportunistic contracting parties to take advantage of their spouses. Various statutory measures which aim to protect parties to antenuptial contracts, in addition to protecting third parties, are therefore becoming more widely accepted.

(a) England and Wales

4.15. Before the English case of *Radmacher v Granatino,*[166] prenuptial agreements (ie antenuptial contracts) were not regarded as binding. However, *Radmacher* changed this

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162 *W v H* at par [49].

163 *Barnard v Barnard* 2000 (3) SA 741 (C).

164 Section 86 of the Deeds Registries Act 47 of 1937. See *Lagesse v Lagesse* 1992 (1) SA 173 (D)). Also *Issue Paper* 41 at par 4.8.

165 *Ex parte Spinazze and Another NNO* 1985 (3) 650 (A); *Odendaal v Odendaal* 2002 (1) SA 763 (W).

166 *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534.

and found the agreements between parties should be binding and enforceable. The Law Commission for England and Wales investigated this very issue as a result and it published its report on Matrimonial Property, Needs and Agreements in 2014.[167] It recommended that antenuptial agreements which met with certain requirements would be valid and enforceable. However, these agreements

> cannot take a couple's arrangements outside the scrutiny of the family courts; they will be upheld only if they are "not unfair", in accordance with the decision of the Supreme Court in *Radmacher v Granatino*.[168]

4.16. The recommendation is therefore that, even when parties meet the protective requirements for antenuptial contracts, courts should retain a residual discretion to deviate from unfair antenuptial contracts.

4.17. The common law rule that a contract that was entered into as a result of undue influence or duress is voidable, was confirmed, but the Commission agreed that there should be no special presumption of undue influence in antenuptial agreements.[169]

4.18. The Commission recommends that antenuptial contracts meet the following requirements:

(a) The agreement should be in writing, registered by deed and contain a statement that both parties understand the meaning and legal effects of an antenuptial contract if the marriage is dissolved by divorce.[170]

(b) The contract must be concluded at least 28 days before celebration of the marriage to reduce the chance of one spouse coercing the other by threatening to withdraw from an imminent wedding.[171]

(c) At the time of concluding the agreement, both parties must have the benefit of "disclosure of material information about the other party's financial situation and the requirement of disclosure cannot be contractually waived."[172]

(d) Both parties must receive independent legal advice from different lawyers on the nature of the agreement and how it would affect their legal rights. A statement in

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167 Law Com No 343 accessed at http://lawcommission.justice.gov.uk/areas/marital-property-agreements.html accessed on 20 April 2023.

168 Law Com No 343 page 7-8.

169 Law Com No 343 par 6.16, 6.29.

170 Law Com No 343 par 6.36, 6.40.

171 Law Com No 343 par 6.65, 6.67.

172 Law Com No 343 par 6.91, 6.103.

the agreement that legal advice was received – signed by the parties and the lawyer – would constitute prima facie proof of the advice being provided.[173]

(e) An agreement cannot leave a spouse or a child of the relationship financially destitute and parties may therefore not limit their duties of spousal or child support by way of antenuptial agreement.[174]

(b) Australia

4.19. The Australian Family Law Amendment Act 143 of 2000 amended the 1975 Family Law Act by inserting specific provisions pertaining to antenuptial contracts.

4.20. A valid antenuptial contract:[175]

a) Must be signed by both parties.

b) Must contain a certificate from a legal practitioner who advised the parties to the agreement.

c) Must contain a declaration by both parties that they received independent legal advice before entering into the agreement, which covers the following matters:

1. The effect of the agreement on their legal rights.
2. The extent to which the agreement serves their financial interests.
3. Whether it would be prudent to enter into the agreement.
4. Whether the terms of the agreement are fair and reasonable in light of their circumstances at the time when they enter into the contract.

4.21. Nevertheless, courts retain general discretion to vary the terms of the agreement or to refuse to enforce an agreement:

a) relating to spousal or child maintenance;[176]

b) where circumstances changed since the agreement was signed, which make it impractical to enforce the agreement;[177]

c) if, since the agreement was made, circumstances relating to the care of a child of the marriage changed;

d) if one of the parties to the agreement induced the other by fraud “including non-disclosure of a material matter”;

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173 Law Com No 343 par 6.125, 6.142, 6.145, 6.159.

174 Law Com No 343 par 5.68.

175 Schedule 2, amending section 90G of the Family Law Act of 1975.

176 Section 90F.

177 Section 90 K(1)(a-e).

e) in cases where “a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable.”

(c) New Zealand

4.22. One year after the adoption of the Australian legislation, New Zealand enacted the Property Relationships Amendment Act[178] amending the 1976 Property (Relationships) Act to set requirements for contracts between spouses and intimate partners.

4.23. The scope of permitted agreements is limited to the ownership and division of their property, which includes future property.[179] Contracts to defraud creditors are void and unenforceable.[180]

4.24. In order to be valid, agreements must:[181]

a) be in writing and signed by the parties;
b) be preceded by independent legal advice on the effect and consequences of the agreements;
c) have parties’ signatures witnessed by the lawyers who must certify that they provided legal advice.

4.25. Even though agreements meet these requirements, courts nevertheless have a discretion not to enforce agreements “if, having regard to all the circumstances, it is satisfied that giving effect to the agreement would cause serious injustice.”[182] In the exercise of this discretion, courts should consider the following factors:[183]

(a) the provisions of the agreement:
(b) the length of time since the agreement was made:
(c) whether the agreement was unfair or unreasonable in the light of all the circumstances at the time it was made:
(d) whether the agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made (whether or not those changes were foreseen by the parties):
(e) the fact that the parties wished to achieve certainty as to the status, ownership, and division of property by entering into the agreement:

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178 Property Relationships Amendment Act 5 of 2001.

179 Section 21(1). References to the amended sections of the Property (Relationships) Act.

180 Section 47.

181 Section 21 F(2)-(5).

182 Section 21 J(1).

183 Section 21 J(4).

(f) any other matters that the Court considers relevant.

(d) The Uniform Premarital Agreements Act (UPAA) in the United States

4.26. The UPAA is a model federal statute in the United States, first promulgated in 1983 to encourage consistency on the enforcement of antenuptial and marital contracts in the various US jurisdictions. It is not mandatory, but has been adopted by several states, many of which amended it to some extent.[184]

4.27. The suggested requirements for validity include writing and signing by the parties[185] and independent legal advice for both parties before the contract is signed. An agreement may be set aside if a party did not receive "adequate financial disclosure' which is defined as 'a reasonably accurate description and good-faith estimate of value of the property, liabilities, and income of the other party."[186] The last two requirements may be waived in writing.

4.28. An agreement may be also set aside if there was no legal representation, or no consent or if it was concluded under duress.[187] A court may refuse to enforce an agreement or a term in the agreement if it was unconscionable at the time when the contract was concluded, if, as a result of changed circumstances, its enforcement would lead to severe hardship or if it relates to spousal maintenance and enforcement would mean that the spouse would need public financial support.[188] Certain issues related to children, like parental rights and responsibilities and rights to child support will not be enforced, as will be provisions which limit remedies for domestic violence.[189]

(e) Common protective mechanisms and formalities in antenuptial contracts in other countries

4.29. The legislative initiatives surveyed indicate that there are certain features which are commonly encountered in statutes governing this area.

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184 For the text with annotations see 'Uniform Premarital and Marital Agreements Act' (2012) 46 *Family Law Quarterly* 345. This edition of the journal contains a collection of academic articles on the UPAA, which could be consulted for additional detail.

185 Section 6.

186 Section 9(d)(1).

187 Section 9(a)(1).

188 Section 9(e), (f).

189 Section 10.

4.30. The first is limits on the subject matter of the agreement – with child support, spousal support and parental rights and responsibilities generally excluded from the agreement. Contracts which are the result of fraud, duress or undue influence are also unenforceable. This is also the case in South African common law.[190]

4.31. The Law Commission of England and Wales' suggests that the agreement should be concluded a certain number of days before the marriage as a practical measure to limit opportunities for duress and undue influence.

4.32. What is not found in South African law is a general judicial discretion to refuse to enforce the contract on the basis that it was either unconscionable or grossly unfair at the time of its conclusion, or that enforcement had become impracticable or grossly unfair as a result of changing circumstances during the marriage.

4.33. Also lacking from South African law are provisions which aim to ensure that parties have sufficient information to understand the nature and consequences of the agreement. These take two forms – disclosure requirements and the widespread requirement of separate, independent legal advice before conclusion of the contract.

5 Questions posed in *Issue Paper* 41 and responses received

Questions

4.34. 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?

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

190 *W v H* 2017 (1) SA 196 (WCC); *ST v CT* 2018 (5) SA 479 (SCA). See generally E Bonthuys "Public Policy in Family Contracts Part II: Antenuptial Contracts" (2021) 32 *Stell LR* 3.

4.36. 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?

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

4.38. Should notarial registration remain a requirement for a valid antenuptial contract?

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

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

4.41. The idea that parties should have duties to disclose their financial positions in the utmost good faith before concluding an antenuptial contract received widespread support.[191] This is seen to be particularly important in marriages subject to the accrual system, because of the potentially negative consequences of a lack of accurate information in these marriages.[192] An anonymous respondent, however, asks: what prevents a potential spouse from lying about their financial situation?

4.42. The LRC submits that a statutory duty to disclose their financial positions provides a clear basis for the calculation of accrual and redistribution claims. It suggests that it would reduce claims at divorce that parties were not sufficiently informed when they entered into antenuptial contracts. It states that the current provisions only protect spouses if they act in good faith. Unfortunately, the party who avers that assets were excluded from the estate for the accrual calculation or maintenance claims bears the financially prohibitive burden of proof to establish exclusion and the nexus between excluded assets and current assets.

4.43. The LRC supports the requirement that both parties have a duty to fully and accurately disclose financial information when signing the contract. The LRC suggests

191 Karen Botha, Sandra van Standen, Mariette Englebrecht, Pitse Mamabolo, AMAL, Teboho Hlapolsa, Anonymous and Legal Aid SA; Centre for Human Rights.

192 BASA, the CRL Commission, Legal Aid SA and Dave de Klerk.

that this should be a duty of utmost good faith, because that would create an onus on parties who dispute their own declarations of assets at divorce to convince the court that their incorrect disclosure was not done with the intention to deceive their spouse. As alternatives, the LRC suggests that there should be a rebuttable presumption that assets that were not disclosed do not form part of the assets or that a court be allowed to draw an adverse inference from a spouse's failure to disclose in good faith.

4.44. Although supportive of duties to disclose, two respondents[193] note that a mandatory disclosure requirement may be expensive if assets require professional valuation. Parties may also be reluctant to engage in formal disclosure when they are optimistic and hope that divorce will never happen. Further, a statutory disclosure requirement may potentially give rise to unnecessary litigation and disputes about the adequacy of disclosures.

4.45. The UUCSA supported by Islamic Forum Azaadville and Sunni Ulama Council Gauteng submit that it is understandable that marriages in community of property require full disclosure by the parties thereto. However, the default matrimonial property regime under Islamic Law, being out of community of property and without the accrual system, means that spouses will maintain separate estates. They argue that it is against the very nature of this regime to create a legal requirement that the parties must disclose the details of their estates to the other. However, if they do so voluntarily, then that would pose no problem.

4.46. Keneilwe Mabapa disagrees with the imposition of a legal duty to disclose but argues that parties should rather be strongly advised that disclosure will make the separation of estates and the calculation of accrual at divorce simpler. To avoid challenges with the calculation of accrual, there should be a rebuttable presumption that if an asset is not disclosed at the time of signing an antenuptial contract, it forms part of the accrual of the person who failed to disclose it.

4.47. A majority of respondents supported the suggestion that spouses should receive independent legal advice before entering into antenuptial contracts.[194] They think it would

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193 The Cape Bar Council and Miller du Toit and Family Law Forum.

194 Miller du Toit Cloete and Family Law Forum, BASA, Legal Aid SA, UUCSA, by Mariette Englebrecht, MPL Network, WLC, Sandra van Standen, Karen Botha, The Cape Bar Council's,AMAL, Tebogo Hlapolosa, Islamic Forum Azaadville and Sunni Ulama Council Gauteng.

enable spouses to receive honest and unhindered advice, because it may be difficult to ask specific questions in front of the other spouse without offending them. Other benefits would be to ensure equal bargaining power, avoid future conflicts and prevent allegations of undue influence.

4.48. However, some respondents are concerned about the cost of such a recommendation, and suggest that it would increase costs to such an extent that entering into an antenuptial agreement would be out of reach for many people.[195] As a result, these respondents recommend that the spouses should have the right to request separate legal advice and should be informed of this right by the relevant legal practitioner, but that it should not be a legal requirement. The CRL Commission holds this view and suggests that the marriage officer can play an important role in ensuring that both parties are aware of their rights and their responsibilities and of the potential pitfalls of the contract that they chose to conclude.

4.49. An anonymous respondent agrees that some form of scrutiny is essential, but to curb costs, suggests that an independent third party (similar to a mediator) evaluate the antenuptial contract. The respondent makes the point that even separate legal representation would not guarantee equal bargaining power if one party can afford a very experienced lawyer, while the other cannot and must rely on the services of a student in a law clinic.

6 Evaluation

4.50. The argument that disclosure is not required in marriages out of community of property because spouses administer their own separate estates during marriage fails to understand the purpose of such disclosure. This purpose is to enable spouses to make an accurate decision about the applicable property system. The fact that spouses administer their own separate estates during marriage should be a consequence of an informed decision, based on accurate information.

4.51. The suggestion that separate legal representation could prove costly is important. However, the experience is that antenuptial contracts are not routinely concluded, except at the instance of wealthier parties to protect themselves from having to share assets

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195 Keneilwe Mabapa.

with poorer spouses. We invite comments on how to address this problem for poorer spouses.

4.52. The suggestion that marriage officers could explain or give advice on matrimonial property regimes assumes that marriage officers have sufficient legal knowledge to do so. In practice, marriage officers are not usually lawyers and would be unable to offer meaningful legal advice. Moreover, receiving legal advice at the time when parties have already approached a marriage officer may be too late, since parties may already have started to plan the wedding and therefore be motivated to disregard the possibility of negative financial consequences at that time.

4.53. The Commission foresees that some spouses may enter into antenuptial contracts which fail to adhere to the disclosure and other formal prescriptions in the legislation. For instance, Muslim marriages are concluded by way of *nikāh* contracts. These contracts do not usually comply with the requirements that are envisaged for other antenuptial contracts. The question then arises about the validity of antenuptial contracts which fail to comply with these requirements and which is not notarially registered.

7 Proposed reforms

(a) Scope of antenuptial contract and prohibited terms

4.54. The Commission proposes explicitly to deal with the validity and effect of certain provisions in antenuptial contracts. While these rules are already contained in the common law, explicit statutory provisions will improve accessibility and clarity for members of the public and the legal profession. They are:

4.54.1. Spouses may, by way of a written antenuptial contract regulate the **status, ownership and division of their estates** during marriage.

4.54.2. No antenuptial contract may contain a provision which limits the **rights to spousal or child support during or after the end of the marriage**/relationship. Any such provision in an antenuptial contract will not be enforceable.

4.54.3. Any antenuptial agreement or term in an antenuptial contract which has the purpose or effect of **defeating the claims of creditors** of either spouse will be void.

4.54.4. Any antenuptial agreement or term in an antenuptial contract which **offends public policy or the boni mores** is void and unenforceable.

4.54.5. An antenuptial contract does not automatically affect family property in customary law unless the parties expressly refer to such property.

4.55. Respondents are asked to comment on whether they agree with the proposed limits on the scope of an antenuptial contract. Should anything be removed or added?

4.56. Do respondents agree that some or all of these provisions should also apply to partnership contracts by unmarried intimate partners?

(b) Duties to disclose

4.57. The Commission proposes a list of information which should be provided by parties entering into an antenuptial contract by adding a section to the Matrimonial Property Act, as follows:

a) Before entering into an antenuptial contract future spouses have a duty of the **utmost good faith** to fully and accurately disclose information about:
   1. Any **trusts** of which a spouse is a trustee, beneficiary, founder or has donated assets to;
   2. **Investments** in the name of the spouse;
   3. **Crypto currency** and **foreign currency** owned by the spouse;
   4. **Bank accounts** in the name of the spouse including foreign bank accounts and the balances of such accounts;
   5. **Immoveable property** of which the spouse is owner or co-owner and details of any mortgages registered over such immoveable property;
   6. Any immoveable property which is designated as **customary family property** of a future spouse;
   7. **Significant debts** of each spouse and any **assets which secure such debts**;
   8. **Contracts of suretyship** entered into by each spouse;
   9. Any **pensions or annuities** of which the spouse is currently or will in future be the beneficiary;
   10. Whether the contracting parties are partners **in existing marriages or unmarried intimate partnerships** and the proprietary consequences of such marriages or partnerships;
   11. Any other financial information which could significantly influence the proprietary rights of the spouses at divorce.

4.58. Parties who signed an antenuptial contract have a **cooling off period** of one calendar month during which they may withdraw from the contract. If they fail to withdraw from the contract or marry during this period, they are regarded as having ratified the contract.

4.59. Failure to accurately disclose information before marriage has the following consequences at the time of divorce:

4.59.1 **Option 1:** Depending on all the circumstances, a court making a divorce order can draw **an adverse inference** from a spouse's failure to accurately disclose assets at the time when an antenuptial contract was concluded.[196]

4.59.2 **Option 2:** Depending on all the circumstances, **a court which exercises its general discretion to deviate** from the chosen property regime[197] may take account of the fact that one party failed to accurately disclose financial information at the time when an antenuptial contract was concluded.

4.59.3 **Option 3:** Failure by one spouse to accurately and fully disclose significant financial information, which would have an effect on the calculation and distribution of assets at divorce leads to **a rebuttable presumption** that the undisclosed assets or liabilities should be taken into account for the purposes of calculating and distributing assets and liabilities at divorce.

4.59.4 **Option 4**: Failure by one spouse to accurately and fully disclose significant financial information, which would have an effect on the calculation and distribution of assets at divorce can be a basis on which a court makes **a punitive cost order** against such a party.[198]

Respondents are asked to comment on:

4.60. Whether the information which spouses should disclose is adequate or includes information which should be left out?

4.61. Should information be disclosed in writing or by way of affidavit or would oral disclosure be sufficient?

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196 See *ST v CT* 2018 (5) SA 479 (SCA) par 36.

197 See par 4.70 regarding a discretion to deviate from the antenuptial contract terms and Chapter 4B(1) *infra* regarding the Commission's recommendation to introduce a general discretion to equitable distribution at the time of divorce.

198 See *B v B* 2014 ZASCA 137 at par [41].

4.62. Should there be a deadline for when disclosure should take place, for instance before the antenuptial contract is signed?

4.63. Should there be a cooling off period after signing the antenuptial contract during which a contracting party may withdraw from the contract or is this unnecessary?

4.64. If a spouse fails to disclose prior to marriage, which of the options provide the most effective sanctions? Are there any other sanctions which should be considered?

(c) Independent legal advice prior to entering into an antenuptial contract

4.65. The Commission proposes that the following provisions be added to the Matrimonial Property Act:

(1) No antenuptial contract may be concluded within one calendar month before a wedding takes place. The fact that a contract was concluded in contravention of this provision should be considered by a court exercising its general discretion to deviate from the chosen property regime.[199]

(2) Every antenuptial contract must be preceded by independent legal advice provided separately to each spouse.

(3) At the time when advice is given, each legal advisor should have access to the information about assets and liabilities disclosed by each spouse.

(4) The legal advice should explain-

  (a) the general nature and effect of an antenuptial contract;

  (b) the consequences of the antenuptial contract if the marriage is terminated;

  (c) whether it is advisable in the current circumstances of the relationship for the party to enter into an antenuptial contract in the proposed terms;

  (d) whether it is advisable in the circumstances which are reasonably foreseeable in future for the party to enter into an antenuptial contract in the proposed terms.

(5) Each legal practitioner should certify that this information was provided by way of a certificate which should be attached to the antenuptial contract.

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199 See par 4.70 below and chapter 4B(1).

T**he Commission asks for comments on the following issues:**

4.66. Do respondents agree with the requirements regarding independent legal advice? Are there any proposed provisions which should be changed or discarded?

4.67. The Commission suggests three options describing the effect of failure to obtain independent legal advice or to attach a certificate that such advice was obtained. Which of these options are most feasible and effective?

4.68. Do respondents agree on the scope of the information which should be provided by the independent legal advisor – should anything be left out or added?

4.69. Do respondents have any ideas on how best to mitigate the costs of separate legal representation? Should this representation, for instance, be included in legal aid?

(d) Judicial discretion to deviate from the terms agreed upon in the antenuptial contract

4.70. Irrespective of the matrimonial property regime, which an antenuptial contract introduces, a court may refuse to enforce such an agreement or a term in such an agreement at divorce or separation if its enforcement **would cause serious injustice or undue hardship**. In deciding whether serious injustice or undue hardship should result from enforcement of the antenuptial contract, a court should consider the following factors:

4.70.1. The terms of the agreement;

4.70.2. Whether the agreement was concluded within a calendar month of the wedding;

4.70.3. The time which has elapsed since the agreement was concluded;

4.70.4. Failure by a spouse to disclose material financial information (information which would materially affect the distribution of assets);

4.70.5. False declaration of financial information by a spouse at the time of the conclusion of the contract;

4.70.6. Failure to obtain independent legal advice before conclusion of the antenuptial contract;

4.70.7. Whether a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable, including conduct:

4.70.7.1. in respect of the conclusion of the antenuptial contract;

4.70.7.2. during the relationship and leading to the breakdown of the relationship;

4.70.7.3. during and leading up to the divorce or separation.

4.70.8. Whether, at the time of its conclusion, the terms of the agreement were substantially unfair;

4.70.9. Whether the agreement became unfair or is likely to lead to severe hardship as a result of any changes in circumstances since it was made (whether or not those changes were foreseen by the parties);

4.70.10. The parties' respective contributions to the joint household (including non-financial contributions);

4.70.11. The parties respective contributions to the increase in each other's estates (including non-financial contributions);

4.70.12. Any other factor, which in the opinion of the court is relevant

The Commission invites comments on:

4.71. Do respondents agree with serious injustice or undue hardship as the overriding criteria for whether or not a court should refuse to enforce the terms of an antenuptial agreement? Is this adequate or should there be another overriding criterion?

4.72. Do respondents agree with the various factors which a court can consider to decide whether enforcement of the antenuptial contract would lead to serious injustice or undue hardship? Are there factors which should be removed or others that should be inserted?

(e) Antenuptial contracts which fail to comply with the formal requirements

Option 1

4.73. Antenuptial contracts which fail to comply with formality requirements, including independent legal advice and notarial registration, are enforceable between the spouses when the marriage is dissolved, but subject to a court's discretion to deviate from the terms of the contract.

Option 2

4.74. Failure to comply with the requirements regarding independent legal advice renders the antenuptial contract **voidable at the instance of either spouse**. The

election to have a contract declared voidable may be exercised at any time before the marriage is dissolved.

Option 3

4.75. Antenuptial contracts which fail to comply with formality requirements, including independent legal advice **are null and void** and parties will be married according to the default matrimonial property system.

Option 4

4.76. Failure to comply with formality requirements, including independent legal advice and notarial registration is a factor which a court can take into account in deciding to exercise its discretion to deviate from the terms of the antenuptial contract.

4.77. Respondents are asked to comment on the feasibility of each of the proposed options and suggest any other mechanisms which may be preferable.

4.78. How should these proposed rules be adjusted in polygynous marriages?

4.79. Should the proposed rules also apply to cohabitation or partnership contracts concluded by unmarried intimate partners?

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

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

(a) Background

4.80. 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 system for marriages out of community of property.[200]

4.81. Parliament's aim in introducing the discretion was:[201]

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

4.82. The discretion was therefore only available for those spouses married out of community of property before the commencement date of the legislation in 1984. This section was inserted into the Divorce Act to protect vulnerable women who were married out of community of property and contributed towards the growth of their husbands' estates while their own was not growing due to the gender roles that they assumed during their marriages. It allows vulnerable women to be allocated a portion of their

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200 Section 7(3) of the Divorce Act. See also SALRC *Issue Paper* 41 at par 4.12.

201 SALRC Project 12: *Review of the Law of Divorce: Amendment of Section 7(3) of the Divorce Act, 1979 Report* ("Project 12") published in July 1990 paras 1.3.4, 1.3.5. The SALC concluded that s 7(3) … was only meant to be an outlet valve to alleviate the unfairness in existing marriages that had been made subject to the rigid predetermined matrimonial property systems" and that the English system allowing for a judicial redistribution discretion was, with the said exception of section 7(3), never part of our law and "… was never intended to be a matrimonial property system, alongside any other system".

husbands' assets that were accumulated during the marriage, because they are ordinarily prevented from sharing on divorce due to being married out of community of property.[202] In *Beaumont v Beaumont,*[203] Botha JA explained that section 7(3) was introduced as "an entirely novel concept into this branch of our law: the power of the Court under certain circumstances to order the transfer of assets of the one spouse to the other." In *Beira v Beira,*[204] the court expounded that section 7(3) "was enacted to enable both spouses to enjoy their rightful shares in the wealth accumulated during the subsistence of the marriage by their joint endeavours."

4.83. In *Holomisa v Holomisa,*[205] the Constitutional Court declared section 7(3) of the Divorce Act constitutionally invalid to the extent that it excludes a spouse married out of community of property, who has not entered into an antenuptial contract or made an express declaration in terms of section 39(2) of the repealed section 39 of the Transkei Marriage Act,[206] from its ambit. In other words, section 7(3) of the Divorce Act discriminated against women married out of community of property under the Transkei Marriage Act insofar as it excluded them from the benefits of a just transfer of assets on divorce.[207] Subsequently, the judicial discretion in terms of section section 7(3) was extended to civil marriages out of community of property conducted in terms of the Transkei Marriage Act.

4.84. Under section 7(3)(c) of the Divorce Act, another category of marriages has been included to be considered for redistribution of assets following *Holomisa v Holomisa*. 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.[208]

4.85. The discretion will be exercised:[209]

> …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

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202 *Holomisa v Holomisa and Another* 2019 (2) BCLR 247 (CC) at par 2.

203 *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 987G.

204 *Beira v Beira* 1990 (3) SA 802 (W).

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

206 Transkei Marriage Act 21 of 1978.

207 *Holomisa v Holomisa* at par 2.

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

209 Section 7(4) Matrimonial Property Act. See also *Issue Paperr* 41 at 14.

> 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.

4.86. Similarly, the Constitutional Court in *Gumede v President of the Republic of South Africa*,[210] held that customary marriages concluded before the Recognition of Customary Marriages Act came into operation would effectively be marriages in community of property. The Court effectively created a judicial discretion in all customary marriage divorces and stated that:

> …every divorce court granting a divorce decree relating to a customary marriage has the power to order how the assets of the customary marriage should be divided between the parties, regard being had to what is just and equitable in relation to the facts of each particular case. This would require that a court should carefully examine all the circumstances relevant to the customary marriage and in particular the manner in which the property of the marriage has been acquired, controlled and used by the parties concerned, in order to determine, in the final instance, what would be a just and equitable order on the proprietary consequences of the divorce.[211]

4.87. Finally in *Women's Legal Centre Trust v President of the Republic of South Africa and Others,*[212] the Constitutional Court allowed for circumstances in which a court could distribute assets at the dissolution of a Muslim marriage and 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.[213]

4.88. This creates yet another category of marriages to which the judicial discretion will apply, irrespective of the dates of the marriages. The Constitutional Court gave Parliament until 28 June 2024 to correct this injustice.[214] In the meantime, Mr Hendricks, a member of Parliament for Al Jama–ah, introduced the Private Member Divorce

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

211 *Gumede v President of the Republic of South Africa* at par [44]. The judicial discretion created in *Gumede* is broader than the discretion created in s 7(3)(a) and does not limit the discretion to marriages concluded before or after a specific date.

212 *Women's Legal Centre Trust v President of the Republic of South Africa and Others* (CCT 24/21) [2022] ZACC 23; 2022 (5) SA 323 (CC); 2023 (1) BCLR 80 (CC) (28 June 2022).

213 *Women's Legal Centre Trust* par [86] 1.3.

214 *Women's Legal Centre Trust* par [86] 1.6. The decision was handed down on 28 June 2022 and the order specified that the state had 24 months in which to pass legislation.

Amendment Bill[215] as an "effective, expedient and timely remedy to amend the Divorce Act and to bring it in line with our Constitution, by ensuring that parties in a Muslim marriage and the children born from such marriage are no longer left out, and that the injustices that arise from their exclusion are eradicated".[216] As at 2 May 2023, Mr Hendricks agreed to delay the introduction of the Bill given the Department of Home Affairs efforts to develop an Executive Bill to regulate all marriages in South Africa.[217]

4.89. Currently, there are several different dates and types of marriages which determine whether the discretion in section 7(3) would be available to a marriage.[218] Few of these dates and marriages bear any relation to the original purpose of the legislation.[219] 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.[220]

4.90. The court's discretion to transfer assets from the financially stronger spouse to the financially weaker spouse is a remedial exercise that recognises the contribution of the financially weaker spouse on the accumulated assets that increased the financially stronger spouse's estate.[221] As a result, the lack of such discretion can be said to mainly impact disproportionately on wives in marriages where they have contributed to the growth of their husbands' estates but cannot claim a share of the assets.[222]

(b) G v Minister of Home Affairs

4.91. After *Issue Paper* 41 was published and during the period that comments were submitted, the Gauteng High Court, Pretoria handed down the decision of *G v Minister*

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215 B32-2022. GG 47526 of 18 November 2022.

216 *Ibid*.

217 Parliamentary Monitoring Group meeting summary of the Parliamentary Home Affairs's Committee 2 May 2023, available at https://pmg.org.za/committee-meeting/36771/.

218 SALRC *Issue Pape*r 41 at par 4.21.

219 SALRC *Issue Pape*r 41 at par 4.21.

220 SALRC *Issue Pape*r 41 at par 4.21. As far back as 1994, Sinclair suggested that: "The discrimination [in section 7(3)] takes the form of denying to those people a remedy to relieve injustice that is granted to persons married with an identical system, but earlier." *See J* Sinclair 'Family Rights' in D Van Wyk *et al* (eds) *Rights and Constitutionalism – The New South Africa Legal Order* (1994) 502 at 548. See also *G v Minister of Home Affairs* 2022 (5) SA 478 (GP).

221 C Marumoagae "Is the divorce court's discretion to transfer assets as per the Divorce Act unconstitutional?" (2022) Nov *DR* 18.

222 Heaton *SAJHR* 2005 at 562; Marumoagae *De Rebus* 2022.See also SALRC *Issue Paper* 41 at par 4.22.

of Home Affairs[223] on 11 May 2022.[224] In this matter, the applicant (wife) challenged the fact that the court's discretion to redistribute is limited to marriages out of community of property that were entered into before 1 November 1984 in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded.

4.92. The applicant challenged section 7(3)(a) on several grounds. First, she submitted that section 7(3)(a) arbitrarily and irrationally differentiates between people married before and after 1 November 1984. Secondly, the applicant contended that the cut-off date in section 7(3)(a) disproportionately impacts women, and as such, amounted to unfair discrimination based on sex, gender, marital status, culture, race and religion.[225]

4.93. The Court canvassed a variety of arguments by the parties, the *amici* and the minister's submissions. Submissions that were against the extension of the discretion to marriages after 1984 included:

1. It does not respect parties' freedom to contract;
2. Parties should rather utilise normal contractual remedies to antenuptial contracts entered into under coercion, *justus error* or fraud;
3. There would be little chance of ignorance between contracting parties as the notary would have explained alternatives to the parties, and even if the notary failed to do so, ''it has never been the object of the law to protect the foolish';
4. A marital property system excluding any sharing is chosen deliberately, for clear and well-considered reasons, and such decisions should be respected;
5. The judicial discretion applicable to marriages out of community of property pre- the commencement of the Matrimonial Property Act is a temporary emergency measure, applicable to those who, for whatever reason, did not opt for the conversion possibilities under section 21 of the Matrimonial Property Act;
6. The extension of the judicial discretion would encourage litigation, increase costs and extend the time of litigation;

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223 *G v Minister of Home Affairs* 2022 (5) SA 478 (GP).

224 The court acknowledges the SALRC's consultation period on the Issue Paper in paras 18-20 in noting the Minister's submissions. In their submissions to the SALRC, Miller du Toit Cloete and Family Law Forum and Cape Bar Council referred to the application (at which stage it was pending before the Western Cape High Court).

225 It was argued that this blanket deprivation of excluding spouses from the potential benefits of a just and equitable redistribution order constitutes unfair discrimination based on sex, gender, marital status, culture, race, and religion. As a result, it operates to trap predominantly women in harmful, and toxic relationships when they lack the financial means to survive outside of the marriage, *G v Minister of Home Affairs* par 11.

7. The extension of the judicial discretion would encourage cohabitation;
8. Judicial discretion creates uncertainty; and
9. The extension of the judicial discretion would ignore the interests of creditors.

4.94. Submissions in favour of the extension included:

1. Women cannot be allowed to contract themselves and their children into poverty;
2. Women entering into an antenuptial contract with an express exclusion of the accrual system are seldom making an "informed choice";
3. There is a power imbalance between the parties;
4. Our law recognises the imbalance between other contracting parties, such as employer and employee and has legislated to protect the weaker party.[226]

4.95. Having canvassed these arguments, considered comparative jurisdictions[227] and a report on the state of gender inequality in South Africa,[228] the Court found that section 7(3) was inconsistent with the Constitution and invalid to the extent that the provision limited the operation of the provision to marriages out of community of property entered into before the commencement of the Matrimonial Property Act. It is this decision which is currently before the Constitutional Court.

(c) Comparative perspectives

4.96. It is useful to consider comparative jurisdictions given the arguments against introducing a general discretion as raised in the *Greyling* case and some respondents reacting to questions in *Issue Paper* 41. In citing a relevant albeit outdated article,[229] the *G* court found that while most jurisdictions allow parties to conclude antenuptial contracts (thereby regulating their matrimonial property regime), most states complement this freedom of contract by certain control mechanisms, some by administrative requirements such as registration and/or court approval (as set out in the antenuptial contract section above) or/and by a judicial discretion that permits the court to vary or discard the contract

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226 These arguments were put forward by the Minister of Justice and Constitutional Development in 'an answering affidavit … to supplement the arguments raised by Mrs G in her founding affidavit and assist the court in establishing the views of the Department on the relief sought by Mrs G and the proposed remedy' (par 17).

227 *G v Minister of Home Affairs* par 62(vii)ff.

228 This was in the form of expert evidence in a joint report authored by Prof Elsje Bonthuys and Dr Anzille Coetzee. See *G v Minister of Home Affairs* paras 12ff.

229 NDC Dillon "The financial consequences of divorce: section 7(3) of the Divorce Act 1979 - a comparative study" (1986) 19 *CILSA* 271. See *G v Minister of Home Affairs* par 62(vii)ff.

thus deviating from the matrimonial property system chosen or imposed by the jurisdiction in question.

(i) England and Wales

4.97. England and Wales's default matrimonial property system creates an entire separation of assets during the subsistence of marriage.[230] However, section 25 of the Matrimonial Causes Act 1973 (as amended) provides that the court can order an equitable distribution upon divorce. Importantly, while courts will consider any marital contract, they have the power to vary it. The section allows a court to take into account the following factors in the division of marital property:

a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
c) the standard of living enjoyed by the family before the breakdown of the marriage;
d) the age of each party to the marriage and the duration of the marriage;
e) any physical or mental disability of either of the parties to the marriage;
f) the contributions which each of the parties made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

4.98. The overall requirement in applying section 25 is to achieve fairness.[231] In *White v White*,[232] an English court held that there is to be no discrimination in financial remedy

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230 W Pintens and M De Jong “Default matrimonial property regimes and the principles of European family law–a European–South African comparison (part 1)” 2015 *TSAR* 363 at 366.

231 *RC v JC* [2020] EWHC 466 (Fam) par 32.

232 *White v White* [2000] UKHL 54; [2001] 1 AC 596.

cases between a husband and wife. In *Miller v Miller: McFarlane v McFarlane*,[233] the House of Lords identified three principles that should guide the court in trying to achieve fairness, namely: - (a) The sharing of matrimonial property generated by the parties during their marriage, (b) Compensation for relationship generated disadvantage and (c) Needs balanced against ability to pay.

(ii) Australia

4.99. In terms of section 79 of the Family Law Act 1975, as amended, a court may make such order "as it considers appropriate" in property settlement proceedings upon divorce. In making such order, the court must be satisfied that it is "just and equitable" to do so, taking into account the following factors:

a) Direct or indirect financial contributions by spouses to the acquisition, conservation or improvement of any of the property of the parties to the marriage.
b) Contributions made by the spouses to the welfare of the family constituted, including any contribution made in the capacity of homemaker or parent.
c) The effect of any proposed order upon the earning capacity of either party to the marriage.
d) Any child support/maintenance paid to the children of the marriage (or child support that must be provided in the future).
e) Any of the factors listed in the maintenance obligation of the Act, in so far as they are relevant.[234]

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233 *Miller v Miller: McFarlane v McFarlane* 2006 UKHL 24; [2006] 2 AC 618.

234 While these factors are numerous, it is helpful to set them out here fully to understand the full range of factors that the court has to take into account. for example: (a) the age and state of health of each of the parties; and (b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment; and (c) whether either party has the care or control of a child of the marriage who has not attained the age of 18 years; and (d) commitments of each of the parties that are necessary to enable the party to support: (i) himself or herself; and (ii) a child or another person that the party has a duty to maintain; and (e) the responsibilities of either party to support any other person; and (f) the eligibility of either party for a pension, allowance or benefit g) where the parties have separated or divorced, a standard of living that in all the circumstances is reasonable; and (h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income; and (ha) the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant; and (j) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party; and (k) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration; and (l) the need to protect a party who wishes to continue that party's role as a parent; and (m) if either party is cohabiting with another person--the financial circumstances relating to the cohabitation; and n) the terms of any order made or proposed to be made under their section 79 (o) any fact or circumstance

(iii) Malawi

4.100. Section 24 of the Malawian Constitution[235] explicitly provides for the protection of women upon dissolution of marriage in general.[236] In particular, section 74 of the Marriage, Divorce and Family Relations Act Chapter 25:01[237] gives the courts a wide discretion to "equitably divide and re-allocate property upon the dissolution of the marriage taking into account: - (a) the income of each spouse; (b) the assets of each spouse; (c) the financial needs of each spouse; (d) the obligations of each spouse; (e) the standard of living of the family during the subsistence of the marriage; (f) the age and health of each spouse; or (g) the direct and indirect contributions made by either spouse, including through the performance of domestic duties".

(d) Questions posed on responses received

4.101. 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?

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

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

(i) A general redistribution discretion

4.104. In response to the first question, most respondents agree that a redistribution discretion should be available in all marriages out of community of property without the accrual system, irrespective of the dates on which these marriages were

which, in the opinion of the court, the justice of the case requires to be taken into account; and (p) the terms of any financial agreement that is binding on the parties to the marriage; and (q) the terms of any Part VIIIAB financial agreement that is binding on a party to the marriage.

235 Republic of Malawi (Constitution) Act, 1994 (No. 20 of 1994).

236 Section 24 (1) -Women have the right to full and equal protection by the law and have the right not to be discriminated against on the basis of their gender or marital status which includes the right -(b) on the dissolution of marriage- (i) to a fair disposition of property that is held jointly with a husband; and (ii) to fair maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and the needs of any children.

237 Marriage, Divorce and Family Relations Act of 2015, assented to on 10 April 2015 and commenced on 3 July 2015.

concluded.[238] More importantly, many respondents suggested that this discretion be extended to all marriages, ie not only those out of community of property. Many of the respondents repeat the reasoning set out in the *G* matter. For the sake of completeness, we set out a summary of related comments for and against the redistribution below.

(ii) Comments in favour of a redistribution discretion

4.105. *The significance of the delay between signing the antenuptial contract and the divorce:* The WLC highlights that circumstances change in line with the reality from the time the antenuptial contract was entered and concluded. The redistribution discretion is an opportunity to ensure that vulnerable spouses (mostly women) who are prejudiced have an opportunity to challenge previous decisions in light of their current realities and status.

4.106. *The existence and appropriateness of court discretion in family law matters generally:* The LRC highlights that South African courts already exercise discretion in family law matters, for example, in the determination of maintenance and in decisions on parental rights and responsibilities in respect of children. The LRC believe that this discretion should start off from a presumption of equal distribution because the parties entered into marriage in the expectation of sharing material and non-material benefits.

4.107. *Differentiation between parties solely based on a date, and type of marriage:* Some respondents argue that the current limited availability of the discretion to redistribute is unconstitutional because it is available in some marriages, but not in others.[239] Although Miller du Toit Cloete and Family Law Forum agree that a redistribution discretion be available in such cases, they caution that – from a contractual perspective – concerns and issues will be raised.

4.108. *The reality of continued gender inequality in South Africa:* Most respondents recognised that section 7(3) disproportionately impacts women.[240] Most respondents

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238 Cape Bar Council, Sandra van Standen, Legal Aid SA, CRL Commission, Karen Botha, Lekota Motlanthe, Miller du Toit Cloete and Family Law Forum, Susan Wagenaar, MPL Network, Pitse Mamabolo, UUCSA, Centre for Human Rights and LRC.

239 LRC and Legal Aid South Africa.

240 For an interesting debate about the extent of gender inequality in South Africa, see the following notes in the *De Rebus* (a legal practitioner's magazine): Alick Costa "The antenuptial contract – incorporating or excluding accrual resulting in section 7(3) of the Divorce Act being applicable" (2023) March *DR* 12; Clement Marumoagae "Is the divorce court's discretion to transfer assets as per the Divorce Act unconstitutional? 2022 (Nov)

also recognise that – although progress has been made in relation to gender equality – women are still likely to earn less, and engage in housekeeping and child rearing when compared with men.

(iii) Commentary against a redistribution discretion

4.109. A minority of the respondents are opposed to a redistribution discretion. These respondents focus on the need to respect parties' freedom of contract[241] and the protection of creditors.[242] Mabapa suggests that if a notary must explain the implications of choices when finalising the antenuptial contracts to both parties, then parties would have "knowledge of what they are getting into".[243]

4.110. In the context of religious (Muslim) marriages, most respondents are opposed to a redistribution discretion.[244] The respondents submit that the Islamic law of ownership must apply and decisions must be reached based on the marital contract. The respondents' further state that they are concerned about judicial overreach and the need to set a limit to the judiciary's powers to intervene. They suggest that any redistribution should have its basis as the contract, which was initially entered into taking into account changes mutually agreed to by the parties to the marriage. Furthermore, they argue that any discretion to redistribute will contradict principles regarding ownership within the Islamic context.

(iv) Factors to be taken into account

4.111. *Issue Paper* 41 asked the question whether, if a redistribution discretion was appropriate, what (if any) factors the court should consider in the exercise of its discretion.

4.112. Some respondents[245] are of the view that the wording of sections 7(4) and (5) is sufficiently wide to achieve the objective of the legislature: that a just and equitable redistribution can be made when parties are married out of community of property

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DR 18; and Alick Costa Are women still disadvantaged when it comes to s 7(3)(a) of the Divorce Act?" (2023) May *DR* 26.

241 Keneilwe Mabapa suggests that the parties who get married out of community of property have an option and they should be held accountable for the choices they make.

242 BASA.

243 See proposals in the ANC section above.

244 AMAL, Islamic Forum Azaadville and Sunni Ulama Gauteng.

245 Cape Bar Council, Karen Botha, Sandra van Standen, Pitse Mamabolo, Keneilwe Mabapa.

(excluding the accrual) and the one spouse has either directly or indirectly contributed to the maintenance or increase of the estate of the other spouse during the marriage. A court is enjoined by section 7(3), as read with sections 7(4) and (5), to take account of several factors, and our courts have grappled with the application of these factors over the years. They point out that section 7(5)(d) contains a broad general discretion allowing the court to consider "any other factor" when determining distributions.

4.113. The Cape Bar Council supports introducing additional distribution criteria, similar to section 25 of the English and Wales statute (the Marital Causes Act) such as:

a) the duration of the marriage;[246]
b) the assets brought into the marriage by the spouses;[247]
c) the existing or prospective means of the spouses;[248]
d) he financial needs and obligations of the spouses;[249]
e) the best interests of children;[250]
f) the need for a clean break between the spouses; and
g) special circumstances which may arise in customary marriages.

4.114. The WLC submits that the following factors need to be considered in this context: unpaid care work during the duration of the marriage or domestic relationship, career growth and potential opportunities available for the most vulnerable spouse in the marriage. As a result, the respondent further submits that courts should consider factors such as systemic forms of discrimination that may be present within society as well as the family life of the parties before it. These forms of discrimination are often ingrained in our everyday life and present barriers to women to advance outside of their homes, make financial contributions, and often disregard the contributions that are made because of existing stereotypes.

(v) Non-financial contributions: child-rearing and housekeeping

4.115. Another question that was asked was whether non-financial contributions, like childrearing and housekeeping should be considered when deciding a redistribution order. There is overwhelming support that non-financial contributions should be

246 Supported by LRC, Legal aid SA and Miller du Toit Cloete and Family Law Forum.

247 Supported by LRC, Legal aid SA and Miller du Toit Cloete and Family Law Forum.

248 Supported by LRC and Miller du Toit Cloete and Family Law Forum.

249 Supported by LRC.

250 Supported by Legal Aid SA.

considered when deciding a redistribution order.[251] The MPL Network submits that courts must consider the division of "social reproductive" work in the home (the responsibility for which overwhelmingly falls on women), including childcare and housework. Further, it suggests that courts must consider the earning capacity of both spouses, especially in cases where the earning capacity of a spouse has been stilted in the course of a marriage (for example, where one partner takes on childcare responsibilities for a number of years or where a husband actively frustrates his wife's attempts to study or gain work experience). Respondents emphasise the role of women in making these contributions and, while indispensable to society, the value of unpaid care work is not recognised by dominant conceptions of exchange and market value.

4.116. The WLC submits that, in our family law and patriarchal society, historically little to no value has been attached to the work or contribution of women in households. The WLC suggest that women are unable to meet threshold requirements set for financial contributions towards the growth of a household's wealth, their contributions are not always "financial" and very often they carry the double burden of working both inside as well as outside of the house while not matching their partner's financial position.

4.117. In relying on General Comment 6 of the Maputo Protocol, the Centre for Human Rights, the University of Pretoria, agrees and points out that one of the main reasons for inequitable sharing of property identified by General Comment No. 6 is the pervasive disregard of the woman's contributions during the subsistence of the marriage. It urges state parties therefore to ensure that legislation and institutions that administer divorce and separation recognise the many forms of women's contribution including development of land and property through unpaid labour and child care.

4.118. Pitse Mamabolo submits that the stay at home spouse includes a house-husband because we have learned from other countries that families are becoming hybrid. Lisa Ngobeni points out the plight of women in rural areas who toil the fields for food to raise children while husbands are in the mines and when they get divorced they are left with nothing.

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[251] Miller du Toit Cloete and Family Law Forum, Karen Botha, Keneilwe Mbapa, Cape Bar Council MPL Network, Sandra van Standen, Legal Aid South Africa, Susan Wagenaar, Teboho Hlapolsa, Pitse Mamabolo, Centre for Human Rights, University of Pretoria, Lekota Motlanthe, CRL Commission, Miriam Tayob, Lindokhuhle Kheswa, Muhamed Fazel Bulbulia, Premier Mpumalanga and LRC.

4.119. The Cape Bar Council reminds us that our courts have long recognised the value of non-financial contributions and, in fact, recognises such contributions.[252] The respondent submits that there is no reason why courts would not consider such contributions in future. Further, they argue that to exclude non-financial contributions would discriminate on the basis of gender and would offend the constitutional values entrenched in sections 9 (equality) and 10 (dignity) of the Constitution.

4.120. According to Sunni Ulama Council Gauteng, non-financial contributions are not comparable. It suggests that it is difficult to compare child-bearing to the father bearing the brunt of financial child support. It is their view that contributions raised in this context cannot be qualified objectively. This should be left entirely to the contract entered into by the spouses. The UUCSA submits that non-financial contributions should only be taken into account if it is proven that Islamic Law permits such a contribution in a particular circumstance. AMAL's view is that non-financial contributions should not be considered when deciding a redistribution order.

(e) Evaluation

4.121. Given the overwhelming support for a general discretion, and the motivation for this review, being gender substantive equality, the Commission recommends that, first, the courts be provided with a general discretion in divorce proceedings in marriages out of community without accrual. We also pose an additional question here in the light of the respondents' views: Should this general discretion be extended notwithstanding the matrimonial property regime?

4.122. We recognise that the Constitutional Court is seized with the first issue in the matter of *G v Minister of Home Affairs* at the date of writing, and their decision may be different from the recommendations of the Commission. However, these views may all be taken into account by the legislature in deciding any amendment to the Divorce Act to ameliorate the position of vulnerable spouses.

4.123. We heed some respondents' cautions that, if such a wide discretion is contemplated, it should be fettered by factors that the court must take into account in the

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252 The Cape Bar Council refers the SALRC to *Beaumont v Beaumont* 1987 (1) SA 967 (A) and Others; *Kritzinger v Kritzinger* 1989 (1) SA 67 (A); *Katz v Katz* 1989 (3) SA 1 (A); *Wijker v Wijker* 1993 (4) SA 720 (A).

exercise of its discretion. We set out our proposal for these factors in the proposal section below.

4.124. The Commission recognises that non-financial contributions are already accounted for in section 7(4) of the Divorce Act and case law, but suggest that the courts be explicitly directed to such "indirect" contributions as a factor to take into consideration (as provided for in the existing discretion in the Divorce Act and the Malawian legislation).

4.125. The Commission is of the view that the spectre of increased litigation and the creation of uncertainty if the court was given discretion is more apparent than real. Lessons can be learnt from the public policy debates in the commercial contract realm. The Constitutional Court's recognition that public policy may play a part in considering the enforceability of a contract[253] has not resulted in a flood of litigation nor in uncertainty. The fact that courts have been exercising discretion in other areas of family law for many years now also should alleviate any concern of the parties.

4.126. In terms of the proposals below, we ask respondents to consider whether the general discretion should be available to parties where they are in a marriage out of community of property without accrual, or indeed in all marriages, regardless of the matrimonial property regime. In terms of the latter proposal, this will mean that there is no need for a special forfeiture of benefits provision. Courts will need to consider the circumstances around the finalisation of any matrimonial property regime in exercising this discretion, including the finalisation of antenuptial contracts. The forfeiture of benefits provision is dealt with in more detail in the next section but a proposal incorporating this section is set out at par 4.131 below.

(f) Proposals

4.127. The Commission invites respondents to consider the options set out below and comment on any related aspects raised in relation to a general discretion for marriages out of community but without accrual, or/and the general discretion for all marriages.

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253 *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* (CCT109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (17 June 2020).

Option 1

4.128. Adopt the current wording of section 7(3) of the Divorce Act to direct the court's discretion for all marriages out of community without accrual. In other words, a court may redistribute assets by taking into account the existing means and obligations of the parties (including donations), any forfeiture orders, and any other factor to ensure that the distribution is just and equitable.

Option 2

4.129. Adopt specific factors that a court must take into account as suggested by respondents and with the insight provided by comparative jurisdictions for marriages out of community of property without accrual. These factors should include:

a) the duration of the marriage;
b) the assets brought into the marriage by the spouses;
c) the existing or prospective means of the spouses;
d) the financial needs and obligations of the spouses;
e) the direct and indirect contributions made by either spouse, including through the performance of domestic duties and contributions made to the earning capacity of the other spouse;[254]
f) the dissipation of assets in the marriage intended to prejudice the other spouse(s) pending the outcome of the divorce proceedings;
g) any forfeiture of benefits asked for and ordered.
h) the best interests of children;
i) the need for accommodation in the matrimonial home;[255]
j) the need for a clean break between the spouses; and
k) special circumstances which may arise in customary marriages.

Option 3

4.130. To adopt a general discretion to deviate from the applicable matrimonial property regime in all marriages (ie not just for marriages out of community of property without accrual). This option would mean that all the above factors in option 2 will be taken into account, but with the addition of the following factors:

(a) Whether the parties entered into an antenuptial contract, and the circumstances of the finalisation of that contract. These include all those factors

254 See Chapter 9 paragraph 9.84 below. (NB not necessary if respondents count a career asset as property).

255 See Chapter 9 paragraphs 9.115 and 9.116 below relating to the matrimonial home.

listed in the antenuptial contracts section above, included here for ease of reference:

- The terms of the agreement;
- Whether the agreement was concluded within a calendar month of the wedding;
- The time which has elapsed since the agreement was concluded;
- Failure by a spouse to disclose material financial information (information which would materially affect the distribution of assets);
- False declaration of financial information by a spouse at the time of the conclusion of the contract;
- Failure to obtain independent legal advice before conclusion of the antenuptial contract;
- whether a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable, including conduct in respect of the conclusion of the antenuptial contract during the relationship and leading to the breakdown of the relationship during and leading up to the divorce or separation;
- Whether, at the time of its conclusion, the terms of the agreement were substantially unfair;
- whether the agreement became unfair or is likely to lead to severe hardship as a result of any changes in circumstances since it was made (whether or not those changes were foreseen by the parties);
- Any other factor which in the opinion of the court is relevant.

(b) Any substantial misconduct

(c) Any failure to disclose information that would have a substantial effect on the division of the assets

- during the subsistence of the marriage
- at the time of divorce[256]

(d) The circumstances leading to the breakdown of the marriage.

4.131. If option 3 is preferred, then it would obviate the need for a forfeiture of benefits provision with the result that a forfeiture of benefits order need not be a factor taken into account in the exercise of a general discretion to deviate from the chosen matrimonial property regime.

256 See paragraph 9.45.

2 Forfeiture of benefits in marriages in community of property and marriages out of community of property with accrual

(a) Background

4.132. The principle of forfeiture of benefits was part of South Africa's legal system prior to the promulgation of the Divorce Act.[257] A forfeiture order was based on the principle that no one ought to benefit financially from a marriage that he/she wrecked.[258] Under common law, the fault principle was derived from the grounds for divorce being adultery and malicious desertion.[259] This same fault principle was used for forfeiture of benefits.[260]

4.133. 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.

4.134. According to Sibisi,[261] the purpose of forfeiture is to prevent undue benefit to one spouse, but Heaton argues that:[262]

> 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

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257 C Marumoagae "The regime of forfeiture of patrimonial benefits in South Africa and a critical analysis of the concept of unduly benefited" 2014 *De Jure* 85.

258 S Sibisi "Forfeiture of Patrimonial Benefits and the Dissolution of Marriage through Death: *Monyepao v Ledwaba* (1368/18) [2020] ZASCA 54 (27 May 2020)" (2022) 25 *PELJ* 1.

259 Marumoagae *De Jure* 2014 at 86. For the history of this concept at common law see Sibisi *Obiter* 2022 at p 73; E Bonthuys "The rule that a spouse cannot forfeit at divorce what he or she has contributed to the marriage: An argument for change" (2014) *SALJ* 442; Marumoagae *De Jure* (2014) 76-78.

260 C Marumoagae "Factors justifying forfeiture of patrimonial benefit orders" (2015) *Obiter* 232.

261 Sibisi *PELJ* 2022. See also Heaton and Kruger *South African Family Law* (2015) 135.

262 Heaton *SAJHR* 2005 at 557-558.

generally own and acquire fewer assets and therefore contribute less matrimonial property than husbands do.

4.135. The reason for this criticism is the interpretation by the courts[263] that a spouse cannot be ordered to forfeit wealth which he or she has brought into the marriage and the result is that forfeiture is generally ordered against wives, but not against husbands.[264] Bonthuys[265] explains the issue this way: "South African courts have interpreted this remedy so as to limit forfeiture to the spouse who contributed least to the joint estate or whose separate estate shows the smaller accrual, while the spouse who had made the larger financial contribution to the marriage is protected from forfeiture." A party claiming forfeiture must "plead the necessary facts to support that claim and formulate a proper prayer in the pleadings to define the nature of the relief sought".[266] Thus the *onus* is on the applicant for a forfeiture order to prove the nature and the ambit of the benefit to be forfeited, and in so doing the applicant must prove the extent to which it is an undue benefit.[267]

4.136. Another question is whether the factors which are considered in the decision to order forfeiture themselves amount to gender discrimination.[268] In the case of *MC v JC*,[269] the Court requested, in the course of the hearing, argument on the constitutionality of the forfeiture section based on the ground of substantial misconduct. Counsel for the wife argued that the right to dignity as contained in section 10 of the Constitution entails the right not to be punished for actions that are not unlawful.[270] Such punishment would

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263 SALRC *Issue Paper* 41 at 4.28. *Botha v Botha* [2006] ZASCA 6; 2006 4 SA 144 (SCA), *JW v SW* 2011 1 SA 545 (GNP), *Wijker v Wijker* 1993 4 SA 720 (A*), Swanepoel v Swanepoel* All SA 1996 (3) 444.

264 Marumogae *De Jure* 2014 at 10; Bonthuys *SALJ* 2014 at 456 argues 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 usually made by wives contributes to the disproportionate impact of forfeiture orders on women. See also *BS v PS* 2018 (4) SA 400 (SCA) where the SCA found that the High Court erred in placing all the blame on the wife due to the alleged affair.

265 Bonthuys 2014 *SALJ* 439-460.

266 *Koza v Koza* 1982 (3) SA 462 (T) at 465H.

267 *Engelbrecht v Engelbrecht supra*; *V v V* (3389/2017) [2020] ZAGPPHC 154 (4 March 2020).

268 *Issue Paper* 41 at 17.

269 *MC v JC* 2016 (2) SA 227 (GP).

270 *MC v JC* at par [33].

constitute an infringement into a person's capacity to make choices.[271] The right to dignity implies that a person's capacity to make choices must be protected from unwarranted intrusions and thus also the freedom to contract. He further argued that the section may infringe the rights to privacy and property contained in sections 14 and 25 of the Constitution respectively. The right to privacy goes against exposing and scrutinising the private affairs of a person that is legally neutral for the sake of making a moral judgment. On the other hand, the right to property provides that no law may permit arbitrary deprivation of property. In this case, it could be argued that section 9(1) allows the arbitrary deprivation of the wife's property. The reproductive rights of a wife who had secretly terminated her pregnancy may be violated if her conduct is viewed as a ground for a forfeiture order.[272] Furthermore, a spouse's right to dignity may be violated if he or she is compelled to remain in an unhappy marriage for fear of losing patrimonial benefits. Moreover, if the unhappy marriage results in violence, the spouse's right to freedom and security of the person would be violated.[273] The Court held, by way of an *obiter dictum*, that section 9(1) might infringe the right to equality. This was because it placed the party who committed substantial misconduct in an unfavourable position when it came to distribution of the patrimonial benefits of the marriage. In this regard, the Court referred with approval to the decision in *DE v RH.*[274] As a consequence of counsel failing to follow certain filing procedures, the Court did not rule on the constitutionality of section 9(1). The Court determined, however, that the wife should not forfeit the assets, since she had contributed to the marriage.[275]

4.137. Referring to the court's ruling on the constitutionality of the forfeiture order in *MC v JC*,[276] Carnelley[277] noted that substantial misconduct could possibly contradict several provisions in the Constitution.[278] She reveals that the right to equal treatment is at risk because, in the divorce proceedings, one of the parties, particularly the spouse

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271 *MC v JC* at par [34]).

272 *MC v JC* at par [32.2].

273 *MC v JC* at par [32.3].

274 *DE v RH* 2015 (5) SA 83 (CC).

275 A subsequent judgment *P.I.L v P.E.L* (5345/2017) [2020] ZAFSHC 44 (27 February 2020) that refers to *MCv JC* reiterates that this factor must be treated carefully since, as the court says in relation to misconduct as a factor, '[t]he court must uphold and apply the law and not make moral or emotional judgments' (see par 34).

276 *MC v JC* 2016.

277 Carnelley M "The impact of the abolition of the third party delictual claim for adultery by the Constitutional Court in *DE v RH* (CCT 182/14) [2015] ZACC 18" (Vol 1) [2016] *SPECJU* 1.

278 Carnelley *SPECJU* 2016 at p 11.

who committed substantial misconduct, is placed in a weakened bargaining position during the settlement negotiations and at trial.[279] What this entails is that the spouse at fault or the party that is found guilty of substantial misconduct does not have the right to negotiate over the distribution of the assets or to equal treatment of the law as envisaged in section 9 of the Constitution.[280]

(b) Comments: Issue Paper 41

4.138. *Issue Paper* 41 asked whether forfeiture orders should remain available in marriages in community of property and in marriages out of community of property subject to the accrual system. Some respondents[281] agree that forfeiture orders should remain available but it must be subject to the onus of proving that, absent a forfeiture order, the other party will be unduly benefited, with the onus remaining on the spouse seeking a forfeiture order. The respondents further state that the forfeiture order is a necessary tool to ensure that, not only is the integrity of the institution of marriage maintained, it can also be utilised as a necessary tool to ensure that individuals do not abuse the institution of marriage to bring about inappropriate gain. AMAL also agree that forfeiture orders should remain available in marriages in community of property and in marriages out of community of property subject to the accrual system. On the other hand, Miller du Toit Cloete and Family Law Forum submit that forfeiture is rarely claimed, and it is even rarer to prove a forfeiture claim.

4.139. The Sunni Ulama Council Gauteng and Islamic Forum Azaadville agree that there should be no forfeiture orders available. The respondents, however, accept that claims arising from the marriage contract should be fulfilled.

4.140. Following up on the previous question, what factors should courts consider when deciding whether or not to order forfeiture of benefits? Three respondents prefer the factors set out above in the discussion on redistribution of assets in terms of section 7(3) of the Divorce Act.[282] AMAL states that all relevant factors should be taken into account, which include the non-financial contribution to the household, child-caring and other time spent in the upkeep and development of the household.

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279 Carnelley *SPECJU* 2016 at p 11

280 Carnelley *SPECJU* 2016 at p 11.

281 Adv Sandra van Standen, CRL Commission and BASA.

282 Sandra van Standen, CRL Commission, Karen Botha, BASA, LRC and Legal Aid SA.

4.141. The Centre for Human Rights, University of Pretoria agrees with the issue paper's assertion that women are historically disadvantaged by forfeiture. The respondent indicates that General Comment 6 of the Maputo Protocol alludes to the financial contribution of spouses by recommending that states should ensure that the laws define marital property in clear terms to include any property acquired during the marriage by direct or indirect efforts by one or both spouses. The respondent states that the inclusion of the term "indirect contribution" recognises the efforts by a spouse despite them being non-financial or the outright financial aspects being less than the other spouse. According to the respondent, member states should put in place mechanisms where threats of dispossession of marital property should be made punishable by law.

4.142. Miller du Toit Cloete and Family Law Forum advise that the mere fact that one spouse contributes less to the financial wealth of the marriage should not be a source of a forfeiture claim. The LRC submits that the Divorce Act does not state that the spouse who contributes more to the joint estate or whose estate accrues more than the other, may not forfeit a percentage of that accrual or share in the joint estate, on the grounds that he/she has been unduly benefitted. The respondent further submits that unfortunately, a judicial practice has developed whereby forfeiture orders are only granted against the spouse whose estate shows the smaller accrual or who contributed the least to the joint estate (generally the woman). According to the LRC, this is untenable.

4.143. Legal Aid SA believes that forfeiture should cover either financial or non-financial contributions. Karen Botha disagrees that forfeiture should only be available against the spouse who contributed less to the financial wealth of the marriage. According to her, this amounts to discrimination.[283] The CRL Commission submits that forfeiture should be available to the spouse whose conduct led to the breakdown of the marriage.

4.144. *Issue Paper* 41 asked if the separate remedies of forfeiture of benefits on the one hand, and redistribution orders on the other hand, should be replaced with a single redistributive discretion at divorce based on fairness. The LRC submits that substantive equality requires the extension of redistribution powers to all marriages with statutory guidelines for a fairer division of assets and support to realise substantive equality. The

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283 She is supported by AMAL and Sunni Ulama Council Gauteng**.**

respondent further submits that forfeiture of benefits is an antiquated remedy and should be replaced by a single redistributive discretion based on guiding principles. Sandra van Standen and Legal Aid SA say that it is best to keep them separate as they are now.

4.145. Miller du Toit Cloete and Family Law Forum state that the solution lies in the creation of a single redistribution discretion upon divorce, based on equity and taking into account the factors that have been referred to above. This would take into account the issues and concerns raised by spouses. It should, however, remain a no-fault divorce system. Forfeiture in practice does not apply often and is, in any event, a punishing concept, difficult to prove. With a discretion that weighs all the factors, a just and equitable award may be made. Other respondents[284] submit that all current factors considered in section 7(3) and in respect of forfeiture could be used.

(c) Evaluation

4.146. Respondents indicate that the forfeiture of benefits provision exists to serve an important purpose. That purpose is to ensure that a spouse does not abuse the institution of marriage to bring about inappropriate gain. However, the current nature of what can be forfeited may be problematic. As pointed out by respondents, a general redistribution discretion given to courts could cut the Gordian knot. If the factors currently set out in section 9 of the Divorce Act were inserted into a court's general discretion to redistribute, this could resolve some shortcomings and problems currently experienced such as:

(a) Respondents indicate that the claim is rarely made and/or proved.

(b) In reality, it is an empty remedy given that one can only forfeit the "benefits" of the marriage. Thus, courts have found that it applies only to those who contributed the least to the joint estate or whose separate estate shows the smaller accrual, usually the wife's. This effectively means that the spouse who made the larger financial contribution to the marriage is protected from forfeiture.[285]

4.147. Some respondents feared that the introduction of a general discretion will change the principle of a no-fault divorce. This is not the intention: substantial misconduct

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284 Karen Botha and CRL Commission.

285 E Bonthuys "The rule that a spouse cannot forfeit at divorce what he or she has contributed to the marriage: An argument for change" South African Law Journal 2014 (131):2 439 – 460.

will be but one of the many factors to be taken into account by courts exercising their general discretion.

(d) Proposals

The Commission provisionally recommends the following:

Option 1

4.148. The court be given a general discretion (as set out in paragraphs 4.128-4.130 above) which will apply to all marriages irrespective of dates on which the marriages were concluded and irrespective of the matrimonial property systems that were concluded. Forfeiture of benefits will therefore be subsumed into the general discretion power and no longer exist as a separate remedy.

Option 2

4.149. If the general discretion is not adopted:

Part A: Section 9 continues to operate as it is, but with an added proviso: that forfeiture is available irrespective of the financial contributions of the spouses. In other words, the spouse who made the greatest financial contribution can forfeit on the same basis as the spouse who made the smaller financial contribution.

Part B: In marriages subject to the accrual system, the factors set out under the antenuptial contract section at paragraph 4.71 must be added to the existing factors in section 9 in determining whether forfeiture should be ordered.

C Changing the matrimonial property system during the subsistence of a marriage

1 Background

(a) The section 21 procedure

4.150. Section 21 of the Matrimonial Property Act determines that spouses, irrespective of the date of their marriages and their matrimonial property regimes, may apply jointly to court for leave to change their matrimonial property regime after their

marriage.[286] They must set out the proposed new system in a notarial contract, which will be approved by the court if the couple can show sound reasons for requesting the change.[287]

4.151. All creditors of the spouses as well as anyone else who could be adversely affected by the new matrimonial system should receive notice of the proposed change.[288] The application should show why creditors will not be prejudiced and the proposed contract must expressly protect the rights of existing creditors.

4.152. If a court is satisfied that the requirements are met, it may order the parties to enter into a notarial contract by which their future matrimonial property system is regulated on such conditions as the court may think fit.[289]

4.153. It is currently not clear whether the court can authorise a change of the matrimonial property system with retroactive effect.[290] In *Ex Parte Krös*,[291] the Court applied the change of regime retrospectively whereas in *Ex parte Oosthuizen*,[292] and *Ex Parte Burger,*[293] it can be seen that this position will only apply to the future matrimonial property regimes of the parties and will not be effective retrospectively. The parties also attempted to change the matrimonial property regime without using the mechanisms in the Matrimonial Property Act.[294]

4.154. Guidelines for an application in terms of section 21(1) of the Matrimonial Property Act were set out in *Ex Parte Lourens,*[295] as follows:

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286 Barbara Stark and Jacqueline Heaton *Routledge Handbook of International Family Law* (2019).

287 Section 21(1) (a). See also *Ex Parte Kros* 1986 (1) SA 642 (NC).

288 Section 21(1) (b) and (c).See also *LNM v MMM* (2020/11024) [2021] ZAGPJHC 563 (11 June 2021).

289 Heaton in The Law of Divorce 67 – 69.

290 Heaton in The Law of Divorce 67 – 69.

291 *Ex Parte Kros* 1986 (1) SA 642 (NC).

292 *Ex Parte Oosthuizen* 1990 (4) SA 15 (E). See also *Ex parte Coertzen* 1986 2 SA 108 (O).

293 *Ex Parte Burger* 1995 1 SA 140 (D).

294 E Viljoen “Huweliksvoorwaardekontrakte en die effek van die verandering van die huweliksgoederebedeling na huweliksluiting” (2019) mini-dissertation for an LLM, NWU at 42.

295 *Ex Parte Lourens and Four Other Similar Cases* 1986 (2) SA 291(C). Also applied in *Ex Parte Le Roux; Ex Parte Von Berg* 1990 (2) SA 70 (O), *Ex Parte Madikiza* 1995 4 SA 433 (Tk).

(a) Notice of the applications must be given to the Registrar of Deeds in terms of section 97 (1) of the Deeds Registries Act 47 of 1937.

(b) The draft notarial contract which it is proposed to register must be annexed to the application.

(c) Notice of intention to make the application must also be published in the *Government Gazette* and one English and one Afrikaans newspaper at least two weeks before the date on which the application is heard.

(d) The date upon which the application is heard must be specified in the published notice, setting out what steps an objector to the order sought must take and where the application and draft contract can be inspected.

(e) In addition, at least two weeks prior to the application, notice must be given by certified post to all creditors, whether actual or contingent. A list of such creditors, verified by affidavit, shall be included in the application and proof that such notice has been given to them must be provided by an affidavit to which are annexed the relevant certificates of posting.

(f) Sufficient information regarding the assets and liabilities of the couple concerned must be set out in the application to enable the Court to judge whether or not there are sound reasons for the proposed change and whether or not any other person will be prejudiced by the proposed change.

4.155. Informal changes to their property regime, even if both spouses agree in writing, will not be enforced.[296]

4.156. The Court stated the following with regard to sound reasons:[297]

> Sound reasons cannot be defined exhaustively and in advance. However, care must be taken to motivate fully the proposed change in the existing matrimonial property system.

4.157. In *Ex Parte Engelbrecht*,[298] the Court held that "sound reasons" refer to the ordinary grammatical meaning of the words and must be convincing, valid and based on reality. Evidence as to the parties' intention and agreement concerning the matrimonial property regime reached before their marriage is relevant and admissible. According to the Court, not to admit such evidence would amount to preventing a party from furnishing

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296 *Honey v Honey* 1992 (3) SA 609 (W); *JW v CW* 2012 (2) SA 529 (NC); *EA v EC* [2012] ZACPJHC 219 (25 October 2012); *SB v RB* 2014 JDR 0818 (WCC)).

297 *Ex Parte Lourens and Four Other Similar Cases* 293H.

298 *Ex Parte Engelbrecht* 1986 (2) SA 158 (NC).

sound reasons to the court as to why the matrimonial property regime should be altered.[299] This effectively means the court cannot adopt a blanket approach and must take into account the circumstances of each case.

4.158. In *Ex Parte Kros*,[300] the Court found that the reasons advanced by the parties were sufficient to allow a change of the matrimonial property regime. In this case, spouses averred that they had been ignorant about the consequences of marriage in community of property when they entered into marriage. They only realised after their marriage that a marriage out of community of property regime better suited their needs. Furthermore, there had been a substantial change in the couple's financial position.[301]

4.159. Under the Recognition of Customary Marriages Act, the default position for customary marriages became "in community of property" instead of under customary law. As noted in Chapter 5,[302] couples who entered into a customary marriage before the date of the Act had an opportunity to apply to the court for leave to change their marital property system.[303] The court may grant permission for a change of property regime if it is satisfied that there are sound reasons for the change, that sufficient written notice of the change has been given to all creditors, and that no other person will be prejudiced by the change.[304] In this case, there was no notarial option, even for a limited time period.

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299 The parties produced evidence to show that the wife was being hampered by her limited contractual capacity in the administration of the assets bequeathed to her and her children by her deceased husband, and both applicants had kept and administered their assets separately.

300 *Ex Parte Kros* 1986 (1) SA 642 (NC).

301 The court held that a sound reason would be where one of the spouses starts a business. In the event of liquidation of the company, especially if it were a sole proprietorship, the spouses' joint assets would be at stake.

302 Discussion of customary marriages below.

303 If the marriage is polygamous, all of the spouses (and all other persons with a sufficient interest in the matter) must be joined in the proceeding.

304 See section 7(4) of the Recognition of Customary Marriages Act. As noted above, one difference is that section 21(1) of the Matrimonial Property Act requires sufficient notice of the proposed change to "all the creditors of the spouses", whilst section 7(4) of the Recognition of Customary Marriages Act requires sufficient written notice of the proposed changes to "all creditors of the spouse for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the Gazette". Heaton *SA Family Law* 214 – 215. See also the discussion on customary marriages at Chapter 5 below.

4.160. Informal changes to their property regime, even if both spouses agree in writing, will not be enforced.[305] This can have inequitable consequences, especially when spouses act and rely upon inaccurate advice from lawyers who are themselves unaware of the provisions of the Matrimonial Property Act.[306] For instance, in *Honey v Honey,*[307] the spouses attempted to change their proprietary system by way of a written contract which was notarially executed.[308] The couple in *SB v RB*[309] received legal advice that they could only change their matrimonial property regime by divorcing and remarrying without an antenuptial contract.

(b) Universal partnerships as mechanisms to amend the matrimonial property regime

4.161. One of the ways in which spouses (typically those who were married out of community of property without the accrual system) attempt to change their matrimonial property regime, or at least to escape from its most drastic consequences,[310] is to rely on the existence of a universal partnership contract between them to claim a portion of the proceeds of the partnership assets at divorce. Usually, the person alleging such a partnership is the financially weaker spouse – the wife – who would otherwise be left seriously disadvantaged at the end of the marriage.

4.162. There are two forms of universal partnership that are relevant in this context. The first one is the *societas universorum bonorum* – which includes both existing and future property and both financial and non-financial goods and contributions (the more expansive form of partnership). The narrower form of partnership, called the *societas quae ex quaestu veniunt*, includes all property and profits that were acquired during the subsistence of the partnership. This narrower form of partnership is usually entered into in respect of particular business ventures between the spouses, for instance, where spouses run a dairy business, a café or an estate agency business together.[311]

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305 SALRC *Issue Paper* 41 at par 4.2. *Honey v Honey* 1992 (3) SA 609 (W); *JW v CW* 2012 (2) SA 529 (NC); *EA v EC* [2012] ZACPJHC 219 (25 October 2012); *SB v RB* 2014 JDR 0818 (WCC)).

306 SALRC *Issue Paper* 41 at par 4.3.

307 *Honey v Honey* 992 (3) SA 609 (W).

308 SALRC *Issue Paper* 41 at par 4.3.

309 *SB v RB* 2014 ZAWCHC 56 (16 April 2014).

310 Specifically the lack of a general discretion to redistribute assets at divorce in terms of section 7(3) of the Divorce Act. See par 4.92 above.

311 Elsje Bonthuys "Exploring Universal Partnerships and Putative Marriages as Tools for Awarding Partnership Property in Contemporary Family Law" (2016 (19) *PELJ* 4.

4.163. In *Ponelat v Schrepfer*,[312] the Supreme Court of Appeal indicated that universal partnerships could be formed between people who are married to one another,[313] although this case did not involve a married couple. Courts have accepted that universal partnerships which involve specific businesses could be formed between married couples in older cases.[314]

4.164. However, since the late 1980s, the Appellate Division started to dismiss claims by spouses who were married out of community of property without accrual that they had entered into the broader partnership *universorum bonorum.* These cases were dismissed on the basis that no partnership agreements were proven.[315] More recent cases have ruled that partnerships *universorum bonorum* could not be entered into in these marriages. In *JW v CW*,[316] the alleged partnership agreement involved the husband's farming business. Apart from the fact that the business should have been characterised by the narrower partnership *quae ex quaestu veniunt*, the Court held that the claim was for a *societas universorum bonorum.* As such, this type of partnership agreement could not be allowed, because it amounted to an informal variation of the antenuptial contract, which was not allowed in terms of section 21 of the Matrimonial Property Act. The same reasoning was followed in two subsequent cases.[317] In *RD v TD*,[318] however, the Court held that where the spouse was not relying on a partnership *universorum bonorum*, but the narrower partnership based on a bona fide business venture between them, this reasoning did not preclude sharing of business assets based on a *societas quae ex quaestu veniunt*.

4.165. Thus, the current legal position appears to be that spouses may enter into business partnerships together and may claim a portion of the partnership proceeds on the basis of a universal partnership agreement in the narrower sense if they conducted a commercial enterprise together. However, spouses may not rely on a partnership

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312 *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA).

313 *Ponelat v Schrepfer* at par [22].

314 *Fink v Fink* 1945 WLD 226. *Ex Parte Sutherland* 1968 3 SA 511 (W); *Mühlmann v Mühlmann* 1985 3 SA 102 (A).

315 *Kritzinger v Kritzinger* 1989 1 SA 67 (A); *Katz v Katz* 1989 3 SA 1 (A).

316 *JW v CW* 2012 2 SA 529 (NCK).

317 *EA v EC* 2012 ZAGPJHC 219 (25 October 2012); SB v RB 2014 ZAWCHC 56 (16 April 2014).

318 *RD v T*D 2014 4 SA 200 (GP).

universorum bonorum as an informal way to escape the consequences of their chosen matrimonial property system.

4.166. A related question is whether the existence of a Muslim marriage contract would preclude a Muslim spouse (usually a wife) from relying on a universal partnership. It could be argued that if a Muslim marriage contract stipulates separate estates for the spouses, this would conflict with a tacit universal partnership agreement, which involves sharing of financial benefits. However, this argument has not been raised as an obstacle in cases which have found that there were universal partnerships between spouses in Muslim marriages.[319] Moreover, the existence of an antenuptial contract has not precluded courts in civil marriages from finding that spouses had entered into a universal partnership *quae ex quaestu veniunt* in civil marriages. This jurisprudence would also apply if the antenuptial contract takes the form of a *nikāh* contract. The existence of a *nikāh* should therefore not be an obstacle to a universal partnership in a Muslim marriage to facilitate the equitable sharing by a spouse who assisted in the other spouse's business, including by the rendering of services or who undertook a commercial venture with the other spouse.

2 Comments on Issue Paper 41

4.167. *Issue Paper* 41 asked whether there is a need to widen the possibilities for altering antenuptial contracts or to conclude for postnuptial agreements.

4.168. Several respondents[320] argue that there are many reasons why it may be necessary for spouses to change their matrimonial property regime, including changed circumstances (such as the effects of having children on spouses' abilities to earn money, disability or illness, a change in careers, or changing financial circumstances) on the marriage.[321]

4.169. Some spouses may not have had the means to pay for the registration of an antenuptial contract when they got married. As a result, spouses may only realise after

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319 *Isaacs v Isaacs* 1949 1 SA 952 (C); *Ally v Dinath* 1984 2 SA 451 (T). These cases were, however, decided before the recognition and enforcement of the *nikah* as a contract in *Ryland v Edros.*

320 LRC, Legal Aid SA, AMAL, Miller du Toit Cloete and Family Law Forum, BASA.

321 See the discussion by Bonthuys *SALJ* 2004 899; Heaton *SAJHR* 2005 554.

the marriage that they entered into an unjust and inequitable antenuptial contract or that there are unexpected consequences from their matrimonial property regime. It may also not be feasible for spouses to keep a record of their excluded assets and how these were applied during the course of the marriage.

4.170. The current requirement of a court application to change the matrimonial property system, although important to protect the interests of third parties, may exclude certain couples from changing their property regime. The current procedure and requirements are cumbersome and costly, and out of reach of many spouses. The LRC submits that this approach does not consider the financial realities of many South Africans wishing to amend their matrimonial property regime or their contractual freedom and autonomy.[322]

4.171. On the other hand, Karen van Staden and Kathleen Moira Nhlabathi believe that there is no need to widen the possibilities for altering antenuptial contracts, even though the procedure is expensive. The current process is necessary to protect the rights of third parties who rely on the content of the parties' antenuptial contract.

4.172. Another question was how an existing matrimonial property regime could be changed without court intervention while ensuring adequate protection of third-party rights.

4.173. The LRC refers to a 2008 legislative amendment (article 1396 of the Civil Code) in Belgium which allows spouses to conclude a postnuptial agreement, which is registered with a notary. The notary publishes the agreement and it is specifically captured in the margins of the marriage certificate for public notice. They suggest a similar procedure be mandated in South Africa where an antenuptial contract is notarised and registered in the Deeds Office.[323]

4.174. A similar suggestion was that spouses should be allowed to approach a notary to amend their antenuptial contracts, similar to the way in which people may

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322 JC Sonnekus "Grense aan kontrakvryheid vir eggenote en voornemende eggenote" (2010) *TSAR* 53.

323 Karen Botha and AMAL agree with requiring a written contract which has been notarially registered.

amend trust deeds *inter vivos*, bearing in mind that these changes should not prejudice third parties.[324]

4.175. Miller du Toit Cloete and Family Law Forum submits that there needs to be certainty. To avoid undue pressure, influence and discrimination, a formal written contract executed with certain formalities should be required, but not necessarily notarially registered.[325] Legal Aid SA holds the view that it should be a written contract which is notarially registered. If it is not notarially registered then the changes should be in writing and signed by both parties.

4.176. It has been suggested that the digital registration of a notarially executed amendment to the initial agreement could be a solution.[326] Such a procedure would also deal with the need to protect the rights of third parties (as the digital registration of the amendment would provide for immediate publicity of the change effected).[327] In opposition to this, it could, however, be argued that digital registration would not be accessible to the majority of the South African population.

4.177. The LRC agrees that, subject to protection of third parties and spouses, postnuptial contracts which are written and notarially executed should be allowed. The LRC does not think that a written postnuptial agreement without further formalities should be valid, citing the Constitutional Court case of *AM v HM*[328] in support. However, they argue that courts should have a discretion to validate unformalised written contracts, depending on whether it reflects the parties' agreement to change their matrimonial property system. Due to difficulties of proof, they do not agree that verbal or tacit postnuptial contracts should be valid.

4.178. In general, there was no support for allowing parties to change their matrimonial property regime by way of a written contract without further formalities, or by

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324 LRC, Legal Aid SA, AMAL, Miller du Toit Cloete and Family Law Forum, BASA.

325 Franz Tomasek, states that if notarial registration for a valid ante nuptial contract is done away with, an alternative measure to ensure that the contemporaneous conclusion of the contract can be evidenced should be considered given the impact it has on the partners, their family and third parties.

326 JC Sonnekus "Grense van kontrakvryheid vir eggenote en voornemende eggenote (Deel 2)" (2010) *TSAR* 217 – 218.

327 JC Sonnekus *TSAR* 2010.

328 *AM v HM* 2020 (8) BCLR 903 (CC.

an oral or a tacit contract. Karen Botha and Kathleen Moira Nhlabathi were both opposed to such changes.

4.179. *Issue Paper* 41 questioned whether the current provisions emphasise the interests of third parties (creditors in effect), at the expense of the interests of the spouses and if so, how the interests of third parties could be better balanced against the interests of spouses?

4.180. The LRC argues that there are valid reasons for protecting the interests of creditors who may be disadvantaged when for instance, one of the spouses becomes insolvent. Their rights to reimbursement should be protected. AMAL agrees that the interests of spouses and third parties ought to be balanced. Because third parties are generally innocent in these contexts, and they have protectable financial interests, creditors should be protected unless there are safeguards, for example, that both spouses absorb a portion of the debt.

4.181. The LRC suggested that the panel consider the Constitutional Court order in *Sithole v Sithole,*[329] which found that section 21(2)(a) of the Matrimonial Property Act was unconstitutional because it maintained the discrimination created by section 22(6) of the Black Administration Act.[330] The latter Act meant that civil marriages of African people entered into before 1988 was automatically out of community of property. Instead, the court ordered that these marriages would be in community of property, except if spouses opt out of the in community of property regime. The court order clarified how spouses should opt out of the default regime of community of property as follows:

(a) Spouses who opted for marriage out of community of property shall, in writing, notify the Director-General of the Department of Home Affairs accordingly.
(b) In the event of disagreement, either spouse in a marriage which becomes a marriage in community of property in terms of the declaration in paragraph 2, may apply to the High Court for an order that the marriage shall be out of community of property, notwithstanding that declaration.
(c) In terms of section 172(1) (b) of the Constitution, the orders in paragraphs 1 and 2 shall not affect the legal consequences of any act done or omission in relation to a marriage before this order was made.

329 *Sithole and Another v Sithole and Another* (CCT 23/20) [2021] ZACC 7.

330 38 of 1927.

(d) Any person with a material interest, who is adversely affected by this order, may approach the High Court for appropriate relief.

4.182. Legal Aid SA advises that the interests of third parties are preferentially dealt with in joint estates post-divorce as the parties are only entitled to a division of the *net* estate.

4.183. *Issue Paper* 41 asked for opinions on the requirements for spouses to change their matrimonial property regime during the marriage, including safeguards to protect the financially weaker party.

4.184. Miller du Toit Cloete and Family Law Forum propose that safeguards should be built in for the weaker spouse, for example, independent legal advice.[331] The spouses should only be able to change their matrimonial property regime by way of a written contract with formalities. Most spouses who enter into agreements with each other do not realise that such agreements are not valid and enforceable against third parties, nor necessarily *inter partes.* This again leads to unjust and inequitable consequences. There needs to be certainty. To avoid undue pressure, influence and discrimination, a formal written contract executed with certain formalities should be required, but not necessarily notarially registered.

4.185. Legal Aid SA submits that if the court finds that changes to the matrimonial property system was to the disadvantage to one party, they should have a discretion to reverse unfair any inequitable changes. AMAL does not think this is necessary.

4.186. The LRC agrees that there is a need to protect the financially weaker party from an exploitative contract. They refer to the American case *Re: Marriage of McCour*t,[332] in which the Court posed the following questions to determine the validity of a postnuptial contract:

- Is it clear from the document that each spouse "knowingly and explicitly" waived their right to have a judicial division of their assets in the event of a divorce?
- Was each party represented by independent counsel?
- Did the parties have adequate time to review the postnuptial agreement?
- Is it clear that the parties understood all the specific terms of the agreement?

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331 The same view is held by Kathleen Moira Nhlabathi.

332 *Re: Marriage of McCour*t, Los Angeles County, Super CT Nos BC 509736 & BD514309.

- Did each party understand the rights he or she would have if no postnuptial agreement was signed?

4.187. Muhamed Fazel Bulbulia remarks that the public is not generally aware of the differences between the various matrimonial property systems and will not have sufficient knowledge of contracts which can be signed to change automatic matrimonial property systems. As a result, legal advice is important in this context.

4.188. *Issue Paper* 41 asked what the consequences should be if spouses attempted to change their matrimonial property regime during their marriage without following the required process. The LRC points out that, unless they are settlement agreements, courts currently do not enforce such agreements. They are in favour of courts having a discretion to enforce postnuptial contracts which do not meet with formalities, depending on the parties' intentions and the surrounding circumstances.

4.189. Some respondents[333] are of the view that the status quo on inception of marriage ensues. Any change that is not lawfully recognised is null and void *ab initio*. Save in the circumstances where they had an updated antenuptial contract or where they have a valid contract that is only binding on them and not third parties.

4.190. *Issue Paper* 41 asked respondents to specifically comment on the consequences as between the spouses and third parties who enter into bona fide agreements with spouses. The respondents[334] agree that such contracts should be enforced between spouses if it reflects their intentions, and taking into account the fact that women tend to have less bargaining power than men. Third parties should be protected by a provision allowing them to approach a court for relief if they fear being prejudiced by postnuptial agreements.

3 Evaluation

4.191. There seems to be widespread agreement that the current formalities associated with changing the matrimonial property regime during a marriage are unaffordable and too strict, and should be supplemented or replaced with less stringent measures which nevertheless protect the interests of third parties. Many respondents

333 Legal Aid SA Karen Botha, AMAL and Miller du Toit Cloete and Family Law Forum.

334 LRC, AMAL, Miller du Toit Cloete and Family Law Forum and Legal Aid SA.

also agree on the need for measures which ensure that spouses have adequate legal information before entering into postnuptial agreements.

4.192. There is no clarity on the retrospective effect of postnuptial agreements, or on the effects of invalid or informal postnuptial agreements as between the spouses, on the one hand, and in respect of third parties on the other hand.

4 Proposals

(a) Changing the matrimonial property regime by way of postnuptial agreement

4.193. The Commission proposes the following:

Option 1

4.194. Spouses may change their matrimonial property regime after the conclusion of a marriage by way of a postnuptial agreement, which is duly notarised and registered in the Deeds Office.

4.195. Such a postnuptial contract shall be valid as between the spouses, but does not affect the rights of creditors, unless the spouses can prove that the creditors knew of the existence of the agreement and its essential terms.

Option 2

4.196. Spouses may change their matrimonial property regime after the conclusion of a marriage by way of a postnuptial agreement which is duly notarised, registered in the Deeds Office or digitally registered.

4.197. In addition, the intention to enter into a postnuptial agreement, together with the proposed terms of the agreement must be sent, by registered mail to all creditors who may in writing notify the notary of any objections to the contract.

4.198. No contract may be registered unless creditors agree.

Option 3

4.199. Spouses may change their matrimonial property regime by way of a notarially registered amendment to their antenuptial contract, which shall be digitally registered in the Deeds Office.

Option 4

4.200. No change should be effected to the current system contained in section 21 of the Matrimonial Property Act.

4.201. Respondents are asked for comments on the adequacy of these proposed measures and to offer any other measures which may be more effective to protect the interests of third parties.

(b) Protection of spouses

4.202. The absence of oversight by a court means that parties who wish to change their matrimonial property system need the protections provided by independent legal advice and the duty to disclose important financial information as set out in relation to antenuptial contracts in paragraph 4.57 of this discussion paper. For this reason, the Commission proposes that:

4.203. No postnuptial contract shall be registered unless it complies with the formalities and duties to disclose, which applies to antenuptial contracts set out in paragraph 4.57 of this discussion paper.

4.204. Respondents are asked whether the proposed provision would be effective to protect the interests of spouses, or whether it would cause any other problems. They are asked to suggest any other measures which would be more effective.

(c) Retrospective effect of a postnuptial agreement

Option 1

4.205. A valid postnuptial agreement **shall have retrospective effect**, except that it shall not affect any legal rights or duties which have already vested before the conclusion of the contract.

Option 2

4.206. A valid postnuptial agreement shall have **no retrospective effect**.

4.207. Respondents are asked for comments on the effectiveness of these proposed measures and to offer any other measures which may be more effective to protect the interests of third parties.

(d) Postnuptial agreement which do not comply with the requirements of this section and universal partnership agreements

Option 1

4.208. At dissolution of a marriage, a postnuptial agreement which has been proven to exist, but do not comply with the provisions of this section, including a universal partnership agreement *universorum bonorum* or *quae ex questu veniunt*, will be **enforceable as between the parties** to the agreement after the satisfaction of the claims of all creditors.

Option 2

4.209. A postnuptial agreement which does not comply with the provisions of this section shall **not be enforceable**.

Option 3

4.210. If a **general judicial discretion** to deviate from the applicable matrimonial property regime is granted to courts at divorce, the existence of postnuptial agreements that do not comply with the provisions in this section or universal partnerships can be taken into account in deciding the distribution of matrimonial property.

Option 4

4.211. Spouses who had, during the subsistence of a marriage, entered into a general universal partnership agreement or a universal partnership agreement in respect of a specific commercial enterprise-

(a) which was conducted for the joint benefit of both spouses;

(b) with an object of showing a profit, including the establishment and maintenance of a family;

(c) to which each had contributed either financially or non-financially by way of money, labour or skill; and

(d) are both entitled to a share of the partnership assets, which is determined by agreement between the parties? In the absence of such agreement, the share of each party shall be determined by the extent of their respective contributions.

4.212. Respondents are asked for comments on the adequacy of these proposed measures and to offer any other measures which may be more effective to protect the interests of third parties.

CHAPTER 5: CUSTOMARY MARRIAGES

A Introduction

5.1. The Recognition of Customary Marriages Act 120 of 1998 (RCMA) came into force on 15 November 2000.[335] Before the RCMA was passed, the wife in a customary marriage was prohibited from owning property, was unable to acquire credit and had limited contractual capacity in relation to the joint estate. This position was changed by the Constitutional Court in the case of *Gumede v President of the Republic of South Africa*.[336] All customary marriages entered into after 2000 are a hybrid of concepts of civil marriages and customary marriages.[337] The Constitutional Court ruled that monogamous customary marriages entered into before the RCMA came into effect are deemed to be in community of property. As a result of this, Chapter III[338] and sections 18, 19, 20 and 24 of Chapter IV[339] of the Matrimonial Property Act apply to customary marriages. Accordingly, the wife in a customary marriage has the same rights as her husband in relation to disposing of assets of the joint estate, contracting debts against the joint estate and managing the joint estate generally. By extending certain provisions of the Divorce Act and the Matrimonial Property Act to customary marriages, the RCMA has given the courts the same powers to deal with matrimonial property that they have in respect of civil marriages.[340]

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335 Proclamation R66 the Commencement of the Recognition of Customary Marriages Act, 1998 (Act 120/1998) of 1 November 2000.

336 *Gumede v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC).

337 Himonga in *The Law of Divorce* 232.

338 Marriages in Community of Property.

339 General Provisions.

340 Sections 8(4) (a) of the RCMA. *Issue Paper* 41 at page 22. See also Himonga in *The Law of Divorce* 245.

5.2. Until the Constitutional Court's decision in *Gumede*[341] and *Ramuhovhi,*[342] 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.[343]

5.3. Currently, (ie subsequent to the decision in the *Gumede* case), the matrimonial property system in monogamous customary marriages (entered into before or after 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 antenuptial contract that determines their matrimonial property system.[344] With the new regime, spouses who marry out of community of property may subject their matrimonial property to the accrual system.[345] Thus, unless parties who marry out of community of property exclude the accrual system in their antenuptial contract, it applies by default.[346]

5.4. The *Gumede* decision did not change the position with regard to polygynous customary marriages contracted before the coming into operation of the RCMA. In the subsequent case of *Ramuhovhi*, the Constitutional Court confirmed the High Court order declaring section 7(1) of the RCMA inconsistent with the Constitution, in that it discriminates unfairly against women in polygynous customary marriages contracted before the commencement of the Act on the bases of first gender, and then race, ethnic or social origin.[347]

5.5. Polygynous 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

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

342 *Ramuhovhi and Others v President of the Republic of South Africa and Others* 2018 (2) SA 1 (CC).

343 *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.

344 SALRC *Issue Paper* 41 at par 5.4. See also Mamashela 2004 *SAHRJ* 631-632 as well as section 7(2) of the RCMA (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.

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

346 *Ibid*.

347 SALRC *Issue Paper* 41 at par 5.4. See also *Ramuhovhi and Others v President of the Republic of South Africa and Others* [2017] ZACC 41.

section 7(6) of the RCMA.[348] 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.[349] The Act does not provide for the consequences of non-compliance with section 7(6), and the position in this regard is still unclear.[350] The solution, adopted in the *Ramuhovhi* case, seems to distinguish between family, house and personal property, but that these terms are not defined in the judgment and the subsequent amendment of the RCMA,[351] leading to uncertainty.

5.6. Succession in polygynous marriages is often organised according to "houses" or "kitchens", and in accordance with the male primogeniture rule.[352] Accordingly, many traditional communities distinguish between general and house property.[353] Each wife and her children constitute a "house", with the husband as the common spouse of all the houses.[354] Furthermore, many communities regard the family house as the site of communication between the spiritual (ancestral) and material worlds.[355] Thus, it does not form part of matrimonial property, even where the couple live exclusively in it.[356] In this context, the division of matrimonial property is problematic in situations where a spouse contributed to the improvement of the family house.[357]

5.7. Section 10(1) of the RCMA specifically provides for spouses between whom a customary marriage already subsists to contract a civil marriage with each other.[358] In other words, section 10 of the RCMA recognises legal pluralism by allowing parties in a

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348 SALRC *Issue Paper* 41 at par 5.5. 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.

349 SALRC *Issue Paper* 41 at par 5.5.

350 Recognition of Customanry Marriages Amendment Act 1 of 2021. See SALRC *Issue Paper* 41 at par 5.5

351 Recognition of Customary Marriages Amendment Act 1 of 2021.

352 This rule stipulates that inheritance is through the eldest male child. See I Schapera *A handbook of Tswana law and custom* (1970) 15; T Venter and J Nel "African customary law of intestate succession and gender (in) equality" 2005 *TSAR* 86. See *Issue Paper* 41 at 22.

353 SALRC *Issue Paper* 41 at par 5.6.

354 SALRC *Issue Paper* 41 at par 5.6.

355 SALRC *Issue Paper* 41 at par 5.6.

356 SALRC *Issue Paper* 41 at par 5.6.

357 SALRC *Issue Paper* 41 at par 5.6.

358 De Klerk M "I don't want your money honey – Recognition of Customary Marriages Act" (2015) *De Rebus* at 42.

monogamous customary marriage to marry under both customary law and the Marriage Act.[359] However, it "does not adequately regulate the interface between the couple's customary marriage and the subsequent civil marriage".[360] For example, it stipulates the consequences of a civil marriage – that it is in community of property unless such consequences are excluded in an antenuptial 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 antenuptial contract in terms of a civil law marriage?[361] 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?[362] 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 this 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?[363]

5.9. More concerning is the fact that section 10(2) could provide an unfair advantage to spouses who convert their customary marriage to a civil marriage, since those who do not convert their marriages are, in terms of section 7(1) and (2) of the RCMA (as amended by the *Gumede* case), required to comply with the provisions of section 21 of the Matrimonial Property Act.[364]

5.10. The prevailing view, however, is that when the customary marriage is followed by a civil marriage between the same spouses, the customary marriage, together with its property consequences, is thereby terminated and substituted by the civil marriage.[365]

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359 SALRC *Issue Paper* 41 at par 5.7.

360 J Heaton and H Kruger *South African Family Law*, 4 ed 236-37.

361 SALRC *Issue Paper* 41 at par 5.8.

362 SALRC *Issue Paper* 41 at par 5.8.

363 F Osman "The Million Rand Question: Does a Civil Marriage Automatically Dissolve the Parties' Customary Marriage?" (2019) 22 *PELJ* 1. Similar comments were forwarded from Project 144: Single Marriage Statute.

364 SALRC*Issue Paper* 41 at par 5.8. See Magdaleen de Klerk *De Rebus* 2015 at 42.

365 See F Osman "The Million Rand Question: Does a Civil Marriage Automatically Dissolve the Parties' Customary Marriage?" (2019) 22 *PELJ* 1 and the cases it cites.

This may be unconstitutional, but there is authority to this effect. This is certainly an issue that needs clarification.

5.11. Also, the fact that section 10(2) does not stipulate how couples should divide their property is problematic.[366] 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.[367] Perhaps adopting the rules of the matrimonial property system under section 7(6), read with 7(7) of the Act, one may conclude that the rules regulating a customary marriage operate until the civil marriage consequences come into being.

5.12. Finally, indigenous norms of matrimonial property division do not recognise community of property.[368] Significantly, these norms emerged in agrarian, patriarchal social settings, where family wealth was generated collectively.[369] 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 *femme covert* (married woman).[370] 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.[371]

B Comments: Issue Paper 41

5.13. *Issue Paper* 41 asked respondents to comment on the current property regime in monogamous customary marriages. BASA notes that monogamous customary marriages follow the same property regime as civil marriages, being in community of property. Some respondents[372] submit that it is in community of property *on paper* as

366 SALRC *Issue Paper* 41 at 26.

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

368 SALRC *Issue Paper* 41 at 26.

369 AC Diala "Legal pluralism and the future of indigenous family laws in Africa" (2021) *International Journal of Law, Policy and the Family* 1 at 3-5.

370 AC Diala "The shadow of legal pluralism in matrimonial property division outside the courts in Southern Nigeria" (2018) *African Human Rights Law Journal* 706 at 710-711.

371 SALRC *Issue Paper* 41 at 26.

372 Rashida Abdul and Funeka Mpetha Women Action for Upliftment.

provided for in the RCMA, but that the community is not even aware what property regime they are married under. Even those that are educated when they are in a monogamous customary marriage may not be aware that their marriages are in community of property. They will tell you that they are preparing to go and marry by civil order so that their marriage is in community property. The LRC remarks that the default position is in community of property, unless excluded by a valid antenuptial contract.

5.14. The WLC indicates that their clients comprise diverse people drawing from different customary beliefs and practices. It is therefore difficult to provide a generalised response to this question. They state that the majority of women that consult with them are confident that their relationships take up elements that would at best be described as marriage or domestic relationships in community of property.

5.15. Legal Aid SA noted the following trends at the Legal Aid SA Local Offices based in the following provinces:

(a) KZN: Parties are deemed to be married in community of property unless they entered into a valid registered antenuptial contract.
(b) EC: Very few non-monogamous customary marriages report to Legal Aid SA for a divorce.
(c) WC: More religious marriages than customary marriages were noted in the Western Cape. Fewer people nowadays enter into customary marriages.
(d) FS/NW: Marriage in community of property.
(e) GP: In community of property.

5.16. The issue paper asked what types of property regimes are in polygynous customary marriages in one's community. Legal Aid SA noted the following trends at the Legal Aid SA Local Offices based in the following provinces:

(a) KZN: In community of property, out of community of property with or without accrual.
(b) EC: No matters involving a polygynous customary marriage at the Port Elizabeth office were reported.
(c) FS/NW: Marriage in community of property.
(d) GP: Usually the first wife will be married in community of property, while others are married out of community of property.

5.17. The LRC notes that the 2021 amendment to the RCMA determines the regime for polygynous marriages entered into before the Act as follows:

(a) the spouses in such a marriage have:
    i. Joint and equal;
    ii. Ownership and other rights; and
    iii. Rights of management and control, over marital property.
(b) The rights contemplated in paragraph (a) must be exercised
    i. in respect of all house property, by the husband and wife of the house concerned, jointly and in the best interests of the family unit constituted by the house concerned; and
    ii. in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses.
(c) Each spouse retains exclusive rights over his or her personal property.
(d) For purposes of this subsection, the terms “marital property”, “house property”, “family property” and “personal property” have the meaning ascribed to them in customary law.

5.18. The WLC reiterates that the question of perceptions of the applicable matrimonial property regimes is difficult to answer given the diversity of people that they engage and consult with. There are often factors such as whether the client is based in rural or urban areas, whether the clients identify with the legal terminology or not, whether they live strictly in terms of custom or a combination of customary practices with a more secular / western / civil law influence. Another key factor is whether there is knowledge and consent of the other households and therefore how the assets of each household is viewed. The response would therefore differ and range between parties who identify with sharing across households to having defined households.

5.19. *Issue Paper* 41 asked what the differences are between personal, house and family property in customary marriages in particular communities. The Rural Women's Movement, KZN set out that, in the communities that they serve, land belongs to the community, livestock belongs to the family and personal belongings to the individual. The respondent explains that different communities may have different interpretations of land and property rights and different methods of allocating land. Andile Nodoba is aware that customary law systems are generally organised in terms of family and house property where the husband is traditionally in control and can decide what happens to the family property alone.

5.20. Some respondents[373] explain that personal property is the property an individual has which serve the interests of an individual like clothes, utensils and personal things. Personal property may be transferred and can be inherited while family property may not. House property is property that is allocated to a woman when she arrives at her husband's kraal - it is a separate establishment. The husband would allocate property to different houses that then become the property of that house. Family property is the property that is entrusted to the family as a whole, but is controlled and managed by the family head. The ownership is said to be joint (shared amongst family members) and cannot be divided. That is why it is the family head who controls it. He is the trustee of the family property. Women under customary law do not have rights to the control of family property. Although she may have contributed to building up the family property, she does not own it or share in it after the customary marriage ends. This makes women economically vulnerable. Some respondents suggest that even though women's rights are addressed in the RCMA, it is just "paper law".

5.21. The WLC suggests that the allocation of property in this context is dependent on a number of factors including whether the households are aware of each other or have consented to the other marriages, whether people are living in rural or urban areas or in fact both. It can also be influenced by issues of who works inside or outside the home. The WLC suggests that in seeking to define specific property, it runs the risk that we may inadvertently exclude certain persons from recognition and protection of their rights to property. In this light then, the WLC suggests that a court should determine matters on a case by case basis.

5.22. Legal Aid SA noted the following trends at their provincial Legal Aid SA Offices:

Limpopo: A family house does not form part of the matrimonial property.[374] Family property (inherited) does not form part of the joint estate.

EC Although the Eastern Cape offices have not had any matters where personal, house or family property issues have been raised, it remains a problem in the community and a number of issues arise depending on the specific custom of that family/community.[375]

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373 CRL Commission, Lindokhuhle Kheswa and Women Action for Upliftment.

374 Legal Aid SA suggests that this practice is unconstitutional but from experience, it is still believed and applied.

375 For example, the EC office raises the issue of a polygamous marriage where each marriage could have its own house. Should there be a death of a woman or a divorce, it questions whether the other wives are able to claim a portion of that house, personal assets, etc. It suggests whether this could impact on inheritances of children of that specific wife.

FS/NW Private property is held by title deed while most property in customary marriages are kept by family tribes under the control of the chief. The family property does not form part of the estate of the married couple, who usually have permission to occupy the property.

5.23. Women Action for Upliftment explains that in Daantjie,[376] which is mostly rural, the community regards family property as such due to its function, which is to serve the family interest. The respondent states that the wife will never own family property. She may use it to take care of the children after the husband dies. The respondent dealt with a number of problematic situations where the function of family property is not observed. For example, where the head of the family or heir marries another wife in town or maybe sells the property that he is holding in trust, and acts contrary to that position.

5.24. The LRC mentions that in terms of the RCMA Amendment Act, the meanings assigned to these terms have the meanings ascribed to them in terms of customary law. These definitions are broad and exact definitions may be difficult to ascertain, as the customary law will differ amongst various communities. The test for living customary law is set out in *Shilubana v Nwamwita*, considering:

a) the history of the community;
b) the current practices of the community;
c) the feasibility of the customary rule in current circumstances; and
d) compliance with the Bill of Rights.

5.25. Some respondents suggested that the uncertainties surrounding the matrimonial property system that arise in polygynous customary marriages should section 7(6) not be complied with should be urgently addressed.[377] They suggest that the RCMA Amendment Act, which aims to further regulate the proprietary consequences of customary marriages, does not assist in this regard. They believe that instead, it creates more problems because it fails to define the forms of property ownership in customary law, such as marital, house, family and personal property. Andile Nodoba further states that the SALRC needs to do in depth research and extensive consultation with the stakeholders to unravel this problem to avoid unintended consequences to the detriment of women in customary marriages.

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376 In Mpumalanga.

377 Andile Nodoba and Mrs Angeline Gumede.

5.26. *Issue Paper* 41 asked whether and how a spouse should be compensated for substantial renovations to a family house that does not form part of the matrimonial property. There are diverse views from respondents on this question. Karen Botha says that there should be a debatement of account. Before parties marry, they need to properly understand the consequences of marriage and the regime affecting their marriage, including what happens when they purchase property. One suggestion is that parties should be required to attend a consultation prior to their marriage from a person certified to issue a "licence" that confirms that the various marital regimes were explained to the parties and they understood the consequences of each regime.

5.27. BASA submits that compensation should be addressed through the amendment of the RCMA and the Divorce Act to ensure that there is overall adequate protection of all parties in a polygynous customary marriage in line with the Constitution relating to the redistribution of assets and compensation for any contributions made during the marriage.

5.28. Legal Aid SA advises that compensation for substantial renovations to a family house that does not form part of matrimonial property should be the same as an improvement/renovation lien over the property subject to proof of total cost of renovations. Thus, it should be calculated on actual expenses. The respondent states that this question raises a number of concerns as in most instances the parties do not have access to funding to compensate the other. Also, the party who has control over the family house would generally not have a title deed for the property. Instead, they would have just a right to occupy. There would also be the issue of the evidence needed to calculate the compensation and how to calculate the increase in value due to the renovations. Legal Aid SA suggests that – considering it is the husband who will normally have control of the family house – it would be unfair if the wife was not compensated upon divorce, despite the issues relating to the calculation of the funding and the manner of payment.

5.29. CRL Commission submits that one way to calculate compensation for improvements is to consider the increase in the market value of the house, or to consider the actual expenditure on current market related prices. Alternatively, a general rule of compensation should be the full remuneration for improvements. Women Action for Upliftment submits that it is a difficult question because the spouse renovated a house built on land that belongs to the community even though allocated to that family. The LRC submits that, upon distribution of family property, a spouse who contributed to

increase the value of family property should be compensated. The LRC recommends a written agreement to this effect before the contribution is made.

5.30. The WLC explains that if the *Ramuhovhi* order is used as a guide, then family property is jointly accumulated and shared within the collective family unit that may be made up of different spouses and children. Such property does not appear to belong to either the individual or the husband and wife, but between a husband, wives and children collectively. Therefore, it does not form part of the matrimonial property. Contributions made to renovations of such property are therefore made to enrich the collective and any claim is therefore against the family collective, but outside of the matrimonial property.

5.31. One of the questions posed in the issue paper was how should customary property be distributed if parties are married under both customary and civil law? BASA notes that, ordinarily customary property is acquired through customary law, for example, a house passed down to the eldest son from generation to generation. In order to continue the tradition, the customary property would need to be distributed under customary law otherwise if distributed under civil law, it may distort custom and as such not serve the community. BASA recommends that the rights of *bona fide* third parties should be considered, in this instance the person that funded the purchase of the property.

5.32. The WLC advises that the intentions of the parties need to be determined, and this will serve as guide as to which marriage type should be recognised in law and, as such, the matrimonial property regime that governs the marriage. The WLC suggests that, often parties think that a customary marriage is not legally recognised in our law and, as a result, enter into civil marriages. Too often couples are provided with incorrect legal advice and presume that they need to marry twice in order to have the marriage recognised. Often, the LRC finds that – because of social/family pressure – couples who desire to marry and have a “white wedding” first enter into a customary marriage to appease the family. Their intention is then not to enter a valid customary marriage, but a marriage under the Marriage Act. In other instances, couples are advised that they must enter into the marriage in terms of the Marriage Act for the marriage to be valid when their intention was only ever to enter into a customary marriage. Work therefore needs to be done on educating South Africans on the different forms of marriage, their legal status and legal implications.

5.33. Legal Aid SA submits that there is an equitable division where parties married under both the RCMA and the Marriage Act. CRL Commission submits, that in terms of the matrimonial property law, there is equal division of assets in the absence of the antenuptial contract. Rashida Abdul and Funeka Mpetha explains that there is a lot of uncertainty surrounding the consequences of dual marriages. Some respondents referred to the dual marriage of the Mandelas which, they believe, was never clarified. Women Action for Upliftment submits that they are aware that certain property cannot be divided in customary law. The LRC notes that it is widely believed that the property consequences of the civil marriage apply also to the customary monogamous marriage. It suggests that, because polygynous customary marriages cannot co-exist with civil marriages, polygynous marriages will not be valid and no property will be shared.

5.34. *Issue Paper* 41 posed a question whether the proprietary consequences of customary marriages in the RCMA serves the needs of communities? Most of the respondents[378] believe that the proprietary consequences of customary marriages in the RCMA do not serve the needs of communities, but for different reasons. For example, some respondents suggest that the proprietary consequences of customary marriages in the RCMA are on paper only. Many women married in terms of this law are not receiving the benefits that the law intended. A respondent suggests that there is a belief in the rural areas that a woman goes to live in her matrimonial home, property of her husband but that she does not acquire any interest in this matrimonial property. The only right that she has is to live there so long as the marriage exists. This right is conferred because of her status as wife and ends at divorce. The respondent suggests that, until the SALRC educates women about their rights, the RCMA/MPA will remain “paper law”. Many people living in rural areas are still not aware that customary marriages should be registered. Greater efforts should be made to reach out to these rural communities to ensure awareness and make registration less cumbersome. It is suggested that all stakeholders including the Department of Home Affairs should spearhead such efforts. They submit that women do not know that they are married in community of property in terms of the RCMA. One unfortunate consequence is that often, women do not use the courts for divorce and, as such, they are not given their due such as a pension interest.

5.35. CRL Commission states that in cases where these marriages are registered and marriage certificates issued by the Home Affairs, the proprietary consequences serve

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[378] Karen Botha, Lindokuhle Kheswa, LRC, Rural Women's Movement, Women Action for Upliftment, Rashida Abdul and Funeka Mpetha, Nombini Nkala, Legal Aid SA.

the needs of the communities. In cases where the marriages are not registered, it becomes a problem as the matrimonial property regime cannot be effectively applied. The LRC notes that the decreased number of customary marriages registered in recent years could be the result of a perception that customary marriages do not provide spouses with adequate financial protection. It could also be the result of difficulties women experience in registering their customary marriages. The general redistribution discretion formulated in the case of *Gumede* does, however, protect customary spouses.

5.36. *Issue Paper* 41 asked what could be done to protect the property rights of spouses in customary marriages. Karen Botha submits that if all marriages, whether customary, civil or religious, are automatically considered out of community of property without accrual but with a redistribution discretion by the courts upon divorce, this would regulate property rights across the board and provide for fair and equitable consequences. Rural Women's Movement, Rashida Abdul and Funeka Mpetha advocate for the stricter regulation of polygynous marriages.

5.37. Most of the respondents[379] believe that the problem of property division in polygynous marriages lies with section 7(6) of the RCMA. Some respondents suggest that penalties should be imposed for failure by men to follow the provisions of section 7(6) of the RCMA. If the husband in an existing customary marriage wishes to enter into further customary marriages with other women, he is required to make an application to the court to approve a written contract, which will regulate the future matrimonial property system of his marriages. Respondents suggest that most men enter into further marriages without their existing wife/wives consent or knowledge. One respondent suggested: “They will only know when he has died and there are six of them.”

5.38. These respondents suggest that people should be encouraged to register their customary marriages and that the government should do more to make the public aware of the legal consequences of customary marriages in respect of marital property. Traditional leaders in rural areas or municipal offices in urban areas should be engaged in these efforts.

5.39. The issue paper enquired about the ways in which the RCMA protects the matrimonial property rights of rural women. The LRC points out that the RCMA does

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379 Women Action for Upliftment, Nombini Nkala, LRC, Rashida Abdul and Funeka Mpetha Rural Women's Movement CRL Commission, BASA and WLC.

contain progressive provisions, both for monogamous and polygynous customary marriages. However, it states that in practice, people do not comply with these provisions. In particular, they suggest that men take subsequent wives without notifying existing wives. Litigation is costly and women are not aware of their legal rights, with the result that their legal rights are simply not implemented.

5.40. Legal Aid SA submits that the fact that the marriage is now automatically in community of property means that women/vulnerable parties will be protected. It questions whether registration should be a requirement since rural women/vulnerable parties may not be well educated/fully informed and will depend on their husbands/other party to register the marriage, which might not happen. CRL Commission explains that registration will help protect rural women. As a result, they suggest that the Act must also allow for registration by local traditional councils, which will then submit documents to Home Affairs for registration and the issuing of a marriage certificate. The WLC states that non-registration of a customary marriage does not invalidate it. However, due to access to justice (legal aid and courts) being inaccessible, women find themselves unable to register their marriages due to bureaucratic challenges and inconsistent application to the law.

5.41. In the light of these challenges, the issue paper asked in what ways matrimonial property law could be regulated in customary marriages. The CRL Commission submits that the matrimonial property in the customary marriage is automatically in community of property. However, if the default matrimonial system is to be adopted across all marriages, it suggests that an out of community regime with accrual will be a better option. Rashida Abdul and Funeka Mpetha advise that it should remain in community of property for monogamous marriages. In respect of polygynous marriages, they suggest that there should be requirements and strict rules to protect the first wife. Women Action for Upliftment usually assists in cases where the second wife was aware that the husband was married and her parents/relatives nevertheless accepted lobolo. Women Action for Upliftment warns that it will always be difficult to regulate matrimonial property because of the lack of compliance with the provisions of the RMCA. The LRC considers that the existing legal provisions adequately protect women's property rights but the problem remains that there is a lack of proper implementation.

5.42. In particular, the issue paper asked whether spouses who convert their customary marriage should be required to comply with the provisions of section 21 of the Matrimonial Property Act. Karen Botha and the LRC argue that section 21 unfairly

discriminates against persons in lower income earning brackets because they will not be able to afford the joint court application, which it requires. If spouses in a monogamous customary marriage, which is in community of property, choose to convert their marriage into a civil marriage, the marriage should automatically remain in community of property. Requiring a separate court application in terms of section 21 places an additional administrative and financial burden on spouses. However, this may be required if the parties choose a different matrimonial property regime upon entering the civil marriage. Legal Aid SA supported by CRL Commission and Kathleen Nhlabathi agree that the provisions of section 21 of the Matrimonial Property Act must be complied with as this could avoid any dispute or uncertainty that could emerge. Failure to do this may be detrimental to creditors and all people having an interest in the joint estate.

C Evaluation

5.43. It should be noted that all marriages, which were automatically out of community of property in terms of the Black Administration Act (BAA), are now in community of property from 14 April 2021, unless the affected couple opt out.[380]

5.44. Historically, the matrimonial property regime of African people was regulated by the BAA.[381] Section 22(6) of the BAA made such marriages automatically out of community of property, except if certain conditions allowing for a different marital regime were fulfilled. However, section 22(6) was repealed by the Matrimonial Property Law Amendment Act 3 of 1988, which inserted sections 21(2)(a) and 25(3) into the Matrimonial Property Act (MPA), thus affording persons married out of community of property the opportunity to change their marital regime within two years after 2 December 1988 (the commencement date of the MPA).

5.45. On 14 April 2021, the Constitutional Court unanimously confirmed a Durban High Court ruling in *Sithole* v *Sithole*.[382] The ruling invalidated section 21(2)(a) of the MPA for maintaining the discriminatory default regime of a marriage out of community property for African couples created by section 22(6) of the BAA. Currently, all marriages of

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380 *Sithole and Another v Sithole and Another* (CCT 23/20) [2021] ZACC 7; 2021 (6) BCLR 597 (CC); 2021 (5) SA 34 (CC) (14 April 2021).

381 *Sithole and Another v Sithole and Another* at par 1.

382 *Sithole and Another v Sithole and Another*.

African people in terms of section 22(6) of the BAA are now marriages in community of property.

5.46. The key issues affecting matrimonial property under customary law include:

5.46.1. Proprietary consequences of a dual marriage under section 10(2) of the RCMA (ie marriage under both customary and civil law). In other words, how should property be distributed if the parties are married under customary and civil law?

5.46.2. Proprietary consequences of non-fulfilment of section 7(6) of the RCMA regarding polygynous marriages.

5.46.3. Divisibility of the family property and the house property (matrimonial property allocated to a wife in the marriage).[383] It is unclear whether and to what extent the matrimonial family house, usually located at the husband's homestead, forms part of matrimonial property. For a family matrimonial house located in the urban area, with title deeds, communities tend to consider it as part of the matrimonial property.

5.46.4. Non-recognition of community of property (equality) in division of assets during divorce due to the nature of the property recognised under customary law.

D Proposals

1 Conversion of Customary Marriage to Civil Marriage

5.47. The Commission recommends that the property regime of the customary marriage remains the property regime of the subsequent civil marriage unless the parties change the property regime of the civil marriage in the following ways:

383 In most patrilineal communities, upon marriage, the wife moves and lives in the family homestead of the husband. She has her matrimonial home which upon divorce, she leaves behind.

Option 1

5.48. By changing the property consequences of the civil marriage by making a court application in terms of section 21 of the Matrimonial Property Act.

Option 2

5.49. By changing the property consequences of the civil marriage in terms of the recommendations made in par 4.194 above. The Commission prefers this option.

Option 3

5.50. By concluding an antenuptial contract regulating the property consequences of the civil marriage.

Option 4

5.51. If there is uncertainty regarding the applicable regime at divorce, the parties must choose which regime should apply to their matrimonial property, failing which the court will decide for them, considering the interest of creditors.

2 Non-fulfilment of section 7(6) and polygynous marriages

5.52. If any of the polygynous marriages are dissolved by divorce, and the husband has not complied with section 7(6) of the Recognition of Customary Marriages Act:

Option 1

5.53. Each wife should retain the right of use over property in her own “house”. The husband retains control over family customary property, if any. Personal property is retained individually by the spouses.

Option 2

5.54. The husband and all his wives share property in community, excluding family property but subject to the court’s discretion to deviate from equal distribution and considering the following factors:

(a) Duration of each marriage.
(b) Husband’s knowledge of requirements in section 7(6) of the RCMA.
(c) Wives’ knowledge of husbands’ marriage(s) to other women.

(d)	Spouses' financial and non-financial contributions.
(e)	A wife's right of use and control over house property.
(f)	The treatment of bridewealth (*Lobolo*) in respect of each marriage, for example:
(i)	Whether bridewealth was transferred and its extent.
(ii)	Whether bridewealth was returned and its extent.

3 Options for customary family property

5.55. Customary family property denotes the ancestral home or communal land held by the extended family of either spouse. As such, the Commission recommends that this be recognised and that it be confirmed that customary family property does not form part of matrimonial property in the customary or civil marriage of spouses who are subject to customary law. However, the Commission recommends that a spouse should be compensated for substantial renovations to a customary family property that does not form part of matrimonial property upon dissolution of the marriage. Such compensation should be adjusted for inflation and supported by oral and/or documentary evidence provided by the party who asserts it.[384]

E General

5.56. Although not directly concerned with matrimonial property, the Commission suggests that consideration should also be given to registration of customary marriages. Since registration of a customary marriage seems to be a cumbersome process for spouses (especially women living in patriarchal communities), this challenge could be mitigated by encouraging traditional leaders to facilitate the registration of customary marriages.

5.57. Law reform that would provide for registration of life partnerships (which include customary marriages) is underway. Discussion Paper 152[385] recommends a draft Bill which seeks to rationalise the laws on marriage and marriage-like relationships. Among others, the Bill provides for the recognition of protected relationships entered into by

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384 Courts should recognise women's equitable interest in family property, even in the absence of standard proof. This is in line with quasi-judicial jurisprudence from government departments in Nigeria.

385 SALRC *Discussion Paper 152 Single Marriage Statute Project 144* January 2021 www.justice.gov.za/salrc/dpapers/dp152-prj144-SingleMarriageStatute-May2021.pdf.

parties regardless of their religious, cultural or any other beliefs or convictions, or how the protected relationship was entered into; to provide for the requirements of a protected relationship; for the registration of a protected relationship; and for the taking effect of the legal consequences of a protected relationship.[386]

386 SALRC *Discussion Paper* 152.

CHAPTER 6: RELIGIOUS MARRIAGES

A Background

6.1. On 28 June 2022, the Constitutional Court confirmed the Supreme Court of Appeal's ruling that the common law definition of marriage is unconstitutional to the extent that it does not include Muslim marriages.[387]

6.2. The Constitutional Court also confirmed that the Marriage Act and certain provisions of the Divorce Act are unconstitutional because they do not recognise or regulate the consequences of Muslim marriages. These consequences include matrimonial property, *mahr* (dower), and spousal *nafaqah* (maintenance). The provisions of the Divorce Act that are implicated include sections 7(3) and 9(1). In the event of a civil divorce, section 7(3) allows for a redistribution of assets if it is just to do so, and section 9(1) enables a forfeiture of assets. The Court found that section 7(3) of the Divorce Act is unconstitutional to the extent that it "fails to provide for the redistribution of assets, on the dissolution of a Muslim marriage, when such redistribution would be just."[388] Section 9(1) of the Divorce Act was deemed unconstitutional "insofar as it fails to make provision for the forfeiture of benefits of a Muslim marriage at the time of its dissolution in the same or similar terms as it does in respect of other marriages that are dissolved."[389]

6.3. The Constitutional Court further confirmed the order that the legislature amend existing legislation or enact new legislation within 24 months (ie 28 June 2024) to recognise Muslim marriages as valid marriages and to regulate the consequences of Muslim marriages.[390]

6.4. As an interim measure, until legislation is amended or enacted to give effect to the Constitutional Court's judgment, the Court confirmed that the matrimonial property

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387 *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2022] ZACC 23 at par 86 (*Women's Legal Centre Trust*).

388 *Women's Legal Cenbtre Trust* par 23.

389 Women's Legal Centre Trust par *23*.

390 Women's Legal Centre Trust par 23.

regime of Muslim marriages is to be treated as out of community of property unless the parties agreed otherwise.[391]

6.5. The Court's judgment means that Muslim marriages are now legally recognised, but their consequences are yet to be regulated. Religious marriages other than Muslim marriages, however, are still not legally recognised or regulated.

6.6. Non-recognition and non-regulation of religious marriages leaves many women financially vulnerable.[392] Women who are parties to only a religious marriage are usually left financially bereft on divorce because they are, among others, not deemed to share joint estates with their husbands.[393] In many situations, the husbands in religious-only marriages amass assets acquired during the marriage in their own names to the exclusion of their wives. This was illustrated in the case of *Singh v Ramparsad*[394] 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.[395] 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.[396]

6.7. Even where parties conclude both a religious and a civil marriage, the wife could still be disadvantaged especially where she is unable to access, or has difficulty in accessing, a religious divorce.[397] In these instances, the wife is shackled to the marriage and unable to pursue a religious marriage with anyone else. In a Jewish context, this

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391 *Women's Legal Centre Trust* par 23.

392 Waheeda Amien and Khaleel Rajwani, 'Equalizing gendered access to Jewish divorce in South Africa' (2020) *The Journal of Legal Pluralism and Unofficial Law* 1 at 2. Waheeda Amien 'South Africa's failure to legislate on religious marriages leaves women vulnerable' 2020 *The Conversation* accessed at https://theconversation.com/south-africas-failure-to-legislate-on-religious-marriages-leaves-women-vulnerable-140371.

393 See for example, *Ryland v Edros* 1997 (2) SA 690 (C); *Singh v Ramparsad*. 2007 (3) SA 445 (D).

394 *Singh v Ramparsad* 2007 (3) SA 445 (D).

395 SALRC *Issue Paper* 41 par 6.3.

396 SALRC *Issue Paper* 41 par 6.3.

397 As illustrated in *Amar v Amar* 1999 (3) SA 604 (W) and *Singh v Ramparsad* 2007 (3) SA 445 (D).

was illustrated in *Amar v Amar*,[398] which involved parties who were married by Jewish and civil law. In contrast, due to the polygynous nature of certain marriages, husbands in Muslim, Hindu and Jewish marriages can conclude a religious marriage with another woman.

6.8. Upon divorce and in the absence of an agreement between the parties, wives in religious marriages may also not be able to access religious benefits attached to the religious marriage.[399] For example, in *Ryland v Edros*,[400] the Cape High Court (as it then was) recognised the Muslim marriage as a legally enforceable contract.[401] 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 Muslim practice regarding division of marital assets.[402] For instance, the wife in the *Ryland* case contended that she was entitled to an equitable division of her husband's estate.[403] She relied on Malaysian law to substantiate her argument.[404] 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 and which they both followed while they were married to each other.[405] The husband, 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. 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.[406]

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398 *Amar v Amar* 1999 (3) SA 604 (W).

399 Razaana Denson. "A Comparative Exposition of the Law of Husband and Wife in Terms of Islamic Law, South African Law and the Law of England and Wales – Part Two" (2021) 42 *Obiter* 352.

400 *Ryland v Edros* 1997 (2) SA 690 (C).

401 *Ryland v Edros* at 710 D-E.

402 SALRC *Issue Paper* 41 par 6.2.

403 SALRC *Issue Paper* 41 par 6.2.

404 *Ryland v Edros* at 715 D-J. See section 58 of the Malaysian Islamic Family Law (Federal Territory) Act 303 of 1984.

405 SALRC *Issue Paper* 41 par 6.2.

406 *Ryland v Edros* at 717 B-D. See also SALRC *Issue Paper* 41 par 6.2.

6.9. Spouses in marriages that receive no legal recognition, including those in religious marriages, and people who, knowingly or unwittingly, have not entered any formal marriages have no statutory rights to share in property that has been amassed during their relationships.[407] The negative impact of this lack of legal rights falls mainly on women, who may have contributed tangibly or intangibly to their partners' estates yet are left destitute when the marital relationships end.[408]

6.10. In addressing this issue, there are two parallel processes underway to afford legislative recognition to religious marriages.[409] The one process is spearheaded by the Department of Home Affairs, which produced a Green Paper on Marriages in South Africa.[410] The other process is initiated by the SALRC Advisory Committee on Project 144, which published an issue paper[411] and a discussion paper[412] on the *Single Marriage Statute*.[413] In addition, Mr Hendricks (a Member of Parliament for Al Jama–ah) introduced the Private Member Divorce Amendment Bill[414] in 2021 with a view to regulating Muslim divorces. As at 2 May 2023, this Bill is delayed pending the outcome of the above processes.[415]

6.11. The Commission's Advisory Committee on Project 144 indicates that it will draft legislation to recognise and regulate the registration of different forms of protected relationships or marriages and life partnerships.[416] This includes religious marriages. The Commission 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 Marriage Act, Divorce Act, Matrimonial Property Act, Children's Act,[417] Maintenance

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407 SALRC *Issue Paper* 41 par 1.9.

408 SALRC *Issue Paper* 41 par 1.9.

409 SALRC *Issue Paper* 41 at par 6.8.

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

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

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

413 SALRC *Issue Paper* 41 par 6.8.

414 B32-2022. GG 47526 of 18 November 2022.

415 See par 4.90 above.

416 SALRC *Issue Paper* 41 at par 6.9.

417 38 of 2005.

Act,[418] Intestate Succession Act 81 of 1987 and Maintenance of Surviving Spouses Act.[419]

6.12. In line with the above approach by the Commission and the Constitutional Court's order that existing legislation be amended to recognise the consequences of Muslim marriages, this Committee sought input through its *Issue Paper* 41 about which matrimonial property regime should apply to religious marriages.

B Comments

6.13. *Issue Paper* 41 asked whether a default matrimonial property regime should apply to a monogamous religious marriage. Several respondents[420] argued that there should be a default property regime for monogamous religious marriages, akin to other marriages.

6.14. However, the CRL Commission submits that there should not be a default matrimonial property regime. According to the CRL Commission, parties must choose which regime should apply to the marriage. It suggests that, if the regime allowing all marriage contracts to be decided independently by the participants is seen as the approach, the necessity for a default matrimonial property regime is negated. It would mean that every regime of marriage would be decided at the inception of the marriage and would stand as the rules to the marriage.

6.15. UUCSA, supported by Islamic Forum Azaadville, emphasise that the courts have accepted that marriages concluded under Islamic Law are by default out of community of property and without the accrual system. Therefore, they suggest that a default matrimonial property regime cannot apply to all monogamous religious marriages. The marrying parties must have the freedom to choose a proprietary marital regime in accordance with their religious convictions. According to AMAL, this is because different religions have different default matrimonial property regimes. If there is a single default matrimonial property regime, then the purpose of individually recognised religious

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418 99 of 1998.

419 27 of 1990.

420 Miller du Toit Cloete and Family Law Forum, Karen Botha, Legal Aid, MPL Network, Miriam Tayob Rashida Abdul and Funeka Mpetha, LRC, WLC,

marriages falls away.[421] However, in respect of monogamous Muslim marriages, marriages ought to be, as a default, out of community of property without accrual.

6.16. Where respondents thought that a default regime for monogamous Muslim marriages was not appropriate, they offered a diversity of answers to the question of how this could be managed.

6.17. The CRL Commission submits that if the requirement of a marriage contract is that a regime has to be decided on, then it places the responsibility on the participants to decide the regime. Parties have the responsibility to choose a matrimonial property regime prior to concluding the marriage. Islamic Forum Azaadville submits that Islamic law should prevail over Muslim marriages. AMAL submits that the system of marriage should be regulated by legislation. Powers should be given to registered religious leaders who solemnise marriages to register the marriage in terms of a default system of marriage. UUCSA submits that the marrying parties must have the freedom to choose a proprietary marital regime in accordance with their religious convictions.

6.18. Where respondents were in favour of a default matrimonial property regime for monogamous religious marriages, the majority of respondents believe that in community of property with profit and loss should apply for different reasons:

(a) The LRC thinks the same default regime should apply to all marriages and that the marriage in community of property is best suited to achieve gender equality. It notes that allowing religious marriages to inadvertently support gender inequality between spouses based on religious grounds cannot be justified when considering the role of equality as a founding value of the South African society.

(b) The WLC believes that an in community of property regime is the most substantively equal default position available in law. It is the most well-known amongst their clients and therefore provides a level of certainty. It cannot see that there is a justification to deviate from providing one category of women with protection while not providing the same protection to a different category purely on the basis of religious belief.

(c) The MPL Network recommends that the default should be either in community of property or out of community of property with accrual. This will ensure that both spouses have a proprietary interest in matrimonial property because of their contributions to the marital estate - whether by supporting each other's career or

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421 Sunni Ulama Council Gauteng is of the same view.

by contributions in business ventures or their individual childcare responsibilities and inputs in building the marital home.

(d) Zainab Dada urges the Commission to reconsider allowing the default position to be a marriage in community of property, which may then be changed by mutual agreement because of the ignorance and illiteracy of many Muslim women who are treated unfairly.

(e) Legal Aid SA holds the view that an in community of property regime should be a default regime as, on the face of it, it is the fairest to both parties and removes the possibility of the weaker party being prejudiced. It is straightforward and easy to apply without a cumbersome process required like antenuptial contracts.

(f) Mariam Tayob recommends that the envisaged matrimonial property regime should be an automatic in community of property regime. She recalls Muslim family members advising that an out of community of property with the accrual system complies with the principles of Muslim Personal Law because it protects women who are vulnerable.

(g) Rashida Abdul and Funeka Mpetha propose that the default should be the same as the default in the Marriage Act, RCMA and the Civil Union Act namely, “in community of property” otherwise it will constitute discrimination against Muslim women.

6.19. The following respondents support out of community of property with accrual:

(a) Muhamed Fazel Bulbulia submits that an out of community of property with accrual system is consistent with the principles of Islamic personal law. He points out that the majority of the couples choose antenuptial contracts excluding the accrual system on advice received from the Ulama. He suggests that this advice impacts harshly on Muslim women. However, women contribute directly and indirectly to the growth of their husbands’ estates by raising the children, supporting their husbands etc. but will be left with little on divorce, and only maintenance of three months. He suggests that the public is not generally aware of the differences between the various matrimonial property systems and will not have sufficient knowledge of how to change automatic matrimonial property systems. It is easier to protect a woman’s share at the commencement of marriage through a favourable matrimonial property system, that is, a marriage out of community of property with the accrual system. At the end of the marriage the accrual will automatically apply.

(b) Miller du Toit Cloete, Family Law Forum, MPL Network and Cape Bar Council submit that there are a number of factors to be considered in setting out a default

matrimonial property regime for monogamous Muslim marriages. While the tenets of the religious marriage would be an important factor, other factors would be based on justice, equity and the Constitution. These respondents are in support of a court's discretion to redistribute on divorce based on the factors previously discussed,[422] taking into account the spouses' contributions (monetary and non-monetary) to the growth of each other's estates.

(c) Zainab Dada and Hafeesa Moosa also support the out of community of property regime with accrual. They suggest that it will address inequalities regarding the distribution of property at divorce.

6.20. UUCSA, AMAL, Karen Botha and Saber Khan support out of community of property without accrual.

6.21. On being questioned about the need for a court discretion upon divorce to equitable distribution, most respondents[423] agree that there should be such a discretion to compensate women for the unpaid housekeeping, caring and labour which they generally do within families. They reiterate that the economically weaker spouse, usually the woman, does not share in the estate of the financially stronger spouse.

6.22. UUCSA refers to paragraph 4.23 of *Issue Paper* 41 and explains that, with the rising middle class and both parties in the marriage working or being professional, there will be a concomitant increase in couples who conclude marriages out of community of property without the accrual system. However, jurisprudence has shown that couples do not always live according to the dictates of the contract. It is virtually impossible to pre-empt the various ways in which a couple or one of the parties to the contract may live outside the bounds of the contract. The variables are endless. Therefore, UUCSA suggests that a judicial discretion should be available for a court to bring the parties back to the parameters of the contract. A judicial officer exercising a discretion in relation to a Muslim marriage should only take factors applicable to Islamic Law into account.

6.23. *Issue Paper* 41 posed a question whether a default matrimonial property regime should apply to polygynous religious marriages. UUCSA submits that a default system cannot apply because parties to a religious polygynous marriage must have the freedom

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422 See par 4.130 above of this Discussion Paper.

423 Karen Botha, Rashida Abdul and Funeka Mpetha, LRC, WLC, MPL Network, CRL Commission, AMAL, Legal Aid SA and Miriam Tayob.

to choose the matrimonial property system in accordance with their religious convictions. Rashida Abdul and Funeka Mpetha rejects a default regime for a different reason. The respondents warn that there will be confusion and it will be detrimental to the wives who were first in the marriage. To illustrate this premise, if the default is in community of property then the wife who came first and has contributed more years to the growing of the estate will be at a disadvantage while the newcomer will benefit unfairly.

6.24. Legal Aid SA and Karen Botha agree to the default as all the spouses will benefit equally. On the face of it, there would seem to be a need for a default position as that would most likely be the fairest way to protect the various parties. The other wives would need to be certain of their position should there be a divorce with one of the other wives or possibly even death. The parties to existing marriages should also have the existing marriages and the benefits thereof protected once the male party marries further wives.

6.25. The LRC recommends that all polygynous marriages, whether religious or not, should be out of community of property, and that spouses should conclude antenuptial contracts to determine the property consequences. According to the CRL Commission, a matrimonial property regime must be chosen before the marriage is concluded. Islamic Forum Azaadville and AMAL restrict their comments to Muslim marriages. AMAL suggests that Muslim polygynous marriages should be deemed to be out of community of property, without accrual, by default.

6.26. Where respondents thought that polygynous religious marriages should not have a default applied, they suggest different ways of regulating this state of affairs. UUCSA states that when a man and a woman conclude a marriage under Islamic law, out of community of property and without the accrual system, and the man then concludes a further polygynous marriage, he must fund and maintain the second marriage from his separate estate. Legal Aid SA submits that all spouses should benefit equally. CRL Commission submits that it should be decided and regulated in terms of a contract between the parties, with the parties choosing the specific matrimonial property regime. If a marriage contract is required and a matrimonial property regime has to be chosen as part of that process, then – the CRL Commission submits – it places the responsibility on the participants to decide the regime. Islamic Forum Azaadville submits that Islamic law should prevail over Muslim marriages. Rashida Abdul and Funeka Mpetha advise that the best way is to consider doing it the way the RCMA has done it.

6.27. Where respondents suggest that a default matrimonial property regime should apply to polygynous religious marriages, they offer the following forms:

(a) In community of property with profit and loss[424]

(b) Out of community of property with accrual[425]

(c) Out of community of property without accrual[426]

6.28. Most of the respondents agree that the court be given a discretion to compensate spouses from unfair property regimes.[427] They support the discretion for purposes of fairness and to protect the interests of the vulnerable, such as women who have not financially contributed to the growth of the marital estate.

6.29. The Sunni Ulama Council Gauteng explains that the Constitution recognises the right to practice religion freely and recognises the diversity that prevails in the country. As a result, it submits that the questions relating to matrimonial property regimes are largely redundant since Muslims should be given the right to marry and live their lives according to the Sharia law.

6.30. *Issue Paper* 41 asked whether the religious marriage contract should 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*) and provisions of the Jewish marriage contract (*ketubah*) such as spousal consent to obtain a Jewish divorce (*get*) be regarded as terms of an antenuptial contract? AMAL disagrees and suggests that these terms should be regarded as binding and enforceable contracts between the spouses. The respondents[428] also agree that these terms should be deemed binding antenuptial contracts, subject to judicial discretion to redistribute equitably. Karen Botha, supported by Rashida Abdul and Funeka Mpetha, disagrees because these terms are potentially discriminatory, particularly against women.

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424 WLC.

425 Family Law Forum, Western Cape and Miller du Toit, LRC.

426 AMAL, CRL Commission, Adv Karen Botha, Mariam Tayob , Legal Aid SA, AMAL, Miller du Toit and Family Law Forum, Rashida Abdul and Funeka Mpetha, LRC and WLC.

427 CRL Commission, Adv Karen Botha, Mariam Tayob , Legal Aid SA, AMAL, Miller du Toit and Family Law Forum, Rashida Abdul and Funeka Mpetha, LRC and WLC.

428 LRC, Islamic Forum Azaadville, CLR Commission, Legal Aid SA and UUCSA.

6.31. Miller du Toit and Family Law Forum assert that the issue of religious marriages is contentious. In line with other respondents, they suggest that a solution may be found in allowing the courts an automatic discretion to override religious law provisions where they are unduly onerous. They question whether there should be an opt out clause in favour of a religious contract. They say this since it is possible that the inequality will continue, as undue pressure will be brought on spouses, not only by the more powerful spouse, but also by the spouses' respective families and the religious community.

6.32. Respondents made certain suggestions regarding how to deal with potentially discriminatory terms of religious marriage contracts. In its submission, the CRL Commission stresses the importance of maintaining fairness and principles of equality and non-discrimination. The right to freedom of religion and the placing of terms in the contract must be considered. For example, Islamic law requires a husband to maintain (*nafaqah*) the wife and not vice versa. It also applies to a husband having to pay a dower (*mahr*) to the wife in terms of the contract and not vice versa. This could be regarded as valid in terms of the right to enter into contracts as well as the right to freedom of religion based on an agreement between the two parties to the marriage. UUCSA explains that a term in a marriage contract may appear to be discriminatory but, when the term is viewed from the perspective of the wholeness of Islamic jurisprudence, it is not discriminatory. The solution to this conundrum may be solved with an open application regime. A party to a contract, under certain strict conditions, may waive their right to claim the benefit of the right in the future.

6.33. Other respondents[429] believe that discriminatory terms of religious marital contracts should not form part of the antenuptial contract. The respondents submit that the Constitution remains the supreme law, and all marriage terms should be in line with it. They believe that, by allowing certain terms in these contracts, it would continue to discriminate against women and vulnerable persons. Any provision in a religious marital contract must remain constitutionally valid. In this regard, AMAL believes that such clauses ought to be subject to review by a court.

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429 LRC, Legal Aid SA, Karen Botha and Rashida Abdul and Funeka Mpetha.

6.34. *Issue Paper* 41 posed a question whether the same formalities and requirements should apply to antenuptial contracts in religious marriages as in other types of marriages? Generally, respondents[430] agree that the formalities and requirements that apply tor antenuptial contracts in other marriages should apply to religious marriages. However, Rashida Abdul and Funeka Mpetha are concerned that there is no indication regarding how many prospective spouses of the working class will notarise and register an antenuptial contract before they get married.

6.35. While some respondents[431] submit that the same formalities should apply to Muslim marriage contracts, some suggest that provision should, however, be made for the presence and participation of a religious officer. The Cape Bar Council cautions that an antenuptial contract should not be registered by a marriage officer only, as this may lead to fraud and again be subject to undue pressure, influences and an unequal power basis.

6.36. The last question under this chapter is: Should parties simultaneously enter a religious marriage and a civil marriage, which marriage's matrimonial property regime should apply if they are not the same? The following diverse responses were given:

(a) UUCSA: The matrimonial property regime of the first marriage must apply, except in the case where it is clear that the parties intend that the regime of the second marriage should apply to their marriage.
(b) Legal Aid SA holds the view that the civil marriage should take precedence.
(c) The Cape Bar Council submits that this problem may be solved by an overarching redistribution discretionary claim applying to all marriages, whether religious or not.
(d) The CRL Commission suggests that the regime that promotes fairness and principles of equality and non-discrimination and protects the rights of the vulnerable should be chosen. Alternatively, the religious marriage would be the default regime, whereas the civil marriage should require a contract to be concluded before the marriage. This would also bring about legal certainty.
(e) AMAL submits that, before these legislative developments, persons would be married in terms of Islamic law but would only register the marriage in terms of civil law for it to be recognised.

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430 Karen Botha, UUCSA, Legal Aid SA, AMAL, MPL Network, LRC and CRL Commission.

431 LRC, Legal Aid SA, CRL Commission and AMAL.

(f) The LRC proposes that there should be an option for the parties to choose that the religious marriage's matrimonial property regime apply, but in the absence of such a choice, the consequences of a civil marriage should apply.

6.37. The following general comments were made in relation to the topic of religious marriages in general:

(a) Keneilwe Mabapa suggested that there are certain Christian religious marriages which have a "polygamous flavour" to them, and this needs to be considered. She gives the following example: A man marries the first wife in terms of civil law and later, in line with church rules, marries another woman or he marries both women at the same church ceremony. While she suggests that these marriages have an element of invalidity and bigamy to them, she thinks they are a South African reality that needs to be addressed. She questions whether these marriages can be legitimised? If so, how? If not, how are the parties to be dealt with, especially in the event of the death of the husband?

C Evaluation

6.38. The Constitution protects both the individual and collective rights to freedom of religion.[432] Section 15(1) of the Constitution entrenches the individual right to freedom of religion while section 31(1) protects the collective right of persons belonging to religious communities to practise their religion and form, join and maintain religious associations with other members of their religious community. Through section 15(3)(a) of the Constitution, the enactment of legislation is permitted for the recognition of religious marriages or systems of religious personal or family laws.

6.39. However, section 15(3)(b) of the Constitution requires legislation purporting to recognise religious marriages or systems of religious personal or family laws to be consistent with other provisions of the Constitution including gender equality. Similarly, section 31(2) of the Constitution obliges persons belonging to a religious community who exercise their collective right to, among others, practise their religion, to do so in a manner that does not conflict with other provisions of the Constitution such as gender equality.

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432 Waheeda Amien, 'Comparative Perspectives: South Africa', in James Dingemans et al (eds) *The Protections for Religious Rights: Law and Practice* (2013) 241-256, 243.

6.40. Section 9 of the Constitution protects the right to equality and to not be discriminated against based on, among others, sex, gender, sexual orientation, race, religion and marital status. Yet, several statutory provisions currently treat certain marriages differently from others, without advancing any clear or rational state interest. For example, the non-recognition of religious marriages prevents parties to those marriages from accessing statutory benefits that parties in civil and customary law marriages have access to. Parties to religious marriages are therefore discriminated against on the bases of religion, sex, gender and marital status.

6.41. Moreover, Constitutional Court decisions over the years make it clear that substantive rather than formal equality is required.[433] 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. This is important when 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.

6.42. A Muslim marriage is a contract between the spouses to the marriage.[434] Within the parameters of this contract, Islamic law allows parties to a Muslim marriage to regulate their matrimonial property according to a regime of their choice.[435] In the absence of a written contract, the traditional Islamic practice is to keep the matrimonial estates of the parties separate.[436] Also, in the absence of a written contract, Islamic practice traditionally deems the parties to have agreed to keep their estates separate. At the same time, Islamic principles do not preclude compensation from being paid at the

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433 On the substantive equality approach in South African courts, see 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.

434 Waheeda Amien, 'Overcoming the conflict between the right to religious freedom and women's rights to equality – a South African case study of Muslim marriages', *Human Rights Quarterly* 28 (2006) 729–754, 736. Waheeda Amien, "Reflections on the recognition of African customary marriages in South Africa: Seeking insights for the recognition of Muslim marriages", 13 *Acta Juridica* (2013) 357-384, 379.

435 Ebrahim Moosa, "Prospects for Muslim Law in South Africa: A History and Recent Developments" *Yearbook of Islamic and Middle Eastern Law* 3, (1996): 130-155*,* 154. Waheeda Amien, "A consideration of the conflict between women's right to equality and freedom of religion when Muslim family law is assimilated, accommodated or integrated into multicultural constitutional jurisdictions", (2011) PhD Thesis, University of Ghent, 26.

436 Schacht, Joseph *An Introduction to Islamic Law* (London: Oxford University Press, 1964), 16.

end of the marriage for any financial or non-financial contributions made by either party during the subsistence of the marriage to the growth of the other's estate. Non-financial contributions include housework, breastfeeding and childcare responsibilities.[437] Parties can, however, deviate from this arrangement by express agreement.

6.43. In several countries with significant Muslim populations, a court can consider a spouse's direct and indirect (non-financial, intangible, unpaid) contributions in determining a just and equitable division of matrimonial properties upon the dissolution of the marriage. These countries include Malaysia, Singapore, Brunei, Indonesia, Morocco, Algeria, Afghanistan, Kazakhstan, Iran, Maldives, Tunisia and Turkey. Brunei, Malaysia, Singapore and Indonesia adopt default joint property regimes, which recognise a wife's non-financial contributions in the marital home. In Morocco, Algeria and Tunisia, spouses can choose a matrimonial property regime where they share joint ownership of assets. The above countries include adherents of the *Sunni* (*Hanafi*, *Shafi'i* and *Maliki*) and *Shi'i* traditions.[438]

6.44. Considering the above, any of the three recognised matrimonial property regimes in South Africa is consistent with Islamic principles governing the just and equitable distribution of matrimonial property.[439]

6.45. Almost no comments were received regarding Jewish and Hindu marriages. Respondents are asked to send comments on how the below proposed options affect these religious marriages.

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437 In the event of dissolution of a marriage, Qur'ān 2:231 provides:

> When ye divorce women and they fulfil the term of their ('Iddat) either take them back on equitable terms or set them free on equitable terms; but do not take them back to injure them or to take undue advantage; if anyone does that He wrongs his own soul.

See also Musawah, *Musawah Policy Brief #05*, 5. Available at www.musawah.org (accessed 21 May 2023). M. Siraj Sait, (2016) 'Our marriage, your property? Renegotiating Islamic matrimonial property systems', Nadjma Yassari (ed) *Changing God's Law. The Dynamics of Middle Eastern Family Law* 245-286.

438 M. Siraj Sait, (2016) 'Our marriage, your property? Renegotiating Islamic matrimonial property systems', Nadjma Yassari (ed) *Changing God's Law. The Dynamics of Middle Eastern Family Law* 245-286.

439 W Amien and DA Leatt, "Legislating Religious Freedom: An Example of Muslim Marriages in South Africa" (2014) 29 *Maryland Journal of International Law* 501 at 532.

6.46. In the comments received in response to *Issue Paper* 41, most respondents agreed that there should be a default matrimonial property regime for monogamous religious marriages. Many supported the option of an in community of property with profit and loss regime. The major reasons for this choice lie in respondents' suggestions that Muslim marriages must be aligned with other marriages that are already recognised legally and to achieve gender equality. Many respondents also supported out of community of property subject to the accrual system to ensure an equitable distribution of the spouses' estates. A small portion of the respondents preferred an out of community of property regime without accrual.

6.47. When considering if a default matrimonial property regime should apply to polygynous religious marriages, some respondents felt that no default should apply, while most agreed that there should be a default matrimonial property regime in general. The respondents were split in their approach as to the type of default regime that should apply to polygynous religious marriages. Some supported in community of property, some favoured out of community of property without accrual and others proposed out of community of property with accrual. Most respondents felt that if polygynous religious marriages were out of community of property without accrual, a judicial discretion should be available to compensate spouses for their contributions to the growth of the other's estate. Two respondents[440] suggested that the same approach in the Recognition of Customary Marriages Act regarding polygynous customary marriages should be adopted.

6.48. The Commission is of the view that, in the case of polygynous religious marriages, it is necessary for a court to have judicial oversight over the matrimonial property regimes when there are two or more marriages involved to ensure that none of the parties, especially the wives, are disadvantaged.

6.49. To resolve the potential conflict that could arise if parties enter both a civil marriage and a religious marriage that have different matrimonial property regimes, it may be practical to distinguish between marriages entered prior to proposed amendments to the Matrimonial Property Act and those entered after its amendment. In the case of the former (marriages entered before the proposed amendments to the Matrimonial Property Act), the civil marriage would have taken precedence and to maintain consistency, should continue to take precedence. Once the amendment relating to the matrimonial

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440 Rashida Abdul and Funeka Mpetha.

property regimes is affected in the Matrimonial Property Act, it is proposed that parties should have the option to decide which matrimonial property regime applies. In the absence of such a choice, the court should have discretion to apply the regime that renders the most equitable distribution of the estates between the parties.

D Proposals

6.50. In relation to religious marriages, the Commission offers the options below as default matrimonial property systems for the following types of religious marriages. For monogamous religious marriages, the Commission favours option 1.

1 Monogamous religious marriages

Option 1

6.51. In the case of monogamous religious marriages, which include a marriage contract,

6.51.1. The matrimonial property regime is deemed to be out of community of property with accrual, unless a term in the marriage contract excludes accrual.

6.51.2. In the absence of a term in the marriage contract recording the commencement values of each spouse's estate, the net value of each estate is deemed to be nil.

6.51.3. To ensure an equitable distribution of the estates, judicial discretion may be exercised in the crafting of a redistribution order, as discussed at par 4.128 of this discussion paper.

Option 2

6.52. In the case of monogamous religious marriages, which include a marriage contract,

6.52.1. The matrimonial property regime is deemed to be out of community of property without accrual.

6.52.2. To ensure an equitable distribution of the estates, judicial discretion may be exercised in the crafting of a redistribution order, as discussed at par 4.128 of this discussion paper.

Option 3

6.53. In the case of monogamous religious marriages, which include a marriage contract,

6.53.1. The matrimonial property regime is deemed to be in community of property.

6.53.2. To ensure an equitable distribution of the joint estate, judicial discretion may be exercised in the crafting of a redistribution order, as discussed at par 4.128 of this discussion paper.

2 Polygynous religious marriages

6.54. In the case of polygynous religious marriages,

6.54.1. a spouse who wishes to enter a subsequent religious marriage must apply to court to approve a written contract for the regulation of the future matrimonial property system of their marriages.

6.54.2. the court must terminate the matrimonial property system of the existing marriage and make an equitable distribution of the marital estate/s.

6.54.3. subsequent matrimonial property regimes of polygynous religious marriages are deemed to be out of community of property without accrual, subject to judicial discretion being exercised in the crafting of a redistribution order, as discussed at paragraph 4.128 of this discussion paper.

6.54.4. if the husband does not obtain court approval, the court must redistribute equitably considering the following factors:

a. Knowledge of the husband that he needed court approval for a written contract governing the regulation of the matrimonial property regime of the subsequent marriages.

b. Knowledge of the wives that the husband was entering into subsequent marriages.

c. Respective financial and non-financial contributions of the spouses.

6.55. If the husband does not obtain court approval as set out in 6.54.1, the court must redistribute equitably considering the factors listed at paragraph 6.54.4.

6.56. If one of the wives becomes aware of the subsequent marriage, she can approach a court for an equitable distribution of the marital estates.

3 Civil and religious marriages

6.57. If parties enter a civil and religious marriage prior to amendments addressing religious marriages in the Matrimonial Property Act, the matrimonial property system of a civil marriage will apply.

6.58. If parties enter a civil and religious marriage after the amendments addressing religious marriages in the Matrimonial Property Act, they can decide which matrimonial property system of either a civil marriage or religious marriage applies. In the absence of the parties exercising a choice regarding matrimonial property system, the court has discretion to apply the matrimonial property regime of either the civil marriage or religious marriage entered by the parties, which renders the most equitable distribution of the estates between the parties.

CHAPTER 7: UNMARRIED LIFE PARTNERSHIPS

A Introduction

7.1. As *Issue Paper* 41 sets out, people can be involved in unmarried intimate relationships either because they never entered into any marriage with their partner, or because, knowingly or unbeknown to them, they entered into an invalid marriage.

7.2. The reasons for the invalidity of a marriage may include failure to meet various requirements, for instance failure to register a marriage officer with the Department of Home Affairs, or bigamy by one of the spouses.

7.3. The possibility of entering into an invalid marriage is especially prevalent in customary marriages for three reasons:

(a) First, the requirements which the RCMA set for a valid customary marriage are vague (for instance, section 3(1) requires only that the parties must both be of marriageable age and must consent, and "the marriage must be negotiated and entered into or celebrated in accordance with customary law"). At the time of divorce, this provides an avenue to spouses to deny the validity of a customary marriage because one or more customary requirements have not been met. If such a challenge to the validity of a marriage succeeds, the other spouse may find that, unbeknownst to her, she had been in an unmarried partnership rather than a marriage.

(b) The second reason is the requirements for entering into second and subsequent customary marriages. The RCMA requires in section 7(6) that a husband who intends to enter into a further customary marriage must approach a court to approve a written contract regulating the proprietary consequences of the marriages, but this does not affect the validity of subsequent marriages. However, the Constitutional Court ruled in *MM v MN*[441] that the permission of a first customary wife is a validity requirement for any subsequent marriages. Failure to obtain this permission would render a second customary marriage invalid. A second wife may not be aware whether or not the permission of the first wife has

441 *MM v MN* 2013 (4) SA 415 (CC).

been obtained and may be, without her knowledge, in an unmarried partnership rather than a marriage.

(c) Finally, a customary marriage which is concluded when one of the spouses is already married to another person in a civil marriage, is invalid.[442] Once again, a spouse (usually the wife) may be unaware of the existing civil marriage and therefore unaware of the fact that she is not legally married.

7.4. Similarly, wives in polygynous religious marriages may not be aware that their husband contracted religious marriages with more than one wife. A husband may also be in a religious marriage with one wife and a civil marriage with another wife. Should the requirements proposed in Chapter 6 of this discussion paper for polygynous religious marriages not be met, one or more of the religious marriages and/or matrimonial property regimes of the religious marriages may not be valid.

7.5. This section considers that different legal mechanisms may be necessary to deal with the two categories of unmarried partnerships, which we will refer to as the never married intimate partners on the one hand, and the intimate partners in invalid marriages, on the other hand.

7.6. The questions posed in the issue paper also asked for comments relating to these different kinds of intimate partnerships.

7.7. We will use the term “partnership property” to refer to any property amassed by either partner to an unmarried intimate partnerships during the subsistence of the partnership.

7.8. There could be questions around including property relief for unmarried partners in the Matrimonial Property Act, rather than a separate statute. On considering this issue, the Commission believes that, given the fact that many unmarried intimate partners are actually in void marriages, it is appropriate to provide relief in the statute which governs valid marriages. In addition, the proposed legal relief for unmarried relationships will in many cases have an impact on existing marriages and it is therefore appropriate to address these consequences in the same statute.

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442 Section 10(4) of the RCMA.

7.9. Given the proposals in this chapter of extending some of the traditional property consequences associated with marriage to unmarried intimate relationships, the question arises whether the title of the Matrimonial Property Act should be amended to reflect this wider focus on both married and unmarried intimate relationships. The Commission proposes the following options:

Option 1

7.10. The title of the Matrimonial Property Act should remain as it is but the definition section should include unmarried intimate partnerships in the ambit of relationships, which can receive legal relief under particular sections of the Act

Option 2

7.11. Change the title of the Matrimonial Property Act to the Property in Protected Relationships Act.

Option 3

7.12. Change the title of the Act to the Matrimonial and Intimate Relationships Property Act.

7.13. Respondents are asked to express a preference for either of these options or to recommend other, more appropriate options.

B Comments received

7.14. In *Issue Paper* 41*,* a question was raised whether a universal partnership agreement should apply to polygamous customary marriages where the existing marriages are in community of property? Respondents supported that universal partnership agreement should apply to polygamous marriages.[443] They pointed out that few husbands comply with the RCMA's requirements before entering into subsequent marriages. In such cases, the universal partnership may offer an equitable solution for subsequent marriages, which would enable wives to share in property amassed by their husbands. However, when the first marriages are in community of property, it could be

443 LRC, BASA and Legal Aid SA.

difficult to establish which assets form part of the universal partnership. Legislative guidance is required to create rules for these situations. They further submit that there should be legal argument available to spouses in Muslim marriages and in other civil marriages out of community of property without the accrual system to be able to lay a claim to partnership property. Other respondents do not support this.[444] They submit that all requirements of customary marriages including permission by the first spouse to enter into a second marriage and thereafter must be complied with. Without compliance thereof, the marriage must be declared null and void. They further submit that existing marriages should be respected and the rights of the current wife protected as per the *Mayelane v Ngwenyama,*[445] where the court protected the rights of the first wife. If it is made to apply, then it should apply to the part of the estate that belongs to the husband or the polygamous partner only, which means that the joint estate should be divided between the married parties and only after that has been done, should the universal agreement apply to the partner's share. At no stage should the first wife have to suffer the consequences of her husband's actions.

7.15. The Cape Bar Council submits that there should be an overriding redistribution discretion that will apply and the doctrine of universal partnership should therefore not be necessary.[446] They further submit that needless to say, the parties in a marriage relationship may enter into a commercial contract regarding a specific asset, which cannot be prevented. Again, in regard to bigamous marriages, the polygamous marriages proposal for division at the entry into the bigamous or polygynous marriage should apply. Sandra van Standen on the other hand states that it is very difficult to envisage how this will work in practice. She warns that careful consideration will have to be given to the rights and/or contributions of each spouse in such a marriage. It is difficult to imagine how to balance the rights of the different spouses and how to evaluate the different contributions of each spouse, unless there are clear and distinct separate "pools" of assets allocated to each marriage relationship. One respondent states that its constituency is predominantly Muslim based and accordingly, it does not have the expertise of data available to substantially answer these questions.[447]

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444 Keneilwe Mabapa, CRL Commission and Islamic Forum Azaadville.

445 *Mayelane v Ngwenyama* (CCT/57/12) [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) (30 May 2013),

446 Supported by Karen Botha who submits that section 7(3) should be extended to do away with universal partnership claims.

447 AMAL.

7.16. Another question asked in the issue paper was whether the doctrine of putative marriage should be available in bigamous marriages where an existing marriages is in community property. Karen Botha supported by Legal Aid SA agree and submit that this will protect, for example, children born of that marriage as well as the innocent spouse. Sandra van Standen does not agree as this will cause great uncertainty, which could lead to chaos in society and will greatly prejudice spouses in existing marriages. She is supported by CRL Commission, Islamic Forum Azaadville and Sunni Ulama Gauteng. One view was that there should be an overriding redistribution discretion that will apply, and the doctrine of universal partnership should therefore not be necessary.[448] Further that, the parties in a marriage relationship may enter into a commercial contract regarding a specific asset, which cannot be prevented. Again, in regard to bigamous marriages, the polygamous marriages proposal for division at the entry into the bigamous or polygynous marriage should apply. Cape Bar Council submits that it should apply only in favour of an innocent spouse who had no idea that their partner was already married. It should, however, not happen at the expense of the first or existing wife. The LRC points out that, in *Zulu v Zulu*, the court found that only those assets that were excluded from the joint estate of the first legal marriage could form part of the joint estate in the putative marriage. This is highly prejudicial to a bona fide party to a putative marriage. However, in the same vein, it would be highly prejudicial to the spouse in the first marriage to have to share assets with someone to whom their spouse had entered a putative marriage.

7.17. *Issue Paper* 41 asked how a court should distribute the property if the previous question was answered in the positive. Respondents agree that a balance would be achieved by providing courts with a discretion to decide whether the bona fide spouse can share in the assets where the existing marriage is in community of property.[449] This should be done fairly and equitably.[450] This can include consideration of factors such as the duration of the putative marriage, whether the first spouse was aware of the putative marriage, whether the bigamous spouse was bona fide and the contribution that the spouse in the putative marriage made to the estate of the bigamous spouse. The bigamous party, for knowingly entering another marriage while married, should stand to forfeit the benefits of the marriage in community of property. On a case-by-case basis, the court may apply discretion to waive the application of forfeiture where there are

448 Miller du Toit Cloete and Family Law Forum.

449 LRC and Legal Aid SA.

450 Legal Aid SA.

exceptional circumstances to do so.[451] Section 7(3) should be extended to do away with universal partnership claims.[452]

7.18. Another question was: 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? Most respondents support reliance on universal partnership contracts coupled with judicial discretion.[453] There should be legal argument available to spouses in Muslim marriages and in other civil marriages out of community of property without the accrual system to be able to lay a claim to partnership property. If there was a partnership between the spouses and it can be proven to have existed. Criteria should be set for universal partnerships in marriage unlike the current requirements, which do not always favour the party claiming universal partnership, taking into account parties do not enter a relationship with an intention to make profit.[454] Adv Karen Botha reiterates that section 7(3) should be extended to do away with universal partnership claims. They highlight that as long as Muslims marriages are not recognised as valid marriages and thus do not have the legal consequences of a civil marriage, it should be possible for such spouses to rely on universal partnership contracts to lay claims to partnership property. Spouses in civil marriages out of community of property without the accrual system should similarly be able to rely on universal partnership contracts for this purpose.

7.19. The LRC further argues that the expanded notion of what constitutes a contribution to a universal partnership and of the benefits covered by such a partnership, which is found in the cases dealing with such partnerships should be used to provide an equitable solution in marriages out of community of property without accrual. In respect of Muslim marriages, they refer to the orders in the SCA 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* allowing a court to make equitable orders for the distribution of property in monogamous and polygynous Muslim marriages.

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451 LRC.

452 Karin Botha.

453 BASA, Legal Aid SA, Keneilwe Mabapa, Sandra Botha and LRC.

454 Keneilwe Mabapa.

7.20. Other respondents disagrees because spouses in Muslim Marriages and Civil Marriages out of community of property without accruals are fully aware of the consequences of such marriages and choose to enter into such marriages.[455]

7.21. The last question under this topic was whether unmarried life partners should 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. Few respondents agree and adds that when parties decide not to enter into a marriage, the consequences of marriage and especially any of the marital regimes should not be assumed as it is not the intention of the parties to have this apply and will make clear decisions regarding the universal partnership. In addition, it must also be regulated by statute.[456] There are views that acknowledge that a life partnership is a relationship worthy of protection and that partners within such a relationship should not be discriminated against. The respondent states that our courts have already come to the aid of life partners in certain circumstances (*Bwanya*).[457]

7.22. According to the Cape Bar, there are arguments which weigh for and against introducing a statutory presumption that property acquired during the relationship is to be shared equally between the partners. They acknowledge that, if the spouses in a life partnership are in agreement as to the existence of such a relationship, a presumption may reduce the possibility of litigation between them regarding the division of assets acquired during the partnership. The respondent do, however, also foresee that such a presumption does not necessarily put an end to litigation: Would a property that partner A acquired before entering into the life partnership be excluded even though partner A accelerated payment on the mortgage loan or increased the value of the property through renovations during the subsistence of the life partnership? What happens if such a property is sold and the net proceeds used to acquire (in part) a property purchased after the life partnership commenced?

7.23. According to them, an injustice may in any event result. In this regard, we refer to the following situation: Partner A has accumulated assets (substantial or otherwise) prior to the life partnership. During the life partnership he/she does not acquire any further

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455 Islamic Forum Azaadville, Sunni Ulama Council and CRL Commission.

456 Legal Aid SA and CRL Commission.

457 Keneilwe Mabapa, Cape Bar Council and LRC.

assets but expends his/her income on lifestyle expenses (entertainment, clothing, holidays and the like) while partner B utilised her/his income to cover joint household expenses and did not acquire any assets. At best, partner B would have a limited maintenance claim and the statutory presumption would not assist them. Would a universal partnership claim still be available to partners in a life partnership if a statutory presumption, that property acquired during the relationship is to be shared equally by both partners, is legislated? They advise that universal partnership claims may no longer be competent and yet would have been the only possible remedy available to a partner seeking to address injustice and/or inequality in circumstances where no assets were acquired during the marriage in the scenario mentioned earlier. People often enter into life partnerships because they do not believe in the institution of marriage or they do not wish to share their estates with the other party.

7.24. The respondent further submits that in light of the clear guidance regarding universal partnerships given by the SCA in *Butters v Mncora* they are of the view that it is not necessary to introduce a default property regime for life partnerships, or to create a statutory presumption, as life partners will be able to share in each other's assets even where there are no joint business endeavours. The universal partnership claim also allows the court to exercise a discretion in regard to the percentage of assets to be awarded to each spouse. In its view, a statutory mechanism that provides a court with a wide discretion to distribute assets in life partnerships akin to that in section 7(3) of the Divorce Act, in addition to common law universal partnership claims (which in certain cases may be difficult to establish), is more likely to ensure that justice can be done between life partners with due regard to several criteria, including the parties' intentions.

7.25. On the other hand, the LRC supports the proposal of a statutory presumption of equal property sharing in unmarried intimate partnerships, because a claim in terms of a universal partnership requires litigation, which is not affordable to many people. Also, without a statutory right, the results of litigation may be unpredictable and uncertain. A statutory presumption would address these obstacles but it may be necessary to provide guidance on which unmarried partnerships qualify for this relief, including the duration of the relationship, contributions made by both partners, cohabitation, recognition as partners by family and friends, and a commitment to mutual support. The presumption should be rebuttable by showing that the partners did not intend to share partnership assets with one another.

7.26. A view is held that a statutory presumption that property acquired during the relationship of unmarried life partners is to be shared equally by both partners does appear to be fair. However, this may have unintended consequences which need to be considered.[458] These could be legal uncertainty for any person contracting with the partners in a life partnership. Any distribution of assets should, however, give due regard to formal agreements with bona fide parties in relation to assets, which were put in place during the course of the relationship and the impact such a redistribution may have. The respondent recommends that in order to safeguard against any unintended consequences, such a statutory presumption would need to be qualified in some way. There should be a clear definition of what constitutes life partnership considering factors such as shared responsibilities (household, financial, caregiving to the other spouse and/or children, duration of the partnership, etc.).

7.27. Another respondent[459] submits that parties' freedom of choice should be respected and therefore there should be no statutory presumption that property acquired during a relationship is to be shared equally by both partners since such parties have made a conscious choice (either both parties or one of the parties) to remain in an unmarried life partnership and not in a marriage. However, they should have the benefit of being able to rely on universal partnership contracts to claim a share of assets and, in the event where they have entered into an agreement, particularly a written agreement as to how assets will be shared, effect should be given to such agreement. Lastly, Karen Botha reiterates that these partnerships should be considered on the basis of out and out, and a judicial discretion should be applied. Forcing parties to prove a universal partnership is discriminatory with the financially dependent partner, usually the women, being placed in an almost impossible position to prove her claim.

7.28. According to WLC, the requirements of a universal partnership in law is extremely difficult for women to prove.

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458 BASA.

459 Sandra van Standen.

C Evaluation

7.29. The existing common law options to extend property sharing rights to unmarried partners are the universal partnership contract and the putative marriage for partners who participated in some form of marriage ceremony.

7.30. In addition to these, the Commission received many comments in favour of a judicial discretion to distribute partnership assets equitably in all unmarried partnerships. Such a discretion would be similar to a redistribution discretion, which has thus far only been available to spouses in valid marriages in terms of section 7(3) of the Divorce Act. The proposal is that a similar discretion (taking account of additional factors) should govern the distribution of property in unmarried intimate relationships.

D Proposals: Options to consider

7.31. Proposals will be formulated for each of these options.

1 A judicial redistribution discretion:

7.32. A judicial discretion to order redistribution of partnership assets assumes that there is a starting point from which the redistribution departs. The Commission proposes two starting points or “default regimes” for unmarried intimate partnerships:

Option 1: The no-sharing starting point

7.33. In the absence of an **agreement** to the contrary, which includes a universal partnership agreement, unmarried intimate partners shall have **no rights to share** in any property amassed during the subsistence of their relationship.

Option 2: The equal sharing of partnership assets starting point

7.34. In the absence of an agreement to the contrary, which includes a universal partnership agreement, unmarried intimate partners shall have equal rights to share in any property which has been amassed by either of them during the subsistence of their relationship.

2 Judicial discretion to deviate from the starting point

7.35. At the end of an unmarried intimate partnership, the assets which were amassed by both partners during the subsistence of the relationship shall be divided between the partners in accordance with their agreement. If there is no agreement, the assets will be divided according to the proprietary regime / starting point as set out in options 1 and 2 above.

7.36. However, a court shall have a discretion to order a division which is equitable in the circumstances taking account of:

Any **agreement** between the partners, including a universal partnership agreement before or during the course of the relationship

a) the **duration** of the relationship;
b) whether the partners shared a **common residence;**
c) whether the partners participated in some **form of marriage ceremony** or event or ceremony acknowledging the relationship;
d) whether either or both of the parties, **in good faith, believed they were in a valid marriage**;
e) if one of the partners is a spouse in an existing marriage, whether either or both of the partners **were aware of the existence of the marriage;**
f) any **substantial misconduct** by either partner, including domestic violence and financial abuse directed at the other partner or any other members of the household;
g) the **conduct of the parties**, particularly any **actual sharing** of financial and other resources or expenses during the subsistence of the relationship;
h) any **contributions** made by either partner to the acquisition or growth of assets by the other partner;
i) the **equal value of non-financial contributions**, in particular any caring labour provided by the parties, including care of the home, and care for children and other dependent members of the household; and
j) whether one partner had **given up or reduced their careers** or economic activities in order to care for the home and any family members or members of the household.

Questions for consideration

7.37. Are respondents in favour of a judicial discretion at the end of unmarried intimate partners? If so, should such a discretion be combined with any of the other options?

7.38. Are respondents in favour of a starting point reflected in option 1 (no sharing) or option 2 (equal sharing of partnership assets)?

7.39. Which factors should be added to or removed from those proposed for the judicial discretion?

3 The putative marriage doctrine for unmarried intimate partners and invalid marriages

7.40. Partners who never married would not be able to rely on a putative marriage to claim assets. This doctrine is therefore only useful for people who entered into a marriage which was – for any of a number of reasons - invalid and which met the two requirements: that one or both spouses must have been unaware of the invalidity of the marriage and that they must have undergone some form of ceremony, which could have led to a valid marriage.[460]

7.41. If a putative marriage exists, the common law sets out first the consequences for the children born of the "marriage" and, second, property consequences for the putative spouses. The consequences relating to children are now largely superfluous, since the Children's Act has extended rights to succession and rights to maintenance to children born out of wedlock on the same basis as children born in wedlock. There is therefore no practical need to apply the putative marriage doctrine to safeguard the rights of children.

7.42. What remains legally relevant is the property consequences of the putative marriage. If both spouses to the putative marriage were bona fide, their chosen matrimonial property regime will apply; if only one spouse is bona fide (as would be the case where the other spouse is already married to another person), effectively the property regime, which would favour the bona fide spouse, will apply.

460 On the requirements for and consequences of a putative marriage see Sinclair and Heaton *The Law of Marriage Volume I* (1996) 404-406;

7.43. The question arises whether, given the possibility of a universal partnership, the putative marriage doctrine remains necessary. However, both the requirements for and the remedies associated with these two legal forms differ.[461]

7.44. In the case of the universal partnership, the claimant would be entitled to a portion of the partnership assets, which depends on the extent of her contribution and she would need to prove the factors for a universal partnership as set out in the *Butters* case.[462]

7.45. In the case of the putative marriage, all that needs to be proven is that at least one partner was in good faith and that both participated in some form of marriage ceremony. Depending on the different circumstances in particular cases, partners may qualify for one remedy but not for the other. It may therefore be useful to retain both the remedies provided by the putative marriage and the universal partnership.[463]

7.46. Mwambene and Kruuse note that the putative marriage has not yet been extended to customary marriages but that there may be a need to do so, given the frequent challenges to the validity of customary marriages.[464] There appears to be no principled reason why this should not be done, given that it has been used for Hindu, Muslim and Jewish religious marriages, which meet the requirements.

7.47. If the putative marriage doctrine is retained and extended to customary marriages, the question is whether it needs to be codified in legislation. The benefits of codification are that the doctrine, which is relatively obscure, would be more accessible to members of the legal profession and of the general public. It would also be easier to undertake public education if the requirements and consequences of putative marriages are more widely accessible.

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461 *Ramatshimbila v Phaswana* 2014 ZASCA 117 (19 September 2014) par 8.

462 *Butters v Mncora* 2012 4 SA 1 (SCA) par 11.

463 Bonthuys 2016 PELJ 6-7.

464 L Mwambene and H Kruuse “Form over function? The practical application of the Recognition of Customary Marriages Act 1998" in South Africa” 2013 *Acta Juridica* 292 at 314-316. See however, *Makholiso v Makholiso* 1997 (4) SA 509 (TkS) in which the effects of the putative marriage were implemented in relation to the status of the children from a customary marriage.

4 Options to codify the putative marriage doctrine

7.48. The Commission recommends the following relating to putative marriages:

Option 1

7.49. The first option is that the putative marriage doctrine is not codified and it remains in the common law. However, in this instance, an explicit provision in legislation should set out that the doctrine applies to putative common law, customary and religious marriages that meet its requirements. In this way, it clarifies its application for all forms of putative marriages.

7.50. If the reason for voidness is an existing marriage between a partner to the putative marriage and a third party, and if the existing marriage to the third party is either in community of property or subject to the accrual system, then the property will be divided as set out at paragraph 7.51 below.

7.51. In the case of multiple putative and valid marriages, the property of the spouse who is party to all the marriages will be divided between the valid and putative marriages in the following manner:

a) The court must terminate the matrimonial property system of the first marriage and divide the assets according to the applicable matrimonial property system.
b) Thereafter, the court must order an equitable distribution of the property of the person who is a spouse in all the marriages, to the remaining putative spouses.

Option 2

7.52. The second option is that the putative marriage doctrine and its requirements is codified in the following manner: Parties to a void civil, customary or religious marriage who participated in good faith in a ceremony or ceremonies which, but for the circumstances which caused invalidity of the marriage, could have resulted in a valid marriage are entitled to the matrimonial property consequences of a putative marriage as set out below:

(a) If both partners were in good faith, the default matrimonial property regime is that which the parties chose to apply, either by entering into an antenuptial contract or by failing to enter into an antenuptial contract.
(b) If one party was in good faith, but the other party was not in good faith, the default matrimonial property consequences which are most favourable to the spouse who had been in good faith will apply.

(c) Whether one or both putative spouses were in good faith, a court will have the discretion to redistribute assets which applies to marriages, and must, in addition to the other applicable factors, take into account the existence of the putative marriage and whether one or both partners were in good faith.

(d) If the reason for voidness is an existing marriage between a partner to the putative marriage and a third party and if the existing marriage to the third party is either in community of property or subject to the accrual system, then the property will be divided as set out in paragraph (e) below.

(e) In the case of multiple putative and valid marriages, the property of the spouse who is party to all the marriages will be divided between the valid and putative marriages in the following manner:

i. The court must terminate the matrimonial property system of the first marriage and divide the assets according to the applicable matrimonial property system.

ii. Thereafter the court must order an equitable distribution of the property of the person who is a spouse in all the marriages, to the remaining putative spouses.

Questions for consideration

7.53. Commentators are asked to consider whether the putative marriage doctrine should be available for all situations in which one or both partners participated in a marriage-like ceremony and in good faith considered themselves married, including invalid customary marriages.

7.54. Commentators are asked for their opinion on whether the legal requirements and consequences of putative marriages should be codified in legislation.

7.55. Commentators are asked for their opinions on the feasibility of codifying the putative marriage doctrine as in option 2 above and for any suggestions on improving this option.

7.56. Should the remedies for putative marriages be available in addition to a judicial discretion and/or remedies for universal partnerships?

5 Universal partnerships for unmarried intimate partners and monogamous invalid marriages[465]

7.57. A long history of cases has established that unmarried intimate partners and people in invalid marriages can also claim a portion of the assets generated during their relationships by proving that there was a written, oral or tacit universal partnership contract between them.[466] In order to do so, they have to show that, on a balance of probabilities, the partners or spouses had an agreement with the following terms:

> firstly, that each of the parties brings something into the partnership or binds themselves to bring something into it, whether it be money, or labour, or skill. The second element is that the partnership business should be carried on for the joint benefit of both parties. The third is that the object should be to make a profit. A fourth element proposed by Pothier, namely, that the partnership contract should be legitimate, has been discounted by our courts for being common to all contracts.[467]

7.58. It is important that the cases on universal partnerships acknowledged that a universal partnership does not only have to relate to business ventures but could also have the aim:

> to provide the necessaries of life and such a measure of comfort and security as could be obtained for the common welfare in the home and the upbringing and education of their children.[468]

7.59. This means that non-financial contributions, like caring for homes and children should be considered and valued as contributions to the universal partnership, which would entitle a party to share in the partnership assets. In *Butters v Mncora,* the court pointed to 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."[469]

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465 See paragraph 4.165 above on universal partnerships in marriages out of community of property.

466 For instance *Moghrabi v Moghrabi* 1921 AD 274; *Ex Parte L* 1947 3 SA 50 (C) 60; *Annabhay v Ramlall* 1960 3 802 (D); *Moola v Aulsebrook* 1983 1 AllSA 278 (N) 280; *Isaacs v Isaacs* 1949 1 SA 952 (C) 95, 958; *Ratanee v Maharaj* 1950 2 SA 538 (D); *Ally v Dinath* 1984 2 SA 451 (T).

467 *Butters v Mncora* par 11, setting out Pothier's requirements.

468 *Isaacs v Isaacs* 1949 1 SA 952 (C) 958 at 961; *Butters v Mncora par* 18, 20;

469 *Butters v Mncora* par 22.

7.60. Both in *Butters v Mncora* and *Isaac v Isaac*, the courts noted the inherent improbability of parties agreeing that financial profits of a relationship would accrue to one spouse only, while the other spouse who had made extensive contributions during the relationship is left without any share of the partnership property.[470] For instance, in Butters the court noted that:

> though they intended to share the benefits of their joint contribution, the defendant would retain the surplus income and accumulate assets only for himself. From the plaintiff's viewpoint that intent would be quite remarkable. It would mean that she intended to contribute her everything for almost 20 years to assist the defendant in acquiring assets for himself only; that in her old age she would be entirely dependent for her very existence on the benevolence of the defendant towards her.

7.61. When a universal partnership is proven, at the end of the relationship, the parties are entitled to share in the partnership assets according to their agreement, or if there was no agreement about the extent of sharing, according to the value of their contributions to the partnership. Unfortunately, despite the jurisprudence which encourages courts to value women's typical caring contributions, women's contributions are not valued on a par with the purely financial contributions typically made by men and women often receive less than half of the partnership assets.

7.62. Respondents had different opinions on whether or not there should be a legislative checklist, which courts should consider although many were in favour of a general judicial discretion to order a distribution of partnership property. Most respondents were not in favour of a default position that assets should be distributed equally.

7.63. The benefits of codifying the rules on universal partnerships, as described in the section on putative marriages, is ease of reference, wider dissemination of the law and the possibility of adding additional factors to a statutory provision.

Option 1

7.64. The existing common law rules can be codified and amplified as follows:
A partner can claim a part of the assets amassed by the other partner if they can prove an express or tacit universal partnership agreement between the partners or spouses that:

(a) each party will contribute money, labour or skills to the partnership
(b) that the partnership will be carried on for the joint benefit of the partners

470 *Butters v Mncora* par 26; *Isaacs v Isaacs* 961.

(c) that the object of the partnership be to make a financial profit or to provide for the necessary care and upkeep of the common home and the care and upbringing of any children in the home

(d) The extent of the share claimed depends on the agreement between the parties, or in the absence of an agreement, the extent of the parties' contributions.

(e) In assessing whether such an agreement was reached and assessing the extent of each party's contributions, a court must consider:

(f) Any written or oral **agreement** between the partners, including a universal partnership agreement before or during the course of the relationship

(g) The **duration** of the relationship

(h) Whether the partners shared a **common residence**

(i) Whether the partners participated in some **form of marriage ceremony** or event acknowledging the relationship

(j) Whether either or both of the parties **in good faith believed they were in a valid marriage**.

(k) If one of the partners is a spouse in an existing marriage, whether either or both of the partners **were aware of the existence of the marriage.**

(l) Any **substantial misconduct** by either partner, including domestic violence and financial abuse directed at the other partner or any other members of the household.

(m) The **conduct of the parties**, particularly any **actual sharing** of financial and other resources or expenses during the subsistence of the relationship.

(n) Any **contributions** made by either partner to the acquisition or growth of assets by the other partner.

(o) The **equal value of non-financial contributions**, in particular any caring labour provided by the parties, including care of the home, and care for children and other dependent members of the household

(p) whether one partner had **given up or reduced their careers** or economic activities in order to care for the home and any family members or members of the household

Option 2

7.65. The existing common law position should be retained without being codified: a party who claims a share of partnership assets on the basis of a universal partnership must prove the existence of the agreement and the extent of the contributions. If a

universal partnership is proven, partnership assets are divided according to the partners' agreement or, in the absence of an agreement, in proportion to their respective contributions to the partnership assets.

Questions for consideration

7.66. Should the rules on universal partnerships be codified?

7.67. If respondents are in favour of codification, are there any comments on the proposed codification as set out? In particular, are there any factors which should be omitted, changed or added?

6 Property available for distribution where there is an existing civil or customary marriage in community of property

7.68. The discussions in the previous paragraphs assumed that the parties claiming financial compensation on the basis of putative marriages or universal partnerships were not also involved in marriages or intimate relationships with people other than their partners.

7.69. However, that is not necessarily the case. One of the spouses could be married to a third party, and if that marriage is in community of property, this raises questions about the protection of the existing spouse's rights to the joint estate.

7.70. It is for this reason that the court in *Zulu v Zulu* 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 marriage.

7.71. Prof. Bradley Smith has criticised this reasoning and argued that the case represented a rare opportunity to develop the common law on the proprietary effects of a putative marriage in order to protect the financial interests of the bona fide putative spouse. He suggested that according to:

> American and French jurisprudence, this may have been achieved by recognising (i) the first wife and the deceased's claim to their respective equal shares of the community as it existed at the time of the conclusion of the second (putative) 'marriage'; (ii) the fact that the moment that the putative marriage was entered

> into, the second 'spouse' became entitled to one-half of the deceased's half of the estate that existed between himself and his first wife at that date; and (iii) the fact that the first wife is also a party to the putative estate, with the result that herself, the second 'spouse' and the deceased should be entitled to equal shares (thus one-third) of this estate. In the end result, the first wife would be entitled to one-half of the estate that existed between herself and the deceased at the date of entering into the putative marriage plus one third of the estate involving all three parties (the putative estate), while the second 'wife' and the deceased estate would each be entitled to one quarter of the estate that existed between the first wife and the deceased at the date of entering into the putative marriage plus one third of the putative estate. A court would however be permitted to deviate from this division if it deemed doing so to be just and equitable in view of all factors relevant to the case.

7.72. To summarise, if one of the partners to a universal partnership or a putative marriage is a spouse in an existing marriage in community of property, there is a pre-existing joint marital estate owned by the third party and the partner in the universal partnership or putative marriage. This means that the unmarried partner's rights to property cannot infringe upon the existing rights of the spouse in the subsisting marriage. The issue is therefore how to protect both the property rights of existing spouses and the rights of unmarried intimate partners.

7.73. A similar problem also exists when the existing marriage is subject to the accrual system.

7.74. However, in the Namibian case of *Konrad v Shanika*[471] the court found a way to protect the spouses in a way that the court in *Zulu* did not. While the court in *Zulu* refused to divide the property that made up the community of property between the husband and the legal wife, in *Konrad,* the court found a way to divide the property between the legal wife, the putative wife and the husband in a way that protected both women: the husband had to divide his half of the matrimonial assets with his putative wife, while the lawful wife received her half as per her matrimonial property regime of in community of property.[472]

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471 *Konrad v Shanika* HC-MD-CIV-ACT-OTH-2018/00094) [2020] NAHCMD 259 (30 June 2020).

472 The California Family Law Code provides a codified version of the doctrine and courts have found that sharing could indeed take place where the first marriage was in community of property.

E Proposal

7.75. We suggest therefore the following provision based on sections 20 and 8 of the Matrimonial Property Act:

(1) Where a person successfully claims a share of partnership assets in terms of a universal partnership or a putative marriage from a partner who is also a spouse in **an existing marriage in community of property** with a third party, the court shall order the immediate division of the joint marital estate between the spouses to the existing marriage in equal shares or on such other basis as the court may deem just.

(2) A court making an order under subsection (1) may order that the community of property be replaced by another matrimonial property system, subject to such conditions as it may deem fit.

(3) Where a person successfully claims for a share of partnership assets in terms of a universal partnership or a putative marriage from a partner who is in an existing marriage **out of community of property, but subject to the accrual system** with another spouse, the court shall immediately order the division of the accrual between the spouses to the existing marriage and may order that the that the accrual system applicable to the marriage be replaced by another matrimonial property system.

(4) Upon such an order being handed down, the provisions of sections 8(3) and (4) of the Matrimonial Property Act shall apply mutatis mutandis.

(5) Following upon the division of the joint estate or the calculation of the accrual, the successful claim for a share of partnership assets in terms of the universal partnership agreement or the putative marriage shall be satisfied from that portion of the marital estate of the spouse who is also a party to the universal partnership agreement or the putative marriage.

7.76. Respondents are asked to comment on these proposed provisions, especially whether the interests of existing spouses are sufficiently protected.

CHAPTER 8: MANAGEMENT OF ASSETS DURING MARRIAGE

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

1 Background

8.1. Where parties are married in community of property, they can jointly manage their matrimonial estate.[473] 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.[474] Where a spouse does not obtain this consent, the transaction will be void. Nevertheless, where a third party did not know and could not have reasonably known that a contracting spouse did not have the requisite consent, then it is deemed that the transaction was entered into with the requisite consent, and is therefore valid.[475] If the transaction is deemed valid, the non-consenting spouse has the right to an adjustment in their favour in terms of section.[476]

8.2. Scholars have argued that the bona fide third party's interests are protected to the detriment of the non-consenting spouse and that this protection should shift more clearly in favour of the non-consenting spouse.[477]

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473 SALRS *Issue Paper* 41 at 39.

474 SALRC *Issue Paper* 41 at 39

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

476 Section 15(9)(b) of the Matrimonial Property Act

477 SALRC *Issue Paper* 41 at 40. Barratt "Clarifying protection of spouses married in community of property?" 2011 *Stell LR* 272 274; Heaton 75; JC Sonnekus "Huweliksvermoënsregtelike aspekte van egskeidings en verbandversekerde lenings" 2005 *TSAR* 372 373. See the comment by Mocumie JA in *Vukeya v Ntshane and Others* (Case no. 518/2019) [2020] ZASCA 167 11 December 2020) at par 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 *TSAR* 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) *SALJ* 253; A Barratt, 'Clarifying Protection of Spouses

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.[478] 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.[479] 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.[480]

2 Comments: *Issue Paper* 41

8.4. Some respondents agree that section 15 does offer protection.[481] Nevertheless, they accept that the challenge is lack of knowledge of this protection, hence its underutilisation. Miller du Toit Cloete and Family Law Forum suggest that there should be an obligation on a third party to request the spouses to set out their matrimonial property regime when entering into contracts with such a third party. According to them, this will limit disputes about consent.

8.5. Adv Karen Botha submits that if the default system was out of community without accrual, section 15 would become irrelevant. This would protect the parties and third parties.

8.6. The LRC thinks that the provisions do not adequately protect the interests of wives, because they will only be compensated when the joint estate is divided and on condition that they apply for an adjustment. Before dissolution of the marriage, wives have no

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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 *Stell LR* 272; M de Jong and W Pintens "Default Matrimonial Property Regimes and the Principles of European-South African comparison (part 2)" 2015 *TSAR* 551.

478 *Issue Paper* 41 at 40. See also Sonnekus 377-379, who points out that in practice many of the acknowledged banks in South Africa are slack in complying with the consent requirements when further loan contracts for additional credit on existing bonds are concluded with spouses married in community of property and that these banks will be unable to rely on the protection of s 15(9)(a). 132 s 15(9)(b).

479 *Issue Paper* 41 at 40.

480 *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).

481 Keneilwe Mbapa, CRL Commission, Sandra van Standen, Legal AID SA.

recourse against bona fide third parties. At this time, there may not be enough money in the joint estate to compensate the injured spouse. Spouses who alienate property without permission are usually secretive and mislead third parties who would usually be bona fide. Moreover, the section is practically meaningless because there are so many exceptions that often cover very valuable transactions like sale of shares and stocks. There is no law requiring that assets be held in joint bank accounts, which means that the spouse in whose name a bank account is registered has effective control of all funds in that account. The other spouse is not even entitled to information about funds in that account. Similarly, there is no rule requiring employers to pay salaries into joint bank accounts. The remedies of immediate division of the joint estate and suspension of one spouse's powers to bind the joint estate are only available when the injured spouse is aware of the offending transactions and will often not be useful. The LRC suggests a provision determining that debts incurred without the required consent of the other spouse should become the separate debts of the transacting spouse. They endorse the suggestion by De Jong and Pintens[482] in favour of a provision that transactions concluded without the required consent may be annulled by the court on application by the non-consenting spouse.

8.7. The LRC also suggest that, at the stage when a court upholds a transaction with a bona fide third party, the court should be able to provide relief to the non-consenting spouse where necessary as part of the proceedings before them – this will ensure that the adjustment is secured and does not have to be argued for at a later date in further court proceedings (eg divorce proceedings/ after the death of a spouse). Furthermore, the Matrimonial Property Act is silent on whether the adjustment for the loss is made while considering inflation. Inflation must be considered since it is only then that the true loss suffered by the innocent spouse be rectified. Finally, what constitutes bona fide conduct by a third party should be clarified by setting out that the third party must confirm:

- whether the person they are in business with is married,
- if so, in terms of which marital regime,
- if the marital regime is in community of property, whether the spouse of the person consented to the business envisaged.

8.8. Suppose that the answer to the question "Does section 15 strike the appropriate balance in protecting the interests of the non-consenting spouse, on the one hand, and

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482 Default matrimonial property regimes and the principles of European family law with a European and South African comparison (part 2), TSAR 2015

the bona fide third party on the other?" - is no, how should the legislation be amended to provide for the appropriate balance of protection? Several respondents agree that legislation could be improved to ensure an appropriate balance of protection.[483] They support broadening the scope by which consent may be obtained.

8.9. The LRC states that, although section 15 does attempt to strike a balance between bona fide third parties and the non-consenting spouse, the adjustment remedy is problematic. This is because, after the third party has demonstrated their bona fides and the transaction is upheld, the non-consenting spouse must meet two requirements to obtain the adjustment referred to in section 15(9)(b). These requirements are that the adjustment can only be made when the joint estate is being dissolved and that the non-consenting spouse must make an application to the court to order the adjustment. In this regard, the LRC points out that more could be done to protect the non-consenting spouse. This is in line with the court's suggestion in *Bopape and Another v Moloto*[181] that the remedies of the non-consenting spouse must not be limited to the "four corners of section 15(9)(b) of the Act". For example, if the court was to find that the third party acted bona fide and the contract was upheld – the LRC suggests that the court could provide relief to the non-consenting where necessary as part of the proceedings before them. This, it is argued, will ensure that the adjustment is secured and does not have to be argued for at a later date in further court proceedings (eg divorce proceedings/ after the death of a spouse).

8.10. Miller du Toit Cloete and Family Law Forum suggest that there should perhaps also be a provision that both spouses sign and complete a contract and reply to the question relating to their marriage regime. This will protect the non-consenting spouse and give such a spouse notice of the transaction.

8.11. Islamic Forum Azaadville, supported by Sunni Ulama Council states that this issue does not arise or apply to Islamic marriages.

8.12. The CRL Commission and BASA are satisfied with the current "reasonable belief'" standard. Other respondents feel that there should be more added to section 15.[484] They believe that third parties should also be held responsible for reckless actions. For instance, it is common practise for car dealers to sell a vehicle to a person married in

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483 Keneilwe Mabapa, BASA, Miller du Toit Cloete and Family Law Forum, AMAL and LRC.

484 Keneilwe Mabapa, Miller du Toit Cloete and Family Law Forum, Legal Aid SA, LRC.

community of property without securing the consent of their spouse. It should be made compulsory for credit providers to secure spousal signatures in the same way as it is compulsory when transferring immovable property and if such consent is not secured, to make the credit provider take responsibility for it instead of the innocent spouse having to bear the burden.

3 Evaluation and proposals

(a) Is the protection offered by section 15 of the MPA adequate?

8.13. Parties married in community of property are required to obtain the consent of their spouse for certain transactions involving their joint assets as set out in section 15 of the MPA. Where a spouse does not obtain this consent, the transaction would be void. Responses to *Issue Paper* 41 are mixed over the adequacy of section 15. Some respondents stated that spouses (mostly husbands) use the "gaps" in section 15 to dissipate assets to the detriment of their wives. Others expressed concern over the lack of knowledge of the protection offered by the section.

8.14. Most respondents agree that in cases where a third party did not know and could not have reasonably known that a contracting spouse did not have the requisite consent, the law should deem the transaction as valid and give the non-consenting spouse the right to an adjustment in their favour in terms of section 15(9)(b). The question then is whether the reference to "reasonable belief" in the legislation clear enough?

8.15. Many respondents stated that the reference to "reasonable belief" in the legislation is clear enough. Although section 15(9) protects both the non-consenting spouse and the bona fide third party, this protection should be weighted in favour of the non-consenting spouse. In this vein, most respondents believe that cases involving the alienation of joint assets are best handled on a case-by-case basis. They support full disclosure of all transactions conducted during the marriage. Thus, "reasonable" belief in section 15(9) should be retained because it is flexible enough to account for varying circumstances of alienation of immovable joint assets.

8.16. Importantly, most respondents focused on the adjustment remedy and its uncertainty as to timing and value. As such, the following options are suggested:

(b) Options regarding 'reasonable belief"

Option 1

8.17. Keep the wording of section 15(9)(a) unchanged.

Option 2

8.18. Introduce the requirement that the third party must undertake an "adequate inquiry" in order to be deemed to have a reasonable belief as set out in section 15(9)(a).

(c) Options regarding the adjustment remedy between spouses

Option 1

8.19. The adjustment remedy should be available to the non-contracting spouse at the time that the transaction is deemed valid in terms of section 15(9)(a) of the MPA.

8.20. Where the non-contracting spouse successfully applies for an order for adjustment in terms of this section, they will be deemed to satisfy the requirement of prejudice in terms of section 20 of the MPA, allowing the non-contracting spouse to apply for an immediate division of the joint estate in the same action**.**

B Dissipation of assets pending divorce

1 Background

8.21. The dissipation of marital assets is a real danger from the time when the marriage relationship starts deteriorating up to the granting of a divorce order. Despite the fact that this practice is frowned upon by our courts,[485] it often happens that when one spouse is contemplating a divorce he or she starts concealing, diminishing or squandering assets that might otherwise be eligible for the division of assets upon divorce. When spouses become aware that a divorce will soon take place, some of them may want to alienate or

485 SALRC *Issue Paper* 41 at par 8.7. M De Jong "The need for new legislation and/or divorce mediation to counter some commonly experienced problems with the division of assets upon divorce" *Stell LR* 2012 (23):2 at 232. See also *MB v NB* 2010 3 SA 220 (GSJ) par 42 and *JLT v CHT and Another* (EL 819/2020) [2021] ZAECELLC 4 (22 January 2021).

hide assets in order to prevent sharing these assets with the other spouse at divorce.[486] Women are often disadvantaged by these practices because they often leave the finances to their husbands and are thus unaware of financial matters.[487]

8.22. As set out in the previous paragraph 8.1, 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.

8.23. In spite of this, not all financial 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.*

8.24. 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.[488]

8.25. 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.[489] Despite the legal obligation to "furnish full particulars of the value of that estate" at the time of divorce,[490] 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

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486 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.

487 De Jong, M 2012 *Stell LR* 225 232.

488 SALRC *Issue Paper* 41 at par 8.10.

489 SALRC *Issue Paper* 41 at par 8.10. 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) par 26.

490 Matrimonial Property Act section 7.

immediate division of the accrual in terms of section 8 of the Act.[491] The effectiveness of this section depends again on obtaining information about the proposed behaviour by the other spouse.[492]

2 Comments: Issue Paper 41

8.26. We sought views on whether the mechanisms aimed at preventing spouses from concealing and dissipating assets pending divorce provide adequate protection for spouses married in community of property and out of community of property subject to the accrual system. Most respondents[493] believe that the mechanisms are not sufficient. Respondents state that men, who are usually in charge of family finances, use the gaps in the legislation to hide assets to the detriment of wives. They further state that the onus rests on wives, who are usually the more vulnerable parties, to prove the existence and value of assets, which is unfair because they must rely on expensive investigators and attorneys to assist them with obtaining information and access to the assets.

8.27. The Cape Bar Council suggests that for marriages in community of property, it may be necessary to widen the category of assets designated in section 15 of the Matrimonial Property Act, requiring spousal consent for certain transactions, to include all investments as well as the family home, irrespective of whether it is held by the parties personally or indirectly through an entity in which they have a majority shareholding.

8.28. Keneilwe Mabapa suggests that whilst there are measures in place to assist the innocent party, subject to a potential dissipation of their claim to matrimonial assets, they are inadequate in that they:

a) Place a burden on the innocent party to prove that the other party had a particular state of mind to get rid of the funds in the joint estate or is likely to do so, which may be difficult to prove due to lack of evidence (eg party not having access to financials of their spouse).
b) It also requires the innocent party to approach the court, assuming that he/she is aware of the dissipation – which is not often the case.

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491 SALRC *Issue Paper* 41 at par 8.10.

492 SALRC *Issue Paper* 41 at par 8.10.

493 Miller du Toit Cloete and Family Law Forum, LRC, Karen Botha disagrees supported by CRL Commission, Legal Aid SA and Sandra van Standen.

c) Place a financial burden on the spouse who might not have the funds and ability to secure legal assistance or might even be ignorant of their rights.

8.29. Islamic Forum Azaadville, supported by Sunni Ulama Council, states that this issue does not apply to Islamic marriages.

8.30. Another question posed in the issue paper is what measures could be introduced to improve the position? For example, should the legislation be changed to determine the value of accrual at the time of *litis contestatio* (at the time of instituting the divorce action) instead of at the time of the order of court? Many respondents agreed with this proposal, but others said that it holds dangers for more vulnerable spouses. For example, Sandra van Standen suggests that: while it may appear that "pegging" the date for determining the value of the accrual at the time of *litis contestatio* will curb the costs, the danger of doing so is that it could hold great prejudice for either spouse. For example, if the estate increase after *litis contestatio,* it would have the unfair effect of the other spouse having to pay or transfer assets to the claimant spouse, which exceeds the value of the estate at the time of divorce.

8.31. Also, it was asked: should courts deciding Rule 43 applications be empowered to require the spouses to provide a full valuation at that point? Most respondents[494] support full disclosure and scrutiny into all transaction conducted during the marriage, not only in a rule 43 but at the point of a divorce summons. They point out that in all marriages where a divorce action is pending, there should be an automatic consequence that parties cannot encumber or alienate any assets, other than during the ordinary course of business, pending the outcome of the divorce. The respondents state that in regard to transactions relating to business decisions, written notice of, say 14 days, should be given to the other spouse of such a decision, unless not reasonably possible, in which case a shorter notice period shall be given. It would be useful if a specific date is set at which one sets the values of consuming to revalue the assets, particularly in larger estates. They are cautious that perhaps the assets should then be valued as at close of pleadings, which should be the cut-off date. They suggest that section 15 be broadened to include a range of transactions. In regard to the accrual regime, the parties should disclose all their assets and liabilities at the commencement of the marriage and then again at the institution of proceedings in terms of the new procedures suggested.

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494 Miller du Toit Cloete and Family Law Forum, LRC, CRL Commission Cape Bar Council, Legal Aid SA, Keneilwe Mabapa Karen Botha and Sandra van Standen.

8.32. Anonymous says that even at the time of *litis contestatio*, it is usually too late. The respondent further says that a husband's intent on divorcing his wife and disempowering her financially will have no compunction about dissipating/hiding the assets to his satisfaction well ahead of time (ie, even before he declares he wants a divorce). The respondent explains that the same applies to a Rule 43 application – it is already too late, since an unconscionable husband will provide a false evaluation. In addition, she states that it is not unusual for a man contemplating divorce to deliberately and substantially cut his earning capacity prior to divorce in order to skew the accrual calculation in his favour. She submits that fraud is fraud: dissipation of assets by a spouse (almost invariably the male) should be categorised as criminal behaviour and appropriate sanctions should be brought to bear upon the guilty party. (In this regard, an analogy could be made to the Director of a company misappropriating assets or profits.) She further submits that it is common for self-employed men to deliberately cut their earnings when contemplating or instituting a divorce action. Not only that, but there is no redress in the situation where a spouse contemplating divorce dissipates assets on items such as personal effects, "business trips" (in reality trips to connect with an affair partner), or lunches at high-end restaurants – all of which expenses cannot be included in the accrual.

8.33. Islamic Forum Azaadville, supported by Sunni Ulama Council, states that this issue does not apply to Islamic marriages.

8.34. Legal Aid SA holds the view that institutions like FICA should have the authority in divorce matters to bring out a report as to the assets of the parties (bank accounts etc.). This would greatly assist in determining if a spouse has been alienating/hiding/dissipating assets before and during divorce. Keneilwe Mabapa submits that one of the measures it may use is to make it compulsory for parties to submit financial statements for between 24 – 60 months prior to the date of the institution of divorce (including salary advice, bank statements and SARS annual returns). The parties should also be required to explain transactions, their necessity and why they did not disclose to their spouses where section 15 requires such disclosure. These would help the court to trace the financial transactions and show what the parties have been up to and at the same time easing the burden on the innocent party.

8.35. The Cape Bar Council submits that the risk of dissipation and non-disclosure pending matrimonial proceedings could be limited significantly by introducing mandatory requirements along the following lines:

(a) Within a specified period after the institution of matrimonial proceedings, the parties shall be obliged to disclose fully, verified on oath, (a) their assets and liabilities and income for the last calendar year, including their interests as founder/settlor and/or beneficiary and/or loan creditor of any local or off-shore trust and any directorships of companies; (b) what donations, interest free or unsecured loans and transactions with trusts they have made two years before the institution of matrimonial proceedings;

(b) After the institution of matrimonial proceedings, spouses shall be precluded from selling, alienating, encumbering or in any other way disposing of any of their assets without their spouse's written consent (which shall not be unreasonably withheld) except in the ordinary course of business or to meet the family's maintenance needs and obligations;

(c) If there is any material change in the spouses' assets/liabilities after the disclosure they made in terms of (1), they shall notify their spouse of this promptly in writing.

8.36. AMAL believes that spouses providing full valuations at the time of the Rule 43 proceedings would not only encourage speedy settlement, but also would be in the interest of justice and protection of vulnerable spouses.

8.37. Miller du Toit and the Family Law Forum, Western Cape, suggest that, in all divorce matters, disclosure of assets should take place on oath with the summons and the plea and counterclaim. Sandra van Standen agrees and makes the following specific suggestions:

a) Shortly after instituting action, both parties should make a complete and full disclosure of assets and liabilities as well as their income over a particular period ie, for the previous 12 months predating the institution of divorce proceedings. They should also disclose any interests which they have as founder and/or beneficiary and/or loan creditor of a trust (both local and/or offshore) as well as directorships of companies and/or interests in partnerships (both formal and informal). If they do have interest in a trust, they should disclose whether they have received any donations, loans or have had any other transactions/agreements which they entered into with a trust for a certain period predating institution of the divorce proceedings.

b) The disclosure in item 1 above should be made under oath.

c) There should be a general prohibition against spouses alienating and/or encumbering assets without the consent of their spouse (except in the normal course of business) once divorce proceedings have been instituted.

d) Courts should be empowered to order full and proper disclosure (discovery) during a Rule 43 process. A full and proper valuation at that point will be helpful. However, it could have major costs implications, particularly where a trial is not imminent because in such instance, an updated valuation will have to be done again closer to the trial date and the parties would therefore have to incur such costs a second time.

8.38. The LRC agrees that the current situation is problematic. The problems of dissipation and secreting assets also exist in marriages subject to the accrual system. The law does not contain provisions preventing dissipation or hiding of assets in these marriages. Nor does it contain compensation for the spouse who has been prejudiced if the other spouse has dissipated or hidden assets. Where a spouse becomes aware of pending dissipation of assets, the common law allows them to obtain an interdict, but this is not easily obtained.[495] There should be a statutory remedy, which allows the value of squandered assets to be added to the amount to be distributed as accrual.

8.39. The LRC supports legislative reform that would see the value of the accrual and the estate (marriages in community of property) determined at the time of the institution of the divorce, rather than at litis contestatio or any later date. Moving the date for the calculation of accrual earlier would remove the temptation to squander assets – see *MB v NB* 2010 3 SA 220 (GSJ), but litis contestatio may give a dishonest spouse time to squander or hide assets. The LRC therefore suggests that the law should be amended to determine the value of accrual at the time of the institution of the divorce proceedings to protect parties when the other spouse decides to conceal or dissipate assets during the divorce proceedings. This is in line with the approach in German law, as well as in other European countries such as the Netherlands.

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495 See, for example, *RS v MS* 2014 (2) SA 511 (GJ).

3 Evaluation and proposals

8.40. In terms of Rule 35 of the Uniform Rules of Court, a party must make discovery on oath of any and all documents in the action, which are or have at any time been in the possession or control of such party and relevant to the action, and to disclose where such documents are, if not in his possession. While a party can request further and better particulars, it depends on their ability to verify the assets, interests and income of the other party. Unlike in many jurisdictions, there is no statutory regulation of itemisation or content of a disclosure of assets in the form of a financial disclosure form, for example, in Canada. As a result, parties in South Africa have to rely on the ordinary civil procedure rules to obtain information on value.

8.41. The issue of sanctions is important. At the moment, a court can make an adverse inference against a recalcitrant spouse, or grant a punitive cost order.[496] Upon request for discovery, a party who questions the authenticity of a family trust or suspects the other party of failure to disclose assets may face an uphill battle. A party may subpoena relevant bodies for information, but they have to establish relevance. This may be difficult where the requesting spouse is acting "in the dark" so to speak, and courts may set aside subpoenas on the basis that it constitutes an abuse of process.[497]

4 Proposals

(a) What measures could be introduced to improve protection against dissipation of assets?

8.42. Whenever divorce is threatened, instituted or pending, parties should be barred from encumbering or alienating valuable property except in the ordinary course of business or for the purpose of subsistence. This prohibition should continue until the divorce is determined.

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496 *DEB v MGB* 2014 ZASCA 137. See also *R v R* (45854/2020) [2022] ZAGPPHC 886.

497 *TM v LM* (4022/16) [2016] ZAKZPHC 59 *Kilborn v Kilborn* (case numbers 9793/2022, 10149/2022, 9794/2022 and 9882/2022) WCHC unreported judgment (7 December 2022).

8.43. For the purposes of the options set out below, dissipation of assets shall include alienation of assets at disproportionate value or that have a significant effect on the division of assets at the dissolution of marriage.

8.44. The Commission therefore recommends the following:

Option 1

8.45 That there shall be no dissipation of assets from the date that the divorce summons is issued as set out above; and/or

Option 2

8.46 that there shall be no dissipation of assets by the spouse instituting the divorce proceedings as set out above; and/or

8.47 Shortly after the issue of divorce summons or receiving a divorce summons, both parties should make a complete and full disclosure of their assets and liabilities, as well as their income over the previous 12 months, predating the commencement of divorce proceedings. Parties are then required to detail their assets in a disclosure form as discussed at par 9.46 below.

CHAPTER 9: TECHNICAL ISSUES

A Trusts

1 Background

9.1. An important principle of a South African trust law is that there must always be a separation between ownership or control of trust assets and the enjoyment of trust benefits.[498] Section 12 of the Trust Property Control Act[499] supports this principle as follows:

> Trust property shall not form part of the personal estate of the trustee except in so far as he as the trust beneficiary is entitled to the trust property.

9.2. Nowadays, trusts are increasingly abused by beneficiaries and trustees, particularly in family and business trusts. 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.[500] Because men are usually in charge of family finances, especially where large amounts of money are at stake, this practice usually affects wives detrimentally.

9.3. It has therefore become necessary for our courts to deal with the separation of ownership and control of trust assets, especially upon divorce. Courts use two avenues to do this and there is therefore jurisprudence on "sham" trusts on the one hand, and

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498 The Supreme Court of Appeal established this concept in its decision in *Landbank and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA). In this case Cameron JA expressed this basic idea as follows: 'Though a trustee can also be a beneficiary, the central notion is that the person entrusted with control exercises it on behalf of and in the interests of another. This is why a sole trustee cannot also the sole beneficiary. . .' par [19] at 86. See also "Trusts discussed at FISA conference" *De Rebus* September 2016, where Prof Bradley Smith discussed separation of control and enjoyment in trusts, and stressed that it was vital for trustee-spouses to ensure compliance with the core idea of trust so as to minimise risk at divorce.

499 Trust Property Control Act 11 of 2018.

500 SALRC *Issue Paper* 41 at par 9.1. C Weyer "The viability of the trust as an estate planning tool" (2017) LLM, UP.

"abuse" scenarios in which courts will "pierce the corporate veil" to consider trust assets in certain situations, on the other hand.[501]

9.4. A sham trust exists where the trust appears to have been established in terms of a trust deed but these terms do not reflect the parties' (the founder and the trustees) true intentions, thereby misleading third parties about the true terms of the trust.[502] De Waal explains that in the case of a sham trust, the question is whether a valid trust has been created at all.[503]

9.5. In this case, "the question whether or not a trust is a sham trust has everything to do with the requirements for the creation of a valid trust", particularly the requirement that the founder must have had the intention to create a trust.[504] If this intention is lacking, or the real intention is to create something different, no trust comes into existence.[505] A trust is therefore a sham where there is no true intention to form a trust. The challenge is consequently to establish the "real intention" of the founder, which differs from the "simulated intention".[506] In *Van Zyl v Kaye,*[507] Binns –Ward J stated that the test to determine if a trust is a sham is whether or not the requirements for the establishment of a valid trust were met or whether the appearance of having met them was in reality a simulation.

9.6. In *Badenhorst,*[508] the Supreme Court of Appeal (SCA) 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.[509] In this case, the SCA confirmed that the value of the assets of a trust could be taken into

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501 BS Smith "Sham trusts in South Africa: *Tempora mutantur, nos et mutamur in illis* (times change, and we change with them)" (2019) 136 *SALJ* 550.

502 *Humansdorp Co-op v Wait* Case no 2896/2012, ZAECGHC (1 November 2016).

503 M de Waal "The abuse of the trust (or: "Going behind the trust form"): The South African experience with some comparative perspectives" (2012) 76 *The Rabel Journal of Comparative and International Private Law* 1078.

504 De Waal 2012 at 1082.

505 De Waal 2012 at 1082.

506 De Waal 2012 at 1082.

507 *Van Zyl v Kaye* 2014 4 SA 452 (WCC) par 16.

508 *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA).

509 *Issue Paper* 41 at par 9.2.

account for the purposes of a redistribution of assets order (in terms of section 7(3) to (6) of the Divorce Act. This was due to the fact "the terms of the trust deed" as well as "the evidence of how the affairs of the trust were conducted during the marriage demonstrated that the respondent had de facto controlled the trust and but for the trust would have acquired and owned the [trust's] assets in his own name".

9.7. In *RP v DP,*[510] the court held that it was "fallacious" to argue that the court's discretion to take the value of the assets of an alter ego trust into account was derived from (and restricted to) marriages to which the discretionary powers conferred by section 7(3) to (6) of the Divorce Act applied (at par 56). As a result, the common law power could also be exercised in the marriages subject to accrual.

9.8. However, In *WT v KT,*[511] the Supreme Court of Appeal 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.[512]

9.9. Because of this uncertainty and complication of the law in this area, some argue in favour of legislation to 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, irrespective of the matrimonial property regime.[513]

9.10. Another problem is that 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.[514]

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510 *RP v DP* 2014 (6) SA 243 (ECP).

511 *WT v KT* 2015 (3) SA 754 (SCA).

512 SALRC *Issue Paper* 41 at par 9.2.

513 Costa *De Rebus* 2003.

514 SALRC *Issue Paper* 41 at par 9.3.

9.11. The following questions were asked in the issue paper:[515]

a) 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?

b) 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?

c) What factors should the courts take into account when exercising this discretion?

d) 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?

e) 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?

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

9.12. Respondents overwhelmingly supported the idea that courts should 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.[516]

9.13. Most respondents believe that this should apply to all trusts as well as all marriages, including customary marriages.[517]

9.14. The Cape Bar Council, supported by Family Law Forum, Western Cape and Miller du Toit Cloete, further state that, if the court's section 7(3) redistribution discretion is extended to all marriages out of community of property, the question of how to deal with trust assets on divorce will also arise in out of community of property marriages, excluding accrual.

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515 *Issue Paper* 41 at 44.

516 BASA, Karen Botha, Pitse Mamabolo, CRL Commission and Legal Aid SA, Miller du Toit Cloete and Family Forum, Western Cape, Keneilwe Mabapa, Cape Bar Council, Sandra van Standen,LRC and MPL Network even though Impl Network's position regarding trusts is evolving as they are still consulting within their communities and are being guided by the ways in which this mechanism is used to deny assets to wives.

517 Legal Aid SA, Karen Botha, LRC, Pitse Mamabolo, Keneilwe Mabapa, LRC and UUCSA.

9.15. Other respondents[518] argued that the discretion should apply only to *inter vivos* trusts but not to Court Order and Testamentary Trusts.

9.16. Nevertheless, the UUCSA supported by the Islamic Forum Azaadville and Sunni Ulama Council Gauteng, argued that courts should only have a discretion if either of the parties acted in breach of an agreement (for example, a partnership agreement) entered into between the parties at the inception of the marriage.

9.17. In response to the question on the factors which a court should take into account to decide to include trust assets, there were divergent views.

9.18. The Cape Bar Council, supported by Miller du Toit Cloete and Family Law Forum, pointed to legislation, which confers authority on divorce/family courts to make special orders with regard to trust assets in other jurisdictions. However, they cautioned that legislative reform in this area should be cautious and that serious consideration should be given, among others, to the following factors:

a) The interests of third parties;
b) Often trust structures involve complex subsidiary corporate structures which do not allow assets to be easily separated;
c) The tax implications of distributing trust assets;
d) The need for to align the principles which govern the piercing of trusts in matrimonial proceedings with established legal principles governing the piercing of corporate structures in general.

9.19. The MPL Network, supported by AMAL, argue that a list of factors for courts to consider may prevent courts from certain critical factors in the case before it. They therefore recommend the addition of a general factor such as “any additional factors which a court may consider relevant.”

9.20. Commentators suggested the following factors for consideration:

a) when was the trust created;[519]
b) purpose of the trust;[520]
c) Who established the trust;[521]

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518 AMAL, MPL Network, Sandra van Standen and CRL Commission.

519 Keneilwe Mabapa, BASA and CRL Commission.

520 Karen Botha; BASA, Legal Aid SA and Keneilwe Mabapa.

521 Keneilwe Mabapa, BASA and Sandra van Standen. The Cape Bar Council supported by Miller du Toit Cloete and Family Law Forum, further submit that a distinction should be made between, on the one hand, dynastic and intergenerational trusts which have been

d) beneficiaries of the trust;[522]

e) consultation between the spouses beforehand;[523]

f) the source of funding of the trust;[524]

g) control of the trust;[525]

h) What benefit was gained?[526]

i) What prejudice was suffered?

9.21. Some respondents argued in favour of a rebuttable 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.[527] The LRC points to their experience that women disproportionately suffer from being denied a share in assets held in trusts and argues that there is no reason for prioritising trusts over the chosen matrimonial property regime and the spouses' rights to share in matrimonial property.

9.22. Other respondents disagree.[528] The MPL Network believes that such a presumption would tamper with the onus of proof and recommend that presiding officers should exercise caution in this regard.

9.23. There were different suggestions on the question about legal mechanists to ensure that spouses have adequate information about trust assets at divorce but several respondents agreed that this was indeed a problem in practice.[529]

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legitimately established and grown by non-spouse founders (in practice often one of the spouse's parents or grandparents) and, on the other hand, trusts established at the instance of one of the spouses during their marriage.

522 Keneilwe Mabapa, Cape Bar Council supported by Miller du Toit Cloete and Family Law Forum and BASA.

523 Keneilwe Mabapa

524 Legal Aid SA, BASA and Keneilwe Mabapa.

525 Keneilwe Mabapa, Legal Aid SA and Karen Botha.

526 Legal Aid SA.

527 Legal Aid SA, Keneilwe Mabapa, Karen Botha, CRL Commission and LRC.

528 MPL Network, AMAL, Sandra van Standen, UUCSA and Cape Bar Council supported by Family Law Forum, Western Cape and Miller du Toit Cloete.

529 LRC, MPL Network.

9.24. Some respondents suggested that a rebuttable presumption that all the assets in a family trust form part of the matrimonial property could be accompanied by a provision that allows for both spouses to have access to information in relation to the trust.[530]

9.25. Sandra van Standen suggests that costs contributions should take into account the ability by the other spouse to access trusts funds.

9.26. Others[531] suggest that existing legal mechanisms already fulfil this function, for instance:

a) PAIA – allows for anyone to call for disclosure, and would, allow for information of the trust to be released.
b) Discovery processes could compel parties to disclose information and evidence.

9.27. Karen Botha suggested that: any party wishing to form a trust, should be required to make a disclosure to their spouse. A trust should not be registered by the Master without a form signed by the other spouse, in the presence of the Master, to certify that he/she has read the trust deed, understands the purpose of the trust and agrees that trust assets will not form part of the estate of their spouse. Whenever a spouse wishes to donate assets to a trust, a similar process should apply.

9.28. The Cape Bar Council, supported by Miller du Toit Cloete and Family Law Forum, suggest that a possible starting point is the extension of the courts' discretionary powers in terms of section 13 of the Trust Property Control Act to vary or collapse trusts in respect of family trusts set up during marriages. The factors, which courts should take into account when exercising this discretion, could include the factors developed in case law, for example, in *Badenhorst v Badenhorst*. However, the actual control of trust assets should not be decisive because there may be family trusts where both spouses are trustees but due to conflict associated with the divorce, are unable to continue co-administering the trust assets. In such situations, it may be desirable to have a legislative mechanism to allow them to achieve a clean break in their family trust on divorce (eg a broader discretion in terms of section 13 Trust Property Control Act).

9.29. On the question of other problems regarding trust assets upon divorce, Karen Botha submits that trusts are not properly managed and that they are used to protect

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530 LRC and CRL Commission.

531 MPL Network supported, AMAL and Legal Aid SA.

assets, usually from spouses and/or creditors. She believes this could be solved by putting measures in place whereby assets cannot simply be transferred to a trust without oversight.

9.30. The Cape Bar Council, supported by Miller du Toit Cloete and Family Law Forum, feel that imposing a mandatory disclosure duty on spouses at the beginning of matrimonial proceedings would help spouses to obtain financial information about trust assets. They anticipate that this would significantly reduce the need for costly interlocutory proceedings and would facilitate earlier settlement. Keneilwe Mabapa agrees that disclosure of information and access to financial records would enable spouses to trace transactions in and out of trusts.

9.31. Legal Aid SA believes that the lack of good governance can be problematic in divorce cases. One spouse can have control over the assets while the other does not have access to the trust. By their nature, trusts are separate from the person who established them and do not form part of the estate of the trustee as the trustee operates in a representative and not personal capacity. Pitse Mamabolo submits that the SALRC must heed the warning of Prof. van Wyk that the MPA seemed "deficient in protective measures against fraudulent alienations of assets aimed at defeating the other spouse's equalization [accrual] claim." Prof. van Wyk specifically mentioned alienations of property to a discretionary trust as a manner to engage in "preventative estate planning prior to divorce."

2 Evaluation of the treatment of *inter vivos* trusts at divorce

9.32. In *Land and Agricultural Bank of South Africa v Parker and Others*[532] Cameron J observed that the central idea of a trust is that there should be a separation of ownership and control (vested in the trustees) from enjoyment of the trust assets (vested in the beneficiaries) and that the trustees could be held accountable by the beneficiaries where they fail diligently to exercise their duties. However, this structure often breaks down in the case of family trusts where trustees and beneficiaries are usually the same people. In such situations, beneficiaries would have no incentive to hold trustees to account. This situation does not advance the interests of third parties, who cannot assume that trustees

532 *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) 19.

would exercise their fiduciary duties properly and can therefore not be certain that the control and the enjoyment of the trust assets are indeed separated.[533]

9.33. Cameron J further stated that:

> The core idea of the trust is debased in such cases because the trust form is employed not to separate beneficial interest from control, but to permit everything to remain 'as before', though now on terms that privilege those who enjoy benefit as before while simultaneously continuing to exercise control.[534]

9.34. Although courts have attempted to grapple with these issues, uncertainty and conflicting views remain in certain areas, including in the criteria and circumstances in which trusts will be declared to be simulated (sham trusts) or when the veneer of the trust should be pierced to consider and distribute trust assets at divorce. There are also conflicts on whether these remedies are available to calculate the division of assets in marriages in community of property and marriages subject to accrual and to redistribute assets in terms of section 7(3) of the Divorce Act. For these reasons, the court suggested that there should be legislative intervention to better regulate family trusts to ensure that the trust form is not abused and this is widely supported by respondents.[535]

9.35. We therefore propose to clarify and provide guiding factors which indicate when a court should take cognisance of *inter vivos* trust assets at divorce *or separation* and the legal remedies, which are available in respect of trust assets. In respect of the available remedies, the Supreme Court of Appeal[536] has made it clear that: “a declaration could be made that the trust assets in question are to be used to calculate the accrual of the appellant's estate, as well as satisfy any personal liability of the appellant to make payment to the respondent.”

9.36. We also propose certain duties of disclosure to assist divorcing spouses to determine the true value of their estates and thus facilitate accurate division of the matrimonial property.

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533 *Land and Agricultural Bank of South Africa v Parker and Others* at Par [22-34].

534 *Land and Agricultural Bank of South Africa v Parker and Others* at Par [26].

535 See *PAF v SCF* (788/2020) [2022] ZASCA 101 (22 June 2022)).

536 *REM v VM* 2017 3 SA 371 SCA [20].

3 Proposals: *inter vivos* trusts at divorce

9.37. The Commission propose that a section should be inserted into the Divorce Act to the effect that:

9.38. Irrespective of the matrimonial property regime, a court should take the assets of *inter vivos* trusts into account in calculating and distributing assets upon divorce or separation or in making redistributive orders when:

9.39. The effect of a trust (excluding customary family property in informal trusts) is to frustrate or circumvent a matrimonial property claim by a spouse including an order for equitable redistribution, irrespective of the matrimonial property regime.

Taking account all of the following factors:

1. The property system applicable to the marriage;
2. The terms of the trust deed;
    a. When the trust was established and the circumstances surrounding its establishment;
    b. Whether the trust was established in a non-South African jurisdiction;
    c. Who the founder or founders of the trust are and
        i. the relationships between the founders of the trust;
        ii. the relationships between the founders and the spouses;
    d. Who the trustees of the trust are and
        i. what their relationships are to each other;
        ii. what their relationships are to both spouses;
    e. Who the beneficiaries of the trust are, including:
        i. The relationships between the beneficiaries and the spouses;
        ii. The arrangements for sharing the trust benefits between the beneficiaries;
3. The nature and origins of the property which was donated to the trust;
    a. Whether the family home formed part of the trust assets;
    b. The nature and extent of donations to the trust by both spouses;
4. Effective *de facto* control of the trust by the spouses, including:
    a. Extent of the involvement of the spouses in the administration of the trust affairs
    b. Direct control of the spouses by making resolutions and daily administration of the trust;

c. Indirect control of the spouses by way of powers to appoint other trustees or change the trust deeds or the trust assets;

5. Extent and accuracy of the information which both spouses had about the trust;
    a. Whether and when the existence of the trust was disclosed to both spouses;
    b. Whether both spouses agreed to the creation of the trust;
    c. Whether both spouses agreed to the donation of any marital property to the trust, including property in the spouses' separate estates;
    d. If both spouses were aware of the trust, the explanation or rationale for the creation of the trust which was offered to both spouses;
    e. The extent to which both spouses controlled or were informed about the daily management of family finances outside of the trust;
    f. Whether there was any verbal agreement between the spouses about the trust assets which was not reflected in the trust deed;
    g. Detailed information about trusts, such as:
        - The trust instrument;
        - Bank statements for all transactions relating to trusts;
        - Annual audited accounts of the trust as available;
        - Trust assets and the circumstances of their donation;
        - Minutes and resolutions of trustees.

6. Any other factor which the court considers significant.

4 Evaluation: Duties of disclosure:

9.40. The general rule about onus in matrimonial property disputes is that the party who wants to share in the value of certain assets must prove the existence of assets and their value, but the party who wants to argue that they are excluded must prove this.[537]

9.41. However, the existence of a trust, which is often administered by one spouse in his own interests, complicates the matter. In *REM v VM*, Mocumie JA remarked that:

> In circumstances where, as in this case, the appellant is the only person in possession of all the facts relating to the assets in the trusts, it can never be expected of the respondent to say more than the little she knew. She could not

537 *ST v CT* 2018 5 SA 479 (SCA) par [29].

> be expected to be up to date with the affairs of trusts that she did not herself run or administer.[538]

9.42. The majority of respondents agreed that spouses may use their monopoly on knowledge about financial matters, including the details of trusts to hide assets and prolong litigation to frustrate and wear down other spouses.

9.43. However, this problem extends beyond trusts. Section 7 of the Matrimonial Property Act imposes a duty on spouses to disclose their assets for the purpose of calculating the accrual, but there is no general duty of disclosure in all marriages. Spouses often fail to disclose the existence of pensions and retirement benefits at divorce, to the financial detriment of their spouses who do not claim the share of such assets to which they are entitled. This is clearly not in the interests of justice and may waste the courts' time.

9.44. A related problem is that there are no duties to disclose financial positions when marriages and antenuptial contracts are concluded. This was discussed in the section relating to antenuptial contracts at 4.57 above.

5 General duty to disclose at the time of divorce

9.45. We therefore propose the imposition of general duty to accurately and in good faith disclose financial information, including information about trusts, pensions and other assets when a marriage breaks down, irrespective of the matrimonial property regime and when a marriage or antenuptial contract is concluded.

9.46. A section should be inserted into the Divorce Act to the effect that:

> **Information which should be accurately and fully disclosed by both spouses:** Irrespective of the applicable matrimonial property regime, and in addition to the information on *inter vivos* trusts, spouses have a duty to disclose in the utmost good faith (uberimae fidei) the following information:
>
> (a) Any trusts of which a spouse is a trustee, beneficiary, founder or has donated assets to, including:
>
> - The trust instrument;
> - Bank statements for all transactions relating to trusts

538 *REM v VM* par [31].

- Trust assets and the circumstances of their donation
- Minutes and resolutions of the trustees

(b) Other financial information which must be disclosed

- Investments
- Crypto currency
- Foreign currency
- Bank accounts including foreign bank accounts
- Substantial donations, taking account of the spouses' financial circumstances made during the past two years including details of recipients[539]
- Debts
- Any pensions or annuities of which the spouse is currently or will in future be the beneficiary
- Any transfers of money from pension funds into annuities which have been effected within 2 years of summons being issued for a divorce or separation
- Any other financial information which could significantly prejudice the proprietary rights of the spouses at divorce.

(c) If it appears from the disclosed information that a spouse has financial interests in any trusts, pension funds or living annuities the trustees and administrators of the pension funds and annuities have a legal duty to cooperate to supply the relevant information. In the absence of cooperation, the affected spouse can bring an application to compel compliance with this section.

6 Consequences of failure to disclose fully and accurately

9.47. Referring to the duty to disclose in marriages subject to the accrual system, imposed by section 7 of the MPA, the SCA[540] cited many instances in which courts were very critical of the tactical refusal to fully disclose information at divorce. It held that a failure to comply with the duty to disclose "may warrant the drawing of an adverse

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539 The Committee was uncertain of whether to include an actual amount, for instance R100 000 in this provision, given that what amounts to a substantial donation depends on people's financial circumstances. We ask participants for specific comments on this issue.

540 *ST v CT* [33-36].

inference where it is reasonable in all the circumstances to do so, that a party has hidden assets."[541]

9.48. We propose to extend this to all marriages, irrespective of their matrimonial property systems. There are 2 options for doing so:

Option 1

9.49. Where a court finds that a spouse had failed accurately and fully to disclose financial information will and may, if it is reasonable to do so, draw an adverse inference that the spouse had done so to hide assets.

Option 2

9.50. The failure of a spouse to fully and accurately disclose the existence and value of financial assets, including but not limited to pensions, annuities and relevant trust assets, should be taken into account by a court in making an equitable order for redistribution of property.

7 Protection of disclosed financial information

9.51. The duty to disclose could lead to disclosure of spouses' financial information to members of the public. It is therefore proposed to protect this information as follows:

9.52. Information about the spouses' financial positions must be kept confidential and must not be disclosed within the public domain. Section 12 of the Divorce Act applies to all information disclosed in this provision.

8 The stage in divorce proceedings when information should be disclosed

9.53. It is important that the duty to disclose arises early enough in divorce proceedings to prevent spouses from seizing an opportunity to hide assets from each other. We have identified two options.

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541 *ST v CT* at par 36.

Option 1

9.54. After issuing summons, a spouse may bring an application against the other spouse pending divorce for disclosure of financial information, which has been set out above. This spouse may change her pleadings or amend her claims as a result of information obtained.

Option 2

9.55. Every summons in a divorce action must contain a form, which both parties must complete in writing within a period of 40 days from the date of service of summons, disclosing fully and accurately the financial information as set out above.

Questions for respondents

9.56. On the judicial discretion to order that assets of an *inter vivos* trust be considered in the calculation, distribution or redistribution of assets at divorce:

(a) Do respondents have any comments on the proposed information which should be disclosed, specifically related to *inter vivos* trusts at divorce?

(b) Which of these factors are preferable?

(c) Are any of these factors problematic?

(d) Are there any other factors which should be included?

(e) Which, if any, existing legislation would be affected by the proposals and to what extent would they need to be amended by the proposals?

(f) Do respondents think that the same rule should apply at the end of unmarried intimate partnerships?

(g) Would any of these proposed changes affect any other legislation and if so, which changes to other legislation would be required to give effect to the proposed changes?

9.57. On the duty to disclose financial information at divorce:

a) Do respondents think that the information required would be helpful and is there anything which should not be disclosed or anything? Which should be added to the list?

b) On the consequences of failure to disclose, which of the options do respondents prefer or should both be used? Are there better options? Which should be considered?

c) Does the section on the protection of spouses' financial information adequately protect the information of divorcing spouses or should it be amended in any way?

d) On the time when the duty to disclose should arise and the manner of obtaining disclosure, which of the two options are preferable? Is the period of 40 days in option 2 practicable or should it be reduced? In option 2, should there be provision for the period to be extended in situations where complex financial information should be supplied?

e) Do respondents think that the same rule should apply at the end of unmarried intimate partnerships?

f) Would any of these proposed changes affect any other legislation and if so, which changes to other legislation would be required to give effect to the proposed changes?

B Career assets as property[542]

1 Background

9.58. 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.[543] 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. [544]

9.59. While assets are traditionally associated with immovable and movable property such as vehicles, money, jewellery and other physical assets,[545] our courts have recognised and held as divisible non-traditional forms of assets, for example, enterprise goodwill. Enterprise goodwill, an intangible asset, consists of a collection of advantages that a business entity possesses and may use to enhance the value of the business.[546] Enterprise goodwill can also be viewed as the premium paid for a business that exceeds the net sum of its assets and liabilities.[547]

9.60. An analogy can be made between career assets and enterprise good will. 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

542 The Committee is grateful to Mr Hugh Harnett for his substantial contribution to this section.

543 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.).

544 SALRC *Issue Paper* 41 at 9.11.

545 Heaton *The Law of Divorce* 71.

546 Kellym A.B. (2001) at 78.

547 SALRC *Issue Paper* 41 at 9.12.

as a form of wealth enhancing future income."[548] Examples of career assets include professional licences or degrees, (enhanced) earning capacity and personal (professional) goodwill.[549] Currently, these assets are not considered as assets subject to distribution upon dissolution of marriage.[550]

9.61. Burns and Grauer[551] describe such assets by viewing all wealth as a product of investment. For example, buying a property is viewed as an investment as there is an expectation that it will yield a greater return tomorrow. The same is true of a person who graduates with a university degree or similar personal enhancement programme. While the family unit may sacrifice tuition fees, support and time today for the pursuance of the qualification, these are expended with the expectation that the asset acquired via the training will yield future income gains above and beyond what the person is currently earning or would have expected to earn without the university degree. To the extent that an investment in such a programme will increase earning capacity, it may be valued as human capital.[552]

2 Comparative study

(a) United States (the US)

9.62. In the US, state courts approach the issue of professional degrees as marital property at divorce differently.[553] Prior to *In re Marriage of Graham*[554] in 1978, the majority

548 Kelly, A. B. (2001) at 77.

549 *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).

550 SALRC *Issue Ppaer* 41 at par 9.13. Heaton *SAJHR* 2005 at 571 – 572 and Bonthuys 2001 64(2) *THRHR* 192 at 200.

551 LF Burns & GA Grauer "Human Capital as Marital Property" (1990) 19 *Hofstra Law Review* 449. See also *Elkus v.Elkus* 572 N.Y.S.2d 901.

552 Burns & Grauer *Hofstra Law Review* (1990).See also Zuhairah Ariff Abd Ghadas "Rights of Future Interest as Matrimonial Property: Special Reference to Earning Capacity (2014) 22 *IIUMLJ* 249.

553 Sarah Simon "Should a Professional Degree Be Marital Property? It Depends" *University of Cincinnati Law Review* 27 October 2020 (available at https://uclawreview.org/2020/10/27/should-a-professional-degree-be-marital-property-it-depends/). See *Moss v. Moss* 80 Mich. App. 693, 264 N.W.2d 97 (1978); *Colvert v. Colvert* 568 P.2d 623 (Okla. 1977); *Hubbard v. Hubbard*, 603 P.2d 747, 752 (Okla. 1979); *Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969); Graham v. Graham* 194 Colo. 429, 574 P.2d 75 (1978).

554 *In re Marriage of Graham*, 574 P. 2d 75 - Colo: Supreme Court 1978.

of early cases that addressed this issue held that neither the degree nor the increased earning potential would be considered property.[555] While the Supreme Court of Colorado *In re Marriage of Graham* held that a professional degree (an MBA in the case) was not divisible marital property, the dissenting judgment was a powerful one. This was because it was common cause that the wife provided 70 per cent of the couple's financial support while he pursued the degree. The majority of the court concluded that an MBA should not be considered property upon divorce, citing that it had no objective transferable value on the open market; that a qualification was personal to the holder; that it could not be sold to another person and was not inheritable on death.[556] The majority was also of the view that degrees were the cumulative product of many years of previous education, diligence and hard work and were an intellectual achievement of the individual. The court found then that, while the MBA may have assisted in the future acquisition of property, it was not property itself.[557]

9.63. Carrigan, J, writing for the dissenting minority said:[558]

> The case presents the not-unfamiliar pattern of the wife who, willing to sacrifice for a more secure family financial future, works to educate her husband, only to be awarded a divorce decree shortly after he is awarded his degree. The issue here is whether traditional, narrow concepts of what constitutes “property” render the courts impotent to provide a remedy for an obvious injustice. … While the majority opinion focuses on whether the husband’s master’s degree is marital “property” subject to division, it is not the degree itself which constitutes the asset in question. Rather it is the increase in the husband’s earning power concomitant to that degree which is the asset conferred on him by his wife’s efforts. That increased earning capacity was the asset appraised in the economist’s expert opinion testimony as having a discounted present value of $82,000. Unquestionably the law, in other contexts, recognizes future earning capacity as an asset whose wrongful deprivation is compensable. Thus one who tortiously destroys or impairs another’s future earning capacity must pay as damages the amount the injured party has lost in anticipated future earnings.

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555 *Todd v. Todd*, 272 Cal.App.2d 786, 78 Cal. Rptr. 131 (Cal. Ct. App. 1969); *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (N.J. 1975);

556 *In re Marriage of Graham* 77.

557 *Ibid*.

558 *Ibid*.

9.64. A professional degree is considered marital property in New York State.[559] New York courts rely on the Equitable Distribution Law.[560] This statute was intended to provide an equitable and comprehensive approach to the distribution of assets at divorce.[561] The law established the concept of "marital property" in New York in order to identify assets acquired during the marriage by either spouse individually or jointly. It does not define property as such, but, in terms of the Domestic Relations Law § 236 (B), marital property has been interpreted to include anything with provable economic worth that is produced by either or both spouses during their marital partnership.

9.65. In the case of *O'Brien v O'Brien,*[562] the New York Court of Appeal held that a medical license acquired during the marriage constituted marital property subject to equitable distribution.[563] During their marriage, the couple had not accumulated any "traditional" property to note.[564] The principal issue before the court was whether that license, acquired during their marriage, is marital property subject to equitable distribution under Domestic Relations Law section 236 (B) (5).[565] The Supreme Court held that it was. The court found that because marital property was a remedial and equitable concept, it should not be confined to traditional notions of property and should instead be analysed in terms of the value of the object to its holder.[566] While the medical license could not be sold, it afforded the holder an opportunity to achieve a greater income and enhance his earning capacity – making it a thing of value.[567]

9.66. The approach in *O'Brien* has been endorsed by courts in celebrity divorces.[568] Courts were approached to decide whether celebrity status based on being an actor, as well as other types of celebrities, such as athletes and musicians can be considered as

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559 *O'Brien v. O'Brien* N.Y.2d 576, 489 N.E.2d 712, 498, N.Y.S.2d 743 (1985), *Elkus v. Elkus* 572 N.Y.S.2d 901, *Kalnins v. Kalnins*, N.Y.L.J., Nov. 16, 1989, at 23, col. 3. (N.Y. Sup. Ct.), *McGowan v. McGowan*, 142 AD 2d 355 - NY: Appellate Div., 2nd Dept. 1988.

560 Domestic Relations Law 236.

561 Domestic Relations Law 236(B)(5)(d)(1)-(12).

562 *O'Brien v O'Brien* (1985).

563 *O'Brien v O'Brien* at 715.

564 *O'Brien v. O'Brien at 713.*

565 *O'Brien v. O'Brien at 713*.

566 *O'Brien v. O'Brien at 713*.

567 *O'Brien v. O'Brien at 713*.

568 *Golub v. Golub*, 139 Misc. 2d 440, 527 N.Y.S.2d. 946 (Sup. Ct. 1988; *Piscopo v. Piscopo*, 231 N.J. Super. 576, 555 A.2d 1190 (Ch. Div. 1988); *Elkus v. Elkus*, 169 A.D.2d 134, 572 N.Y.S.2d 901 (N.Y. App. Div. 1991).

property on dissolution of marriage. While the investment in human capital occurs in the professional degree through educational institutions, the same equally occurs in acquiring celebrity status through training.[569]

9.67. *O'Brien's* decision has been followed in a number of courts during the 1990s and 2000s.[570] In some of the cases, the court has required the "working spouse" to show that he/she made a “substantial contribution” to the acquisition of the degree”.[571] The court found that since the "working spouse" took on more childcare responsibilities than he ordinarily would have so the wife could attend school, he was entitled to a share of her income potential.[572]

(b) Malawi

9.68. The recent case of *Tewesa v Tewesa*[573] found that career assets (a teaching qualification) was not property. [574]

9.69. Nonetheless, the Malawian court held that it had to comply with the mandate of section 24(1)(b)(i) of the Malawian Constitution,[575] which protects the rights of women “to a fair disposition of property that is jointly held with the husband”. As a result, the

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569 Allen M. Parkman, “Human capital as property in celebrity divorces*", Family Law Quarterly*, No. 1vol.29 (1995) 141: 4.

570 *Dicaprio v. Dicaprio*, 162 A.D.2d 944 (N.Y. App. Div. 1990; *Duspiva v. Duspiva* 181 AD 2d 810, 581 NYS 2d 376- NY: Appellate Div., 2nd Dept., 1992; *Morrongiello v. Paulsen* 195 AD 2d 594, 601 NYS 2d 121- NY: Appellate Div., 2nd Dept., 1993; *Barbuto v. Barbuto* 286 AD 2d 741 - NY: Appellate Div., 2nd Dept. 2001; *Lipsky v. Lipsky* 276 AD 2d 753 - NY: Appellate Div., 2nd Dept. 2000; *Flanigen-Roat v. Roat*, 17 AD 3d 1093 - NY: Appellate Div., 4th Dept. 2005*; Huffman v. Huffman,* 84 AD 3d 875 - NY: Appellate Div., 2nd Dept. 2011*; Quarty v. Quarty*, 96 A.D.3d 1274, 1277 (N.Y. App. Div. 2012); *Owens v. Owens*, 107 A.D.3d 1171, 967 N.Y.S.2d 465 (3d Dep’t 2013); *Kim v. Schiller*, 112 AD 3d 671 - NY: Appellate Div., 2nd Dept. 2013; *Spinner v. Spinner* 188 AD 3d 748 - NY: Appellate Div., 2nd Dept. 2020;

571 *Huffman v. Huffman*, 84 A.D.3d 875, 923 N.Y.S.2d 583 (2d Dep’t 2011); *Esposito–Shea v. Shea*, 94 A.D.3d 1215, 1217, (2012); *Quarty v. Quarty*, 96 A.D.3d 1274, 1277 (N.Y. App. Div. 2012); *Hogle v. Hogle*, 40 Misc. 3d 1220(A), 977 N.Y.S.2d 667, 2013 N.Y. Misc. LEXIS 3270 (Sup. Ct. Columbia Co. 2013). While in *Lauzonis v. Lauzonis*, 105 A.D.3d 1351, 964 N.Y.S.2d 796 (4th Dep’t 2013) the trial court failed to award the enhanced earning capacity. EEC to wife non-titled spouse and remitted to trial court to award enhanced earning capacity based on wife’s “‘modest’ contribution toward the husband’s attainment of a master's degree.

572 *Quarty v. Quarty* at 1278*.*

573 *Tewesa v Tewesa* (Matrimonial Cause Number 9 of 2012) [2020] MWHC 28 (31 August 2020).

574 *Tewesa v Tewesa* 8—9.

575 Republic of Malawi (Constitution) Act, 1994 (No. 20 of 1994).

court awarded the wife compensation to the value of her contributions towards the husband's qualifications to an amount to be assessed by the Registrar of the High Court.[576]

(c) United Kingdom

9.70. The English and Wales Court of Appeal (Civil Division) in *Waggot v Waggot*[577] held expressly in 2018 that it did not support the extension of the English "sharing principle" to an earning capacity (a career asset), echoing the Colorado Supreme Court in *In re Marriage of Graham* stating that "An earning capacity is not property and, …, it results in the generation of property *after* the marriage".

9.71. The Court in *Waggot v Waggot,* however, equally held that earning capacity was sometimes relevant when establishing a fair distribution of the assets pursuant to the English *sharing* principle citing *Jones v Jones*[578] at par 17 where Wilson LJ said:

> Even if, however, an earning capacity may also sometimes be relevant to a fair distribution of the assets pursuant to the *sharing* principle, it does not follow that the earning capacity should itself be treated as one of those assets, still less that an attempt should be made to capitalise it.

(d) Canada

9.72. The Ontario Court of Appeal in *Caratun v Caratun*[579] ruled that career assets, that is, the right to practise a profession or the education, knowledge and experience that enable one to make a good living, are not property and cannot be valued for the purposes of determining the equalisation payment provided for in the Ontario Family Law Act to divide family property on marriage breakdown.[580]

9.73. Despite not recognising career assets as property, the Ontario Court of Appeal upheld the trial court's award of "compensatory support", and awarded as a lump sum of CA$30 000.[581]

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576 *Tewesa v Tewesa* 2, 8—9.

577 *Waggot v Waggot* [2018] EWCA Civ 727 par 128.

578 *Jones v Jones* [2011] EWCA Civ 41.

579 *Caratun v Caratun* (1992), 58 O.A.C. 140; leave to appeal to SCC refused 27 May 1993.

580 M McCallum *"Caratun v Caratun*: It seems that we are not all realists yet" (1994) 7 *Canadian Journal of Women and the Law* 197 at 197

581 McCallum *Canadian Journal of Women and the Law* 201.

3 Comment: Issue Paper 41

9.74. *Issue Paper* 41 asked whether it would be equitable for career assets to be included as property capable of division at the dissolution of marriage. Many respondents[582] agreed that it would be more equitable but differed as to their reasons. Keneilwe Mabapa supports the recognition of career assets as property at dissolution of marriage, especially when one spouse sponsored the qualification/career acquisition. The respondent provides the following example:

a) It is common for a spouse to pay for the education of their spouse from high school up to university, often at their own disadvantage. Once their spouse has qualified and is now in a high paying job, they tend to find them no longer suitable and divorce them.
b) The reality is that if the spouse did not fund the studies (often also having to take care of the household and children when the spouse is studying), the spouse would not be in the position they are in or having the career they have. This contribution is not claimable or recognised in our law currently but it should be.

9.75. The CRL Commission agrees and state that such career assets must be obtained during the marriage. Anonymous agrees and explains that the ability to earn is crucial to one's financial wellbeing at every stage of life, and particularly for women post-divorce. This is extremely important regarding women in long-term marriages (anywhere from 20—50 or more years' duration).

9.76. The LRC argues that the exclusion of human capital or career assets as property for purposes of the MPA has a disproportionate impact on women. The respondent explains that women tend to be the ones who forego their education and careers to take on childcare duties and tend to the household, while men pursue their education and careers. As a result, men tend to have more "career capital" (the recognition of career assets as property at dissolution of marriage) than women as their earning capacities are naturally higher.

9.77. However, some respondents[583] do not consider their inclusion as a feasible option. The Cape Bar Council cites the following reasons as justification for its disagreement:

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582 Keneilwe Mabapa, Mariam Tayob, CRL Commission, LRC and Anonymous

583 Miller du Toit Cloete and Family Law Forum, Cape Bar Council, Sandra van Standen, Islamic Forum Azaadville, Sunni Ulama Council Gauteng and Karen Botha.

(a) The nature of intangible career assets is such that they are contingent in character: their value depends on the continued capacity of the individual to work, thereby translating the skill, experience and reputation into income. If circumstances render the asset holder unable to work, the asset has no value. It would not be fair to compel holders of career assets to make a capital payment on divorce based on the value of the career asset, only to find that the asset is afterwards rendered valueless because of a subsequent inability to work due to, for instance, injury or illness. A further problem is that any valuation of career assets will be expensive.[584]

(b) In the same way that it is complex and costly to value company shares and business enterprises, intangible career assets would be very difficult and expensive to value, inevitably requiring expert evidence.[585] The respondents believes that including career assets as property for division on divorce would greatly increase the scope for disputes and the cost of divorce litigation.[586]

(c) Earning capacity is already taken into account in the determination of spousal maintenance in terms of section 7(2) of the Divorce Act. The Cape Bar Council therefore suggests that this is the appropriate context in which to have regard to career assets, as maintenance orders can be varied in future if altered circumstances so dictate.

(d) Career assets are very personal in character. They represent the essence of the person. The notion of treating such assets as property for division on divorce seems contrary to constitutional values of human dignity, autonomy, personal responsibility and self-determination. In the same way that damages for personal injury are excluded from community of property in terms of section 18 of the MPA, career assets should not be shared.

9.78. In their submission, Miller du Toit Cloete and the Family Law Forum argue that this proposal is not viable. It raises a difficult question as one needs to distinguish between proprietary claims and maintenance claims. According to respondents, although there have been cases in England where future income earning prospects have been

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584 Sandra van Standen endorses this view, noting that any valuation of career assets will be expensive.

585 According to Franz Tomasek, Head: Legislative Policy Tax, Customs and Excise, SARS' experience (and that of other tax administrations internationally) is that intangible assets such as goodwill can be very difficult to value accurately, particularly given the information asymmetry that may exist between tax administrations and taxpayers. Similar issues may arise in the context of the discussion on career assets.

586 Karen Botha and Sandra van Standen share this view.

capitalised in a certain actuarial manner to be included in matrimonial assets, this would be difficult in South Africa where there is such a clear distinction between matrimonial property and maintenance claims, and there is not a clean break principle where maintenance can be capitalised and awarded.

9.79. Legal Aid SA suggests that if career assets are considered as property capable of division at divorce, the South African common law concept of "collation" that affects inheritances could be considered as an option. The respondent explains "collation" (in terms of inheritance) as unique in its principle that children should inherit equally when one dies, which includes taking into account valuable benefits given to your children and referring to the benefits, such as providing an expensive education for one child but not the others. These benefits would have to be valued and "added into" the estate before it could be divided among the beneficiaries. The respondent further explains that when collation is implemented, the executor has to determine what benefits were received and who qualifies to receive them.[587]

9.80. Another question posed was whether the legislature should define the concept of "property" on divorce explicitly? Currently, the term matrimonial property is not defined. Alternatively, should the interpretation of this concept be left to the courts depending on the particular circumstances? Karen Botha believes that a formal definition may be helpful, as this may avoid litigation over the interpretation of what constitutes "property" and what property is included or excluded. Keneilwe Mabapa, supported by AMAL, states that "property" should be properly defined with courts given more discretion in awarding the benefit such as is given with spousal maintenance. The respondents believe that legislation would not be able to cover all cases, but that the presiding officer would have the advantage of getting all relevant circumstance related to the matter before them and would be able to make a determination to add to what the legislature has provided.

9.81. The LRC supports a definition that can adapt to rapid changes in the way people hold property based on the circumstances of change, rather than a static definition. The respondent explains that developments around property and particularly intangible

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587 Legal Aid SA gives an example where a will states that two children are to inherit the residue of R100 000, each should receive R50 000 at face value if collation is excluded. If the will does not exclude collation and Child A says they did not receive university fees of R20 000, the executor adds that sum to the residue to get R120 000. That equals R60 000 each and Child A gets R60 000, while Child B gets R60 000 minus R20 000, or R40 000.

property, is rapid, and the way in which people hold property will change significantly in the years to come. For example, issues around assets held in cryptocurrency or in virtual settings will become increasingly relevant in divorce proceedings.[588]

9.82. There is also a view that the interpretation of this concept should be left to the courts depending on the circumstances of an individual case, as the South African courts have a wide discretion.[589] The respondents' perspective is that the current concept of property in our law is widely accepted and functions well. A statutory definition of property in the family law context might serve to inhibit the courts from recognising new forms of property as and when the circumstances arise.

9.83. Furthermore, we asked whether there are any other ways in which "intangible / non-traditional" marital property, such as career assets, can be considered in the divorce distribution if respondents believe that it is not appropriate to redefine "property" for divorce purposes. We received a handful of responses from this question, which do not answer the question.

4 Evaluation

9.84. As set out above, some commentators support the notion that intangible assets, such as earning capacity can be classified as matrimonial assets after divorce.[590] The discussion on foreign case law above, highlighted the approach of the court in determining the right of divorce parties who contributed directly or indirectly to the acquisition of intangible assets acquired by other spouses to claim a share after divorce.

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588 The LRC gives examples of property as inter alia including: the marital residence, professional degrees, license and practice, pension rights, retirement and other employment-related benefits, joint tenancy holdings, financial interests, insurance annuities and other policy benefits, business interests and property acquired before the marriage, after institution of proceedings, fraudulent transfers and property transferred while the action is pending, debts and liabilities, worker's compensation claims and other pending actions, homemaker's services, dissipation of marital assets, the contributions of each party to the acquisition, preservation or appreciation of assets.

589 The CRL Commission, Sandra van Standen, Cape Bar Coucil and Legal Aid SA.

590 Burns, Leslie F., and Gregg A. Grauer. "Human Capital as Marital Property." Hofstra L. Rev. 19 (1990): 499; Haggar, K. M. (2004); Garrison, M. (2011); Kelly, A. B. (2004); Brown, R. L. (2013)

9.85. Many of the respondents[591] believe that career assets should be included in the definition of property at divorce. Some are sceptical saying that in the same way that it is complex and costly to value company shares and business enterprises, intangible career assets would be very difficult and expensive to value, inevitably requiring expert evidence. In the view of these respondents, including career assets as property for division on divorce would greatly increase the scope for disputes and the cost of divorce litigation.

9.86. Some scholars also suggest that the contributing spouse has made an investment in "human capital" by helping the educated spouse to obtain a license and that the contributing spouse deserves a return on that investment. Trends are changing and it is increasingly important to recognise investments of this sort. Interesting, while many of the cases did not find that the career asset amounted to "property" (for example, *Tewesa v Tewesa*), the courts were able to compensate wives in other ways – either as part of an equitable division power, or as part of maintenance or a type of unjustified enrichment claim. *Tewesa* acknowledges that society still suffers from patriarchal tendencies with men being able to educate themselves with the support of wives.[592] In *Tewesa*, the judge stated that he had not come across any Malawian precedent dealing with educational qualifications as forming part of family property, which is to be shared between spouses upon dissolution of marriage.[593] He had also scoured the English case law as well, unfortunately, he did not find any case law on the same. Thus, he has referred to American case law which has a myriad of cases on the subject.

5 Proposals

9.87. We propose that the advantages of recognising career assets as property outweigh the disadvantages raised by the respondents, particularly if one considers the motivation or purpose regarding proposed reform of the Matrimonial Property Act, namely, *the need for equality and fairness and the prohibition of discrimination based on gender.*[594] This is based on the premise that the ability of one spouse to advance their career arises from the couple's decision regarding the division of labour within the marital partnership.

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591 LRC, Legal Aid SA, Anonymous, K.

592 Joan Smarts Mukisa, Education Qualifications as part of Matrimonial Property *African legal studies* 30 October 2020.

593 *Tewesa* v *Tewesa* at page 6.

594 See paragraph 1.8 above.

Comparing a marriage to a business partnership, by analogy, means that one can view these contributions as an investment by the supporting spouse in the career of the other spouse.

9.88. The main disadvantages to recognising career assets appear to relate to process rather than substance. That is, respondents suggest that valuation might be difficult, and it might be expensive to undertake this valuation. These concerns have been repeated in foreign jurisdictions.[595] However, we believe that the benefits might outweigh or mitigate these disadvantages, specifically as they relate to women. Should we place difficulty of valuation as a bar on career assets, would we – by parity of reasoning – need to consider excluding the other categories of property set out in the Cape Bar submission namely company shares and business enterprises?

9.89. In terms of the valuation and expense examples, we suggest that valuation of a career asset is no more complex or expensive than valuing a private company or future loss of income in delict (a personal injury case for example). The valuation would, in any case, be based on assumptions that may prove inaccurate but are balanced out by contingencies that are taken into account.[596] The criticism is true for any valuation, but difficulty is (a) not a reason to refuse recognition and (b) should not be confused with impossibility. Given the expense of valuation (true in all cases), this would in fact encourage litigators to ensure that the facts support the claim for a career asset, rather than going on a fishing expedition.

9.90. Certain respondents suggested that the court already takes career assets into account (albeit not as "property") when considering the award for spousal maintenance in terms of section 7(2) of the Divorce Act. However, South Africa's maintenance could be said to be rehabilitative, not reimbursive (the latter being true in other jurisdictions).[597] Making a career asset "property" could in fact mean less maintenance

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595 See *In re Marriage of Graham* 574 P. 2d 75 - Colo: Supreme Court 1978 76; *DeWitt v DeWitt* 296 NW 2d 761 - Wis: Court of Appeals 1980 54 and *Tewesa v Tewesa* [2020] MWHC 28 (31 August 2020) paras 8 – 9 as examples of this view.

596 One aspect that would need to be explicitly factored in is that a valuation would have to ignore career growth post divorce since this would be unfair. Thus the salary at divorce would be discounted to a present value paying the spouse a once-off lump sum so the clean break can be implemented. This was the approach in the case of *O'Brien supra.*

597 For example, in New Jersey (US), See *Mahoney v Mahoney* (91 N.J. 488 (1982) 453 A.2d 527 at 541.) The English Courts have awarded compensatory maintenance, for eg *Miller v Miller; McFarlane v McFarlane* [2006] 2 A.C. 618 (2006) par 13-15,28 (they recognise compensation and maintenance overlap) and *Waggot v Waggot* [2018] EWCA Civ 727 par 121 - 128 - earning capacity is not a matrimonial asset. The English courts do recognise

if we assume (as we should) that the position of the divorced spouse would be financially stronger if a career account was taken into account as property. If respondents' concern is "double dipping", then the discretion in 7(2), once one applies its factors, is enough to mitigate against this concern.

9.91. We ask respondents to consider three options to regulate the recognition of career assets. In the first two options, we consider career assets as property. Once a career asset is included in the definition of marital property, then one needs to deal with the way to recognise it. One way to deal with the complexity of valuation is to opt for option 1 as a basis for valuation rather than option 2. Option 1 effectively is much simpler, whereas option 2 requires a more involved process.[598]

Option 1: A 'return *of* investment' model

9.92 The "return of investment model" broadly entails compensating the spouse for the cost they incurred investing in enhancing the earning capacity of the other.

Option 2: A 'return *on* investment' model

9.93 The "return on investment" recognises that a spouse has invested in the enhanced earning capacity of the other spouse in a marriage. In the divorce then, that spouse gives up their ability to share in the fruits flowing from the other spouse's enhanced earning capacity.

Option 3

9.94. Should respondents feel that career assets should not be valued as property *per se*, then it should be included in a general discretion provision (as set out in chapter 4 above). In other words, whether the spouse contributed to the career assets of the other spouse during the marriage would be a factor that the court would take into account in dividing the matrimonial property.

"relationship generated disadvantage" - compensatory the only case that they have awarded an amount is *Waggot.*

598 These models are considered in L Weitzman *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (1985) 131 under the terms "Cost Incurred: The reimbursement approach" and "Benefits Gained: Enhanced Earning Capacity" respectively. We are indebted to Hugh Harnett of the Rhodes Law Faculty for suggesting this terminology.

C Special provisions on the distribution of family homes

1 Background

9.95. 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.[599] In addition to providing physical shelter and security, family home provides emotional stability as well.[600]

9.96. 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.[601] 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. [602]

9.97. 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. [603]

9.98. 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

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599 See Chapter 5 above.

600 SALRC *Issue Paper* 41 at par 9.28.

601 SALRC *Issue Paper* 41 at par 9.29. 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. See also *Issue Pape*r 41 at 50.

602 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.

603 SALRC *Issue Paper* 41 at par 9.30.

members could be registered as the private property of that spouse.[604] In that case, the other spouse (usually the wife) could lay claim to a part of the property at divorce,[605] resulting in problems.[606]

9.99. The Committee on Economic, Social and Cultural Rights has stated that "… the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head, or views shelter exclusively as a commodity. Rather, it should be seen as the right to live somewhere in security, peace and dignity."[607]

9.100. In a UK divorce, you have a wide range of options when deciding how to divide the family home. This could include:

a) buying your spouse out of their share of the home;
b) selling the home; or
c) postponing a sale until your children are older- what is usually termed "Mesher Order".[608] This allows the sale of the family home to be postponed for a certain period of time or until a particular trigger event happens.[609]

9.101. Depending on the value of any other assets, it may also be possible to offset one person's interest in the home against another asset. For example, perhaps one of the spouses will keep the family home in exchange for the other keeping a pension fund or holiday home. There is no general rule over who will typically keep the family home in a divorce financial settlement. The court must take into account a number of factors when deciding this, including:

a) the needs and arrangements for children;
b) the age, health and earning capacity of each spouse;

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604 *Issue Paper* 41 at 50. Also Maxim Bolt and Tshenolo Masha (2019) 'Recognising the family house: A problem of urban custom in South Africa' 35 *SAJHR* 147 1.

605 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].

606 SALRC *Issue Paper* 41 at 9,31. See Chapter 5 at paragraph 5.50 above.

607 Committee on Economic, Social and Cultural Rights, General Recommendation No 4, par 7.

608 A Mesher Order is a court order that says how the family home will be dealt with after divorce. A Mesher Order allows the sale of the family home to be pushed back for a certain length of time or until a specific event takes place; such as the kids leaving school.

609 Section 25(1) Matrimonial Causes Act 1973.

c) the assets and available resources;

d) what each spouse needs; and

e) the length of the marriage and what each spouse contributed;

f) The standard of living of each spouse; and

g) Any negative conduct that would be inequitable for a court to ignore.

9.102. The first consideration for the court will always be the housing needs of the children. One of the major criticisms of Mesher orders is that the parties are left in a state of uncertainty as to whether or not they will be able to rehouse themselves once the proceeds of sale do eventually available.[610] For the party having to wait for their share of the matrimonial home whilst not having the benefit of occupation of the property, a Mesher order has a distinct disadvantage. That party is kept out of their share of the property for a number of years and may be in some difficulty obtaining secure accommodation or the means of acquiring accommodation because of their restricted access to their share of the property in the meantime. For the party facing the prospect of selling their home once the youngest child turns 18, Thorpe LJ summarised the Court of Appeal's view of Mesher orders, when in *Dorney-Kingdom v Dorney-Kingdom*[611] he stated:

> …...the form of Mesher order has been criticised in a number of decisions in this court for producing a harsh situation in which the primary carer, having discharged her responsibility to the children, is then left in a position when she is unable to rehouse herself as an independent person, probably at a relatively vulnerable stage of life.

9.103. Great care is required when determining the shares and trigger events in a Mesher order to avoid criticism of discrimination[612] between the parties.

9.104. Nova Scotia's Matrimonial Property Act[613] creates a regime of equal possessory rights in the matrimonial home that arise on marriage. This is an important protection. The matrimonial home may not only be a family's largest asset but also provides stability and security for the members of the family that reside there. Because of the importance of the matrimonial home, the Matrimonial Property Act provides for

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610 *Mortimer v Mortimer-Griffin* [1986] 2 FLR 315.

611 *Dorney-Kingdom v Dorney-Kingdom* [2000] 2 FLR 855.

612 Richard Tambling, The legal and practical issues arising in financial remedies cases where Mesher orders may be the appropriate solution, Family Law Week 2011.

613 Matrimonial Property Act R.S.N.S. 1989, c. 275.

equal personal rights of possession as between spouses during the marriage,[614] and rights against disposition or encumbrance of the matrimonial home by either spouse without consent of the other spouse, regardless of title.[615]

9.105. Nova Scotia's matrimonial property law is a regime of deferred sharing of matrimonial assets on relationship breakdown.[616] Until there is an order or agreement for division, spouses do not share in property and debt in the name of one spouse only.[617] Section 8(1) of the Matrimonial Property Act states that neither spouse shall dispose of or encumber any interest in a matrimonial home unless the other spouse has consented or released his or her interest in the home, a court order has been obtained allowing the transaction, or the house has not been designated a matrimonial home but instead another property has been designated. Subsection 8(2) provides that if 8(1) is breached, the court can set aside the transaction. In Nova Scotia, the matrimonial home is defined as meaning "the dwelling and real property occupied by a person and that person's spouse as their family residence in which either or both of them have a property interest other than a leasehold interest".[618] In Ontario, section 18 of the Family Law Act states that "every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home".

9.106. On the other hand, the law in Australia provides no special protection for the family home except in so far as the property regime protects it by virtue of the presumption of co-ownership.[619] However, reformers have argued that there is a need for special treatment of the family home in Australian law, particularly when the interests of minor children are involved.[620]

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614 *Trask v Trask* (1997), 166 NSR (2d) 344, 32 RFL (4th) 368.

615 Section 8 of the Nova Scotia's Matrimonial Property Act.

616 Alastair Bissett-Johnson "Whatever Happened to Exempt Property?" An Overview of the Matrimonial Property Act of Nova Scotia.

617 Section 8, Matrimonial Property Act Nova Scotia.

618 Section 1 of the Matrimonial Property Act Nova Scotia.

619 Bordow and Harrison, 'Outcomes of Matrimonial Property Litigation: An Analysis of Family Court Cases' Australian Journal of Family Law, 1994,p.p. 264, 269.

620 Kovaks, 'Matrimonial Property Law Reform in Australia: The Home and the Chatelst Expedient. Studies in the Art of Compromise', University of Tasmania Law Review, 1978-1980, p. 227.

9.107. In Namibia, the law reform proposals already put forward by the Law Reform and Development Commission in respect of divorce propose fairly broad judicial discretion for re-allocating and re-distributing marital property, but do not make any specific mention of the matrimonial home.[621] This provision would extend judicial discretion in connection with divorce to allow for an award of the matrimonial home and its contents to one spouse, regardless of the marital property regime, or for a right of occupation on the part of the spouse with custody of the children in appropriate cases, for a temporary period, or until the children have completed their schooling.[622] Custody of the children would not automatically lead to retention of the matrimonial home, as this might encourage parents to seek custody for the wrong reasons.

2 Comments by respondents

9.108. In the issue paper, the question was posed: Should family homes be treated exactly like other assets at divorce or should they be treated differently? Karen Botha agrees that family homes should be treated like any other asset, except in circumstances where there are minor children and it is in their best interests that they remain in the family home pending the divorce. The views of AMAL and Sandra van Standen are similar, with Sandra van Standen adding that courts should have the discretion to award rights to primary caregivers to reside in the family home with the children born of the marriage as well as the discretion to determine the duration of such rights. On the other hand BASA, supported by the CRL Commission, submits that family homes should not be treated the same as other assets at divorce. However, this would need to be qualified in such a way that it serves the purpose of protecting young children, vulnerable kin and extended family members who reside in such family homes. BASA recommends that the rights of bona fide third parties should also be considered in this regard, particularly the third party that provided funding for the purchase and improvements to the property. Where the family home was improved (renovated) by the other spouse, reimbursement of expenses should apply. Legal Aid SA submits that in instances where the family home belongs to one person there should not be any issues, the challenges occur where the family home belongs to more than one person and forms the main asset in the estate. So, if the family home belongs to five members then each member will have a 1/5th claim

621 Namibian Law Development Agency Marital Property in Civil and Customary Marriages Proposals for Law Reform 2005.

622 Namibian Law Development Agency Marital Property in Civil and Customary Marriages Proposals for Law Reform 2005.

and if the other members do not have the financial means to pay out the other members, they may be prejudiced.

9.109. Keneilwe Mabapa considers this a difficult one to respond to. On the one hand, it makes sense for the family home to be treated differently, whilst on the other, it is part of the estate and should be treated the same. She also feels that the marital home is a place of shelter and as such, it deserves to enjoy special legal protection. The marital home is a place of shelter and as such, it deserves to enjoy special legal protection. The respondent further states that the marital home must be subject to a special regulation which corresponds with its special meaning as a great part of the property, the primary family shelter and as a focal point of the family activities.

9.110. Three respondents[623] refer us to the position in England and Wales where the divorce law prioritises the welfare of children. When deciding who gets the house in a divorce with children the safety of children always comes first, along with minimising any disruption caused by the divorce. They submit that they have considered the position in English matrimonial law, which may provide helpful guidelines as follows:[624]

a) If one spouse owns the family home and the other spouse does not, the spouse who does not own the family home automatically acquires home rights. These home rights include the right to live in the family home and the right not to be made to leave the family home before divorce, unless there is an order stating that the spouse must leave.
b) Such a home right can be registered. By registering the home rights other people and organisations such as the Land Registry, banks and third parties will know that that spouse has home rights. A spouse cannot sell or mortgage the family home without the spouse with home rights knowing about it.
c) A spouse with home rights may be allowed to occupy the family home after the marriage ends if the court makes an order to this effect.
d) The family home is considered to be a matrimonial asset and is dealt with when distributing assets between the spouses by using a wide range of criteria aimed at achieving a just and equitable result.

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623 Family Law Forum, Western Cape and Miller du Toit Cloete, Cape Bar Council and LRC.

624 The provisions regarding home rights are set out in Part IV of the Family Law Act 1996 (FLA 1996) and in FLA 1996 Schedule 4.

9.111. The Cape Bar Council further submit that South African legislation has not recognised a "home right". The respondent points out that in practice our courts have, however, allowed spouses to remain in the family home, after separation, until divorce, irrespective of whether the property is jointly registered or held in the name of only one spouse. This is done on the basis of maintenance needs – either of the spouse or the parties' children who remain primarily resident with one parent in the family home. Allowing a spouse to continue occupying the family home pending divorce, may, however, not protect the non-owning spouse when the other spouse sells the family home without the non-owning spouse's knowledge or consent. The respondent is of the view that family homes are not like other assets. Consideration should be given to formally recognising "home-rights" and conferring wide discretions on our courts in terms of section 7(2) and 7(3) of the Divorce Act to grant suitable orders in respect of family homes.

9.112. According to the LRC, a court in England or Wales can defer the sale of a home by making a "Mesher" order. This can put off the sale of the home until a specific event triggers the sale – for example, the youngest child turning 17 or 18. The net sale proceeds are then divided in accordance with the court order.

9.113. Another question in *Issue Paper* 41 enquired whether courts should have a specific discretion to award family homes to parents who are primary caretakers of young children. Respondents[625] agree that consideration could be given to allowing the court a discretion to award rights to the primary carer to reside in or occupy the family home if there are minor children. Such an award must, however, be fair and equitable to both spouses. According to these respondents, this may not be achievable when family homes also represent financial liabilities and when the other spouse would not be able to afford accommodation unless the family home is sold. The Cape Bar Council argues that, even though, in principle, such discretion should be vested in our courts, it should only be exercised after considering the following additional factors:

a) the income, earning capacity, property and financial resources of both spouses at the time of the divorce and in the future;
b) the financial needs, obligations and responsibilities of both spouses at the time of the divorce and in the future;
c) the ages of the children and the spouses at the date of divorce;

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625 Sandra van Standen, AMAL, CRL Commission, LRC, Cape Bar Council, Legal Aid SA, Keneilwe Mbapa

d) the duration of the marriage;
e) the best interests of minor children and any special needs that the children may have;
f) the matrimonial property regime applicable to the marriage;
g) the contributions the parties have made during the marriage, including non-financial contributions;
h) whether the non-primary caregiver or both parties are the registered owner(s) of the property;
i) whether the home order would lead to an inequitable result;
j) special circumstances in the case of customary marriages; and
k) whether it is more appropriate and/or suitable to provide the primary caregiver with rights of residency as opposed to rights of ownership.

9.114. Karen Botha does not believe this would always result in a just and equitable solution, as the parent awarded the home could then proceed to sell the home and use the funds for any purpose he/she deems fit, to the detriment of the other parent and the children. The judicial discretion to redistribute assets in terms of section 7(3) of the Divorce Act provides another example of a discretion to deviate from a strict application of the marital property system in order to achieve equity between divorcing spouses.

9.115. In *Issue Paper* 41, it was asked whether courts should consider non-financial and financial contributions to the family home in determining how the property should be divided upon divorce. The respondent agrees that value must be given to non-financial, as well as financial contributions made by spouses in a marriage. And specifically, that financial contributions may not be attributed a higher value than non-financial contributions.[626] One respondent, however, warns that such consideration should be approached with great caution in a marriage out of community of property excluding the accrual system and where the family home is registered only in the name of one spouse.[627] Furthermore, LRC submits that homes which are part of family property in customary law should receive special treatment. The respondent states that by virtue of the way the family property structure is recognised in customary law, in polygynous marriages, this property concerns all the spouses jointly. Therefore, the management of the assets upon divorce/death of a spouses would need to be managed in a fair manner. Further that, this means that it would be untenable to exclude a spouse (in polygynous

626 Karen Botha, CRL Commission, AMAL, Sandra van Standen, LRC

627 Sandra van Standen.

relationships) from benefitting from family property. The concept of individual property is like the concept of “house property” because house property refers to property owned jointly by the husband and wife of a specific family unit. In this case, the home that constitutes house property may be treated as the family home.

9.116. Keneilwe Mabapa believes contributions should not be taken into account when a marriage in community of property is involved. With regards to marriage out of community of property, this can be considered because the spouse who is not the owner of the property usually makes renovations or contributes to the development of the family home as he/she lives in it with the children but when the marriage ends, this contribution cannot be claimed back due to section 23(4) of the Matrimonial Property Act, providing that where parties do not have an agreement between themselves, a spouse does not have a right of recourse against their spouse when it comes to any contribution which he/she made in respect of necessaries for the joint household. She feels that the same Act does not define the words “necessaries for the joint household”, which creates uncertainty as to what could be considered as a necessary expense of a joint household. Some people consider necessaries as just consumables like groceries whilst some would go as far as considering house renovations and installing security features (amongst others) as necessities. She proposes that provision should be made in the Act to provide for spouses who have contributed to the family home of their spouse in one way or the other, to claim their contributions back. It is even worse where contributions are non-financial.

9.117. Should homes, which are part of customary family property, be treated differently at divorce from family homes which are individually owned by the spouses? There is support that homes which are part of family property in customary law should receive special treatment.[628] By virtue of the way the family property structure is recognised in customary law, in polygynous marriages, this property concerns all the spouses jointly. Therefore, the management of the assets upon divorce/death of a spouses would need to be managed in a fair manner. This means that it would be untenable to exclude a spouse (in polygynous relationships) from benefitting from family property. The concept of individual property is like the concept of “house property” because house property refers to property owned jointly by the husband and wife of a specific family unit. In this case, the home that constitutes house property may be treated as the family home. BASA cautions that the rights of bona fide third parties should also

628 BASA, Legal Aid SA, LRC, Keneilwe Mabapa, Premier Mpumlanga.

be considered in this regard, particularly the third party that provided funding for the purchase and improvements to the property.

9.118. The Islamic Forum Azaadville and Sunni Ulama Council submit that in Islamic Law, assets are identifiable in terms of ownership and therefore no special rules need to apply as ownership is identifiable.

3 Evaluation

(a) Retaining the family home for the primary caretaker of dependent children

9.119. Considering the importance of the marital home for the family[629] and the way the respondents supported the protection of it, the SALRC should envisage its special legal protection. The marital home is a place of shelter and as such, it deserves to enjoy special legal protection. In this sense, one of the respondents[630] states that the "marital home must be subject to a special regulation which corresponds with its special meaning as a great part of the property, the primary family shelter, and as a focal point of the family activities".

9.120. The most important argument in favour of envisaging special legal protection of the marital home are the children.[631] In most divorce cases, the children are entrusted to one of the spouses and it is usually the mother. Thus, they are forced to move from the marital home. Changing the home and the environment is a reason for stress and it negatively affects the child's development and emotions.[632] Because of this, the treatment of the marital home is increasingly becoming a concern to the courts.[633] Thus, they embrace the viewpoint according to which the principle of the best interests of the child should be taken into consideration. In practice, this interest is accomplished by permitting the children to remain in the marital home, close to their friends and school.[634]

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629 Tom Altobelli "The Family Home in Australian Law" (2012) 3 *Iustinianus Primus Law Review* 3.

630 Keneilwe Mabapa, see par 9.39 above.

631 LRC, Mme Sophy Selau, Keneilwe Mabapa and Legal Aid SA.

632 Amy Morin, The Psychological Effects of Divorce on Children *Verywell Family* 2019 p23.

633 *Rahube v Rahube and Others* 2018 (1) SA 638 (GP).

634 Morin 2019 23.

The first three months of the divorce are "highly disturbed and emotional period .... the husband is the one who usually keeps the house, while the woman leaves".[635]" In that sense, it is quite correct to embrace the theory which permits the children to remain in the marital home and to retain the comfort and the living standard without being disturbed. As a result of this, during the division of the marital home the interests of the children should be taken into account in the first place.[636] The lower the age of the child, the need and dependence on the marital home is greater. Despite this, the trend of moving children from the marital home is constantly on the rise. These changes have had a profound impact on the changes in the children's standard of living, as well as on their education and circle of friends. So far, the experience indicates that the damages incurred as a result of these factors were very difficult to deal with by parents and relatives, as well as by teachers.[637]

9.121. With a few exceptions, there seems to be general agreement that, where it is in the interests of dependent children and other dependent family members, a court should consider making a division of the family property, which would allow that spouse who has primary caring responsibility for vulnerable family members to retain the family home in exchange for other assets, as is the case in other jurisdictions to which respondents pointed. However, many respondents pointed out that this may not be feasible when family homes also represent financial liabilities and when the other spouse would not be able to afford accommodation unless the family home is sold. These considerations are valid and courts should take them into account.

9.122. In *Van Onselen v Kgenkgenyane,*[638] the courts' wide discretion to make decisions about the liquidation of a commercial partnership estate "to achieve a result that was both fair to the parties and sensible in the circumstances" could be extended to the dissolution of a marriage in community of property and could therefore justify making an order, which would be just and equitable in relation to the family home. The judicial

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635 Martha F. Davis 'The marital home: equal or equitable distribution?' (1983) 50 *University of Chicago Law Review* 1089.

636 The LRC argues that section 28(2) of the Constitution requires that when it is just and equitable to do so, a court should have the discretion to award the family home to the primary caregiver should that be in the best interests of the child.

637 Maxim Bolt and Tumelo Masha *The Family House: A Position Paper* (2018) Wiser available at https://www.birmingham.ac.uk/Documents/college-artslaw/dasa/2019/family-house-position-paper.pdf.

638 *Van Onselen NO v Kgengwenyane* 1997 (2) SA 423 (B), relying on *Robson v Theron* 1978 1 SA 841 (A).

discretion to redistribute assets in terms of section 7(3) of the Divorce Act provides another example of a discretion to deviate from a strict application of the marital property system in order to achieve equity between divorcing spouses. These provide examples which could be used in relation to the family home.

4 Proposal

9.123. The Commission recommends the following:

Option 1

9.124. If courts are granted a general judicial discretion on the division of assets, they could be directed specifically to consider factors relating to the family home. These factors would include:

a) The fact that one spouse will remain the primary caretaker of children or other dependent household members.
b) The need of children or other dependent household members for stability and continuity in respect of their accommodation, schooling, medical treatment or other important needs.
c) The financial means and responsibilities of both parties, including their ability to meet bond or rental payments for the family home and to provide for their own accommodation.
d) The extent to which, during subsistence of the marriage, both spouses contributed to the rental or payment of the family home, including indirect contributions by covering other household expenses or providing services.
e) The distribution of other assets from the marriage.
f) Any orders for post-divorce spousal or child maintenance made by the court.

Option 2

9.125. Instead of including these factors in the general redistribution provision, they could be contained in a separate section with the same content.

Option 3

9.126. The occupation of the family home may also become an issue pending a divorce. It is possible to include the same or similar discretion in rule 43 proceedings to protect the interests of children and other dependents pending the final divorce.

9.127 Respondents are asked to comment on these three options and any others which they may consider useful.

5 The family home in unmarried families

9.128. The family home is also a problem in unmarried partnerships. According to Bradley Smith:[639]

> Contrary to the position of a married couple, the existence of a life partnership does not *ipso facto* entitle both partners to occupy the common home. Therefore, unless the home is registered in the name of both life partners or unless both of them were parties to the lease agreement, the life partner who is neither the owner nor the lessee has no right to reside there either during the subsistence of the life partnership or after its dissolution. Occupation of the common home may however be regulated in a life partnership agreement.

9.129. If the decision is to include a provision granting a court a discretion on the distribution of partnership property when an unmarried intimate partnership comes to an end, such a provision could direct the court to consider granting the family home to the parent who has the responsibility of the daily care of any children from the relationship if this is feasible and in the interests of children.

9.130. Respondents are asked to comment whether a court should have such a discretion and to comment on the best way of incorporating it into law.

6 Family homes in customary law

9.131. There appears to be general agreement that family homes in customary law should be treated differently from individual property or "house property" because they represent an asset and a refuge not just for the individual household, but for vulnerable members of the extended natal family to whom the home belongs.[640] Several respondents also mentioned the need for an equitable mechanism to recompense a

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639 The dissolution of a life or domestic partnership" in Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 389 430

640 Maxim Bolt "Homeownership, legal administration, and the uncertainties of inheritance in South Africa's townships: Apartheid's legal shadows" (2021) 120 *African Affairs* 219; M Bolt & T Masha 'Recognising the Family House: A Problem of Urban Custom in South Africa' (2019) *SAJHR* 147, 150.

spouse who had contributed to the maintenance of or improvements to the family home of the other spouse. Many respondents in our field research suggested special provisions pertaining to the treatment of the family home in the event of divorce.

9.132. Family homesteads in rural areas are often not owned in individual title, but wider kinship groups have rights to occupy the land. Individual spouses of members of this group do not have claims to homesteads when marriages dissolve. Family homes in urban areas were leased to African people by government but because African people could not own land in urban areas, their rights depended on residence permits or certificates which would be passed down to children and grandchildren.[641] The post-apartheid state gradually converted these rights of occupancy to private ownership rights as part of land tenure reform.[642] They were seen as urban versions of rural family homesteads and were often managed in the interests of the wider family group by certain family members and were understood to be inalienable.[643]

9.133. Unfortunately, property rights were often awarded to male family members, some of whom would evict other family members from the property, as happened in *Rahube v Rahube*[644] and *Shomang v Motsotse.*[645] It is possible to enter into family rights agreements in respect of family homes and to have such agreements registered against the title deeds – somewhat in the nature of a usufruct – in favour of living and future family members, but people often fail to change the names of registered owners and beneficiaries, leading to disputes about the rights to occupy family homes. The issue is accurately captured by Du Plessis AJ in *Shomang v Motsotso*:

> The concept of "family homes" and the property rights that they confer on the people living in them is thus a common occurrence and yet is invisible to the "formal laws" of South Africa. Formally, the registered owner is conferred rights that bestow on them the normal entitlements of ownership in terms of the common law, including alienating the property at will. This sometimes leads to great conflicts as this goes against the norms that underlie the idea of a "family home", as is visible in this case.[646]

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641 Bolt & Masha 'Recognising the Family House: A Problem of Urban Custom in South Africa' (2019) *SAJHR* 147 at 150.

642 Emdon 'Privatisation of State Housing: With Special Focus on the Greater Soweto Area' (1993) *Urban Forum* 1.

643 Bolt & Masha 151.

644 2019 1 BCLR 125 (CC).

645 *Shomang v Motsose N.O. and Others* 2022 (5) SA 602 (GP).

646 *Shomang v Motsose N.O. and Others* Par 46.

9.134. The problem in relation to the division of matrimonial property is that if family homes are regarded as individual property, then the spouse whose family is not the beneficiaries of the home may be entitled to some or all of the family home belonging to the other spouse in whose name the property may be registered. This is what occurred in *Shai v Makena Family*[647] and *Khwashaba v Ratshitanga*.[648] Where the title deed reflects the family home as family property, this should not in practice be allowed, but, as the cases make clear, registered information is not necessarily complete or up to date. What would be the solution? Du Plessis AJ asserts that:[649]

> The ownership model is an inflexible system that does not allow for alternative models of holding land, especially not the social tenures that operate outside this formal system. For property law to transform, what is needed is a fragmentation of land rights, not by abolishing ownership but by developing a more comprehensive range of rights, such as a property right in a family home, that can sometimes trump ownership. It is not simply a process of making more people common law owners, but it requires that we give effect to other rights in property too. This needs to be flexible and context-sensitive and allow for the creation of new rights and the adaptability of existing rights to new situations. If these structural inequalities in the property system are not addressed, transformation will be impossible, and our constitutional ideals not be attained.

9.135. While the task of fixing the deep structural problems in our property laws and land registration system is not part of this investigation, we suggest that it would advance equity and reduce costly legal disputes to create a statutory provision, which places family homes out of reach of divorcing spouses and to preserve them to secure the rights of natal families until such time as the land registration system is attended to.

Option 1

9.136. When a family house is registered in the name of a spouse, it does not form part of the marital property, irrespective of the chosen matrimonial property regime and upon dissolution of the marriage, the other spouse does not have a claim to this property, except as set out paragraph 9.138 below.

9.137. A family house is a home in respect of which there is a family property agreement whether or not this agreement is registered against the title deeds or a

647 *Shai v Makena Family* 2013 JDR 0608 (GNP).

648 *Khwashaba v Ratshitanga* [2016] ZAGPJHC 70 (29 February 2016).

649 *Khwashaba v Ratshitanga* par 73.

home which has been used and occupied by the family members of a spouse for the joint benefit of all family members.

Option 2

9.138. In the alternative, the provision could create a rebuttable presumption that a family home does not form part of the individual estates or the marital estates of either spouse.

7 Improvements to family homes in customary law

9.139. Upon dividing the matrimonial assets, a court shall award reasonable compensation to the spouse who contributed to repairing or improving the family home of the other spouse.

9.140. In the event of a family home not being distributed as a marital asset, should a spouse who contributed to the maintenance or improvements to such a family home be compensated when the marriage ends?

9.141. Should this compensated be reduced by the value of having lived in the family home? If so, is there a formula which could be used to calculate the value of having lived in the family home?

9.142. If the Commission's suggestions regarding extension of the new Family Law Act to cover cohabiting couples are accepted, the term "matrimonial home" will no longer be appropriate. Accordingly, the Commission suggests that a new term, "family residence", be used.

D Pensions

1 Background

9.143 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. [650]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.[651] 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.[652] 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.[653] 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.[654] In light of the 2007[655] and 2011[656] amendments to statutes dealing with pensions, the clean break[657] 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 antenuptial contract by which community of property, community of profit and loss and the accrual system are excluded.[658]

9.144 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). The provisions of the Divorce Act regarding pension sharing relate only to a

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650 SALRC *Issue Paper* 41 at 46.

651 *Ibid*.

652 *Ibid*.

653 *Ibid*.

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

655 Pension Funds Amendment Act 11 of 2007

656 Government Employees Pension Law Amendment Act 19 of 2011.

657 For the explanation of 'clean break' see Marumoagae C "Breaking up is hard to do, or is it? The clean-break principle explained." *De Rebus* October 2013 198.

658 *Issue Paper* 41 at 47. 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).

pension "interest".[659] 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.[660] However, the correctness of this position is disputed.[661]

9.145 In 1999, the Commission submitted a report to the Minister of Justice[662] proposing, amongst other measures, that pension benefits should not be regarded as matrimonial assets and suggesting a radically different formula to calculate these benefits.[663] More than 20 years later, these proposals have not been implemented.[664]

9.146 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.[665] 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.[666] Unfortunately, there are other retirement funds for which no litigation has been undertaken and which still fall outside

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659 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); *M v M* 2012 ZAKZDHC 17 (1 January 2012); *Kgopane v Kgopane* 2012 ZANWHC 58 (16 August 2012); *Kotze v Kotze* 2013 JOL 30037 (WCC); *Motsetse v Motsetse* 2015 2 All SA 495 (FB).*Ndaba v Ndaba* (600/2015) [2016] ZASCA 162. *CNN v NN* [2023] ZAGPJHC (23 February 2023).

660 Glover in *Family Law* par D8.

661 SALRC *Issue Paper* 41 at par 9.18. 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.

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

663 SALRC *Report on Sharing of Pension Benefits* 1999 44 *et seq*. See also the discussion of the SALRC's recommendations by Marumoagae *Obiter* 2016 317 *et seq*.

664 SALRC *Issue Paper* 41 at par 9.19.

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

666 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.

the scope of the Pension Funds Amendment Act of 2007. This can have a negative impact on financially weaker spouses, who are mostly women.[667]

9.147 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.[668] In *ST v CT,*[669] the Supreme Court of Appeal held that the rights to claim in terms of a living annuity belonged to the insurer, and that they did not fall into the estate of the spouse for purposes of calculating the accrual at the end of marriage.[670] This was confirmed in *CM v EM:*[671]

> 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.

2 Comments: Issue Paper 41

9.148 *Issue Paper* 41 posed a question whether courts should be able to use their discretion to redistribute pension benefits in marriages out of community of property without the accrual system? The majority of respondents[672] support the view that the courts should have a general distribution discretion in all marriages and, in that event, that spouses' pension interests should, like spouses' other assets, be subject to such distribution. The Cape Bar Council feels that this question is in fact subsidiary to the larger question as to whether our courts should have a general distribution discretion in all marriages out of community of property without the accrual system, irrespective of the dates on which these marriages were concluded, and this is addressed in Chapter 4.

9.149 Some respondents believe that the spouses in a marriage out of community of property without the accrual system ("an excluded marriage") have no intention of

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667 SALRC *Issue Paper* 41 at par 9.20. M De Klerk "Does a non-member spouse have a claim on pension interest?" *De Rebus* December 2015 38.

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

669 *ST v CT* 2018 (5) SA 479 (SCA).

670 SALRC Issue Paper 41 at par 9.21.

671 *CM v EM* 2020 (5) SA 49 (SCA).

672 Mariette Englebrecht, Karen Botha, Cape Bar Council, Miller du Toit Cloete and Family Law Forum, Sandra van Standen, Legal Aid SA, Old Mutual, LRC and AMAL.

sharing in each other's assets at the dissolution of their marriage. The Institute of Retirement Funds Africa (IRFA) submits that allowing a court to have the discretion to redistribute pension benefits will be going against the choices made by the parties at the inception of their marriage. Furthermore, it will be unfair on the parties as their intentions were clear from inception that they do not intend to share in each other's estate at the dissolution of their marriage either by death or divorce. Respondents who deal with pensions regularly[673] submit that the regulatory regime should be amended to enable courts to only use their discretion to redistribute pension benefits in marriages in community of property, or out of community of property with accrual.

9.150 Another question was: Which pension funds are excluded from the Pension Funds Amendment Act 11 of 2007 and what are the consequences for divorcing spouses? It appears to the IRFA as if the clean-break principle on divorces is not yet applicable to the following public sector retirement funds:[674]

a) Associated Institutions Pension Fund
b) Associated Institutions Provident Fund
c) Members of Statutory Bodies Pension Scheme
d) SA Public Library Pension Fund
e) Closed Pension Fund
f) Telkom Pension Fund
g) Transport Pension Fund, the Transnet Retirement Fund and the Transnet Second Defined Benefit Fund.

9.151 Legal Aid SA submits that pension funds where the head office of the association which carries on the business of that fund, or as the case may be, of every employer who is a party to such fund, is outside the Republic as well as public pension funds. This has the implication that non-member spouses may not claim their share in the pension interest on divorce and only once the member spouse retires.

9.152 The CRL Commission states that any pension fund, which has been established or continued in terms of a collective agreement concluded in a council in terms of the Labour Relations Act[675] before the Labour Relations Amendment Act, 1998, has come

673 Anonymous 2, IRFA and Old Mutual.

674 They qualify their submission that the SALRC consider the specific pieces of legislation in terms of which each of these funds were established to determine if their assumption is correct:

675 Act No. 66 of 1995.

into operation, nor in relation to a pension fund so established or continued and which, in terms of a collective agreement concluded in that council after the coming into operation of the Labour Relations Amendment Act, 1998, is continued or further continued (as the case may be). The provisions of the Pension Fund Amendment Act do not apply to these pension funds.

9.153 *Issue Paper* 41 posed a question whether the provisions of the Pension Funds Amendment Act 11 of 2007 relating to the payment of pension benefits at divorce should apply to all pension funds? According to the majority of respondents,[676] the clean break principle should apply to all pension funds. Respondents believe that excluding some public sector funds from applying the "clean break" principle is unfair and discriminatory and should be remedied.

9.154 Furthermore, the issue paper asked whether living annuities should be included in the estate of the spouse entitled to these annuities in order to calculate the accrual. Responses to this question are detailed and need to be stated. The Financial Planning Institute of Southern Africa (FPISA) submits that the treatment of living annuities (and resultant annuity income payments) at divorce has been a contentious point of law for years to the detriment of primarily women in marriages. However, Old Mutual, FPISA and IRFA point out that the recent Supreme Court of Appeal judgment, *CM v EM*[677] has shed new light on the treatment of an annuitant's right to future income payments for the purposes of calculating accrual. In this matter, the IRFA point out that SCA held that where a spouse has a living annuity at the time of divorce, the *right* to the future annuity payments, and not the capital of the living annuity, is an asset in his/her estate for purposes of calculating the accrual in the estate of the living annuitant. Old Mutual point out that the annuity itself is also not subject to division or assignment, as it is protected by section 37A of the Pension Funds Act. The IRFA supports the *CM v EM* finding since not recognising the living annuity in a marriage subject to the accrual system would provide an opportunity to frustrate the purpose of the accrual system by excluding something of financial value that was not excluded when the marriage was in force.

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676 Miller du Toit Cloete and Family Law Forum, Keneilwe Mabapa, Sandra van Standen, Anonymous 2, Old Mutual, Karen Botha, CRL Commission, Legal Aid SA, IRFA, Cape Bar Council, Mariette Englebrecht and LRC.

677 *CM v EM* (1086/2018) [2020] ZASCA 48 (5 May 2020). Also cited as *Montenari v Montenari.*

9.155 The LRC agrees with the finding in *CM v EM* but finds the jurisprudence there confusing. The LRC suggests that permitting retirement fund members who are married in community of property to purchase living annuities using proceeds of retirement benefits that accrued to their joint estate amounts to unfair discrimination and arbitrary deprivation of their property and is thus unconstitutional. They suggest that the rules of various retirement funds enable member spouses who are married in community of property to deprive their spouses of their entitled financial assets. The LRC suggests that how cases have been decided illustrates that non-member spouse's lack the rights to claims to property to which they, in accordance with matrimonial principles, are entitled. These cases confirm that non-member spouses on divorce do not have a claim to the capital amount of their member spouses' living annuities because living annuities are simply not regarded as constituting part of the annuitants' estates. The LRC suggests that adequate application of matrimonial principles is necessary to protect non-member spouses' rights in the accrued retirement benefits that member spouses put beyond their reach through living annuities.

9.156 Miller du Toit Cloete and Family Law Forum also commented on the issue of living annuities, but in relation to the practicalities of valuing the right to the future annuity payments They point out that there has been no definitive case on how actuarially the living annuity value should be calculated to take into account the value as at date of settlement or date of divorce.

9.157 Furthermore, a question was raised in the issue paper as to whether living annuities should be treated as pension benefit at the time of divorce. Some respondents wondered whether living annuities should be treated as pension benefit at the time of divorce. Most respondents[678] agree, although they remind the SALRC about the decisions taken recently in the SCA. The respondents also agree for different reasons. Their responses are given below:

a) It is Old Mutual's view that any benefit that has already accrued (be it in the form of an annuity or lump sum already paid to a person), would constitute an asset in the person's estate, and would thus be taken into account for divorce purposes. However, the respondent highlights the fact that the assets which underpin an

678 Old Mutual, Financial Planning Institute of Southern Africa, Mme Sophy Selau, LRC, Mariette Englebrecht, AMAL, Miller du Toit Cloete and Family Law Forum, Karen Botha and Anonymous 2.

annuity do not belong to the annuitant and so it is only the actual annuity benefit payments which accrue to the annuitant when they are actually paid.

b) Anonymous 2 also agrees and states that this would be the most appropriate solution. Despite what *CM v EM* said, in their view, a portion of the capital of the living annuity should be accessible to the divorced spouse, as this would allow a clean break. However, the spouse should only be allowed to transfer this capital to a living or life annuity and should not be entitled to a commutation (ie capital payment in cash) as this could compromise the prior tax-neutral status of the transfer from a retirement fund. However, this would require an amendment to the Pension Funds Act and the Income Tax Act to allow access to transfer the capital when an order meeting the requirements is made.[679]

c) Mme Sophy Selau poses these questions: "where did he get the money to buy his living annuity? It is the pension fund that I am entitled to as per Divorce Act. But why after buying a living annuity I am no more entitled to it? Because without a pension fund there will be no living annuity. So why is she not entitled to it as living annuities? Why is it not part of the matrimonial estate?".

9.158 Other respondents[680] emphasise that living annuities cannot be treated as pension benefits at the time of divorce, because the Supreme Court of Appeal in *ST v CT*[681] has explained why a spouse's living annuity cannot be regarded as an asset in that spouse's estate.

9.159 Commentators were requested to point out any other pension interest problems that need clarification or reform to the Commission. Anonymous 2 indicates that this is a very complicated issue. Currently, there are unlevelled playing fields depending on who pays the annuity income. If an insurer issues the policy to a member, the non-member spouse has no rights (other than the issue raised in the appeal of the *CM v EM* judgment. However, if the spouse has purchased a conventional annuity the problems are more complex. Whatever is to happen it is proposed that all annuities are treated in the same way.

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679 Anonymous 2 suggest that consequential amendments to the Income Tax act would be required, if a decision is made to allow the spouse to commute a portion, to make provision for taxation to be paid by such a spouse at her lump sum rates and not the annuitant, as this would be unfair given that in pension funds the spouse electing to take a lump sum would have to pay the tax.

680 Cape Bar Council, Sandra van Standen and IRFA.

681 *ST v CT* 2018 (5) SA 479 (SCA).

9.160 In relation to the actual court orders or/and court orders incorporating settlement agreements, Karen Botha suggests the following:

a) There needs to be a standard wording to all orders that will bind all funds, without the need for obtaining a letter of no objection.
b) This process delays divorce matters, often for months, waiting for the fund to provide the necessary letter of no objection. Unfortunately, many funds say they will not give this without an order, and it is an ongoing fight for the practitioner to obtain this letter.
c) If the legislature provides a single format form that must be completed with the exact wording required and which the funds must comply with, this will resolve this issue.

9.161 The IRFA submits that the relevant provisions in the Pension Funds Act and the Divorce Act must be amended to bring clarity in terms of whether orders following the dissolution of Islamic marriages (ie orders dealing with the matrimonial consequences of the parties to Islamic marriages that were not solemnised in terms of the Marriage Act) must be treated in the same manner as the dissolution of civil and customary marriages. The respondent further submits that the definition of pension interest in the Divorce Act be revised to accommodate paid-up members, deferred retirees and pensioners (ie divorce orders granted after employment had terminated) by rather referring to a member's accrued benefit in the fund at date of divorce. The IRFA states that in the Supreme Court of Appeal case of *Paixão & Another* [682]it was highlighted that a further determinative factor to establish a permanent life partnership was whether the relationship was such as to have a reciprocal duty of support as is found in a marriage. The IRFA explains that it is not practical, economical or appropriate to require retirement funds to undertake similar such exercises to determine whether a person was or was not a permanent life partner, especially as the facts may differ from couple to couple. There is a great need for a definition of what constitutes a permanent life partner in our law. This is not confined to retirement funds but also other areas of law (eg the *Paixão* judgment had to do with a claim against the Road Accident Fund).

9.162 Keneilwe Mabapa disagrees. She emphasises that when parties get married out of community of property excluding accrual, they are expressing their intention not to

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682 *Paixao and Another v Road Accident Fund* (05692/10) [2011] ZAGPJHC 68 (1 July 2011).

share their assets with each other. The law should not be used to overrule their expressed intentions.

9.163 Old Mutual provides the following proposals in response to this question:

a) The question posed by the Law Commission in 9.25 of *Issue Paper* 41 (Should living annuities be treated as assets in the estate of the spouse entitled to these annuities for the purposes of calculating the accrual?) only pertains to the accrual claim, but the same solutions should be provided in respect of joint estates where persons are married in community of property.

b) The definition of a "pension interest" in relation to a retirement annuity fund in section 1 of the Divorce Act requires an actuarial calculation, and this value is often far less than the actual fund value. This creates confusion and uncertainty, with non-member spouses often ending up with a much smaller value than anticipated. A solution to this problem would be to equate the value of a pension interest in a retirement annuity fund with the value of a pension interest in a pension, provident or preservation fund, ie, the value to which the member would have been entitled to if his/her membership was terminated on date of divorce.

c) The definition of a "pension interest" in a pension or provident fund in section 1 of the Divorce Act provides that the value thereof is equal to the amount that a member would have been entitled to if membership of the fund was terminated on date of divorce on account of resignation from office. Where a member resigned from office but opted to preserve the retirement interest in the relevant pension or provident fund, no pension interest exists, and the non-member spouse would not be able to share in the retirement interest of the member (confirmed in *Eskom Pension and Provident Fund v Krugel and Another*[683]). The same principles would apply if the member chose to preserve the retirement interest in a pension or provident fund upon reaching retirement age. The definition of "pension interest" should be amended to include the interest of deferred pension or provident fund members in the fund. The current situation is not equitable, especially if compared with a member that chose to defer the pension benefits by transferring it to a preservation fund (before or after reaching retirement age), in which case a pension interest will exist in such preservation fund on divorce. Thus, Old Mutual proposes that the definition of "pension interest" is not narrowly defined with reference to the amount that a member is

683 *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) (31 May 2011).

entitled to from a retirement if they withdraw from the service of the employer, but rather merely to reference it to the value of their "minimum individual reserve" (as defined in the Pensions Funds Act) in the fund as at the date of the divorce.

d) Legislative amendments on the effect of retirement benefits on divorce should make provision for awards where persons are married in terms of the tenets of a major religion (eg Muslim and Hindu marriages) or in terms of customary laws.

3 Evaluation

9.164 It is now accepted that a spouse's pension is a matrimonial asset that ought to be divided between the spouses according to their chosen matrimonial property regime. There has been an incremental progression in realising this right to share.[684] This has been achieved in the form of amendments to the Divorce Act and the Pensions Fund Act, as well as developments in the case law.[685] However, it is clear from the respondents' comments that there are substantive and practical difficulties that impede a spouse's access to their pension interest. These difficulties relate to equality of access across different pension funds. These difficulties also appear where member spouses convert their pension benefits to living annuities. Whether this is deliberate or not, the result of such action is to take the pension interest out of reach of the non-member spouse.

9.165 From the responses received by the SALRC, it appears that there are four main areas where reform may be appropriate:

a) Ensuring that all non-contributing member spouses entitled to a pension interest receive this interest at the date of divorce, thereby applying the clean break principle across the board.

b) Ensuring that non-contributing member spouses receive adequate information to, first, claim the pension interest, and secondly, to ensure sufficient information in the court order to allow pension administrators to pay out such interest.

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684 See for example, the efforts by the SALRC to realise this right and the subsequent reform in legislation that has followed. See the SALC's report on *The investigation into the possibility of making provision for a divorced woman to share in the pension benefits of her former husband* (Oct 1986) and its *Report on sharing of pension benefits* Project 112 (1999).

685 Sec 7(7) and (8) of the Divorce Act, and sec 37D of the Pensions Funds Act 24 of 1956 (as amended by the Pension Funds Amendment Act 11 of 2007). See the watershed case of *GN v JN* 2017 (1) SA 342 (SCA) where the SCA clarified the proper interpretation of ss 7(7) and 7(8) of the Divorce Act.

c) Confirming recent jurisprudence that a non-member spouse is entitled to the share of the future income derived from a living annuity. In particular, legislation may be required to provide a mechanism for the insurer to pay such income directly to the non-member spouse or transfer to a similar retirement plan.
d) Protecting non-member spouses where member spouses get dismissed, retire, are retrenched, or resign before the divorce is finalised.

9.166 Significantly, no respondents showed an appetite to revive the SALRC's 1999 recommendations that a separate piece of legislation govern the division of retirement benefits on divorce, seeing the road set in 2007 (see below) as capable of further amendment in the existing Divorce Act and Pension Funds Act inter alia.

4 Proposals

(a) Applying the clean break principle to all pension funds

9.167 The Pension Funds Amendment Act 11 of 2007, which allows a non-contributing member spouse to access their pension interest at the date of divorce, is only applicable to private sector funds. While members of some public sector funds have forced their funds to implement similar changes through litigation (based on equality discrimination), there are still several pension funds where the clean break principle is not applicable. This means that non-member spouses are only entitled to their pension interest on the retirement date of the member spouse. This disparity leads to arbitrary treatment (based on the nature of the pension fund), financial hardship and the non-application of the clean break principle. The Institute of Retirement Funds Africa (IRFA) have identified the following funds that have no legislative mechanism to allow administrators to pay out at the date of divorce:

a) Associated Institutions Pension Fund
b) Associated Institutions Provident Fund
c) Members of Statutory Bodies Pension Scheme
d) SA Public Library Pension Fund
e) Closed Pension Fund
f) Telkom Pension Fund
g) Transport Pension Fund, the Transnet Retirement Fund and the Transnet Second Defined Benefit Fund.

9.168 Following the lead of respondents to the issue paper, we propose that the clean break principle is made applicable to all pension funds regardless of their provenance.

Option 1

9.169 The legislature must include all state-owned/public sector retirement funds in a new definition of retirement funds under the Pension Funds Act. As a result, these funds must be registered/licenced in terms of the Pension Funds Act. The Pension Funds Act provisions will then apply to them, including the section 37D provisions and the clean break principle on divorces.[686]

9.170 The question for further comment is then: if these funds are included under the Pension Funds Act, how will this affect the jurisdiction of the Pension Fund Adjudicator to resolve issues in relation to the pay out of these funds and any other unintended consequences arising from such inclusion?

Option 2

9.171 By way of a general amendment Act, amend each public fund's guiding statute to provide for a payout at the date of divorce, together with similar protections under section 37D.

9.172 If options 1 and 2 are not viable, are there any other measures that can be taken to allow for the clean break principle to apply to all pensions.

(b) Disclosure of pension fund information at an early stage of divorce proceedings

9.173 While a pension interest is considered a matrimonial asset, financially vulnerable non-member spouses often do not have adequate information regarding the pension fund details. This can lead to challenges in terms of access, especially where a court order is not clear and pension fund administrators refuse to pay out on the basis of this lack of clarity.

9.174 A duty of disclosure of certain information regarding the pension fund should be mandatory. Options relating to disclosure are discussed in Chapter 4 paragraph 4.57.

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686 The IRSA suggests that this be done via the draft Conduct of Financial Institutions Bill.

(c) Living annuities and the right to share

9.175 The treatment of living annuities at divorce has been a contentious issue for many years. Anecdotally, a spouse will use an accrued pension fund payment to purchase a living annuity, often to frustrate the non-member spouse's claim to a pension interest pending a divorce. This is because (as confirmed by case law), the living annuity does not form part of a spouse's estate since the insurer and not the annuitant owns the capital.[687]

9.176 The SCA has provided some reprieve to the spouse prejudiced by the actions of the member spouse. It has characterised a living annuity as actually consisting of two distinguishable monetary parts, not only the capital value, but also the income stream.[688]

9.177 While the capital does not belong to the member spouse, the annuitant has a contractual right to the future income stream.[689] As a result, the non-member spouse has a right to share in that contractual right according to their matrimonial property regime.

9.178 The difficulty, as is clear from respondent's comments, is not only how to value this right, but also the lack of a mechanism to deal with this share in a way that is similar to that provided for pension interests.

9.179 Without a similar mechanism, there is no direct claim against the insurer to pay out the non-member's share of the income. In addition, section 37A of the Pension Funds Act prevents the insurer/fund paying any part of an in-fund living annuity or fund-owned living annuity to the non-member spouse as they would effectively be characterised as a creditor.

9.180 As a result, legal practitioners engage in "tortuous procedures"[690] where agreements *inter partes* are drawn up where the owner of the living annuity pays out a

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687 *ST v CT* and *CM v EM* have confirmed the legal nature of living annuities, particularly that the capital is vested in the insurer and not in the annuitant (par 28 and 37).

688 Eben Nel 'Some clarity on the accrual of living annuities at death or divorce *CM v EM* (1086/2018) [2020] ZASCA 48; [2020] 3 All SA 1 (SCA); 2020 (5) SA 49 (SCA) (5 May 2020)' (2021) 42 *Obiter* 734.

689 *ST v CT* (supra par 109–112) and in *CM v EM* (supra par 31).

690 As characterised by the Family Law Forum, Western Cape and Muller, du Toit and Cloete.

certain percentage of their income on an annual basis post-divorce.[691] This offends the clean break principle and also complicates matters for the non-member spouse who has no directly enforceable right against the insurer. It also creates tax problems as the income is taxed in the member spouse's hands before payment to the non-member spouse. This creates the possibility that the spouse with the living annuity has to make the payment out of *after tax* income from the living annuity.

9.181 Other respondents[692] have pointed out the practical difficulty on satisfying a half share or accrual claim from a living annuity, particularly where it is the spouse's main asset. If the annuitant spouse possesses little or no other assets, it creates the untenable situation that the annuitant would not be able to satisfy the claim. However, it appears that the court could use their discretion to provide for payment by instalment subject to the views set out below.

9.182 While some respondents suggest no legislative intervention is needed, we propose the following options:

Option 1

9.183 Provide for the valuation of the non-member's share of the right to a future income stream in the form of a lump sum payment, and then provide a similar mechanism for an insurer to pay that amount directly into a retirement fund or living annuity, should the non-member spouse want this. This would allow the non-member spouse to benefit from the tax-neutral status of a transfer.

9.184 This option would require consequential amendments to the Income Tax Act and a qualification to section 37A of the Pension Funds Act.

Option 2

9.185 Some respondents have suggested that the living annuity should be treated as a capital asset of the member spouse for division just as in the case of pensions as a type of legal fiction. However, this would go against the very nature of ownership of the capital. This is because the capital value used to purchase a living annuity

691 While the issue of a living annuity was a red herring in *Roelofse NO v L and Another* (2016/13170) [2021] ZAGPJHC 740 (26 November 2021), the decision illustrates the way in which the parties attempted to avoid actuarial assessment of the future payments by agreeing on a lump sum payment.

692 Old Mutual, and the Cape Bar. See also ANNONYMOUS 2.

transfers to the insurer, and thus this capital never accrues to the annuitant as an asset in their estate.

(d) Protecting non-member spouses where member spouses get dismissed, retire, are retrenched, or resign before the divorce is finalised.

9.186 Some respondents suggest that reform is needed in situations where the pension benefit accrued to the member spouse often in situations where the divorce summons was issued, but before the divorce was finalised. While the funds from such payment would be dealt with according to the ordinary rules of their matrimonial property regime, non-member spouses can be severely prejudiced, as the recent case of *CNN v NN*[693] illustrates. In this case, the parties (married in community of property) divorced. They entered into a divorce agreement that was made an order of court. In this settlement agreement, the wife was assigned 50 per cent of the husband's pension interest. However, when the wife approached the pension fund, the pension fund advised that the husband's pension benefit had accrued to him, and thus there was no pension interest. The court found that the legislative framework did not cater for her claim as her pension interest ceased to exist upon the accrual of the benefits. The court suggested that the case "raised an important gap regulating pension interests in South Africa."[694]

693 *CNN v NN* [2023] ZAGPJHC (23 February 2023). It is noteworthy that the Acting Judge in this matter is the same respondent who raised this issue, and has written several articles about it.

694 *CNN supra* par 19.

Option 1

9.187 Where divorce proceedings are in process, any accrual of the pension benefit must be deemed to have taken place *after* the date of the divorce order, in order to protect the non-member's right to a pension interest.

9.188 In order to facilitate this, when a divorce summons is issued, the member spouse must notify the pension fund administrator and that pension fund administrators must endorse that spouse's records to prevent payment until the divorce is finalised.

9.189 Require that pension fund administrators be notified when divorce summons are issued, with a view to endorsing the pension fund records and retaining

E Settlement agreements

1 Background

9.190. Currently divorcing spouses are permitted to regulate the division of their property in a settlement agreement[695] (also called a deed of settlement or consent paper).[696] The Divorce Act stipulates that the court "may" make a settlement agreement between divorcing parties relating to spousal maintenance or the division of assets an order of court upon divorce.[697] Settlement agreements usually take the form of a written agreement between the parties. It is always strongly advised to have the settlement agreement in writing in order to avoid future disputes relating to the actual terms of that agreement. As settlement agreements are contracts, the rules that apply to the interpretation of contracts apply to settlement agreements.[698]

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695 *Issue Paper* 41 at 50.

696 See in general Heaton in *The Law of Divorce* 86 – 90; Heaton *SA Family Law* 123 – 125. Section 7(1) of the Divorce Act. See also D van Zyl ADJP in *Ex parte Le Grange and Another; Le Grange v Le Grange* (984/2011) [2013] ZAECGHC 75; [2013] 4 All SA 41 (ECG); 2013 (6) SA 28 (ECG) (1 August 2013) at par [1].

697 Sec 7(1) of the Divorce Act which reads as follows: "A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other".

698 Heaton in *The Law of Divorce* at 90. *Odgers v De Gersigny* (32/06) [2006] ZASCA 125; 2007 (2) SA 305 (SCA) (30 November 2006).

9.191. The court may incorporate the settlement agreement into the divorce order.[699] However, a court is not compelled or obliged to incorporate a settlement agreement as part of the court order.[700] Heaton[701] indicates that although the various divisions of the High Court do not follow a uniform practice in this regard, by far the majority of them do incorporate the settlement agreement into the divorce order. She further indicates that in KwaZulu-Natal, the practice is not to incorporate the whole settlement agreement in the court order (Practice Directive 15 of the KwaZulu-Natal High Court).[702] In other divisions, the practice is to incorporate the whole settlement agreement in the court order.[703]

9.192. Until recently, the position in the Eastern Cape Division was unclear.[704] There is no practice directive regarding this issue in the Eastern Cape, and consequently presiding officers seem to be free to exercise the discretion in terms of section 7(1). According to Alkema J, in *Thutha v Thutha,*[705] the practice in the Eastern Cape courts of including settlement agreements as part of court orders is problematic. In this case, an application was brought for the enforcement of an order of divorce incorporating a settlement agreement. It was claimed that the Respondent was in contempt of court for failing to comply with the order and the Applicant asked that he be sentenced to a term of imprisonment, which term was to be suspended pending his fulfilment of the terms of the agreement. Alkema J dismissed the application on the grounds that the settlement agreement in question was not capable of enforcement.

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699 In *PL v YL* 2012(6) SA 29 (ECP) the issue was not so much what the court ordered, but rather what it failed to order. The High Court has a discretion in divorce proceedings to make a settlement agreement an order of court. The matter subsequently went on appeal to a full bench in *Ex parte Le Grange and Another [2013] ZAECGHC 75*. Heaton in *The Law of Divorce* 87.

700 *Thutha vs Thutha* 2008(3) SA 494 (TKH) paragraph [43] at page 506*; Rowe v Rowe* (105/96) [1997] ZASCA 54; 1997 (4) SA 160 (SCA); [1997] 3 All SA 503 (A); (27 May 1997).

701 Heaton in *The Law of Divorce* at 88. *Ex parte Le Grange at par* [18].

702 Heaton in *The Law of Divorce* at 88. *Ex parte Le Grange at par* [18]. *Mansell v Mansell* 1953(3) SA 716 (N) at 721H

703 *Eksteen v Eksteen* 1920 OPD 195, *Frazer v Frazer* 1922 EDL 85. *Berkowitz v Berkowitz* 1956(3) SA 522 (SR).

704 *Thutha v Thutha* 2008 3 SA 494 (TkH); *PL v YL 2012 (6) SA 29 (ECP).*

705 *Thutha v Thutha* 2008 (3) SA 494 (TkH***).***

9.193. The approach of the court in *Ex parte Le Grange,*[706] with regard to the nature of settlement agreements in matrimonial disputes, was endorsed by the Constitutional Court in *Eke v Parsons*.[707] The Constitutional Court confirmed that once a settlement agreement has been made an order of court, it is an order like any other and changes the terms of the settlement agreement to an enforceable court order.[708] In context, an "order" of court is the same as a "judgment" of the court. There is, of course, no distinction in law between a judgment (relief claimed in a trial action) and an order (relief claimed in application proceedings).[709]

9.194. Settlement agreements may not contain certain terms, which will result in the rest of the agreement not enforceable.[710] The terms of the agreement must not be impossible, illegal, *contra bonos mores* or contrary to public policy.[711] In addition, terms and clauses that require another party to perform illegal acts cannot be incorporated. Public policy is explained in *Barkhuizen v Napier:*[712]

> What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus, a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.

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706 *Ex parte Le Grange and Another; Le Grange v Le Grange* (984/2011) [2013] ZAECGHC 75.

707 *Eke v Parsons* 2016 (3) SA 37 (CC) (2015 (11) BCLR 1319; [2015] ZACC 30). In *AVW v SVW and Others (*3118/2021) [2022] ZAWCHC 74 (20 April 2022) at par 8, De Wet AJ stated that "Making a settlement an order of court changes the nature of the agreement in that it provides the parties with a method to execute thereon."

708 *Eke v Parsons* pars 29 and 31.

709 *Ex parte Le Grange.*

710 *L M and Others v. T M (343/2019)* [2020] 2020) ZASCA 43 (21 April 2020) where the SCA held that settlement agreement was ambiguous. In this case L and T entered into a settlement agreement in terms of which B would pay A R5 500 000 (Settlement Amount) in full and final settlement of the dispute, including any claim of maintenance that A might have had against B. However, the Settlement Amount was, in fact, payable as follows: C would have (i) purchased a parcel of game, for an amount equal to the Settlement Amount, and (ii) paid the purchase price (an amount equal to the Settlement Amount) to A (Payment Method). However, B and C could not come to an agreement on the purchase price for the parcel of game and C decided against buying the game.

711 Heaton in *The Law of Divorce* 87. *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) par 30. *Brisley v Drotsky* 2002 (4) SA 1 (SCA) (Brisley), the Supreme Court of Appeal identified good faith as a fundamental principle in South African law which only finds application as an underlying, general and supplementary value in conjunction with other established rules and principles.

712 *Barkhuizen* par 29.

9.195. If the agreement or its terms are not made an order of court, the agreement is merely a contract and cannot be enforced in the same way as an order of court.[713]

9.196. A settlement agreement that has been made an order of court binds only the parties to the divorce proceedings.[714] A court dealing with a divorce action is entitled, in its discretion, to incorporate the terms of the settlement in a court order. It cannot, however, thereby bind a party who was not a party to the action before it in terms of such an order[715] In *Rohde v Rohde and Others,*[716] Kubushi AJ pointed out that the court order issued in terms of the divorce proceedings could not bind the Trust. The Trust was not cited as a party to the proceedings nor was it joined as such. According to the judge, it could not have been the court's intention to bind parties who were not joined in the divorce proceedings by incorporating the settlement into the order of the court. The terms the applicant relied on were not captured in the settlement.[717]

9.197. 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.[718]

9.198. It has been submitted, however, that spouses are, for various reasons, often in an unequal bargaining position when they negotiate divorce settlement agreements

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

714 *Nedbank Ltd vs Finin & Others* (70232/2013) ZAGPPHC 673 (1 September 2014) paras [5] and [8] where it is stated that although the settlement agreement was made an order of court, it is not binding against the applicant because it was not party the divorce action. The settlement agreement can only be binding on the applicant by consent. The first respondent failed to allege that the applicant had consented to the delegation of liability to the first respondent. Therefore this ground of defence failed; Heaton in *The Law of Divorce* 88 – 89

715 *Nieuwoudt and Another NNO v Vrystaat Mielies (EDMS) BPK, 2004(3) SA 486* SCA.

716 *Rohde v Rohde and Others* (4966/09) [2011] ZAFSHC 157 (15 September 2011) at par [49]; *M J Froneman v A Froneman and Others*_(3074/2009) [2009] ZAECGHC 92 (10 December 2009.

717 Ro*hde v Rohde* at [49].

718 SALRC *Issue Paper* 41 at par 9.37. Ro*hde v Rohde* at [87]; Heaton in *SA Family Law* par 12.2.

and that the weaker spouse is often prejudiced.[719] In *Amar v Amar,*[720] the court heard a matter where a husband was withholding the grant of a *get* on the basis, inter alia, that he was unhappy with certain financial provisions contained in the civil settlement agreement signed by the parties. The court held that it was clear that the Defendant was withholding his co-operation in obtaining a Jewish divorce in order to compel the Plaintiff to accede to his request that the agreement be amended to reflect his financial demands. Settlement agreements normally protect the interests of the party who is in the stronger bargaining position.[721] Heaton[722] states that an abusive marital relationship can seriously distort bargaining power. But even in the absence of threats or fear of physical or psychological harm, family relations are often based on overt and covert coercion.[723] The coercion may have emotional origins. For example, if the wealthier spouse has strong feelings of guilt about being the cause of the breakdown of the marriage, he or she may be persuaded to be financially better disposed towards the poorer spouse. On the other hand, if the poorer spouse caused the breakdown, the wealthier spouse may exploit this.[724]

9.199. Although courts can refuse to include a settlement agreement in a divorce order under certain circumstances,[725] it has been pointed out that courts generally do not afford settlement agreements the necessary scrutiny. Although settlement agreements are entered into every day, they are often prepared in haste at court, scribbled down on a pad, signed and presented to a judge, anxious to clear the court roll. As with any agreement, the purpose and effect should be carefully considered before the agreement is crafted to secure the interests of the parties. All of this before the agreement is set in a court order. [726]

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719 *Issue Paper* 41. See also Heaton SAJHR 2005 566 – 570.

720 *Amar v Amar* [1999] 2 All SA 376.

721 Heaton *SAJHR* 2005 at 567. E Bonthuys `Labours of Love: Child Custody and the Division of Matrimonial Property at Divorce' (2001) 64 *THRHR* 192, 192 shows that the rules regarding property division and maintenance favour men at the expense of their ex-wives and children.

722 See Heaton *SAJHR* 2005 and the research she refers to at 567.

723 See Heaton *SAJHR* 2005 and the research she refers to at 567.

724 See Heaton *SAJHR* 2005 and the research she refers to at 567.

725 *A.V.W v S.V.W and Others* (3118/2021) [2022] ZAWCHC 74 (20 April 2022).

726 SALRC Issue Paper 41 at par 9.39. Heaton SAJHR 2005 568 – 569.

2 The position in other jurisdictions

(a) New Zealand

9.200. In New Zealand, the Property (Relationships) Act[727] governs the division of property of married couples, civil union partners and *de facto* couple's.[728]. As in South Africa, settlement agreements are governed by contract law, and a party may apply for a court to set it aside on the basis that a party makes a mistake about the law or facts, and/or where a party to a settlement agreement has been induced to enter it by a misrepresentation made by another party.

9.201. The Act allows a court to set aside an antenuptial or a settlement agreement if the court finds that enforcing them would result in serious injustice, based on all the circumstances.[729] The Act sets out certain factors that the court must have regard to in doing so, namely:

a) the provisions of the agreement;
b) the length of time since the agreement was made;
c) whether the agreement was unfair or unreasonable in the light of all the circumstances at the time it was made;
d) whether the agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made (whether or not those changes were foreseen by the parties);
e) the fact that the parties wished to achieve certainty as to the status, ownership, and division of property by entering into the agreement; and
f) any other matters that the court considers relevant.

(b) Australia

9.202. Australian law also permits the setting aside of an antenuptial agreement or divorce settlement on various grounds.[730] These grounds include that, in view of the circumstances which have arisen since the making of the agreement, it is impracticable for the agreement or part of it to be carried out; that since the making of the agreement,

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727 Property (Relationships) Act 1976 (1976 No 166).

728 Section 4D of the Property Relationship Act 1976.

729 Sections 21(1), 21(2), 21A(1), 21J(1) and (4) of the Property (Relationships) Act1976.

730 Section 21F(3) of the Family Law Act 1975. See also Heaton *SAJHR* 2005 at 569.

a material change has occurred in respect of the care, welfare or development of a child of the marriage, and, as a result of the change, the child or a party to the contract will suffer hardship if the agreement is not set aside.[731]

9.203. The test for "hardship" for the purposes of setting aside financial agreements under section 90K(1)(d) is a constant and continuing threat for those entering into financial agreements during the course of and prior to the commencement of a relationship/marriage.[732] Section 90K(1)(d) of the Act looks at the court's power to set aside a financial agreement where there has been a material charge occurring by reason of the care, welfare and development of a child, and by reason of that change to the child or the parent, they will suffer hardship if the financial agreement is not set aside. This section requires not only enquiry as to the parties' circumstances at the time of entering into the financial agreement with those at the time the material charge has been asserted, but also an assessment as to the degree of hardship that might be suffered by a child or the parent party should the agreement not be set aside.[733] The test for hardship is well settled: it requires a comparison of the position of the child, or the person with caring responsibility, if the agreement remains in place and their position if the agreement is set aside.[734]

(c) England and Wales

9.204. In England and Wales most divorces, and dissolutions of civil partnerships are governed by the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004. Parties can agree between themselves as to the division of their property (viz a settlement agreement) and apply to make such agreement an order of court (a consent order). When applying for such consent order, both parties must complete a statement of information (attached as a schedule in the Matrimonial Causes Act: D81) to give the court some insight when making such agreement an order of court.

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731 Heaton SAJHR 2005 at 569.

732 Jacqueline Campbell "Financial agreements and the law of contract: grounds for setting aside *Television Education Network* March 2015.

733 *Daily v Daily* [2020] FamCAFC 304.

734 *Frederick & Frederick* [2019] FamCAFC 87 at [24]; *Fewster & Drake* [2016] FamCAFC 214 at 67.

9.205. A court must take into consideration the following factors (as per section 25 of the Matrimonial Causes Act or Civil Partnerships Act) in determining whether the agreement is fair in all the circumstances:

a) The income, earning capacity, property, and other financial resources that each of the parties has or is likely to have in the foreseeable future (including any increase in earning capacity that it would be reasonable to expect a party to the marriage to take steps to acquire).
b) The financial needs, obligations, and responsibilities that each of the parties to the marriage has or is likely to have in the foreseeable future.
c) The standard of living that the parties enjoyed prior to the breakdown of the marriage.
d) The age of the parties and the duration of the marriage.
e) Any physical or mental disability of either party to the marriage.
f) The contributions that each of the parties has made or is likely in the future to make to the welfare of the family.
g) The conduct of each of the parties (where it is conduct that it would be in the opinion of the Court be inequitable to disregard).
h) In the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit that party will lose the chance of acquiring (including benefits under a pension scheme).

9.206. If a court is not satisfied with the information in the statement of information form (D81) and that the factors are not adequately met by the agreement, the court may ask further questions and request reassurances of a party to the order or seek additional documentation to satisfy themselves that all information has been disclosed accurately.

3 Comments

9.207. *Issue Paper* 41 posed a question whether the current practice with regard to settlement agreements does lead to problems, and if so, what are those problems and why do they occur? All respondents agree that current practice with regard to settlement agreements leads to problems for various reasons:

a) Legal Aid SA suggests that enforcement[735] is a concern if the settlement agreement is not made an order of court. Apart from enforcement, it also

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735 This view is also held by Karen Botha.

suggests that if the wording and interpretation of the provisions are not clear in the settlement agreement, this leads to unnecessary challenges in court.[736]

b) Miller du Toit Cloete and Family Forum submit settlement agreements should be made court orders.[737]

c) The LRC suggests that there are special problems relating to settlement agreements because they are affected by unequal power relations, abuse and /or coercion applied to one spouse, lack of counselling and legal representation. This is exacerbated when courts rubber stamp settlements.[738]

9.208. The issue paper asked respondents as to how these problems could be dealt with by legislation, if at all? Karen Botha suggests the following:

a) The Divorce Act and corresponding Rules of Court should set out the procedure for making a settlement agreement an order of court clearly. One requirement should be that both parties should appear in court, or where this is not possible, to connect via Zoom.

b) The court must carefully read the terms of the agreement to ensure there are no misinterpretations by either party, that the parties understand the terms and that the terms are enforceable.

c) Where the court believes a term may result in issues down the line, it should have a discretion to adjust the wording of the clause to avoid this, without changing the import of the clause according to the parties' understanding thereof.

d) Currently, settled and unopposed matters are rushed through the court without agreements being properly considered, save for terms relating to children.

e) Even maintenance terms are often vague and understood differently by the parties.

f) Where parties are represented, their representatives may explain how they interpret a clause to their client, but the other party may have a completely different interpretation.

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736 Keneilwe Mabapa. See for example, *CB and Another v HB* (1324/2019) [2020] ZASCA 178 (18 December 2020) where the parties disputed whether the word 'remarriage' in the settlement agreement extended to an instance where one of the spouses subsequently cohabited with another and had a religious Christian ceremony bless the union. The court held that this was not a remarriage as contemplated in the settlement agreement.

737 AMAL agrees.

738 The Cape Bar Council holds the same view.

g) If the parties both appear in court and confirm their understanding under oath, this will reduce the risk of parties coming back to court as a result of differing interpretations.

9.209. Some of the respondents[739] believe that it is not necessary to change the Divorce Act or the Matrimonial Property Act. Rather, these respondents suggest that practical training should be given to the relevant role-players so they can make informed decisions on the necessary and relevant content of such clauses. The Cape Bar Council suggests that the Chief Justice could be alerted to the problem and a comprehensive training brief submitted to the South African Judicial Education Institute covering the matters which the courts are required to consider before making settlement agreements an order of court.

9.210. Legal Aid SA suggests that the Divorce Act must require that all settlement agreements be made orders of court and be incorporated in the final decree of divorce.[740] Legal Aid SA emphasises that the deed of settlement cannot include, for example, a provision that is *contra bonos mores,* eg a request to withdraw a criminal charge against the other party.

9.211. UUCSA proposes that the use of dispute resolution mechanisms such as conciliation or mediation should be made compulsory for parties to arrive at negotiated settlement of issues. All issues concerning division of assets between the parties, payment of maintenance, custody of and contact with the children including payment of costs of proceeding must be dealt with in the conciliation and mediation. The respondent suggests that the courts should properly investigate all the terms of the settlement agreement and also take the circumstances in which each agreement was concluded into account. It suggests that where the court finds a potential conflict, then the court should refer that matter to another court for trial.

9.212. The LRC recommends that reform measures must ensure the enforcement of judicial scrutiny of settlement agreements prior to granting the decree of divorce. It suggests that the court must ensure that s/he exercise the inherent inquisitorial powers

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739 CRL Commission, Cape Bar Council, Keneilwe Mabapa and Sandra van Standen.

740 AMAL support this although the respondent believes that such agreement ought to be dealt with in both the Divorce Act and the Matrimonial Property Act. .

to interrogate the settlement agreement and satisfy the court that the agreement is fair - especially where a party is unrepresented.

9.213. *Issue Paper* 41 posed a question whether there are any special statutory safeguards which should be applied to settlement agreements (for instance, legal representation of the parties). Karen Botha and AMAL disagree that settlement agreements should be protected by special statutory safeguards, with the former suggesting that such representation is not necessary if there is proper judicial oversight of agreements. This would discriminate against parties who cannot afford legal representation.

9.214. The UUCSA, the CRL Commission, the LRC and Keneilwe Mabapa make various recommendations regarding the possibility of special statutory safeguards. UUCSA believes that all parties should have independent legal representation to ensure that both parties are fully acquainted with all terms and conditions of the agreement. On the other hand, the CIR Commission submits that legal representation should be by choice. However, if one party chooses not to have legal representation, the courts should have the power to reject a settlement agreement that does not make sense. Keneilwe Mabapa believes that there should be a responsibility on legal practitioners to pay careful attention to the terms of the agreements so that they represent the interests of their clients. The LRC emphasises that legal representation is essential for the protection of spouse's interests and to assist informed decisions. The respondent recommends that settlement agreements be scrutinised by courts, especially when one party is unrepresented. The LRC further suggests that Family Advocates could consider whether the settlement agreement is in the best interests of the minor child/ren. Although the enquiry is aimed at determining the best interests of the child – these interests are inextricably linked to the interests of the primary care giver and custodial parent. The court be required to satisfy itself that that the settlement agreement is fair to the parties.

4 Evaluation

9.215. In civil matters, it is common practice to make an agreement between parties an order of the court.[741] The conversion of settlement agreements into court orders have

741 *Van Schalkwyk v Van Schalkwyk* 1947 (4) SA 86 (O) 95]

existed for a long time, with a strong tradition in law.[742] Substantive law favours a contract of compromise and courts generally accommodate settlement-based orders,[743] which avoids protracted litigation,[744] save costs and scarce court resources.[745]

9.216. The main problem is that settlement agreements are not properly drafted with the wording that is poor or ambivalent, which gives rise to uncertainty. While legal representation is preferred for the protection of the spouses' interests and to assist in taking informed decisions, it does not necessarily mean that the agreement will be free from coercion or unfairness.

9.217. There is a tendency on the part of some courts to "rubber stamp" settlement agreements. Most of the commentators suggest that the reform measures must ensure that courts scrutinise settlement agreements prior to granting the decree of divorce. There is some jurisprudence suggesting that courts understand this role and the unique nature of a settlement agreement upon divorce, as is evident from the passage below:

> Settlement agreements in divorce matters are clearly distinguishable from settlements in other types of litigation as they are primarily regulated by statute and concern issues of status, maintenance issues which can only be determined at divorce and the best interests of minor and dependent children.[746]

9.218. However, there is also a suggestion that courts often lack the evidence to properly interrogate the settlement agreement's terms.[747]

5 Proposals

9.219. The Commission proposes that the Chief Justice should be notified of the issues arising in divorce matters and a comprehensive training brief should be submitted to the South African Judicial Education Institute ("SAJEI") to cover matters which courts

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742 In *Van Schalkwyk v Van Schalkwyk* 1947 (4) SA 86 (O) van Heerden J, at page 95 outlined the historical background to the practice and concluded that "the tradition of such orders is very strong in our legal system".

743 *Ex parte le Grange 2013* (6) SA 28 (ECG) paras 37 and 41.

744 *Eke v Parsons* 2016 (3) SA 37 (CC) at par 19.

745 *Eke v Parsons* at par 22.

746 *AVW v SVW and Others* (3118/2021) [2022] ZAWCHC 74 (20 April 2022) par 40.

747 *AVW* par 41.

are required to consider before making settlement agreements an order of court. The Commission further proposes the following options, with a preference for option 2 or 3:

Option 1

9.220 The Commission proposes that courts should continue to make settlement agreements orders of court subject to the usual court rules and directives.

Option 2

9.221 Parties must provide a certificate of independent legal advice when requesting the court to make their settlement agreement an order of court. The certificate must set out that the parties received independent legal advice on the consequences and prudence of entering into the terms set out in the agreement.

Option 3

9.222 When deciding whether to incorporate a settlement agreement into the divorce order, the court should consider the factors listed below:

- the extent to which the spouses were in an unequal bargaining position when they entered into the settlement agreement;
- the extent to which the agreement was inequitable and unjust in view of all the circumstances at the time it was entered into;
- the extent to which the agreement has become inequitable and unjust in view of any subsequent change in the spouses' circumstances;
- any other matter the court considers relevant.

9.223 Respondents are asked to comment on the feasibility of these options and suggest alternative measures.

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ANNEXURE A

LIST SUBMISSIONS*: ISSUE PAPER* 41

1. Association of Muslim Accountants and Lawyers (AMAL)
2. Banking Association of South Africa
3. Baker Stephen, Baker & Partners, Jersey
4. Prof Boniface AE, University of Johannesburg
5. Advocate Botha Karen
6. Bulbulia Muhamed Fazel -Practising Attorney, Notary Public and Conveyancer
7. Cape Bar Council: prepared by Adv Gassner SC, Julia Anderssen and Bernstein (with input provided by Adv Davis SC, Adv Van Embden and Adv Thiart)
8. Annonymous 2
9. Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission)
10. Dada Zainab, student
11. Commission on Gender Equality (from project 144)
12. Sipho Citabatwa, Community activist
13. De Klerk Dave, Actuary
14. Anonymous
15. Du Toit Maritjie, student and litigant
16. Englebrecht Mariette
17. Family Law Forum, Western Cape and Miller du Toit Cloete Inc., attorney's firm in Cape Town (Miller du Toit Cloete and Family Law Forum)
18. Financial Planning Institute of Southern Africa
19. FORSA, Daniela Ellerbeck
20. Hlapolosa Tebogo Taunyane, Attorney
21. Inkatha Freedom Party-Pietermaritzburg
22. Institute of Retirement Funds Africa
23. Islamic Forum Azaadville
24. Adv Joubert and Franck
25. Kheswa Lindokuhle, UNISA student
26. Legal Aid SA, Dr Izette Knoetze-le Roux
27. Legal Resources Centre: compiled by the following lawyers:
    Sharita Samuel, Saadiyah Kadwa, Amy-Leigh Payne, Anneline Turpin, Lelethu Mgedezi, Ektaa Deochand, Cecile van Schalkwyk, Sipesihle Mguga, Ona Xolo

Charlene Kreuser (Candidate Attorney, Cape Town), Priyanka Naidoo (Candidate Attorney, Cape Town) and Nokuthula Mbele (Candidate Attorney, Durban)

28. Mabapa Keneilwe, Practising Attorney, Polokwane
29. Maloka Susan, Women Policy City of Tshwane
30. Mamabolo Pitse
31. Matshelo Puleng
32. Mochela Rethabile, Practising Attorney
33. Moleko AM, Practising Attorney, Pietermaritzburg
34. Moroka Gaongalelwe, Kgosigadi, House of Traditional Leaders
35. Ms Moosa Hafeeza housewife
36. Motlanthe Lekota, Practising attorney Nelspruit
37. Ngobeni Lisa, house wife
38. National Spiritual Assembly of the Bahá'ís of SA
39. National House of Traditional Leaders (NHTL) Zolani Mkhiva
40. Nhlabathi Kathleen
41. Old Mutual
42. Rural Women's Movement, KZN
43. Premier Eastern Cape
44. ANC Women's League Cape Town
45. Muslim Personal Law Network (MPL Network), Contributors: Farhana Ismail, Dr. Fatima Seedat, Ayesha Royker, Rumana Mahomed and Shahin Mia
46. Sayed Iqbal
47. Shikwambana Melissa, house wife
48. B S Smith, Prof, UFS
49. Sunni Ulama Council Gauteng
50. Tayob Mariam
51. Tomasek Franz, SARS
52. United Ulama Council of South Africa (UUCSA)
53. Ina Botha Legislative Development, DOJC
54. Adv Sandra van Staden,
55. Women Action for Upliftment in Mpumalanga
56. Wagenaar Susan
57. Centre for Human Rights, University of Pretoria