SOUTH AFRICAN LAW COMMISSION

PROJECT 12

REVIEW OF THE LAW OF DIVORCE

AMENDMENT OF SECTION 7 (3) OF THE DIVORCE ACT, 1979

REPORT

July 1990

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To Mr H J Coetsee, MP, Minister of Justice

I have the honour to submit to you in terms of section 7(1) of the South African Law Commission Act, 1973 (Act 19 of 1973), for your consideration the Commission's report on the investigation into the amendment of section 7(3) of the Divorce Act, 1979.

p.p.

H J O VAN HEERDEN
CHAIRMAN

INTRODUCTION

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

The members of the Commission are -

The Honourable Mr Justice H J O van Heerden (Chairman)
The Honourable Mr Justice P J J Olivier (Vice-Chairman)
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HIERDIE VERSLAG IS OOK IN AFRIKAANS BESKIKBAAR.

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CHAPTER 1

1. Introduction

1.1 Section 7(3) of the Divorce Act, 1979, was inserted in that Act by section 36(b) of the Matrimonial Property Act, 1984,[1] and at that stage provided as follows:

> (3) A court granting a decree of divorce in respect of a marriage out of community of property entered into before the commencement of the Matrimonial Property Act, 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, may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party.

1.2 On 25 February 1988 the State President assented to the Marriage and Matrimonial Property Law Amendment Act, 1988,[2] in terms of section 2 of which section 7(3) of the Divorce Act was amended so as to extend its application to marriages entered into by Blacks in terms of section 22(6) of the Black Administration Act, 1927.[3] As a result of this amendment, section 7(3) of the Divorce Act, 1979, now provides as follows:

> (3) A court granting a decree of divorce in respect of a marriage out of community of property -
>
> (a) entered into before the commencement of the Matrimonial Property Act, 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; or

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1 Act 88 of 1984.

2 Act 3 of 1988.

3 Act 38 of 1927.

(b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22(6) of the Black Administration Act, 1927 (Act No. 38 of 1927), as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988,

may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party.

1.3 In its report on the Marriage and Matrimonial Property Law Amendment Bill during February 1988 the Parliamentary Select Commitee on Matrimonial and Matrimonial Property Law stated, inter alia:[4]

> Your Committee further wishes to report that it requested the Minister of Justice to consider the possibility of extending section 7(3) of the Divorce Act 70 of 1979 to those marriages that are automatically entered into out of community of property, with special reference to marriages entered into outside the Republic.[5]

The Minister has referred the said request to the Commission for consideration, hence this working paper. The working paper has been published in full to provide sufficient background information to enable those wishing to comment or make suggestions for the development, improvement, modernisation or reform of this facet of the law to place reasoned submissions before the Commission.

An invitation was also extended to any person or body that wished to make oral representations to the Commission to submit a brief résumé of the proposed representations, together with a written request to be heard by the Commission, in writing to the Commission.

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4 Minutes of the proceedings of the House of Assembly dated Monday, 8 February 1988 (Annexure, item 5).

5 Our translation.

2. Present legal position

2.1 The present legal position with regard to persons domiciled in South Africa who are married out of community of property is as follows:

(a) Those who were married before the commencement of the Matrimonial Property Act, 1984, out of community of property as contemplated by section 7(3) of the Divorce Act, 1979, can, upon divorce, request the court to order that assets of one spouse be transferred to the other spouse on an equitable basis.

(b) Those who were married in terms of section 22(6) of the Black Administration Act, 1927, before the commencement of the Mariage and Matrimonial Property Law Amendment Act, 1988, can now also request the court to make such an order.[6]

(c) Those who were married out of community of property and of profit and loss after the commencement of the Matrimonial Property Act, 1984, have either had a system of accrual made applicable to their marriage in terms of the Act or have expressly chosen to exclude such a system by means of their antenuptial contract,[7] usually after having optained legal advice on the consequences.

(d) Section 7(3) does not apply to marriages out of community of property where the matrimonial property regime to which the marriage is subject is controlled by a foreign legal system[8].[9]

2.2 Section 7(3) of the Divorce Act, 1979, does not, of course, apply to marriages in community of property, or out of community of property but with retention of community of profit and loss.

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6 As amended by Act 3 of 1988.

7 See section 2 of the Matrimonial Property Act, 1984 (Act 88 of 1984).

8 See e.g. Frankel's Estate v The Master 1950 (1) SA 220 (AD) and H R Hahlo The South African Law of Husband and Wife 4th edition Cape Town: Juta 1975, p627 et seq.

9 See Milbourn v Milbourn 1987 (3) SA 62 (WLD).

3. Academic writers on the current legal position

3.1 Prior to the publication of the working paper the two main issues that attracted the attention of academic writers commenting on section 7(3) of the Divorce Act, 1979, were the reasons for its limitation to marriages entered into before 1 November 1984[10] and the exclusion of Blacks (now amended)[11] and other persons married out of community of property without an than by antenuptial contract, for instance those married outside the Republic.

A. Marriages entered into after 1 November 1984

3.2 Professor June Sinclair is one who is critical of the restriction of the subsection to marriages entered into before 1 November 1984. She raises the matter thus:[12]

> Is it justifiable to treat marriages entered into before the Act according to the system of complete separation of goods differently from those entered into after it according to exactly the same system? It seems possible, even likely, that some people will exclude the accrual system in their antenuptial contracts.
>
> Women whose marriages were entered into later, and with the exclusion of the accrual system, will be in exaclty the same economic position on divorce as those whose unenviable position has been deplored and has now been improved by the introduction of the discretion. Why is the new device to ensure justice not to serve them also?
>
> The argument against extending S 36(b) to marriages entered into after the Act was that in such cases a discretion would interfere with the contractual choice of the parties made at the time of marriage. Spurious this distinction must surely be, for interference is accepted if the parties chose to marry a certain way before some arbitrary date fixed for the coming into operation of the Act. Why has this date been chosen to determine the fate of the divorced, over the similarity of their circumstances? Moreover, interference with the contractual choice of the parties is provided for in the case of economic misconduct, regardless of when the spouses were married. Is it defensible in one breath to spurn contractual freedom and in another to sanctify it? Even more importantly, in a country with exiguous statutory welfare provisions, it may be doubted whether we can allow

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10 The date of commencement of the Matrimonial Property Act, 1984.

11 See section 2 of Act 3 of 1988 - paragraph 1.2 above.

12 June Sinclair An Inroduction to the Matrimonial Property Act, 1984 Cape Town: Juta 1984 pp 48 - 49.

people to contract into poverty for themselves, and for their children.

3.3 Another writer who criticises this restriction of the court's discretion with regard to marriages entered into before 1 November 1984 is Nicholas D C Dillon.[13] He feels that the mere inclusion by the Matrimonial Property Act, 1984, of the system of accrual does not prevent people from choosing, or from being wrongly advised to choose, strict separation of estates as in the past.

Thus, he argues, people choosing (presumably after bad advice) to retain two separate estates are in the same position as those who so chose before the commencement of the Matrimonial Property Act, 1984, and, accordingly, they should not be treated differently. He states[14] -

> ... The form of relief provided by S 7(3) is not designed to protect those who have made an "informed" choice, it is to protect those who contracted, for whatever reason, be it ignorance, coercion or even foolishness, to their disadvantage.

3.4 On this point, Professor H R Hahlo has the following to say:[15]

> In mariages out of community of property entered into after the commencement of the Matrimonial Property Act the accrual system applies, unless the spouses have in their antenuptial contract expressly excluded it, ensuring that the spouses share in each other's accrual during the subsistence of the marriage. And where they have excluded the accrual system, they have made a deliberate choice against sharing. No accrual system operated before the Matrimonial Property Act came into force, and this may lead to inequitable results when a marriage entered into before the commencement of the Matrimonial Property Act is dissolved by divorce. It is to

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13 "The financial consequences of divorce: S 7(3) of the Divorce Act 1979 - a comparative study" 1986 XIX CILSA p 271 et seq.

14 Op cit p 277.

15 The South African Law of Husband and Wife 5th edition Cape Town: Juta 1985 p 384.

enable the courts to remedy such inequities that section 7(3) was inserted.

B. Marriages governed by foreign law

3.5 Although it was probably apparent that section 7(3) of the Divorce Act, 1979, did not apply to marriages which are out of community op property by virtue of the law of a foreign country, it was not until the decisions in Mathabathe v Mathabathe[16] and Milbourn v Milbourn[17] that a spate of articles exposing this lacuna appeared.

3.6 Professor P Q R Boberg, in an article dealing mainly with section 7(4) of the said Act, mentions in passing that a court cannot, in terms of section 7(3), redistribute the property of spouses whose marriage is out of community of property because it is governed by a foreign legal system and not because of an antenuptial contract.[18]

3.7 Both Michael Lupton[19] and Rita Jordaan[20] discuss the two above-mentioned decisions and come to the conclusion that a clear lacuna exists that calls for legislative rectification.

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16 1987 (3) SA 45 (W).

17 1987 (3) SA 62 (W).

18 P Q R Boberg "Sharing matrimonial assets" 1987 (17) Businessman's Law 82.

19 Michael Lupton "Divorce and property rights" 1988 (17) Businessman's Law 119.

20 Rita Jordaan "Oordag van bates in geval van egskeiding ingevolge artikel 36 van die Wet op Huweliksgoedere 88 van 1984" in 1988 (51) THRHR 109.

3.8 H C Roodt[21] discusses the problems caused by the lacuna and suggests three ways of resolving them. Her first suggestion is that the courts should do away with the strict "definition" of what falls under the concept "matrimonial property" so that the distribution of assets on divorce can be classified as dealing with "matrimonial property", thus allowing a distribution in accordance with a foreign legal system. Her second suggestion is that the lacuna be filled by means of legislation. Her third suggestion is that the courts, in interpreting section 7(3), should give a wider meaning to the concept "antenuptial contract" than that given in the Milbourn decision[22] and shoud hold that -

> ... the mere decision to get married is a contract for the purposes of section 7(3).[23]

This would have the effect of bringing all marriages out of community of property within the ambit of section 7(3).

3.9 In a contribution on the present topic to the Commission Prof A H van Wyk of Stellenboch University offers the following solution:

> I would also like to mention that in my opinion the theoretically correct approach would be to consider this problem from the angle of private international law and to prescribe through legislation a more correct characterisation of the judical discretion concerned as a patrimonial consequence of marriage. Such an approach would be much more in keeping with the Roman-Dutch classification of our international matrimonial property law, as well as the functional role that judicial discretion plays in the Anglo-Saxon matrimonial systems. It could be that from the viewpoint of legal drafting the amendment of section 7(3) of the Divorce Act would be simpler, but the basic anomaly would remain: for example, because Austrian law charcterises its judicial discretion as matrimonial property law we also do so and apply Austrian law, but because English law

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21 H C Roodt "Artikel 7(3) van die Egskeidingswet: talle vroue feitlik sonder remedie" January 1988 De Rebus Procuratoriis 59.

22 See footnote 17 above.

23 Our translation.

characterises its discretion as divorce law we follow that and apply South African lex fori![24]

4. Draft Bill

4.1 The proposed section 7(3) of the Divorce act, as embodied in the draft Bill reads as follows:

> "(3) A court granting a decree of divorce in respect of a marriage out of community of property -
>
> (a) entered into before the commencement of the Matrimonial Porperty Act, 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; or
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> (b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22(6) of the Black Administration Act, 1927 (Act No 38 of 1927), as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988; or
>
> (c) entered into after the commencement of the Matrimonial Property Act, 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, where the court is satisfied that exceptional circumstances exist which justify an order for the division of the assets of the spouses between them on an equitable basis; or
>
> (d) entered into at any time to which the matrimonial property rules applicable are those of a foreign country and which rules do not provide for community of property community of profit and loss or for accrual sharing in any form,
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> may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to the marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of such assets, of the other party as the court may deem just be transferred to the first-mentioned party ..."

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24 Our translation.

CHAPTER 2

COMMENTS RECEIVED

1. General

1.1 No comments and/or criticism were received with regard to the proposed section 7(3)(a) and 7(3)(b) of the Bill.

2. Comments in favour of the proposed section 7(3)(c) of the Bill

2.1 The vast majority of those in favour of the proposed section 7(3)(c) of the Bill strongly support the arguments of Professor June Sinclair[25], which are as follows:

> Is it justifiable to treat marriages entered into before the Act according to the system of complete separation of goods differently from those entered into after it according to exactly the same system? It seems possible, even likely, that some people will exclude the accrual system in their antenuptial contracts.
>
> Women whose marriages were entered into later, and with the exclusion of the accrual system, will be in exactly the same economic position on divorce as those whose unenviable position has been deplored and has now been improved by the introduction of the discretion. Why is the new device to ensure justice not to serve them also?
>
> The argument against extending S 36(b) to marriages entered into after the Act was that in such cases a discretion would interfere with the contractual choice of the parties made at the time of marriage. Spurious this distinction must surely be, for interference is accepted if the parties chose to marry a certain way before some arbitrary date fixed for the coming into operation of the Act. Why has this date been chosen to determine the fate of the divorced, over the similarity of their circumstances? Moreover, interference with the contractual choice of the parties is provided for

25 June Sinclair An Inroduction to the Matrimonial Property Act, 1984 Cape Town: Juta 1984 p 48 - 49.

> the case of economic misconduct, regardless of when the spouses were married. Is it defensible in one breath to spurn contractual freedom and in another to sanctify it? Even more importantly, in a country with exiguous statutory welfare provisions, it may be doubted whether we can allow people to contract into poverty for themselves, and for their children.

2.2 In her comments on the working paper the Honourable Miss Justice L van den Heever unequivocally supports the views of Professor Sinclair as far as marriages solemnised after 1 November 1984 are concerned. She goes on to show that the intention of the legislature with the implementation of the accrual system was to achieve fairness and to move away from Roman-Dutch law. According to the learned Judge the legal draftsmen responsible for the Matrimonial Property Act, 1984, failed to appreciate the true nature of marriage and they treated it "whether in community of property or out of community of property as a business transaction instead of what it is suppposed to be: a lifelong relationship between two adults to support each other and for the sake of their children's education and the good of the community". (translation) She contends that the accrual system has long since fallen into desuetude because elements of a business transaction were dragged into marriage according to which assets had to be listed and kept track of. For these reasons the Judge says: "I therefore strongly support the view that the redistribution of assets should be possible at divorce in all marriages out of community of property that exclude the accrual system, when and wherever soleminised". (translation)

2.3 The Clearing Bankers Association of South Africa agrees with Professor Sinclair and states as follow:

> It has to be agreed that the choice of a matrimonial property regime that may be exercised by the spouses before the solemnising of the marriage is not a waterproof defence for the absence of judicial discretion in cases of divorce where the parties were married after 1 November 1984. Parties should surely still be able to choose a matrimonial property regime where their marriage was solemnised before 1 November 1984. Since contractual freedom receives attention in one case it should definitely also be applied in other similar

cases and then it would surely be juridically unsound to take a mere date as a cut-off point for the use of judicial discretion or the total absence thereof in court proceedings. (translation)

2.4 Several practising attorneys also support the proposed amendments, and Mr K G Mustard of the firm McClung, Mustard and McGlashan in Pinetown said the following about the informed choice that parties have to make after obtaining legal advice as regards the exclusion or otherwise of the accrual system in the antenuptial contract:

> The memorandum talks about an informed choice by parties entering into an Antenuptial contract. From practical experience as a Notary I am of the view that half the time the parties are so starry eyed at the prospect of getting married that they do not listen to a word that the Notary is saying when he explains the options. Furthermore, it is quite often found that one of the parties to a marriage is more dominant than the other and the other will fall in line with what the first party says. A marriage contract should not be treated as having been entered into on the same basis as a commercial contract.

2.5 Mary Ann Glendon:[26]

> There is no reason to think that increased use of marriage contracts would enable the economically weaker spouse to bargain for property division and future economic security in case the marriage terminates by divorce. On the contrary, European and American experience and common sense, indicate that such contracts, if they did come into wider use here, would probably more often be used by the stronger party to contract out of or to restrict property division and future maintenance to the limits permitted by law.

2.6 The Association of Law Societies of South Africa is of the opinion "that the provisions of section 7(3) of the Divorce Act, 1979, should be extended to those marriages out of community of property that were solemnised after the commencement of the Matrimonial Property Act of 1984." (translation)

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26 Mary Ann Glendon The New Family and the New Property: Toronto Butterworths 19 p 66.

2.7 Lecturers attached to the Department of Private Law at the University of South Africa welcomed the proposed amendment of section 7(3)(c) of the Bill.

3. Comments against the proposed section 7(3)(c) of the Bill

3.1 Professor J C Sonnekus of the Rand Afrikaans University sees the purpose of the proposed amendment of section 7(3) as an extension of the power to redistribute assets fairly. This extension to marriages out of community of property excluding the accrual system or sharing of profit and loss after entered into after 1 November 1989 would prejudice legal certainty since within five years after the Parliamentary decision of 9 December 1983 under General Notice 920 of 1983 another extension is being proposed so as to include marriages entered into after 1 November.

The Professor also submits that the legislature was prepossessed in favour of accrual-system marriages as an ideal and fair allocation of matrimonial property in as far as there is movement away from marriages in community of property, as appears from the preferential treatment that has been accorded those matrimonial property regimes in terms of section 24 read with section 34 of the Act.

Despite its preference, the legislature did not go so far as to direct the court to calculate an effective 50/50 distribution of the accrual during marriage and to make a redistribution order accordingly in all cases where the redistribution discretion is involved. According to the Professor, this shows that the legislature did not want to do away with the parties' agreement concerning their matrimonial property regime. In principle the parties' freedom to contract is still respected.

Like Van Wyk,[27] he sees this far-reaching redistribution power as a "temporary emergency measure"[28] for spouses married under the old system who for whatever reason did not opt for the conversion possibilities under section 21.

Professor Sonnekus further believes that from recent judgments it appears that the courts have indeed started to interpret the existing redistribution discretion restrictively. According to him and with reference to Kretschmer v kretschmer 1981 1 SA 566 (W), Kritzinger v Kritzinger 1989 1 SA 67(A) and Katz v Katz 1989 3 SA 1(A) the courts do not automatically in cases of divorce give the applicant a right to share in the other spouse's assets irrespective of whether a real contribution towards the maintenance or growth of the other spouse's assets could be proved. The extension contained in the proposal of the Law Commission would result in a redistribution discretion also applying to those marriages that have knowingly been entered into since 1 November 1984 by virtue of a antenuptial contract excluding the accrual system. According to him, this development is in direct conflict with the said development in our law"[29]

Professor Sonnekus is further of the opinion that the legislature clearly chose to retain the parties' freedom of choice in this regard too. According to him, this is in accordance with the universal recognition of the principles of contractual freedom and hence the recognition of freedom of choice as embodied in English judgments such as Printing and Numerical Registration Co v Sampson (1875) LR 19 Eq 462 at 465:

> It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public party requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred

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27 Van Wyk: Community of property and accrual sharing in terms of the Matrimonial Property Act 1984, 1985 DR 20 p. 61.

28 Our translation.

29 Our translation.

> and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract.

He admits, however, that public policy has undergone changes in South Africa law too, but doubts whether there has been such a drastic change in the general principle of freedom of choice and hence freedom to contract, especially as far as matrimonial property affairs are concerned. It was not the intention of the legislature to make the judicial discretion in terms of section 7(3) a general intervening discretion in conflict with the explicit agreement between the parties. He goes on to stress that practical experience since the introduction of the Act has in fact shown that parties only decide to opt for "cold exclusion" for clear and well-considered reasons and that such decisions should be respected. Professor Sonnekus comes to the following conclusion "I believe that it would be a sad day if the proposed amendment of section 7(3)(c) were to be accepted. This would mean that the vested rights of those couples who have, since 1 November, decided with firm resolve against accrual and have opted for the cold exclusion could be drastically impaired."[30]

3.2 The General Council of the Bar of South Africa sees the intervention discretion as justified in cases where both the accrual system and marriage in community of property are seen as a partnership or a pooling of assets. If one party acts to the prejudice of the other under such circumstances the courts may intervene. In marriages out of community of property where the accrual system is excluded there is, however, no such danger since the estates have a separate and independent existence.

The Council is also of the opinion that various people who were married before 1 November 1984 were indeed aggrieved by the fact that, although they had actually entered into a contract to regulate their particular situation, the legislature had intervened and ignored their express wishes. As regards the extension to marriages entered into after 1 November 1984, it

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30 Our translation.

stresses the fact that the operation and application of the accrual system are now clear. Professional people are also properly informed about its operation. Such an extension would consequently bring about greater resistance if freedom of choice were to be interfered with once again.

The Council is of the opinion that the argument of Nicholas D C Dillon[31] about the purpose of section 7(3) does not represent the correct view. According to Dillon the purpose is:

> ... to protect those who have contracted, for whatever reason, be it ignorance, coercion or even foolishness, to their disadvantage.

The Council criticises the question of ignorance and shows that it must be accepted that attorneys who have qualified as notaries are capable of explaining the various alternatives to parties and that there is very little chance of ignorance. If coercion takes place and this renders the contract voidable, the aggrieved party may resort to other remedies. Finally, Dillon's argument is countered by showing that it has never been the object of the law to protect the foolish.

As regards as the suggestion that section 7(3) should be made applicable to marriages out of community of property after 1 November 1984 where justus error or fraud gave rise to the contract, the Council believes that the normal contractual principles should be applied and that these circumstances consequently render the contract voidable.

The Council concedes that an antenuptial contract is sui generis and one to which the normal rules of contract do not necessarily apply. On the other hand the Council is aware of the legislature's intention to assist disadvantaged spouses by the extension of section 7(3), but it states categorically that there is not sufficient justification for extending this "relief" to

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31 "The financial consequences of divorce: S 7(3) of the Divorce Act 1979 - a comparative study" 1986 XIX CILSA p 271.

parties who have deliberately decided to marry out of community of property with the exclusion of the accrual system.

3.3 Practising attorneys belonging to the firm Cozyn, Hertzog and Horak in Pretoria were unanimous that the aforementioned extension of section 7(3)(C) would encourage litigation, push up costs and extend the time of litigation unnecessarily. They further indicated that in practice most marriages are in fact entered into out of community of property with inclusion of the accrual system. According to this firm, the exclusion of the accrual system is the exception rather than the rule. This raises the question of whether legislation should be promulgated for the exception. This can be taken back to D1.3.3.5,[32] in which it is submitted that legislation should express the rule rather than the exception. Mr Hart of the firm Venn, Nemeth and Hart in Pietermaritzburg also contends that considering the growing importance of and emphasis on the unique requirements of the business world the proposed extension of section 7(3)(c) would inevitably result in parties electing to live together rather than getting married. He goes on to contend the parties would not have entered into marriage if they did not have the option to keep their estates separate - even after a possible divorce.

3.4 Professor A H Van Wyk of the University of Stellenbosch is of the opinion that it would be a step in the wrong direction to extend the current section 7(3) to marriages entered into since 1984 and, in the case of Blacks, marriages that have been entered into since 1988, even if this were done in exceptional circumstances only.

He shows that the discretionary principle underlying section 7(3) is completely alien to the South African law of matrimonial property. South African family law is based on a conceptual approach with a clear internal structure and fixed rules, while the English system depends largely on judicial discretion to solve

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32 See L C Steyn Uitleg van Wette 1981 Juta & Kie Kaapstad 79.

problems. According to Professor Van Wyk the amalgamation of such divergent systems is virtually impossible.

The writer goes on to show that one of the fundamental principles of the South African law of matrimonial property is freedom of choice and that parties to a marriage can, within the limits of public interest, freely decide on the patrimonial relationship between them.

Our law has never entertained the idea that the court could make a decision for the parties to a marriage concerning their patrimonial relationship. The acceptance of section 7(3) should be seen as a emergency measure for a limited period.

The writer criticises Professor Sinclair 's view that "... It may be doubted whether we can allow people to contract into poverty for themselves, and for their children." According to him, this points to paternalism and he asks whether freedom of choice according to the various patrimonial systems should be abolished and that only complete community of property, where the wife automatically receives half the estate, should be enforced.

Professor Van Wyk's objections to a discretionary approach may be summarised as follows:

(a) Section 7(3) not only fits badly into our matrimonial property law but there are convincing arguments against the entire discretionary concept.

(b) It results in considerable legal uncertainty in a field in which legal certainty is of the utmost importance in planning for the future of the entire family: In this regard he refers to Kritzinger's case.

(c) The disretionary approach is in fact a rich man's law, and in the development of a matrimonial property system the legislature should not be led by the needs of "Geheimräte und Millionäre".

(d) The psychological premise on which the system is based is wrong. Instead of the law giving automatic recognition to the woman's important contribution she has to fight in court for a "favour" and furhtermore still show that she is an "exceptional case".

(e) Contrary to what is often implied, discretionary reallocation is not "modern", but is in fact a process by which the Anglo-Saxon systems endeavoured to move to a system of matrimonial property that is fair and more structered. This emerges very clearly from the numerous proposals for law reform in countries such as England and the United States of America. The writer rightly shows that in this field we are indeed leading and not following.

(f) In the last instance the writer shows that the discretionary approach gives rise to problems in private international law since the characterisation thereof is problematic. He asks what a foreign court would do with such an extended section 7(3).

4. Comments in respect of the choice of words in section 7(3)(c)

4.1 With a few minor exceptions, almost all the bodies and persons, that provided contributions on the proposed amendment expressed their dissatisfaction with the choice of words in the proposed section 7(3)(c), which reads as follows: "... where the court is satisfied that exceptional circumstances exist which justify an order for the distribution of the assets of the spouses between them on an equitable basis".

4.2 Professor J C Sonnekus is of the opinion that these words are unnecessary since every judicial redistribution discretion is per definition based on fairness and consequently it could only be applied in exceptional circumstances.

4.3 The General Council of the Bar of South Africa is of the opinion that the words "exceptional circumstances" are too broad and vague and would therefore lead to unnecessary litigation. It emphasises that there is already excessive litigation owing to the present operation of section 7(3) and that further litigation should be avoided. The Council is also of the opinion that the words might lead to the renewed reimplementation of the fault principle. It indicates that fault is still relevant in respect of section 7(2) and 7(5) and that it is preferable not to extend it further.

4.4 The Association of Law Societies is of the opinion that the use of the words "exceptional circumstances" cannot be justified. It contends that the existing section does not require any such circumstances in respect of marriages entered into before 1 November 1984.

4.5 Lecturers from the Faculty of Law of the University of South Africa are of the opinion that no qualification should be required for the application of section 7(3) - (6) in respect of marriages entered into after the commencement of the Act. The qualification of "exceptional circumstances" does not apply to marriages entered into before 1 November 1984. According to them the scope of application of this section has been restricted unnecessarily and

the use of section 7(3) - (6) will be made more difficult for such spouses by the additional requirement of "exceptional circumstances" than for those who were married before the commencement of the Act. They are further of the opinion that if there has to be a restriction then the restriction should be the same for couples married before the commencement of the Act as for those married after its commencement. They submit, however, that a better restriction would be if parties were only not allowed to avail themselves of section 7(3) - (6) in exceptional circumstances, in other words that the use of section 7(3) - (6) be allowed in the divorce proceedings of all couples married out of community of property and profit or loss and excluding the accrual system, except where exceptional circumstances convince the court not to implement section 7(3) - (6).

5. Comments relating to marriages regulated by foreign law

5.1 In order to kill the lacuna in this field the draft Bill makes provision for the implementation of section 7(3)(d), which reads as follows:

> (7) A Court granting a decree of divorce in respect of a marriage out of community of property -
>
> (d) entered into at any time to which the matrimonial property rules applicable are those of a foreign country and which rule do not provide for community of profit and loss or for accrual sharing in any form may, subject to the provisions of sub-sections (4), (5) and (6) on application by one of the parties to the marriage in absence of any agreement between them regarding the division of their assets, order such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party.

5.2 Professor J C Sonnekus criticises the general wording of the proposed section 7(3)(d) and indicates that the application of the section is not restricted to cases in which the national law of the country in which the marriage took place does not give the parties a choice. This means with reference to section (c) that parties who have had a thorough opportunity to choose but still decided against sharing could later in divorce proceedings request the court to make a redistribution order. This once again means that the court has to disregard the parties' contractual agreement. His submission is therefore that the subsection should only apply "... in those instances in which, irrespective of when the parties got married, the national law regulation the matrimonial property rights gave the parties no choice whatsoever

to elect to share in any form, either through community of property, community of profit and loss or the accrual system."[33]

5.3 All other parties fully support the aforesaid section 7(3)(d).

6. Sundry matters which the writers feel also need to be addressed

6.1 The Honourable Miss Justice L van den Heever raises the restriction by the Appellate Division on the trial court's discretion in divorce proceedings to achieve fairness by considering the conduct of the parties towards each other and within the marriage, during its subsistence. She supports her criticism by referring to the Appellate Division approach to the matter Kritzinger v Kritzinger 1989(1) SA 67(A). According to Miss Justice Van den Heever, Kritzinger and his wife decided that for the benefit of both parties her career would enjoy preference over his. This decision was taken on the assumption that the marriage would last as marriages are supposed to do. This assumption did not materialise and, according to her Milne JA ignored this as well as the fact that it was she who decided to look for another place to live permanently. Her conclusion is as follows:

> Because the courts do not use the wide discretion that the legal draftsmen intented to give to them, it should perhaps be spelled out that the courts are also empovered for the sake of equity to take into account any financial loss which one party to a marriage accepts in the interests of the financial benefit of the other, or of both parties stante matrimonio.[34]

The restriction in the concluding words of section 7(4) and 7(5)(d) should be rectified by legislation.

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33 Our translation.

34 Our translation.

6.2 The Honourable Mr Justice H G Squires has suggested in respect of section 7(3)(d) that proof of matrimonial property rules of a foreign country that regulate the marriage of the parties be put before the court by affidavit. He is of the opinion that the omission of such a provision will require the hearing of expert evidence in respect of such matrimonial property systems and that this will inevitably be accompanied by considerable additional expenses.

6.3 The Clearing Bankers Association of South Africa has identified the following lacuna. "The proposed amendmend ignores the interests of creditors when a spouse, who enjoys certain privileges with regard to his or her assets, divorces his or her spouse who has few or no assets. In such cases the assets of the first-mentioned party will be partially reallocated to the other party, which will result in the creditors having a reduced possibility of recourse. The lacuna in the proposals is the abbsence of protection for banks and creditors against the diminishing of the assets of the spouse or spouses owing to the redistribution order that is made."[35]

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35 Our translation.

CHAPTER 3

GENERAL CONCLUSIONS AND RECOMMENDATIONS

1. Conclusions

1.1 The above-mentioned shows clearly that there is a considerable difference of opinion between writers, jurists and academics concerning the proposed amendment of section 7(3) of the Divorce Act, 1979.

1.2 For practical purposes a clear distinction should be made between the extension of the court's discretion to redistribute assets in cases of marriages entered into in South Africa after 1 November 1984 and marriages entered into abroad and dissolved in South Africa.

1.3 When arguments for or against the extension of the court's discretion to order the distribution of assets in cases where marriages have been concluded after 1 November 1984, are judged the following must be kept in mind:

1.3.1 After a long and thorough investigation the Law Commission produced its report on matrimonial property in 1982. The Commission considered the matrimonial property systems in the Western world from the point of view of comparative law. The merits of the English system, in particular, were investigated, according to which there is separation of assets during the marriage but at divorce the court has the power to reallocate assets from the one spouse to the other on an equitable basis.

1.3.2 By contrast the Commission considered the German system, which is comparable to our present accrual system. The Commission did not agree with the English system, in

terms of which the court has the power of rectification on an an adhoc basis when the marriage is terminated, but accepted the accrual system as an alternative to marriage in community of property and marriage out of community of property.

1.3.3 The Law Commission did not want to interfere with existing vested rights and was of the opinion that changes should apply to future marriages only.

1.3.4 However, on the recommendation of a select committee Parliament inserted section 7(3) in the Divorce Act, 1979, 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.

1.3.5 This 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.

1.3.6 It should also be remembered the Matrimonial Property Act, 1984, for the first time made provision for an individual to change his or her matrimonial property system stante matrimonio.

1.3.7 Consequently the English system of separation of assets coupled with the discretion of the court to eventually order a division of assets was, with the said exception, never part of our law and was never intended to be a matrimonial property system, alongside any oter system.

1.3.8 If effect were to be given to Professor Sinclair's proposal, this would in fact amount to the introduction of the system as an alternative system, despite the careful consideration and rejection thereof at the time by the Law Commission.

1.3.9 If it were to be accepted as a generally valid system, however, there would in any case be no reason for the acceptance of a system in terms of which accrual takes place according to fixed rules - the same could be attained through an ad hoc court order.

1.3.10 Apparently the disadvantages of accepting such a viewpoint are legal uncertainty, infringement of contractual freedom, and the possibility that the distribution of assets could be in conflict with the wishes of a party. A simple example is that of divorced people or widowers or widows that decide to enter into a second or third marriage at an advanced age. It is normally the wish of such parties to keep their estates absolutely separate for their respective families, and accordingly the possiblity of a court order with regard to the transfer of assets should be excluded.

1.3.11 The Commission is therefore against the extension of the court's discretion to distribute the assets of spouses in cases where the marriage took place after 1 November 1984 with exclusion of community of profit and loss and the accrual system.

1.4 As regards foreign marriages that are dissolved in South Africa the following must be taken into account:

1.4.1 The patrimonial consequences of such marriages have to be determined according to the rules of private international law. Accordingly it is necessary to consider the domicile of the husband at the time of marriage.

1.4.2 Where it is determined with the aid of the above-mentioned rules that the patrimonial consequences of a marriage are in fact governed by foreign law, problems can still arise since the foreign legal system may not characterise the judicial discretion regarding division of assets on dissolution of the marriage as a patrimonial consequence of the marriage. This can result in the South

African courts not being able to apply a judicial discretion with regard to the division of the parties' assets.

1.4.3 To clarify this the example of parties married in England without an antenuptial contract can be used. After the marriage the parties move to South Africa and decide to get divorced after a few years. The patrimonial consequences of the marriage are governed by private international law through the domicile of the husband at the time of marriage. The parties are therefore married out of community of property. Sections 21 and 25 of the English Matrimonial Causes Act of 1973 give the English courts extremely wide discretionary power to divide the assets between the parties. This discretionary power of the courts is however not seen as a patrimonial consequence of marriage and therefore the South African courts do not at present have the power to order the division of assets on divorce in terms of the rules of private international law.

1.4.4 The alleged lacuna therefore derives from the fact that if the parties' marriage had indeed been dissolved in England the court would have had a discretion to divide the assets, whereas the court does not have such a discretion if the marriage is dissolved in South Africa.

2. Recommendations

2.1 The Commission therefore recommends that the application of section 7(3) of the Divorce Act, 1979, should not be extended to also make provision for a discretionary division of assets in cases where the parties were married after 1 November 1984.

2.2 As regards the alleged lacuna with regard to foreign marriages the Commmission recommends that the Bill contained in Annexure B be considered by the legislature.

ANNEXURE A

PERSONS AND BODIES THAT COMMENTED ON THE COMMISSION'S WORKING PAPER

UNIVERSITIES

1. Rhodes University
   Professor I Schäfer

2. Rand Afrikaans University
   Professor J C Sonnekus

3. University of South Africa
   Institute of Foreign and Comparative Law
   H C Roodt

4. University of South Africa
   J Heaton

5. University of Stellenbosch
   Professor A H van Wyk

ADVOCATES

1. General Council of the Bar of South Africa
   Secretary: D F Joubert

2. Cape Bar Council
Secretary: J A S Hortt-Smith

ATTORNEYS

1. Association of Law Societies of the Republic of South Africa
Director of Professional Matters: A Botha

2. Members of the Law Society of the Cape of Good Hope
Mr Geard
Mr A F Watermeyer

3. Members of the Natal Law Society
Mr K G Mustard
Mr S N Roberts
Mr O D Hart

4. Members of the Law Society of the Transvaal
Mr van der Merwe
Mr A de W Horak
Mr A M Costa

BANKS

Clearing Bankers Association of South Africa
Mr N van Loggerenberg

WOMEN'S, CHURCH AND OTHER ORGANISATIONS

1. Women's Legal Status Committee
   Convener.

2. Family and Marriage Society of South Africa
   Director

3. The Honourable Miss Justice L van den Heever

4. The Honourable Mr Justice H G Squires

5. Office of the Central Divorce Court
   Ferreirasdorp
   President

6. Member of the public
   W A Ramsbottom

Annexure B

BILL

To amend the Divorce Act, 1979, in order to provide that the power which a foreign court may possess according to the law of that state to order the transfer on dissolution of a marriage of the assets of one spouse to the other is, in the application of the rules of private international law, vested in the court that grants the divorce.

Introduced by the Minister of Justice

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

Amendment of section 7 of the Divorce Act, 1979, as amended by section 36 of Act 88 of 1984, section 2 of Act 3 of 1988 and section 2 of Act 7 of 1989

1. Section 7 of the Divorce Act, 1979 (Act No 70 of 1979), is hereby amended by the insertion after subsection (8) of the following subsection:

> "(9) A court granting a decree of divorce in cases in which the patrimonial consequences of the marriage are according to South African private international law, governed by the law of a foreign state, shall have the same power as a competent court of the foreign state concerned would have had at that time to order the transfer of assets from one spouse to the other.".

Short title and commencement

2. This Act shall be called the Divorce Amendment Act 19.., and shall come into operation on a date to be determined by the State President by proclamation in the Gazette.