

FAMILY LAW

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LEGISLATION

MATRIMONIAL PROPERTY ACT

Section 21 of the Judicial Matters Amendment Act 66 of 2008 came into operation on 17 February 2009 (GN 166 GG 31908 of 17 February 2009). It amends section 18 of the Matrimonial Property Act 88 of 1984 in keeping with the decision in *Van der Merwe v Road Accident Fund & another (Women's Legal Centre Trust as amicus curiae)* 2006 (4) SA 230 (CC). In terms of the amended section 18 (b), a spouse who is married in community of property may recover damages in respect of bodily injuries his or her spouse caused to him or her. Those damages are no longer restricted to the non-patrimonial sort. The amount recovered is the injured spouse's separate property.

REFORM OF CUSTOMARY LAW OF SUCCESSION AND REGULATION OF RELATED MATTERS ACT

A comprehensive discussion of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 is out of place in this chapter. For purposes of family law, it should, however, be noted that the Act extends the right to intestate succession in terms of the Intestate Succession Act 81 of 1987 to a spouse in a customary marriage (s 2(2) (a)). It also extends the concept of 'descendant' for purposes of the Intestate Succession Act. In terms of the extended definition, a 'descendant' includes a woman who was not the deceased's spouse but was a party to a union with the deceased in terms of customary law for the purpose of providing children for the house of the deceased's customary spouse. It also includes a woman who was married to a deceased woman under customary law for the purpose of providing children for the deceased woman's house (s 2(2)(b) and (c)). Confusingly, section 3(1) of the Act provides that any reference in section 1 of the Intestate Succession Act to 'a spouse

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who survived the deceased' must be construed as including every spouse and every woman referred to in section 2(2)(a), (b) and (c) of the Reform of Customary Law of Succession and Regulation of Related Matters Act. Furthermore, section 3(2) of the Act amends section 1(1)(c) of the Intestate Succession Act by inserting section 1(1)(c)(iii). The inserted subparagraph (iii) provides that if the deceased's intestate estate is insufficient to provide 'each surviving spouse and woman referred to in paragraphs (a), (b) and (c) of section 2(2) of the Reform of Customary Law of Succession and Regulation of Related Matters Act' with the amount fixed from time to time by notice in the *Government Gazette*, the estate must be divided equally between such 'spouses'. The conflicting terminology leaves one wondering whether the women section 2(2)(b) and (c) refers to are 'descendants' or 'spouses' for purposes of intestate inheritance (see also Francois du Toit 'The Constitutional Family in the Law of Succession' (2009) 126 SALJ 463 at 476n74).

The Act further re-casts the repealed section 22(7) of the Black Administration Act 38 of 1927. (Section 22(7) was repealed by section 1(4) of the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005.) Section 22(7) used to provide that a civil marriage which a husband in a customary marriage entered into with another woman during the subsistence of the customary marriage did not 'in any way affect the material rights' of any of the spouses in the customary marriage or the children born of the customary marriage and that the widow of the civil marriage and the children born of the civil marriage enjoyed no greater rights in respect of the deceased spouse's estate than they would have enjoyed had the civil marriage been a customary marriage. In other words, the section protected the proprietary rights of the customary wife and the children born of her customary marriage. This protection was needed because prior to 2 December 1988, when the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 came into operation, the husband's existing customary marriage was automatically dissolved when he entered into a civil marriage with another woman (*Nkambula v Linda* 1951 (1) SA 377 (A)). Section 7(1) of the Reform of Customary Law of Succession and Regulation of Related Matters Act now provides that a civil marriage does not affect the proprietary rights of any spouse in a customary marriage or any children born of a customary marriage if the civil marriage was entered into between the commencement date of

sections 22 and 23 of the Black Administration Act and the date of commencement of the Marriage and Matrimonial Property Law Amendment Act (between 1 January 1929 and 2 December 1988) while the husband was married to another woman at customary law. Akin to its predecessor, section 7(2) of the Reform of Customary Law of Succession and Regulation of Related Matters Act provides that the widow of the civil marriage and the children born of the civil marriage enjoy no greater rights in respect of the estate of the deceased spouse than they would have enjoyed had the civil marriage been a customary marriage. Finally, the Schedule of the Reform of Customary Law of Succession and Regulation of Related Matters Act amends the definition of 'survivor' in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 to include the discarded customary wife.

The date of commencement of the Reform of Customary Law of Succession and Regulation of Related Matters Act is still to be proclaimed (s 9).

SUBORDINATE LEGISLATION

The regulations issued under the Marriage Act 25 of 1961 have been amended to indicate that the term 'Director-General' connotes the Director-General of Home Affairs, to govern testing of marriage officers and other persons in order to ascertain whether they have 'an adequate knowledge' of the Marriage Act and the regulations, and to effect changes regarding marriage certificates and certain forms (regs 1, 3, 4, 5A, 5B, 6, 8, 9, and 11, as amended by GN R2 GG 31750 of 2 January 2009). The amounts that are payable for the issuing of duplicate marriage certificates, copies of the marriage register, reproduction of supporting documentation, verification of information in the marriage register, and letters of confirmation of a person's marital status have also been revised. The revised amounts apply as from 1 April 2009 (GN R344 GG 32044 of 27 March 2009). Lastly, regulation 13 has been repealed, as it was outdated (GN R2 GG 31750 of 2 January 2009).

The regulations relating to certain forms that must be completed for purposes of the Civil Union Act 17 of 2006 were amended by Government Notice R1 in GG 31750 of 2 January 2009.

DRAFT LEGISLATION

DRAFT MARRIAGE AMENDMENT BILL

Last year, the Department of Home Affairs published the draft Marriage Amendment Bill, 2008 for comment (Gen N 35

GG 30663 of 14 January 2008). The draft Bill never progressed beyond publication in the *Government Gazette* and has since been replaced by the draft Marriage Amendment Bill, 2009 (Gen N 149 GG 31864 of 13 February 2009).

DRAFT PREVENTION AND COMBATING OF TRAFFICKING IN PERSONS BILL

The draft Prevention and Combating of Trafficking in Persons Bill, 2009 was published for comment in General Notice 431 in GG 32222 of 8 May 2009. The objects of the draft Bill include giving effect to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, combating and preventing the trafficking of persons within and across the borders of South Africa, and providing measures to protect and assist victims of trafficking in persons. The draft Bill, inter alia, contains specific provisions relating to child trafficking (clauses 4(3), 11, 13, 15, 28, 30(1)(b)(v), 31, and 32). One of the provisions deals specifically with trafficking of a child by his or her guardian or another person who has parental responsibilities and rights in respect of the child. The clause empowers a children's court to suspend all the parental responsibilities and rights of a parent or other person who has parental responsibilities and rights if it has reason to believe that the parent or person has trafficked the child, and to place the child in temporary safe care, pending an inquiry by a children's court (clause 32(1)). The parent or person can also be held liable for committing the offence or trafficking in persons (clause 32(2)).

DRAFT PROTECTION FROM HARASSMENT BILL

The draft Protection from Harassment Bill, 2009 provides for the issuing of protection orders against harassment even if the parties are not involved in a domestic relationship as defined in the Domestic Violence Act 116 of 1998. It also amends the Domestic Violence Act to provide a mechanism to subpoena witnesses to attend proceedings in terms of that Act. The draft Bill was published for comment in General Notice 432 in GG 32222 of 8 May 2009.

DRAFT RECOGNITION OF CUSTOMARY MARRIAGES AMENDMENT BILL

A draft Bill to amend the Recognition of Customary Marriages Act 120 of 1998 was published for comment in General Notice 416

in GG 32198 of 8 May 2009. Some of the clauses of the draft Bill are discussed below in the context of the case law on customary marriages.

CASE LAW

CHILDREN

Abduction

In terms of the Hague Convention on the Civil Aspects of International Child Abduction, the court in the contracting state to which a child has been wrongfully removed, or in which he or she is wrongfully retained, is normally compelled to order the child's immediate return. The court may, however, refuse to order the child's return if the unlawful removal or retention occurred more than a year before the commencement of the court proceedings and the child is settled in his or her new environment (art 12). In *Central Authority v B* 2009 (1) SA 624 (W), the child had been removed from the United States of America almost two years before the application for her return was launched. Basing its finding, inter alia, on the report of a forensic social worker with some 40 years' experience, the court found that the facts of the case showed that the child had indeed become settled in South Africa (para [9]). The court accordingly refused to order the child's return (para [16]). In an obiter dictum, the court censured the office of the family advocate for the subjective manner in which it fulfilled its functions in the present matter and for its failure to pay proper attention to the conditions that South African courts normally impose in order to mitigate interim prejudice to the child as a result of an order for his or her return (paras [14]–[15]).

In *Family Advocate, Cape Town & another v EM* 2009 (5) SA 420 (C), an exception to the child's mandatory return was at issue. In this case, the mother, who had wrongfully retained the child in South Africa, resisted the child's return to England on the ground that the child's father had consented to or acquiesced in the child's retention (art 13 (a)). She alleged that a letter the father had written to give the child's grandmother permission to accompany the child to South Africa after the child and her grandmother had visited the father in England constituted consent or acquiescence. The visit to England had taken place after the mother had begun her wrongful retention of the child in South Africa. The

court rejected the mother's allegation. It held that the burden to prove that the wronged parent acquiesced rests upon the party who resists the child's return. This burden of proof must be discharged on a balance of probabilities (para [17]; see also *Smith v Smith* 2001 (3) SA 845 (SCA); *Pennello v Pennello* (Chief Family Advocate as *amicus curiae*) 2004 (3) SA 117 (SCA); *Senior Family Advocate, Cape Town v Houtman* 2004 (6) SA 274 (C); *Central Authority v H* 2008 (1) SA 49 (SCA)). The wronged parent will be found to have acquiesced only if there is clear and unqualified evidence of acquiescence (para [36]; see also *Central Authority v H* (supra); *Central Authority v B* (supra)). In the present case, nothing in the father's letter suggested that he had acquiesced in his child's wrongful retention (para [31]). The court also rejected the mother's contention that the father had delayed seeking the child's return and that this delay indicated consent or acquiescence on his part. It found that there had been no delay, as the father had obtained legal advice and initiated proceedings in terms of the Hague Convention within four months after the child had been wrongfully retained (para [41]). The court correctly held that as the mother had failed to prove consent or acquiescence, the child's return had to be ordered (para [49]).

Adoption

In *Flynn v Farr NO & others* 2009 (1) SA 584 (C), the court had to decide whether a de facto adoption results in the 'adopted' child's qualifying as an intestate heir of his or her deceased 'adoptive parent'. The decision is discussed in the chapter on The Law of Succession (Including the Administration of Estates) and Trusts.

AS v Vorster NO & others 2009 (4) SA 108 (SEC) deals with the effect of an informal withdrawal of consent to adoption. In terms of the now-repealed Child Care Act 74 of 1983, a parent who consented to his or her child's adoption could withdraw such consent within 60 days, and no adoption order could be made until this period has expired (s 18(8) and (9); s 313 read with schedule 4 of the Children's Act 38 of 2005 repealed the Child Care Act as from 1 April 2010: Proc R12 GG 33076 of 1 April 2010). A withdrawal of consent to adoption had to take place in writing (reg 19 of the regulations issued under the Child Care Act). In *AS*, the mother of a child born of unmarried parents consented to her child's adoption but withdrew her consent within the prescribed 60-day period. She conveyed her withdrawal of

consent to the social workers who were involved with the adoption application but did not sign the required forms. Her child was returned to her, but the adoption application went ahead and an adoption order was granted in favour of the adoption applicants. The mother then sought an order setting the adoption order aside. The court held that if a parent unequivocally and clearly conveys his or her withdrawal of consent to the adoption social workers and they fail to make arrangements for compliance with the formalities for withdrawal of consent, the court should not ignore the parent's oral withdrawal (at 115D–E). If the child is returned to the parent who has withdrawn his or her consent orally, the adoption process comes to an end (at 115G–H). If the parent then again decides to give the child up for adoption, the statutory procedure for adoption begins anew (at 115H–I). As the mother in the present case had clearly withdrawn her consent, the adoption order had been wrongly granted (at 115J). However, as the court concluded that it would not be in the best interests of the child to set the adoption order aside, it refused to grant the mother's application (at 117–18 and 122B–E).

Children's rights

Legal Aid Board v R & another 2009 (2) SA 262 (D) deals with the appointment of a legal representative for a minor in terms of section 28(1)(h) of the Constitution of the Republic of South Africa, 1996. In this case, a 12-year-old child had sent a mobile phone text message (an 'sms') to a staff member at Childline to request help because of the very acrimonious litigation between her parents about her care. The staff member contacted the Centre for Child Law, which got the Legal Aid Board (now Legal Aid South Africa) to appoint a lawyer for the child. The child consulted with the lawyer and indicated that she wanted him to represent her. However, the child's mother objected to the appointment on the ground that only the court or the child's legal guardian or another person who has parental responsibilities and rights in respect of the child has the power to appoint a legal representative for the child. In a most welcome decision, the court rejected the mother's objection. It held that the Legal Aid Board is empowered to render legal assistance to a minor in terms of section 28(1)(h) and to appoint a legal representative for a child without having to obtain either a court order authorising it to do so or the consent of the child's legal guardian or any other person who has parental responsibilities and rights in respect of

the child (paras [3]–[4], [30]–[36], and [39]–[40]). The court further held that if the ‘voice of the child has been drowned out by the warring voices of her or his parents, it is a necessary conclusion that substantial injustice to the child will result if he or she is not afforded the assistance of a legal practitioner to make his or her voice heard’ (para [20]). In such circumstances section 28(1)(h) dictates that a legal representative must be appointed for the child (paras [20]–[21] and [35]). The court accordingly confirmed the appointment of the lawyer by the Legal Aid Board (para [5]). It further held that, after being appointed, the legal representative need not consult with either of the child’s parents on how the matter is to proceed. The legal representative must exercise her or his independent judgment regarding the child’s best interests in the circumstances of the case and place such material before the court as he or she deems appropriate (para [23]).

Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others 2009 (4) SA 222 (CC) relates to child witnesses in criminal cases and child victims of crime. The case is discussed in the chapter on Constitutional Law. For present purposes it should be noted that the court reiterated the view it had earlier adopted in *S v M (Centre for Child Law as amicus curiae)* 2008 (3) SA 232 (CC) that the paramountcy of the child’s best interests does not mean that those interests are absolute and cannot be limited (*Director of Public Prosecutions* para [72]). It further stated that, for purposes of the present decision, it was ‘neither necessary nor desirable to define with any precision the content of the right to have the child’s best interests given paramount importance in matters concerning the child’ (para [73]). As was explained in 2007 *Annual Survey* at 924–5, the terminology employed by the courts on the nature of section 28(2) is confusing. Even within a single judgment of the Constitutional Court, the section has been called a ‘right’, a ‘principle’, an ‘injunction’, and a ‘legal rule’. In the present case, the Constitutional Court used the terms ‘right’ (paras [72], [73], and [200]), ‘principle’ (paras [79], [84], [95], [113], [123], [128], and [144]) and ‘constitutional promise’ (para [198]). Subsequently, in *Centre for Child Law v Minister of Justice and Constitutional Development & others (NICRO as amicus curiae)* 2009 (6) SA 632 (CC), the Constitutional Court used yet another term. In this case, Cameron J called section 28 (and thus by implication also s 28(2)) an ‘enforceable precept’ (para [25]).

Maintenance

Fish Hoek Primary School v Welcome 2009 (3) SA 36 (C) has been overturned on appeal (*Fish Hoek Primary School v GW* 2010 (2) SA 141 (SCA)). But it should be noted that the part of the decision in which it was held that section 21 of the Children's Act does not operate retroactively (at 45–6) was not rejected on appeal. Section 21(1) confers full parental responsibilities and rights on the father of a child born of unmarried parents if the father lived with the mother in a permanent life partnership when the child was born (s 21(1)(a)). Regardless of whether the father has ever lived with the child's mother, he also acquires full parental responsibilities and rights if he consents or successfully applies to be identified as the child's father in terms of the Act or pays damages in terms of customary law, and contributes or attempts in good faith to contribute to the child's upbringing and maintenance for a reasonable period of time (s 21(1)(b)). Section 21(4) provides that section 21 'applies regardless of whether the child was born before or after the commencement' of the Children's Act. The trial court in *Fish Hoek* correctly held that this provision does not mean that an unmarried father who meets the requirements in section 21(1) has retroactively acquired parental responsibilities and rights in respect of his child if the child was born before the commencement of the Act. All it means is that even if the child was born before the coming into operation of the Act, the father acquired parental responsibilities and rights when section 21 came into operation — on 1 July 2007 (Proc 13 GG 30030 of 29 June 2007).

CIVIL MARRIAGE

Invariable consequences

In *Wiese v Moolman* 2009 (3) SA 122 (T), the plaintiff sued the defendant for damages on the ground of the adultery the defendant had committed with the plaintiff's wife. The defendant countered by raising a special plea that the action on the ground of adultery was unsustainable in modern South African law. He submitted that the views of the community have changed to such a degree that the action should no longer be recognised and that the action violated the Constitution. The parties agreed to raise the question of the sustainability of the action for damages on the ground of adultery as a stated case.

The matter came before Du Plessis J. He considered it trite that the importance and unique nature of marriage had repeatedly been acknowledged by local and international courts, and that spouses voluntarily undertake to be sexually faithful to each other (at 125E–F). In view of the legal recognition of the significance of marriage as an institution, Du Plessis J concluded that the content of marriage, including sexual exclusivity, must still be respected and that the concept ‘marriage’ and society’s *boni mores* have not changed to such a degree that adultery is no longer unlawful (at 127D–J). He further held that legal policy requires that sexual exclusivity must be protected from interference by third parties and also justifies the rule that a betrayed spouse cannot sue his or her adulterous spouse (at 127J and 128G). The defendant’s first argument was accordingly rejected.

Du Plessis J also rejected the defendant’s argument that the action on the ground of adultery violates the rights to equality, dignity, freedom of conscience, religion, thought, belief and opinion, and freedom of association (ss 9, 10, 15, and 18 of the Constitution). He, quite correctly, rejected the view that the equality clause is violated as only heterosexual spouses may institute the action on the ground of adultery. However, he incorrectly relied on *Minister of Home Affairs v Fourie (Doctors for Life International & others, amicus curiae) Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) in support of his view that same-sex civil union partners may also institute the action (at 128–9). The correct authority is section 13 of the Civil Union Act. Section 13(1) provides that the legal consequences of a civil marriage apply to a civil union ‘with such changes as may be required by the context’. Further, section 13(2) provides that, with the exception of the Marriage Act and the Recognition of Customary Marriages Act, any reference to ‘marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union’ and ‘husband, wife or spouse in any other law, including the common law, includes a civil union partner’. These provisions leave no doubt that a cuckolded same-sex civil union partner can also institute the action on the ground of adultery. Also, in respect of the suggestion that affording the action for damages on the ground of adultery solely to married persons amounts to inequality, Du Plessis J indicated that the reason for the differentiation between married and unmarried persons is that unmarried persons choose not to be married. In his view, unmarried persons

may thus not bemoan the absence of the consequences of marriage (at 129B). This argument is in keeping with the argument regarding choice that was fundamental to the Constitutional Court's decision in *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) — that legal recognition may be denied to heterosexual life partners, as the law may justifiably distinguish between married and unmarried persons.

Du Plessis J further rejected the view that a third party's right to dignity is violated if he or she is held liable for intentionally interfering in a married couple's private relationship (at 129D). In so far as it was contended that the action on the ground of adultery violates the right of the adulterous spouse and the third party to exercise their right to freedom of conscience in respect of using their bodies as they see fit and their right to freedom of association, Du Plessis J held that the adulterous spouse voluntarily limited his or her rights upon entering into marriage. The third party can be sued on the ground of adultery only if he or she was aware of his or her sexual partner's marriage and, consequently, of the limitation of the constitutional rights by the marriage (at 129E–F). Du Plessis J accordingly concluded that there was no violation of the right to freedom of conscience or the right to freedom of association as the limitation of these rights occurred due to a voluntary limitation. He dismissed the defendant's special plea with costs (at 132A–B).

Marriage in community of property

In *Danielz NO v De Wet & another* 2009 (6) SA 42 (C), the first respondent and her deceased husband had been married in community of property. The marriage was terminated by the death of the husband as a result of injuries inflicted on him at the instigation of his wife (the first respondent). She and her accomplice were convicted of conspiracy to assault and do grievous bodily harm and assault with the intent to do grievous bodily harm. The applicant, who was the nominee of the executor of the deceased husband's estate, sought an order declaring that the first respondent was not entitled to the proceeds of certain life insurance policies taken out on the deceased's life. The first respondent claimed the death benefits under the policies, in the first instance, as the sole beneficiary under the policies; secondly, by virtue of the spouses' joint will which named her the heir to her deceased husband's half of the joint estate; and, thirdly, by virtue of her ownership of half the joint estate.

The court held, in the first instance, that the first respondent had rendered herself unworthy of receiving the proceeds of the policies as her criminal conduct had been so morally reprehensible that public policy required that she be disqualified as a beneficiary (paras [27]–[34]). For the same reason, the court held that the first respondent was unworthy of inheriting in terms of the will (paras [36]–[38]). In accordance with the rules of the law of insurance and the law of succession which disqualify an unworthy beneficiary and heir, the first respondent was accordingly not entitled to the proceeds of the policies. Moreover, the first respondent had repudiated the benefits under the will and so could not receive the proceeds of the policies once they fell into the deceased estate (para [39]). (For criticism of the court's arguments regarding insurance law, see JC Sonnekus 'Onwaardigheid vir erfopvolging én versekeringsbegunstigting. *Danielz NO v De Wet 2009 6 SA 42 (K)* 2010 TSAR 184 at 178–82.) The court also rejected the first respondent's contention that she was entitled to the proceeds of the policies because the proceeds formed part of the spouses' joint estate (para [40]). It held that prior to the deceased's death the proceeds did not exist (paras [41] and [43]; see also *Hees v Southern Life Association Ltd 2000 (1) SA 943 (W)*). It was only when the deceased died that the proceeds came into existence. At that point the joint estate no longer existed, as the marriage and the joint estate had terminated ex lege upon the deceased's death (paras [42] and [43]). The first respondent's half-share in the joint estate thus did not include the proceeds of the policies and did not entitle her to claim those proceeds (para [44]). The court accordingly made the declaratory order sought (para [57]).

The decision is at odds with the approach that practitioners have apparently adopted in the past. Elzette Muller ('The treatment of life insurance policies in deceased estates with a perspective on the calculation of estate duty' 2006 (69) *THRHR* 259 at 267 and 269) states that practitioners have treated the proceeds of a life insurance policy without a nominated beneficiary (which is what the policies in *Danielz* amounted to, as the beneficiary was disqualified from receiving the proceeds) as part of the joint estate. This approach meant that the surviving spouse was entitled to half the net proceeds of the policy. Muller supports the practitioners' approach. Sonnekus (op cit at 184) also supports the view that a policy without a nominated beneficiary falls into the joint estate.

In terms of section 50(1) read with section 48(1) of the Prevention of Organised Crime Act 121 of 1998, a property which is, on a balance of probabilities, 'an instrumentality' of an offence referred to in schedule 1 of the Act, the proceeds of unlawful activities, or property associated with terrorist and related activities, may be forfeited to the state. In *Mazibuko & another v National Director of Public Prosecutions* 2009 (6) SA 479 (SCA), the National Director of Public Prosecutions sought a forfeiture order in respect of a farm on which illicit drugs were manufactured. The farm was owned by spouses who were married in community of property. The court below granted the forfeiture order against both spouses even though the wife was unaware of the criminal activities conducted on the farm and qualified as an 'innocent owner'. (An 'innocent owner' is an owner who acquired his or her interest in property legally, and neither knew nor had reasonable grounds to suspect that the property was the proceeds of unlawful activities, an instrumentality of an offence referred to in schedule 1, or property associated with terrorist and related activities (s 52(2) and (2A)).) The spouses appealed against the forfeiture order.

On appeal, the Supreme Court of Appeal concluded that the court below had correctly found that the husband had known that drugs were being manufactured on the farm (para [42]). The court below was, therefore, correct in making a forfeiture order. Section 52(1) of the Act would ordinarily have entitled the wife, as an 'innocent owner', to an order excluding her interests in the property from the operation of the forfeiture order (para [43]). However, because spouses who are married in community of property have indivisible rights in respect of their joint estate, the existence of community of property between the spouses rendered exclusion of the wife's interests in the farm legally impossible (para [48]). The Supreme Court of Appeal further held that because the spouses' rights are indivisible, a forfeiture order that is made in terms of the Act in respect of property that falls into the joint estate must of necessity operate in respect of both spouses' rights to the property. Nugent JA, delivering the majority judgment, correctly stated that 'an order that purported to excise a portion of indivisible rights . . . would have been a nonsense' (para [49]). He accordingly found that both spouses' rights in the farm had to be forfeited to the state and that exclusion of the wife's interests in the property was legally impossible (paras [49] and [59]). As a result of the forfeiture order, the farm vested in a

curator bonis on behalf of the state as of the date that the forfeiture order took effect (s 56(2)). Put differently, the spouses lost ownership of the farm to the state on the date the forfeiture order took effect.

But Nugent JA did not stop there. He held that an exclusion order which is made in terms of section 52 need not be confined to excluding the innocent owner's interest in the rights which vest in the curator bonis when the forfeiture order takes effect (para [52]). He pointed out that the Act obliges the curator bonis to dispose of forfeited immovable property and deposit the proceeds into the Criminal Assets Recovery Account (s 57(1)(c) read with the definition of 'account' in s 1(1)). He considered the ambit of section 52 and concluded that it empowered the court to exclude an innocent owner's interest in the proceeds from the operation of the forfeiture order (paras [53]–[54]). He held that interpreting the Act in this manner would avoid a violation of section 25(1) of the Constitution, which provides that no one may be arbitrarily deprived of his or her property (para [55]). He then pointed out that even if a court were to exclude the innocent owner's interest in the proceeds of the sale from the operation of the forfeiture order, the proceeds would still fall into the joint estate of the innocent owner and his or her spouse. But, he held, the court that orders exclusion of the interest in the proceeds of the forfeited asset also has the power to order that the excluded interest in the proceeds must fall outside the joint estate (para [56]). He accordingly declared the farm forfeit to the state and ordered that upon disposal of the property the curator had to pay the wife half the net proceeds, which would be her separate property (para [59]).

In making this order, the court extended the number of categories of separate assets of spouses who are married in community of property. The other categories of separate assets are: assets excluded in an antenuptial contract; assets excluded by will or deed of donation; assets subject to a fideicommissum or usufruct; jocalia; benefits under the Friendly Societies Act 25 of 1956; non-patrimonial damages; damages as a result of personal injury inflicted on one spouse by the other spouse; and costs in a matrimonial action (DSP Cronjé & Jacqueline Heaton *South African Family Law* 2 ed (2004) 72–3; WA Joubert (gen ed) *The Law of South Africa* vol 16 sv 'Proprietary Consequences of Marriage' (by Joan Church & Jacqueline Church) 2 ed (2006) par 70). The court's approach is clearly not limited to the proceeds of

immovable property. Logically, it applies to the proceeds of any forfeited asset. One can but speculate how a court would go about protecting the interests of the innocent owner in a marriage in community of property if the forfeited asset was not something which has to be disposed of in return for proceeds. For example, if the forfeited asset were an amount of money that formed part of the joint estate, the whole amount would have to be forfeited to the state because, as the Supreme Court of Appeal held, a forfeiture order that is made in respect of property which falls into the joint estate necessarily operates in respect of both spouses' rights to the property. The money would vest in the curator when the forfeiture order took effect, and, in terms of section 57(1)(a) of the Act, the curator would have to deposit the forfeited money into the Criminal Assets Recovery Account. Would the court perhaps seek to protect the innocent owner's interests in the deposited money by ordering that once the money had vested in the curator half of the amount must be paid to the spouse who is the innocent owner? If it did so, the order would have exactly the same outcome as dividing the indivisible shares of the spouses in their joint estate would have had.

CUSTOMARY MARRIAGE

Requirements for validity

Ndlovu v Mokoena & others 2009 (5) SA 400 (GNP) concerns a factual dispute about the validity of a deceased man's second customary marriage. After the man's death, his alleged second wife claimed half his pension. The deceased's first wife challenged the validity of the second marriage. She alleged that she was the deceased's only surviving spouse and that she alone was entitled to the deceased's pension. Registration certificates for both customary marriages had been issued after the deceased's death. In view of the evidence placed before the court, Van Rooyen AJ concluded that a registration certificate should not have been issued in respect of the second marriage. The second marriage did not comply with the requirements for a valid customary marriage, as the woman was never delivered to the groom's family and the couple never lived together (para [12]).

This decision is in keeping with judgments such as *Mabena v Letsoalo* 1998 (2) SA 1068 (T) and *Fanti v Boto & others* 2008 (5) SA 405 (C), in which it was held that the essential requirements

for a customary marriage are the consent of the bride and her father or guardian, the payment of lobolo, and the handing over of the bride.

It should further be noted that if clause 4 of the draft Recognition of Customary Marriages Amendment Bill were to become law, it would no longer be possible to register a customary marriage after the death of one of the parties. Clause 4 (a) seeks to amend section 4(2) of the Recognition of Customary Marriages Act to require both spouses jointly to apply for the registration of their customary marriage. At present, either spouse may apply for registration.

Proprietary consequences

When the Recognition of Customary Marriages Act came into operation on 15 November 2000, it conferred full legal recognition on customary marriages regardless of when they were concluded and regardless of whether they are monogamous or polygynous (s 2). Although the date of the conclusion of a customary marriage does not affect the recognition of the marriage, the Act imposes different patrimonial consequences on a customary marriage depending on whether it was concluded before or after the coming into operation of the Act. In *Gumede v President of the Republic of South Africa & others* 2009 (3) SA 152 (CC), a woman who had entered into a monogamous customary marriage in KwaZulu-Natal before the coming into operation of the Act sought confirmation of an order of unconstitutionality the High Court had made in respect of certain sections of the Act, the KwaZulu Act on the Code of Zulu Law 16 of 1985 ('KwaZulu Code') and the Natal Code of Zulu Law (Proc R151 GG 10966 of 9 October 1987 ('Natal Code')). As the applicant's customary marriage was monogamous, it would, in terms of section 7(2) of the Act, have been in community of property had it been concluded after the coming into operation of the Act. However, as it was concluded before the coming into operation of the Act, section 7(1) applied. In terms of this provision, customary law governed the patrimonial consequences of customary marriages entered into before the Act came into operation. In the applicant's case, section 7(1) entailed that the patrimonial consequences of her marriage were governed by the customary law contained in the KwaZulu and Natal Codes. In terms of these codes, the family head owned and had control over all family property (s 20 of the KwaZulu Code; s 20 of the Natal Code). The Natal Code further

provided that all 'inmates' of a kraal were under the control of and owed obedience to the family head in respect of all family matters (s 22). Effectively, these provisions deprived the applicant of a claim to family property during the marriage and upon its dissolution (paras [11] and [27]). The applicant challenged the constitutionality of the differentiation between the patrimonial consequences of monogamous customary marriages depending on whether they were concluded before or after the coming into operation of the Act, on the ground that the differentiation constituted unfair discrimination on the grounds of gender and race against women who married under KwaZulu-Natal customary law. The High Court declared section 7(1) of the Act as well as the inclusion of the words 'entered into after the commencement of this Act' in section 7(2) of the Act unconstitutional and invalid. It also declared section 20 of the KwaZulu and Natal Codes and section 22 of the Natal Code unconstitutional and invalid.

The Minister of Home Affairs and the KwaZulu-Natal Member of the Executive Council for Traditional and Local Government Affairs opposed confirmation of the High Court's order, *inter alia*, on the ground that the relief that the applicant sought was 'premature and unnecessary', because the divorce court could transfer property to her in terms of section 8(4)(a) of the Act read with section 7 of the Divorce Act 70 of 1979. Section 8(4)(a) bestows 'the powers contemplated in sections 7, 8, 9 and 10 of the Divorce Act, 1979' on a court that dissolves a customary marriage, and section 7(3) and (4) of the Divorce Act empowers that court to transfer assets, or parts of assets, of the one spouse to the other spouse if it is just and equitable to do so. Thus the respondents' argument essentially was that the applicant's remedy was 'not to seek an order invalidating the laws concerned, but to approach the divorce court for appropriate relief' (para [13]).

Delivering the judgment of the Constitutional Court, Moseneke DCJ held that the differentiation between 'old' and 'new' customary marriages for purposes of their proprietary consequences, the subjection of a customary wife in KwaZulu-Natal to her husband's marital power, and the husband's exclusive ownership and control of all family property unfairly discriminated against women on the ground of their gender — only they were subject to the unequal consequences of 'old' customary marriages and were considered incapable of holding or controlling, or unfit to hold or control, property (paras [34] and [35]; see also para [46]).

Thus the matrimonial property system that applies to 'old' customary marriages in KwaZulu-Natal 'strikes at the very heart' of equality and dignity (para [36]). It renders wives in such marriages vulnerable by stripping them of their dignity and rendering them poor and dependent. They are also demeaned and made vulnerable, as they are subjected to patriarchal domination and excluded from owning and dealing with family property (paras [36] and [46]).

The respondents contended that the unfair discrimination was justifiable because section 8(4)(a) of the Act empowers a court that dissolves a customary marriage to transfer assets to the wife (para [38]). Therefore, the applicant would not necessarily be left empty-handed upon divorce. As Moseneke DCJ pointed out, this argument fails to deal with the position during the subsistence of the marriage and does not indicate why the unfair discrimination that operates during the marriage may be justifiable (paras [39] and [45]). Further, while the 'old' customary matrimonial property system operates, section 8(4)(a) does not entitle the applicant, as of right, to any part of the family property, for her husband remains the sole owner of all family property unless she obtains an order in terms of section 8(4)(a) (para [45]).

In dealing with the respondents' argument regarding section 8(4)(a), Moseneke DCJ considered it necessary to settle the uncertainty regarding the customary marriages to which the court's power to order redistribution in terms of the section applies. Although section 8(4)(a) applies the whole of section 7 of the Divorce Act to the dissolution of a customary marriage, the uncertainty arose because of the express wording of section 7(3) of the Divorce Act. Section 7(3) expressly restricts the judicial power to redistribute assets to marriages which are subject to complete separation and were concluded before the coming into operation of the Matrimonial Property Act on 1 November 1984 in the case of White, Coloured, and Asian persons, or before the coming into operation of the Marriage and Matrimonial Property Law Amendment Act on 2 December 1988 in the case of Black persons. As section 7(3) — which was originally enacted solely with civil marriages in mind — expressly refers only to marriages that are subject to complete separation of property, authors argued that the court's power to redistribute property in customary marriages is also restricted to marriages which are subject to complete separation of property (Cronjé & Heaton *op cit* 195; R-M Jansen 'Family Law' in JC Bekker, C Rautenbach & NMI

Goolam *Introduction to Legal Pluralism in South Africa* 2 ed (2006) 46). (In *Gumede* para [41], the court incorrectly stated that Cronjé and Heaton contend that the power to redistribute property may be exercised even in respect of marriages that are not out of community of property.) Some authors even argued that the power does not apply to any customary marriage which was entered into before the coming into operation of the Recognition of Customary Marriages Act (Elsje Bonthuys 'Labours of love: child custody and the division of matrimonial property at divorce' (2001) 64 *THRHR* 192 at 211; R-M Jansen 'The Recognition of Customary Marriages Act: many women still left out in the cold' (2002) 27 *J for Juridical Science* 115 at 123; L Neil van Schalkwyk 'Kommentaar op die Wet op die Erkenning van Gebruiklike Huwelike 120 van 1998' (2000) 63 *THRHR* 479 at 496; but see also Jansen in Bekker et al op cit at 46–7). Moseneke DCJ held that the power to redistribute assets in terms of section 8(4)(a) applies to all customary marriages regardless of when they were concluded and regardless of the matrimonial property system that operates in them. He stated that in order to give effect to the dominant purpose of the Recognition of Customary Marriages Act — to recognise and reform the law on customary marriages and to equalise the status and capacity of customary spouses — the limitation regarding the matrimonial property system that applies to civil marriages in terms of section 7(3) of the Divorce Act should not be applied to customary marriages. He further pointed out that, textually, section 8(4)(a) does not refer to customary marriages in or out of community of property. He held that the absence of a reference to marriage in or out of community of property was apt in the context of customary marriages, for, 'properly understood, customary marriages should not be seen through the prism of the marital proprietary regimes under the common law or divorce legislation that regulates civil marriages' (para [43]; see also para [42]). He stated that customary law 'does not place a premium on the dichotomy between marriages in and out of community of property', and that the equitable discretion which section 8(4)(a) confers on a court is 'more consonant with the underlying ethos of customary law which strives for equity in resolving conflict' (para [43]). He accordingly concluded that there was no valid reason for limiting the court's power to redistribute assets to customary marriages in which complete separation of property operates.

He concluded that section 7(1) and (2) of the Act, section 20 of the KwaZulu Code, and sections 20 and 22 of the Natal Code are

unconstitutional, as they unjustifiably discriminate unfairly against the applicant on the ground of her gender (para [49]). In view of this conclusion, he found it unnecessary to decide whether the applicant was also subject to unfair discrimination on the ground of race (para [23]). He declared section 20 of the KwaZulu Code and sections 20 and 22 of the Natal Code unconstitutional and invalid. He further declared section 7(1) of the Act unconstitutional and invalid to the extent that it relates to monogamous customary marriages. He also declared the inclusion of the words 'entered into after the commencement of this Act' in section 7(2) of the Act unconstitutional and invalid, and excised them from the section. Finally, he held that the order of invalidity would operate retroactively but would not affect customary marriages that had already been terminated (paras [49], [51], [52], [58], and [59]).

In the first instance, the most obvious remark regarding the decision is that, as section 7(2) of the Act now applies to all monogamous customary marriages, the patrimonial consequences of a monogamous customary marriage are the same regardless of when the marriage was concluded. However, as the court's order removed section 7(1) of the Act from the statute book only to the extent that its provisions relate to monogamous customary marriages entered into before the coming into operation of the Act, the patrimonial consequences of a polygynous customary marriage still depend on whether the marriage was concluded before or after the coming into operation of the Act.

Secondly, as section 7(1) of the Act still applies to polygynous customary marriages concluded before the coming into operation of the Act and the court declared section 20 of the KwaZulu Code and sections 20 and 22 of the Natal Code unconstitutional and invalid, uncodified customary law now governs the ownership and control of family property throughout the country. Precisely what the relevant customary-law rules are, and whether they can be reconciled with the constitutional values of equality and dignity, are difficult to ascertain. Perhaps customary law — as a living body of law — has developed towards gender equality in respect of the sharing and control of family and house property, but this is by no means clear. Thus it may be that the very same customary position which the Constitutional Court criticised so vehemently in so far as it applied to monogamous customary marriages concluded before the coming into operation of the Act continues to operate in polygynous customary marriages concluded before the coming into operation of the Act. (In *Alexkor*

Ltd & another v Richtersveld Community & others 2004 (5) SA 460 (CC) para [53], the Constitutional Court recognised that customary law is a body of rules and norms that is not static (see also *Shilubana & others v Nwamitwa & others* 2009 (2) SA 66 (CC) para [44]). But, as Van der Westhuizen J pointed out in *Shilubana* (para [46]), “[l]iving” customary law is not always easy to establish and it may sometimes not be possible to determine a new position with clarity’ (see also *Alexkor* para [54]).)

Thirdly, the decision makes it clear that the judicial power to redistribute property in terms of section 8(4)(a) of the Act operates upon the dissolution of all customary marriages by divorce, regardless of when the marriage was concluded and regardless of the matrimonial property system that operates in the marriage (para [44]). This is a welcome and progressive interpretation of section 8(4)(a) which serves the constitutional objective of achieving substantive gender equality. However, the implication of this interpretation is that there is stark differentiation between spouses in civil and customary marriages, because the power to redistribute property is much more restricted in civil marriages than in customary marriages. In terms of section 7(3) of the Divorce Act, one spouse in a civil marriage may ask the court to transfer the other spouse’s assets or part of those assets to him or her, only if the spouses did not enter into an agreement concerning the division of their assets, and they were married either prior to the commencement of the Matrimonial Property Act with an antenuptial contract which excludes community of property, community of profit and loss, and accrual sharing in any form, or prior to the commencement of the Marriage and Matrimonial Property Law Amendment Act in terms of section 22(6) of the Black Administration Act. In *Gumede*, the Constitutional Court held, correctly, that it was unnecessary to decide the constitutional validity of section 7(3) of the Divorce Act for purposes of the case before it (para [48]), but the implications of the judgment certainly invite renewed scrutiny of the constitutionality of section 7(3).

The first fundamental right which comes into play is equality before the law and equal protection and benefit of the law (s 9(1) of the Constitution). The test for determining whether a differentiation violates this right is whether there is a rational connection between the differentiation and the legitimate governmental purpose it is designed to further (see, for example, *Prinsloo v Van der Linde & another* 1997 (3) SA 1012 (CC) paras [25]–[26];

Harksen v Lane NO & others 1998 (1) SA 300 (CC) para [42]; *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC) para [10]. A differentiation that is arbitrary or irrational, or manifests naked preference, violates section 9(1) (*Prinsloo* supra para [25]; *Jooste* supra para [16]). Although it is accepted that differences may legitimately exist between customary and civil marriages, and although the Constitutional Court held in *Gumede* that 'customary marriages should not be seen through the prism of the marital proprietary regimes under the common law or divorce legislation that regulates civil marriages' and that, unlike the common law, customary law 'does not place a premium on the dichotomy between marriages in and out of community of property' (para [43]), I doubt whether the difference in the type of marriage (customary versus civil) provides a rational basis for the vast differentiation that exists between spouses in customary and civil marriages in so far as the judicial discretion to redistribute assets is concerned. In respect of both types of marriages the legitimate governmental purpose of empowering the court to order redistribution upon divorce is to enable the court to address financial inequity between the spouses. In both customary and civil marriages women usually bear the brunt of such inequity due to their financial and societal inequality with men. It is not rational to afford the court the power to redistribute assets upon divorce in all customary marriages, while restricting the court's power in civil marriages to those that are subject to complete separation of property and were concluded prior to the commencement of the Matrimonial Property Act or the Marriage and Matrimonial Property Law Amendment Act. Thus the differentiation indeed amounts to inequality before the law and unequal protection and benefit of the law (see also Jansen in Bekker et al op cit at 47).

The differentiation may also amount to unfair discrimination based on the listed ground of race (s 9(3) of the Constitution). It is unclear whether people who are not Black may enter into a customary marriage. Jansen (in Bekker et al op cit at 33) submits that customary marriages are not restricted to Black people, but points out that people who do not follow a cultural lifestyle where there are traditional leaders and traditional community values and customs might find it difficult to prove that they have entered into a customary marriage. However, CRM Dlamini ('The ultimate recognition of the customary marriage in South Africa' (1999) 20 *Obiter* 14 at 15) expresses the view that customary marriages are

restricted to Black people. If customary marriages are indeed restricted to Black people, the racial discrimination would be direct, as only Black people would be able to obtain redistribution upon divorce regardless of the matrimonial property system that operates in their customary marriage. Even if customary marriages are open to all races, there still is indirect discrimination on the ground of race, because the effect of the restricted power to redistribute assets when a civil marriage ends in divorce is that a disproportionate number of White, Coloured and Asian people are unable to seek redistribution. The restriction of the power in respect of civil marriages has far-reaching deleterious consequences for the financially weaker spouse (and the spouse's children if they are placed in his or her care, as children and their care-giving parent share the same post-divorce economic circumstances and standard of living (see, for example, Bonthuys *op cit*; L van Zyl 'Spousal support — an update' (1992) 55 *THRHR* 297 at 297). The restriction also affects the dignity of the financially weaker spouse (and his or her children).

The decision has also invalidated the argument that the limited power to redistribute assets in civil marriages is justified, as the extension of the power would lead to unacceptable legal uncertainty about the outcome of divorce (as was argued by the South African Law Commission: *Report on the Review of the Law of Divorce: Amendment of Section 7(3) of the Divorce Act, 1979* (1990) chap 3 ¶ 1.3.10). The Constitutional Court clearly considers the supposed risk of legal uncertainty regarding the division of matrimonial property upon divorce to be an acceptable price to pay in order to serve the constitutional values of equality and dignity in so far as wives in monogamous customary marriages are concerned. Extending the court's power to redistribute assets upon divorce to all civil marriages that are subject to complete separation of property, or even to all civil marriages regardless of the matrimonial property system that operates in them (as has been suggested before: Jacqueline Heaton 'Striving for substantive gender equality in family law: selected issues' (2005) 21 *SAJHR* 547 at 562) would not lead to greater uncertainty than that which now applies in respect of customary marriages. Arguing that uncertainty is acceptable within the context of customary marriages but not in the context of civil marriages would be derisory.

Finally, note that although the Constitutional Court in *Gumede* declared section 7(1) of the Act unconstitutional and invalid only

to the extent that it related to monogamous customary marriages, clause 6 (a) of the draft Recognition of Customary Marriages Amendment Bill deletes the whole of section 7(1), in this way abolishing the rule that customary law determines the consequences of customary marriages entered into before the coming into operation of the Act. It is unclear how the patrimonial consequences of such customary marriages will be determined if the whole of section 7(1) were to be repealed. In customary marriages that are entered into after the coming into operation of the Act, section 7(6) regulates the position. In terms of section 7(6), a husband who already is a party to a customary marriage and wants to enter into another customary marriage must, prior to the celebration of the new marriage, obtain the court's approval of a written contract which is to regulate the future matrimonial property system of his marriages. This provision can clearly not apply to polygynous customary marriages which already existed at the time when the Act came into operation.

DIVORCE

Pension sharing by divorcing spouses

In terms of section 7(7)(a) of the Divorce Act, a spouse's pension interest is deemed to be part of his or her assets upon divorce. Section 7(8)(a) empowers the court to order the member's pension fund or retirement annuity fund to pay any part of the pension interest which is due to the spouse of the fund member directly to the non-member spouse when the pension benefit accrues to the member. Section 28 of the Pension Funds Amendment Act 11 of 2007 amended section 37D of the Pension Funds Act 24 of 1956 to provide that, for the purposes of section 7(8)(a) of the Divorce Act, the pension interest of a member who is getting divorced is deemed to accrue to the member on the date of the divorce. The Amendment Act came into operation on 13 September 2007 (Proc 26 GG 30297 of 13 September 2007).

Kirchner v Kirchner & another 2009 (4) SA 448 (W) deals with the issue of whether the non-member is entitled to immediate payment of his or her share of the member's pension interest if the divorce order was made before 13 September 2007. This question arose because the Amendment Act did not expressly indicate whether the amendment applied to divorce orders that were granted before the date of the coming into operation of the Amendment Act. Gildenhuis J held that the amendment did not

operate with retroactive effect. Unfortunately, he failed to take account of subsequent amendments to section 37D of the Pension Funds Act that had been effected by section 16 of the Financial Services Laws General Amendment Act 22 of 2008. His decision was handed down on 5 November 2008, which was four days after the coming into operation of section 16 (GN R1170 GG 31561 of 31 October 2008). Section 37D(4)(d), as amended by section 16 of the Financial Services Laws General Amendment Act, provides: 'Any portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce or decree for the dissolution of a customary marriage granted prior to 13 September 2007 are [sic] for purposes of any law other than the Income Tax Act, 1962, including, but not limited to, section 7(8)(a) of the Divorce Act, 1979, deemed to have accrued to the member on 13 September 2007.' This provision makes it clear that spouses who were divorced prior to the coming into operation of the Pension Funds Amendment Act can also claim payment or transfer of their pension interest portion. Gildenhuis J's judgment was, therefore, *per incuriam* and should never have been reported.

Protektor Preservation Pension Fund v Bellars & others 2009 (4) SA 455 (D) also deals with pension sharing. In this case, the first respondent's husband transferred his pension benefits to the applicant preservation fund when he resigned from his employment. (A preservation fund is 'a temporary warehouse for the withdrawal benefits from registered and approved pension or provident funds' (para [5]).) When the first respondent and her husband subsequently divorced, the court awarded the first respondent an amount of R363 959,93 of her husband's pension interest. In terms of the definition of a 'pension interest' in section 1 of the Divorce Act, the pension interest of a divorcing spouse who is a member of a pension fund connotes 'the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office'. This definition refers to deemed termination of the member's membership of the pension fund on the date of the divorce 'on account of his resignation from his office', and does not deal with actual termination of employment and subsequent transfer of the member's accumulated pension benefit to a preservation fund prior to the divorce. If an employee who has left his or her employment transfers his or her accrued

pension benefits to a preservation fund, he or she is treated as still being in the employment of his or her former employer. Because of the difference between a pension fund and a preservation fund, the applicant sought an order declaring that the words 'on account of his resignation from his office' in the definition of the 'pension interest' of a member of a pension fund in section 1 of the Divorce Act are to be read to refer to the termination of the employer-employee relationship of a member of the applicant preservation fund. The applicant further sought an order declaring that the definition of 'pension interest' should be read to include the withdrawal benefit that would have been payable to the member of the preservation fund if he or she had opted to take the whole benefit at the date of the divorce.

Levinsohn DJP granted the order sought. He pointed out that the employer-employee relationship between a member of a preservation fund and his or her former employer is an artificial one, as the member is no longer a true employee. As the member is actually no longer an employee, he or she cannot realistically be deemed to terminate his or her employment on the date of the divorce, as is envisaged in the definition of the pension interest of a member of a pension fund. However, when the member of a preservation fund takes a total withdrawal benefit from the preservation fund, he or she terminates his or her artificial employer-employee relationship. Taking the full withdrawal benefit can accordingly be equated with the member's resignation from employment, as envisaged in the definition of the pension interest of a member of a pension fund (para [15]). Levinsohn DJP accordingly found that the withdrawal benefit of a member of a preservation fund qualifies as a pension interest for purposes of the Divorce Act (para [17]).

This decision is welcome. Denying the non-member spouse the right to share in the member's pension purely because the member, fortuitously or intentionally, resigned from his or her employment and transferred his or her accrued pension benefit to a preservation fund prior to divorce would have been most unjust. It would also have resulted in unjustifiable inequality between spouses of members who belong to pension and retirement annuity funds and spouses of members who belong to preservation funds. It would further have enabled one spouse to violate the other's dignity by resigning from employment and transferring his or her accrued pension benefit to a preservation fund prior to the divorce. Even though Levinsohn DJP did not

engage in a constitutional analysis, the outcome of his decision is in keeping with the conclusion that would have been reached had he applied the purposive approach the Constitutional Court has laid down. The purposive approach dictates that when the constitutionality of a statutory provision is in issue, the court must examine the purpose of the particular provision and the Act in which it is contained in order to determine whether an interpretation that is in keeping with our constitutional values can be given to the provision. If the provision has more than one plausible interpretation, and one of those interpretations is in keeping with the spirit, purport, and objects of the Constitution, it is the one that has to be preferred (*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO & others (Hyundai)* 2001 (1) SA 545 (CC); *Daniels v Campbell NO & others* 2004 (5) SA 331 (CC); *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* 2009 (4) SA 222 (CC)). In *Protektor*, section 7(7) and (8) of the Divorce Act, read with the definition of 'pension interest' in section 1 of the Act, could have been challenged as unconstitutional had withdrawal benefits from a preservation fund been excluded from the definition of a pension interest and, consequently, from division upon divorce. The purpose of allowing the non-member spouse to obtain a portion of the member spouse's pension interest is to 'ensure that there be an equitable division of assets between the spouses' (para [12]). The purpose is, therefore, to contribute to the economic equality of the spouses. This objective would have been defeated for spouses of members who belong to preservation funds had Levinsohn DJP excluded preservation fund withdrawal benefits. The interpretation of the definition of 'pension interest' he adopted is plausible and in keeping with the constitutional values of equality and human dignity. His decision is accordingly supported on constitutional grounds, too.

Redistribution of assets upon divorce

In *Brunette v Brunette & another NO* 2009 (5) SA 81 (SE), the court ordered the joinder of the applicant's husband in his capacity as trustee of the second respondent in a contested divorce action. The applicant's husband was already the first respondent in the divorce action in which the applicant was seeking a redistribution order in terms of section 7(3)–(6) of the Divorce Act. The applicant and her husband were the trustees of

two trusts that owned the immovable property from which the spouses conducted their businesses. The application was made because the applicant intended to change her particulars of claim in the divorce action to include a prayer that the assets of the trusts be regarded as the assets of the businesses that she and her husband conducted as partners. She alleged that the spouses conducted the businesses without distinguishing between the assets of their partnership and those of the trusts. She accordingly wanted the trial court in the divorce action to take the trust assets into account when making the redistribution order. Her husband resisted the joinder on the grounds that the trusts had separate identities and had been created for the protection of the spouses and their children, and to minimise estate duty, that the businesses and trusts have always had separate financial statements, and that the businesses paid rent to the trusts.

The court rejected the first respondent's objections. Chetty J referred to *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA), where it was held that the mere fact that assets vest in a trust does not in and of itself mean that the assets must be ignored for purposes of a redistribution order. In *Badenhorst*, the Supreme Court of Appeal had held (para [9]) that trust assets can be taken into account for purposes of a redistribution order if it is proved that one of the spouses —

'... controlled the trust and but for the trust would have acquired and owned the assets in his own name. Control must be de facto and not necessarily de iure ... De iure control of a trust is in the hands of the trustees but very often the founder in business or family trusts appoints close relatives or friends who are either supine or do the bidding of their appointer. De facto the founder controls the trust. To determine whether a party has such control it is necessary to first have regard to the terms of the trust deed, and secondly to consider the evidence of how the affairs of the trust were conducted during the marriage.'

In *Brunette*, Chetty J held that the applicant had made a prima facie case that the trust assets were regarded as assets of the spouses' partnership, inter alia, because the balance sheets of the trusts reflected a profit distribution to the spouses (para [4]). The trial court in the divorce action had to determine whether the applicant's contentions that the trust assets were treated as partnership assets were correct. To be able to make such a determination, the trial court would have to consider the manner in which the trusts had been administered in the past (ibid).

Chetty J accordingly concluded that the applicant's husband should be joined in his capacity as trustee (para [6]).

Post-divorce spousal maintenance

In *Botha v Botha* 2009 (3) SA 89 (W), Mrs Botha claimed post-divorce spousal maintenance from her husband in terms of section 7(2) of the Divorce Act. She contended that the reciprocal spousal duty of support that arises upon marriage continues after divorce and entitles her to be maintained in accordance with the standard of living the spouses enjoyed while still living together. She argued that because her own income was insufficient to enable her to maintain the standard of living to which she had become accustomed during the subsistence of the marriage, her husband had to contribute the shortfall. When Mrs Botha had married her husband, she was 39 years old and had a 13-year-old daughter whom she had supported alone all along because she had chosen not to claim maintenance from the child's father. Her husband, who was 50 years old, earned a great deal more than she did. After the wedding, Mrs Botha and her daughter moved from their rented accommodation in a middle-class suburb to Mr Botha's home in an expensive neighbourhood. During the marriage, which was subject to complete separation of property, Mrs Botha continued in paid employment except for a period of approximately eighteen months. She invested about half of the severance package she received when she resigned and spent the rest of the money on herself and her daughter. After the eighteen-month period, she returned to paid employment because she chose to do so. Some six and a half years after the Bothas married, Mrs Botha and her daughter moved out of the matrimonial home due to the spouses' marriage having broken down irretrievably. More or less at that time an interim maintenance order in the amount of R15 000 per month plus payment of her medical expenses was granted in favour of Mrs Botha. In the subsequent divorce action, Mrs Botha initially claimed maintenance in the amount of R30 000 per month. She later lowered the amount to R20 000 per month plus her medical expenses. By the time of the conclusion of the trial, some two years after the interim maintenance order had been made, her legal representative submitted that rehabilitative maintenance in the amount of R20 000 per month for five years would be appropriate. At that time, Mr Botha was earning about R54 000 per month plus a discretionary annual bonus, while Mrs Botha was earning about

R12 000 per month plus a guaranteed bonus of one month's salary and a discretionary annual bonus.

In deciding Mrs Botha's claim for maintenance, Satchwell J distinguished between two 'approaches' to post-divorce support. One 'approach' is that the poorer spouse is automatically entitled to maintenance 'by reason solely of the prior existence of the marriage and financial inequality between the parties' (para [2]). The other is that maintenance is a discretionary award (*ibid*). She held that the latter 'approach' is correct and that the party who claims maintenance must prove that he or she is entitled to maintenance. Once that has been done, the court determines the amount of maintenance to be awarded and the duration of the duty to pay maintenance (para [3]). She rejected the argument that the reciprocal spousal duty of support survives termination of the marriage, and that Mrs Botha's inability to sustain the marital standard of living, coupled with Mr Botha's ability to pay maintenance, entitled Mrs Botha to maintenance (paras [26]–[28] and [33]). She pointed out that payment of post-divorce spousal maintenance was unknown in our law until the Matrimonial Affairs Act 37 of 1953 authorised the court to order payment of post-divorce maintenance by the guilty spouse to the innocent spouse (para [30]). The courts did not interpret the Matrimonial Affairs Act as conferring an automatic right to maintenance on the innocent spouse. Instead, they held that the Act conferred a discretion on the court to award maintenance to the innocent spouse (para [31]). Section 7(2) of the Divorce Act did not explicitly deviate from this interpretation by providing that maintenance would be ordered simply because of the marriage and because one party was unable to maintain the marital standard of living after divorce. Referring to the use of the word 'may' in section 7(2), Satchwell J concluded that the language of the section 'is clearly discretionary' (para [32]; see also para [114]). (Section 7(2) provides that '[i]n the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court *may* . . . make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or re-marriage of the party in whose favour the order is given, whichever event may first occur' (emphasis added).)

Satchwell J further considered whether the absence of an automatic entitlement to post-divorce maintenance and the application of the clean-break principle by our courts are in keeping

with the principles embodied by the Constitution (para [35]). The clean-break principle dictates that divorcing parties should become economically independent as soon as possible after the divorce. A clean break can be achieved, for example, by making an award for rehabilitative maintenance instead of permanent maintenance. Satchwell J indicated that the impact of all court orders must be measured against the constitutional principles of human dignity, equality, and non-sexism. She held that the common-law position that the poorer spouse is not automatically entitled to post-divorce maintenance is not inimical to those principles and that neither the common-law position nor section 7(2) of the Divorce Act limits the right to equality (para [37]). She did, however, acknowledge that substantive equality has not always followed on formal equality in so far as financial independence is concerned, because the courts have not always taken full account of the many experiential barriers and familial responsibilities that render financial independence illusory for many women. Because no children were born of the Bothas' marriage, Satchwell J concluded that gender inequality arising from child-rearing obligations was not an issue in the present case (para [39]). Unfortunately, she did not pay much attention to the gender inequality which frequently arises from a woman's domestic responsibilities other than child-care duties. She simply stated that there was no evidence that Mrs Botha contributed to the marriage 'in the traditional role of homemaker any more than did Mr Botha', that Mrs Botha acted 'as an economically independent adult' both before and during the marriage, and that Mrs Botha's lifestyle and responsibilities 'were in no way the result of choices made or dictated by Mr Botha or dependent upon him' (paras [116] and [117]).

Having dealt with the preliminary theoretical issues, Satchwell J proceeded to investigate whether Mrs Botha had made out a case for the court's exercising its discretion to award maintenance to her. She held that the purpose of the court's investigation in terms of section 7(2) is to determine what maintenance award would be 'just'. In this regard the court must consider the interests of both spouses and the impact that the order will have on each spouse and effect justice as between the spouses (paras [43]–[44]). She held that merely establishing that the poorer spouse's income is insufficient to enable her to sustain the marital standard of living, and that her husband can afford to pay maintenance does not comply with section 7(2) of the Divorce Act

and does not achieve justice (paras [48]–[49]). Taking into consideration the factors that are listed in section 7(2), Satchwell J concluded that Mrs Botha was not entitled to any maintenance. She specifically referred to ‘the independent lives established by the parties into middle age’, the short duration of the marriage, the absence of fault as a relevant factor, the absence of evidence that Mrs Botha’s health problems had any impact on her ability to earn an income, Mrs Botha’s employment prior to and during the marriage, her continued employment, and Mrs Botha’s refusal to seek a contribution towards child support from her daughter’s natural father as factors which militated against a maintenance order being made in Mrs Botha’s favour (paras [3], [50]–[59], [61], [73], and [77]). (Mrs Botha’s health problems were depression, a digestive problem arising from a hernia, and a damaged hand and ankle.) With regard to proof of Mrs Botha’s financial needs and obligations, and the marital standard of living, Satchwell J (with good reason) criticised Mrs Botha for failing to provide supporting evidence, establishing an extravagant lifestyle after she and her husband had separated, offering unreliable evidence as to the amounts claimed, claiming many items that related to her daughter, and including expenses relating to colleagues and friends (paras [3], [80], [83], [85], [88]–[90], [95]–[103], [118], and [120]). The judge concluded (paras [91] and [93]):

‘At the end of the day, I am in no position to extract mother from daughter, truth from untruth, extravagance from necessity or even category of expense from cash payments. . . .

‘I am . . . left in the dark as to the quantum of reasonable expenses which Mrs Botha is unable to meet and in respect of which she seeks maintenance from Mr Botha. I cannot simply guess an amount based on no credible information or evidence which has not been led.’

In the circumstances, Satchwell J found it impossible to determine ‘whether or to what extent Mrs Botha’s reasonable and necessary monthly expenses for herself exceed her own income’ (para [119]).

In respect of Mrs Botha’s last-ditch attempt to obtain rehabilitative maintenance, Satchwell J pointed out that the purpose of rehabilitative maintenance is to enable the spouse who ‘has been disadvantaged or disabled in some way by the marriage . . . through training or therapy or opportunity, to be restored either to the economic position vis-à-vis employment which she occupied prior to the marriage, or to be reintroduced to the ability to

participate effectively and profitably in normal economic life' (para [106]). Mrs Botha did not need rehabilitative maintenance, as there was no evidence that she was 'less able to support herself or has suffered in her ability to support herself by reason of the marriage', that she earned less than she would have earned if she had not married Mr Botha, that her employment was less secure, or that another five years of rehabilitative maintenance would enable her to support herself at a higher standard of living from her own income (para [107]). Mrs Botha's claim for maintenance was accordingly dismissed. The court also made a costs order against Mrs Botha.

The facts of the case, Mrs Botha's untruthfulness, the poor and incomplete evidence presented, and the legally incorrect 'approach' to post-divorce maintenance advanced on Mrs Botha's behalf justify the court's decision not to award maintenance to her. A general warning must, however, be sounded about the ease with which claims for post-divorce maintenance for employed wives are frequently dismissed. The assumption in many quarters seems to be that the mere fact that a wife is employed disentitles her to maintenance and invariably demands a clean break. Unfortunately, a superficial reading of the decision in *Botha* may strengthen this assumption. Further, Satchwell J's failure to pay attention to the gender inequality which frequently arises from a woman's domestic responsibilities other than child-care duties is of concern. Although it may be true that Mrs Botha did not fulfil domestic responsibilities, it is a pity that the judge so easily dispensed with this issue. Research has shown that even if a couple does not have children (and, surprisingly, even if the wife earns more than the husband), women who are employed outside the home still spend more time on domestic and family care than men do (see Barbara Stark 'Marriage proposals: from one-size-fits-all to postmodern marriage law' (2001) 89 *California LR* 1481 at 1502n116). Satchwell J unfortunately seems to have assumed that unless a wife remains unemployed, or a wife who is employed bears children for her husband and fulfils child-care responsibilities in respect of those children, she cannot be the victim of substantive financial gender inequality. (On women's disproportionate domestic and family-care burdens, the preference which is given to husbands' careers and women's lower employment status, see further the sources quoted in Heaton *op cit* (2005) 21 *SAJHR* at 551n12.) A further concern is that the decision creates the impression that

the marital standard of living is an unimportant consideration if the poorer spouse is employed. Section 7(2) of the Divorce Act does not indicate that some of the listed factors are less important than others. As Berman J held in *Grasso v Grasso* 1987 (1) SA 48 (C) at 52E: 'no particular stress was laid on any one or more of these factors, and they are not listed in any particular order of importance or of greater or lesser relevance'.

Publication of particulars of a divorce

As was generally expected, the Constitutional Court confirmed the unconstitutionality of section 12 of the Divorce Act in *Johncom Media Investments Limited v M & others* 2009 (4) SA 7 (CC). Section 12(1) provided that, except for the names of the parties and the fact that a divorce action was pending between them, no particulars of a divorce action or any information which came to light in the course of such an action could be made public. Section 12(2) created exceptions in respect of publication for the purposes of the administration of justice, a bona fide law report, and the advancement of or use in a particular profession or science. Section 12(3) extended the provisions of section 12(1) and (2) to proceedings relating to the enforcement or variation of any order made in terms of the Divorce Act and any enquiry instituted by a family advocate in terms of the Mediation in Certain Divorce Matters Act 24 of 1987.

Jafta AJ delivered the Constitutional Court's unanimous judgment. He pointed out that the restriction regarding the publication of information which becomes known as a result of a divorce action limits the right to freedom of expression (s 16 of the Constitution), and that the limitation operates regardless of the nature of the information and regardless of whether the publication of the information will infringe the rights to privacy and dignity (ss 14 and 10 of the Constitution, respectively) of the divorcing parties and the interests of their children (para [18]). He held that the restriction in section 12 limits the right to freedom of expression, not only of the media, but also of the public, as it deprives the public of the right to receive information (para [28]). Although the purpose of the limitation is legitimate — to protect the privacy and dignity of the divorcing parties and their children — the chosen method of protection is over broad and is also not particularly efficient in achieving its purpose, as section 12 permits publication of the identities of the parties (paras [29]–[30]). The purpose of section 12 could be better achieved

by less restrictive means, by prohibiting the publication of particulars that identify the parties and their children (para [30]). He concluded that the limitation of the right to freedom of expression could not be justified (para [31]). He accordingly declared section 12 unconstitutional and invalid (paras [31] and [45]). He further prohibited the publication of the identity of any party or child in any divorce proceedings before any court and any information which may reveal the identity of a party or child, unless the court authorises publication (paras [42] and [45]). The order specified that court authorisation of publication may be granted in exceptional circumstances only (para [45]).

As the whole of section 12 was declared invalid, the exceptions in section 12(2) have also fallen away. Thus, the identity of the parties and their children may no longer be published without the court's permission, even if publication occurs for the purposes of the administration of justice, a bona fide law report, or the advancement of or use in a particular profession or science. Keeping the identity of the parties and their children hidden in a bona fide law report, or in the advancement of or use in a particular profession or science is simple enough. However, whether the prohibition of publication of the identity of the parties and their children for the purposes of the administration of justice unless the court permits publication is sensible or feasible, I doubt.

Interim relief

Litigation costs are part of the duty of support (see, for example, *Chamani v Chamani* 1979 (4) SA 804 (W); *Dodo v Dodo* 1990 (2) SA 77 (W); *Samsudin v Berrange NO & others* 2005 (3) SA 529 (N)). At common law, matrimonial guilt determines whether a spouse can claim support during the subsistence of the marriage (*Bing and Lauer v Van den Heever* 1922 TPD 279; *Excell v Douglas* 1924 CPD 472; *Behr v Minister of Health* 1961 (1) SA 629 (SR); *Chamani v Chamani* (supra)). Therefore, a spouse who causes the breakdown of his or her marriage is not entitled to interim maintenance or a contribution towards the costs of a pending matrimonial suit. However, in *Carstens v Carstens* 1985 (2) SA 351 (SE), the court held that the rationale for using matrimonial guilt as the determining factor in respect of applications for interim maintenance and a contribution towards costs in terms of rule 43 of the Uniform Rules had fallen away because the Divorce Act no longer required matrimonial miscon-

duct for a divorce to be granted (at 353H–J and 354G–H). The court nevertheless rejected the wife's claim for interim maintenance because she was living with another man. The court held that it is against public policy to award interim maintenance to such an applicant (at 353F). But it granted her application for a contribution towards costs. It held that because the spouses were married in community of property, the wife could claim part of the joint estate upon divorce. She was accordingly entitled to a contribution towards costs to enable her to pursue her claim (at 354F).

In *SP v HP* 2009 (5) SA 223 (O), the court was again confronted with an application for interim maintenance and a contribution towards costs by a wife who had left the matrimonial home to move in with another man. The court dismissed the wife's application (para [12]). In rejecting her application for interim maintenance, Musi JP relied on *Carstens* (supra) and concluded that awarding interim maintenance to her would be contrary to public policy (para [10]). He also dismissed the wife's claim for a contribution towards costs. In this regard he distinguished the present case from *Carstens* on the ground that the parties in present case were married out of community of property and there was no indication that the wife was making any claim against her husband's estate (para [11]). Musi JP did not refer to the other reported decision on matrimonial guilt in the context of applications in terms of rule 43 after the introduction of no-fault divorce — *Dodo v Dodo* 1990 (2) SA 77 (W).

In *Dodo*, as in *Carstens*, the court held that if the applicant were 'living as man and wife with another man, who is contributing to her support, it would be absurd, and against public policy, to allow her to obtain an order for maintenance to be paid to her by her husband to supplement what the other man is paying her' (at 89G). However, later in the judgment the court seems to have reverted to the view that matrimonial guilt is the determining factor, for it considered whether the facts amounted to 'the class of case of matrimonial misconduct as a result whereof she [that is, the applicant] forfeits the right to maintenance' (at 90G). Perhaps the court was not focussing on matrimonial guilt as such but rather on whether the conduct was of such a nature that public policy would require that interim maintenance not be ordered. It could thus be concluded that Musi JP's decision in *SP v HP* regarding interim maintenance is supported not only by *Carstens* but also by *Dodo*. In respect of a contribution towards

costs, the court in *Dodo* adopted a similar approach to the one in *Carstens*. It based its decision that the wife was entitled to a (further) contribution towards costs on the fact that although the parties were married out of community of property, the wife was claiming the existence of a partnership between the parties and equal division of the partnership assets between the spouses or, in the alternative, transfer of 50 per cent of her husband's assets to her in terms of section 7(3) of the Divorce Act. She was thus making property claims that had to be litigated and she was unable to fund the litigation (at 99A–C). Musi JP's approach in respect of the wife's claim for a contribution towards costs is accordingly also in keeping with *Carstens* and *Dodo*.

The conclusion to be reached from these three decisions is that even though the common-law rule that matrimonial guilt determines whether a spouse can claim support during the subsistence of the marriage has never expressly been abolished by legislation or developed in terms of section 8(3)(a) of the Constitution, it has become judicial practice not to apply this rule in applications in terms of rule 43. (Section 8(3)(a) instructs courts, when applying a provision of the Bill of Rights, to 'apply, or if necessary develop, the common law to the extent that legislation does not give effect to' a right in the Bill of Rights.)

In *Du Preez v Du Preez* 2009 (6) SA 28 (T), a wife claimed interim maintenance in terms of rule 43. She further sought payment of specific expenses, including bond instalments, home insurance premiums, arrear medical expenses, and repairs to the matrimonial home, as well as a contribution of R40 000 towards her legal costs. Her application ran to 139 pages and her husband's reply to 46 pages. Murphy J was most displeased with the verbosity of the parties' papers. He reiterated the familiar rule that rule 43 is a special procedure which has the object of adjudicating interim matters expeditiously and cheaply (para [3]; see also, inter alia, *Colman v Colman* 1967 (1) SA 291 (C); *Zaphiriou v Zaphiriou* 1967 (1) SA 342 (W); *Varkel v Varkel* 1967 (4) SA 129 (C); *Mather v Mather* 1970 (4) SA 582 (E); *Henning v Henning* 1975 (2) SA 787 (O); *Verster v Verster* 1975 (3) SA 493 (W); *Andrade v Andrade* 1982 (4) SA 854 (O); *Grauman v Grauman* 1984 (3) SA 477 (W); *Greenspan v Greenspan* 2000 (2) SA 283 (C); *Baadjes v Matubela* 2002 (3) SA 427 (W)). He pointed out that prolixity in rule 43 proceedings has incurred the wrath of the courts throughout the country, as it defeats the purpose of rule 43 and thus amounts to abuse of process

(paras [3]–[4], [6], and [13]). The courts have punished prolixity by striking the matter from the roll, making a costs award against the offending party, or ruling that the practitioners who drafted and submitted the papers cannot claim costs from their client(s) (see, for example, *Smit v Smit* 1978 (2) SA 720 (W); *Visser v Visser* 1992 (4) SA 530 (SE); *Patmore v Patmore* 1997 (4) SA 785 (W)). As the circumstances of the present application were not particularly exceptional, they did not excuse the verbosity of either party's papers. Murphy J accordingly concluded that there was no justification for the 'inordinate prolixity' of the papers (para [13]). He supported the sanction for prolixity that had earlier been imposed in *Visser*. In *Visser*, the court had held that the parties in rule 43 proceedings are unlikely to be aware of the provisions and purpose of such proceedings, but that their attorneys should be. Instead of making an order which saddled the parties with the costs of rule 43 proceedings that are struck from the roll due to prolixity, the parties' lawyers should bear the brunt of the court's displeasure. Murphy J ordered that the matter be struck from the roll, that no costs order be made, and that neither party were to be charged any fees by their attorneys in respect of the application and the opposition of the application (paras [14] and [19]).

He further dealt with the tendency of parties in rule 43 proceedings to exaggerate their expenses and understate their income. If they are later caught out, their counsel 'unabashedly seek to rectify the false information as if the original misstatement was one of those things courts are expected to live with in rule 43 applications' (para [15]). Murphy J called this practice 'distasteful', 'unacceptable' and 'dishonourable', and declared that it must be censured (*ibid*). He warned that the intentional making of a false statement under oath is perjury and may in some instances amount to defeating the course of justice (*ibid*). Further, as a misstatement with regard to one aspect invariably taints other aspects of the case, applicants in rule 43 proceedings had to act with the utmost good faith and disclose all material information with regard to their financial affairs. A party who makes a false disclosure or material non-disclosure 'is not before the court with 'clean hands' and the court could on that ground alone refuse the party relief (para [16]). As the applicant in the present case had failed to disclose some of her income, Murphy J held that her failure to act with the utmost good faith was another reason for denying her application and justified a costs order being made against her (paras [17]–[18]). However, as he

wanted to 'send a strong signal against prolixity' and inspire 'greater discipline among attorneys' (para [18]), he opted for making the order set out above.

For the run-of-the-mill case where rule 43 papers are unacceptably verbose Murphy J's approach of punishing the lawyers rather than their ignorant clients is welcome. But it must be borne in mind that in some cases one of the spouses may be motivated by spite or other nefarious reasons and may insist on including unnecessary detail in the papers purely with a view to embarrassing or intimidating the other party. In such event, a costs order should be made against the offending party and not his or her lawyer.

Butcher v Butcher 2009 (2) SA 421 (C) highlights one of the more adverse practical implications of the lowering of the age of majority. The case concerns an application in terms of rule 43 for interim maintenance and a contribution towards costs. When Mrs Butcher originally instituted divorce proceedings against her husband, section 1 of the Age of Majority Act 57 of 1972 was still in operation. It set the age of majority at 21 years. In her particulars of claim in the divorce action, Mrs Butcher claimed maintenance for the Butchers' two children as well as the children's educational and medical expenses. At the time, the children were below the age of 21 years. Section 17 of the Children's Act subsequently lowered the age of majority to eighteen years. Because the lowering of the age of majority turned both children into majors, Mrs Butcher's attorneys advised her that the children would have to claim maintenance in their own names in the divorce action, but that she could claim maintenance for them in rule 43 proceedings because they still lived with her. In the application in terms of rule 43 Mrs Butcher sought an order compelling her husband to pay interim spousal maintenance to her, to pay the children's medical and motor vehicle expenses, and to pay the children's cell phone expenses, pocket money, and clothing directly to them. The legal question that had to be decided was whether a parent has *locus standi* to claim an interim maintenance order in terms of rule 43 on behalf of his or her adult children who are not parties to the pending divorce proceedings between the parents.

Gassner AJ started the reasons for her judgment by referring to the rule that a parent's duty of support does not come to an end when his or her dependent child reaches majority (para [10]). The duty terminates only once the child becomes self-supporting

(see, for example, *Raichman's Estate v Rubin* 1952 (1) SA 127 (C); *Kemp v Kemp* 1958 (3) SA 736 (D); *Ex parte Pienaar* 1964 (1) SA 600 (T); *Smit v Smit* 1980 (3) SA 1010 (O); *S v Mujee* 1981 (3) SA 800 (Z); *Hoffmann v Herdan NO & another* 1982 (2) SA 274 (T); *Burse v Bursey* [1997] 4 All SA 580 (E) (confirmed on appeal: 1999 (3) SA 33 (SCA)). As regards locus standi, she referred to *Burse* where it was held (in the words of Gassner AJ in *Butcher* para [11]) that 'an obligation to maintain a child, which was incorporated in a consent paper concluded when the child was a minor, was enforceable at the instance of the mother by means of a writ in circumstances where the maintenance obligation continued after the child attained majority'. However, Gassner AJ could not simply follow *Burse*, as the facts of the two cases were distinguishable. In *Burse*, there was an existing enforceable maintenance order which was granted when the child was a minor; in *Butcher*, there was no enforceable maintenance order that could continue to operate after the children became majors.

Gassner AJ then dealt with subsections (1) and (3) of section 6 of the Divorce Act, which read as follows:

'(1) A decree of divorce shall not be granted until the court —
 (a) is satisfied that the provisions made or contemplated with regard to the welfare of any minor *or dependent* child of the marriage are satisfactory or are the best that can be effected in the circumstances;
 . . .

(3) A court granting a decree of divorce may, in regard to the maintenance of a *dependent* child of the marriage or the custody or guardianship of, or access to, a minor child of the marriage, make any order which it may deem fit. . . ' (emphasis added).

She rejected the argument that these subsections empower the court to grant a maintenance order in favour of an adult dependent child at the behest of the child's parent, because they specifically refer not only to a minor child but also to a 'dependent child'. She held that the court that grants a divorce may make a maintenance order in respect of an adult dependent child, but may do so only if the adult dependent child is joined as a party in the divorce proceedings and claims maintenance in his or her own name (para [13]). She accordingly concluded that only the adult child has locus standi to sue for maintenance (para [15]). Mr Butcher, therefore, could not be ordered to make interim maintenance payments to Mrs Butcher for their adult children's

maintenance. Nor could he be ordered, at Mrs Butcher's instance, to pay amounts directly to the adult children or to pay expenses on their behalf (para [16]).

Gassner AJ then considered whether the court has the power to order one parent *pendente lite* to pay an amount of spousal maintenance to the other parent that includes expenses relating to the couples' adult dependent children (such as the children's food and groceries, and general household expenses that relate, at least partly, to them). She pointed out that one of the factors which section 7(2) of the Divorce Act lists as a consideration the court must take into account when deciding a claim for spousal maintenance is the parties' respective financial needs and obligations. As the Butchers' children lived with their mother, Mrs Butcher 'had to use her household budget to run the family home and provide groceries for a three-member household'. In having to do so, Mrs Butcher incurred an 'obligation' within the meaning of section 7(2) of the Divorce Act (para [17]). Gassner AJ took this financial burden into account in determining the quantum of the interim maintenance to which Mrs Butcher was entitled (*ibid*).

It is most unfortunate that adult children who are still dependent on their parents for their support are compelled personally to sue their parents for maintenance or to be joined in their parents' divorce proceedings. This state of affairs — especially the requirement of the children being joined in their parents' divorce proceedings — is likely to harm the relationship between parent and child because of the adversarial nature of such litigation. Gassner AJ's attempt to come to the aid of Mrs Butcher by including some of the amounts relating to the children's maintenance under spousal maintenance provides an inadequate solution to the difficulties created by compelling an adult child who lives with one of his or her parents to sue the other parent for maintenance. I suggest that the legislature should address the situation by enacting legislation expressly conferring *locus standi* on a parent with whom a dependent adult child lives to sue the other parent for maintenance on the child's behalf. The legislation should not limit the adult dependent child's *locus standi* in any way. It should, instead, afford *locus standi* to the parent with whom the child lives while retaining the child's *locus standi*. Thus, either the adult child or the parent with whom he or she lives should be empowered to sue the other parent for the child's maintenance.

HINDU MARRIAGE

Govender v Ragavayah NO & others 2009 (3) SA 178 (D) deals with an application by a Hindu widow to be recognised as a spouse for purposes of intestate succession. The applicant and the deceased had married each other by Hindu marriage rites in 2004. The marriage was not solemnised in terms of the Marriage Act and thus did not constitute a civil marriage. As the marriage was purely a Hindu marriage, it was not recognised in terms of South African law. After the death of the applicant's husband, her father-in-law was appointed as the executor of the deceased estate. He argued that he and his wife were the deceased's sole heirs, as Hindu marriages are invalid and the applicant accordingly did not qualify as the deceased's intestate heir. He lodged a liquidation and distribution account which provided that he and his wife were the deceased's sole heirs. The applicant disputed the account and applied for an order declaring that the word 'spouse' in the Intestate Succession Act includes a surviving partner in a monogamous Hindu marriage. She relied on the Constitutional Court's judgment in *Daniels v Campbell* (supra), where it was held that a surviving spouse in a monogamous Muslim marriage qualifies as a 'spouse' and 'survivor' in terms of the Intestate Succession Act and the Maintenance of Surviving Spouses Act, as this interpretation is in keeping with the ordinary meaning of the word 'spouse' and also serves the purpose of the Acts. In opposing the application, the respondents relied on *Singh v Rampersad & others* 2007 (3) SA 445 (D), in which the court had held that a Hindu marriage does not fall within the ambit of the Marriage Act or the Divorce Act and that it can accordingly not be dissolved by divorce in terms of the Divorce Act.

Moosa AJ pointed out that recent Constitutional Court decisions have extended the application of the Intestate Succession Act to same-sex life partners, customary spouses and spouses in monogamous Muslim marriages, and that in *Hassam v Jacobs NO (Women's Legal Centre Trust as amicus curiae)* [2008] 4 All SA 350 (C) the then Cape Provincial Division of the High Court had recognised a de facto polygynous Muslim marriage for purposes of the Intestate Succession Act (paras [23] and [40]). (The relevant Constitutional Court decisions are *Gory v Kolver NO & others (Starke & others intervening)* 2007 (4) SA 97 (CC); *Bhe v Magistrate, Khayelitsha*, (Commission for Gender Equality as amicus curiae); *Shibi v Sithole & others*; *South African Human Rights Commission v President of the Republic of South Africa*

2005 (1) SA 580 (CC); *Daniels v Campbell* (supra).) Referring specifically to *Daniels*, Moosa AJ pointed out that the Constitutional Court did not require registration of a monogamous Muslim marriage as a prerequisite for recognising the surviving spouse as a 'spouse' for purposes of the Act (para [29]). Moosa AJ further referred to section 4(9) of the Recognition of Customary Marriages Act which provides that failure to register a customary marriage does not affect the validity of the marriage (para [30]). Moosa AJ concluded that the relief the applicant sought was not dependent on the validity of her Hindu marriage (para [42]). This finding is in keeping with the approach of the Constitutional Court in *Daniels* in respect of the surviving spouse of a monogamous Muslim marriage. Moosa AJ also arrived at the same conclusion regarding the surviving spouse in a monogamous Hindu marriage that the Constitutional Court had earlier arrived at in *Daniels* in respect of a surviving spouse in a monogamous Muslim marriage. Moosa AJ accordingly declared that the word 'spouse' as used in the Intestate Succession Act includes the surviving partner in a monogamous Hindu marriage, and that the applicant qualified as her deceased husband's 'spouse' for purposes of the Act. The liquidation and distribution account was set aside and the executor was ordered to prepare the account on the basis that the applicant qualified as the deceased's heir (para [44]). The decision is correct and unsurprising.

MAINTENANCE OF A SURVIVING SPOUSE

In terms of section 2(1) of the Maintenance of Surviving Spouses Act, a surviving spouse who is unable to provide for his or her reasonable maintenance needs from his or her own means and earnings has a claim for maintenance against the estate of his or her deceased spouse until his or her death or remarriage. In *Feldman v Oshry & another NNO* 2009 (6) SA 454 (KZD), a widow claimed a lump sum of R671 062 as maintenance in terms of the Act and payment of R50 000 in terms of a deed of donation. The lump sum was actuarially calculated to provide her with reasonable maintenance until her death or remarriage and took the assets she owned and inherited into account. When the executors of her husband's deceased estate rejected her claim, she instituted proceedings in the High Court. In those proceedings the executors did not dispute that she needed maintenance but they did dispute the scope of her need as well as her claim for

payment by way of a lump sum. They also disputed that she was entitled to the donation of R50 000.

The first issue which the court had to decide was the meaning of the phrase 'own means'. Section 1 of the Act states that 'own means' 'includes any money or property or other financial benefit accruing to the survivor in terms of the matrimonial property law or the law of succession or otherwise at the death of the deceased spouse'. The court held that by using the word 'include' the legislature intended to indicate that the definition was not exhaustive. Means other than those expressly mentioned in the definition must accordingly also be taken into account (para [17]). In the present case, the plaintiff's sons from her first marriage had been making voluntary contributions to her maintenance since her second husband's death. The executors contended that those contributions should be taken into account in calculating the plaintiff's means. The court rejected this contention. It held that voluntary contributions made to a surviving spouse's maintenance by his or her children do not fall within the ambit of the term 'means', as the surviving spouse has no more than a spes in respect of such payments (para [27]). The court further referred to the view which the plaintiff's deceased husband had expressed during his lifetime — that her sons should assume responsibility for her after his death. The court held that the deceased's view did not absolve his deceased estate from the liability the Act provided for (para [28]). Taking into account the R1 313 367 in the deceased estate, the eighteen-year duration of the spouses' marriage, the plaintiff's age of 78 at the time of her husband's death, the insufficiency of her means, and the fact that liquidating her assets would expose her to risk and insecurity and would be insufficient to maintain her for the rest of her life, the court concluded that the estate was liable for maintenance (paras [18], [29], and [30]).

The court then considered whether a lump-sum maintenance award was competent. In terms of the Act, the executor may enter into an agreement with the surviving spouse and the interested heirs and legatees in order to settle the surviving spouse's maintenance claim either fully or partially (s 2(3)(d)). The court held that, in the absence of an agreement providing for the payment of a lump sum, it did not have the power to make an order for lump-sum maintenance. It held that the ordinary grammatical meaning of the word 'maintain' entails elements of continuity and repetition, and that an order for the payment of a

single lump sum was thus impermissible (para [33]; see also para [42]). The court further found that an order for the payment of a lump sum would be undesirable on policy grounds, *inter alia*, because the surviving spouse might survive longer than anticipated and might so outlive the maintenance received by way of a lump sum. In such event, the surviving spouse would be prejudiced by the lump-sum award having been made. Or the surviving spouse might die much earlier than expected or might remarry, in which event the deceased estate and the heirs would be prejudiced by the lump-sum award having been made (paras [34] and [35]).

Although the court rejected the plaintiff's claim for lump-sum maintenance it held that it would be unfair to dismiss her claim entirely (para [42]). The court accordingly proceeded to deal with the quantum of maintenance to which the plaintiff was entitled on a monthly basis. It held that, since the legislature used the word 'reasonable' in respect of the surviving spouse's maintenance needs (ss 2(1) and 3 of the Act), a conservative approach was required (para [26]). It further held that in determining a surviving spouse's reasonable maintenance needs, the criteria for fixing the quantum of interim maintenance in terms of rule 43 of the Uniform Rules could be applied — in both cases a conservative approach had to be adopted (para [45]). Thus, in keeping with the approach adopted in rule 43 proceedings, a surviving spouse might not be entitled to maintain a lavish standard of living even if the deceased was wealthy, and the court would frown on exorbitant or extravagant amounts being claimed and inflated figures being provided in support of a surviving spouse's maintenance claim. And, as in proceedings in terms of rule 43, 'more weight will be attached to the evidence of a party who evinces a willingness to implement his lawful obligations than to the evidence of one who is obviously seeking to evade them' (*ibid*). Ultimately, the quantum of maintenance would depend on a reasonable interpretation of the facts before the court, as is the case in proceedings in terms of rule 43. Applying these principles to the facts of the present case, the court concluded that the plaintiff was entitled to maintenance in the amount of R9 628,63 per month until her death or remarriage or until the order was otherwise varied, suspended, or discharged (*ibid*). The court also ordered the executors to pay the donation of R50 000 to the plaintiff (paras [41] and [51]), as the facts of the case did not prove the executors' allegation that the deceased had already performed in terms of the deed of donation before his death (para [41]).

This case is the first in which the approach which is to be adopted when fixing the quantum of a surviving spouse's reasonable maintenance needs has been indicated. The court's decision that a conservative approach has to be adopted and the argument it used to arrive at this conclusion are sound. The case is also the first to consider the form that a maintenance order which is made in terms of the Act may take. The court's view that a lump-sum payment does not constitute maintenance and can therefore not be ordered corresponds to the view which has been adopted in respect of section 7(2) of the Divorce Act (*Purnell v Purnell* 1989 (2) SA 795 (W)). The court's inability to make an order for lump-sum maintenance for a surviving spouse is even more regrettable than its corresponding lack of competence in terms of section 7(2) of the Divorce Act, for making an award for periodic maintenance against a deceased estate complicates the administration of the estate and delays its finalisation, often frequently indefinitely. The difficulties regarding the administration and finalisation of the estate are likely to be compounded in the case of a polygynous marriage where several surviving widows might have maintenance claims against their deceased husband's estate. I submit that the legislature should amend the Maintenance of Surviving Spouses Act (and the Divorce Act) expressly to empower courts to make lump-sum maintenance awards.

MUSLIM MARRIAGE

Hassam v Jacobs NO 2009 (5) SA 572 (CC) deals with the confirmation of an order of constitutional invalidity the Cape High Court had made in respect of the Intestate Succession Act. In *Hassam v Jacobs* [2008] 4 All SA 350 (C), the High Court had extended the application of the Intestate Succession Act and the Maintenance of Surviving Spouses Act to spouses in de facto polygynous Muslim marriages. In respect of the Maintenance of Surviving Spouses Act, the High Court had held that the word 'survivor' can be applied to more than one surviving spouse without unduly straining the language of the Act. It accordingly concluded that the Act applies to surviving spouses in de facto polygynous Muslim marriages. It had further found that, save for section 1(4)(f), the provisions of the Intestate Succession Act could also easily be applied to spouses in de facto polygynous marriages. In respect of the word 'spouse' in section 1(4)(f), the High Court had found that the word and the subsection contem-

plated only one surviving spouse. It had declared the exclusion of surviving spouses in a de facto polygynous Muslim marriage from section 1(4)(f) unconstitutional and made a reading-in order. As an order of constitutional invalidity regarding an Act has no force unless it is confirmed by the Constitutional Court (s 172(2)(a) of the Constitution), the order regarding section 1(4)(f) was referred to the Constitutional Court. As it was only the order in respect of section 1(4)(f) of the Intestate Succession Act that had to be referred to the Constitutional Court, the court did not deal with the High Court's interpretation of the Maintenance of Surviving Spouses Act.

The Constitutional Court held that the objective of the Intestate Succession Act was frustrated by the exclusion of surviving spouses of de facto polygynous marriages from the ambit of section 1(4)(f) (para [38]). It further held that exclusion of surviving spouses of de facto polygynous marriages unjustifiably discriminates unfairly against them on the grounds of gender, religion, and marital status (paras [30]–[34], and [36]–[42]). The court found that the word 'spouse' in section 1 of the Intestate Succession Act cannot in its ordinary sense refer to more than one spouse (paras [48] and [53]). As the word was not reasonably capable of being understood as referring to more than one spouse, the court could not adopt the same approach that it did in *Daniels v Campbell* (supra). Instead, in *Hassam*, the Constitutional Court had to find that section 1 of the Intestate Succession Act was unconstitutional (paras [48], [49], [53], and [57]). It remedied the unconstitutionality by reading in the words 'or spouses' after each use of the word 'spouse' in section 1 of the Act (paras [53] and [57]). The order was made with retroactive effect up to 27 April 1994, subject to the proviso that estates that have already been finally wound up would be unaffected by the order (paras [55] and [57]). (27 April 1994 is the date of the coming into operation of the first Bill of Rights, in chapter 2 of the Constitution of the Republic of South Africa Act 200 of 1993.) The court further declared that if serious administrative or practical problems were to arise in implementing the order, any interested person could approach the court for a variation of the order (para [57]).