THE LAW OF PERSONS AND THE FAMILY

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LEGISLATION

CHILDREN'S AMENDMENT ACT

The Children's Amendment Act 41 of 2007 was published in GN 313 *GG* 30884 of 18 March 2008. The Act was discussed in the 2007 *Annual Survey* at 894–901.

CHOICE ON TERMINATION OF PREGNANCY AMENDMENT ACT

The Choice on Termination of Pregnancy Amendment Act 1 of 2008 came into operation on 18 February 2008 (Proc 213 *GG* 30790 of 18 February 2008), two days after the deadline imposed in *Doctors for Life International v Speaker of the National Assembly & others* 2006 (6) SA 416 (CC). The Choice on Termination of Pregnancy Amendment Bill 21 of 2007 was discussed in the 2007 *Annual Survey* at 905–6.

FINANCIAL SERVICES LAWS GENERAL AMENDMENT ACT

The Financial Services Laws General Amendment Act 22 of 2008 was promulgated in *GG* 31471 of 30 September 2008. The Act, inter alia, amends section 37D of the Pension Funds Act 24 of 1956, which governs the payment or transfer of a portion of a member spouse's pension interest to the non-member spouse after divorce. The amended section 37D came into operation on 1 November 2008 (GN R1170 *GG* 31561 of 31 October 2008).

Traditionally, an unaccrued pension benefit was not considered part of a spouse's assets upon divorce. This position changed in 1989 when the Divorce Amendment Act 7 of 1989 amended section 1 of the Divorce Act 70 of 1979 and inserted section 7(7) and (8) into the Act. The amendment deemed a spouse's pension interest to be part of his or her assets upon divorce, and empowered the court to order the pension fund to pay the portion of the pension interest which was due to the fund

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member's spouse directly to the non-member spouse when the pension accrued to the member (s 7(7)*(a)* and (8)*(a)*(i)). The non-member spouse was not entitled to obtain his or her portion of the pension interest before the pension accrued to the member, which could be many years after the divorce. Nor was the non-member spouse entitled to any growth or interest on his or her portion between the time of the divorce and eventual payment to him or her.

To address this inequity, the Pension Funds Amendment Act 11 of 2007 amended section 37D of the Pension Funds Act to authorize payment or transfer of the non-member spouse's portion of the pension interest upon divorce. The Amendment Act came into operation on 13 September 2007, but, unfortunately, failed to clarify whether the change in respect of payment or transfer of the non-member spouse's portion applied to divorce orders made prior to that date. Amongst others, to remove the uncertainty regarding the retroactive operation of the change, Parliament enacted section 16 of the Financial Services Laws General Amendment Act ('the Amendment Act'). Section 16*(a)*–*(c)* of the Amendment Act replaces the provisions of section 37D of the Pension Funds Act that deal with the non-member spouse's portion of the pension interest.

Section 16*(a)* of the Amendment Act amends section 37D(1)*(d)* of the Pension Funds Act to permit the deduction of maintenance that is payable in terms of the Maintenance Act 99 of 1998, and the deduction of any pension interest portion that is payable in terms of an order under section 7(8) of the Divorce Act from the member's pension. If more than one court order have been made against the member, the maintenance order ranks first in the order of preference and the claim for payment of the portion of the pension interest second, unless the member obtained a loan or guarantee against his or her pension prior to the making of the maintenance or divorce order. If such a loan or guarantee was obtained, it ranks first, the maintenance order second, and the claim for payment of the pension interest portion third (s 37D(3)*(a)* and *(b)*, as inserted by s 16*(c)* of the Amendment Act). Put differently, before any maintenance or portion of the pension interest is paid, the amount of the member's loan or guarantee must first be deducted. This qualification, unfortunately, enables a member to render the provision regarding payment of maintenance and/or the pension interest portion meaningless by obtaining a large loan or guarantee against his or her pension before the divorce or maintenance order is granted.

Section 16*(c)* of the Amendment Act inserts sub-sections (4)–(6) into section 37D of the Pension Funds Act. The non-member spouse's portion of the member spouse's pension interest is deemed to accrue to the member spouse on the date of the divorce (s 37D(4)*(a)*). A non-member spouse who is entitled to a portion of the member spouse's pension must submit the divorce order to the member's pension fund. The pension fund must be named in the divorce order or be identifiable from it. If it is not, the non-member can apply for amendment of the divorce order to reflect the name or identify the pension fund. If such an application is not sought or is denied, the non-member would have to sue the member spouse for payment of the amount of his or her portion of the pension interest.

Within 45 days of submission of the divorce order, the pension fund must request the non-member spouse to elect whether to have his or her portion of the pension interest paid directly to him or her, or to have it transferred to a pension fund of his or her choice (s 37D(4)*(b)*(i)). The non-member spouse has 120 days to inform the fund of his or her election, and must provide the fund with the necessary details to enable it to give effect to the election (s 37D(4)*(b)*(ii)). The fund has 60 days to give effect to the election (s 37D(4)*(b)*(iii)). The non-member spouse is entitled to fund return on his or her portion of the pension interest from the end of the period of his or her election until payment or transfer of his or her portion of the pension interest, but is not entitled to any other interest or growth (s 37D(4)*(c)*(ii)). If the non-member spouse fails to make an election or to provide the necessary details to enable the fund to give effect to his or her election, the fund must pay the amount directly to the non-member spouse within 30 days of the end of the election period (s 37D(4)*(b)*(iv)). If the fund cannot reasonably ascertain how payment must be effected, it must retain the amount and fund return on it until such time as the member, the non-member, or any other person provides details of how payment must be effected (s 37D(4)*(b)*(v)).

Most importantly, the new section 37D(4)*(d)* of the Pension Funds Act states:

> '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. It is interesting to note that the amendment refers specifically to 'a decree of divorce or decree for the dissolution of a customary marriage'. The reference to a decree for the dissolution of a customary marriage is superfluous, as section 8(1) of the Recognition of Customary Marriages Act 120 of 1998 requires a court order for the dissolution of a customary marriage by divorce. Thus, the phrase 'a decree of divorce' in section 37D(4) in any event covers a decree of divorce in respect of a customary marriage. Before the coming into operation of the 1998 Act, customary marriages were not fully recognized and did not have to be dissolved by a court. Parliament might have been concerned that the past position would influence the interpretation of 'a decree of divorce' under section 37D of the Pension Funds Act and might have included the specific reference to a 'decree for the dissolution of a customary marriage' ex abundanti cautela to ensure that there was no uncertainty regarding the application of the provision to customary marriages.

Section 37D(4)*(c)* confirms *Old Mutual Life Assurance Co (SA) Ltd & another v Swemmer* 2004 (5) SA 373 (SCA), in which the Supreme Court of Appeal held that the non-member spouse does not become the owner of the retirement annuity policy or any unaccrued pension benefits to which his or her portion of the pension interest relates. Nor does the non-member spouse replace the member spouse as a member of the pension or retirement annuity fund. Thus the non-member spouse cannot exercise any of the rights of the member spouse, such as anticipating or postponing the date on which the pension or retirement annuity will mature. Section 37D(4)*(c)*(i) expressly provides that '[a] non-member spouse is not a member or beneficiary in relation to the pension fund'.

Section 16*(c)* of the Amendment Act further inserts provisions into section 37D of the Pension Funds Act that change the determination of a 'pension interest' as defined in section 1(1) of the Divorce Act. In terms of section 1(1), the value of a spouse's pension interest is calculated in the following manner: *(a)* If the spouse is a member of a pension fund other than a retirement annuity fund, the pension interest is the benefit to which the spouse would have been entitled had he or she terminated his or her membership of the fund on the date of the divorce. *(b)* If the

spouse is a member of a retirement annuity fund, the pension interest is equal to all his or her contributions to the fund up to the date of the divorce, together with annual simple interest on those contributions calculated at the rate the Minister of Justice and Constitutional Development prescribes in terms of the Prescribed Rate of Interest Act 55 of 1975.

In terms of section 37D(5) of the Pension Funds Act, as inserted by section 16*(c)* of the Amendment Act, the total amount of annual simple interest payable may not exceed the fund return on the non-member spouse's portion. And, in terms of section 37D(6), the non-member spouse's portion of the member spouse's pension preservation fund or provident preservation fund is the equivalent of the benefits to which the member would have been entitled in terms of the rules of the fund had the member's membership of the fund terminated on the date of the divorce.

The above amendments remove a great deal of the uncertainty and unfairness that used to plague the sharing of pension interests of divorcing couples. They do not, however, provide impenetrable security to the non-member spouse, for, as pointed out above, a spouse who is set on frustrating payment of maintenance or a portion of the pension interest can still prejudice his or her spouse by entering into a loan or guarantee against his or her pension before the maintenance or divorce order is granted. Furthermore, the amendments do not apply to government employees, as the Government Employees Pension Fund is governed by separate legislation — the Government Employees Pension Law, 1996 (Proc 21 *GG* 17135 of 19 April 1996). Similar amendments have not yet been effected to the latter legislation.

Jurisdiction of Regional Courts Amendment Act

The Jurisdiction of Regional Courts Amendment Act 31 of 2008 ('the Act') was promulgated in *GG* 31579 of 5 November 2008 but has yet to come into operation. The main object of the Act is to extend the jurisdiction of the regional divisions of the magistrates' courts. The provisions of the Act that relate to jurisdiction in family-law matters largely correspond to the clauses of the Jurisdiction of Regional Courts Amendment Bill 48 of 2007 which were discussed in the 2007 *Annual Survey* at 906–7. Like the Bill, the Act empowers regional divisions to decide divorce and nullity

cases, cases relating to customary marriages, and matters arising from such cases, and it clothes the regional divisions with the same jurisdiction the High Court has in such matters (s 29(1B) of the Magistrates' Courts Act 32 of 1944 as inserted by s 7 of the Act). However, in so far as the power to preside in such matters is concerned, the Act differs from the Bill. The Bill restricted the power to magistrates who had completed a prescribed training course in civil adjudication (cl 3*(d)*). The Act is more accommodating. Section 12(7) of the Magistrates' Courts Act, as inserted by s 4*(d)* of the Act requires the Magistrates' Commission to keep a list of regional magistrates who may adjudicate civil disputes. Only those magistrates whose names appear on this list may preside (s 12(6) of the Magistrates' Courts Act, as inserted by s 4*(d)* of the Act). A magistrate's name may be entered on the list only if one or more places have been appointed in his or her regional division for the adjudication of civil disputes, and one of the following requirements is met (s 12(8) of the Magistrates' Courts Act, as inserted by s 4*(d)* of the Act): *(a)* the head of the South African Judicial Education Institute has issued a certificate that the magistrate has successfully completed an appropriate training course in the adjudication of civil disputes; *(b)* the Magistrates Commission is satisfied that, before the Institute was formed, the magistrate successfully completed an appropriate training course in the adjudication of civil disputes; or *(c)* the Commission is satisfied that, because of his or her previous experience as a magistrate presiding over the adjudication of civil disputes or as a legal practitioner with at least five years' experience in the administration of justice, the magistrate has suitable knowledge of and expertise in civil litigation to preside over the adjudication of civil disputes.

Granting regional courts jurisdiction to adjudicate divorce and nullity cases, cases relating to customary marriages, and resultant matters facilitates access to courts. A major concern, though, is the ability of the presiding officers in the regional divisions to adopt a different approach when presiding in these cases. The type of approach that is adopted in criminal matters is not suited to the resolution of family-law matters, especially those involving children. I hope that the training to be offered by the South African Judicial Education Institute will be comprehensive, not only with regard to black-letter family-law rules but also with regard to the approach that is needed in family-law matters.

SUBORDINATE LEGISLATION

Proclamation 213 *GG* 30790 of 18 February 2008 brought the Choice on Termination of Pregnancy Amendment Act 1 of 2008 into operation as from 18 February 2008.

The seventh amendment of the regulations issued under the Births and Deaths Registration Act 51 of 1992 were published in GN R463 *GG* 30988 of 25 April 2008. The amendment deletes the definition of 'immigration officer' and inserts a definition of 'inspectorate' into the regulations (reg 1). It further deals with the powers and duties of regional and district representatives of the Department of Home Affairs to receive and verify certain information, and requires the attachment of a copy of a successful application for the recognition of a customary marriage to a notice of birth of a child born from the marriage (regs 3*(c)* and 4A(2), respectively). It also effects several amendments regarding notice and registration of births (regs 5(1) and (2), 6(6)–(10), 7, and 10).

Government Notice 44 *GG* 30662 of 14 January 2008 sets out the revised fees that are payable in respect of various applications, obtaining a birth or death certificate, reproduction of an entry in the birth or death register, reproduction of supporting documents, verification of information from the birth or death register, and the issuing of a duplicate confirmation of the change of a person's forename or surname.

Government Notice R66 *GG* 30702 of 28 January 2008 contains the twelfth amendment of the regulations made under the Marriage Act 25 of 1961. This amendment substitutes regulation 5B, which deals with the issuing of, and payment for marriage certificates and letters of confirmation of a person's marital status.

Government Notice R1391 *GG* 31735 of 24 December 2008 grants another extension of the cut-off date by which customary marriages must be registered. Originally, customary marriages that were concluded before the coming into operation of the Recognition of Customary Marriages Act had to be registered with the Department of Home Affairs within a year after the coming into operation of the Act — by 15 November 2001 (s 4(3)*(a)*). This period was subsequently extended to 15 November 2002 (GN 1228 *GG* 22839 of 23 November 2001). The latest extension is to 1 November 2009. Customary marriages concluded after the coming into operation of the Act that have not yet been registered as required by s 4(3)*(b)* may also be registered up to 1 November 2009 (GN R1390 *GG* 31735 of 24 December 2008).

Government Notice R1170 *GG* 31561 of 31 October 2008 brought the sections of the Financial Services Laws General Amendment Act 22 of 2008 that change the law regarding pension sharing between divorcing and divorced spouses into operation as from 1 November 2008. Those sections are discussed above.

DRAFT LEGISLATION

Domestic Partnerships Bill

The regulation of domestic partnerships is long overdue. The fact that Parliament has started the process to enact legislation on domestic partnerships by publishing the Draft Domestic Partnerships Bill of 2008 (Gen N 36 *GG* 30663 of 14 January 2008) is, therefore, welcome. The Bill is largely based on the Domestic Partnerships Bill that appears as Annexure E of the South African Law Reform Commission's *Report on Domestic Partnerships Project 118* (2006).

The objectives of the published Bill correspond to those of the South African Law Reform Commission's draft Bill — 'to ensure the rights of equality and dignity of the partners in domestic partnerships' and to recognize the legal status of domestic partners, regulate their rights and obligations, and to protect and finally determine their interests and those of interested parties on the termination of the domestic partnership (cl 2).

The Bill distinguishes between registered and unregistered domestic partnerships. Chapter 3 governs registered domestic partnerships. It sets requirements for entering into a registered domestic partnership, stipulates when a registered domestic partnership comes to an end, and governs the consequences of a registered domestic partnership during its subsistence and upon its termination. A person may be a partner in only one registered domestic partnership at a time, and neither partner may be a party to a civil or customary marriage, or a civil union (cl 4(1) and (2)). Subject to these qualifications, any two adults may register their relationship as a domestic partnership by going through a registration procedure before a registration officer (cl 6). A registered domestic partnership ends upon the death of one or both partners, or through termination in terms of a court order or a joint written termination agreement (cll 12, 14, and 15). Partners who have minor children from the registered partnership

must apply to a High Court or regional magistrate's court for a termination order (cl 15 read with the definition of 'court' in cl 1 and s 29(1B)*(a)* of the Magistrates' Courts Act, the latter as inserted by s 7 of the Jurisdiction of Regional Courts Amendment Act). If the partnership is terminated by death, the surviving partner qualifies as a 'spouse' and 'survivor' for purposes of the Maintenance of Surviving Spouses Act 27 of 1990 and the Intestate Succession Act 81 of 1987 (cll 19 and 20). While a registered domestic partnership exists, the partners owe each other a duty of support, are entitled to occupy the family home, and may not, without each other's written consent, sell, donate, mortgage, let, lease, or otherwise dispose of joint property (cll 9–11). A registered domestic partnership is subject to complete separation of property except to the extent that the partners deviate from this dispensation in a registered domestic partnership agreement (cl 7(1) and (3)). In the case of a dispute regarding the division of property upon the termination of the partnership, either party, or both parties, may apply to court for an order dividing their property (cl 7(2) read with cl 22). The application must be made within two years of the termination of the partnership, unless the court grants the applicant leave to apply after the expiry of the period (cl 23). If the parties entered into a registered domestic partnership agreement, the court may deviate from the agreement if giving effect to it would cause serious injustice (cl 8). If the parties did not enter into an agreement regarding the payment of post-termination maintenance, the court may make any maintenance order it considers just and equitable, taking specified factors into account (cl 18).

Chapter 4 of the Bill applies to unregistered domestic partnerships. It deals mainly with the termination of such partnerships. It provides that an unregistered domestic partnership is terminated by death or separation (cl 26(1)). After the termination, either party, or both parties, may apply to court for a maintenance order, an intestate succession order, and/or a property division order (cll 26(1), and 28–33). The court makes an order in view of all the circumstances of the relationship, including its duration and nature, the nature and extent of common residence, the degree of financial dependence or interdependence between the partners, any arrangements for financial support the partners have made, the ownership, use, and acquisition of property, the degree of mutual commitment to a shared life, the care and support of children of the partnership, the performance of house-

hold duties, the reputation and public aspects of the relationship, and the status of the relationship in the eyes of third parties (cl 26(2)). The property division order must be sought within two years of the termination of the partnership, unless the court grants the applicant leave to apply after the expiry of the period (cll 32 and 33). If an unregistered domestic partnership is terminated by death, the surviving partner may claim maintenance from the deceased estate and inherit as an intestate heir only if the court orders it (cll 29–31). Unregistered domestic partners do not owe each other a duty of support and are not entitled to post-separation maintenance unless they agree to it, or the court orders it (cl 27).

Judicial Matters Amendment Bill

A reprint of the Judicial Matters Amendment Bill 48B of 2008 was published in General Notice 705 *GG* 31117 of 2 June 2008. Clause 21 of the Amendment Bill proposes to amend section 18 of the Matrimonial Property Act 88 of 1984 in keeping with *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC). In *Van der Merwe,* the Constitutional Court declared section 18*(b)* of the Matrimonial Property Act unconstitutional. In terms of section 18*(b)*, a spouse married in community of property could recover non-patrimonial damages for bodily injuries his or her spouse inflicted on him or her, but was not allowed to recover patrimonial damages for such injuries. The Constitutional Court confirmed the High Court's order that the words 'other than damages for patrimonial loss' in section 18*(b)* be struck out. The Constitutional Court further ordered that the words 'such damages do not fall into the joint estate but become the separate property of the injured spouse' must be read into the section after the words 'either wholly or in part to the fault of that spouse'. By virtue of this insertion, all damages for bodily injuries accrue to the separate estate of the injured spouse if the bodily injuries were inflicted by the injured person's spouse. If the injuries were inflicted by a third party, section 18*(a)* operates. The latter section still excludes only non-patrimonial damages from the joint estate.

Clause 21 of the Judicial Matters Amendment Bill proposes to amend section 18 of the Matrimonial Property Act to read as follows:

> 'Notwithstanding the fact that a spouse is married in community of property —

(a) any amount recovered by him or her by way of damages, other than damages for patrimonial loss, by reason of a delict committed against him or her, does not fall into the joint estate but becomes his or her separate property;
(b) he or she may recover from the other spouse damages in respect of bodily injuries suffered by him or her and attributable either wholly or in part to the fault of that spouse and these damages do not fall into the joint estate but become the separate property of the injured spouse.'

Marriage Amendment Bill

The Marriage Amendment Bill of 2008, published for comment in General Notice 35 *GG* 30663 of 14 January 2008, has been replaced by the Marriage Amendment Bill of 2009 (General Notice 149 *GG* 31864 of 13 February 2009).

Draft Regulations in Terms of the Children's Act

In June 2008, the Minister of Social Development published draft regulations in terms of the Children's Act 38 of 2005 (Gen N 780 *GG* 31165 of 27 June 2008). Chapter 1 of the draft regulations contains definitions and requires the Member of the Executive Council for Social Development in each province to compile a provincial profile of the strategies concerning partial care, early childhood development, child protection, prevention and early intervention programmes, the provision of child and youth care centres, and drop-in centres. Chapter 2 deals with consent to, and the conducting of, virginity tests and male circumcision. Chapter 3 governs parental responsibilities and rights agreements and parenting plans, while chapter 4 provides that the Director-General may require a person to receive counselling before he or she gets access to any biographical and medical information regarding a child's genetic parents. The draft regulations on partial care are contained in chapter 5. They deal, inter alia, with the registration and management of partial care facilities, and the national norms and standards these facilities must meet. (The norms and standards are set out in Part A of Annexure A.) Chapter 6, read with Part B of Annexure A, deals with early childhood development programmes and the national norms and standards to be met. Chapters 7 and 8 contain extensive draft regulations regarding the child protection system and the National Child Protection Register. The national norms and standards for child protection services are set out in Part C of

Annexure A. Consent to medical treatment of and surgery on children, and the duties and accountability of adults who supervise child-headed households, are regulated by chapters 9 and 10, while chapter 11, read with Part D of Annexure A, sets out the national norms and standards for prevention and early intervention programmes. Chapter 12 regulates the removal of children who are in need of temporary safe care, the bringing of children before the children's court to decide whether they are in need of care and protection, and the position of abandoned and orphaned children. Chapter 13 governs the provision of alternative care, the approval of persons, facilities, places or premises for temporary safe care, leave of absence of children from alternative care, the transfer or discharge of children from alternative care, and the extension of alternative care beyond the age of eighteen. Chapter 14 regulates foster care by individuals and cluster foster care schemes. Chapter 15, read with Part E of Annexure A, sets out the national norms and standards for child and youth care centres, governs the registration and management of such centres, places restrictions on behaviour management in such centres, and sets out the rights of children who are placed in such centres. The registration and management of drop-in centres, and the national norms and standards for drop-in centres, are regulated by chapter 16, read with Part F of Annexure A. Chapters 17 and 18 deal with adoption and inter-country adoption, while chapter 19 regulates child trafficking. The draft regulations further contain 79 forms pertaining to the Children's Act.

The same General Notice in which these draft regulations were published also contains draft regulations published by the Minister of Justice and Constitutional Development for comment. The five chapters of those draft regulations deal with the appointment, functions, powers, and duties of clerks of the children's court, aspects of the procedure in the children's courts, pre-hearing and family group conferences, child abduction, and miscellaneous matters, such as the keeping of records, the submission of statistics to the Magistrates' Commission, and contribution orders. These draft regulations also contain forms pertaining to the Children's Act, but they are much more limited in number than the ones published by the Minister of Social Development — there are only fourteen of them.

CASE LAW

Breach of Promise to Marry

In *Sepheri v Scanlan* 2008 (1) SA 322 (C), the plaintiff instituted a claim on the ground of breach of promise. She sought contractual damages in the amount of R1 309 250 plus £21 708 in respect of loss of the financial benefits of the marriage she would have entered into, and delictual damages in the amount of R250 000 for iniuria the defendant allegedly inflicted on her. Alternatively, she claimed an order declaring that a universal partnership existed between her and her former fiancé during the period they had lived together. The defendant instituted a claim in reconvention for damages in the amount of R50 000 for defamation and R250 000 for loss of rent, because the plaintiff had refused to vacate the parties' common home after the breakup of their relationship. He also sought the plaintiff's eviction from the house, which was registered in his name and was paid for with his funds. The plaintiff argued that she was not in unlawful occupation of the house, as the house was an asset of the universal partnership that she alleged existed between the parties.

Although Davis J in an obiter dictum questioned whether the claim for breach of promise still had a place in South African law (at 330–1), he accepted that the action still formed part of our law and proceeded to decide the case on this basis. He pointed out that the plaintiff would succeed with a claim based on breach of promise only if she could prove on a balance of probabilities that a contract of engagement existed between the parties and that the defendant had terminated the engagement without justification (at 331D–F). The parties were in agreement that they were engaged, but differed on who had broken off the engagement. On the evidence, Davis J concluded that it was the defendant who had terminated the engagement (at 336C). The plaintiff was accordingly entitled to damages for breach of promise.

Davis J then dealt with the damages that should be awarded to the plaintiff. In the case of breach of contract, damages are normally calculated on the basis of positive interest, with the result that the wronged party receives an amount that places him or her in the position he or she would have been in had the contract been fulfilled. In the case of breach of the contract of engagement, a pure application of this rule means that the wronged party is placed in the position he or she would have

been in had the marriage taken place. In the present case, there was no evidence regarding the matrimonial property system the parties would have chosen 'other than the repetitious assertion ''when we are married half of this will be yours''' (at 336F). This assertion suggested that the parties would have married in community of property. Applying the ordinary rule regarding contractual damages, the plaintiff would be entitled to half of what would have fallen into the parties' joint estate — half the defendant's South African and foreign assets. These assets amounted to R2 618 500 and £43 417. However, instead of awarding the plaintiff half these amounts, Davis J took the possibility that the plaintiff might in the future get married into account to reduce the damages to which she was entitled (at 337D). His approach is in keeping with *Guggenheim v Rosenbaum (2)* 1961 (4) SA 21 (W), where the court held that both the prospective loss of the benefits of the marriage and the actual monetary loss or expenditure incurred or to be incurred can be awarded, provided that the latter flowed directly from the breach of promise, or were reasonably supposed to have been contemplated by the parties as a probable consequence of the breach. The court further held that as far as prospective loss is concerned, it would take into account factors such as how long the marriage would probably have lasted, the plaintiff's age, and the possibility of the plaintiff marrying someone else (*Guggenheim v Rosenbaum* at 40F–H). The calculation of contractual damages for breach of promise is thus sui generis, in the sense that the principle of awarding positive interest is not applied in a pure way (DSP Cronjé & Jacqueline Heaton *South African Family Law* 2 ed (2004) 14; MJ de Waal & BJ van Heerden 1987 *TSAR* 254 at 255; WA Joubert (founding ed) *The Law of South Africa* vol 16 sv 'Marriage' 2 ed by Jacqueline Heaton, Joan Church & Jacqueline Church (2006) par 9). In the present case, Davis J reduced the contractual damages by 50 per cent as he concluded that the plaintiff's marriage prospects were 'reasonably good' (at 337D–E). He accordingly awarded her R654 625 and £10 854 as contractual damages for breach of promise (at 341F).

In so far as her delictual claim for iniuria was concerned, Davis J found that both parties had made malicious assertions against each other, that their emotional outbursts were 'but a sad reflection of the result of a relationship turned terribly sour', and that the 'emotional pyrotechnics was an inevitable consequence of ferocious litigation' (at 337H–I). He accordingly did not award the plaintiff any amount for iniuria.

Although Davis J partly granted the plaintiff's primary claim for contractual damages, he also had to deal with whether a universal partnership existed between the parties, as the existence of the universal partnership was central to his decision on the defendant's counterclaim for loss of rent. The plaintiff alleged that the defendant expressly entered into a universal partnership agreement with her by stating that everything was 'ours' (at 326F–H, 338–9, and 339B–C), while the defendant alleged that his intention was that everything would be shared once they had married. Taking all the evidence into account, Davis J concluded that the defendant never intended to enter into a universal partnership with the plaintiff (at 339G–I). As consensus is one of the requirements for the coming into existence of a universal partnership, no universal partnership existed between the parties (at 339J). Because there was no universal partnership, and because Davis J concluded that there were no circumstances that rendered the plaintiff's eviction from the property unjust and inequitable as envisaged by the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998, the plaintiff's occupation of the property was declared unlawful and she was ordered to vacate it (at 340F–I). Davis J further found that as the plaintiff's occupation of the property was unlawful, the defendant was entitled to damages for loss of the rent he would have earned had the plaintiff not occupied the property unlawfully (at 340I).

In so far as the defendant's contention that he had been defamed by allegations that the plaintiff had made in earlier spoliation proceedings relating to the immovable property were concerned, Davis J held that the allegations were relevant within the context of the spoliation proceedings and the 'general litigation between the parties' (at 341D). The defendant's claim for damages for defamation was dismissed (ibid). In the final result, the plaintiff was awarded R654 625 and £10 854 plus interest at the rate of 15,5 per cent as well as costs in respect of her claim for breach of promise, but she had to pay the defendant R250 000 plus interest at the rate of 15,5 per cent and costs in respect of her eviction.

Children

Abduction

In *Central Authority v H* 2008 (1) SA 49 (SCA) the Supreme Court of Appeal set aside an order that Van Oosten J had made in

terms of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996. He had ordered the return of the mother of an abducted child to the Netherlands, where the child had been habitually resident prior to his removal to South Africa. The child was born of married parents who had equal custody rights in respect of the child. The mother and child came to South Africa with the father's permission. After some months in South Africa, the mother refused to return to the Netherlands or to let the child return to the Netherlands. The parents' versions regarding the reason for the visit to South Africa and its agreed duration differed markedly. Although the mother and child had travelled to South Africa on return tickets, the mother alleged that the family had agreed to emigrate to South Africa and that the father would come to South Africa once he had wound up the family's affairs in the Netherlands. The father, however, stated that he and the child's mother had agreed that she and the child could take a holiday of, at most, three months. While the mother and child were in South Africa, the parents agreed to divorce and the father instituted divorce proceedings in the Netherlands. The mother refused to return to the Netherlands or to return the child for a determination on who should have custody of the child. The father approached the Dutch central authority to obtain the child's return in terms of the Hague Convention on the Civil Aspects of International Child Abduction on the ground that the child's retention in South Africa was wrongful. When the mother refused to return the child, the South African central authority (the Chief Family Advocate) brought an application for an order directing the child's return to the Netherlands. Van Oosten J ordered the mother's return to the Netherlands for the purpose of attending and/or opposing the custody hearing in respect of the child if oral evidence were required in the hearing. The South African central authority appealed against this order.

Van Heerden JA delivered the unanimous judgment of the Supreme Court of Appeal. She reiterated that one of the main objects of the Convention is to achieve the prompt return of children who have been wrongfully removed to, or retained in a contracting state so that custody and similar issues can be adjudicated upon in the country of the child's habitual residence (para [16]; also *Smith v Smith* 2001 (3) SA 845 (SCA); *Pennello v Pennello (Chief Family Advocate as amicus curiae)* 2004 (3) SA 117 (SCA)). Subject to certain exceptions, the court in the contracting state to which the child has been wrongfully removed

or in which he or she is wrongfully retained is compelled to order the child's immediate return (arts 12, 13, and 20 of the Convention). One of the exceptions or defences to the child's return is that the person, institution, or body who cared for the child was not actually exercising custody rights at the time of the child's removal or retention, or consented to or subsequently acquiesced in the child's removal or retention (art 13*(a)*). In the present case, the mother's argument that neither the removal nor the retention of the child was wrongful, as the father had consented to it, amounted to this defence (para [12]). The burden of proving a defence rests on the party resisting the child's return. Thus, the mother had to prove that the father had consented to the child's retention in South Africa (paras [18] and [21]). Van Heerden JA referred to the judgment of the Family Division in England in *Re K (Abduction: Consent)* [1997] 2 FLR 212 (FD). There it was held that consent has to be proved on a balance of probabilities and that the evidence in support of consent must be clear and cogent. In the case of uncertainty, the defence fails (*Re K* 217; *Central Authority v H* para [20]). On the evidence, Van Heerden JA concluded that the mother had failed to discharge the burden of proof, and that her defence was unsustainable (para [25]).

Van Heerden JA further pointed out that as none of the exceptions provided for by the Convention applied, the court below had been obliged to order the child's return. Instead, it had ordered the mother's return for the purposes of attending and/or opposing the custody hearing in respect of the child, if oral evidence were required in the hearing. Such an order does not comply with the Convention (para [26]). The appeal was accordingly upheld and a new order made. The order directed that the child be returned to the Netherlands. It further instructed the father to obtain an order in the Netherlands should the mother indicate that she wanted to accompany the child. The Dutch court should award interim custody to the mother. Unless the Dutch court made a different order, the father should provide his wife and child with accommodation, maintenance, medical expenses, and a roadworthy vehicle with a child seat, and pay their travel expenses to the Netherlands, while the father should have reasonable access to the child. Pending the child's return to the Netherlands, the mother was prohibited from removing the child from Gauteng and was ordered to keep the Family Advocate informed of her physical address and telephone numbers (para [37]).

The decision is uncontentious. Note, however, that when item 8 of Schedule 4 of the Children's Act comes into operation, the Hague Convention Act will be repealed. However, chapter 17 and Schedule 2 of the Children's Act re-enact most of the provisions of the Act and incorporate the Convention into our domestic law.

Adoption

In *AD v DW (Centre for Child Law as amicus curiae; Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC), the applicants were foreigners who wanted to adopt the child in the United States of America. They sought leave to appeal to the Constitutional Court against the order of the Supreme Court of Appeal in *De Gree & another v Webb & others (Centre for Child Law as amicus curiae)* 2007 (5) SA 184 (SCA) (see 2007 *Annual Survey* 914–19). They further sought an order replacing the court's dismissal of their appeal against an unsuccessful application for an order awarding sole guardianship and sole custody of an abandoned South African baby to them, and authorizing them to remove the child from South Africa. The Supreme Court of Appeal had held that granting the order for sole guardianship and sole custody, and authorizing the child's removal from South Africa, would amount to sanctioning a route to inter-country adoption which would bypass the protective provisions of the Child Care Act 74 of 1983 in respect of adoption. The order would also violate the principle of subsidiarity.

Shortly after the hearing commenced in the Constitutional Court, the parties reached a settlement, which they asked the court to make an order by consent. In terms of the agreement, the child was declared to have been abandoned, and the children's court was directed to hear the adoption application on an expedited basis. The children's court was further requested to consider the favourable reports of the social workers and the child's curatrix ad litem; the appointment of the curatrix was extended to enable her to act on the child's behalf in the adoption proceedings. The agreement further recorded that the parties agreed that it was in the child's best interests to be adopted by the applicants and that the principle of subsidiarity was not a bar to the adoption, that the Department of Social Development and the amicus curiae did not oppose the adoption, and that the Department of Social Development would sign all documentation necessary to facilitate the adoption. Once the adoption was finalized, it would be registered by the Department. The Constitu-

tional Court acceded to the parties' request and made the agreement an order of court by consent (para [17]). However, as the agreement did not resolve the underlying constitutional issues, the court still had to give judgment on those.

Delivering the Constitutional Court's unanimous judgment, Sachs J also provided the court's reasons for making the agreement an order of court. He pointed out that the court had to ensure that the terms of the agreement were neither against the child's best interests nor, broadly, incompatible with South Africa's international obligations (para [59]). The question was not whether the applicants would be suitable adoptive parents for the child — that was a matter for the children's court. The Constitutional Court merely had to satisfy itself that there was nothing on the face of the agreement that militated against the child's best interests (para [60]). In view of the report of the curatrix and the fact that the child's stage of emotional, cultural, and ethical development and ability to adapt to change required a speedy resolution of the dispute, Sachs J was satisfied that the terms of the agreement had the object of serving the child's best interests (paras [61]–[62]).

The court further granted the application for leave to appeal, as it found it to be in the interests of justice that the issues that were raised by the matter be decided by the Constitutional Court (paras [20]–[21]). Dealing with the appeal, Sachs J indicated that two interrelated constitutional issues arose in the present case — the jurisdiction of the High Court to hear an application for sole guardianship and sole custody where the ultimate purpose is the child's adoption in another country, and how section 28(2) of the Constitution of the Republic of South Africa, 1996 should be interpreted in the context of a proposed inter-country adoption (para [18]).

In respect of the first issue, he referred to *Minister of Welfare and Population Development v Fitzpatrick & others* 2000 (3) SA 422 (CC). Prior to *Fitzpatrick*, section 18(4)*(f)* of the Child Care Act forbade adoption of South African children by foreigners. In *Fitzpatrick*, section 18(4)*(f)* was declared unconstitutional and invalid on the ground that the blanket ban it imposed unjustifiably violated section 28(2) of the Constitution, which provides that the child's best interests must be paramount in every matter concerning the child. The court further stated that children's courts are the sole authority empowered to grant orders of adoption. Sachs J pointed out that, in the present case, the applicants decided not

to approach the children's court, because they had been advised that instructions issued by the Department of Social Development would block them from adopting the child, and that the children's court would apply the subsidiarity principle in such a way that they could not become the child's adoptive parents even if the facts showed that adoption was in the child's best interests (para [25]). Only in documents filed in the Constitutional Court shortly before the hearing did it become clear that this information was inaccurate, in that the department was not implacably opposed to inter-country adoption or to inter-country adoption to the United States (paras [27] and [28]). Sachs J held that, with or without the necessary information, the High Court had been correct in holding that the appropriate route for the proposed adoption in the present case was to bring adoption proceedings in the children's court (para [29]). He further held that the High Court retained its capacity as upper guardian of all minors, and that the Child Care Act did not implicitly create an inflexible jurisdictional bar to a High Court granting a sole guardianship and sole custody order to foreigners who intended to obtain an inter-country adoption (paras [31] and [34]). However, such an order should be made in exceptional circumstances only, for adoption proceedings in the children's court usually protect the child's best interests better. In the children's court, there are safeguards and appropriate procedures that do not operate in respect of an application for sole guardianship and sole custody in the High Court. Furthermore, the High Court cannot guarantee that an adoption order will ultimately be sought and granted in the foreign country (para [33]). Sachs J held that the present case was not exceptional where approaching the children's court for an adoption order would not have been in the child's best interests. He concluded that the majority in the Supreme Court of Appeal had been right in deciding that a sole guardianship and sole custody order should not be granted (para [32]).

Sachs J then considered whether the majority decision of the Supreme Court of Appeal, that the principle of subsidiarity barred the granting of an adoption order in favour of the applicants, was correct. He pointed out that a direct consequence of *Fitzpatrick* was that while foreigners were no longer barred from adopting South African children, no clear statutory regime existed to deal with inter-country adoptions (para [36]). Because of the lack of statutory guidance, the principle of subsidiarity that applies in international law came into play (ibid). In respect of inter-country

adoption, this principle was first articulated internationally in article 17 of the United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, which was adopted by the General Assembly on 3 December 1986. It provides that inter-country adoption may be considered as an alternative means of providing a child with a family, if the child cannot be adopted or placed in foster care or another form of suitable care in his or her country of origin. The principle is also enshrined in article 21*(b)* of the United Nations Convention on the Rights of the Child ('CRC') and article 24*(b)* of the African Charter on the Rights and Welfare of the Child ('the African Charter'), which permit inter-country adoption only if the child cannot be adopted or placed in foster care, or cannot in any suitable manner be cared for in his or her country of origin (para [38]). Article 4*(b)* of the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption ('the Hague Convention') also refers to the principle of subsidiarity, but is less restrictive than the CRC and the African Charter, as it permits inter-country adoption 'if the competent authorities of the state of origin have determined, after possibilities for placement of the child within the state of origin have been given due consideration, that an inter-country adoption is in the child's best interests' (para [47]). The Hague Convention thus recognizes that a child's need for a permanent home and family may be greater than his or her need to remain in his or her country of birth, and that an inter-country adoption can be in a child's best interests (para [48]). Although South Africa has acceded to the Hague Convention, it does not yet form part of our domestic law, as the parts of the Children's Act that apply the Hague Convention to our law have not yet come into operation (para [53]). According to Sachs J, the reduction of the effect of the subsidiarity principle by the Hague Convention is better aligned to the best interests of the child than the subsidiarity principle as expressed in the CRC and the African Charter (para [47]). He held that in all cases the best interests of the child must be paramount and determined by way of a contextualized case-by-case enquiry in which the child's best interests are not circumscribed by mechanical legal formulae or rigid hierarchical rankings of care options (paras [49] and [50]). The starting point and guiding principle must be that there are 'powerful considerations favouring adopted children growing up in the country and community of

their birth', but that the subsidiarity principle is subsidiary to the paramountcy principle (para [55]). Sachs J accordingly concluded that the statement by the majority of the judges in the Supreme Court of Appeal, that the principle of subsidiarity was an insurmountable barrier to the granting of an order in favour of the applicants, was framed too simply (para [54]).

Although Sachs J found that, ultimately, the majority's decision that the matter should have been pursued in the children's court 'was basically correct', he criticized them for simply dismissing the appeal and leaving the child in a legal limbo. He held that they should have taken into account that a new situation had been created since the first hearing of the matter, as the child had grown older. They should proactively have made an order referring the matter to the children's court for speedy resolution. Such an order would have enabled the question of subsidiarity to be looked at by the children's court in the overall context of determining where the best interests of the specific child lay (para [56]). Sachs J accordingly upheld the appeal and replaced the order of the Supreme Court of Appeal by the consent order (para [63]).

The Constitutional Court's confirmation that the High Court has the power to make an order for sole guardianship and sole custody even if the order is sought with the ultimate object of obtaining an inter-country adoption is welcome. The sole criterion that should be used to determine whether the High Court has the power to act as upper guardian and whether it should exercise that power is the best interests of the child in the particular case. The determining factor should not purely be the motive of the person or body approaching the court. Imposing a blanket restriction on the High Court's power to grant a sole guardianship or sole custody order purely because the ultimate object of the applicants is to obtain an inter-country adoption, would constitute such a drastic limitation of section 28(2) of the Constitution that it would be unjustifiable.

Children's Rights

S v M (Centre for Child Law as amicus curiae) 2008 (3) SA 232 (CC) deals with children's rights in the context of sentencing (for discussion, see 2007 *Annual Survey* 920–5).

Several provisions of the Criminal Procedure Act 51 of 1977 dealing with the position of child witnesses and child victims were declared unconstitutional on the ground that they are inconsistent

with section 28(2) of the Constitution (*S v Mokoena* 2008 (5) SA 578 (T)). Other provisions of the Act were found to violate the right to equality entrenched in section 9 of the Constitution (see further the chapter on Constitutional Law).

In *Centre for Child Law & others v MEC for Education, Gauteng, & others* 2008 (1) SA 223 (T), the court held that certain practices and conditions at a school of industry violated several sections of the Constitution. Murphy J ordered the Member of the Executive Council for Education of Gauteng Province ('the MEC') to supply each pupil at the school with a sleeping bag and to devise plans for perimeter and access control at the school. From a family-law perspective, Murphy J's statements about the state's duty to provide care and social services to children who are placed in a school of industry as a result of a court order in terms of section 15(1)*(d)* of the Child Care Act are noteworthy. He pointed out that placing a child in a school of industry is based on the idea that the school will provide a higher standard of care than that which the child's parents can provide. However, in the present case, the children were living in conditions that might be poorer than those from which they were removed (at 227B–C). Consequently, the 'scheme and object' of the Child Care Act were defeated by the state's failure to furnish the means and measures needed to give effect to the state's constitutional and statutory obligations to the pupils who were living in the school of industry (at 227C). Murphy J held that because the state is obliged to provide care and social services to children who have been removed from their family environment (s 28(1)*(b)* and *(c)* of the Constitution), the government must provide appropriate facilities for and meet the basic needs of such children (at 228G). It was thus impermissible to plead — as the MEC had done — that efforts would be made to raise funds from the Red Cross to obtain sleeping bags for the children (at 228F–H). Unlike some of the other sections of the Constitution that deal with socio-economic rights, section 28 does not contain an internal qualification subjecting children's rights to the availability of resources and legislative measures for the progressive realisation of the rights (at 227I). So the state's duty to provide the children with appropriate facilities and to meet the children's basic needs could not be restricted to the state's pleading with private parties to furnish it with resources that will enable it to meet its obligations (at 228G–H). He held that although children's rights, like all constitutional rights, are subject to limitation, the absence of any internal

limitation in section 28 entrenches the rights that are contained in it as unqualified and immediate (at 227J).

Custody/Care

J v J 2008 (6) SA 30 (C) is an appeal to the full bench of the Cape Provincial Division (now the Western Cape High Court) against the dismissal of an urgent application in which the father of a child sought an order compelling the mother to re-enrol the child at a particular school. The parents were divorced. As the child was born while his parents were married to each other, the parents were co-holders of parental responsibilities and rights in respect of the child (ss 19 and 20 of the Children's Act). In terms of the parents' divorce settlement agreement, custody was awarded to the mother. However, the settlement agreement further provided that the father had the right to decide which school the child should attend, provided that he paid the child's school fees in full. His failure to pay the school fees would result in the mother being entitled to select the child's school. Several years after the divorce, the father failed to pay the child's school fees. The mother then moved the child from the English private school where he was enrolled to an Afrikaans public school. The child was fully bilingual, although his home language was Afrikaans. He was still at primary school but it was envisaged that he would attend an Afrikaans High School. The Afrikaans primary school was closer to his mother's home, and he and his mother agreed that it was in his best interests that he be enrolled at the Afrikaans school.

On appeal, the child's mother sought to place extracts from a report by an educational psychologist before the court. The psychologist had evaluated the child at the father's request and had recommended that the child be enrolled at the Afrikaans school. The father did not want the report to be considered. The full bench held that in its capacity as upper guardian of all minors it may, and must, consider all relevant facts in order to make a decision on the child's best interests. It reiterated the widely accepted view that, as upper guardian, the High Court is not bound by procedural strictures, the limitations of the evidence placed before it, or the arguments advanced by the parties, and it may consider any source of information that may assist it in arriving at a decision regarding the child's best interests (para [20]). As the recommendations in the educational psychologist's report were material, the court decided to take them into account (para [21]).

Another issue that was raised on appeal was whether the partial coming into operation of the Children's Act on 1 July 2007 rendered the parties' settlement agreement invalid because it violated the spirit and policy underlying the Act. The judgment does not indicate in what regard the agreement allegedly violated the spirit and policy underlying the Act. It seems that it was the mere fact that the agreement allocated custody to the mother that the father found objectionable. The full bench rejected the contention that the agreement was invalid. It stated that the Act embeds the principle that the incidents of parental responsibilities and rights may be regulated by agreement, and that such agreement may be made an order of court. It pointed out that section 30(3) permits an agreement in terms of which one co-holder authorizes another to exercise any or all of his or her parental responsibilities on his or her behalf. In terms of section 30(4), such an agreement does not divest the co-holder of his or her parental responsibilities and rights. The court stated that the latter statutory rule is in line with the common-law principle that awarding custody to one parent does not divest the other parent of guardianship or access (para [32]).

The full bench further rejected the father's contention that the court below had made factual errors regarding the child's position which justified setting its order aside (paras [23] and [24]). The full bench also rejected the father's contention that section 31(2) of the Children's Act required the mother first to give due consideration to the father's views before enrolling the child in a different school (paras [33] and [35]). Section 31(2) provides that before a co-holder of parental responsibilities and rights takes any decision which is likely to change significantly or to have a significant adverse effect on the co-holder's exercise of parental responsibilities and rights in respect of the child, he or she must give due consideration to any views and wishes expressed by the co-holder. The full bench pointed out that a child's custodian normally has the right to decide which school the child will attend (para [31]). In the present case, the settlement agreement varied the normal position subject to the father's full payment of the child's school fees. When the father failed to pay the school fees, he forfeited the right to choose the child's school and the right reverted to the mother. Citing section 30(2) of the Children's Act as authority, the full bench held that the mother could act without the father's consent in selecting a school for the child (para [31]). As the mother had the right to select the child's

school, her decision to change the child's school had no effect on the father's parental responsibilities and rights (para [34]). Section 31(2) accordingly did not apply and did not oblige the mother to give due consideration to the father's views and wishes. The full bench, correctly, further stated that even if the mother were obliged to give due consideration to the father's views and wishes, she was in no way bound to give effect to them. She simply had to consider them and could then act independently (para [35]). The full bench also held, again correctly, that failure to give consideration to the father's views and wishes would not render the mother's decision void or invalid. Her decision would remain effective but could be set aside on review if the decision was not in the child's best interests (ibid).

Taking all the relevant factors into account, including the report which the father had obtained from the educational psychologist, the full bench concluded that the mother's decision to enrol the child in the Afrikaans school was in the child's best interests (paras [37]–[43]). The appeal was accordingly dismissed. The full bench further made a costs order against the father (para [45]).

In the main, the judgment is correct. One point of criticism is that the court relied on section 30(2) of the Children's Act as authority for its decision that the mother could act without the father's consent in deciding which school the child should attend. Section 30(2) states:

> 'When more than one person holds the same parental responsibilities and rights in respect of a child, each of the co-holders may act without the consent of the other co-holder or holders when exercising those responsibilities and rights, except where this Act, any other law or an order of court provides otherwise.'

In *J v J*, the parents did not hold the same parental responsibilities and rights in respect of the child. Upon the parents' divorce, custody was awarded to the mother subject to the father's right to choose the child's school provided that he paid the school fees. When the father failed to pay the school fees, all incidences of custody reverted to the mother. Thus she alone had the parental responsibilities and rights encompassed by custody. She did not need the father's consent to enrol the child at a different school, as she was the only person who had the particular parental responsibility and right, and not because section 30(2) empowered her to act without the father's consent.

Delict

Wessels v Pretorius [2008] 1 All SA 131 (SCA) concerns the liability of a parent for his or her minor child's delict. In this case, a 16-year-old boy had driven his father's vehicle with his father's permission. The boy had executed a manoeuvre that caused serious injury to the respondent. The respondent successfully sued the boy's father for damages. The Supreme Court of Appeal held that the boy had driven recklessly, that his father had acted negligently in giving him unrestricted access to the vehicle in circumstances where it ought reasonably to have been foreseen that he might use the vehicle in a manner that might cause harm to others, and that the damage he caused was causally connected to his father's negligence. See further the chapter on the Law of Delict.

High Court as Upper Guardian of Minors

In *B v B* 2008 (4) SA 535 (W), Moshidi J set aside a protection order that had been made against a mother in terms of the Domestic Violence Act 116 of 1998, as well as an order awarding interim custody to the children's father pending the present decision. The parents were in the process of getting divorced. In light of the facts of the case, Moshidi J concluded that the father had obtained the protection order on spurious grounds. He held that the Domestic Violence Act did not remove the High Court's powers as the upper guardian of all minors to decide what is in the best interests of children (para [24]). On the ground that the protection order was not in the best interests of the children, Moshidi J set it aside and awarded interim custody to the mother pending the divorce (para [32]).

On the High Court's power as upper guardian to make an order for sole guardianship and sole custody as a prelude to an inter-country adoption, see *AD v DW* (supra).

In *J v J* (supra), the High Court used its power as upper guardian of all minors to deviate from procedural rules in order to consider extracts from a psychologist's report that were placed before it only on appeal.

Maintenance

Forssman v Forssman 2008 (2) SA 144 (W) (also reported in [2007] 4 All SA 144 (W)) was discussed in the 2007 *Annual Survey* at 931–2.

In *Fosi v Road Accident Fund & another* 2008 (3) SA 560 (C), the court reiterated the common-law principle that a parent is entitled to be maintained by his or her child if he or she is indigent (paras [12]–[13]). Whether a parent is indigent, is a question of fact that must be decided in each individual case. Indigence refers to not having the necessities of life; what constitutes necessities of life, depends on the parent's station in life (para [13]). The court further pointed out that customary law also imposes a duty of support on a child who is financially able to provide maintenance to his or her needy parents (paras [16] and [17]). As the plaintiff and the deceased were black persons, the court considered it appropriate to apply both the common-law and the customary-law rule (paras [24]–[25]). See further the chapter on the Law of Delict.

Curator

Road Accident Fund v Mdeyide (Minister of Transport Intervening) 2008 (1) SA 535 (CC) (also reported in 2007 (7) BCLR 805 (CC)) was discussed in the 2007 *Annual Survey* at 932–3.

In *Spangenberg & another v De Waal* [2008] 1 All SA 162 (T), the court confirmed that a curator bonis lacks locus standi to institute divorce proceedings on behalf of the person whose property he or she administers. See further below.

In *Shea v Legator McKenna Inc & others* [2008] 1 All SA 491 (D), a curator bonis sold immovable property belonging to the incapacitated person whose affairs he was managing. The sale occurred after the High Court had made an order declaring the person incapable of managing her own affairs and appointing the second defendant as her curator bonis but before the curator received letters of curatorship. The court order specifically stipulated that the curator was 'required to exercise the powers conferred upon him subject to the approval of the Master' (at 494*h*). The incapacitated person successfully attacked the validity of the sale. The court supported the decision in *Bouwer NO v Saambou Bank Bpk* 1993 (4) SA 492 (T) and held that acts a curator bonis carries out after being appointed by the court but prior to receiving letters of curatorship are invalid (497*i–j*).

Divorce

Deed of Settlement

Thutha v Thutha 2008 (3) SA 494 (Tk) deals with the practice of incorporating a deed of settlement into a divorce order, in this

way rendering the clauses in the agreement enforceable as the terms of a court order and not merely as contractual terms. Although most divisions of the High Court accept and apply this practice, Alkema J was highly critical of it in *Thutha*. He referred to the 'inherent and potential difficulties, if not dangers, of clothing a contract, albeit a settlement agreement, in the terms of a court order' (para [15]). In his view, these inherent difficulties result in many court orders that incorporate deeds of settlement being unenforceable and incapable of immediate execution. Conflicting judgments have been delivered on the proper solution to the problem (para [17]). The conflicting judgments have been based on the various courts' views on the requirements of justice, convenience, and practicalities, and have resulted 'in a mixture of contractual, delictual and family law principles being applied in considering the enforcement of a court order which is essentially a matter of substantive procedural law' (para [44]; see also paras [25], [42], and [47]). (On the procedural aspects of this decision, see the chapter on Civil and Constitutional Procedure and Jurisdiction.) For present purposes, note that section 7(1) of the Divorce Act empowers a court that grants a decree of divorce to make an order regarding the division of the assets of the parties or the payment of maintenance by one of the spouses to the other 'in accordance with a written agreement between the parties'. The provision does not stipulate that the deed of settlement be incorporated into the divorce order. Thus the court is empowered to decide which terms of the settlement it will incorporate into its order, and which 'are best suited to leave as a contract between the parties' (para [43]). Alkema J listed several procedural principles that should be applied to determine what could, and should, be included in a court order (para [53]). He concluded that the practice of incorporating deeds of settlement into a court order should not be followed in the Eastern Cape (para [54]). Certain terms of a settlement agreement may, however, be embodied in the divorce order, but those terms must relate to custody or care, maintenance, and the settlement of certain proprietary rights, and must be capable of ready enforcement by execution without redress to further litigation (para [55]). He dismissed the present application for enforcement of the court order incorporating the parties' settlement agreement because he found that the terms of the order were incapable of enforcement (paras [11], [61], [64], [66], and [77]). He further held that enforcement should be denied in the present case even if it were

sought on the basis of the deed of settlement as a contract (paras [64]–[78]).

Division of Matrimonial Property

In *Moore v Nouveau Investments CC & others* [2008] 4 All SA 566 (W), a divorce action was pending between the sole members of a close corporation. The spouses each held a 50 per cent members' interest in the close corporation. The husband alleged that the wife was not the owner of the 50 per cent members' interest in the close corporation that was registered in her name, as she merely held it as his nominee. The wife denied this. The sole asset owned by the close corporation was immovable property which the wife had, in accordance with a resolution of the close corporation, sold in 2006. The resolution failed to stipulate what was to happen with the proceeds of the sale. Unbeknown to the husband, the money had been paid into the wife's bank account and was later paid over to her attorneys. The wife suggested that certain amounts be deducted from the proceeds, that the balance be divided equally between the spouses, that she be allowed to retain and use her share, and that her husband's share remain in her attorneys' trust account pending the divorce. The husband rejected this suggestion and brought an application for the winding-up of the close corporation. The court concluded that the close corporation had served its purpose and should be liquidated (para [8]). It further held that the wife could not unilaterally decide how the proceeds of the sale should be dealt with, as the proceeds were owned by the close corporation and were the subject of a dispute in the pending divorce proceedings. The court stated that '[t]o allow one party in these circumstances, to unilaterally appropriate any portion of those funds . . . would, for obvious reasons, open the door to all kinds of irregularities' (ibid). The court accordingly ordered that the close corporation be wound up (para [10]).

The judgment is correct and, as it closes the door to an opportunity for inequitable financial manipulation in divorce negotiations, it also satisfies one's sense of justice.

Interim Relief

In terms of Uniform Rule 43, the court may award certain types of relief while a divorce is pending. In *Spangenberg v De Waal* (supra), a curator ad litem applied for the setting aside of a rule 43 order that had been made against a husband who was

incapable of administering his own affairs, as he was of unsound mind. His wife (the respondent) had lodged the application in terms of rule 43, as her husband had falsely informed her that his curator bonis had instructed attorneys to institute divorce proceedings against her. As her rule 43 application was unopposed, it was granted by default. The first applicant was later appointed as the husband's curator ad litem. The curator ad litem now requested the court to set aside the rule 43 order on the ground that no divorce was pending or contemplated when the order was made, and that no curator ad litem had been appointed to oppose the rule 43 application on the husband's behalf.

The court, correctly, set the order aside. It held that the wife was the only person who could institute divorce proceedings. The husband did not have the capacity to institute divorce proceedings, as he had been declared of unsound mind and incapable of administering his own affairs, and the evidence before the court did not show that, factually, he had the mental capacity to institute a matrimonial action without the assistance of a curator ad litem (at 170). Also, in *Ex parte AB* 1910 TPD 1332 at 1341 it had been held that a curator bonis does not have locus standi to institute divorce proceedings on behalf of a spouse, because 'the relationship of husband and wife is so personal that it would be most inexpedient to allow a third party — even if he be the curator to the lunatic — to determine whether or not a divorce should be obtained on behalf of the lunatic'. In *Spangenberg*, the court considered whether the abolition of fault as a requirement for a divorce by the Divorce Act justified a deviation from *AB* (at 167–8). The court stated that even though marriage is now much more secular in nature, and divorce more prevalent, and socially more acceptable than it was when *AB* was decided, 'the deep personal nature of marriage has not changed' (at 168). The court concluded that there was no reason to deviate from *AB* (ibid). Thus, as the wife had not instituted or contemplated instituting divorce proceedings when the order was made in terms of rule 43, and neither the husband nor his curator bonis had the capacity to institute divorce proceedings, the rule 43 order should never have been made (at 170).

Although the decision in *Spangenberg*, as in *AB*, relates specifically to the lack of locus standi of a curator bonis to institute divorce proceedings, I submit that a curator ad litem and a curator personae also do not have locus standi to institute such proceedings, for the extremely personal nature of a mar-

riage is unaffected by the type of curator that is appointed for one of the parties to a marriage.

Welfare of Children

K v K 2008 (5) SA 431 (W) takes up only about two pages in the law reports, but it gives rise to as many concerns. When the parties came to court for the hearing of an application in terms of Uniform Rule 43 pending their divorce, they settled their whole divorce, although the issue of the defendant's access to, or contact with, the couple's four-year-old child posed a problem and had not been investigated by the family advocate. Goldstein J decided to make a divorce order even though he concluded that the issue of access would have to be investigated and resolved. His judgment contains no indication whether any arrangements at all had been made with regard to access. It indicates only that the child's mother would have custody of the child. Immediately after granting the divorce order, Goldstein J made another order in which he requested the family advocate, in terms of section 4(1)*(b)* of the Mediation in Certain Divorce Matters Act 24 of 1987 to enquire into the father's access to the child and to report to the court (para [6]). He stated that he would have liked to issue a single order dissolving the marriage and requesting the family advocate to investigate access, but that section 6 of the Divorce Act precluded such an order (para [2]). Section 6(1) of the Divorce Act forbids the granting of a divorce until the court is satisfied that the provisions made or contemplated with regard to 'the welfare' of the couple's minor or dependent children are satisfactory or the best that can be achieved in the circumstances (s 6(1)*(a)*). The section further provides that if the family advocate institutes an enquiry, the divorce may not be granted until the court has considered the family advocate's report and recommendations (s 6(1)*(b)*). Goldstein J considered the arrangements that had been made in respect of custody of the child and, solely by looking at those arrangements, concluded that the provisions made with regard to the welfare of the couple's child were satisfactory and thus complied with s 6(1)*(a)* (paras [2] and [3]). He further concluded that since neither the parties nor the court had requested the family advocate to launch an investigation prior to the divorce, and the family advocate had not applied for an order authorising an investigation, section 6(1)*(b)* did not present an obstacle to the granting of the divorce order.

Goldstein J's approach does not properly protect the best interests of the child, for it isolates access from the other issues relating to the child's best interests. Furthermore, in respect of the divorce order it is worrying that he considered only the custody arrangements in determining whether the provisions made or contemplated with regard to the child's welfare were satisfactory or the best that could be achieved in the circumstances. The best interests of the child should be determined holistically in light of a multitude of factors and should encompass guardianship, custody, access, maintenance, and the division of the spouses' matrimonial property (see, for example, E Bonthuys E 'Labours of Love: Child Custody and the Division of Matrimonial Property at Divorce' (2001) 64 *THRHR* 192). Although it might be argued that the concept 'the welfare' of the child as envisaged in section 6 of the Divorce Act is more limited than the concept 'the best interests' of the child, section 28(2) of the Constitution requires that the child's best interests be paramount in every matter concerning the child (also s 6 of the Children's Act.) The best interests is thus the standard that must be applied in divorce matters, too. Goldstein J was apparently motivated to make the two orders he did because the parties 'have limited resources' (para [1]) and he wanted to save them legal costs. Unfortunately, his approach did not put the child's best interests in the paramount position that the Constitution and section 6 of the Children's Act demand.

Another problem is that the order Goldstein J made immediately after granting the divorce refers to section 4(1)*(b)* of the Mediation in Certain Divorce Matters Act. In terms of s 4(1), the family advocate must institute an enquiry —

> '*(a)* after the institution of a divorce action; or
> *(b)* after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act . . .
> if so requested by any party to such proceedings or the court concerned. . . .'

In the present case, there was no application for the variation, rescission, or suspension of the order that the court had only just made in terms of the Divorce Act. Thus, Goldstein J's order requesting the family advocate to institute an enquiry is without a statutory foundation, for section 4(1)*(b)* did not apply. He should have invoked his power as upper guardian of all minors had he wanted to refer the matter for investigation by the family advocate after having made the divorce order.

Insolvent

When a person is declared insolvent and his or her estate is sequestrated, several limitations are placed on his or her legal capacity, capacity to act, and capacity to litigate. These limitations come to an end when the insolvent is rehabilitated. In *Ex parte Fourie* [2008] 4 All SA 340 (D), the court held that an application for rehabilitation is not a formality and that the lapse of time alone is not a good ground for granting rehabilitation (paras [24] and [39]). See further the chapter on Insolvency Law.

Life Partnerships

Botha NO v Deetlefs & another 2008 (3) SA 419 (N) concerns the unlawful occupation of alleged partnership property by a surviving life partner. The decision offers yet another example of the precarious position in which a surviving life partner may find himself or, more frequently, herself if the parties failed to regulate the financial consequences of their relationship by means of a contract and testamentary dispositions. In *Deetlefs*, the deceased died without leaving a will. Currently, life partners do not inherit from each other in terms of the rules of intestate succession. (The Domestic Partnerships Bill discussed above indicates that Parliament intends to alter this unsatisfactory position.) So the surviving life partner in *Deetlefs* could not inherit from the deceased's estate. Despite this rule, the surviving life partner remained in occupation of immovable property that she had shared with the deceased while he was still alive. The property was registered in the deceased's name and was subject to a mortgage. The executor of the deceased's estate wanted to sell the property to discharge the debts of the estate, but the surviving life partner refused to vacate the property. She alleged that she and the deceased had entered into a tacit universal partnership that encompassed the assets in the deceased's estate. She instituted proceedings in which she sought an order declaring that the alleged universal partnership existed and was dissolved by the deceased's death. She also sought the appointment of a receiver to realize the assets of the partnership and divide them equally between her and the deceased estate. Those proceedings were still pending when the present application for her eviction from the property was heard. In the present proceedings she contended that since the proceedings regarding the existence of the universal partnership were still pending, the

application for her eviction was premature. She also submitted that as the surviving partner in the universal partnership she was entitled to half of the partnership assets, which included the immovable property. Therefore, she argued, her occupation of the property was not unlawful.

The court rejected her submissions and ordered her to vacate the property (para [25]). It held that even if a universal partnership had existed between the life partners, it had come to an end upon the deceased's death (para [14]). A former partner may not remain in exclusive possession and occupation of partnership assets after the termination of the partnership unless the partners have agreed that this may be done, or unless the deceased partner bequeathed the property to the surviving partner (paras [16], [18], and [19]). In the present case there was no such agreement or bequest. Thus, in terms of the ordinary principles of the law of partnership, the surviving partner merely had the right to an undivided half share in the partnership's property (para [19]). She was thus not entitled to continue living in the property. Consequently, her occupation of the property was unlawful (paras [19] and [20]). In addition to ordering her to vacate the property, the court also ordered her to pay the executor's costs (paras [25] and [26]).

In *Sepheri v Scanlan* (supra), the plaintiff also argued that a universal partnership existed between her and her former life partner, and that her occupation of his immovable property was not unlawful. Her contention that the life partners had entered into a universal partnership argument was rejected on the evidence. As there was no universal partnership, and as the court concluded that there were no circumstances that rendered the plaintiff's eviction from the property unjust and inequitable as envisaged by the Prevention of Illegal Eviction and Unlawful Occupation of Land Act, her occupation of the property was declared unlawful and she was ordered to vacate the property. See further the discussion above under Breach of Promise to Marry.

Marriage

Customary Marriage

Fanti v Boto & others 2008 (5) SA 405 (C) concerns a dispute about the right to bury a deceased. The deceased's mother made funeral arrangements for the deceased. Before the funeral could

take place, the applicant brought an urgent application in which he sought a declaratory order that he was entitled to make the funeral arrangements, and an interdict prohibiting the deceased's mother and aunt from taking possession and control of the deceased's body and having her buried. The applicant alleged that he was the deceased's widower. The decision turned on whether or not the deceased and the applicant had entered into a valid customary marriage.

Dlodlo J 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 (para [19]). A customary marriage cannot come into existence if the husband merely informs the head of the wife's family that he and the bride are going to marry (para [21]). Dlodlo J further held that the mother of a woman whose father has died or is for some other acceptable reason absent and/or unable to discharge the duties that the *kraalhead* normally undertakes in respect of a customary marriage, is entitled to act as the head of the family (ibid). Such a mother would negotiate for and receive the *lobolo* paid in respect of her daughter (ibid; see also para [9]). Dlodlo J specifically stated that this rule 'would in no way be repugnant to the customary law of marriage as practised in this country' (para [21]). In the present case, the applicant had paid an amount of R3 000 and two bottles of brandy to open *lobolo* negotiations, but had never entered into actual *lobolo* negotiations with the deceased's mother (paras [25]–[27]). Furthermore, the deceased's family had not attended the alleged traditional wedding ceremony, while a customary marriage must take place in the presence of the head of the family of the bride and/or the family head's authorized representatives (paras [21], [23], and [24]). Nor was the bride handed over to the applicant or his family (para [22]). Dlodlo J accordingly found that the requirements for a valid customary marriage had not been met. In view of his finding that a valid customary marriage did not exist between the applicant and the deceased, Dlodlo J dismissed the application (with costs) and declared that the deceased's mother was entitled to make the funeral arrangements and bury the deceased (para [29]).

In Community of Property

Spouses who are married in community of property have equal powers to administer their joint estate (s 14 of the Matrimonial

Property Act). Subject to certain exceptions in the Act, either spouse may perform any juristic act with regard to the joint estate without the consent of the other spouse (s 15(1)). If both spouses' consent is required for a particular transaction, and the transaction is concluded without the requisite consent, the transaction is valid only if the third party with whom the transaction was concluded did not know, and could not reasonably have been expected to know, that consent was required or that it was not obtained (s 15(9)*(a)*). If the third party was mala fide, the transaction is void (*Amalgamated Banks of South Africa Bpk v Lydenburg Passasiersdienste BK en andere* 1995 (3) SA 314 (T); *Bopape & another v Moloto* 2000 (1) SA 383 (T); on appeal, *Lydenburg Passasiersdienste* was reversed on the facts (*Amalgamated Banks of South Africa Bpk v De Goede en 'n ander* 1997 (4) SA 66 (SCA)), but the Supreme Court of Appeal did not deal with that part of the decision in which the court below had held that a deed of suretyship that was signed without the required spousal consent was void, so that *Lydenburg Passasiersdienste* is still authority for the view that a juristic act that contravenes the consent requirement is invalid if the third party was mala fide).

In *Gounder v Top Spec Investments (Pty) Ltd* 2008 (5) SA 151 (SCA), it was contended that the transaction in question was void, as it was concluded without the necessary consent and the third party had known that consent was required but not given. The facts of the case are that a husband who was married in community of property entered into a written loan agreement with the respondent. The document was apparently signed by both spouses. In terms of the agreement, the spouses undertook to repay a loan of R1 000 000. They also undertook to pay a raising fee of R140 000 within 90 days of the date of the loan. The agreement further provided that the maximum term of the loan would be 90 days, and that a penalty fee of ten per cent per month would be levied if the 90-day period were exceeded. The loan was to be secured by a mortgage over the spouses' immovable property. Both spouses apparently signed a power of attorney to register a mortgage bond over their immovable property, but the mortgage was never registered. The spouses failed to repay the loan and to pay the raising and penalty fees. The respondent successfully sued them in the High Court, by way of motion proceedings, for payment of R1 140 000 plus the penalty fee and costs. The wife appealed against the order. She submitted that the loan agreement incorporated an agreement to

mortgage her home (para [13]). Therefore, she argued, the loan agreement and the agreement to register a mortgage amounted to a single transaction that related to entering into a contract to alienate, burden with a mortgage or servitude, or confer any other real right in immovable property which forms part of the joint estate. In terms of section 15(2)*(b)*, one of the juristic acts for which both spouses' consent is required is entering into a contract to alienate, burden with a mortgage or servitude, or confer any other real right in immovable property which forms part of the joint estate. The spouse who wants to enter into such a transaction must obtain the other spouse's written consent, which must be attested by two competent witnesses. The appellant submitted that because the loan agreement and the agreement to register a mortgage amounted to a single transaction, section 15(2)*(b)* required her written consent, attested by two witnesses. She alleged that it was not her signature that appeared on the documents and that she had never signed either the loan agreement or the power of attorney. Thus, the transaction was concluded without her consent. She further submitted that the respondent was not a bona fide third party as he knew that the spouses were married in community of property and that her consent had not been obtained. She argued that because of the respondent's mala fides, the transaction was void and the respondent's claim had to be dismissed. The respondent countered by arguing that the loan agreement was distinct from the contract to register a mortgage, and that the Act did not require the appellant's consent for the loan agreement. Accordingly, the loan agreement was valid and the spouses were obliged to repay the loan and to pay the raising and penalty fees.

Dealing with whether the appellant had given consent, Mpati DP held that because the respondent had chosen to proceed by way of motion proceedings, it had to be accepted that the appellant had not signed the documents, and that the matter had to be decided on that basis (para [10]; see also *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A); *Ngqumba en 'n ander v Staatspresident en andere; Damons NO en andere v Staatspresident en andere* 1988 (4) SA 224 (A)).

Turning to the appellant's contention that the loan agreement was a transaction that related to entering into a contract to alienate, burden with a mortgage or servitude, or confer any other real right in immovable property as envisaged in section 15(2)*(b)*, Mpati DP pointed out that the loan agreement made no reference

to a mortgage bond that was to be registered over the spouses' immovable property (para [16]). He further emphasized that 'a court is not entitled to import words into a statute that do not appear in it if the meaning intended by the words actually used is clear and unambiguous' (para [17]). He held that the provisions of section 15(2)*(b)* are clear and that they —

> 'prohibit the entering into a contract for the alienation, mortgaging, etc of a real right in immovable property forming part of a joint estate without the requisite consent of the other spouse. Closer to home, it prohibits Mr Gounder [the appellant's husband] from doing what he purported to do, viz to enter into an agreement to pass and register a mortgage bond over the fixed property without the appellant's written consent. The subsection does not prohibit one spouse from entering into a loan agreement without the consent of the other. That is permissible in terms of s 15(1)' (para [17]).

Mpati DP, correctly, concluded that in the present case there were two separate agreements — the loan agreement, and an agreement to secure the loan with a mortgage bond (para [18]). The loan agreement did not fall within the scope of section 15(2)*(b)* but rather within the general rule as stated in section 15(1) — either spouse may independently enter into any transaction in respect of the joint estate. As consent was not required for the loan agreement, it was unnecessary to consider whether the respondent was mala fide and whether section 15(9)*(a)* protected him (para [19]). The court dismissed the appeal against the High Court's order for repayment of the loan and the raising fee (para [26]).

The appeal in respect of payment of the penalty fee did, however, succeed. As the penalty fee would have totalled more than double the amount of the loan, the Supreme Court of Appeal concluded that the fee was out of proportion to whatever prejudice the respondent might have suffered as a result of the spouses' failure to repay the loan on the due date, and it thus had to be reduced to a just and equitable amount in terms of section 3 of the Conventional Penalties Act 15 of 1962 (para [23]). Mpati DP accordingly replaced the penalty fee with an order that the ordinary rate of moratory interest of 15,5 per cent per year had to be paid on the capital sum (paras [25]–[26]).

In *Govender & another v Maitin & another* 2008 (6) SA 64 (D), spouses who were married in community of property attempted to compel a third party to transfer his immovable property to them pursuant to an alleged contract of sale. The first respondent (the third party) had put his immovable property up for sale. The first

applicant signed an offer to purchase the property. The first respondent accepted the offer subject to an alteration regarding payment that constituted a counter-offer by the first respondent. The first applicant did not sign the counter-offer. The applicants alleged that the second applicant signed the counter-offer and that because she was married in community of property to the first applicant, she had signed on behalf of both spouses. From both parties' allegations it was clear that neither the first nor the second applicant's alleged acceptance of the counter-offer had been communicated to the first respondent. The applicants brought an urgent application for an order interdicting the first respondent from selling, letting, passing a mortgage over, or in any way encumbering or disposing of the immovable property, and interdicting him and the second respondent (the Registrar of Deeds) from effecting transfer of the property into the name of anyone other than the applicants. They further sought an order directing the first respondent to do all things necessary and to sign all documents to cause the immovable property to be transferred into their name, subject to their complying with the payment requirements set out in the contract. A rule nisi was issued, but on the return day it was discharged with costs.

On the facts, the court found that there was no agreement to purchase the property (para [8]). It was clear that the counter-offer was made to the first applicant and that he failed to indicate his acceptance to the first respondent (paras [9] and [12]). The court held that a third party has the right to choose the party with whom he or she concludes a contract, and that a marriage in community of property does not endow either party with the power to divest a third party of this right (para [12]). In the present case, the first applicant alone had signed the original offer to purchase. The first respondent had responded by making a counter-offer to the first applicant. As the first applicant was the intended party to the contract, the second applicant's alleged signing of the counter-offer on behalf of both spouses violated section 2(1) of the Alienation of Land Act 68 of 1981, which requires that a contract for the alienation of immovable property must be contained in a deed of alienation and must be signed 'by the parties thereto or by their agents acting on their written authority'. Accordingly, an enforceable agreement for the sale of the immovable property did not come into existence.

The court further rejected the applicants' contention that section 15(2), read with section 15(9), of the Matrimonial Property Act

empowers each spouse in a marriage in community of property to bind the other spouse and the third party to a contract for the purchase of immovable property in terms of the Alienation of Land Act, provided that the other spouse consents to the transaction (para [11]). Section 15(2)*(g)*, read with section 15(5), requires the written consent of both spouses in a marriage in community of property for the purchase of immovable property in terms of the Alienation of Land Act. The consent must be attested by two competent witnesses. In the present case, such formal consent was not given and the alleged contract was thus entered into in breach of the consent requirement in section 15(2). As was pointed out above in the discussion of *Gounder v Top Spec Investments*, section 15(9)*(a)* provides that a transaction which a third party enters into in breach of the consent requirement is deemed to have been entered into with the required consent, if the third party does not know, and cannot reasonably be expected to know, that the consent of the spouse of the other party to the transaction is required or has not been given. (In paragraph [11], the court referred to section 15(9) of the Alienation of Land Act, but from the provision quoted it is clear that it had section 15(9) of the Matrimonial Property Act in mind.) Put differently, if the third party is bona fide, the transaction is valid and enforceable. The applicants submitted that section 15(9)*(a)*ain rendered the present transaction binding and that they could rely on the section to hold the first respondent to the alleged contract (para [10]). The court rejected this submission. It held that the words 'it is deemed that the transaction concerned has been entered into with the consent required in terms of . . . subsection (2)' in section 15(9)*(a)* do not render transactions that were concluded without the requisite consent enforceable at the instance of the spouses who failed to comply with the consent requirement (para [11]). The court stated that it could never have been the intention of Parliament to 'provide a weapon to enable partners in a marriage in community of property to enforce transactions against third parties where any of such spouses contract contrary to the peremptory provisions of s 15(2) with third parties who act in good faith and do not know and cannot reasonably know that the transaction is being entered into contrary to those provisions' (ibid). The court concluded that section 15(9)*(a)* did not support the applicants' case (ibid). Thus, the applicants' attempted enforcement of the contract failed.

Although the wording of section 15(9)*(a)* does not expressly indicate who may rely on the validity of the transaction if the

deeming provision in the section applies, I support the court's conclusion that the transaction cannot be enforced against a bona fide third party who does not wish to be bound by the transaction. It would be extremely odd if Parliament intended to enable spouses who were mala fide in the sense of knowingly having failed to comply with the consent requirement to enforce the transaction against an unwilling bona fide third party. If this were indeed the intention of Parliament, it would lead to the anomaly that mala fide spouses would be protected by section 15(9)*(a)*, while a mala fide third party would not. Protecting mala fide spouses while denying protection to a mala fide third party is so anomalous that it is unthinkable that this position would be in line with the intention of Parliament. (On the presumption of interpretation of statutes that Parliament does not intend absurd or anomalous results see GE Devenish *Interpretation of Statutes* (1992) 177–8; LC Steyn *Die Uitleg van Wette* 4 ed (1974) 123–4; and the cases cited there. On the absence of protection for a mala fide third party, see *Amalgamated Banks v Lydenburg Passasiersdienste* (supra) and *Bopape v Moloto* (supra).) Furthermore, arguing that Parliament intended to enable a mala fide spouse to enforce a transaction against an unwilling bona fide third party leads one to ask whether if only one of the spouses was mala fide in the sense of knowingly having violated the consent requirement, the mala fide spouse could hold the unwilling bona fide third party to the transaction, even if the 'bona fide' non-consenting spouse did not wish to enforce the transaction against the third party. If the answer is 'yes', this would enable the mala fide spouse very easily to circumvent the consent requirement, which would defeat the object of the consent requirement and could not be in keeping with the intention of Parliament. If the answer is 'no', it would mean that the transaction could be enforced against an unwilling bona fide third party only if both spouses were mala fide, or if the 'bona fide' non-consenting spouse agreed to enforcement of the transaction against the unwilling bona fide third party. In either situation, the mala fide spouse(s) would be rewarded for his or her (their) breach of the consent requirement at the expense of the bona fide third party, which result is also so anomalous that it cannot be in line with the intention of Parliament.

Although the Explanatory Memorandum on the Matrimonial Property Bill, 1984 bears no weight in determining the intention of Parliament, it is interesting to note that the memorandum indi-

cates that the remedy in section 15(9)*(a)* permits enforcement of the transaction 'at the choice of a third party who is affected by it, if the third party does not know and cannot reasonably know of the absence of consent' (see also South African Law Commission *Report Pertaining to the Matrimonial Property Law with Special Reference to the Matrimonial Affairs Act, 1953, the Status of the Married Woman, and the Law of Succession in so far as it Affects the Spouses* RP26/1982 (1982) ¶ 19.3). The premiss of most discussion of section 15(9*)(a)* is also that the object of the section is to protect the bona fide third party (see Cronjé & Heaton *Family Law* 81–2; Joubert *LAWSA* par 75; June D Sinclair *An Introduction to the Matrimonial Property Act 1984* (1984) 21–3; Annél van Aswegen 'Transactions Between a Spouse and a Third Party: the effect of the Matrimonial Property Act 88 of 1984' 1984 *Modern Business Law* 140 at 145–6; Johan David van der Vyver & David Johannes Joubert *Persone- en Familiereg* 3 ed (1991) 557; L Neil van Schalkwyk *Huweliksreg-bronnebundel* (1992) 199; Andreas van Wyk 'Gemeenskap van Goedere en Aanwasdeling Volgens die Wet op Huweliksgoedere, 1984' January 1985 *De Rebus* 20 at 22; A van Aswegen 'The Protection of a Spouse's Right to Share in the Joint Estate or Accrual' February 1987 *De Rebus* 59 at 59–60; PJ Visser & JM Potgieter *Introduction to Family Law* 2 ed (1998) 127–9; N Zaal 'Marital Milestone or Gravestone? The Matrimonial Property Act 88 of 1984 as a Reformative Half-way Mark for the Eighties' (1986) *TSAR* 57 at 65–7. The general tenor of the discussion by June Sinclair (Belinda van Heerden, Alfred Cockrell & Raylene Keightley (gen eds) *Boberg's Law of Persons and the Family* 2 ed (1999) 191–2) is similar to her exposition in *Introduction*, and thus also suggests that the object of section 15(9)*(a)* is to protect the bona fide third party. However, in *Boberg* (at 192n109) she states that the validity of a transaction that is entered into in breach of the consent requirement 'depends on the facts upon which s 15(9)*(a)* is based'. She continues: 'If the facts make the deeming provision [in section 15(9)*(a)*] effective, the transaction is one with consent — that is, valid'. The latter statement implies that even mala fide spouses would be able to enforce the transaction and that they would be able to do so even against the will of the bona fide third party. I cannot established the premiss of HR Hahlo (*The South African Law of Husband and Wife* 5 ed (1985) 253) as regards the intended beneficiary of section 15(9)*(a)*, as his discussion focuses on evidentiary matters and the scope of the third party's

duty to enquire into the need for obtaining the consent of the spouse of the other party to the contract: The discussion by Chuma Himonga (Francois du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) 279) also does not convey a premiss as regards the intended beneficiary of the protection that is afforded by the section. She merely summarizes section 15(9)*(a)* in one sentence, adds that the Act is silent on the consequences of the transaction if the third party is mala fide, and expresses support for the view that such a transaction is void. The discussion by L Neil van Schalkwyk ('Onlangse Regspraak ten Opsigte van die Toestemmingsvoorskrifte Ingevolge Artikel 15 van die Wet op Huweliksgoedere 88 van 1984' (2001) 33 *De Jure* 147 at 151–4) likewise does not convey a premiss as it focuses on the position where the third party is mala fide and thus does not enjoy the protection of section 15(9)*(a)*. JS McLennan ('The Perils of Contracting with Persons Married in Community of Property' (2000) 117 *SALJ* 367 at 371) does not support section 15(9)*(a)* at all. He argues that the section should be deleted and replaced with a provision that states that any transaction that violates the consent requirement is valid unless the third party knew that this requirement was being breached.

Muslim Marriage

Muslim marriages do not, as yet, enjoy full legal recognition. They are, however, expressly included within the ambit of certain statutes, or certain sections of statutes, that apply to religious marriages. Although the Intestate Succession Act and the Maintenance of Surviving Spouses Act do not expressly cover religious marriages, the Constitutional Court held, in *Daniels v Campbell NO & others* 2004 (7) BCLR 735 (CC), that these Acts do apply to the surviving spouse in a de facto monogamous Muslim marriage. The court specifically left open the issue of the application of the Acts to de facto polygynous Muslim marriages (para [63]).

In *Hassam v Jacobs NO & others* [2008] 4 All SA 350 (C), the Cape High Court held that the Acts apply to de facto polygynous Muslim marriages. Van Reenen J pointed out that prior to the advent of the present constitutional era, South African courts had refused to recognize polygynous marriages, because they were considered to be contrary to public policy (para [9]). Thus, the then Appellate Division had ruled in *Ismail v Ismail* 1983 (1) SA 1006 (A) that a polygamous union and the contractual obligations flowing from it could not be recognized, because polygamy

violates public policy. After the coming into operation of the Bill of Rights, the High Court held in *Ryland v Edros* 1997 (2) SA 690 (C) that the approach in *Ismail* could be attributed to the fact that public policy relating to the enforcement of the Muslim marriage contract used to be determined in accordance with the views of only one group in our pluralistic society. In the constitutional era, this approach was no longer acceptable. Now, an act would be branded as offensive to public policy only if it was 'offensive to those values which are shared by the community at large, by all right-thinking people in the community and not only by one section of it' (at 707G). The court in *Ryland* accordingly concluded that the contractual obligations flowing from a de facto monogamous Muslim marriage could be recognized and enforced as between the parties despite the fact that the marriage was potentially polygynous.

Relying on *Ryland*, Van Reenen J held in *Hassam* that *Ismail* no longer precluded the High Court from considering whether, on a proper construction of the Intestate Succession Act and the Maintenance of Surviving Spouses Act, the benefits that are conferred are also available to the surviving spouses of de facto polygynous Muslim marriages (para [9]). He pointed out that section 39(2) of the Constitution obliges courts to interpret legislation in a manner that promotes the spirit, purport, and objects of the Bill of Rights (para [14]). He further referred to the principle that if it is 'reasonably possible to construe a statute in such a manner that an inconsistency with the Constitution is avoided, preference should be given thereto rather than another reasonable construction that would result in an inconsistency' (ibid). He then referred to the wide and inclusive interpretation of the concepts 'spouse' and 'survivor' in *Daniels*, where the Constitutional Court had held that a surviving spouse in a monogamous Muslim marriage qualifies as a 'spouse' and 'survivor' in terms of the two Acts, as such interpretation is in keeping with the ordinary meaning of the word 'spouse', and serves the purpose of the Acts — providing relief to widows, who constituted a particularly vulnerable section of society (*Daniels* paras [21]–[23]). The Constitutional Court held that an interpretation that excludes a party to a monogamous Muslim marriage from the ambit of the Acts is discriminatory and constitutionally unsustainable (paras [20]–[25]). In *Hassam*, Van Reenen J held that —

> '[u]nless the concept[s] ''spouse'' and ''survivor'' are construed to encompass also widows of polygynous Muslim marriages the practi-

> cal effect would be that the widows of such marriages will be discriminated against solely because of the exercise by their deceased husbands of the right accorded them by the tenets of a major faith to marry more than one woman. Such discrimination would not only amount to a violation of their rights to equality on the basis of marital status, religion (it being an aspect of a system of religious personal law), and culture but would also infringe their right to dignity' (para [16]).

(The right to equality is protected by section 9 of the Constitution, and the right to dignity by section 10.)

Van Reenen J indicated that none of the parties to the proceedings suggested that there was any justification for the unfair discrimination that existed in the present case (para [16]). He concluded that there was no justification for excluding the widows of de facto polygynous Muslim marriages from the provisions of the two Acts. He based his conclusion on five reasons. In the first instance, the considerations that prompted the Constitutional Court to opt for its extensive interpretation in *Daniels* apply with equal force to widows in polygynous Muslim marriages (para [17]). Secondly, polygyny has received increasing legislative and judicial recognition (ibid). The shift in legislative and judicial policy manifested itself, inter alia, through the enactment of the Recognition of Customary Marriages Act and Parliament's implicit recognition of polygynous marriages by including all Muslim marriages within the ambit of certain Acts (para [18]). Thirdly, 'the South African Law Commission gave recognition to polygynous Muslim marriages in its report on Islamic Marriages and Related Matters' (para [18], with reference to the South African Law Reform Commission, Project 106 *Islamic Marriages and Related Matters Report* (2003)). The latter statement was carelessly phrased and offers weak support for the judge's conclusion regarding the unjustifiability of excluding surviving spouses in de facto polygynous Muslim marriages from the provisions of the Intestate Succession Act and the Maintenance of Surviving Spouses Act. The South African Law Reform Commission clearly does not have the power to 'recognize' any form of marriage. The Muslim Marriages Bill which the Commission attached to its report on Islamic marriages merely embodies its recommendations that certain Muslim marriages be recognized and regulated by legislation. (On the provisions of the Bill, see Cronjé & Heaton *Family Law* 218–21; Ziyad Motala 'The Draft Bill on the Recognition of Muslim Marriages: an Unwise, Improvident and Questionable Constitutional Exercise' (2004) 37 *CILSA*

327; C Rautenbach 'Some Comments on the Current (and Future) Status of Muslim Personal Law in South Africa' 2004 (2) *PER*. The Commission for Gender Equality has also drafted a Recognition of Religious Marriages Bill that has the object of regulating religious marriages (see Hoodah Abrahams-Fayker 'Polygamous Muslim Marriages' October 2008 *De Rebus* 42). Fourthly, Van Reenen J indicated that 'African customary law, which recognizes polygamy, is now given its rightful recognition as an integral part of South African law to the extent that its rules and principles are compatible with the Constitution and the Bill of Rights' (para [18], with reference to *Bhe & others v Magistrate, Khayelitsha & others (Commission for Gender Equality as amicus curiae); Shibi v Sithole & others; South African Human Rights Commission & another v President of the Republic of South Africa & another* 2005 (1) SA 580 (CC)). Fifthly, he relied on a supposed 'judicial policy to give recognition to polygynous marriages and their legal consequences' (para [18]). He stated that this policy 'appears from a number of decided cases' (ibid). He specifically cited *Kahn v Kahn* 2005 (2) SA 272 (T) (it was held that Muslim spouses fall within the ambit of the Maintenance Act even if their marriages are de facto polygynous), *Wormald NO & others v Kambule* 2006 (3) SA 562 (SCA) (in which, according to Van Reenen J, 'the right of the surviving spouse of a polygynous customary marriage to be maintained and provided with residential and agricultural land was recognized'), and *Gaza v Road Accident Fund* ((case no 579/2001) unreported), in which, by consent, an order was made the effect of which 'is to recognize an actionable duty of support by a customary law wife despite the existence of a prior valid civil law marriage' (*Hassam* para [18]). I submit that the cases which Van Reenen J cited do not support his broad statement that 'it is now judicial policy to give recognition to polygynous marriages and their legal consequences' (ibid). The cases constitute authority only for the view that our courts have been willing to recognize polygynous marriages for very specific, limited purposes. Furthermore, I doubt whether *Wormald* is authority for even this narrow statement. According to Van Reenen J, the court in *Wormald* recognized 'the right of the surviving spouse of a polygynous customary marriage to be maintained and provided with residential and agricultural land' (ibid). The main issue in *Wormald* was whether a woman who was allegedly the surviving spouse in a customary marriage that co-existed with a civil marriage in terms of the Transkei Marriage Act 21 of 1978 could

be evicted in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act from property that was owned by a close corporation of which her deceased spouse was the sole member. At no point did the Supreme Court of Appeal hold that the alleged customary marriage existed or that it amounted to a polygynous customary marriage (see *Wormald* paras [13] and [21]). Accordingly, I submit, the Supreme Court of Appeal's statements about any supposedly polygynous marriage are obiter.

Having reached his conclusion regarding surviving spouses in de facto polygynous Muslim marriages, Van Reenen J considered the order he should make as regards the wording of the two Acts.

In respect of the Maintenance of Surviving Spouses Act, he pointed out that the Act defines 'survivor' as 'the surviving spouse in a marriage dissolved by death' (s 1), and that every reference to 'survivor' is preceded by the definite article 'the', which suggests that only one survivor was intended. He concluded, however, that the concept 'survivor' is capable of being applied to more than one survivor without unduly straining the language of the Act. He based this decision, in the first instance, on section 6 of the Interpretation Act 33 of 1957, which provides that in every law, unless the contrary intention appears, words in the singular include the plural. Secondly, the mechanisms in the Maintenance of Surviving Spouses Act for determining how competing claims of spouses and minor children are to be dealt with and the factors that are to be considered in the determination of the reasonable maintenance needs of a spouse (ss 2(3)*(b)* and 3) can readily be applied to more than one survivor. Thirdly, he pointed out that in *Kambule v The Master & others* 2007 (3) SA 403 (EC) it was held that the provisions of the Act can be applied to multiple surviving spouses in polygynous customary marriages (*Hassam* para [21]).

In so far as the Intestate Succession Act is concerned, Van Reenen J found that, save for section 1(4)*(f)*, the provisions of the Act could readily be applied to spouses in de facto polygynous marriages, as each surviving spouse would be entitled to a child's portion if there were descendants, and to an equal share if there were no descendants (para [20]). Section 1(1) reads:

> 'If after the commencement of this Act a person (hereinafter referred to as the "deceased") dies intestate, either wholly or in part, and —
> *(a)* is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate;

. . .
(c) is survived by a spouse as well as a descendant —
(i) such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette, whichever is the greater; and
(ii) such descendant shall inherit the residue (if any) of the intestate estate.'

Section 1(4)*(f)* states that 'a child's portion, in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of children of the deceased who have either survived him or have died before him but are survived by their descendants, plus one.' Van Reenen J stated that section 1(4)*(f)* presents interpretive difficulties as it does not readily lend itself linguistically to an easy adaptation to cater for more than one surviving spouse. He rejected the submission that the words 'plus one' should simply be interpreted as conveying 'plus one for each spouse'. In his view, such an interpretation would place 'an intolerable strain on the language used with the consequence that it, to that extent, is inconsistent with the constitution and warrants the reading in of words in order to remedy its unconstitutionality' (para [20]). He accordingly declared that the word 'survivor', as used in the Maintenance of Surviving Spouses Act, and the word 'spouse', as used in the Intestate Succession Act, include a surviving partner to a de facto polygynous Muslim marriage, and that, in the present case, both widows qualified as 'survivor' and 'spouse' (para [23.1]). He further declared section 1(4)*(f)* of the Intestate Succession Act unconstitutional to the extent that it provides for only one spouse in a Muslim marriage to be an heir in the intestate estate of a deceased husband (para [23.2]). To correct the unconstitutionality of section 1(4)*(f)*, he made the following reading-in order:

'Section 1(4)*(f)* of the Intestate Succession Act . . . is to be read as though the whole of it was substituted by the following:
In the application of section 1(1)(*c*)(i) to the estate of a deceased person who is survived by more than one spouse:
(a) A child's share in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased;

(b) Each surviving spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister for Justice and Constitutional Development by notice in the *Gazette*, whichever is the greater; and

(c) Notwithstanding the provisions of sub-para *(b)* above, where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided between the surviving spouses.'

The declaration of unconstitutionality and the substituted wording of section 1(4)*(f)* were referred to the Constitutional Court for confirmation (para [23.4]). Van Reenen J made no ruling on the retroactivity of his order.

I strongly support Van Reenen J's finding that surviving spouses in de facto polygynous Muslim marriages should fall within the ambit of the two Acts, and this finding will in all likelihood be approved by the Constitutional Court. However, his order in respect of section 1(4)*(f)* of the Intestate Succession Act presents difficulties. His reading-in order replaces 'the whole of' section 1(4)*(f)* with a provision that relates 'to the estate of a deceased person who is survived by more than one spouse'. Thus the effect of the reading-in order is that section 1(4)*(f)* caters solely for de facto polygynous marriages and leaves the calculation of a child's share in monogamous marriages unregulated. I submit that this result will not find favour in the Constitutional Court. Further, the Constitutional Court will probably find it necessary expressly to deal with the retroactivity of the application of the Acts to polygynous Muslim marriages.

On *Hassam*, see also Abrahams-Fayker op cit at 42ff.

Putative Marriage

Zulu v Zulu & others 2008 (4) SA 12 (D) deals with the consequences of a bigamous civil marriage where the second wife was unaware of the existence of the first marriage. In 1985, the applicant entered into a civil marriage in community of property with the deceased. She did not know that her husband had already entered into a civil marriage in community of property with another woman in 1974, and that this marriage still existed. She discovered the existence of the first civil marriage only after her husband's death. It is trite that civil marriages are monogamous. As the civil marriage between the applicant and her deceased husband was bigamous, it was void. Since she had been unaware of the existence of the first civil marriage, the

applicant claimed that her marriage to the deceased was a putative marriage and that she was entitled to half of her deceased husband's estate.

The court referred to the common-law rule that an invalid civil marriage may qualify as a putative marriage if one or both of the parties to the marriage are unaware of the defect that renders the marriage invalid (at 14H). It further stated that if the parties to the putative marriage did not exclude community of property, the bona fide party may claim that the marriage was in community of property and that he or she is entitled to a half share of the joint estate (at 15B–C). The court cited *Mograbi v Mograbi* 1921 AD 275 and *Ex parte L (also known as A)* 1947 (3) SA 50 (C) (see also *M v M NO* 1962 (2) SA 114 (GW)). Strictly, referring to community of property (or any other type of matrimonial property system) in the context of a putative marriage is incorrect, as no matrimonial property system can operate in a void marriage. What is really at issue is a universal partnership (DSP Cronjé & Jacqueline Heaton *Casebook on South African Family Law* 2 ed (2004) 68; Cronjé & Heaton *Family Law* 47–8; Joubert LAWSA par 44; Himonga op cit at 311; Van der Vyver & Joubert *Persone- en Familiereg* 3 ed (1991) 521; Visser & Potgieter op cit at 70). The applicant, however, seemed to have considered a universal partnership as an alternative to her claim that community of property existed between her and her deceased husband, for the court states that '[t]he applicant also alleges that she and the deceased intended to form a universal partnership' (at 15H).

The court first dispensed with the applicant's argument regarding the existence of community of property in her putative marriage. In the absence of case law dealing with the position where the existing civil marriage that rendered the second marriage bigamous was in community of property, the court applied general principles relating to community of property. The court, correctly, pointed out that in a marriage that is subject to universal community of property, all the assets of both spouses fall into the joint estate in equal undivided shares for as long as the marriage lasts, and that the spouses cannot divide the joint estate or transfer their undivided half shares during the subsistence of the marriage (at 15E–F). (Universal community of property refers to a marriage where no assets have been excluded from the joint estate.) Thus, in the present case, the joint estate of the deceased and his first wife consisted of all their assets (at 15G). As the deceased did not own any property that

was excluded from the joint estate created by his first marriage, there was no property that could fall within any joint estate that might have been created by the putative marriage (at 15H). The court accordingly dismissed the applicant's contention that she was entitled to a half share of the deceased's estate because she and the deceased had been married in community of property (ibid). This part of the decision is in keeping with the generally accepted view on the nature of universal community of property — it entails that the spouses are tied co-owners in undivided and indivisible half-shares of all their assets and liabilities until the joint estate is terminated (see, for example, *Estate Sayle v Commissioner for Inland Revenue* 1945 AD 388; *De Wet NO v Jurgens* 1970 (3) SA 38 (A); *Ex parte Menzies et uxor* 1993 (3) SA 799 (C); *Du Plessis v Pienaar NO & others* 2003 (1) SA 671 (SCA)).

In so far as the applicant's contention with regard to the existence of a universal partnership was concerned, the court reiterated the requirements for such a partnership (at 15H–J): *(a)* each partner must bring money, labour or skill into the partnership or undertake to bring something into it; *(b)* the business should be carried on for the joint benefit of both parties; *(c)* the object should be to make profit; and *(d)* the contract between the parties must be legitimate (lawful). What is odd about the statement of the requirements for a universal partnership is that the judge cited (at 16A) only a secondary source as authority (WA Joubert (founding ed) *The Law of South Africa* vol 19 sv 'Partnership' by JJ Henning 2 ed (2006) 197) when cases like *Mühlmann v Mühlmann* 1981 (4) SA 632 (T) (confirmed on appeal: *Mühlmann v Mühlmann* 1984 (3) SA 102 (A)) and *Pezzutto v Dreyer & others* 1992 (3) SA 379 (A) offer primary authority. Be that as it may, the court correctly held that all four requirements must be met before a universal partnership can come into existence (at 16A). In the present case, the requirement of a legitimate contract was not met, as the deceased was still married in community of property when he allegedly entered into the universal partnership with the applicant (at 16B). Put differently, the universal partnership agreement was not legitimate, as the parties unlawfully attempted to deviate from the legal nature of universal community of property. Further, the deceased could not have intended to create a universal partnership, as he knew that he was still married in community of property to another woman (at 16B–C). Also, there was no proven object to make a profit (at 16C). The

court accordingly rejected universal partnership as a foundation for the applicant's claim and dismissed the application with costs (at 16E–F).

In an obiter dictum, the court pointed out that our law recognizes a claim for damages where a person is unknowingly induced to enter into a void marriage. The judge stated that such a claim for damages was the applicant's only possible remedy in the present case (at 16C–D, citing *Snyman v Snyman* 1984 (4) SA 262 (W)). (Although the court did not indicate this, note that *Snyman* was approved and applied in *Arendse v Roode* 1989 (1) SA 763 (C).)

Requirements for Validity

One of the requirements for the coming into existence of a valid civil marriage is that the marriage must be duly solemnized in terms of the Marriage Act. *Nkwanyana & others v Mbambo & others* [2008] 1 All SA 375 (D) deals with a factual dispute about whether or not a civil marriage had been concluded between the first applicant's deceased son and the first respondent prior to the deceased's death. The court favoured the first applicant's version of events. It held that no wedding ceremony had ever taken place, and that the alleged marriage had thus never come into existence. The court declared the purported marriage invalid and null and void ab initio.

LITERATURE

A Practical Guide to Patrimonial Litigation in Divorce Actions. Issue 10. By PA van Niekerk. LexisNexis. 2008.

Casebook on the South African Law of Persons. By DSP Cronje & J Heaton.3 ed. By J Heaton. LexisNexis. 2008.

Die Suid-Afrikaanse Personereg. By DSP Cronje & J Heaton. 3 ed. By J Heaton. LexisNexis. 2008.

Family Law Service Service. Issue 50. By B Clarke. LexisNexis. 2008.

Family Law Service Service. Issue 49. By B Clarke. LexisNexis. 2008.

Inleiding tot die Suid-Afrikaanse Familiereg. 3 ed. By JA Robinson, S Human, A Boshoff & BS Smith. Printing Things (Pty) Ltd. 2008.

Introduction to South African Family Law. 3 ed. By JA Robinson, S Human, A Boshoff & BS Smith. 3 ed. Printing Things (Pty) Ltd. 2008.

The South African Law of Persons. By DSP Cronje & J Heaton. 3 ed. By J Heaton. LexisNexis. 2008.

Trial and Tribulations Trends and Triumphs: Developments in International, African and South African Child and Family Law. Collected Contributions from the International Miller Du Toit Cloete Inc/UWC Conferences on Child and Family Law (2001–2008). By J Sloth-Nielsen & Z du Toit (eds). Juta & Co Ltd. 2008.

De Vos, P 'Sexual orientation and the Bill of Rights'. In *Bill of Rights Compendium* service issue 22. By Y Mokgoro & P Tlakula (consulting eds). LexisNexis. 2008.

Sinclair, J 'A New Definition of Marriage: Gay and Lesbian Couples May Marry'. In *The International Survey of Family Law*. By B Atkin & F Banda (eds). Family Law. 2008.

Van Schalkwyk, N 'Dood en Hertroue as Beëindigingswyses van Onderhoudsbevele Tussen Voormalige Eggenotes Ingevolge die Wet op Egskeiding 70 van 1979'. In *Vita perit, labor non moritur: Liber memoralis PJ Visser*. By T Boezaart & P de Kock (eds). LexisNexis. 2008.

Van der Linde, A 'Die Beskerming van die Gesin en Gesinslewe met Verwysing na Aspekte van Kontak met Minderjarige Kinders Ingevolge die Children's Act'. In *Vita perit, labor non moritur: Liber memoralis PJ Visser*. By T Boezaart & P de Kock (eds). LexisNexis. 2008.

Abrahams-Fayker, H 'Polygamous Muslim Marriages' Oct 2008 *De Rebus* 42

Bakker, P 'Toepassing van Islamitiese Reg in Suid-Afrika: *Hassam v Jacobs* [2008] 4 All SA 350 (C)' (2008) 29 *Obiter* 533

Bates, F ''Escaping Mothers' and the Hague Convention — the Australian Experience' (2008) 41 *The Comparative and International Law Journal of Southern Africa* 245

Bekink, M 'The Maintenance Obligation of Grandparents Towards Children Born In and Out of Wedlock: Comments on the Case of *Petersen v The Maintenance Officer, Simon's Town Maintenance Court* 2004 2 SA 56 (C)' (2008) 41 *De Jure* 145

Bekker, JC 'Commentary on the Impact of the Children's Act on Selected Aspects of the Custody and Care of African Children in South Africa' (2008) 29 *Obiter* 395

Bell, K & Abrahams, D 'The Use of Child Soldiers in Armed Conflict' (2008) 29 *Obiter* 162

Boezaart (Davel), T 'Some Comments on the Interpretation and Application of Section 17 of the Children's Act 38 of 2005' (2008) 41 *De Jure* 245

Bonthuys, E 'Realizing South African Children's Basic Socio-economic Claims Against Parents and the State: What Can Courts Achieve?' (2008) 22 *International Journal of Law, Policy and the Family* 333

Bonthuys, E 'Child Maintenance and Child Poverty in South Africa' (2008) 71 *Journal of Contemporary Roman-Dutch Law/Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 194

Bonthuys, E 'Irrational Accommodation: Conscience, Religion and Same-Sex Marriages in South Africa' (2008) 125 *South African Law Journal* 473

Botha, MFT 'The Duration of the Duty to Maintain and of a Maintenance Order' (2008) 125 *South African Law Journal* 715

Buthelezi, MC 'Killing with Impunity: the Story of an Unborn Child' (2008) 41 *De Jure* 429

Carnelley, M & Soni, S 'A Tale of Two Mummies. Providing a Womb in South Africa: Surrogacy and the Legal Rights of the Parents Within the Children's Act 38 of 2005. A Brief Comparative Study with the United Kingdom' (2008) 22(2) *Speculum Juris* 36

Carpenter, G 'Constitutionally Protected Rights for Parents?' 2008 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 397

De Jong, M 'International Trends in Family Mediation — Are We Still on Track?' (2008) 71 *Journal of Contemporary Roman-Dutch Law/Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 454

De Jong, M 'Giving Children a Voice in Family Separation Issues: a Case for Mediation' 2008 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 785

De Ru, H 'The Value of Recommendations Made by the Family Advocate and Expert Witnesses in Determining the Best Interests of a Child: *P v P* 2007 5 SA 94 (SCA)' (2008) 71 *Journal of Contemporary Roman-Dutch Law/Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 698

De Vos, P 'From Heteronormativity to Full Sexual Citizenship? Equality and Sexual Freedom in Laurie Ackermann's Constitutional Jurisprudence' 2008 *Acta Juridica* 254

De Vos, P 'A Judicial Revolution? The Court-led Achievement of Same-sex Marriage in South Africa' (2008) 4 *Utrecht Law Review* 162

Green, R 'Accrual Can Imperil Inheritance' Nov 2008 *De Rebus* 22

Heaton, J 'The Marriage Act 25 of 1961, the Divorce Act 70 of 1979, and the Dissolution of a Hindu Marriage' (2008) 19 *Stellenbosch Law Review/Stellenbosch Regstydskrif* 452

Idowu, A 'Effects of Forced Genital Cutting on Human Rights of Women and Female Children: the Nigerian Situation' (2008) 12(2) *Law, Democracy & Development* 111

Le Roux-Kemp, A 'The Moment of Death: Law, Society and Science' (2008) 29 *Obiter* 260

Malherbe, R 'The Constitutional Dimension of the Best Interests of the Child as Applied in Education' 2008 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 267

Mezmur, BD '"As Painful as Giving Birth": a Reflection on the Madonna Adoption Saga' (2008) 41 *The Comparative and International Law Journal of Southern Africa* 383

Memzur, BD 'The African Children's Charter Versus the UN Convention on the Rights of the Child: a Zero-Sum Game?' (2008) 23(1) *SA Public Law/SA Publiekreg* 1

Mezmur, BD & Sloth-Nielsen, J 'An Ice-beaker: State Party Reports and the 11th Session of the African Committee of Experts on the Rights and Welfare of the Child' (2008) 8 *African Human Rights Law Journal* 596

Mokotong, M 'A Note on the Customary Law Right of Extra-marital Children to Bury the Deceased' (2008) 41 *De Jure* 616

Moodley, I 'Customary Initiation Rites and the Children's Act 38 of 2005' (2008) 23(1) *SA Public Law/SA Publiekreg* 65

Mujuzi, JD 'The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: South Africa's Reservations and Interpretative Declarations' (2008) 12(2) *Law, Democracy & Development* 41

Neels, JL & Wethmar-Lemmer, M 'Constitutional Values and the Proprietary Consequences of Marriage in Private International Law — Introducing the lex causae proprietatis matrimonii — *Sadiku v Sadiku* case no 30498/06 (26–01–2007) (T) (unreported)' 2008 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 587

Nieuwenhuis, H 'De kracht van de verbeelding' 2008 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 126

Ntlokwana, N 'Customary Marriage and the Law' Oct 2008 *De Rebus* 40

Olowu, D 'Children's Rights, International Human Rights and the Promise of Islamic Legal Theory' (2008) 12(2) *Law, Democracy & Development* 62

Pieterse-Spies, A 'Inter-Country Adoption: A South African Perspective' (2008) 71 *Journal of Contemporary Roman-Dutch Law/Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 556

Pintens, W 'Family Law in Europe: Developments and Perspectives' (2008) 41 *The Comparative and International Law Journal of Southern Africa* 155

Potgieter, JM 'Aanspreeklikheid van Ouers vir Skade Veroorsaak deur Hul Minderjarige Kinders? *Hof van Beroep Antwerpen 27 Maart 2002 Rechtskundig Weekblad* 2005 — 06, 106' (2008) 71 *Journal of Contemporary Roman-Dutch Law/Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 331

Skelton, A 'Severing the Umbilical Cord: A Subtle Jurisprudential Shift Regarding Children and Their Primary Caregivers' (2008) 1 *Constitutional Court Review* 351

Sloth-Nielsen, J 'Realizing Children's Rights to Legal Representation and to Be Heard in Judicial Proceedings: an Update' (2008) 24 *South African Journal on Human Rights* 472

Sloth-Nielsen, J & Mezmur, BD 'Recent Developments Win Some, Lose Some: the 10th Ordinary Session of the African Committee of Experts on the Rights and Welfare of the Child' (2008) 8 *African Human Rights Law Journal* 207

Smith, B & Robinson, JA 'The South African Civil Union Act 2006: Progressive Legislation with Regressive Implications?' (2008) 22 *International Journal of Law, Policy and the Family* 356

Smit, MH 'Language Rights and the Best Interest of the Child' (2008) 71 *Journal of Contemporary Roman-Dutch Law/Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 38

Sonnekus, JC 'Pensioendeling by Egskeiding steeds Onbevredigend en Verwarrend Gereël' 2008 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 286

Stander, L & Horsten, DA 'Die Reg van die Onderhoudsbehoeftige Kind Kragtens Artikel 29 van die Grondwet Teenoor die Reg van Skuldeisers van die Insolvente Boedel van die Ouer' 2008 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 203

Stewart, L 'Interpreting and Limiting the Basic Socio-economic Rights of Children in Cases Where They Overlap with the Socio-economic Rights of Others' (2008) 24 *South African Journal on Human Rights* 472

Van Aardt, WJ & Robinson, JA 'The Biology of Homosexuality and its Implications for Human Rights in South Africa' (2008) 71 *Journal of Contemporary Roman-Dutch Law/Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 179

Van Niekerk, JP 'Co-habiting Same-sex Partners: Reinterpreting Old Concepts in Insurance Contracts to Fit Our New Legal Order' (2008) 16 *Juta's Business Law* 2

Van Niekerk, JP 'The Date of Death: When Exactly Did the Deceased Die' (2008) 16 *Juta's Business Law* 32

Van Schalkwyk, LN '*Badenhorst v Badenhorst* 2005 2 SA 253 (K); 2006 2 SA 255 (HHA): Herverdeling van Bates Ingevolge Artikel 7(3) van die Wet op Egskeiding 70 van 1979 — Trustbates en Herverdeling — Gelykopverdeling Word nie Toegepas nie' (2008) 41 *De Jure* 209

Van Schalkwyk, LN '*Odgers v De Gersigny* 2007 2 SA 305 (HHA): Duur van Onderhoudsbevel Ingevolge 'n Onderhoudsooreenkoms na Hertroue van Onderhoudsgeregtigde — Skikkingsooreenkoms nie in Hofbevel Opgeneem nie' (2008) 41 *De Jure* 215

Van Schalkwyk, LN: Beëindig die Hertroue van die Onderhoudsgeregtigde 'n Onderhoudsbevel Ingevolge 'n Onderhoudsooreenkoms Outomaties? *Welgemoed v Mennell* 2007 4 SA 446 (SOK)' (2008) 71 *Journal of Contemporary Roman-Dutch Law/Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 522

Visser, PJ 'The Exemption of a Parent from Paying Public School Fees with Reference to the Position of the Divorcee' (2008) 71 *Journal of Contemporary Roman-Dutch Law/Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 119

Wood-Bodley, MC 'Intestate Succession and Gay and Lesbian Couples' (2008) 125 *South African Law Journal* 46

Wood-Bodley, MC 'Establishing the Existence of a Same-Sex Life Partnership for the Purposes of Intestate Succession' (2008) 125 *South African Law Journal* 259

Wood-Bodley, MC 'Same-Sex Couple Discrimination in Employment Benefits: Where to Now?' (2008) 125 *South African Law Journal* 483