

THE CLEAN BREAK PRINCIPLE

by

JILL HILARY SINGER

submitted in part fulfilment of the requirements for
the degree of

MASTER OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: PROF J HEATON

JANUARY 1996

THE CLEAN BREAK PRINCIPLE

by JILL HILARY SINGER

DEGREE : MASTER OF LAWS

PROMOTER : PROFESSOR J HEATON

SUMMARY : This short dissertation briefly examines the English law statutory provisions and the English judicial approach relating to the clean break principle. A comparison between English law and South African law (in particular s 7 of the Divorce Act 70 of 1979) shows the latter to allow the application of the clean break principle, but rigidity in the legislative wording and further rigidity in the wording by the courts result in the clean break principle not being a dominant feature of South African divorce law. A detailed analysis of South African case law follows in which the fundamental issues relative to the clean break principle are examined, namely the one third rule, universal partnership, misconduct and its effect on court orders, the nature of a contribution and what property is distributed on divorce. Trends in maintenance orders are looked at and how these affect the clean break principle, in particular rehabilitative maintenance and token maintenance wards.

KEY TERMS: Divorce; Clean Break; Division of Assets; Redistribution of Assets; Redistribution Orders; Maintenance; Rehabilitative Maintenance; Token Maintenance; Financial Independence.

INTRODUCTION

The clean break principle advocates the division of the assets of spouses on divorce so that both spouses attain financial independence, neither spouse is responsible for the ongoing maintenance of the other and all financial ties between the spouses are severed on divorce.

The concept of the clean break is one further acknowledgement by the law of the shifting societal perspective of marriage and divorce. Social policy has moved our law from fault to failure as grounds for divorce; from maintenance awards based on innocence in relation to breakdown, to maintenance awards based on need; from division of assets based on ownership, to division of assets based on diverse criteria of which ownership is not the overriding criterion and where notions of justice and equity are taken into consideration. Social policy has also demanded recognition of greater gender equality, and the law has responded in the sphere of marriage law by abolishing the marital power which a husband had over a wife (1) and by making spouses in community of property joint administrators of the joint estate.(2) Spouses are now joint guardians of their minor children (3) and the wife can acquire a domicile of choice during the marriage.(4) In the sphere of divorce, the courts have become cognisant of the aim of financial independence of the parties on divorce when making awards for the redistribution of assets. The clean break is the most effective tool the courts have at their disposal to implement financial independence of the parties.

However, one has to acknowledge firstly, that reality often lags behind social policy and secondly, that the clean break concept works best in an ideal society - where husbands and wives have equal opportunities within the marriage and outside it to establish economic independence; where child-rearing and running of the home are joint tasks with equal time and effort required of both spouses.

(1) S 11(1) of the Matrimonial Property Act 88 of 1984.

(2) S 14 of the Matrimonial Property Act 88 of 1984.

(3) S 1(1) of the Guardianship Act 192 of 1993.

(4) S 1(1) of the Domicile Act 3 of 1992.

Reality presents itself in a different way. By and large wives become financially dependent on their husbands in a marriage, and that factual reality creates the greatest difficulty on divorce, for one cannot at the time of divorce impose a philosophy of liberty, justice and equality when such a philosophy did not exist up to that point. Furthermore, it cannot be expected of divorce legislation to provide solutions to life's inequalities. Yet many situations do arise where implementation of a clean break is possible and optional. This paper will examine:

- (i) whether a clean break principle is capable of application in South African law in the light of the legislative wording of s 7 of the Divorce Act 70 of 1979;
- (ii) the South African judicial attitude to the clean break principle.

As a starting point, it would be a worthwhile exercise to compare briefly the wording and intent of the English law and the South African law in relation to this issue.⁽¹⁾

THE ENGLISH LAW

1. STATUTORY PROVISIONS

Part II of the Matrimonial Causes Act 1973 deals with maintenance and property adjustment orders on divorce. The reason for the enactment of the relevant sections, and therefore the aim of such provisions, is stated in s 21(1) in connection with financial provision (maintenance) orders and in s 21(2) in connection with property adjustment orders as being "*for the purpose of adjusting the financial position of the parties to a marriage and any children of the family ...*"

(1) It is not the intention of this paper to focus on English Law and hence the discussion on English Law is not comprehensive.

S 23(1) of the Matrimonial Causes Act 1973 empowers the court, on granting, inter alia, a decree of divorce, or thereafter, to order periodical payments from one spouse to another for such term as may be specified in the order ⁽¹⁾ or to order one or more lump sum payments as may be specified to be made from one spouse to another.⁽²⁾ The lump sum payments are designed, inter alia, to settle debts which a spouse reasonably incurred to maintain himself/herself or any child of the family prior to making application for maintenance.⁽³⁾ Periodical ⁽⁴⁾ and lump sum payments ⁽⁵⁾ can also be ordered for the benefit of a child (under 18 years) of a marriage to be paid to a specified person or to the child.

S 24 of the Matrimonial Causes Act 1973 empowers a court on granting, inter alia, a decree of divorce, or thereafter, to make an order obliging one spouse to transfer to, inter alia, the other spouse such property as may be specified.⁽⁶⁾ The court is also empowered to order that property be transferred to its satisfaction ⁽⁷⁾ and to vary any antenuptial or post-nuptial settlement for the benefit of the spouses or children or any of them or to extinguish or reduce the interest of a party under such settlement.⁽⁸⁾

The Matrimonial and Family Proceedings Act 1984 introduced several amendments to the Matrimonial Causes Act 1973. It is instructive to examine those amendments firstly for what they introduce and secondly for what they replace. The most noteworthy change is the enactment in s 25A of the Matrimonial Causes Act 1973 of an obligation on a court, when exercising its discretionary powers in relation to maintenance (of a spouse) or property adjustment orders, (between spouses) to consider whether it would be appropriate to apply a clean break.

(1) S 23(1)(a).

(2) S 23(1)(c).

(3) S 23(3)(a).

(4) S 23(1)(d).

(5) S 23(1)(f).

(6) S 24(1)(a).

(7) S 24(1)(b).

(8) S 24(1)(c).

Subsection (1) requires ["it shall be the duty"] a court to consider whether it would be appropriate to exercise its powers so that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.

Subsection (2) requires ["shall"] a court when ordering periodical payments, secured or unsecured, to consider whether it would be appropriate to require those payments to be made or secured only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party.

Subsection (3) allows ["may"] a court to dismiss an application for periodical payments if it considers that no continuing obligation should be imposed on a party to make or secure such payments in favour of the other party.

Section 25(1) compels the court when making both maintenance and property adjustment orders to take into account all circumstances of the case (giving priority to welfare of children under eighteen) including certain factors specified in s 25(2) and s 25(3). These include resources, obligations, age, duration of marriage and standard of living during marriage and also include as further factors:

"the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity, any increase in that capacity which would in the opinion of the court be reasonable to expect a party to a marriage to acquire." (1)

"the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family";(2)

(1) S 3 of the Matrimonial and Family Proceedings Act 1984 (introducing s 25 (2)(a)).

(2) S 3 of the Matrimonial and Family Proceedings Act 1984 (introducing s 25 (2)(f)).

The underlined portions were introduced by the Matrimonial and Family Proceedings Act 1984, which also introduced the following three subsections.

S 28(1A) states that "(W)here a periodical payments or secured periodical payments order in favour of a party to a marriage is made on or after the grant of a decree of divorce ..., the court may direct that that party shall not be entitled under section 31 below for the extension of the term specified in the order".⁽¹⁾

S 31 (7) states that "(I)n exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen, and the circumstances of the case shall include any change in any of the matters to which the court was required to have regard when making the order to which the application relates, and-

(a) in the case of a periodical payments or secured periodical payments order made on or after the grant of a decree of divorce or nullity of marriage, the court shall consider whether in all the circumstances and after having regard to any such change it would be appropriate to vary the order so that payments under the order are required to be made or secured only for such further period as will in the opinion of the court be sufficient to enable the party in whose favour the order was made to adjust without undue hardship to the termination of those payments;

(b) -" ⁽²⁾

(1) Introduced by s 5(2) of the Matrimonial and Family Proceedings Act 1984.

(2) Introduced by s 6(3) of the Matrimonial and Family Proceedings Act 1984.

S 31 (10) states that *"(W)here the court, in exercise of its powers under this section, decides to vary or discharge a periodical payments or secured periodical payments order, then, subject to section 28(1) and (2) above, the court shall have power to direct that the variation or discharge shall not take effect until the expiration of such period as may be specified in the order."* (1)

2. GENERAL COMMENTS

Clearly the English legislature has considered the clean break concept sufficiently feasible to embody it in an enactment. The amending provisions and insertions have an overriding focus on termination of financial dependence of the spouses and adjustment to financial independence. The approach of the legislature is broad, holistic and realistic. The relevant provisions empower the court to effect a clean break between the parties, even in situations where they themselves agree otherwise.

The concepts of "just and reasonable", "without undue hardship", "reasonable to expect" and "likely" prevent a court from taking an unrealistic view of a divorced spouse's (usually wife's) ability to support herself. Each case is decided on its merits and is based on its own particular circumstances, as will be seen from the short discussion on the case law which follows.

The amendment to s 25(1) of the Matrimonial Causes Act and the introduction of s 25(A) replace a previously unworkable and impractical directive to place the parties, as far as was practicable and just, in the financial position they would have been in if the marriage had not broken down and each party had properly discharged his or her financial obligations and responsibilities to the other.(2)

(1) Introduced by s 6(4) of the Matrimonial and Family Proceedings Act 1984.

(2) Repealed s 25 (1).

In summary, the court has the power to effect a clean break at various stages, during and after divorce proceedings. At the outset, the court is obliged to consider the appropriateness of a clean break. If it decides against a clean break, it can order periodical payments for a specified period (which may be extended). This imposes a clean break at the time of divorce but to take effect at some time later, thus delaying the implementation of the clean break. The court can also at the time of making an order for periodical payments order that no application for extension of the period specified for the periodical payments be allowed. The period then becomes immutably fixed, and the exact time of the implementation of the clean break is set. In considering whether to impose periodical payments for a specified period only, and even more so, to prohibit extension of that period, the court would base its decision largely on the reasonable expectation of the payee spouse to an increase in earning capacity. The introduction of the latter consideration into the legislation means, in my opinion, that the court is more likely to impose a clean break, as the court can consider not only the prevailing situation at the time of divorce, (which may well not permit an immediate or deferred clean break) but also reasonably expected future circumstances, which may allow a future clean break.

The legislation recognises the clean break concept as a broad category of relief, applicable at varying stages and in varying degrees. There can be a complete clean break with an order for division of assets and no periodical payments or entitlements under any other legislation; there can be an order for division of assets and no periodical payments but claims in terms of other legislation remain intact; there can be a lump sum payment in lieu of or in addition to a capital transfer with no periodical payments; there can be a dismissal of an application for periodical payments with or without a capital transfer; there can be periodical payments (secured, unsecured, or as lump sum instalments) for a specified but extendable period; there can be periodical payments for a fixed and unchangeable period; there can be a limitation placed on the time period applicable to further payment of periodical payments in a application for variation of such order; there may even be a discharge of a periodical payment order when application is made for its variation; there can be an order directing that a discharge may not take place until a specified period has elapsed. All of the above variables appear from the legislative

provisions quoted above. The wording of the English legislation provides the courts with the tools to effect a clean break whenever possible.

3. THE APPROACH OF THE COURTS

The English courts have been cautious but willing to apply a clean break. Each case is decided on its own merits and there are no definite guidelines to extract, other than common sense principles. Cretney (1) identifies three categories as illustrative of the attitude of the courts. Where the spouses are (or one of them is) wealthy, the application of the clean break is not difficult. Where periodical payments will not benefit the other spouse, a clean break will be ordered. The broad band of cases between the above two categories, he feels, are more difficult to categorise, but generally a clean break will be applied where the only real asset of value is the family home and the only real source of income is that of one of the spouses. The courts' inclination is to award the family home to the wife and to dismiss her claim for periodical payments. This was for example achieved in Livesey (formerly Jenkins) v Jenkins (2)

The attitude of the courts has been to ensure that no undue hardship results in applying a clean break. An offer by the husband in Boylan v Boylan (3) to pay a particular lump sum in substitution of periodical payments (on application for variation of those payments by the wife following a large capital gain by the husband), was rejected by the court as insufficient. What is interesting about this case is that the court accepted in principle the substitution of a lump sum payment for periodic payments by agreement of the parties, notwithstanding that the Matrimonial Causes Act 1973 expressly provides that lump sum or capital provisions shall not be made on applications to vary periodical awards. (4)

(1) Cretney, S.M. and Masson, J.M. Principles of Family Law 5ed (1990) 413-415.

(2) [1985] F.L.R. 813 (HL) The House of Lords set the order aside on the grounds of the wife's failure to disclose her impending remarriage.

(3) [1988] 1 F.L.R. 282.

(4) S 31 (5) of the Matrimonial Causes Act 1973.

A willingness to implement a clean break is evident. A similar attitude was displayed in S v S,⁽¹⁾ a case preceding Boylan⁽²⁾ which was accepted as correct in Boylan.

It is hoped that the South African courts will not seek guidance from the decision of Suter v Suter and Jones.⁽³⁾ Whilst the court did dismiss the notion that the fact of dependent children prevented a clean break from being applied, it did order token maintenance in the form of one pound a year. The judge felt it was *"premature to make an order terminating the wife's claim for periodical payments ..."*⁽⁴⁾ and thus negated the clean break. In Whiting v Whiting,⁽⁵⁾ an appeal against a decision not to discharge the husband's obligation to make periodical payments to his wife, the appeal court took the view that it was not obliged to discharge the order based on the clean break principle, but could keep the obligation intact by ordering nominal payments which could be increased upon the occurrence of unforeseen events. Slade LJ stated *"I find myself unable to say that the judge was obviously wrong in taking the view that, on the particular facts of this case, the maintenance order should be kept alive as a 'last backstop'."*⁽⁶⁾ It is some comfort that all the judges felt that a clean break was applicable but that the trial judge had not been manifestly wrong in her decision and hence it could not be overturned.

THE SOUTH AFRICAN LAW

1. STATUTORY PROVISIONS

S 7(2) of the Divorce Act 70 of 1979 provides the court with a discretion to order one spouse to pay maintenance to the other after divorce, in the absence of an agreement between the parties. The court, in exercising that discretion must have regard to:

- (1) [1987] 1 F.L.R. 71.
- (2) [1988] 1 F.L.R. 282.
- (3) [1987] 2 All ER 336 (CA).
- (4) At 16 a.
- (5) [1988] 2 All ER 275 (CA).
- (6) At 287 d.

- the existing or prospective means of each of the parties;
- their respective earning capacities;
- their financial needs and obligations;
- the age of each of the parties;
- the duration of the marriage;
- the standard of living of the parties prior to the divorce;
- their conduct insofar as it may be relevant to the breakdown of the marriage;
- an order in terms of ss 3;
- and any other factor which in the opinion of the court should be taken into account.

Taking the above factors into account, the court may make an order which it finds just, to endure for any period until the death or remarriage of the party in whose favour the order is given.

S 7(3) empowers the court to transfer assets from one party to another, in the absence of an agreement between them, provided that the parties were married before 1 November 1984 by antenuptial contract excluding community of property, community of profit and loss and accrual sharing. In respect of people married in terms of s 22(6) of the Black Administration Act 38 of 1927 such marriages were automatically out of community of property without an antenuptial contract being entered into. Thus s 7(3) did not apply to such marriages until 1988 with the enactment of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 which now makes the provisions of the Matrimonial Property Act 88 of 1984 applicable to such marriages. Transfers in terms of s 7(3) must be deemed just and equitable in the eyes of the court and cannot be ordered by the court unless one party has made application therefor.

S 7(4) prohibits the court from making an order in terms of s 7(3) unless the court is satisfied that it is equitable and just by reason of the estate of the spouse against whom the order is given having been maintained or increased during the marriage by the contributions, direct or indirect, of the other spouse, either by rendering of services or saving of expenses which would otherwise have been incurred, or in any other manner.

S 7(5) obliges the court, aside from the contributions referred to in s 7(4), also to take into account:

- the existing means and obligations of the parties;
- any donations by one to the other during the marriage or which is owing and enforceable in terms of their antenuptial contract;
- any order in terms of s 9 or other law which affects the patrimonial position of the parties;
- any other factor which should in the opinion of the court be taken into account.

S 7(6) allows deferment of an order under s 7(3).

2. COMPARISON WITH ENGLISH LAW

Viewing the above sections against the objective of implementing a clean break, and in comparison to the English legislation, the following comments are pertinent:

- i) the first and most obvious observation is that there is no mention in the South African legislation of a clean break as a possible objective - it is neither an overriding consideration nor even a stated option. In comparison, ss 1 of s 25A of the Matrimonial Causes Act 1973 makes the court duty-bound to consider whether it would be appropriate to exercise its powers to effect a clean break between the spouses. The English court is not bound to apply a clean break but rather to consider the aptness of a clean break in every case before it. The South African court gets no direction from the legislation even to consider a clean break as a possible solution. When a South African court does make an order of that nature, it relies on its inherent jurisdiction to do so;
- ii) in both English and South African law the court is empowered to make maintenance orders in favour of one of the spouses. English law incorporates the notion of a clean break even in

orders of this kind, making it peremptory for the court to consider whether it would be appropriate to make such payments of limited duration. The South African provisions contain no such equivalent direction to the court obliging it to consider maintenance payments of limited duration. The court, however, is empowered, if it so wishes, to make such orders in terms of the wording of s 7(2);⁽¹⁾

- iii) the English court can order lump sum payments from one spouse to another for the purposes of maintenance or to off-set debt already incurred in maintaining the family. Thus potentially maintenance can be dealt with on a once-off basis. This order can be made before or after the decree of divorce. South African law does not recognise a lump sum payment as a maintenance award. All maintenance awards are by way of periodic payments and thus of an ongoing nature, whether temporary or permanent;

- iv) lump sum payments and property transfers have a much broader ambit in English law. They can be made to the spouse, to the children of the marriage or to specified people for the benefit of the children. The South African legislation does not, in these provisions, look at the family as a unit. The order it makes is between the spouses. The court is not in any way directed to consider the possibility of catering for the children's needs by way of lump sum payments (to a trust for example). South African law requires maintenance for children to be paid to the other spouse (unless the parties agree otherwise);⁽²⁾

(1) "for any period".

(2) *Joffe v Lubner* 1972 (4) SA 521(C).

- v) in English law the criteria for deciding both property and maintenance orders are the same. The English court has a more holistic approach to its order. The South African law, in contrast, has, in terms of the legislative wording, two separate and different enquiries in regard to maintenance and redistribution orders, utilising different criteria for each. On the plain wording of the provisions, s 7(2) takes cognisance of s 7(3) but not vice versa ⁽¹⁾. The criteria of s 7(2) by and large look to the present and the future, and encompass elements of need. The criteria of s 7(5) look to the present and the past. The relevant factors in s 7(3) are firmly embedded in the past;
- vi) in English law, the future increase in earning capacity of a spouse, not as a certainty but as a reasonable expectation, is considered when making both maintenance and property awards. This places the onus on a spouse to take steps to earn an income or increase that income after divorce, and should he/she not do so when it could reasonably be expected of him/her to do so, the consequences will be his/hers to bear. The responsibility for maintenance thus firstly falls on that person, requiring him/her to gain financial independence. In South African law whether a spouse should find employment is left to the discretion of the court to weigh up in the circumstances of the case. The South African courts are directed to look at the parties' earning capacities. Traditionally the courts have interpreted this to mean present and future, but on the wording, would not necessarily be obliged to include future earning capacities. The South African courts are also directed to look at existing or prospective means. This implies income from sources other than their own earning capacities, and, in my opinion, "prospective" would need to be almost a certainty to be taken into account;

(2) This will be more fully discussed later.

- vii) in English law the contributions of the spouses to be considered are not necessarily to the other's estate but to the welfare of the family as a whole, both past and future. The use of the concept 'welfare' takes the contribution out of the realms of 'financial' contribution or even the necessity to provide a financial quantification, or even to link it to any financial consequence. The wording expressly includes as a contribution the looking after the home or caring for the family. It also includes contributions not yet made but are likely in the foreseeable future to be made. In South African law the wording is narrowly couched so that contributions are those made only to the other spouse's estate. The meaning of the word contribution has been a source of judicial debate, especially on the very issue of whether it would include looking after the home and caring for the family over and above common law duties in this regard; ⁽¹⁾
- viii) in English law the contribution of a spouse is not a *sine qua non* to the transfer of assets or maintenance orders, nor is it more weighted than any of the other factors. Thus, if there has been no contribution by one spouse, an order can still be granted should the other factors exist - the court is obliged to take all the circumstances into account. In South African law without a contribution by one spouse to the other's estate within the meaning of the legislative provisions, ie maintaining or increasing the others spouses estate, there can be no transfer of assets. The wording does not permit any exception;
- (ix) in English law the court is empowered to effect a clean break on application to vary periodical payments by terminating the period for which the periodical payments are to continue. In South African law the court has no such power and can only vary the amount payable and thus has no opportunity to effect a clean break in any situation, other than at the divorce hearing itself.

(1) See discussion later.

3. THE LEGISLATIVE WORDING AND ITS IMPLICATIONS - SOME OBSERVATIONS

It is the last mentioned point which, in my view, militates most strongly against application of a clean break between the parties. A wife who wishes to have a redistribution order in her favour must have contributed to the maintenance or increase of her husband's estate during the marriage in such form and in such manner as will be regarded by the court to have been a contribution in terms of that subsection, and then has to discharge the onus of proving her contribution in evidence at the hearing of the divorce.

The problems involved are manifold. The divorce trial becomes a detailed delving into the past. If the court finds that the wife has contributed sufficiently to her husband's estate, to comply with the legislative requirements, then she is granted some of his assets. The application of this subsection becomes a system of reward, and the wife's future financial stability is based on her past activities. No enquiry is addressed as to her needs.

The downfall of the application of s 7(3) is clear. I cite below various instances that have occurred in my own practice as an attorney, which are illustrative of the practical difficulties of implementing s 7(3) with a clean break in mind. In one case there was a marriage of long duration where the husband amassed enormous wealth, the parties lived luxuriously, the wife did not work as there was no need for her to do so and she consequently had no income or assets of her own. She also did little within the household and nothing in regard to assisting her husband in increasing or maintaining his wealth. On divorce, the wife could not rely on s 7(3) and had no option but to proceed under s 7(2). In this case a clean break was not a legislative imperative where the circumstances would ideally have suited it.

The court has no legislative directive to impose or to consider imposing a clean break. It may well do so, but arising from its inherent jurisdiction and common sense.

Take another example. Both spouses worked during the marriage and had independent incomes, the wife was sickly and ran up enormous medical bills which her income was insufficient to cover. Her husband thus paid for them. On dissolution of the marriage, the wife had in fact depleted her husband's estate. She was thus not entitled to a s 7(3) award. Had the facts been slightly different and she had no income of her own at all because ill health prevented her from working or from running the household without great assistance, there too a s 7(3) claim would have been denied to her. In both scenarios, the wife has to rely on s 7(2). Another situation which has occurred in my practice in a similar vein was where a wife spent excessively, and not only did not add to or maintain her husband's estate, but quite substantially depleted it. The matter is still to be decided by the court, but we have been instructed to plead (on behalf of the husband) that the wife is not entitled to an order in terms of s 7(3) and is entitled to maintenance only. On the facts, however, the husband can afford to provide the wife with sufficient assets to avoid a maintenance claim. The husband refuses to provide her with assets and relies on the legislation for his instructions. Were the court obliged to consider a clean break, and were the wife's past activities not the sole reason for distributing assets, our client's pleadings would of necessity be different and the wife would have been free to require a clean break.

Take one further example from my practice, a wife has worked all her life, run the household, brought up the children, contributed to her husband's estate in the manner required by s 7(3) but the husband's estate has not increased at the date of divorce as he has handled his affairs imprudently. Again, s 7(2) is all that is left to the wife.⁽¹⁾

All of the above is further exacerbated by the narrow meaning the courts have placed on the word 'contribution' in the context of s 7(3), as well as the limitations placed on property which is transferable.⁽²⁾

(1) Sinclair An Introduction to the Matrimonial Property Act 1984 51 - 52.

(2) This will be discussed later.

As s 7(3) is now structured, the application of the clean break principle strains to be implemented. If one looks at the motivation for enacting s 7(3), the reason for its failure to incorporate the clean break principle becomes evident. The motivation behind the enactment was to redress past financial disparity that resulted when spouses, married out of community of property and thus having separate ownership of assets left the marriage with only their own assets. This often created enormous financial hardship. The enactment was also an attempt to grant acknowledgement in law, and hence financial recognition, to the contributions which both spouses made to the marriage, however differently those contributions were made. Thus essentially s 7(3) was seen as a remedy for a particular ill. It was not intended to address other issues like aiming for financial independence of the spouses on divorce. The provisions thus do not address that issue. The English law provisions, in contrast, do just that. Their aim is to adjust the financial positions of the parties with a view to financial independence.

Ironically, there are aspects in s 7(2) which allow a clean break interpretation. That subsection provides that the court has to have regard to the existing or prospective means of each of the parties. This would include for example the likelihood to enjoy greater earnings, a future capital acquisition and possibly even the capacity to earn more. Taking prospective means as a factor in assessing maintenance needs, maintenance for a specified period can be ordered and indeed has been so ordered. The court is entitled to grant maintenance 'for any period' until death or remarriage of the recipient spouse. 'For any period' means a period of any length, decided in the light of the particular circumstances, up to a definite cut-off time. Thus, s 7(2) clearly permits the court to make maintenance awards for a specified length of time for rehabilitative purposes, ie. to allow a person who has perhaps been out of the job market for some years to requalify, to seek employment, to re-adjust and plan for a new financial situation.⁽¹⁾

(1) This will be discussed more fully later.

S7(2) requires the court to consider an order in terms of s 7(3). S7(3) does not have a reciprocal provision. Any attempt to regard that as an oblique suggestion by the legislature to consider a redistribution of assets first and thereafter a maintenance order (if the redistribution were insufficient to do justice in the particular circumstances) has been firmly rejected both by the *dicta* and practice of the courts. Both Kriegler J, in the court *a quo*, and Botha JA, in the appeal court, of the Beaumont (1) matter took both sections into consideration simultaneously. The interrelationship between s7(2) and s7(3) was expressly accepted by the Appellate Division. As its highest point, the lack of reference to s7(2) in s7(4) (which sets out the relevant factors for application of s7(3)) can be regarded as an opening to the courts to apply their discretion in favour of a redistribution and, if circumstances permit, to go no further.⁽¹⁾

4. MARRIAGES NOT SUBJECT TO SECTION 7(3)

It is not only in respect of marriages out of community of property and to which s 7(3) applies that a clean break can result. It is possible, in certain circumstances, to effect a clean break in respect of marriages in community of property and marriages subject to the accrual system. The possibility arises if the factual circumstances permit, not by virtue of any legislation or powers of the court.

Community of property, by its very nature, means that each spouse owns an undivided half-share in the community estate. This is so during the marriage and on divorce. Thus by virtue of ownership each spouse retains 50% of the community estate on divorce. If neither spouse can afford to maintain the other, or neither spouse needs maintenance from the other, the court will order that no maintenance is payable and a clean break will be effected. However, the court is not empowered by any legislation to order that one spouse, who requires maintenance, should acquire more than 50% of the community estate in lieu of maintenance.

(1) 1987 (1) SA 967 (A).

In a situation where one spouse has little or no earning capacity and the other can earn well and acquire assets thereby, the court cannot rely on any legislative provision to order that the spouse with lesser ability to earn retains more than 50% of the community estate and the other spouse pays no maintenance, simply in order to effect a clean break. The court would be entitled to make such an order in terms of the provisions of s 9 of the Divorce Act which would entitle one spouse to be awarded more than 50% of the community estate arising from the other spouse's conduct and depending upon that spouse's contribution to the assets of the marriage. Forfeiture can only apply to that portion of the estate which one spouse benefits by virtue of the marriage in community of property, and not to the assets which that spouse contributed towards the common estate if that contribution exceeds 50%. But in that situation ie forfeiture, other facts and circumstances unrelated to the aim of achieving a clean break would give rise to an uneven division of the community estate. A similar situation prevails in respect of marriages subject to the accrual system. In the absence of a forfeiture order under s 9, the court has no power to order an accrual sharing different from what the parties had contracted in their antenuptial contract. In circumstances where the accrual division is sufficient to allow each spouse to live off his/her own means, coupled with his/her earning capacity, a clean break would be effected, but not as a result of legislative provisions or judicial powers, but as a result of the circumstances of the case. The result achieved is a clean break but that clean break is a by-product of other legislative provisions and not an aim or judicial power in itself.

One final observation should be made in relation to s 7. The only basis on which our courts can apply a clean break is to use s 7(3) as the launching pad and to disregard s 7(2). Aside from marriages entered into in the Black Administration Act 38 of 1927, s 7 applies only to marriages entered into prior to 1 November 1984 out of community of property, profit and loss, excluding any accrual sharing and by antenuptial contract. Marriages after that date or which precede that date but have one of the excluded features do not fall within s 7. Thus in divorces where ideal circumstances prevail to apply a clean break

policy, but the marriage was not one provided for in s 7, the court is not empowered in any way to effect a redistribution of assets and thereby, a clean break.

5. THE APPROACH OF THE COURTS - AN ANALYSIS OF THE CASE LAW

Recognition of the clean break principle

In the light of the legislature having elected not to direct the courts to apply a clean break between divorcing parties, the courts have, not surprisingly, been conservative in their approach to do so. However, the clean break principle has been expressly recognised by the Appellate Division in Beaumont v Beaumont.⁽¹⁾

After discussing the amendment to the (English) Matrimonial Causes Act 1973 Botha JA stated: "*In terms of s 25A it is now the duty of the English courts to consider whether it would be appropriate so to exercise their powers that the financial obligations of each party to the other will be terminated as soon after the grant of the decree of divorce as the Court considers just and reasonable... In other words, the English legislation now seeks to foster the imposition of a 'clean break' in appropriate circumstances.*"⁽²⁾

He continued that: "*Our legislation contains no corresponding provision, but in this instance I do not consider the concept underlying it to be foreign to our law. On the contrary, there is no doubt in my mind that our courts will always bear in mind the possibility of using their powers under the new dispensation in such a way as to achieve a complete termination of the financial dependence of the one party on the other, if the circumstances permit. The last-mentioned qualification is, of course, very important...*"⁽³⁾

(1) 1987 (1) SA 967 (A).

(2) At 992 I.

(3) At 993 A - B.

Judge Botha's words can be seen as a definite endorsement of the applicability of the clean break principle in our law, even though the endorsement is couched in the form of a personal view and is not a statement of principle, and even though the endorsement is limited to "in this instance" (presumably to applications for redistribution orders as opposed to marriages in community of property or subject to the accrual regime). In essence, he felt that, notwithstanding the lack of legislation on the issue, judges will, in his view, adopt the approach the English judges are obliged to adopt ie. to consider the possibility of a clean break. In the case of South African judges, they will consider using their discretionary powers, granted by the legislation, to apply a clean break. His caution that such principle would only be appropriate if the circumstances permit is justifiable as naturally not every situation can uniformly have a clean break applied to it. As will be seen later, the judges have been cautious and conservative in identifying appropriate circumstances. Thus Judge Botha's confidence and optimism that the courts will always consider applying a clean break approach has not been borne out in practice.

Botha JA then went on to explain how the clean break principle is to be fitted into the constraints of s 7(2) and s 7(3). He stated: "*The manner of achieving such a result is, of course, by making only a redistribution order in terms of ss(3) and no maintenance order in terms of ss(2). What I have said earlier with regard to the Court taking an overall view, from the outset, of the possibility of making an order or orders under either ss(2) or ss(3) or both, does not mean that the court will not consider specifically the desirability in any case of making only a redistribution order and awarding no maintenance, having regard particularly to the feasibility of following such a course.*"⁽¹⁾

Beaumont v Beaumont ⁽²⁾ was the very first reported case after the introduction of s 7 (3) - (6) of the Divorce Act and, in a sense, it set the tone for the cases that followed. Accordingly, the *dicta* of Kriegler J are worth examining as a foundation for several issues in relation to the clean break principle and as a basis to compare the dicta of other cases that preceded and followed.

(1) At 993 C - D.

(2) 1985 (4) SA 171 (W).

The One Third Rule

The one third rule was enunciated in the English case of Wachtel v Wachtel.⁽¹⁾ It was used by the English courts as a starting point to assess the parties' respective income and capital distribution on divorce and as a rule of thumb the poorer spouse would receive one third of the joint income and assets. This approach has been subsequently discredited in English law and is hardly followed.

Kriegler J in Beaumont a quo, having rejected the argument that a universal partnership existed between the spouses, adopted the one third rule. He did so with caution, bearing in mind the difference between the English and South African Acts in relation to the single enquiry in English law as to asset and maintenance payments, and the separate enquiries in South African law on those two questions. He concluded: "*If therefore, a particular case calls for both a redistribution of assets plus an order for maintenance, it would not be so inappropriate to take as a starting point in maintenance cum redistribution cases the traditional one third that our Courts have used as a starting point in maintenance matters.*"⁽²⁾ Kriegler J does not explain why this particular case calls for both the redistribution of assets and an order for maintenance. On the contrary his comments suggest that a maintenance order could well have been dispensed with by increasing the assets transfer. The evidence showed that Mrs Beaumont needed maintenance. It was suggested to the judge by Mr Beaumont's counsel that the capital would extinguish the need for maintenance. The judge disagreed - he stated that he had specifically borne in mind that he would award maintenance when making the redistribution award. "*Had that not been the case, the proportion to be transferred to the defendant may well have been higher*".⁽³⁾ Nowhere is it suggested that Mr Beaumont could not afford a greater capital transfer. On the contrary, the judge commented that Mr Beaumont will remain a man of substance and bring in good income. In my view, the case reveals that even if his capital base was depleted, he would have been able to recoup his loss. Yet the Judge did not consider a clean break.

(1) [1973] 1 ALL ER 829 (CA).

(2) At 180 C - D.

(3) At 184 D.

It is interesting to observe why he felt the one third rule was appropriate in regard to assets. He felt that the wife could buy and furnish a house and the husband would not be crippled by making payment therefor. Here he looked at the wife's needs and the husband's ability to pay, neither of which are factors under s 7(3), although are clearly allied to "existing means and obligations". Need, on the one hand, and affordability, on the other, are more in line with an enquiry to apply a clean break between the parties ie. looking forward not backwards. Kriegler J did not take that line of thinking any further. He seemed determined to award maintenance in addition to assets. Having begun with one third as a "starting point" for the asset redistribution order, he moved no further and ended up at his starting point. Thus he was obliged to call upon the maintenance provisions to supplement the shortfall. It seems that a misconstrued reliance on the one third rule prevented a clean break from being applied. There was no logical reason to have resorted to the one third rule. In fact, as stated above, the judge's own comments suggest the opposite.

A case which followed soon after Beaumont a quo also relied on the one third rule. In MacGregor v MacGregor,⁽¹⁾ Nel J did not even give consideration to a clean break when the facts and circumstances were suitable for such an order. The parties were married for 15 years, both worked during the marriage, the wife on a half-day basis. During the marriage, through the combined efforts and financial resources of both parties, they had bought, renovated and sold at a profit several houses. At the time of divorce, the property which had been bought was registered in the wife's name. The other assets were the wife's monetary investment, the husband's pension fund and savings. Nel J recognised that the husband would be able to build up further assets before retirement age (being 49 years at the date of the divorce, relatively well paid and in secure employment). The wife's earning capacity on the other hand was inferior to the husband's but the judge remarked that she would have to take up full-time employment. Being obliged to look at the contributions of both spouses to the other's estate, he simply adopted the Wachtel ruling for no apparent reason without comment on its applicability. He seemed to accept it as a fixed rule.

(1) 1986 (3) SA 644 (C).

But then in doing so, he took away from the wife an interest-bearing investment which would no doubt have supplemented her income, and ordered her husband to pay her maintenance of R300 per month. Had the clean break been a dominant principle, the wife could have retained the majority of the assets and the husband could have retained some but gone on to acquire some more by virtue of his well paid employment and there would have been no further residual ties between the parties. Again an ill founded reliance on the one third rule left an ongoing and unnecessary relationship between two divorced parties.

The suitability of the one third rule was put to rest by the Appellate Division in the Beaumont matter. The Appellate Division appears to have accepted the argument that Wachtel was decided prior to the amendment of the Matrimonial Causes Act 1973 and was accordingly not appropriate even in English law. The judge noted that the one third rule created more problems than it resolved and that it was not accepted as part of our law. Having discarded the one third rule, and no longer feeling bound to an arbitrary rule, one would have expected the courts to take a bolder approach in redistributing assets, this has not been the result.

Universal Partnership

Another principle which has taken up judicial deliberation in the discussion of an equitable basis on which to divide marital assets has been that of a universal partnership. In theory, this principle well founds a clean break. In practice the principle has not met with judicial approval.

In Beaumont a quo, it was put forward on behalf of Mrs Beaumont that she and her husband were in a universal partnership and she was thus entitled to division of the assets on an equal basis. Judge Kriegler's response was that "*am not dealing with the assessment of partnership shares ... The nature of the current exercise is fundamentally different.*"⁽¹⁾

(1) At 179 D.

He rejected the analogy with the Mühlmann ⁽¹⁾ case in relation to universal partnership on the basis of differing enquiries and also differing facts in relation to each solution. The Beaumonts commenced their marriage with no assets whereas Mrs Mühlmann entered an existing partnership and her claim was based on what she should be awarded as a partner. He concluded that the relative means and obligations of the Mühlmanns were irrelevant ⁽²⁾ (whereas those of the Beaumonts were relevant). Taking that argument further, one wonders how the judge would have applied that logic had Mrs Beaumont not impressed him as she did with her contributions to Mr Beaumont's estate within the mandatory guidelines which he had identified. Had she failed to qualify factually in terms of the wording of s 7(3), the relative means and obligations of the Beaumonts would have been irrelevant too in the context of a transfer of assets. Thus no asset transfer and certainly no clean break would have been possible. Only large and long-term maintenance payments would have been the answer.

The existence of a universal partnership is an argument put up in many cases dealing with s 7 and has been rejected almost uniformly with the exception of the a quo judgments in Kritzinger v Kritzinger ⁽³⁾ and Katz v Katz ⁽⁴⁾ where it was accepted and applied. In Kritzinger a quo Berman J found that the parties were married de facto in community of property and in Katz a quo a universal partnership was found to exist. On appeal of both cases, the argument was rejected. The rejections were based largely on the reasoning that the criteria and enquiry in terms of s 7(3) were fundamentally different from partnership dissolution enquiries. In the latter case, monetary contributions are paramount, whereas with marriages there are very many more issues to be considered which have no place in relation to partnerships. However, in my view, if the clean break is ever to have a proper place within our law, one needs to view the marriage institution within the very broad framework of a partnership as an underlying philosophical basis. That is not to say that all

(1) Mühlmann v Mühlmann 1984 (3) SA 102 (A).

(2) At 179 E.

(3) 1987 4 (SA) 85 (C).

(4) Unreported WLD decision.

marriages should be treated as if they were in community of property, nor that all partnerships are equal, but that the fundamental entitlement of each party is established at the outset and the division of the assets would then be based on which party had the greater rights thereto. Those rights would include need and future ability to survive financially. Thereby, in appropriate situations, a clean break would result.

The case of Van Gysen v Van Gysen ⁽¹⁾ is worth mentioning for a particular passage of Tebbutt J in which he commented on the underlying philosophy of s7(3): "*... where assets in the marriage have been acquired and maintained by the joint efforts of both, then when the marriage breaks down they should be regarded as the joint property of both of them, no matter in whose name they stand and a distribution of those assets can be effected by the Court if the parties cannot agree to do so themselves.*"⁽²⁾

This comment is significant for it predicates as a basis for the entitlement of both parties to the assets (notwithstanding legal ownership), their joint efforts. The judge has moved away from the maintenance or increase of the other's estate to contributing in general to the amassing of assets. That he regards as the underlying philosophy of both the English and South African Acts. Indeed, were this statement to be carried to its logical conclusion, a clean break would certainly be a more frequent consequence. Notwithstanding his own *dicta*, Tebbutt J ruled that each party retain his/her own assets, which in effect resulted in a one-third/two-third division. The cases that followed have not taken so bold a view on commenting on joint efforts and ownership. It seems clear that the courts will not accept a marriage per se as a universal partnership and something more than the marital relationship will have to be proven for this argument to succeed.

(1) 1986 (1) SA 56 (C).

(2) At 64 H - I.

Misconduct

An encouraging observation can be made in relation to the court's treatment of misconduct. Both courts in the Beaumont decisions placed misconduct in its proper perspective. Although it was felt that notwithstanding the absence of misconduct as a consideration under s 7(3), it could be taken into account even when no maintenance order was made, under the head of 'any other factor'. However, Botha JA in the appellate division ⁽¹⁾ expressed his conviction that our courts would adopt a conservative approach in assessing a party's misconduct as a relevant factor, whether under s 7(2) or s 7(3). Misconduct, when gross, needed to be placed in the melting pot of factors and should not be accorded a specific quantification in terms of asset distribution.⁽²⁾ The view of the judges in Beaumont is, in my opinion, correct. Taking that view against a backdrop of applying a clean break, it could conceivably come about that misconduct too heavily weighted could prevent a clean break from being put into effect by reducing the asset transfer and thus requiring a maintenance order to supplement the insufficiency, or alternatively it could increase the asset transfer, making a maintenance order unnecessary. Botha JA looked at Mr Beaumont's conduct in the context of Mrs Beaumont's maintenance needs. The uncertainty as to her employment possibility tipped the scales in her favour in relation to the quantum of maintenance.

The Kritzinger judgments on the other hand are unfortunate for the very way in which the concept of misconduct is dealt with. Berman J *a quo* laid great emphasis on the misconduct of Mrs Kritzinger and the Appellate Division attempted in an over-conscious way to redress the over-emphasis *a quo*. The result is a focus on misconduct, and the final awards were influenced by that.

It can be argued that s 9 of the Divorce Act can assist in effecting a clean break. S 9 allows the court to order a forfeiture of the benefits of a marriage by one party in favour of another based on the forfeiting party's conduct in relation to the break down of the marriage. As stated above the application of s 9 may well put the court in a position to effect a clean break if the award is

(1) At 994 E.

(2) Compare with Kritzinger and Archer discussed below.

sufficiently large to obviate the necessity of maintenance, or may require a maintenance award if the asset transfer is reduced. However, in my view, it would be a mistake to rely on s 9 as a tool to effect a clean break. The issues and enquiries revolving around s 9 are altogether different from those related to s 7. S 9 is a punitive provision and its purpose is clear. The underlying philosophy of the clean break is not to punish either party but to make them financially independent. The purpose of S 9 is to penalise. Reliance on s 9 to effect a clean break will result in a greater magnification of the parties' conduct, a regressive step in my view.

The nature of the contribution

There has been great judicial debate as to what constitutes a 'contribution' within the meaning of s 7. The approach of the courts is varied. Both Beaumont judgments took an overall view of the contributions made by both parties. The court did not consider each party's claim separately and thereafter set one off against the other. Also Botha JA in the Appellate Division did not even attempt to quantify the saving that Mrs Beaumont had effected to her husband's estate. Suffice it was for him to say that it was substantial. Had he looked at rands and cents the result may well have been different.⁽¹⁾

The court tried to take as wide a view as possible as to what constituted a 'contribution' within the meaning of s 7(3). Whilst recognising it had to rule within the parameters of the wording, the court put paid to the argument that a contribution had to be over and above the common law duty of support which exists between spouses. To hold otherwise would in my opinion, involve dissecting and minimising a spouse's contribution thereby reducing the assets to be transferred and invariably thereby reducing the possibility of applying a clean break.

Also, viewed against the desirability of applying a clean break, exact quantification or refunds would be a regressive step. The second Appellate Division case to deal with s 7 was Kritzinger v Kritzinger.⁽²⁾

(1) Compare this approach to Kritzinger discussed below, as well as Kretschmer.

(2) 1989 (1) SA 67 (A).

Certain of the pronouncements in that case are in my view regressive if one is restricting to implement a clean break.

The Appellate Division rejected the court *a quo*'s 'globular approach' in dealing with the claim and counterclaim under s 7(3) which Mr and Mrs Kritzinger had respectively instituted against the other. This is in conflict with both Beaumont judgments which took an 'overall view'.⁽¹⁾ The Appellate Division required the claim and counterclaim to be dealt with separately. Behind that requirement lies the notion that the parties need prove their precise entitlements in law. This should not be so in the context of s 7(3) which involves a discretionary ruling. Matters of this nature cannot be dealt with in a formalistic fashion if justice is ultimately to be done between the parties. Even more so, if the court is to achieve a clean break between the parties in suitable circumstances, it will not be able to exercise its discretion to achieve that goal if it is bound by artificial accounting constraints. To examine one claim in isolation, and then the other is to adopt the mathematical approach previously rejected.

A restrictive interpretation was placed on the meaning of 'contribution'. It had to be a positive act - putting something into the maintenance or income of the other's estate "by way of money, labour or skill". It does not envisage a mere refraining from a particular activity or course of conduct. Milne, JA said:

"It seems to me that it is prerequisite to a successful claim under this subsection that the claimant must show, on a balance of probabilities, that the conduct relied upon as a contribution in fact caused the alleged maintenance or increase of the other spouse's estate ... The conduct must be the causa causans, and not merely the cause sine qua non of the alleged maintenance or increase ... The respondent contributed nothing in the form of money, property, work, time or skill - or, indeed, any form of activity, whatsoever, to the increase of the appellant's estate."⁽²⁾

(1) See comments previously made.

(2) At 88 G - H.

This is an unfortunate development. By placing so narrow a meaning on 'contribution', the burden of proving a connection between the one spouse's activities and the increase or maintenance in the other's estate becomes even more difficult. The result is that fewer assets will then be redistributed under s 7(3) and the chances of a clean break in any given situation become more remote. In my view, career opportunity costs are and should be valid considerations as 'contributions' as should other intangible and (strictly) unmeasurable contributions. To have borrowed from delict as an analogy is unfortunate. There compensation for a wrongful deed is the underlying rationale, which is not the case under s 7(3).

Milne JA has also required a provable causation link between the contribution and the increase or maintenance of the other's estate. That is another obstacle to an ultimate aim of a clean break as the onus becomes extremely difficult on the spouse requiring the transfer of assets.

As stated above, the Appellate Division in Kritzinger said that court was wrong to take a globular view of the parties' respective claims but should have dealt with each spouse's claim separately. The latter approach was adopted by the court in Kretschmer v Kretschmer ⁽¹⁾ where Flemming J examined each party's claim in great detail (with a fair amount of supposition when accuracy was not possible) to reconstruct the sources and fates of the parties' finances over 12 years of marriage. In this case the court looked at monetary aspects only and gave an even narrower meaning to the understanding of 'contribution'. The court ruled that the wife's transporting of the children, supervising the nanny etc. was not a contribution to the maintenance or increase of the husband's estate as nobody would have been hired to do those tasks and accordingly she had not saved expenses by the rendering of services.⁽²⁾ This is specifically the approach the Appellate Division in Beaumont did not adopt. But the court went further:

(1) 1989 (1) SA 566 (W).

(2) At 577 - 578.

"There is no justification for reasoning that, simply because specific behaviour would have cost money if performed by an outside party, monetary value should be placed thereon for the purposes of s 7(3)."⁽¹⁾ Further it is stated: "The point is that not every activity which can notionally be obtained as a paid-for service can be claimed to represent something by which a party contributed to maintenance or increase in net estate."⁽²⁾ And also: "Section 7(3) is not an action for damages suffered as a result of a lost opportunity to build up an own estate."⁽³⁾ One would agree with the judge that compensation is not necessary, but it is reasonable to regard 'sacrifice' of this nature as a contribution. Nor did the court regard it as a saving of expenses by the husband that the wife contributed to her own maintenance. The judge concluded that the husband's estate increased despite the wife's free spending (and his own). The husband's estate of approximately R1,4 million was made up largely from his family assets and only R81 000 was built up by his own efforts to which the wife was said to have directly contributed nought. Her estate was put as a negative amount. The wife was awarded R33 000 which was the actual amount which she had borne as a loss as a result of increased income tax payable by her arising from her husband's large income. The husband was also ordered to pay R20 000 as a premium towards an endowment policy or retirement annuity for the wife "*as maintenance to plaintiff on a 'clean break' basis.*"⁽⁴⁾ While one commends the court for breaking the ties between the parties and employing a clean break policy, the general tenor of the judgment militates against a clean break in other circumstances as the application of its principles (in relation to contributions) invites smaller s 7(3) orders and therefore maintenance orders will be needed to avoid undue hardship. In this case the husband was wealthy enough for the wife not to have to work nor to have to contribute to his estate. On divorce she thus had a very small claim under s 7(3), whereas the husband retained his wealth. The court placed much significance on the fact that most of the husband's wealth was from his family.⁽⁵⁾

(1) At 580 H.

(2) At 581 C.

(3) At 580 G.

(4) At 584 E.

(5) This issue is discussed later in relation to Beira and Smith.

The line of Kretschmer was not adopted in the Appellate Division decision of Katz v Katz ⁽¹⁾ where again substantial wealth was involved. The facts of this case fitted "the circumstances" suitable to a clean break which Beaumont (*a quo*) spoke of. Here were a wealthy husband, an attorney who had made good in property investments and a wife who was a housewife in the traditional sense save for minor forays into the job market. In the court *a quo* she was granted a redistribution order of R3,5 million on the grounds of the existence of a universal partnership. The tender in the court *a quo* by the husband had been R2 000 per month for the wife plus R300 000 by way of a redistribution. The tender was later amended to delete the maintenance offer and increase the asset transfer to R750 000. At the trial, the husband's assets totalled R7,5 million and the wife's R304 000. The court gave its view of the clean break principle. *"When a Court makes an order for maintenance in terms of s 7(2) it may have regard to the factors there set out, including 'an order in terms of ss (3) and any other factor which in the opinion of the Court should be taken into account.' There is nothing in ss (5) which specifically provides that in the determination of the assets to be transferred as contemplated in ss (3), regard may be had to the fact that no order is being made in terms of ss (2). Nevertheless, such regard is not excluded ... In terms of the decision in Beaumonts' case supra, the 'clean break' concept is not foreign to our law. It is obvious that a 'complete termination of the financial dependence of one party on the other' cannot be achieved so long as there is to be an order for the periodical payment of maintenance. It follows that it will frequently (one may almost say generally) be necessary, if a clean break is to be achieved, that the amount of the determination should be at least such that the spouse concerned will be in a financial position to maintain herself or himself. In such circumstances, a Court will ordinarily take into account the spouse's maintenance needs."*⁽²⁾

The court examined in some detail the contributions of Mrs Katz to the maintenance of her husband's estate, dividing them into three broad categories. The first category, being contributions from her parents, was discounted in terms of s 7(3). The second category, being her contributions to the matrimonial homes, was not significant. The third category, being her 'services' as a wife and mother, was rendered with the assistance of three domestic employees. It was the latter category upon which the wife factually

(1) 1989 (3) SA 1 (A).

(2) At 11 A - D.

had to rely to evaluate her contributions. The court found "*evaluation of the wife's 'services' ... a difficult task*"⁽¹⁾ Taking all factors into consideration, her contributions can by no means be seen as substantial. On the contrary, the court remarked that: "*There is no doubt that it was, to an overwhelming degree, the appellant's own energy, ability, knowledge and courage that enabled him to make extremely profitable investments in property, and even more profitable investments in the stock market.*"⁽²⁾ And further: "*The respondent played no role in the decisions to acquire any assets which constituted the appellant's property portfolio, and later his share portfolio.*"⁽³⁾

Yet the court saw fit to award her R1,5 million. Why? It is interesting to examine some remarks. After discussing the clean break principle, the judge stated that the trial court found: "*... the amount needed to maintain the respondent would be in the vicinity of R500 000...*"⁽⁴⁾ Maintain here meant buying her a house, a car and an annuity to provide her with a gross monthly income of R6 000. On appeal, the judge stated that the above finding was unrealistic as it failed to take inflation into account and the tax she would have had to pay on the annuity income.

Whilst the court was at great pains to state that the judgment did not lay down general principles but related to this particular case, its reasoning did break away from previous cases. It was stated in terms that: "*... it would be just and equitable to make a redistribution order which would, so far as is reasonably practicable, enable the respondent to maintain the same standard of living as the parties enjoyed when the marriage broke up.*"⁽⁵⁾

"*This order is intended, again so far as is practicable, to give the respondent financial security for the rest of her life.*"⁽⁶⁾

(1) At 15 I.

(2) At 13 E - F.

(3) At 13 J - 14 A.

(4) At 11 F.

(5) At 17 A - B.

(6) At 17 B.

Several observations are noteworthy. Firstly, the court is applying a maintenance criterion (standard of living) to a redistribution order. Secondly, the court is viewing maintenance and redistribution as a single enquiry (much along the lines of the English statute). Thirdly, the award granted to the wife is in no way indicative of her contributions to the increase of her husband's estate. On the facts she barely passed that hurdle, even if contributions were given the widest possible meaning, contrary to the decisions mentioned earlier. Fourthly, the court looked at the wife's needs, almost exclusively, and made an order based on that (subject to the affordability by the husband which was not an issue). Fifthly, the value of the husband's estate was irrelevant, so long as he could afford to pay enough to provide her with financial security for the rest of her life. Sixthly, 'services' do not require monetary evaluation ie it need not be proved that if the wife had not performed those tasks somebody would have been employed to do them and thus the wife's contribution saved expenses. Seventhly, a wife did not have to perform duties over and above her common law duties to qualify for a s 7(3) order.

But perhaps the most important breakthrough in this case, and the firmest push for a clean break comes from the court's *dicta*:

"Before the Court can make an order in terms of ss (3) it must be established (a) that the party seeking such an order has made a contribution; (b) that such a contribution has increased or maintained the other party's estate; and (c) that it would be just and equitable to make such an order because of (a) and (b). It does not follow that the manner in which the Court is to arrive at what is just and equitable is limited to what has been contributed. In the first place this is not what the section says. In the second place this Court in Beaumont's case supra has held quite clearly that this is not what the section means."⁽¹⁾

The comments above are made in the context of rejecting the common law duty of support argument, but go much further. They provide a liberal interpretation of s 7(3). Whereas the enquiry up to now has been what is just and equitable in the light of the contributions, this case, to some extent, unlinks the two enquiries. This opens the way to implementing a final cessation of ties between the parties - a clean break - based on different criteria.

(1) At 15 B - D.

The court pointed out that the husband's large estate enabled the court to take the approach that it did. It also pointed out the anomaly in this - where a spouse contributed a great deal, she may not receive a large redistribution or any at all because the husband's estate simply cannot accommodate it financially.⁽¹⁾ That, as the judge says, is unavoidable.

A similar observation was made by Ludorf J in Archer v Archer.⁽²⁾ The estate of the husband was worth approximately R1,5 million at the time of the trial. It would, as the judge observed: "*... permit of division into portions being economically viable in the sense that such portions would be capable each of providing adequately by way of maintenance for the owner of such portion.*"⁽³⁾

In awarding R300 000 to the wife, the judge was much swayed in my view by the heartless way in which the husband had treated the wife during the marriage. He accepted as common cause that the wife had contributed to the husband's estate in the manner contemplated by the Act but felt it unnecessary to elaborate. Thus, whether the contribution was the basis of the kind of transfer ordered is not possible to tell from the judgment.

In Beaumont (a quo), Kriegler J, in relation to the advantages of a clean break stated that they need not be elaborated on. Ludorf J in Archer gives his reasons for doing so:

"Quite apart from the above considerations, it seems to me that in the light of appellant's conduct during the marriage, more particularly his attitude towards respondent as evidenced by such conduct, and his relationship with the lady with whom he is living, it would be desirable to exercise my discretion so as to bring about a 'clean break' between the parties and to render the respondent financially independent from the appellant."⁽⁴⁾

(1) At 17 C - D.

(2) 1989 (2) SA 885 (E).

(3) At 894 G.

(4) At 894 J - 895 A.

The financial independence seems to come as an afterthought. There was no great delving into her economic viability after the divorce. She was awarded R300 000 and already possessed R200 000 worth of assets. Although one feels that the judgment was overall correct, it is difficult to elicit the principles from it. It is not clear how the judge arrived at R300 000 as a redistribution, nor on what basis it was made other than it seemed fair and just in the circumstances. He quoted Beaumont with approval in regard to the approach to be adopted, ie. an overall view and also that the clean break principle should be adopted where circumstances permit.

One welcomes the Archer judgment for its result. However, it lacks clarity on which to base further judgments and in that sense cannot be seen as a fundamental advancement towards the clean break principle.

Deprivation of Income Producing Assets

On the facts, Botha JA in the Beaumont appeal, endorsed Kriegler J's conclusion not to order a redistribution only, as this would have meant too great a reduction on Mr Beaumont's income producing capital or too small a capital payment to Mrs Beaumont to provide for her needs. But commenting on Mr Beaumont's failure to take the witness stand to give evidence on his income, Botha JA said: *"I should add that, if the appellant should have problems in complying with the orders of the Court a quo by using only his available income, there is no reason why he should not dispose of some of his assets in order to meet his obligations, for he can do so without harming his income-producing business. It appears from the evidence that the appellant is not using all of the land he has at Brits for the purposes of his business; he can sell off whatever he does not need. He can also realise his share in the property at Mossel Bay. This will not result in undue hardship on him."*⁽¹⁾ One can only ask why the court did not transfer one or more of those assets to Mrs Beaumont either to rent out or to sell and invest the proceeds, thereby creating a source of income for herself. Thus, notwithstanding both courts' acceptance of the clean break principle, they were reluctant to apply it in circumstances which, on balance, were suitable.

(1) At 1001 G - H.

Had the legislature placed more emphasis on the clean break goal and urged, if not directed, the court to attain it, this case could in all probability have turned that way.

In Archer v Archer (1) the judge's observations are worth noting, particularly his comments at 894 H - J. When discussing the extent of the husband's business and the convenience of being able to separate sectional title units for the purposes of redistribution "*without affecting the essence or continuance of his enterprise, nor its profitability or potential for future profitability*", he noted that the husband would be able to recover the capital loss.(2) He went on to say "*one is, so to speak, not depriving the journeyman of his lathe but only of some of the fruits of his labour which he would be capable of replacing with further, and if needs be, intensified labour. (I should, however, not be understood to hold that a Court may not so deprive a party.)*"(3) It is the last remark that invites thought. Would the judge, one wonders, have indeed deprived Mr Archer of his lathe when faced with the option of implementing a clean break by doing so, or leaving Mr Archer with his lathe but compelling him to pay maintenance. In the light of the decided cases and the legislation as it now stands, it is likely that a maintenance order would have been settled on.

Property Available for Distribution and for Assessment of Wealth

There is a further issue which indirectly affects implementation of the clean break principle, ie what the courts regard as property available for redistribution or property to be included in assessing a party's wealth.

In Beira v Beira (4) Leveson J felt that assets which a party acquired fortuitously "*such as an unexpected inheritance from a rich uncle*" (5) a donation from a third party and such like acquisitions should be excluded from consideration for the purpose of a redistribution order. His reasoning was that such acquisitions are excluded from the accrual of an estate in a post

(1) 1989 (2) SA 885 (E).

(2) At 894 H.

(3) At 894 I.

(4) 1990 (3) SA 802 (W).

(5) At 807 G.

November 1984 marriage and thus should also by implication be excluded from s 7(3) in the absence of express language providing for their inclusion. The only place for consideration of such assets is in assessing the existing means and obligations of the parties.

Thus, following this judgment, where one party has contributed extensively to the increase or maintenance of the other's estate, which estate is large as a result of an inheritance, the proportion of the non-inherited portion of the estate to which the other spouse would be entitled may be too little to give her financial independence and hence maintenance would be payable. It is submitted that in certain circumstances it may well be appropriate to include inherited and such like assets to calculate the quantum of a redistribution.

The same issue came up in the case of Smith v Smith ⁽¹⁾ where the parties had agreed not to take into account certain assets owned by one of the parties in redistributing their assets. Ludorf J had this to say:

"Artikel 7(5)(a) gebied die hof om by die besluit ter uitreiking of andersins die bestaande vermoëns en verpligtinge van die partye in aanmerking te neem. Die effek van hierdie bepaling ... is na my oordeel dat 'n hof hom nie gebonde sal ag aan die onderlinge ooreenkoms tussen die partye te dien effekte dat sekere bestaande vermoëns nie in aanmerking geneem word nie, want die statuut is gebiedend."⁽²⁾

He goes on to say that he agrees with Leveson J in Beira v Beira that certain existing means of the parties (for example an inheritance) are not calculable for an order in terms of s 7(3). But that does not mean that the existence and value of that inheritance must not be taken into account in deciding to make a s 7(3) order against other assets of that estate. He considered it "onbillik" to saddle one party with a redistribution order (notwithstanding the other party's contribution thereto) where the contributor's existing means included a million rand cash inheritance.

(1) 1994 (2) PH 7 (E).

(2) *Ibid.*

"Die totale omvang van beide boedels is na my oordeel van besondere, indien nie deurslaggewende belang, by die oorweging van die ekonomiese uitvoerbaarheid van 'n bevel ingevolge artikel 7(3) en of die besondere geval hom byvoorbeeld leen tot die sogenaamde 'skoonbreuk' gedagte." (1)

In my view Judge Ludorf's is the correct one.

Maintenance

As a final leg to analysing the approach of the courts to the clean break principle, one needs to look at the various recent judicial pronouncements in relation to maintenance. Essentially, it is the notion that one spouse may be responsible for maintaining the other after divorce that is the single biggest obstacle to implementing a clean break. Behind the concept of maintenance rages an on-going debate as to the basis on which maintenance should be paid, ie. need, right, compensation or no basis at all. As the subsection now stands, most of the factors for consideration in terms of s 7(2) relate to need and look to the financial futures of the spouses.

In general, the courts have almost invariably awarded maintenance to spouses as an automatic consequence of divorce. This is understandable prior to the enactment of s 7(3) but, as has been discussed above, the trend has not varied save for a few instances subsequent to the enactment of s 7(3). There has been no unanimity in the court decisions as to when a spouse is entitled to rehabilitative maintenance, token maintenance or no maintenance, as will be discussed below.

In Kroon v Kroon,⁽²⁾ the wife was awarded maintenance not only because of her need therefor but also because "... *plaintiff is, in fairness, entitled not only to maintenance but to more maintenance than would be awarded to a wife who has merely shared a bed and kept house for a few years.*"⁽³⁾ Here the wife's 'contributions' of running the home were regarded as reasons for increased maintenance.

(1) At page 6.

(2) 1986 (4) 616 (E).

(3) At 622 J - 623 A.

Baker J discussed the interrelationship of s 7(2) and s 7(3) and stated "... *If this court orders the defendant's share of the property to be transferred to plaintiff ..., the maintenance which defendant would have had to pay in the absence of a property transfer would fall to be reduced. The one balances the other. If assets are transferred and are capable of generating maintenance, the actual cash sum of maintenance to be paid by defendant may be reduced.*"⁽¹⁾

Baker J quoted the case of Higgo v Higgo ⁽²⁾ in which the entire estate was split 50/50 and no maintenance was allowed, thus effecting a clean break, the yield from the 50% share of the assets being sufficient to generate all the maintenance the wife might need. He then stated the position of our law on maintenance. "*As far as our law is concerned, the position is that no maintenance will be awarded to a woman who can support herself ...; but in the instant case there is no positive evidence that plaintiff can support herself even to a limited extent. Present prospects of employment in this country for unqualified women in their middle forties are depressing. Hahlo at 364 observes that 'rehabilitative' maintenance may be awarded to middle-aged women who have for years devoted themselves full-time to the management of the household and the care of the children of the marriage; it is awarded for a period sufficient to tide them over while being trained or retrained for a job or a profession ... But that postulates a woman who can be trained or retrained. In the present case, the plaintiff's history shows small indication of such an ability.*"⁽³⁾

With respect to the learned judge, Mrs Kroon at the time was 42 years old and could well have, in time, become employable. Rehabilitative maintenance seems to have been appropriate in this case, thereby effecting a clean break between the parties after two or three years. Rehabilitative maintenance bridges the gap between lifelong maintenance and a clean break. Its effect is to defer a clean break until a later specified time.

The next case of importance is Grasso v Grasso.⁽⁴⁾ Referring to the passage quoted in Kroon about the changing fabric of society in regard to women having educational and vocational opportunities and permanent maintenance being reserved for women too old to earn a living and unlikely to remarry,

(1) At 630 A - B.

(2) Unreported WLD decision (1983).

(3) At 632 H - J.

(4) 1987 (1) SA 48 (C).

Berman J had this to say *"Now, I am by no means entirely satisfied that what the authors of the passage quoted above say with regard to the entitlement of a divorced wife, who did not work during her marriage but who devoted herself to the running of her home and the raising of her children, to no more than 'rehabilitation maintenance' is at the present time of application in this country or as yet reflects the state of affairs here ... There is little, if any, doubt in my mind that, where the divorced husband (and particularly one whose misconduct has caused the breakdown of the marriage) can easily afford to have his ex-wife not go out to work and where she did not work prior to divorce, but devoted herself instead to her home and the upbringing of her children, he should be required to see to it that such state of affairs continues - ... What the authors have said in the passage quoted above may well be true of childless couples, or where the husband does not earn enough to maintain, after divorce, two separate homes so as to permit his former wife ... to be at home all day - in such cases payment of 'rehabilitation maintenance' may, or perforce must, be resorted to, but then of necessity and not because it is in the best interests of all concerned. ... Whatever plaintiff's ability to earn her own living or to contribute towards her personal maintenance may be, for the foreseeable future this falls to be disregarded, more particularly as all the other factors mentioned in s 7(2) of the Divorce Act 1979 are favourable to plaintiff in her claim for maintenance."*⁽¹⁾

The approach Judge Berman adopted was that Mrs Grasso was entitled to lifelong maintenance (or until her remarriage).

Mrs Grasso was 40 years old at the time of divorce and was a qualified teacher, although she had hardly used her profession. Despite Mr Grasso's substantial wealth, there appeared to be no claim under s 7(3) [unless this was not a marriage capable of being adjudicated under s 7(3) which is not clear from the judgment] and certainly no mention of a clean break between the parties is made in circumstances which, in my view, appeared to have been eminently suitable. At very least, no more than rehabilitative maintenance should have been ordered for a period until Mrs Grasso had retrained and her children were no longer young and dependent.

(1) At 58 B - I.

Support for the approach of Grasso is found in Pommerel v Pommerel.⁽¹⁾ Mullins J expressed doubt that the *dictum* in Kroon that a wife who could support herself would not be awarded maintenance, was a hard and fast principle applicable to all cases. He held that the Kroon view would probably be correct only if the ex-wife "*is in fact earning sufficient for her support, or in fact has such assets that she can support herself from the income therefrom. This is a very different matter, however, from the notional employability of the woman concerned*"⁽²⁾ He added that a woman's ability to earn an income does not *per se* disentitle the court from ordering maintenance for her; the question of the reasonableness of the woman's decision not to work must be considered in the light of many factors, eg. age, health, qualifications, when she was last employed, the length of the marriage, standard of living during the marriage, having young children. This case shows an inclination to entrench an entitlement to maintenance.

I would submit that were the courts to shift the notions of right and compensation to the enquiry under s 7(3), rather than under s 7(2), a clean break would much more readily be applied. It is trite that an ex-spouse does not have the right to maintenance after divorce. Does she have a right to compensation for loss of opportunity in the job market, lack of seniority when entering the job market at a later age and such-like considerations? Compensation is an unfortunate term, but such factors should, in my view, be considered as contributions under s 7(3). As stated before, the courts have not agreed.

Token Maintenance

A step in the direction towards a clean break was seen in Qoza v Qoza.⁽³⁾ In this case the wife applied for token maintenance in the amount of R1. It was argued on her behalf that she had proved the need for token maintenance *inter alia*:

- (i) on the grounds that her only source of income was from her employment and if she was to become ill and unable to work she would have no source of income; and

(1) 1990 (1) SA 998 (E).

(2) At 1002 C.

(3) 1989 (4) SA 838 (CKGD).

- (ii) the effects of inflation would result in her requiring maintenance from her husband in the future.

The court rejected the above arguments and specifically the test laid down in Portinho v Portinho ⁽¹⁾ where the judge said: *"In my view it is unsatisfactory for the Courts to employ gimmicks to create rights which the Legislature in its wisdom has now twice omitted to bring into being... If it is deemed in the public interest that divorced parties who upon divorce are both financially independent should for years to come be tied together by an unbreakable bond in the form of a contingent right to claim maintenance, then the Legislature should intervene. I am not convinced of the wisdom thereof.*

In my view, the test to be applied is whether on the probabilities maintenance is or will be needed. If the answer is positive the considerations set out in s 7(2) come into play. If on the probabilities it is not shown that maintenance is or will be needed no award thereof (whatever its size) can be made. A token award where no maintenance is needed is therefore not envisaged in the Act."⁽²⁾

In my view, the judge in Portinho came out in full support of a clean break, although the judge in Qoza interpreted the Portinho judgment to mean token maintenance would be permissible. Be that as it may, the judge in Qoza said *"I must therefore with Van Dijkhorst J in Portinho's case question the wisdom of keeping two divorced persons bonded together, possibly for life, by a token maintenance order made merely to provide for speculative possibilities. Such an order where no future need for maintenance has been proved on a balance of probabilities does not seem to me to accord with justice. A divorced spouse capable of self support can be expected to make his or her own provisions against the normal risks of life and for retirement etc."*⁽³⁾

He felt that: *"This approach requires the Court to consider the factors referred to in s 7(2) in order to decide, firstly, whether maintenance is to be paid at all (in other words whether a need for maintenance exists) and, if so, by whom to whom; secondly, the amount to be paid and thirdly the period for which maintenance is to be paid. This*

(1) 1981 (2) SA 595 (T).

(2) At 597 F.

(3) At 843 E - F.

approach, which I adopt, will in my view, eliminate the unjust results which may result from the approach adopted in Brink's case."⁽¹⁾

Brink's case ⁽²⁾ contained the following statement by Milne J: "*Having regard to the depressing rise in the cost of living, at least in the past ten or twelve years, it does not seem unrealistic to say that where a young woman is divorced from her husband and both of them are wage earners, or capable of earning a living, there is, at the lowest, a very distinct possibility that the wife may, in the future, require maintenance from her husband, and that it would be a recognition of the economic history of the Republic and, indeed, of the western world over the past ten years to make provision for such a contingency.*"⁽³⁾

I respectfully agree with the judge in Qoza that Brink could certainly bring about unjust results and is undesirable as a concept in any event.

If one is to distil the general principles from the cases discussed above, despite the lack of unanimity in a general direction, one can state that the following emerges:

- the courts regard granting of maintenance to spouses as the rule rather than the exception;
- where the wife is young or reasonably young, in good health, the marriage has not been of long duration and she has worked at least at some point during the marriage or is working at the time of divorce, she is unlikely to be awarded long-term maintenance and may qualify for rehabilitative maintenance;
- different judges have awarded maintenance for different reasons and aside from the *dicta* in Qoza, none of the cases discussed above have advocated or attempted to apply the clean break principle.

(1) At 842 D - E.

(2) Brink v Brink 1983 (3) SA 217 (D).

(3) At 220 G - H.

It should perhaps be mentioned that in daily practice, rehabilitative maintenance is a frequent aspect of divorce settlement and the trend of practitioners, in appropriate situations, is to implement a severing of financial ties between the parties as soon as possible after divorce.

CONCLUSION

The legislation as it now stands is not conducive to the application of a clean break. The wording neither binds nor encourages the courts to apply or consider applying a clean break. Whilst acknowledging the desirability of the clean break principle, the courts have by and large been conservative in their approach, with a few notable exceptions.

The courts have found difficulty in moving away from the concept of ownership of assets as being the single most important criterion in redistribution orders. There has been a reluctance to deprive an owner of his assets in order to eliminate a maintenance order. Financial independence is seen more as a welcome by-product of a redistribution order than as a goal in itself. The judges have not considered financial independence as a factor falling within their discretion of what is just and equitable. There has been much judicial time and debate spent on analysing the component concepts which form part of s 7. The analysis is contained within the factual framework of the past - what contributions were made, were the spouses (financial) partners, did the spouses misbehave. The legal basis of the redistribution order has also been examined at length - is the approach global or not, does the one third rule apply, how do sections 7(2) and 7(3) interrelate. None of those questions take the issue into a consideration of the future relationship of the divorced spouses, which is ultimately the goal of the clean break principle. In my view until the legislature shifts its focus from past activities to future realities, the current approach of the courts is unlikely to alter significantly.

BIBLIOGRAPHY

Legislation

South African Law

The Divorce Act 70 of 1979
The Guardianship Act 192 of 1993
The Domicile Act 3 of 1992
The Matrimonial Property Act 88 of 1984

English Law

Matrimonial Causes Act 1973
Matrimonial and Family Proceedings Act 1984

Articles and Texts

- * Bromley, P.M. and Lowe, N.V.
Bromley's Family Law 8ed (1992)

- * Clark, B. & Van Heerden B. "Asset redistribution on divorce - The exercise of judicial discretion"
(1989) South African Law Journal 243

- * Costa, A.
"A plea for the reform of s 7(3) of the Divorce Act 70 of 1979 as amended"
(December 1990) De Rebus 916

- * Cretney, S.M. and Masson, J.M.
Principles of Family Law 5ed (1990)

- * Deech, R. "Financial relief"
(1982) Law Quarterly Review 621

- * Heaton, J. "Die oordrag van bates ingevolge artikel 7(3) - (6) van die Egskeidingswet"
(1987) THRHR 103

- * Joubert, W.A. (ed.)
16 LAWSA (1992) 220 - 249

- * Le Roux, C. "Die skoonbreuk-beginsel by wyse van judisiële diskresie"
(January 1990) De Rebus 63

- * Miller, J.G. "The reform of the law relating to financial division and matrimonial property"
(1984) 15 Cambrian Law Review 15

- * O'Donovan, K. "Should all maintenance of spouse be abolished"
(1982) Modern Law Review 45

- * Schäfer, I.D. "Token maintenance"
(1980) THRHR 57

- * Schäfer, I.D. (ed.)
Family Law Service (1995) Division D on Divorce

- * Sinclair, J.D. An Introduction to the Matrimonial Property Act 1984
(1984) 51 - 52

- * Sinclair, J.D. "Divorce and the judicial discretion - In search of the middle ground"
(1989) South African Law Journal 106

- * Sinclair, J.D. "Financial provision on divorce - Need, compensation or entitlement"
(1981) South African Law Journal 469

- * Sinclair, J.D. "Marriage: Is it still a commitment for life entailing a lifelong duty of support?"
(1983) Acta Juridica 75

- * Sonnekus, J.C. "Egskeiding en kwantifisering van die bydrae tot die ander gade se boedel - Artikel 7(3) - (5) van die Egskeidingswet 70 van 1979"
(1986) South African Law Journal 103

- * South African Law Commission
Report on the Review of the Law of Divorce (1988)

- * Standley, K.
Family Law 1ed (1993)

- * Symes, P. "Indissolubility and the clean break"
(1985) Modern Law Review

- * Van Rensburg, J. and Cohen, J.
Matrimonial Property Act and Divorce Actions - An Update
(material presented to participants at seminar given by abovementioned persons on behalf of Continuing Legal Education, Cape Town)

Cases

South African cases

Archer v Archer 1989 (2) SA 885 (E)
Beaumont v Beaumont 1985 (4) SA 171 (W)
Beaumont v Beaumont 1987 (1) SA 967 (A)
Beira v Beira 1990 (3) SA 802 (W)
Brink v Brink 1983 (3) 217 (D)
Grasso v Grasso 1987 (1) SA 48 (C)
Higgo v Higgo unreported WLD decision (1983)
Joffe v Lubner 1972 (4) SA 521 (C)
Katz v Katz 1989 (3) SA 1 (A)
Kretschmer v Kretschmer 1989 (1) SA 566 (W)
Kritzinger v Kritzinger 1987 (4) SA 85 (C)
Kritzinger v Kritzinger 1989 (1) SA 67 (A)
Kroon v Kroon 1986 (4) SA 616 (E)
Macgregor v Macgregor 1986 (3) SA 644 (C)
Mühlmann v Mühlmann 1984 (3) SA 102 (A)
Pommerel v Pommerel 1990 (1) SA 998 (E)
Porthino v Porthino 1981 (2) SA 595 (T)
Qoza v Qoza 1989 (4) SA 838 (Ck)
Smith v Smith 1994 (2) PH 7 (E)
Van Gysen v Van Gysen 1986 (1) SA 56 (C)

English cases

Livesey (formerly Jenkins) v Jenkins [1985] F.L.R. 813 (HL)
Suter v Suter and Jones [1987] 2 All ER 336 (CA)
Wachtel v Wachtel [1973] 1 All ER 829 (CA)
Whiting v Whiting [1988] 2 All ER 275 (CA)