

THE NEED FOR NEW LEGISLATION AND/OR DIVORCE MEDIATION TO COUNTER SOME COMMONLY EXPERIENCED PROBLEMS WITH THE DIVISION OF ASSETS UPON DIVORCE

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1 Introduction

In terms of the Matrimonial Property Act 88 of 1984, the Recognition of Customary Marriages Act 120 of 1998¹ and the Civil Union Act 17 of 2006, there are three generally applicable matrimonial property systems in South Africa, namely universal community of property or in community of property, complete separation of property or out of community of property and the accrual system. With regard to civil marriages and civil unions, the specific matrimonial property system selected by spouses upon the conclusion of their marriage or union principally determines the effect of their divorce on the division of their property.² With regard to customary marriages, the matrimonial property system selected by the parties is less important and the court's view of what is equitable and just is decisive in determining how the parties' assets will be divided.³ Although our law provides clear rules and instructions regarding the division of the parties' assets upon divorce, there are certain difficulties and practical problems which are often experienced and which make this aspect of divorce one of the thorniest issues to resolve in divorce litigation.

In this article the relevant law will be set out first. This will be followed by a discussion of the difficulties and/or practical problems and the impact they have. These problems relate to the postponement of patrimonial claims or the finalisation thereof to a date after the divorce order, uncertainty about the extent of the parties' assets and the dissipation of such assets. Lastly, possible solutions to the problems or practical problems will be examined. These solutions relate to the acceleration of the effective date for determining patrimonial claims and the use of mediation in divorce matters.

¹ Only as far as monogamous customary marriages are concerned

² J Heaton *South African Family Law* 3 ed (2010) 125

³ According to *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC) and s 8(4)(a) of the Recognition of Customary Marriages Act

2 The division of assets upon divorce

2.1 Universal community of property

Where the parties are married in community of property in terms of the Marriage Act 25 of 1961 or the Civil Union Act, the balance of their joint estate, after all liabilities have been paid, must be divided equally between them upon divorce,⁴ unless a forfeiture order is granted against one of the parties⁵ or an adjustment needs to be effected in favour of one of them.⁶ Where the parties cannot agree on the manner in which the joint estate is to be divided, a prayer for the appointment of a receiver or liquidator to divide the joint estate may be included in the divorce summons or, as happens more frequently in practice, the parties may approach the court after the granting of the divorce order under a separate application for the appointment of a receiver or liquidator and possibly again for further directions in the course of such liquidation.⁷ In these circumstances the actual division of the joint estate is postponed to a later stage after the divorce order has been granted and other ancillary matters such as maintenance for the spouses and the interests of children have been decided.

Where the parties are married in community of property in terms of the Recognition of Customary Marriages Act the joint estate need not necessarily be divided equally between the parties as in terms of the decision of the Constitutional Court in *Gumede v President of the Republic of South Africa*,⁸ the power of the court to redistribute assets equitably upon divorce under section 8(4)(a) of the Recognition of Customary Marriages Act applies to all customary marriages.

2.2 Complete separation of property

Where the parties are married out of community of property in terms of the Marriage Act, it is necessary to distinguish between civil marriages concluded prior to the commencement of the Matrimonial Property Act on 1 November 1984⁹ and those concluded after this date. In terms of section 7(3) of the Divorce Act 70 of 1979, where the parties married each other with complete separation of property before 1 November 1984¹⁰ and the parties did not reach an agreement concerning the division of their assets, the party with the smaller estate may request a redistribution order against the other party upon divorce. Such an order will only be granted if the first-mentioned spouse contributed directly or indirectly to the maintenance or increase of the other spouse's estate during the subsistence of the marriage and the court is

⁴ Heaton *SA Family Law* 66

⁵ In terms of s 9 of the Divorce Act 70 of 1979

⁶ In terms of s 15(9)(b) of the Matrimonial Property Act

⁷ PA van Niekerk *A Practical Guide to Patrimonial Litigation in Divorce Actions* (RS 10 2008) 3–3–3–4

⁸ 2009 3 SA 152 (CC)

⁹ Or prior to the commencement of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 on 2 December 1988 where the marriage was concluded in terms of s 22(6) of the Black Administration Act 38 of 1927

¹⁰ Or 2 December 1988

satisfied that, by reason of such contribution, it is equitable and just to make a redistribution order.¹¹ It is clear that these orders must be made upon divorce and no authority could be found where the courts attempted to postpone the making of a redistribution order to a later stage after the issue of the divorce order.

Where the parties married with complete separation of property after 1 November 1984, they cannot claim any transfer of assets upon divorce as they have no financial claims in respect of each other's estates other than possible maintenance claims. The same rule applies to all civil unions concluded with complete separation of property since the coming into operation of the Civil Union Act on 30 November 2006. Once again, customary marriages concluded with complete separation of property are the exception to the rule as the effect of the *Gumede* decision¹² is that the court may equitably redistribute the parties' assets upon divorce in terms of section 8(4)(a) of the Recognition of Customary Marriages Act, regardless of when or how they were married. Section 8(4)(a) applies the whole of section 7 of the Divorce Act to the dissolution of a customary marriage.

2.3 The accrual system

Where the parties were married in terms of the Marriage Act or the Civil Union Act subject to the accrual system, the party whose estate shows the smaller accrual or no accrual at all upon divorce may in terms of section 3(1) of the Matrimonial Property Act claim from the other spouse an amount equal to half the difference between the accrual in the parties' respective estates. Because of the wording of section 3(1), which stipulates that the accrual claim is only acquired upon the dissolution of the marriage by divorce, some authors¹³ are of the opinion that a new and separate action needs to be instituted after the date of the divorce in order to enforce the accrual claim which was acquired on the date of the divorce. This viewpoint has indeed been followed in a few cases. In the unreported case of *Willemse v Willemse*¹⁴ the plaintiff successfully applied for an order in terms of rule 33(4) of the Uniform Rules of Court to the effect that her accrual claim be adjudicated separately, after the issues concerning the dissolution of the marriage and the interests of minor children had been decided. Furthermore, in another unreported case, *Le Roux v Le Roux*,¹⁵ the court held that the plaintiff was not entitled to proceed with her case for the payment of her accrual claim as part of the divorce proceedings; in other words, the court found that an accrual claim may not be included in a divorce summons. These cases relied on the decision in *Reeder v Softline*,¹⁶ where the court concluded that during the subsistence of the marriage one spouse merely has a contingent right to the accrual in the

¹¹ S 7(4) of the Divorce Act

¹² 2009 3 SA 152 (CC)

¹³ See for example Van Niekerk *Practical Guide to Patrimonial Litigation* 3–13

¹⁴ OFPD 12-09-2006 case no 3600/2004

¹⁵ NKC 30-10-2009 case no 1245/2008

¹⁶ 2001 2 SA 844 (W)

other spouse's estate and that the right becomes vested only when the marriage is dissolved, provided of course that there is an accrual.¹⁷ Fortunately, in *MB v NB*,¹⁸ Brassey AJ pointed out that although *Reeder v Sofiline*¹⁹ established the date of a divorce as the moment at which a party's contingent right to share in the accrual of the other party's estate becomes perfected, this decision did not establish the moment at which the respective estates of the parties are to be assessed for purposes of determining a party's accrual claim. The judge did not refer to any of the above unreported cases, but stated that for an accrual claim to become perfected or payable upon divorce, it has to be determined or quantified at an earlier stage. Although he initially proposed to the parties that the cut-off date for determining the plaintiff's accrual claim should be the date on which the parties separate, he finally ruled that the decisive date should be the time when pleadings close, that is *litis contestatio*.²⁰ It is clear that according to *MB v NB*,²¹ a decision of the Gauteng South High Court, Johannesburg, there is no bar against including an accrual claim in a divorce summons. This establishes the right of parties in the Gauteng South High Court, Johannesburg, to include accrual claims in divorce proceedings.

Where the parties were married in terms of the Recognition of Customary Marriages Act they are surely entitled to include an accrual claim in a divorce summons, but it should be borne in mind that the court may nevertheless order an equitable redistribution of assets upon divorce in terms of section 8(4)(a) of the Act.

3 Commonly experienced problems with the division of assets upon divorce

3 1 Postponement of the division of assets to a date after the divorce order

The postponement of the adjudication of any accrual claims and the actual division of the joint estate to be determined or finalised by a receiver or liquidator, with the result that such claims have to be instituted under a new case or adjudicated separately in terms of rule 33(4) of the Uniform Rules of Court after the date of the divorce, results in the piecemeal adjudication of issues that originate from one and the same marriage. In terms of rule 33(4), the court must grant an application for the separation of the trial on certain issues unless this does not appear to be convenient.²² According to *ABSA Bank v Botha*,²³ the word "convenience" relates in this regard not only to expediency, efficacy and desirability, but also to fairness, justice and reasonableness.²⁴ It is my submission, however, that it is neither desirable nor fair to adjudicate

¹⁷ 849F-J

¹⁸ 2010 3 SA 220 (GSJ) 233C-D

¹⁹ 2001 2 SA 844 (W)

²⁰ 2010 3 SA 220 (GSJ) 233D-E

²¹ 2010 3 SA 220 (GSJ)

²² See AC Cilliers, C Loots & HC Nel Herbstein and Van Winsen *The Civil Practice of the High Courts and the Supreme Court of Appeal in South Africa* 2 5 ed (2009) 1414-1415

²³ 1997 3 SA 510 (O)

²⁴ 513I-J

or finalise patrimonial claims in isolation after the date of divorce. Accrual claims and the actual division of the joint estate are intrinsically linked to other issues bound up in the divorce decision, such as housing, the provision of maintenance for spouses and children, and the arrangements regarding the care of and contact with minor children.²⁵ As will be illustrated below, it is quite obvious that if the division of the joint estate and accrual claims are separated from the other issues upon divorce, this may have undesirable and unfair consequences for both children and spouses, especially wives.

As far as children are concerned, the decision about who is to retain or stay on in the matrimonial home is often closely related to the outcome of an accrual claim or the actual division of the joint estate. This decision also affects children's issues such as residence, contact and care orders. If, however, the actual division of the joint estate or an accrual claim is postponed, it might be very difficult for the court to make a ruling on these issues and to fulfil its duty of ensuring that all arrangements made upon divorce are in the best interests of the children involved in a divorce matter.²⁶ In the specific circumstances of a case it might be in the children's best interests to stay on in the matrimonial home so as to maintain the *status quo*,²⁷ but if the court has no idea who is going to retain the matrimonial home or whether the matrimonial home will have to be sold, it is almost impossible for the court to consider all the relevant factors that must be taken into account when a child's best interests are at stake.²⁸

It is further clear that a spouse's maintenance claim can only be adjudicated upon at the time of divorce since section 7(2) of the Divorce Act couples a maintenance order with a decree of divorce.²⁹ When the court has to determine a party's maintenance claim upon divorce, it is required, *inter alia*, to look at the existing or prospective means of the parties.³⁰ However, if the division of the joint estate or the accrual issue is postponed, the court has no means of ascertaining with certainty what a party's existing means are or what his or her prospective means will be and the court may be reluctant to issue a maintenance order. In addition, if the division of assets or an accrual claim is postponed, a party may, for example, decide not to pursue a maintenance claim because he or she expects to receive a substantial amount in respect of his or her half share of the joint estate or in respect of accrual. But later, when the division of the joint estate or the accrual claim is finalised, the spouse might find that the capital amount is not what he or she expected it to be and the dilemma is then that he or she can no longer institute a maintenance claim

²⁵ See CA McEwen, NH Rogers & RJ Maiman "Bring in the Lawyers: Challenging the Dominant Approaches to ensuring Fairness in Divorce" (1994-1995) 79 *Minnesota LR* 1317 1340-1341; S Burman, E Dingle & N Glasser "The New Family Court in Action: An Initial Assessment" (2000) 117 *SALJ* 111 123; M de Jong & H Kruger "The Postponement and Separation of Children's Issues upon Divorce – Quick Relief or a Glaring Mistake? *K v K* 2008 5 SA 431 (W)" (2010) 73 *THRHR* 153 155; M de Jong "The Cut-off Date for Determining Accrual Claims – A Cruel Decision and a Better Decision" (2011) 74 *THRHR* 472 477

²⁶ In terms of s 6(1)(a) of the Divorce Act and s 28(2) of the Constitution of the Republic of South Africa, 1996 ("the Constitution")

²⁷ See *McCall v McCall* 1994 3 SA 201 (C) and also s 7(1)(d) of the Children's Act 38 of 2005

²⁸ See s 7(1) of the Children's Act

²⁹ See Heaton *SA Family Law* 151

³⁰ In terms of s 7(2) of the Divorce Act

against his or her ex-spouse. Because it is women who most frequently need maintenance upon divorce,³¹ the postponement of the division of the joint estate or accrual claims might be seen as a sex or gender issue.

Another negative aspect of the postponement of accrual claims and the actual division of the joint estate for spouses relates to certain practical problems. First, it is possible that a spouse may desperately need the capital that he or she will receive in terms of an accrual claim or the actual division of the joint estate to pay a deposit on a new home or to finance his or her relocation costs after the divorce, but may have no access to his or her money on account of the postponement of the accrual claim or the division of the joint estate. Secondly, it could be very costly and time consuming to approach the court again at a later stage with an accrual claim or to bring an application for the appointment of a liquidator or for further directions in the course of such liquidation.

Besides the adverse effects for parties and children, it would also make the court's task of making an informed ruling on pension-sharing and possible forfeiture claims impossible if patrimonial claims or the finalisation thereof were to be postponed to a date after the divorce order. Like spousal maintenance orders, orders for forfeiture of patrimonial benefits and orders regarding pension-sharing must be made by the court granting the divorce order. Section 9 of the Divorce Act clearly stipulates that *when a decree of divorce is granted*, the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to certain factors, is satisfied that, if the order for forfeiture is not made, one party will be unduly benefited in relation to the other. The question which arises, however, is how a court would be able to order total or partial forfeiture of benefits upon divorce if it has no idea what the benefits from the marriage for a specific party are in terms of the matrimonial property system applicable to the marriage. Furthermore, section 7(8)(a)(i) of the Divorce Act dictates that *the court granting a decree of divorce* in respect of a member of a pension fund may make an order that any part of the pension interest of that member which is due or assigned to the other party to the divorce action shall be paid by the pension fund to the other party. But if a party's accrual claim has not yet been determined, how would the court know what part or percentage of the pension interest the non-member party would be entitled to? Even where the parties are married in community of property and the non-member would be entitled to half the member spouse's pension interest, the parties might, for example, later agree that, in order to ensure that the member spouse's pension interest is not diminished by any pay-out to the non-member spouse, the non-member will be entitled to a bigger share of the proceeds of the matrimonial home or other assets of the joint estate. But if the court has no knowledge of these arrangements, which remain to be decided upon by the parties or by the receiver or liquidator at a later stage, the court

³¹ J Heaton "Family Law and the Bill of Rights" in *Bill of Rights Compendium* (RS 28 2011) para 3C27

might end up making meaningless orders about the member spouse's pension interest, and that could never have been the intention of the legislator.

Furthermore, where the parties were married before 1 November 1984 in terms of the Marriage Act with complete separation of property or under any matrimonial property system in terms of the Recognition of Customary Marriages Act, they can rely on the fact that the court dealing with the divorce will also make a final ruling on the patrimonial claims of the parties. Section 7(3) of the Divorce Act and section 8(4)(a) of the Recognition of Customary Marriages Act clearly provide that it is *the court granting a decree of divorce* which has the power to redistribute assets.³² On the date of the divorce, parties in these marriages will therefore have certainty about which assets they will retain. However, parties who are married in community of property or with the accrual system in terms of the Marriage Act or the Civil Union Act cannot rely on the fact that the court dealing with the divorce will also make a final ruling on the actual division of the joint estate or any accrual claim. On the date of the divorce, parties in these marriages will therefore have no idea as to which assets they will retain. This differentiation between spouses falling into these two groups³³ surely infringes the guarantee of equality before the law and equal protection and benefit of the law.³⁴

3.2 Uncertainty about the extent of the joint estate or the other party's estate at the time of instituting claims and counterclaims

A huge problem upon divorce is that one or both parties³⁵ are often unaware of the nature and extent of the assets and liabilities of the joint estate or the other party's estate. They may have no idea what the current market value of properties is, what their respective pension interests amount to, what the other party's business assets are or his or her membership interest or shareholding in close corporations or companies is, or what the current financial state of the other party's accounts is, *et cetera*. Because they are uncertain as to what their financial position will be after the division of their assets according to the specific matrimonial property system applicable to their marriage, they also have no idea whether they should institute maintenance claims and for what amount they need to institute such claims.

The problem is exacerbated by the fact that it is no longer possible to request further particulars for the purpose of pleading in the High Court³⁶ (or the Regional Courts)³⁷ and the fact that in terms of rule 35(1) of the Uniform Rules of Court (or rule 23 of the Magistrates' Court Rules) requests

³² See Van Niekerk *Practical Guide to Patrimonial Litigation* 3–13 as far as s 7(3) of the Divorce Act is concerned

³³ Namely those married with complete separation of property before 1 November 1984 in terms of the Marriage Act or under any matrimonial property system in terms of the Recognition of Customary Marriages Act on the one hand and those married in terms of the Marriage Act or the Civil Union Act in community of property or with the accrual system on the other hand

³⁴ In terms of s 9(1) of the Constitution

³⁵ Usually the wife, who is not the one who controls the financial affairs in the marriage

³⁶ See AC Cilliers, C Loots & HC Nel *Herbstein and Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal in South Africa* 1 5 ed (2009) 588

³⁷ See DR Harms & F Southwood *Civil Procedure in Magistrates' Courts* (RS 28 2011) para B16 2

to the other party to make discovery of relevant documentation may not be made until after the pleadings are closed, save with the leave of a judge (or a magistrate). Where parties are married with the accrual system they fortunately enjoy the protection of section 7 of the Matrimonial Property Act, which makes it obligatory to furnish full particulars of the value of a spouse's estate upon request therefore by the other spouse at the time when it is necessary to determine possible accrual claims. However, as indicated above, there is no unanimity in practice as to exactly when an accrual claim should be determined. Is it upon *litis contestatio*, or only after the issuing of the divorce order, or may requests in terms of section 7 of the Matrimonial Property Act be made immediately after the issue of a divorce summons?

The fact of the matter is that when divorce summonses are issued and parties are expected to deliver their pleas, they can hardly be expected to seek specific quantified relief as far as patrimonial and possible maintenance claims are concerned and their claims and counterclaims are often based on mere speculation. Where parties are married with the accrual system, for example, it is often not even obvious which of the parties will have an accrual claim against the other. Nonetheless, parties are often reproached by the courts for not stating their case properly in respect of accrual or maintenance claims in the pleadings before the court.³⁸ It is also a fact that such unsubstantiated claims are very often the sole reason for fiercely contested divorce litigation.

3 3 Dissipation of marital assets

The dissipation of marital assets is a real danger from the time when the marriage relationship starts deteriorating up to the granting of a divorce order. Despite the fact that this practice is frowned upon by our courts,³⁹ it often happens that when one spouse is contemplating a divorce he or she starts concealing, diminishing or squandering assets that might otherwise be eligible for the division of assets upon divorce. Van Aswegen⁴⁰ refers to this tendency as "preventative estate planning", and explains that it "consists of placing one's own assets out of the reach of one's spouse by means of discretionary trusts or similar measures". According to Divorcedex,⁴¹ the dissipation of marital assets is the most common form of economic misconduct upon divorce and includes concealment and conveyance of assets through acts that are reckless and negligent, but not necessarily intentional.

It further appears that women are very often the disadvantaged spouse in this regard as their husbands usually control the spouses' financial affairs.⁴² At a recent workshop on family law presented by the Gauteng Law Council⁴³

³⁸ See for example *Reeder v Sofline* 2001 2 SA 844 (W) 8511-J; *Le Roux v Le Roux* NKC 30-10-2009 case no 1245/2008 paras 39-43

³⁹ See for example *MB v NB* 2010 3 SA 220 (GSJ) para 42

⁴⁰ A van Aswegen "The Protection of a Spouse's Right to Share in the Joint Estate or Accrual" (1987) 230 *De Rebus* 59 63

⁴¹ Divorcedex "Dissipation, Summary in Divorce" *Online Index for Divorce* <<http://www.divorcedex.com/divorce/Dissipation-1080.shtml>> (accessed 15-05-2011)

⁴² Divorcedex "Dissipation, Summary in Divorce" *Online Index for Divorce*

⁴³ PA van Niekerk *Seminar Presented at Family Law Workshop* (2010) hosted by the Gauteng Law Council, Pretoria, 20-07-2010

one of the speakers without batting an eyelid instructed attendees that their first advice to new male divorce clients should be to dissipate their assets as soon as possible, and that their advice to female clients should be to make copies of every document in the household without delay. In *MB v NB*,⁴⁴ for example, the basis of the wife's case was that her husband had, since separation, been hiding and squandering his assets so as to reduce his liability in respect of her accrual claim and the request was made on her behalf that the court should nevertheless consider the value of these hidden or squandered assets for the purposes of determining her accrual claim. Therefore, the issue of the dissipation of marital assets might very well also become a sex or gender issue.⁴⁵

4 Possible solutions to the problems encountered regarding the division of assets upon divorce

4 1 Acceleration of the effective date for determining patrimonial claims

In *MB v NB*,⁴⁶ Brassey AJ expedited the cut-off date for determining accrual claims to *litis contestatio*.⁴⁷ He stated that this principle of using *litis contestatio* as the effective date for determining the value of the parties' respective estates for purposes of an accrual claim would do much to limit the temptation to squander assets that some spouses seem to find irresistible and would also expedite the trial.⁴⁸ Despite this ruling, Brassey AJ nevertheless asked the parties why they did not simply take the date of separation as the point in time at which the assets in each party's estate should be valued.⁴⁹ The court mentioned that apart from considerations of convenience, this approach would do justice to the principles underlying the accrual system, namely that marriage is seen as a partnership or at least some kind of joint venture in which the parties go some way towards pooling their resources and making them the subject of joint decision making.⁵⁰

Expediting the date for determining patrimonial claims also seems to be in line with what is currently happening in certain European countries. In Germany, for example, where the matrimonial property system of *Zugewinnngemeinschaft* is in place (a system which operates very similarly to the accrual system in South Africa) section 1384 of the German Civil Code of 1896⁵¹ provides that if a marriage is dissolved by divorce, the date for the calculation of the amount of accrued gains (which is basically the accrual in each party's estate) is the date when the divorce summons is served and not the date of the termination of the matrimonial property regime, which

⁴⁴ 2010 3 SA 220 (GSJ) 232E-F

⁴⁵ Just like the other problems encountered with the division of assets upon divorce as discussed above

⁴⁶ 2010 3 SA 220 (GSJ)

⁴⁷ See part 2.3 above

⁴⁸ *MB v NB* 2010 3 SA 220 (GSJ) 233G

⁴⁹ 232G

⁵⁰ 232G-H

⁵¹ *Bürgerliches Gesetzbuch*

would be the date of the divorce.⁵² It is clear, however, that the date of the divorce remains the decisive date for any equalisation claim (which is in essence an accrual claim) to become due for payment. It is only for purposes of ascertaining the value of the spouses' final assets and any accrued gains that the earlier date of the service of the summons is used.⁵³ The rationale underlying this section of the German Civil Code is to prevent spouses from concealing or diminishing their final assets and any accrued gains upon the deterioration of their marriage relationship and in the heat of the moment after summons is served.⁵⁴

Furthermore, an Amendment Bill⁵⁵ is currently being considered in the Netherlands in terms of which it is proposed that the community of property which may exist between spouses should, in the case of divorce, be terminated on the earlier date of the service of the divorce summons, rather than on the date of the divorce order. It appears from the proposed new section to be inserted in the Civil Code of the Netherlands of 1838⁵⁶ that the community of property between the parties is to be replaced by the matrimonial property system of complete separation of property upon the service of the divorce summons.⁵⁷ If, for any reason the divorce does not proceed, the community of property will revive on the date on which it becomes certain that a divorce order will no longer result from the proceedings.⁵⁸ The argument is that as the presumed solidarity between spouses ceases from the moment when a divorce summons is served, the community of property between the spouses also needs to be terminated. Further justification for the proposed amendment is that spouses will be protected against detrimental transactions that either spouse could have concluded during the divorce process.⁵⁹ More specifically, it is argued that the proposed new provision will prevent the practical problems that could arise where one spouse would like to buy another property to live in before the granting of the divorce order.⁶⁰ In such a case it would, for example, be impossible for the spouse to buy the property solely in his or her name if the community of property between the spouses had not already been terminated on the date of the issue of the divorce summons.

From the brief discussion of Brassey AJ's remarks in *MB v NB*,⁶¹ the provision in German law⁶² and the proposed new provision in Dutch law,⁶³

⁵² For a more detailed explanation of the operation of the German default matrimonial property system of *Zugewinnngemeinschaft* and the similarities between this system and the accrual system in South Africa, see De Jong (2011) *THRHR* 475-477

⁵³ See HCAW Schulze "Some thoughts on the Interpretation and Application of Section 8(1) of the Matrimonial Property Act 88 of 1984" (2000) 63 *THRHR* 116 118

⁵⁴ 118-119

⁵⁵ *Het wetsvoorstel Wet aanpassing wettelijke gemeenschap van goederen* (28 867) See also B Breederveld "Het tijdstip van de ontbinding van de huwelijksgemeenschap bij echtscheiding" (2010) 4 *Actuele ontwikkelingen in het familierecht* 53

⁵⁶ New art 1:99(1) of the *Burgerlijk Wetboek*

⁵⁷ See also Breederveld (2010) *Actuele ontwikkelingen in het familierecht* 58-61

⁵⁸ New art 1:99(3) of the *Burgerlijk Wetboek*

⁵⁹ Breederveld (2010) *Actuele ontwikkelingen in het familierecht* 57

⁶⁰ 57

⁶¹ 2010 3 SA 220 (GSJ)

⁶² Art 1384 of the *Bürgerliches Gesetzbuch*

⁶³ New art 1:99 of the *Burgerlijk Wetboek*

it would appear that the acceleration of the cut-off date for determining patrimonial claims seems to limit or exclude many of the problems encountered with the division of assets upon divorce. In my opinion the acceleration of the cut-off date for determining patrimonial claims upon divorce is a very logical step. It should be applied not only to claims for the division of the joint estate or accrual claims, but also to claims for the equitable redistribution of assets in terms of section 7(3) of the Divorce Act and section 8(4)(a) of the Recognition of Customary Marriages Act. From the moment when any real marriage relationship, solidarity or “partnership” between the spouses ceases, they should no longer be able to benefit from or to be prejudiced by the matrimonial property system applicable to the marriage. Whatever happens after the date on which the divorce summons is served should be irrelevant and left out of account for purposes of patrimonial claims. The acceleration of the cut-off date for determining patrimonial claims to the date of the service of the divorce summons is, however, something that the legislator needs to address. Until such time as the law is changed, one can only hope that other divisions of the High Court will follow the decision in *MB v NB*,⁶⁴ which has at least accelerated the cut-off for determining accrual claims to *litis contestatio*.

4 2 Mediation

Another solution whereby all the problems encountered with the division of assets upon divorce can be addressed right away is divorce mediation. Brassey AJ referred to this means in *MB v NB*⁶⁵ when he penalised the attorneys in this matter for their failure to send their clients to mediation at an early stage by depriving them of their full attorney and client fees. He emphasised that “[i]n the process of mediation the parties would have had ample scope for an informed, but informal, debate on the levels of their estates, the amount of their incomes and the extent of their living costs” and said that “[n]udged by a facilitative intermediary, I have little doubt that they would have been able to solve most of the monetary disputes that stood between them”.⁶⁶ It is submitted that Brassey AJ’s viewpoint in this regard is correct. Parties should be referred to mediation at an early stage not only to determine or quantify patrimonial claims, but also to negotiate on all issues holistically with the facilitation of a trained and accredited mediator.⁶⁷ Brassey AJ’s viewpoint recently also received the stamp of approval from the Supreme Court of Appeal.⁶⁸ In *FS v JJ*,⁶⁹ Lewis JA said that she endorsed the views expressed by Brassey AJ in *MB v NB*,⁷⁰ namely that mediation in family matters is a useful

⁶⁴ 2010 3 SA 220 (GSJ)

⁶⁵ Paras 49-60

⁶⁶ Para 58

⁶⁷ See M de Jong “An Acceptable, Applicable and Accessible Family-law System for South Africa – Some Suggestions Concerning a Family Court and Family Mediation” (2005) *TSAR* 33 37-40 and M de Jong “A Pragmatic Look at Mediation as an Alternative to Divorce Litigation” (2010) *TSAR* 515 529

⁶⁸ C Cohen “Divorce Mediation – The SCA gives its Stamp of Approval” (2011) 504 *De Rebus* 7

⁶⁹ 2011 3 SA 126 (SCA) para 54 (138J-139C) This case is also reported as *S v J* 2011 2 All SA 299 (SCA)

⁷⁰ 2010 3 SA 220 (GSJ) paras 52-59

way of avoiding protracted and expensive legal battles, and that litigation should not necessarily be the first resort. The Judge of Appeal then, *inter alia*, ordered the parties to first attempt to resolve issues regarding the arrangement of contact through a mediator rather than through court proceedings.⁷¹

Mediation gives parties an opportunity to reflect on all the issues bound up in the divorce decision in an unthreatening atmosphere, as the process is not bound by the rules of procedure that dominate the adversarial system of litigation.⁷² It is an informal and simple process that people can readily understand and in which they can fully participate.⁷³ In mediation parties may consider a much broader range of information in determining a settlement outcome than the information that is allowed to be introduced in court.⁷⁴ They can engage holistically with all the issues surrounding a divorce, including the non-legal issues, and find creative solutions for all these issues. The undesirable consequences that ensue for children and for women in particular when certain issues, such as the finalisation of patrimonial claims, are postponed can therefore be prevented in comprehensive divorce mediation.

It is generally accepted that the earlier mediation takes place, the more favourable the outcome for the parties. It has been said that “early intervention is the key to success”.⁷⁵ Hence, the sooner the parties are referred for mediation, the greater their chances of reaching a mutually acceptable solution to their problems and the smaller the chances that they will dissipate their assets. Parties should be encouraged to attend mediation as a first resort for the resolution of their divorce.⁷⁶ Preferably, mediation should take place before the issuing of the divorce summons, but certainly before parties end up in the relatively unpleasant, adversarial atmosphere of the court. Mediators should nonetheless be careful not to pressurise parties into reaching a settlement in the early stages of separation or divorce when they might still be in turmoil and emotionally ill-prepared to take decisions.⁷⁷

It should be noted that encouraging parties to attend mediation at an early stage in no way implies that they are being denied access to the courts – they are merely being given an opportunity to try to sort out and solve their own private and intimate problems before going to court.⁷⁸ There are, however,

⁷¹ 2011 3 SA 126 (SCA) 139G-H

⁷² J Folberg, AL Milne & P Salem *Divorce and Family Mediation: Models, Techniques, and Applications* (2004) 8

⁷³ M de Jong “Judicial Stamp of Approval for Divorce and Family Mediation in South Africa” (2005) 68 *THRHR* 95 97

⁷⁴ De Jong (2010) *TSAR* 519; M de Jong “Child-focussed Mediation” in T Boezaart (ed) *Child Law in South Africa* (2009) 115

⁷⁵ V Goldberg “Family Courts in South Africa and the Implication for Divorce Mediation” (1995) 58 *THRHR* 276 284 with reference to the findings of a study on the social component of the Australian family court. See also F Hamilton “ADR Professional: Mediation – Lessons to be Learnt from Australia” (2010) 40 *Family Law* 1328 1329

⁷⁶ See De Jong (2005) *TSAR* 37-40 and De Jong (2010) *TSAR* 529

⁷⁷ L Parkinson “ADR Professional: Family Mediation: Ideology or New Discipline? Part II” (2011) 41 *Family Law* 196 196-197

⁷⁸ See De Jong (2010) *TSAR* 522 and De Jong “Child-focussed Mediation” in *Child Law in SA* 117

circumstances in which parties should not be encouraged to attend mediation, but be referred directly to litigation in the courts.⁷⁹

At the first mediation session with divorcing parties, besides being orientated to the mediation process and given an opportunity to put their case to the mediator, the parties should be advised to agree on a cut-off date for the determination of the extent of the spouses' estates or the joint estate for purposes of ascertaining and quantifying patrimonial claims. To simplify matters, this date should be selected carefully to coincide, where possible, with the date on which bank statements, pension fund statements and other accounts are delivered to the parties. This date will usually be the end of the month following the date of the first mediation session. It is, however, very important that this date should be set as soon as possible after the breakdown of the marriage relationship between the parties and the decision to get divorced in order to counter many of the problems that may otherwise result from the postponement of the division of assets and minimise the opportunity for spouses to do "preventative estate planning".⁸⁰ The cut-off date for determining patrimonial claims could therefore be set in the past, for example the end of the month preceding the date of the first mediation session or the end of the month in which the decision to get divorced was made.

At the first mediation session the parties should further be instructed to obtain documentary proof of the value of all their assets and liabilities (and, of course, their income and expenditure) as on the agreed-upon cut-off date, so that this information can be disclosed at the second mediation session. First, the importance of open and honest disclosure needs to be stressed by the mediator as crucial to the success of the mediation process. Usually the mere knowledge that the courts will conclude an agreement for the parties if they cannot reach an agreement between themselves in the course of the mediation process is in itself adequate motivation for parties to disclose all the relevant information.⁸¹ Secondly, the mediator should explain that it is not necessary for the parties to convince him or her of the value of immovable properties and movable assets, the extent of earnings, the value of business assets, membership interests in close corporations, shareholding in companies or the value of pension benefits. The parties need to convince each other about these things. If they are satisfied with, for example, an estate agent's market assessment of the value of the matrimonial home, or perhaps the average between two estate agents' market assessments, such assessment should be accepted and there is no need for sworn valuations. If, however, one party insists on sworn valuations for fixed properties these valuations must be obtained, provided of course that it is within the means of the parties to obtain them.⁸²

As it is often a cumbersome process to obtain all the relevant documentary proof of assets and liabilities and income and expenditure, the second

⁷⁹ See De Jong (2010) *TSAR* 522 and De Jong "Child-focussed Mediation" in *Child Law in SA* 118

⁸⁰ See Van Aswegen (1987) *De Rebus* 63

⁸¹ De Jong (2005) *THRHR* 102

⁸² In a particular mediation facilitated by me recently, for example, it was necessary to do a very expensive forensic audit to satisfy or convince the wife of the extent of the husband's business and trust assets

mediation session should never be scheduled too soon after the first. It is considered advisable to schedule the second session no less than three weeks after the first to give clients the opportunity to collect the necessary documentation.⁸³ Where one or both parties are not yet ready to make any decisions on the important matters that need to be resolved, the second session could even be scheduled for six to eight weeks after the first mediation session. As long as the cut-off date for the determination of patrimonial claims has been agreed upon at the first mediation session, it does not really matter how long after the first session the second mediation is scheduled.

At the second mediation session all relevant documentation should be placed on the negotiating table. Therefore, within a reasonable time after the commencement of the mediation process and the decision to separate or get divorced, parties will have certainty about, or at least a pretty good idea of, the extent of the joint estate, the other party's estate or the combined value of the parties' estates for purposes of ascertaining and settling patrimonial claims. It is usually easy to determine the extent of parties' patrimonial claims as legislation and case law provide clear instructions or guidelines in this regard. However, what seems to be more challenging is the question of how the division of assets should be achieved, structured or financed – something that is quite often left for parties to decide themselves after the divorce order has been granted in practice, especially where they were married in community of property.⁸⁴ Here it is the mediator's task to ensure that all possible options are explored, evaluated and reviewed and to work gradually towards a fair and workable solution. For example, where the matrimonial home is registered in both parties' names, it might be necessary to transfer it to one party and to register a new bond on the property to compensate the other party or to give the other party a bigger share of other movable assets such as shares. Alternatively it might be necessary to sell the matrimonial home and to split the proceeds equally or to give one party a bigger share of the proceeds so as to prevent claims against the other party's pension fund. It might even be necessary to keep the matrimonial home in both spouses' names until such time as the children leave school. In such a case an arrangement has to be made for the future division of the proceeds of the matrimonial home so as to compensate the party who will not have the privilege of staying on in the matrimonial home after the divorce until such time as the house is sold.

Once the division of assets and the way in which the assets are to be divided have been settled, it is much easier to deal with possible maintenance claims for the spouses and with children's issues. It is not clear how an attorney would ever be able to draft divorce summonses which include the realistic patrimonial claims of the parties or to make reasonable settlement offers unless the mediation process has been followed first. Brassey AJ's cost penalty against the attorneys for their failure to send their clients to mediation

⁸³ AD Jessani "A Step-by-Step Approach to the Divorce Mediation Process: From Soup to Nuts" (2002) 16 *Am J Fam Law* 118 119

⁸⁴ See part 2.1 above

at an early stage in *MB v NB*⁸⁵ is therefore one hundred percent correct and appropriate. It is to be hoped that the approach that underlies this decision will soon be followed across South Africa so that mediation becomes the first step for parties contemplating a divorce. Although it might be argued that the requirement to refer parties to mediation at an early stage might delay parties' access to justice,⁸⁶ it should be borne in mind that such a referral might easily prevent protracted and expensive legal battles and encourage co-operation between parties.

5 Conclusion

Although it appears that the solution of accelerating the effective date for ascertaining patrimonial claims to the date of the service of the divorce summons would go some way towards preventing some of the problems experienced with the division of assets upon divorce, it cannot exclude all such problems, especially the problem that parties have no certainty about the extent of each other's assets. This solution will also not be of immediate assistance to divorcing parties as the acceleration of the effective date for ascertaining patrimonial claims is something that the legislator needs to address – bearing in mind that this can be a cumbersome and protracted process.

Mediation is therefore a far better solution to the current problems experienced with the division of assets upon divorce. Besides the fact that mediation has the potential to preclude all the problems experienced with the division of assets upon divorce, it is also immediately and readily available to divorcing parties. However, care should be taken to select a properly trained and accredited mediator. To this end, the National Accreditation Board for Family Mediators (“NABFAM”) has now set national standards and accreditation requirements for family mediators, to be adhered to by all local member organisations such as the South African Association of Mediators in Family Matters (“SAAM”) in Gauteng and North West, the Family Mediators Association of the Cape (“FAMAC”) in the Western and Eastern Cape and the Kwazulu-Natal Association of Family Mediators (“KAFAM”).⁸⁷ These standards will hopefully increase public confidence in the evolving mediation profession and provide guidance for its practitioners.

SUMMARY

With regard to marriages concluded in terms of the Marriage Act 25 of 1961 and the Civil Union Act 17 of 2006, the division of the spouses' assets is principally determined by the matrimonial property system applicable to the spouses' marriage. With regard to marriages concluded in terms of the Recognition of Customary Marriages Act 120 of 1998, the matrimonial property system

⁸⁵ 2010 3 SA 220 (GSJ) paras 49-60

⁸⁶ See for instance L Parkinson “ADR Professional: Family Mediation: Ideology or New Discipline? Part I” (2011) 41 *Family Law* 88 89

⁸⁷ NABFAM was officially launched on 23 March 2010 and is housed by the Africa Centre for Dispute Settlement at the University of Stellenbosch Business School. NABFAM recently merged with the Dispute Settlement Accreditation Council (DiSAC), a national body for the entire civil and commercial mediation sector. DiSAC was officially launched on 5 March 2010: “Dispute Settlement Accreditation Council” *USB* <http://www.usb.ac.za/disputesettlement/dispute_settlement_accreditation_council.html> (accessed 09-04-2012)

selected by the parties is less important and the court's view of what is equitable and just is decisive in determining how the parties' assets will be divided. Although our law provides clear rules and instructions regarding the division of the parties' assets upon divorce, there are certain difficulties and practical problems which are often experienced and which make this aspect of divorce one of the thorniest issues to resolve in divorce litigation. These problems relate to the postponement of patrimonial claims or the finalisation thereof to a date after the divorce order, uncertainty about the extent of the parties' assets and the dissipation of such assets. A possible solution to counter some of these problems is the enactment of new legislation in terms of which the effective date for determining patrimonial claims is accelerated to the date of the service of the divorce summons. A better solution through which all the problems encountered with the division of assets upon divorce can be precluded is divorce mediation. In the mediation process parties can holistically negotiate with the assistance of a trained and accredited mediator on patrimonial claims as well as all other issues in the early stages of divorce. An effective date for the determination of patrimonial claims can already be agreed upon at the first mediation session and at the second mediation session an informal discovery process can be followed to give parties certainty about the extent of marital assets and minimise the risk of "preventative estate planning".