

STRIVING FOR SUBSTANTIVE GENDER EQUALITY IN FAMILY LAW: SELECTED ISSUES

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ABSTRACT

This article evaluates the rules regarding the division of matrimonial property upon divorce from a gender-equality perspective and proposes a number of reforms. It is shown that the rigid enforcement of antenuptial contracts sometimes results in substantive gender inequality. What is required is judicial realism and an awareness of the dangers accompanying the assumption that the ordinary rules of the law of contract can be applied in the usual way to contracts between future spouses and that any resulting gender inequality can be justified by relying on the autonomy of the parties to the contract. The article further shows that forfeiture of patrimonial benefits and the limited judicial discretion to redistribute property upon divorce fall short of the object of attaining substantive gender equality. The suggested solution is the introduction of a broad judicial discretion to redistribute property upon divorce, which should be available in all civil marriages. Further, spouses are often in an unequal bargaining position when they negotiate divorce settlement agreements and the weaker spouse is often prejudiced. The suggested solution is that the court be compelled to investigate settlement agreements much more carefully and to take the circumstances in which each agreement was concluded into account. Finally, it is argued that the property which can be divided upon divorce is defined too narrowly. The narrow definition usually prejudices the spouse who is not the main breadwinner, once again resulting in substantive gender inequality. It is proposed that a broad, non-exhaustive definition of 'property' is inserted in the Matrimonial Property Act 88 of 1984 and the Divorce Act 70 of 1979.

I INTRODUCTION

Nearly thirty years ago our divorce and matrimonial property laws were radically reformed. Of course these reforms happened well before the advent of a Constitution containing a Bill of Rights. It is my view that the law relating to the financial consequences of divorce should be reformed once again in view of the Bill of Rights and, in particular, in view of the constitutional commitment to gender equality.

The issues I shall deal with below relate only to the division of matrimonial property upon divorce. Ideally, division of property and post-divorce maintenance should be evaluated together. As children and their custodial parent share the same post-divorce economic circumstances and standard of living,¹ the interrelationship between custody, property division and post-

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1 See for example L Van Zyl 'Spousal Support – An Update' (1992) 55 *THRHR* 297, 297.

divorce maintenance ought also to be included in the evaluation.² It is impossible properly to convey the fruits of such an ambitious project in a single journal article – thus the limited scope of this article.

The analyses and proposals I shall offer will be primarily feminist in outlook. But they do not represent an attempt at developing or even representing a coherent feminist jurisprudential theory. I entirely lack the credentials to undertake such an exercise.

Although I shall make several generalisations regarding wives and husbands and their respective roles in the family, I wish to emphasise that I am not suggesting that all wives and all husbands find themselves in identical positions.

Furthermore, I realise fully that the law reforms I suggest will not help all wives. My analyses and proposals probably mostly reflect the concerns and interests of women from middle-class and, possibly, wealthy families. From this slant the reader should not construe indifference on my part to the plight of other women. The reasons for the limited ambit of the discussion are twofold. Firstly, it is my view that the position of poor women can, in most instances, not be suitably alleviated by the application of private-law rules. In the case of the poor there usually simply are no private financial resources in which the spouses can share. Thus, from the point of private law, there is, realistically speaking, not much that can be done to address these women's financial hardship. In the case of the poor, the state must step in and provide at least the basic necessities of life – after all, it is constitutionally obliged to do so.³ Secondly, I am very aware of the fact that one's perspectives are shaped by one's background, life experiences, and so forth. Because I, as an academic, write from a relatively privileged position, I do not presume to be able to accurately, or even adequately, reflect the voice of the poor.

Two final introductory remarks about the focus of the article: First: the article relates only to civil marriages⁴ and only to those civil marriages in

2 E Bonthuys 'Labours of Love: Child Custody and the Division of Matrimonial Property at Divorce' (2001) 64 *THRHR* 192, 192 shows that the rules regarding property division and maintenance favour men at the expense of their ex-wives and children.

3 Sections 26 and 27 of the 1996 Constitution provide, inter alia, that everyone has the right to access to adequate housing, health care services, social security and sufficient food and water, and compel the state to take reasonable measures, within its available resources, to achieve the progressive realisation of these rights.

4 In terms of the common law, a civil marriage is defined as the legally recognised voluntary union between one man and one woman to the exclusion of all other persons: see for example *Seedat's Executors v The Master (Natal)* 1917 AD 302, 309. To be valid, the marriage must also comply with the requirements the Marriage Act 25 of 1961 sets. In *Minister of Home Affairs v Fourie* (CC 1 December 2005, unreported) the Constitutional Court declared the common-law definition unconstitutional to the extent that it excludes same-sex couples from the status, benefits and responsibilities it accords to heterosexual couples. The court also declared the marriage formula contained in s 30(1) of the Marriage Act unconstitutional to the extent that it relates to heterosexual couples only. The declaration was suspended for a year to enable Parliament to correct the defects. Should Parliament fail to do so on time, the words 'or spouse' will be read in after the words 'or husband' in s 30(1) of the Marriage Act and the common-law definition will be interpreted to cover a union between two persons of the same sex. Once civil marriage has been extended to same-sex couples, the remarks I make in this article will apply to them too.

which there is no foreign element, such as the parties' being foreigners. However, as the consequences of divorce in civil and customary marriages correspond to a large degree,⁵ most of the points I shall make apply to customary marriages too.

Second: As the article deals with gender equality – not sex equality⁶ – the points I shall make in respect of the position of wives pertain equally to husbands who fulfil the duties which are usually assigned to wives.

I shall start my discussion by briefly explaining the meaning of substantive gender equality and sketching the public/private context within which such equality must be evaluated. Then I shall discuss the division of matrimonial property upon divorce and set out my proposals for law reform.

II THE MEANING OF SUBSTANTIVE GENDER EQUALITY

Section 9 of the Constitution of the Republic of South Africa, 1996 entrenches the right to equality. Our Constitutional Court has repeatedly made it clear that substantive equality, instead of mere formal equality, is what is to be achieved.⁷ Very simply put, formal equality refers to rule-equality. Thus, formal gender equality seeks the elimination of legal rules which apply to a specific gender only. Formal gender equality is achieved through mere gender neutrality. Substantive equality, on the other hand, is concerned with context and result-equality. Thus, substantive gender equality evaluates the results of rules or the absence of rules, and the context in which those results occur. Substantive gender equality therefore does not stop at gender neutrality. In so far as marriage and divorce law are concerned, substantive gender equality *inter alia* seeks to place spouses in an equal position taking into account the impact the unequal division of domestic and family-care responsibilities, differences in bargaining power, and so forth have on spouses in general and on the spouses in the particular marriage.

In respect of gender equality in the context of divorce, the public/private dichotomy plays a central role. As is well known, the public/private dichotomy refers to the division of the law and society into two spheres. The public sphere, which relates *inter alia* to paid employment and politics, has traditionally been reserved for men, and the private world of the family and the home has been reserved for women. The

⁵ See s 8 of the Recognition of Customary Marriages Act 120 of 1998.

⁶ 'Sex' refers to the biological fact of being a man or a woman, while 'gender' refers to the roles and differences ascribed to men and women through socialisation. For example a woman's sex entails that only she can fall pregnant, while her gender entails that it is expected of her (rather than her male partner) to fulfil (the major part of) the family-care responsibilities.

⁷ See for example *Brink v Kitshoff* 1996 (4) SA 197 (CC); *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 (2) SA 363 (CC).

assignment of women to the private sphere is based on the notion that because only women can bear children it is natural and inevitable that they should take care of those children, other members of the household, and the home. Women can, therefore, naturally be expected to keep to the private world and not to enter the public world of men. Moreover, the qualities which are necessary for success in the home are deemed unnecessary, or even unsuitable, for the workplace. Furthermore, women who enter the labour market are expected to fit into a workplace that has been designed for people who can dedicate themselves solely to their work – the assumption being that the members of the workforce need not be concerned with domestic and family-care responsibilities because there is somebody at home who is taking care of those responsibilities. In other words, the private sphere is merely the support system that enables the public sphere to function optimally.⁸

One of the biggest drawbacks of this division is that a spouse who stays at home has little or no income and few assets. Moreover, research suggests that there is a direct link between financial power and decision-making power within the home. The link is that the greater the disparity between the spouses' financial position, the greater the wealthier spouse's dominance in decision-making and the more unfair the distribution of domestic burdens. The more domestic and family-care burdens a wife bears, the less are her chances of acquiring or furthering the skills with which she can get a job, set up and run a business, or gain promotion. This circle of disempowerment operates during the subsistence of the marriage and also results in the wife being left with few or no assets and little or no marketable skills when the marriage breaks down.⁹ Upon divorce she is not assured of being awarded maintenance. Even if she gets a maintenance order in her favour she is not assured of actually receiving maintenance, because

8 Numerous authors have discussed the public/private dichotomy and the gendered division of labour in the family and the workplace: see for example P Close 'Toward a Framework for the Analysis of Family Divisions and Inequalities in Modern Society' in P Close (ed) *Family Divisions and Inequalities in Modern Society* (1989) 5, 5; MA Fineman *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (1991); J Kentridge 'Measure for Measure: Weighing Up the Costs of a Feminist Standard of Equality at Work' in C Murray (ed) *Gender and the New South African Legal Order* (1994) 84, 85-86; CA MacKinnon *Feminism Unmodified: Discourses on Life and Law* (1987); N Naffine *Law and the Sexes: Explorations in Feminist Jurisprudence* (1990); K O'Donovan *Sexual Divisions in Law* (1985); SM Okin *Justice, Gender, and the Family* (1989); DL Rhode *Justice and Gender: Sex Discrimination and the Law* (1989); JD Sinclair assisted by J Heaton *The Law of Marriage* vol 1 (1996) 16-28, 69-71; E Bonthuys 'Familiar Discourses of Parenthood' (1999) 62 *THRHR* 547, 551-556; SL Nock 'Time and Gender in Marriage' (2000) 86 *Virginia LR* 1971, 1975; Bonthuys (note 2 above) 193-196.

9 If the marriage is subject to community of property or the accrual system the wife's share of the matrimonial property may occasionally be substantial, but usually it is not. The same is true if the spouses married subject to complete separation of property prior to 1 November 1984 (if they are whites, coloureds or Asians) or prior to 2 December 1988 (if they are Black) and the wife obtains a redistribution order in her favour. Redistribution is discussed below.

enforcement of maintenance orders is notoriously ineffective. This has led to what is called ‘the feminisation of poverty’.¹⁰

Furthermore, even if women are employed outside the home, they are still expected to fulfil most of or even all the domestic and family-care responsibilities. Sometimes they also have to care for their own or their husband’s elderly or disabled relatives. They therefore have to work a double or even a triple shift. To be able to do this, they sometimes take on poorly-paid temporary, seasonal, half-day or part-time employment which does not provide them with financial independence and normally does not confer decent fringe benefits on them. This results in the same circle of disempowerment and post-divorce financial hardship. Even in so-called ‘modern’ marriages between supposed equals, employed women spend more time on domestic and family care than men do. This is so even if the couple does not have children and, surprisingly, even if the wife earns more than the husband.¹¹ It is also common for spouses to give preference to the husband’s career, as they consider his career to be more important, and because he usually has the higher income and the spouses want to maximize their current earnings. These generalisations apply even in respect of dual-career professional couples.¹²

10 On the circle of disempowerment and the feminisation of poverty see eg *Moge v Moge* [1992] 43 RFL (3d) 345 (SCC), [1992] 3 SCR 813 paras 55-60; Close (note 8 above) 14; JD Sinclair *An Introduction to the Matrimonial Property Act 1984* (1984) 4-5; MM Slaughter ‘The Legal Construction of “Mother”’ in MA Fineman & I Karpin (eds) *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* (1995) 73, 83; C L’Heureux-Dubé ‘Economic Consequences of Divorce: A View from Canada’ (1994) 31 *Houston LR* 451, 458, 475. Many of the sources that were cited in note 8 above also deal with these issues.

11 See the sources cited by B Stark in ‘Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law’ (2001) 89 *California LR* 1481, 1502 fn 116.

12 J Brockman *Gender in the Legal Profession: Fitting or Breaking the Mould* (2001) 180-195; Close (note 8 above) 13-14; DJ Swiss & JP Walker *Women and the Work/Family Dilemma: How Today’s Professional Women are Finding Solutions* (1993); LJ Weitzman ‘Marital Property: Its Transformation and Division in the United States’ in LJ Weitzman & M Maclean (eds) *Economic Consequences of Divorce: The International Perspective* (1992) 85, 106. On women’s disproportionate domestic and family-care burdens, the preference which is given to husbands’ careers and women’s lower employment status see further *President of the Republic of South Africa v Hugo* (note 7 above) paras 37-8; DM Almeida & DA McDonald ‘The National Story: How Americans Spend Their Time on Work, Family, and Community’ in J Heymann & C Beem (eds) *Unfinished Work: Building Equality and Democracy in an Era of Working Families* (2005); JC Gornick & MK Meyers ‘Supporting a Dual-Earner/Dual-Carer Society’ in Heymann & Beem (eds) *ibid* 372, 373-375, 376; J Heymann ‘Inequalities at Work and Home: Social Class and Gender Divides’ in Heymann & Beem (eds) *ibid* 103-106; KL Kinnear *Women in the Third World: A Reference Handbook* (1997) 118-119; S Liebenberg & M O’Sullivan ‘South Africa’s New Equality Legislation. A Tool for Advancing Women’s Socio-Economic Equality?’ 2001 *Acta Juridica* 70, 71-72; Slaughter (note 10 above) 78-86; G Summerfield ‘Allocation of Labor and Income in the Family’ in NP Stromquist (ed) *Women in the Third World: An Encyclopedia of Contemporary Issues* (1998) 218, 218-225; M De Jong ‘New Trends Regarding the Maintenance of Spouses upon Divorce’ (1999) 62 *THRHR* 75, 79-80; Stark (note 11 above) 1502, 1523. Many of the sources in note 8 above also deal with these issues. For an overview and analysis of the economic, feminist, political, sociological and philosophical theories on the division of labour within the family see J Carbone *From Partners to Parents: The Second Revolution in Family Law* (2000) 3-52.

The argument that the public/private dichotomy results in gender inequality which must be addressed by, inter alia, divorce law is not accepted by all. Firstly, it is said that women's domestic and family-care duties do not entail much in the way of work. To the extent that they do involve work, such work is primarily non-economic and women should not expect economic compensation for a non-economic contribution. Secondly, it is argued that women are not forced into the private world of the family – they choose it and must therefore suffer the financial and other consequences of their choice.

The first argument clearly has no force. Many of the components of domestic and family-care duties indeed have economic value in the labour market although, it must be said, they are usually poorly remunerated due to the traditional undervaluation of so-called 'women's work'.¹³ Furthermore, one spouse's domestic and family-care contributions enable the other spouse to focus on his or her career and increase his or her estate. Thus those contributions result in economic benefits for the other spouse.

The second argument, that is, the argument about choice, ignores context and reality. Few women have a real choice in the matter of role divisions and their disproportionate domestic and family-care burden. The assumptions and expectations about a wife's role and position are still, to a large degree, based on stereotyping and social pressures. Wives who supposedly choose to stay at home, or choose to subordinate their career and interests to their family's, very rarely make that choice entirely freely. In by far the majority of marriages, decisions on employment, role divisions, and domestic and family-care responsibilities are based on social expectations, the husband's stronger financial position, and what is perceived to be the family's common good. They are not autonomous decisions which are dictated purely by self-interest, as would be the case in most commercial transactions. It is patently unfair, and a clear violation of the constitutional right to gender equality, to visit the financial disadvantages of these decisions disproportionately on women.

With the above background in mind, I shall now discuss the division of matrimonial property upon divorce.

13 See for example B Goldblatt & S Mills 'Reviewing the Road Accident Fund' March 2000 *De Rebus* 30, 36 who illustrate that the undervaluation of women's work prevails even in the context of claims for damages where a woman's earning capacity comes into play. They show that the quantum of damages awarded to female claimants in delictual actions for their disability arising from motor vehicle accidents, or to their dependants in actions for loss of support as a result of their death because of a motor vehicle accident, is lower than the quantum awarded in respect of men's disability or death. See also CH Albertyn et al in *LAWSA* vol 10(2) 'Gender' First Reissue (1997) para 248; E Bonthuys 'Equal Choices for Women and Other Disadvantaged Groups' 2001 *Acta Juridica* 39, 45.

III THE DIVISION OF MATRIMONIAL PROPERTY UPON DIVORCE

(a) General

Divorcing spouses are permitted to regulate the division of their property in a settlement agreement, which the court may incorporate into the divorce order.¹⁴ I shall discuss the gender-equality issues relating to settlement agreements below. I first wish to deal with the rules regarding the division of matrimonial property which apply in the absence of a settlement agreement, for these rules also form the legal backdrop against which settlements are negotiated.¹⁵

(b) Division of property in the absence of a settlement agreement

(i) General

Spouses choose their matrimonial property system before or at the time when they get married.¹⁶ The default position is that the marriage is in community of property.¹⁷ If the spouses want a different matrimonial property system, they must enter into an antenuptial contract. The chosen matrimonial property system governs the position during the subsistence of the marriage and determines how the spouses' property will be divided upon dissolution of the marriage. Only in two very limited categories of divorce cases, which will eventually disappear altogether, may the court deviate from the fixed rules which govern the matrimonial property system. Thus, in terms of our current divorce law, the court is usually constrained to sanction inequality resulting from the application of a particular matrimonial property system.

(ii) Enforcing antenuptial contracts upon divorce

The first gender equality issue I wish to deal with in the context of the

14 Divorce Act 70 of 1979, s 7(1).

15 Negotiations always take place in the shadow of the law. Eg, when negotiating their divorce settlement the parties adopt their respective bargaining positions partly in view of the legal rules on division of property, maintenance, custody, and so forth. See also DSP Cronjé & J Heaton *South African Family Law* 2 ed (2004) 128; Sinclair assisted by Heaton (note 8 above) 144 fn 385. R Mnookin & L Kornhauser 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale LJ* 9, 9 coined the phrase 'bargaining in the shadow of the law' to describe this fact. For an economic formula to test strategic behaviour in divorce cases see R Cooter, S Marks & R Mnookin 'Bargaining in the Shadow of the Law: A Testable Model of Strategic Behaviour' (1982) 11 *J of Legal Studies* 225, 225.

16 During the subsistence of the marriage the spouses may vary their matrimonial property system with the court's approval. The application must be brought by both spouses. The spouses must prove that there are sound reasons for the proposed change, notice of the proposed change has been given to all their creditors, and no other person will be prejudiced by the change: Matrimonial Property Act 88 of 1984, s 21(1).

17 On the exceptions to the rule that all marriages are in community of property see DSP Cronjé et al in *LAWSA vol 16 Marriage* First Reissue (1998) para 63; Cronjé & Heaton (note 15 above) 70-71; PJ Visser & JM Potgieter *Introduction to Family Law* 2 ed (1998) 94-95.

application of the fixed matrimonial property rules is the equation of antenuptial contracts with commercial contracts.

In this regard it should be borne in mind that whatever matrimonial property system is chosen by future spouses, the selection is often driven by the wealthier party, or at least by the party who envisages eventually being the wealthier one. This is especially true where the future spouses agree on complete separation of property.¹⁸ The financially weaker party's agreement to the terms of the antenuptial contract is often the result, not of true autonomy, but of an unequal bargaining position. The unequal bargaining position is due, inter alia, to the public/private dichotomy which forms the backdrop to the negotiations, and cultural and social norms which dictate that women should place a higher value on relationships and altruism. As a result of their generally lower economic and occupational status and because of cultural and social norms, women are therefore usually in a weaker bargaining position than men when it comes to negotiations regarding economic assets.¹⁹

Further, the parties may have different expectations not only regarding the duration of the marriage but also regarding the division of tasks and roles within the ongoing marriage. These expectations play a role in respect of a spouse's bargaining position, even if those expectations are not articulated.

In addition, research shows that intimate partners who enter into a contract about their relationship often do so while suffering from cognitive distortion. The distortion lies in the fact that, despite the enormous number of divorces, one of the future spouses or both of them do not really think that their relationship will end in divorce and/or he or she or they genuinely believe that the other party will behave honourably should the relationship end.²⁰

Finally, the parties may not foresee and/or adequately provide for all the events and circumstances which may crop up during their marriage.

Our law ignores these realities and simply applies the ordinary rules of the law of contract to antenuptial contracts (and indeed to all other

18 J Sinclair in DH Van Wyk et al (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 502, 549; Sinclair assisted by Heaton (note 8 above) 143.

19 E Bonthuys 'Family Contracts' (2004) 121 *SALJ* 879, 896-897. South African notaries recognise that there seldom is true informed choice when future spouses enter into an antenuptial contract. As a notary commented to the South African Law Commission when the commission considered extending the current limited judicial discretion to redistribute property upon divorce (which is contained in s 7(3)-(6) of the Divorce Act): '[I]t is quite often found that one of the parties . . . is more dominant than the other and the other will fall in line with what the first party says': SA Law Commission Report *Project 12: Review of the Law of Divorce: Amendment of Section 7(3) of the Divorce Act, 1979* (July 1990) 11.

20 See Bonthuys (note 19 above) 895 and the research she refers to at 896 fn 117. On temporary cognitive distortion within the context of financial agreements between family members see further MJ Trebilcock & S Elliott 'The Scope and Limits of Legal Paternalism: Altruism and Coercion in Family Financial Arrangements' in P Benson (ed) *The Theory of Contract Law* (2001) 45, 57.

contracts between spouses).²¹ Thus the same preference for the principle of *pacta sunt servanda* that operates in respect of commercial contracts is simply applied to antenuptial contracts.

*Barnard v Barnard*²² offers an example of this. In this case the soon-to-be ex-wife *inter alia* relied on undue influence to attack the validity of a clause in the spouses' antenuptial contract that provided for complete separation of property. She alleged that due to the facts and circumstances which prevailed when the parties entered into the antenuptial contract, her future husband had been in a position of influence and advantage over her, which had weakened her resistance and had made her will pliable. He had unduly used his influence by prevailing on her to consult with his attorney in respect of the antenuptial contract. When the parties entered into the antenuptial contract, the future wife was 24 years old, unmarried, and unsophisticated in business and legal matters. At the time, she had been living with her future husband for approximately five years. She had trusted him and had relied on him for advice and guidance. He was 65 years old, twice divorced and sophisticated in business and legal matters. When the couple's marriage broke down, the wife alleged that, exercising normal free will, she would not have agreed to the exclusion of the accrual system. She sought an order declaring the marriage to be in community of property. The court dismissed her claim. It *inter alia* rejected her argument that the antenuptial contract was contrary to public policy because of her husband's superior bargaining power. It relied, *inter alia*, on the Appellate Division's dictum in *Sasfin (Pty) Ltd v Beukes*²³ that '[t]he power to declare contracts contrary to public policy should ... be exercised sparingly and only in the clearest of cases.'

In *Barnard* the court stated that antenuptial contracts which provide for complete separation of property 'could never be contrary to public policy'.²⁴ It further stated that if public policy indeed played a role in the present scenario, it would require that 'contracts freely entered into between adults of full contractual capacity' should ordinarily be enforced to the letter.²⁵

21 See further MC Regan Jr *Alone Together: Law and the Meanings of Marriage* (1999) 48-52 who shows that the economics perspectives on the process of rational choice and private ordering in the commercial world have simply been applied to family law. For the most recent decision in which the court simply applied the principle of *pacta sunt servanda* in respect of a settlement agreement see *Botha v Botha* 2005 (5) SA 778 (W).

22 2000 (3) SA 741 (C).

23 1989 (1) SA 1 (A), 9B.

24 Note 22 above, para 39.

25 *Ibid* para 40. See also *Brisley v Drotzky* 2002 (4) SA 1 (SCA) paras 93-94 where Cameron JA held that 'neither the Constitution nor the value system it embodies give the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith ... On the contrary, the Constitution's values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint.' The latter case, too, concerned a commercial contract.

In an earlier case, *Ratanev v Maharaj*,²⁶ the court came to the assistance of a wife who had married by Hindu rites at the age of 14. Twenty years into her Hindu marriage, she had accompanied her husband to his attorney to sign an antenuptial contract. The couple had then converted their Hindu marriage into a civil marriage. After the husband's death the court set the antenuptial contract aside on the ground of undue influence even though the content of the contract had been explained to the woman when she signed it. From the fact that she was illiterate and 'of limited intelligence',²⁷ and evidence that wives of the woman's caste habitually signed any document their husbands required them to sign, the court was satisfied that the wife had merely signed the contract to comply with her husband's wishes.

The facts in *Ratanev* indicate a more pronounced inequality in bargaining power than those in *Barnard*. It is nevertheless disappointing that the court in *Barnard* failed to take proper account of the context in which antenuptial contracts are concluded and failed to grasp the significance of the difference in bargaining power between future spouses in general and the future spouses in that particular case.

(aa) Recommendation

The courts should reconsider their approach to enforcing antenuptial contracts. At present, the rigid enforcement of antenuptial contracts all too often results in substantive gender inequality. I am not suggesting that all antenuptial contracts which are even just slightly prejudicial to one spouse should be declared invalid or should not be enforced. Nor am I suggesting that our law should prohibit antenuptial contracts and/or other agreements between spouses because private ordering creates scope for substantive gender inequality. Mine is a plea for judicial realism and an awareness of the dangers accompanying the blithe assumption that all the ordinary rules of the law of contract can be applied in the usual way to antenuptial contracts, and that any resulting gender inequality can be justified by relying on the autonomy of the parties. I am further of the view that presiding officers would benefit from receiving specialised training on the meaning of substantive gender equality in the context of marriage and divorce.

An alternative mechanism for correcting the substantive gender inequality that may result from an unequal bargaining position, cognitive distortion, changed circumstances, and so forth would be the introduction of a broad judicial discretion regarding the division of matrimonial property upon divorce. I shall deal with the latter proposal in more detail below. I first wish to explain why forfeiture of

26 1950 (2) SA 538 (D).

27 Ibid 547.

benefits and the current limited judicial discretion to redistribute assets fail as mechanisms for achieving substantive gender equality upon divorce.

(iii) *Forfeiture of benefits*

In terms of section 9 of the Divorce Act 70 of 1979, the court may order either of the spouses to forfeit all or part of the financial benefits of the marriage. A forfeiture order may be granted only if the court is satisfied that in the absence of the order one spouse will be unduly benefited in relation to the other.²⁸ In *Wijker v Wijker*²⁹ the Appellate Division held that forfeiture may not be used as a mechanism for deviating from the normal consequences of the matrimonial property system simply because the court considers this fair and just. Therefore, forfeiture cannot be used as a general adjustive remedy.

Secondly, a forfeiture order often is rather an empty remedy. Forfeiture does not entail that a spouse loses his or her own assets. It merely entails that he or she loses his or her claim to the matrimonial property the other spouse contributed.³⁰ Thus, if the marriage is in community of property, the spouse against whom the court orders total forfeiture receives only those assets he or she contributed to the joint estate. If he or she contributed more than half the assets, he or she still gets half the joint estate.³¹ The same problem arises if the accrual system applies to the marriage, for then the spouse whose estate shows the larger accrual retains his or her half of the difference between the accrual in the spouses' respective estates.³² In essence, therefore, a forfeiture order is effective only if it is made against the poorer spouse. In its current form, forfeiture is thus of limited use to a court that wants to effect substantive gender equality through the elimination of an undue benefit.

28 Section 9(1).

29 1993 (4) SA 720 (A).

30 *Rousalis v Rousalis* 1980 (3) SA 446 (C); G Glover in B Clark (ed) *Family Law Service* (1988) para D9; HR Hahlo *The South African Law of Husband and Wife* 5 ed (1985) 378, 379; D Hutchison et al *Wille's Principles of South African Law* 8 ed (1991) 198; JD Van der Vyver & DJ Joubert *Persone- en Familiereg* 3 ed (1991) 673; Visser & Potgieter (note 17 above) 180.

31 *Smith v Smith* 1937 WLD 126.

32 J Sinclair 'Financial Provision on Divorce – Need, Compensation or Entitlement?' (1981) 98 *SALJ* 469, 474. But see Hahlo (note 30 above) 385 who states that the court may order that no accrual sharing is to take place, that accrual sharing is to take place only to the extent that it benefits the spouse in whose favour the order is made, or that all accruals or the greater part of the accruals must be awarded to the spouse in whose favour the order is made. (See also A Roothman 'Section 7(8) of the Divorce Act: Income Tax Implications' 1994 *De Rebus* 355, 356.) In other words, the court may make a forfeiture order which amounts to a variation of the spouses' matrimonial property system if the accrual system applies in their marriage. Whether this view is correct is doubted, especially in view of the decision in *Wijker v Wijker* (note 29 above).

It is arguable that restricting the scope of forfeiture to a spouse's claim to share in the matrimonial property the other spouse contributed amounts to indirect gender discrimination. Wives generally own and acquire fewer assets and therefore contribute less matrimonial property than husbands do. Thus, wives normally stand to lose much more than husbands if a forfeiture order were to be made against them. For example, if a total forfeiture order is made against a wife who entered the marriage without any assets and has always been a homemaker, she is not entitled to any matrimonial property whatsoever even if the spouses married in community of property or subject to the accrual system. On the other hand, in most marriages a total forfeiture order which is made against the husband does not deprive him of all the matrimonial property. The differentiation in the impact of forfeiture orders depending on whether they are made against the wife or the husband could be said to impair substantive gender equality and might be unconstitutional. However, even if this contention were to be accepted, forfeiture would probably still be of limited use in the struggle for substantive gender equality, as forfeiture could still not be used as a general adjustive remedy.

(iv) The limited judicial discretion to redistribute assets upon divorce

At present the court's power to order redistribution of assets upon divorce is available in very limited circumstances. It applies only to marriages which are subject to complete separation of property in which the spouses did not enter into a settlement agreement regarding the division of their assets.³³ Moreover, the power is available only in respect of marriages concluded by whites, coloureds or Asians before 1 November 1984 and marriages concluded by Blacks before 2 December 1988.³⁴ The court must also be satisfied that the spouse who seeks redistribution contributed directly or indirectly to the maintenance or increase of the other spouse's estate during the subsistence of the marriage, and that redistribution would be equitable and just.³⁵

Apart from the fact that using the wedding date as the criterion for affording or denying redistribution may constitute an unjustifiable infringement of the right to equality before the law and equal protection and benefit of the law,³⁶ and apart from the fact that the differences in respect of the availability of redistribution in civil and customary marriages also constitutes inequality before the law and unequal

33 Divorce Act, s 7(3).

34 Ibid.

35 Divorce Act, s 7(4).

36 J Heaton 'Family Law and the Bill of Rights' in *Bill of Rights Compendium* (1996) para 3C26; Sinclair (note 18 above) 549-551; Sinclair assisted by Heaton (note 8 above) 143-146. The right to equality before the law and equal protection and benefit of the law is contained in s 9(1) of the Constitution.

protection and benefit of the law,³⁷ the manner in which the courts currently exercise their power does not meet the constitutional objective of substantive gender equality. Unfortunately, most courts, and particularly the Appellate Division or, now, the Supreme Court of Appeal, do no more than pay lip service to gender equality if and when they take it into account.

Section 7(4) of the Divorce Act provides that one spouse can contribute to the maintenance or increase of the other spouse's estate by rendering services; by saving expenses which would otherwise have been incurred; or in any other manner. In *Beaumont v Beaumont*³⁸ the Appellate Division held that the wording of s 7(4) covers a wife's domestic and child-care duties. So far, so good. In *Kritzinger v Kritzinger*³⁹ the same court again considered the nature of a qualifying contribution. In this case, the court was faced with the un-stereotypical situation where the wife was wealthier than the husband and the husband had made the kind of career sacrifice that wives usually make. During the subsistence of the marriage the husband was offered a post overseas, but he declined the offer so that his wife could advance her career and business interests in South Africa. Upon divorce, he contended that he had indirectly contributed to the increase or maintenance of his wife's estate by not settling abroad and thus forfeiting promotion. The court a quo accepted his argument. The Appellate Division, however, struck a very dismissive tone and rejected his career sacrifice as simply doing nothing. The Appellate Division further stated that if the husband indeed had good prospects overseas, which he gave up because of concern for his wife's career and business interests, 'he simply made a bad error of judgment in deciding to stay where he was'.⁴⁰ If, on the other hand, his prospects were not really so rosy, he should be grateful that he declined the overseas posting, as his wife's career had flourished and he had

37 Section 8(4)(a) of the Recognition of Customary Marriages Act 120 of 1998 empowers the court to redistribute assets in customary marriages which are subject to complete separation of property, regardless of when they were concluded. In the case of civil marriages, the power is restricted to marriages which were concluded prior to the coming into operation of the two Acts which reformed the matrimonial property systems in those marriages (ie, the Matrimonial Property Act in the case of civil marriages of whites, coloureds and Asians, and the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 in the case of civil marriages of blacks). In this regard there is thus inequality before the law and unequal protection and benefit of the law in respect of civil and customary marriages. Furthermore, if the customary marriage which is being dissolved is an individual marriage forming part of a polygynous customary marriage, the court is always empowered to 'make any equitable order that it deems just': s 8(4)(b) of the Recognition of Customary Marriages Act. In other words, in the case of the dissolution of polygynous customary marriages the court is always empowered to order redistribution: Cronjé & Heaton (note 15 above) 196, 197; Heaton (note 36 above) para 3C7.

38 1987 (1) SA 967 (A). See also *Katz v Katz* 1989 (3) SA 1 (A); *Jordaan v Jordaan* 2001 (3) SA 288 (C).

39 1989 (1) SA 67 (A).

40 Ibid 86E.

enjoyed the benefit of the high standard of living her income had brought them. In other words, the Appellate Division's view on career sacrifices is: Damned if you, damned if you don't. The court stated that it could not discern any conceptual basis for allowing claims for redistribution on the ground of sacrificing or curtailing one's career. In my view the basis is that the sacrifice or curtailment results in a financial advantage to the other spouse. If this fact is not taken into account, substantive financial gender inequality is the inevitable result.

Secondly, although the decision in *Kritzinger* does not relate to domestic and family-care responsibilities, it implies that if a spouse sacrifices or curtails his or her career out of domestic and/or family-care concerns, his or her contribution is no greater than it would have been had he or she simply been a homemaker all along. For example, if a wife who has a career of her own and also fulfils all the domestic and family-care responsibilities resigns to become a full-time homemaker and family caregiver, her domestic and family-care responsibilities are, in terms of the approach in *Kritzinger*, all that matter. The decision therefore reinforces the public/private dichotomy by discouraging homemakers from engaging in paid employment. The decision furthermore implies that the double or triple burden of a spouse who engages in paid employment while also fulfilling domestic and/or family-care responsibilities is not worthy of recognition and protection.

Another gender-equality issue is the criterion the courts use for establishing the extent of the redistribution. When the judicial discretion was originally introduced, some South African courts adopted the guideline that one-third of the spouses' combined assets should be allocated to the spouse who owns fewer assets.⁴¹ This approach was in line with the starting point which used to operate in English law, and which has since been rejected in favour of equal sharing.⁴² In *Beaumont v Beaumont*⁴³ the Appellate Division rejected the one-third starting point, and indeed all other starting points. However, in practice, one-third became more or less the norm.⁴⁴ The one-third division suggests that financial contributions are more important than non-financial ones.

Recently, a change of attitude occurred when the Cape High Court held that equality should be the yardstick.⁴⁵ The Supreme Court of Appeal quickly nipped this development in the bud. In *Bezuidenhout v Bezuidenhout*⁴⁶ the wife inter alia performed the domestic duties, worked for a third party, and assisted her husband in his business. She later worked in her husband's business full time.

41 *Beaumont v Beaumont* 1985 (4) SA 171 (W); *Van Gysen v Van Gysen* 1986 (1) SA 56 (C); *MacGregor v MacGregor* 1986 (3) SA 644 (C).

42 *White v White* [2000] 2 FLR 981 (HL); see also *Lambert v Lambert* [2003] 1 FLR 139 (CA).

43 Note 38 above.

44 See also Bonthuys (note 2 above) 197.

45 *Childs v Childs* 2003 (3) SA 138 (C); *Bezuidenhout v Bezuidenhout* 2003 (6) SA 691 (C).

46 2005 (2) SA 187 (SCA).

Referring *inter alia* to the equality and interpretation clauses in the Constitution⁴⁷ and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, Pincus AJ in the court *a quo* held that in exercising his discretion to redistribute property he had to 'achieve an equitable sharing of the economic consequences of the marriage and the breakdown' of the marriage.⁴⁸ He added that the constitutional imperatives require him to avoid gender discrimination in weighing up the spouses' respective contributions. He specifically stated that a breadwinner's contribution is not more valuable than a homemaker's purely because it is financial. And he stated that a homemaker should not be prejudiced because of the role she fulfils. Pincus AJ concluded that the spouses' assets should be divided equally.

On appeal the Supreme Court of Appeal reiterated its view that there should be no starting point. It further held that most of Pincus AJ's remarks were *obiter*, as they relate to the position in the traditional marriage where the husband is the breadwinner and the wife the homemaker, which was not the case in respect of the *Bezuidenhouts*. Although the Supreme Court of Appeal expressed its agreement with the view that the traditional role of housewife, mother and homemaker should not be undervalued simply because it is not measurable in terms of money, it attached no weight to the fact that Mrs *Bezuidenhout* bore responsibility for the household. Because she participated in the family business, her contribution was judged solely in terms of that business. Thus she was, in effect, penalised for bearing the double burden of being a homemaker and a businesswoman. As her contribution to the business was adjudged to be less than that of her husband, the court reduced the amount her husband had to pay to her. She ended up with 40 per cent of the combined value of the spouses' assets.

In a subsequent decision, *Kirkland v Kirkland*,⁴⁹ the Cape High Court stated that it did not view the decision in *Bezuidenhout* as a rejection of 'the principle of equality as such'. All the Supreme Court of Appeal had held, Blignault J said, was that the principle of equality did not fit the facts in *Bezuidenhout*. Though this may be true, there is no gainsaying the fact that the Supreme Court of Appeal's understanding of equality is far removed from the Constitutional Court's notion of equality.

There is however one encouraging point in the Supreme Court of Appeal's decision in *Bezuidenhout*. That is that it rejected the argument that wealthier spouses often raise, and that it had itself relied on in *Kritzinger*, namely that the poorer spouse is compensated for his or her contributions by enjoying the privileges of the affluent lifestyle that the

47 Sections 9 and 39.

48 2003 (6) SA 691 (C) para 47.

49 [2005] 3 All SA 353 (C) para 89.

wealthier spouse's income produces during the subsistence of the marriage.⁵⁰

From the decisions of the Appellate Division/Supreme Court of Appeal one deduces the following:

- 1 Sacrificing or limiting one's career usually does not qualify as a contribution.
- 2 Even though a homemaker and child-carer's services qualify as a contribution, financial and business contributions are more valuable.
- 3 A spouse who engages in paid employment and also undertakes domestic and family-care duties should not expect recognition of or compensation for the double or triple burden he or she bears.⁵¹

These views clearly do not accord with the constitutional objective of substantive gender equality.

(aa) Recommendation

Although, in principle, the current judicial discretion could be a mechanism for achieving substantive gender equality in the few marriages to which it applies, the restrictive manner in which the discretion has been applied thus far has failed to deliver such equality. I submit that instead of tinkering with the current discretion the legislature should replace it with a much broader judicial discretion that applies to all marriages. Length constraints make a full exposition of the proposed discretion impossible in a single journal article. I shall simply highlight aspects I consider particularly important.

The court should be empowered to deviate from the ordinary consequences of the matrimonial property system if equity and justice demand this. Applying the concepts of equity and justice is not foreign to our divorce law, for, as I indicated above, one of the requirements for exercising the current limited discretion is that the court must be satisfied that the spouse's contribution to the other spouse's estate makes redistribution equitable and just.⁵² Under my proposal, however, equity

50 Note 46 above, 200F-G.

51 See further M O'Sullivan 'Stereotyping and Male Identification: "Keeping Women in Their Place"' in C Murray (ed) (note 8 above) 185, 185. Using a sample of South African divorce cases O'Sullivan illustrates that women have been disadvantaged by judicial stereotyping. She indicates, *inter alia*, that judges often use the stereotypical homemaker as the ideal against which all women are measured. Women who remain within their traditional stereotypes of good wives and mothers who stay at home 'are treated with protective paternalism', while women who venture outside those boundaries, such as career women, are punished with financial hardship: 190. O'Sullivan trenchantly remarks: 'Housewives might be a judge's private preference but this preference should not impact in a biased fashion upon the decision regarding the economic consequences of divorce': 195. O'Sullivan's study was published eleven years ago, but it seems that not much has changed since then.

52 Divorce Act, s 7(4).

and justice would be the primary requirements for exercising the discretion.

To determine whether equity and justice demand a deviation the court should take into account, *inter alia*,

- the extent to which the spouses were in an unequal bargaining position when they selected their matrimonial property system;
- the extent to which the selected matrimonial property system was inequitable and unjust in view of all the circumstances at the time it was selected; and
- the extent to which the selected matrimonial property system has become inequitable and unjust in view of any subsequent change in the spouses' circumstances.

The fact that the parties jointly or independently obtained legal advice prior to selecting the particular matrimonial property system should not exclude the court's discretion to order redistribution.

If the court concludes that deviation from the normal proprietary consequences of the marriage is required, it should take various factors into account to determine the extent of the deviation. The first of these is each spouse's contribution to the welfare of the family or to the other spouse's estate or the joint estate (if the couple are married in community of property). The concept of a contribution should be defined in broad, non-exhaustive terms. It should include the following:

- being the caregiver of a child, an aged, infirm or disabled member of the family, or an aged, infirm or disabled relative or dependant of either spouse, regardless of whether that relative or dependant lives or lived in the matrimonial home;
- performing household duties, including managing the household;
- acquiring or creating property, or any part of property, which falls into either spouse's estate or the joint estate, including earning an income
- paying money, rendering services or making any other contribution towards maintaining or increasing the value of property, or any part of property, which falls into either spouse's estate or the joint estate;
- making career or business sacrifices or curtailing participation in the labour or business market;
- giving financial or non-financial assistance or support, including assistance or support that enables the other spouse to acquire qualifications or improve his or her employment or business prospects, and assistance and support that helps the other spouse in carrying on his or her employment or business;
- forgoing a higher standard of living than the spouse would otherwise have enjoyed;
- saving expenses which would otherwise have been incurred; and
- any other contribution to the welfare of the family or to the other spouse's estate or the joint estate.

The legislation should not require a detailed appraisal of the spouses' respective contributions and the level at which they were performed, for substantive gender inequality is virtually guaranteed to follow if the scale of the main breadwinner's success has to be compared to the scale of the other spouse's success in the domestic and family-care arena. After all, it is very difficult, if not impossible, to demonstrate the scale of one's success as a homemaker and caregiver.⁵³

To afford proper recognition to domestic and family-care work, the legislation should stipulate that there is no presumption that a monetary contribution is of greater value than a non-monetary contribution.⁵⁴ If such a provision were not included, the traditional devaluation of women's work that has thus far resulted in typically 'male' contributions (such as earning an income and acquiring assets) being valued more highly than typically 'female' contributions (such as fulfilling domestic and family-care responsibilities) might persist.

The legislation should also stipulate that the multiplicity of a spouse's contributions should be taken into account. This would mean that a spouse's double or triple burden would be considered. The result may be that the spouse who bore the double or triple burden receives the lion's share of the matrimonial property.⁵⁵ My proposal therefore does not envisage the mere introduction of a type of postponed 'community of property regime by the back door'.⁵⁶

The other factors the court should take into account to determine the extent to which it should deviate from the ordinary proprietary consequences of the marriage are:

- any contribution either spouse made prior to the marriage while the spouses lived in a life partnership;
- the duration of the spouses' respective contributions;

53 R Bailey-Harris '*Lambert v Lambert: Towards the Recognition of Marriage as a Partnership of Equals*' (2003) 15 *Child and Family LQ* 417, 420.

54 Such a provision would be similar to s 18(2) of the New Zealand Property (Relationships) Act 166 of 1976.

55 MA Fineman 'Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce' in MA Fineman & NS Thomadsen (eds) *At the Boundaries of Law: Feminism and Legal Theory* (1991) 277 warns that the concept of a contribution must not be simplified and employed solely to make the homemaker the equal. Cognisance should be taken of many working women's double or triple burden, otherwise what Fineman calls 'nonhousewife women' might be placed at a disadvantage. A nonhousewife woman not only pays doubly or triply with her time and effort while the marriage lasts, but upon divorce is viewed as not in need of or not deserving of maintenance, as she has a paying job. Focussing mainly on removing the inequality of homemakers may result in overcompensation of some homemakers and the undercompensation of other women. Fineman however doubts whether, if contribution were used as the yardstick, women who make a double or triple contribution would successfully be able to claim more than half the matrimonial property. See also Fineman (note 8 above) 4-5, 47.

56 I am borrowing the phrase Michael Freeman used in respect of English law in 'Exploring the Boundaries of Family Law in England in 2000' in A Bainham (ed) *The International Survey of Family Law* (2002) 133, 136-137.

- the duration of the marriage;
- the spouses' respective ages at the time of the divorce;
- the spouses' existing and future means and obligations, including whether a significant change in the financial circumstances of either spouse is likely to occur within the foreseeable future;
- any serious financial misconduct during the subsistence of the marriage, such as dissipation of assets, illiquidity which is planned to coincide with the divorce, or entering into a transaction in contravention of section 15 of the Matrimonial Property Act 88 of 1984⁵⁷;
- any transfer of assets to a trust;
- donations between the spouses or to a third party;
- the award the court intends making in respect of child custody and maintenance;
- any post-divorce maintenance award the court intends making in favour of either spouse;
- the effect of the proposed redistribution and/or maintenance order on each spouse's earning capacity;
- whether the proposed redistribution will enable the court to effect a financial clean break between the spouses;
- gross misconduct on the part of either spouse leading to the irretrievable breakdown of the marriage;
- any other factor the court considers relevant.

The next issue is which assets should qualify for redistribution. The time at which a particular asset was obtained and the source from which it was obtained may be relevant in this regard. Unless the spouses selected community of property as their matrimonial property system when they married, antenuptial assets should probably, as a rule, not be redistributed unless the couple were life partners before they married. In exceptional cases the court might, however, be willing to order redistribution even in respect of antenuptial assets. Let us take the following example: Prior to getting married out of community of property, the husband inherits a house. The husband is an alcoholic who is unable to retain employment. During the subsistence of the marriage the wife works as a secretary. All the money she earns is spent on the family's maintenance and the upkeep of the home. She also fulfils all domestic and family-care responsibilities. When the spouses get divorced, the house is still the husband's only asset and the wife still owns no assets. As the husband does not have any employment prospects, the wife will not get a maintenance order in her favour. In fact, she might be ordered to pay maintenance to her husband. Unless the antenuptial asset is at least partly redistributed, the wife will never be compensated for her contributions.

57 Section 15 of the Matrimonial Property Act requires both spouses' consent in respect of certain transactions regarding the joint estate.

Exclusion of specific assets from the ambit of the redistribution order should not mean that a contribution the other spouse made to that property is ignored. This should also apply if the proposed legislation were to provide that certain assets which were acquired during the subsistence of the marriage, such as inheritances, donations, and compensation for non-patrimonial loss, are not to be redistributed.

In making its redistribution order, the court should, where this is relevant, take into account financial factors like the cost of repatriating foreign assets, exchange rate fluctuations, tax issues, the profit potential of a particular asset, the upkeep and maintenance it requires, the financial risk associated with owning it, and the issue of whether the post-divorce situation of the spouse who will acquire or retain the particular asset will realistically enable him or her to keep the asset. For example, if the court plans to award the matrimonial home to the wife but her post-divorce financial situation will force her to sell the house, the true value of the home to the wife is less than its market value, as she will have to pay agent's commission plus value-added tax when she sells. This fact must be taken into account. Bonded immovable property which was purchased for purposes of letting offers another example. Upon divorce the property may have a very low net value or none at all but its profit potential may be substantial. Giving the non-property-owning spouse an amount of money which is equal to the net value of the immovable property upon divorce may fail to enable him or her to acquire an asset which offers the same profit potential.

Finally, if the suggested broad judicial discretion were introduced, there would no longer be a need for forfeiture orders, as a redistribution order could be used to eliminate an undue benefit.

(c) Settlement agreements

As I indicated above, spouses are free to enter into a settlement agreement in which they regulate the consequences of their divorce as they see fit. The main advantages of settlement agreements are that the parties can privately tailor the agreement to suit their specific circumstances. However, as John Dewar has pointed out, one of the dangers in allowing private ordering is that 'human rights are more easily abused or overlooked behind closed doors.'⁵⁸

Settlement agreements normally protect the interests of the party who

58 'Family Law and its Discontents' (2000) 14 *Int J of Law, Policy and the Family* 59, 74. Family matters, including divorce and its aftermath, are increasingly being "privatised" by the state's encouraging negotiated settlements and mediation. Thus legal decisions are increasingly left to the spouses themselves (with or without the assistance of their attorneys), or to mediators or (other) members of the helping professions, such as psychologists and social workers. Prohibitive legal expenses obviously also play a role in channelling spouses into private ordering.

is in the stronger bargaining position. An abusive marital relationship can seriously distort bargaining power. But even in the absence of threats or fear of physical or psychological harm, family relations are often based on overt and covert coercion.⁵⁹ The coercion may have emotional origins. For example, if the wealthier spouse has strong feelings of guilt about being the cause of the breakdown of the marriage, he or she may be persuaded to be financially better disposed towards the poorer spouse. On the other hand, if the poorer spouse caused the breakdown, the wealthier spouse may exploit this.

The fact that the spouses have a child can also distort their bargaining power. Judicial notice has been taken of the fact that settlement negotiations often involve a trade-off between money and post-divorce custody and access. The courts' attitude to this fact has, however, been one-sided. In *Van Vuuren v Van Vuuren*⁶⁰ the court warned legal representatives to guard against concessions regarding custody or access being made by the poorer party in pursuance of a better financial settlement. But the court failed to warn of the opposite dangers, namely that the wealthier spouse might claim custody or threaten to claim custody simply to induce the poorer spouse to accept a financially inferior settlement, and that the poorer spouse might agree to custody and access arrangements which favour the wealthier spouse in an attempt to ensure compliance with maintenance provisions.⁶¹

Furthermore, the 'wear-down' or 'starve-out' technique is sometimes used to persuade a financially dependent spouse to accept an inferior financial settlement.⁶² This technique involves the following: the husband stops paying the wife's bills, cancels her credit and garage cards, moves her out of the matrimonial home into much less comfortable accommodation or, if she remains in the matrimonial home he stops paying the bond, and so forth. Sometimes the husband gives the wife a small monthly or weekly amount of money. Sometimes he does not give her any money. If she wants money, or more money, she has to go to the maintenance court to get an interim maintenance award, which takes time and money. Once she gets the maintenance award, her husband pays for a short period of time, or does not pay at all. Then she has to go back

59 Trebilcock & Elliott (note 20 above) 59.

60 1993 (1) SA 163 (T).

61 Cronjé & Heaton (note 15 above) 161 fn 26; Fineman (note 8 above) 5; E Bonthuys 'Spoiling the Child: Domestic Violence and the Interests of Children' (1999) 15 *SAJHR* 308, 311 fn 16; Bonthuys (note 2 above) 209. On the interrelationship between negotiations regarding children and the financial consequences of divorce see also LJ Weitzman 'Gender Differences in Custody Bargaining in the United States' in LJ Weitzman & M Maclean (eds) *Economic Consequences of Divorce: The International Perspective* (1992) 395, 395; J Sinclair 'The Financial Consequences of Divorce in South Africa: Judicial Determination or Private Ordering?' (1983) 32 *Int & Comparative LQ* 785, 802.

62 For an example of this practice see the facts the court a quo set out in *Beaumont v Beaumont* 1985 (4) SA 171 (W). The court specifically remarked that the husband had tried to starve his wife into submission after their separation: 1771-J.

to court to enforce the maintenance order, which again takes time and money – not to mention emotional energy. In this way she is worn down or starved into accepting whatever financial settlement he is prepared to offer, for having something is better than having nothing.⁶³

Finally, women are generally at a disadvantage in legal proceedings, whether these be settlement negotiations or court proceedings. This is so because women tend to undervalue their entitlement to property and maintenance, and because their tolerance for conflict and risk is generally lower than that of men.⁶⁴

Of course, if a settlement agreement contains unconscionable clauses as a result of the parties' unequal bargaining power, the court may refuse to incorporate the agreement in the divorce order and may instead make its own order regarding the consequences of the divorce.⁶⁵ Alternatively it may incorporate only parts of the settlement agreement.⁶⁶ Unfortunately, due to crowded divorce rolls, the reality is that presiding officers seldom give settlement agreements more than a cursory glance. And the cursory glance usually focuses on the clauses dealing with the couple's children. Presiding officers seem to take their constitutional duty to ensure that the child's best interests are paramount⁶⁷ much more seriously than their constitutional duty to strive for substantive gender equality. I suppose that this approach is understandable in light of the Supreme Court of Appeal's preference for assuming autonomy in respect of all contracts between adults.

A pre-Bill of Rights case which illustrates presiding officers' failure properly to check settlement agreements is *Baart v Malan*.⁶⁸ In this case, the settlement agreement provided, inter alia, that the husband would get custody of the couple's children and the wife would pay maintenance for the children. The maintenance she had to pay was her gross monthly salary and her annual bonus. These amounts were payable for 20 years. Apart from the gender inequality this clause occasioned (and in respect of which the presiding officer's failure to intervene might be excused because the case was decided before the enactment of a Bill of Rights), the

63 Weitzman (note 61 above) 404. On the factors which influence the bargaining process see further Trebilcock & Elliott in Benson (ed) *The Theory of Contract Law* 51; MJ Trebilcock & R Keshvani 'The Role of Private Ordering in Family Law: A Law and Economics Perspective' (1991) 41 *Univ of Toronto LJ* 533, 533ff; Dewar (note 58 above) 71-72, 75.

64 Weitzman (note 61 above) 401, 402, 403; L'Heureux-Dubé (note 10 above) 485.

65 *Rowe v Rowe* 1997 (4) SA 160 (SCA) 167C; see also *Lebeloane v Lebeloane* [2000] 4 All SA 525 (W).

66 For example in *Kotze v Kotze* 2003 (3) SA 628 (T) the court refused to sanction a clause in which divorcing parents undertook to educate their child in a particular church and further undertook that he would 'fully participate in all the religious activities' of that church. The court held that the clause violated the child's right to freedom of religion. Section 15(1) of the Constitution provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion.

67 Section 28(2) of the Constitution.

68 1990 (2) SA 862 (E).

offending clause was contrary to public policy. It should never have been incorporated into the divorce order, but it was. After honouring her obligations for some months, the wife sought an order varying the agreement. The court held that the effect of the clause was that the wife was required to pay more than she earned, as her income tax payments were deducted from her salary before she received it. This meant that the clause deprived her of any material benefit from her employment. The court concluded that the clause was unconscionable and contrary to public policy and struck it from the settlement agreement.

(i) Recommendation

It is my view that the court should be compelled to investigate settlement agreements much more carefully and to take the circumstances in which each agreement was concluded into account. The Divorce Act should be amended to instruct the court to consider the following factors when it decides whether or not to incorporate a settlement agreement in the divorce order:

- the extent to which the spouses were in an unequal bargaining position when they entered into the settlement agreement;
- the extent to which the agreement was inequitable and unjust in view of all the circumstances at the time it was entered into;
- the extent to which the agreement has become inequitable and unjust in view of any subsequent change in the spouses' circumstances;
- any other matter the court considers relevant.⁶⁹

69 This approach would be comparable to the position in New Zealand. In terms of ss 21(1), 21(2), 21A(1), 21J(1) and (4) of the Property (Relationships) Act, antenuptial contracts and settlement agreements can be set aside if, having regard to all the circumstances, the court is satisfied that giving effect to the contract would cause serious injustice. In deciding whether serious injustice would be caused, the court takes into account, *inter alia*:

- the provisions of the agreement;
- the length of time that has elapsed since the agreement was entered into;
- whether the agreement was unfair or unreasonable in view of all the circumstances at the time it was entered into;
- whether the agreement has become unfair or unreasonable in view of any foreseen or unforeseen subsequent changes in circumstances;
- any other matter the court considers relevant.

The court may set the agreement aside even though it was entered into after the parties each obtained independent legal advice. In fact, an antenuptial contract or settlement agreement in respect of which each party did not get independent legal advice is invalid: Property (Relationships) Act s 21F(3). Australian law also permits the setting aside of an antenuptial agreement or divorce settlement on various grounds. These grounds include that, in view of the circumstances which have arisen since the making of the agreement, it is impracticable for the agreement or part of it to be carried out; that since the making of the agreement, a material change has occurred in respect of the care, welfare or development of a child of the marriage, and, as a result of the change, the child or a party to the contract will suffer hardship if the agreement is not set aside; and that, in respect of the making of a financial agreement, one of the parties engaged in conduct which was, in all the circumstances, unconscionable: s 90K, Family Law Act 1975. Most Canadian provinces also empower the court to set an antenuptial contract aside upon divorce or to disregard certain of its clauses: see the legislation Bastarache J refers to in *Hartshorne v Hartshorne* [2004] 1 SCR 550 561 para 14.

My appeal for proper judicial investigation of settlement agreements clearly is not a plea for ignoring the principle of freedom of contract. Nor is it a plea for paternalistically imposing some sort of forced sharing of matrimonial property on all spouses regardless of their circumstances. As in the case of the enforcement of antenuptial contracts, my plea is for gender-sensitive realism. At present, the virtual rubber-stamping of settlement agreements overlooks inequalities and entrenches those inequalities in favour of the more powerful – who are usually male. It thus perpetuates substantive gender inequality.

(d) The assets which qualify as property upon divorce

Research provides ample proof that divorce has a disproportionately negative financial impact on women.⁷⁰ This is so even in some countries where the courts do have a judicial discretion to redistribute assets. One of the reasons for this state of affairs is that the courts often focus on formal rather than substantive equality. Secondly, the courts' understanding of what qualifies as property for purposes of determining the financial consequences of divorce is too narrow. Their narrow view usually prejudices the spouse who is not the main breadwinner, once again resulting in substantive gender inequality. Even if the broad judicial discretion I proposed above is never introduced, some of the spouses' financial inequality could be removed by increasing the pool of assets which can be divided upon divorce.

A spouse's estate (or the joint estate in the case of spouses who are married in community of property) encompasses all the traditional forms of property, such as shares, cash, immovable property, vehicles, credit loan accounts, and the surrender or cash value of insurance policies.⁷¹ Many spouses' main, or only, source of financial welfare is, however, to be found in the so-called 'new property'. In the divorce context 'new property' is sometimes derived from entitlements against the state. But it is more usual for it to be derived from employment and the human capital that a spouse accumulates through formal training and on-the-job experience.⁷² These types of interests do not

70 See, eg *Moge v Moge* (note 10 above) paras 56-60, 91; IM Ellman 'Divorce in the United States' in SN Katz et al (eds) *Cross Currents: Family Law and Policy in the United States and England* (2000) 341, 345; Fineman (note 8 above) 174; LJ Weitzman *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (1985); L'Heureux-Dubé (note 10 above) 452; Stark (note 11 above) 1523, and the sources cited by these authors.

71 PA Van Niekerk *A Practical Guide to Patrimonial Litigation in Divorce Actions* (1999) ch 7 discusses some of these assets and their valuation.

72 On new property in family law and the importance of employment-related assets and human capital for modern-day families, see MA Glendon *The New Family and the New Property* (1981) 91-96; Sinclair (note 10 above) 7-8, 69-72; LD Wardle 'Dividing "the New Property" upon Divorce: The Quest for Economic Equity' in R Blanpain (ed) *International Encyclopaedia of Laws: Law in Motion Part II* (1997) 51, 52-54; Weitzman (note 70 above) ch 5, 387-388; Weitzman (note 12 above) 85-86; GH Fick 'Pensioenverrekening tussen gades met egskeiding' (1990) 15 *J of Juridical Science* 57, 60-61.

qualify as traditional forms of property, as they do not confer vested rights and/or are viewed as being entirely personal to the spouse who obtained them. The result of this narrow view is that, upon divorce, the poorer spouse loses out on (some of) the couple's most valuable assets.

In some foreign jurisdictions several types of employment-related assets are now taken into account upon divorce.⁷³ In South Africa there still is a great deal of reluctance to do so.⁷⁴ The most notable exception relates to pension interests. As a result of legislative intervention, pension interests⁷⁵ are indeed now shared upon divorce.⁷⁶ Unfortunately, the legislation regarding the sharing of pension interests is seriously flawed. One of the main problems is that the non-member spouse's share of the member spouse's pension is fixed at the date of the divorce but only becomes payable when the member spouse receives his or her pension – which may be many years later. As the legislation does not make provision either for growth on the non-member spouse's share or for the payment of interest,⁷⁷ the non-member spouse's share may be negligible when it is eventually paid out.⁷⁸

Another career-related asset that is, in principle, taken into account in South Africa is goodwill. Apart from the goodwill which resides in a business or firm as a whole, individual partners, shareholders or members may have personal goodwill, for example, due to their particular skill or expertise. Personal goodwill – like the goodwill of a business or firm – is an asset that should be taken into account. However, nowadays many

73 For overviews of the position in some Anglo-American countries see Sinclair (note 10 above) 7-8; Wardle (note 72 above) 51; AB Kelly 'The Marital Partnership Pretense and Career Assets: The Ascendancy of Self over the Marital Community' (2001) 81 *Boston Univ LR* 59, 76.

74 The movement away from permanent maintenance awards compounds the problem. (Permanent maintenance could function as a way of distributing employment-related assets.) On the trend away from permanent maintenance see Cronjé & Heaton (note 15 above); De Jong (note 12 above) 75-76.

75 Pension interests encompass not only benefits arising from membership of a pension fund but also benefits arising from membership of a retirement annuity fund: Divorce Act s 1.

76 A spouse's pension interest is deemed to be part of his or her assets for the purposes of determining the patrimonial benefits to which the divorcing spouses may be entitled: Divorce Act, s 7(7)(a). The provisions regarding the sharing of pension interests do not apply to spouses who married subject to complete separation of property on or after 1 November 1984: s 7(7)(c).

77 *Schenk v Schenk* 1993 (2) SA 346 (E).

78 For criticism of the legislation see JC Sonnekus 'Pensioenverwagtings en Onderhoud na Egskeiding in Versorgingsregtelike in plaas van Vermoënsregtelike Konteks' 1989 *TSAR* 202, 202, 326, 326; Fick (note 72 above) 57; W Lane 'Pensions and Divorce: Dealing with Pension Interests' 1993 *De Rebus* 1090, 1090; JC Sonnekus 'Pensioendeling, billikheid én die Egskeidingsreg is onversoenbaar' 1994 *TSAR* 48, 48 et seq, 211, 211; G Meyer 'Pensions and Divorce. Restrict "Pension Interest" to Ascertainable Lump Sum' 1994 *De Rebus* 70, 70; L Atterbury 'Pensioenbelang: verdeling by egskeiding' 1994 *De Rebus* 234, 234; V Ngalwana 'Pension Interest and Divorce Cases. What Precisely is the Correct Position?' 1997 *De Rebus* 759, 759; G Gould 'Divorce Orders and Pension Benefits: An Appeal from the Institute of Retirement Funds' January 2000 *De Rebus* 33, 33; F Paul 'Egskeiding – hoe raak dit pensioen?' March 2001 *De Rebus* 27, 27; A Costa 'A Plea for Enlightened Reform' May 2003 *De Rebus* 28, 31, 32. The South African Law Commission has recommended extensive changes to the current position: SA Law Commission Report *Sharing of Pension Benefits Project 112 of 1999* (June 1999) As yet, nothing has come of those recommendations.

partnership, shareholders' and members' agreements provide either that the individual partners, shareholders or members have no goodwill or that they have transferred their goodwill to the business or firm⁷⁹ and are not entitled to any portion of the business or firm's goodwill when they die, retire, resign, or are retrenched or dismissed. Such a provision not only protects the business or firm from goodwill claims by outgoing partners, shareholders or members, but also results in there being no goodwill which can form part of the partner, shareholder or member's estate upon divorce.

Share options are also sometimes taken into account upon divorce. There are no reported cases on the issue, but there seems to be growing agreement among legal and auditing professionals who specialise in divorces that once a share option has vested, that is, once the person has become entitled to buy the shares, those shares should be taken into account even if the person has not yet exercised the share option. There is less certainty on whether a share option that has not yet vested should be included as an asset upon divorce.⁸⁰

In a recent reported case,⁸¹ the capitalised value of a spouse's interests in a retirement annuity from which he derived a monthly income was taken into account for purposes of a redistribution order. The court however stated that it did not consider the issue to be one of whether those interests 'are technically to be regarded as assets'.⁸² It was merely taking the capitalised value into account in exercising its statutory discretion to redistribute the spouses' assets. The court adopted the same approach in respect of the capitalised value of the spouse's interests in a trust from which he was receiving income.

To the best of my knowledge other career assets, such as enhanced earning capacity and professional or business licences, are not yet taken into account upon divorce in South Africa.⁸³

Finally, there is another form of new property our courts have been willing to take into account upon divorce. It is the right to occupy immovable property under a statutory lease, residential permit or tenancy.⁸⁴ This, at least, is one type of asset that has significance for the poorer segments of our society.

79 The transfer may or may not have been in exchange for a market-related amount.

80 On the nature of and various methods of valuing share options see DS Rosettenstein 'D v D – Equality, Fairness, Risk and the Distribution of Share Options on Divorce' (2002) 14 *Child & Family LQ* 207, 208-213. See also Van Niekerk (note 71 above) para 7.2.3.

81 *Kirkland v Kirkland* (note 49 above).

82 *Ibid* para 83.

83 On the problems in respect of quantifying career assets see eg Wardle (note 72 above) 64-68, 73-75; Weitzman (note 70 above) 122-124, 131-135, 139-141; Weitzman (note 12 above) 131-134; Kelly (note 73 above) 77, 89-91.

84 *Persad v Persad* 1989 (4) SA 685 (D); *Toho v Diepmeadow City Council* 1993 (2) SA 679 (W); *Moremi v Moremi* 2000 (1) SA 936 (W). These cases all dealt with forfeiture of benefits in circumstances where the statutory lease, residential permit or tenancy was conferred on the spouse against whom the forfeiture order was made but the rent was paid by the spouse in whose favour the forfeiture order was made.

(i) Recommendation

It is my view, firstly, that the existing legislation regarding the sharing of pension interests upon divorce should be redrafted to address its many deficiencies.

Secondly, for purposes of divorce, the definition of property should be expanded to include employment-related and human capital assets. The definition could possibly be left to develop gradually as and when the definition of property expands within property law. However, it is my view that addressing the problem of substantive gender inequality upon divorce requires a more rapid solution. I propose that a definition of 'property' should be inserted in the Matrimonial Property Act and the Divorce Act. This definition should apply for purposes of determining all the financial consequences of marriage and divorce in all marriages. The definition should be as broad as possible and should be non-exhaustive.

My proposal is obviously based on Charles Reich's now not-so-new theory on new property.⁸⁵ However, I do not wish to suggest that the enlargement of the pool of assets which can be divided upon divorce should be limited to assets that comfortably qualify as new property. I fully acknowledge that merely including interests which can fairly easily be tweaked to approximate the traditional notion of property has serious limitations. A completely new approach to the concept of property might well be what is required.⁸⁶ But, as I am not a property lawyer, I can, fortunately, leave the task of developing a new property theory to the experts in property law.

IV CONCLUSION

When deciding on the title of this article I toyed with using an adapted version of the lyrics of a famous Spice Girls song and calling it 'Let us tell you what we want, what we really, really want'. Instead, I opted for the present rather bland title. But, in case I failed properly to convey the bottom line, let me summarise what women – especially those who are contemplating divorce and those who live in fear of being divorced – really, really want (and what divorced women really, really wanted when they got divorced but failed to get). We want substantive financial gender equality. We want all our contributions to be properly recognised in

85 'The New Property' (1964) 73 *Yale LJ* 733, 733.

86 As AJ Van der Walt 'Protecting Social Participation Rights Within the Property Paradigm: A Critical Reappraisal' in E Cooke (ed) *Modern Studies in Property Law: Volume II: Property 2002* (2003) 27, 36-37 warns in a different context (a critique of Reich's theory on the new property resulting from benefits that are conferred by the state): 'Instead of improving the current unequal division of wealth, this approach actually exacerbates the situation, because it reduces the debate about wealth and poverty in a constitutional democracy to a mechanical process in which everything depends on the classification of recognised and protected versus unrecognised and unprotected interests, inside versus outside the circle of advantage, while more difficult questions about the reasons and motivation for inclusion and exclusion remain unasked and unanswered.'

financial terms. We do not want the law to continue sending the message that our non-financial contributions are of little or no economic value and that the main breadwinner's new property are his alone. Those of us who work outside the home during the subsistence of the marriage and still fulfil domestic and family-care duties want our double or triple shift to be properly recognised.

There are innumerable types of marriages and various circumstances within marriages which have real economic consequences upon divorce, but our law largely ignores this. It proceeds from the premise that the financial consequences of divorce can be regulated by fixed rules which apply to all marriages. This one-size-fits-all approach often results in substantive gender inequality.⁸⁷ What we need is an approach that promotes substantive gender equality instead of permitting a dismissive juristic shrug of the shoulders when substantive gender inequality results from the application of our matrimonial property and divorce law. I hope that my analyses and proposals will play some small part in establishing such an approach.

87 The reference to a 'one-size-fits-all' approach is borrowed from Stark (note 11 above) 1481. She uses the phrase in respect of the availability of only one form of civil marriage, which takes no account of the varying expectations and lived experiences of couples. She proposes modular alternatives to 'regular' marriage, from which couples can select the option most suited to their circumstances and expectations.