FAMILY LAW

Jacqueline Heaton*

LEGISLATION

Children's Act 38 of 2005 and Children's Amendment Act 41 of 2007

Sections 1–11, 13–21, 27, 30, 31, 35–40, 130–134, 305(1)*(b)* and *(c)*, 305(3)–(7), 307–11 and 313–15, and the second, third, fifth, seventh and ninth items of Schedule 4 of the Children's Act 38 of 2005 ('the Act') came into operation on 1 July 2007 (Proc 13 *GG* 30030 of 29 June 2007). The remaining sections of the Act had to be inserted by the Children's Amendment Act 41 of 2007 ('the Amendment Act') and/or required regulations to be issued before they could be implemented. The Amendment Act came into operation on 1 April 2010, while the regulations were published on 31 March and 1 April 2010 (Proc R13 *GG* 33076 of 1 April 2010; GN R250 *GG* 33067 of 31 March 2010; GN R261 *GG* 33076 of 1 April 2010). As all the provisions and regulations were in place by 1 April 2010, the remaining sections of the Act were brought into operation on that day (Proc R12 *GG* 33076 of 1 April 2010). The Act and Amendment Act were discussed in the 2006 *Annual Survey* 141–55 and 2007 *Annual Survey* 885–901.

Jurisdiction of Regional Courts Amendment Act 31 of 2008

The effect of the Jurisdiction of Regional Courts Amendment Act 31 of 2008 on jurisdiction in divorce matters was discussed in the 2008 *Annual Survey* 912–13. The Act came into operation on 9 August 2010 (Proc R41 *GG* 33448 of 6 August 2010).

Magistrates' Courts Amendment Act 19 of 2010

When the Jurisdiction of Regional Courts Amendment Act came into operation on 9 August 2010 (see immediately above), it

* BLC LLB (UP) LLM (Unisa), Professor of Law in the Department of Private Law, University of South Africa. This material is based upon work supported financially by the National Research Foundation. Any opinion, findings and conclusions or recommendations expressed in this material are those of the author and therefore the NRF does not accept any liability in regard thereto. This survey is partly based on contributions previously published in the 2010 *Juta Quarterly Review*.

amended the Magistrates' Courts Act 32 of 1944 ('the Act') by empowering certain regional magistrates to decide civil disputes. These disputes include, on the one hand, divorce and nullity cases, cases relating to customary marriages, and matters arising from such cases, and, on the other hand, other civil matters where the claim or the value of the matter in dispute does not exceed the amount determined by the Minister of Justice and Constitutional Development by notice in the *Government Gazette* (s 29(1B) and s 29(1) of the Act, respectively). The requirements for appointing a person as a regional magistrate who may adjudicate civil disputes are set out in section 12(8) of the Act. Prior to the coming into operation of section 3 of the Magistrates' Courts Amendment Act 19 of 2010 ('the Amendment Act') those requirements were very restrictive. A magistrate's name could be entered on the list of regional magistrates who may adjudicate civil disputes only if one or more places had been appointed in his or her regional division for the adjudication of civil disputes and *(a)* the head of the South African Judicial Education Institute issued a certificate that the magistrate had successfully completed an appropriate training course in the adjudication of civil disputes; *(b)* the Magistrates Commission was satisfied that, before the South African Judicial Education Institute was instituted, the magistrate successfully completed an appropriate training course in the adjudication of civil disputes; or *(c)* the Magistrates Commission was satisfied that, because of his or her previous experience as a magistrate presiding over the adjudication of civil disputes or as a legal practitioner with at least five years' experience in the administration of justice, the magistrate had suitable knowledge of and expertise in civil litigation to preside over the adjudication of civil disputes. Furthermore, in terms of section 12(6) and (7) of the Act, a qualifying magistrate had to be appointed for purposes of adjudicating both categories of civil disputes, that is, divorce and related matters as well as other civil disputes.

To enlarge the pool of eligible magistrates, the Amendment Act amends section 12(6)–(8) of the Act to provide that magistrates may be appointed to adjudicate either divorce and related matters or other civil matters, or to adjudicate both categories of civil disputes (s 3 of the Amendment Act read with para 3.2 of the Memorandum on the Objects of the Magistrates' Courts Amendment Bill, 2010). Section 3 of the Amendment Act further simplifies the third requirement in section 12(8) of the Act (requirement

(c) above) by requiring only that the Magistrates' Commission must be satisfied that the magistrate, on account of his or her previous experience, has suitable knowledge of and expertise in civil litigation matters to preside over the adjudication of either category of civil dispute or both categories of civil disputes.

The Amendment Act came into operation on 7 December 2010 (s 5).

Older Persons Act 13 of 2006

The Older Persons Act 13 of 2006 ('the Act') came into operation on 1 April 2010, as did the regulations under the Act (Proc R11 *GG* 33075 of 1 April 2010; GN R260 *GG* 33075 of 1 April 2010). The Act repeals the Aged Persons Act 81 of 1967.

For purposes of Family Law it should firstly be noted that the Act creates the crimes of abuse of an older person, having contact with an older person in contravention of a written police notice or magistrate's court order issued in terms of section 27, and accommodating or caring for an older person in contravention of a magistrate's court order (ss 30(1), 27(8) and 29(11)). An older person is a man who is 65 years of age or older, or a woman who is 60 years of age or older (s 1). 'Abuse of an older person' is defined in very broad terms. It connotes '[a]ny conduct or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress or is likely to cause harm or distress to an older person', and includes physical, sexual, psychological and economic abuse (s 30(2)). Physical abuse refers to any act or threat of physical violence, while sexual abuse refers to any conduct which violates the older person's sexual integrity. Psychological abuse is any pattern of degrading or humiliating conduct, including repeated insults, ridicule or name calling, repeated threats to cause emotional pain, and repeated invasion of the person's privacy, liberty, integrity or security. Economic abuse is the deprivation of economic and financial resources to which the person is legally entitled, the unreasonable deprivation of economic and financial resources which the person needs or the disposal of household effects or other property that belongs to the person without his or her consent (s 30(3)).

Any person who suspects that an older person has been abused or suffers from an abuse-related injury must immediately notify the Director-General of Social Development or the police (s 26(1)). Failure to do so is a crime (s 26(3)). Also, the provisions

of the Domestic Violence Act 116 of 1998 remain available if domestic violence is committed against an older person who is in a domestic relationship with the perpetrator of the violence (s 24 of the Older Persons Act).

The Act further provides that anyone who is involved with an older person in a professional capacity must notify the director-general if he or she personally observes the older person and concludes that the person is in need of care and protection (s 25(1)). Any other person who is of the opinion that an older person is in need of care and protection may, but need not, report this opinion to a social worker (ss 25(2) and (3)). An older person is in need of care and protection in any of the following circumstances: *(a)* his or her income, assets or old-age grant has been taken against his or her wishes or he or she suffers any other economic abuse; *(b)* he or she has been removed from his or her property against his or her wishes or has been unlawfully evicted from any property he or she occupied; *(c)* he or she has been neglected or has been abandoned without visible means of support; *(d)* he or she lives or works on the streets, or begs for a living; *(e)* he or she abuses or is addicted to a substance and is without support or treatment for such abuse or addiction; *(f)* he or she lives in circumstances which are likely to cause or be conducive to his or her seduction, abduction or sexual exploitation; *(g)* he or she lives in or is exposed to circumstances which may harm him or her physically or mentally; or *(h)* he or she is in a state of physical, mental, or social neglect (s 25(5)).

The director-general or social worker who receives a report that an older person is in need of care and protection must investigate the matter (s 25(3)). If the investigation substantiates the report, the director-general or social worker may *(a)* facilitate the removal of the older person to a shelter, or to a hospital if he or she is injured; *(b)* lodge a report with a police official and request the police official to issue a written notice in terms of section 27; *(c)* take such other steps as may be prescribed by the regulations to ensure adequate provision for the basic needs and protection of the older person; or *(d)* assist an older person who is the victim of a crime to see a police official to lay a complaint (s 25(4)). The notice that is issued in terms of section 27 calls upon the alleged offender to leave the home or place where the older person resides and to refrain from entering such home or place or having contact with the older person until a magistrate's court has held a hearing into the matter. The notice also informs

the alleged offender that he or she must advance reasons at the hearing why he or she should not be permanently prohibited from entering the home or place. The police official must certify that he or she has handed the original notice to the alleged offender and has explained the importance thereof to the alleged offender and must immediately forward a duplicate original of the notice to the clerk of the magistrates' court (s 27(1)–(2)).

The magistrate's court before which the alleged offender appears, summarily inquires into the circumstances which gave rise to the issuing of the notice (s 27(5)). After having considered the circumstances which gave rise to the issuing of the notice and having heard the alleged offender, the court may *(a)* issue an order prohibiting the alleged offender from entering the home or place where the older person resides, from having any contact with the older person, or from both types of conduct for such period of time as it deems fit; *(b)* order that the alleged offender may enter the home or place or have contact with the older person upon specified conditions; *(c)* order that the alleged offender will be responsible for the maintenance of his or her family while he or she is prohibited from entering the home or place where the older person resides or from having contact with the older person; or *(d)* make such other order as it deems fit (s 27(6)).

If the person to whom a notice has been issued in terms of section 27 refuses to leave the home or place where the older person resides, or has contact with the older person in contravention of the notice, he or she commits an offence. The same applies if the person contravenes the order the magistrate's court issued or fails to comply with any condition the magistrate's court imposed in respect of the person's entering the home or place where the older person resides or in respect of having contact with the older person (s 27(8)).

Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009

The aspects of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 that are relevant for Family Law were discussed in 2009 *Annual Survey* 440–2. The Act came into operation on 20 September 2010 (Proc R54 *GG* 33576 of 17 September 2010).

SUBORDINATE LEGISLATION

The regulations regarding the sections of the Children's Act which are administered by the Department of Justice and Consti-

tutional Development were published on 31 March 2010 (GN R250 *GG* 33067). Those regulations relate to children's courts, international child abduction and contribution orders. The remaining regulations, which relate to the sections administered by the Department of Social Development, were published on 1 April 2010 (GN R261 *GG* 33076). The latter regulations deal with social, cultural and religious practices; virginity testing; male circumcision; parental responsibilities and rights agreements; parenting plans; partial care; early childhood development; the child protection system; the National Child Protection Register; protective measures relating to children's health and other children's issues; prevention and early intervention programmes; children in need of care and protection; alternative care; foster care; child and youth care centres; drop-in centres; adoption; inter-country adoption; and consent to medical treatment of, or an operation on, a minor.

As a result of the coming into operation of the Jurisdiction of Regional Courts Amendment Act (see above in this chapter), the Divorce Court Rules had to be repealed. They were replaced by the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts. An amended version of the latter rules was published on 23 August (GN R740 *GG* 33487) and came into operation on 15 October 2010 (GN 888 *GG* 33620 of 8 October 2010).

The regulations under the Older Persons Act were published on 1 April 2010 (GN R260 *GG* 33075 of 1 April 2010).

Regulation 5B of the regulations under the Marriage Act 25 of 1961 was amended on 13 August 2010 (GN 699 *GG* 33444 of 13 August 2010). This regulation deals with the forms and fees relating to the issuing of marriage certificates and confirmation of marital status. However, the relevant Government Notice was subsequently withdrawn by Government Notice 781 (*GG* 33523 of 3 September 2010).

The cut-off date by which customary marriages concluded before the coming into operation of the Recognition of Customary Marriages Act 120 of 1998 must be registered was extended to 31 December 2010 (GN 51 *GG* 32916 of 5 February 2010). Government Notice 54 in the same *Government Gazette* granted the same extension in respect of registration of customary marriages concluded after the coming into operation of the Act.

DRAFT LEGISLATION

Prevention and Combating of Trafficking in Persons Bill 7 of 2010

The Prevention and Combating of Trafficking in Persons Bill 7 of 2010 seeks to give effect to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, to combat and prevent the trafficking of persons within South Africa and across South African borders, and to provide measures to protect and assist victims of trafficking. For purposes of Family Law it should be noted that one of the provisions of the Bill deals with trafficking of a child by his or her parent or guardian or another person who has parental responsibilities and rights in respect of the child. The clause empowers a children's court to suspend all the parental responsibilities and rights of a parent, guardian or other person who has parental responsibilities and rights if it has reason to believe that the parent, guardian or person has trafficked the child, and to place the child in temporary safe care, pending an inquiry by a children's court (cl 34(1)). The parent, guardian or person can, in addition, be charged with the offence of trafficking in persons (cl 34(2)). The Explanatory Summary of the Bill was published in General Notice 61 in *GG* 32906 of 29 January 2010.

Protection from Harassment Bill 1 of 2010

For purposes of Family Law, it should be noted that the Protection from Harassment Bill 1 of 2010 provides for the issuing of protection orders against harassment even if the person who harasses and the party who is being harassed are not involved in a domestic relationship as defined in the Domestic Violence Act. The Bill also amends the Domestic Violence Act to provide a mechanism to subpoena witnesses to attend proceedings in terms of the Domestic Violence Act. The Explanatory Summary of the Bill was published in General Notice 100 (*GG* 32922 of 1 February 2010).

Draft Judicial Matters Amendment Bill, 2010

Among the provisions of the draft Judicial Matters Amendment Bill, 2010 is a clause that amends the Divorce Act 70 of 1979 ('the Act') to regulate the publication of information regarding divorce

proceedings. The proposed amendment substitutes section 12 of the Act in view of the Constitutional Court's finding in *Johncom Media Investments Ltd v M* 2009 (4) SA 7 (CC) that section 12 is unconstitutional and invalid because it unjustifiably limits the right to freedom of expression (paras [31] and [45]). Before the Constitutional Court's decision, section 12 provided that, except for the names of the parties and the fact that a divorce action was pending between them, no particulars of a divorce action or any information which came to light in the course of such an action could be made public. The Constitutional Court not only declared section 12 invalid but also prohibited publication of the identity of any party or child in any divorce proceedings and of any information which may reveal the identity of a party or child, unless the court authorizes publication (paras [42] and [45]). The Constitutional Court further specified that authorization of publication may be granted in exceptional circumstances only (para [45]).

Clause 38 of the draft Amendment Bill substitutes a detailed limitation on publication for the invalid version of section 12 of the Act. In terms of the substituted section 12(1), the identity of, or any information which may reveal the identity of any party or child in any divorce action may not be published in any manner or otherwise be made known to the public or a section of the public, unless the court authorizes such publication. In keeping with the decision in *Johncom* the new version of section 12 stipulates that authorization may be granted in exceptional circumstances only (s 12(1)*(a)*). The substituted section further indicates what information must be construed as information which may identify or reveal the identity of any party or child in a divorce action. Such information includes: *(a)* the person's name, title, pseudonym or alias; *(b)* the physical address or locality at which the person resides or works; *(c)* the person's relationship to another identified relative, the person's association with identified friends or businesses, or the person's official or professional acquaintances; *(d)* the person's physical description or style of dress; *(e)* any employment or occupation engaged in or profession practised or calling pursued by the person, or any official or honorary position he or she holds; *(f)* the person's recreational interests or political, philosophical or religious beliefs or interests; and *(g)* any real or personal property in which the person has an interest or with which he or she is otherwise associated (s 12(1)*(b)*).

As the whole of section 12 was declared invalid in *Johncom*, the exemptions in section 12(2) (which allowed publication of particulars or information for the purposes of the administration of justice, publication in a bona fide law report which does not form part of any other publication than a series of law reports, or for the advancement of or use in a particular profession or science) also no longer exist. The substituted section 12(2) of the Act that is contained in clause 38 of the draft Amendment Bill addresses this gap by re-instating the exemptions. And, like its invalid predecessor, the substituted section 12(3) extends the provisions of section 12(1) and (2) of the Act to proceedings relating to the enforcement or variation of any order made in terms of the Act and any enquiry instituted by a family advocate in terms of the Mediation in Certain Divorce Matters Act 24 of 1987. The sanction for contravention of the prohibition on publication likewise corresponds to the sanction in the invalid section 12(4) — committing an offence that is punishable with a fine or imprisonment for up to one year, or both the fine and imprisonment.

Although the Constitutional Court did not deal with section 11 of the Act in *Johncom*, clause 37 of the draft Amendment Bill amends this section by renumbering the existing version subsection (1) and adding a new subsection (2). The new section 11(2) provides that, if at any stage during proceedings in terms of the Act, it appears to the court that a minor is likely to be harmed as a result of the hearing of any evidence, the court may, of its own accord or on application by any interested party, order that the proceedings be held behind closed doors. In such event no person may be present unless his or her presence is necessary for the proceedings.

The draft Amendment Bill further amends the provisions of the Maintenance Act 99 of 1998 regarding the area of jurisdiction of a maintenance court, the circumstances in which maintenance orders may be granted by default, the transfer of maintenance orders, and the conversion of criminal proceedings into maintenance enquiries (cll 50, 51, 53 and 59, which amend ss 6, 18, 23 and 41 of the Maintenance Act). It further increases the penalties for certain offences and creates new offences under the Maintenance Act (cll 54–8, which amend sections 31, 35, 38 and 39 of the Maintenance Act and insert sections 39A into the Maintenance Act). Clause 52 of the draft Amendment Bill clarifies the legal position regarding the effect of the amendment or discharge of an existing order of the High Court by a maintenance court. This clause

substitutes the existing section 22 of the Maintenance Act. The substituted section provides that if a maintenance court makes a maintenance order in substitution or discharge of an existing maintenance order, the existing order ceases to be of force and effect only in so far as the maintenance court expressly, or by necessary implication, replaces the existing order or part of the existing order. The substituted section further obliges the maintenance officer forthwith to give notice of the decision to the Registrar or Clerk of the Court where the maintenance order was issued. The Registrar or Clerk must amend the relevant record or register accordingly. If enacted, the substituted section 22 will reflect the interpretation the Supreme Court of Appeal adopted in *Cohen v Cohen* 2003 (3) SA 337 (SCA). In this case, it was held that if a maintenance court varies the amount of maintenance that is payable in terms of an existing order of the High Court and does not expressly or by necessary implication deal with other aspects of the existing order, those other aspects remain in force.

CASE LAW

Breach of Promise to Marry

The facts of, and decision in, *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) received a great deal of media attention because of the respondent's status as a celebrity in the Afrikaans music world. Ms Bridges is a singer, lyricist, and promoter. Her fiancé was Mr Van Jaarsveld (appellant). He farms on his family's farm. The intended marriage would have been Ms Bridges' fifth and Mr Van Jaarsveld's first. Mr Van Jaarsveld's family was bitterly opposed to the marriage. His mother instructed him to choose between Ms Bridges and the family farm. Ms Bridges instructed him to choose between her and his mother. Some six weeks before the agreed wedding date, Mr Van Jaarsveld sent Ms Bridges an apologetic cell phone text message in which he informed her that he did not want to proceed with the wedding. He apologized not only to her but also to her mother for breaking off the engagement. However, later the same day he sent Ms Bridges another text message informing her that he had reconsidered and that she should post the wedding invitations. His change of heart did not last long. The next day he finally broke off the engagement — also by way of an apologetic text message. Ms Bridges accepted the repudiation. Three days later, her attorneys sent Mr Van Jaarsveld a letter of demand for

more than R1 million. She issued summons two months later, by which time she already had a new boyfriend. In her summons she claimed R678 203. The court below upheld her claim and awarded her R100 000 as sentimental damages and R172 413 as contractual damages.

Mr Van Jaarsveld sought leave to appeal the order. The court below granted leave only in respect of the quantum of damages. The Supreme Court of Appeal was dissatisfied with the limited scope of the leave to appeal and notified the parties that it wished to hear argument on whether the termination of the engagement was contumacious (ie insulting) and whether the continued existence of the action for breach of promise should be reconsidered. The latter issue arose as a result of *Sepheri v Scanlan* 2008 (1) SA 322 (C) in which Davis J had referred to criticism of the continued recognition of the engagement by way of awards for contractual damages for breach of promise and had stated:

> 'In general I would agree with these views, namely, that our law requires a reconsideration of this particular action. It appears to place the marital relationship on a rigid contractual footing and thus raises questions as to whether, in the constitutional context where there is recognition of diverse forms of intimate personal relationships, it is still advisable that, if one party seeks to extract himself or herself from the initial intention to conclude the relationship, this should be seen purely within the context of contractual damages' (*Sepheri v Scanlan* 330I–331A as quoted in *Van Jaarsveld v Bridges* para [2]).

On appeal, the Supreme Court of Appeal began its judgment by giving guidelines regarding the future development of the law relating to claims for breach of promise (paras [3]–[11]). Those guidelines are obiter because the case was decided purely on the facts. Harms DP (Nugent and Van Heerden JJA and Majiedt and Seriti AJJA concurring) indicated that the courts can and must develop the common law, taking into account the interests of justice and promoting the spirit, purport and objects of the Bill of Rights. Prevailing mores and public policy considerations must be taken into account in deciding whether and how to develop the common law. Harms DP stated that the time had arrived 'to recognize that the historic approach to engagements is outdated and does not recognize the *mores* of our time, and that public policy considerations require that our courts must reassess the law relating to breach of promise' (para [3]).

He distinguished between the two distinct actions which may, in terms of the common law, be instituted on the ground of breach of promise, namely the actio iniuriarum and the action for

contractual damages (paras [4]–[5]). In terms of the actio iniuriarum, the injured party is entitled to sentimental damages if the repudiation was contumacious because the party who broke off the engagement acted delictually wrongfully and with the animus iniuriandi when terminating the engagement. It is irrelevant whether the termination was for a just cause. It is the manner in which the engagement was terminated that is the deciding issue (para [4]; see also para [19]).

In so far as contractual damages are concerned, a claim lies only if the termination was without a just cause. Just cause 'is usually defined as any event or condition or actions *of the other party* which would jeopardise a long and happy marriage and which can induce any right-minded member of society to rescind the engagement' (para [5]; italics in the original). (The court relied on DJ Joubert 'Law of Marriage' (updated by Brigitte Clark) in Brigitte Clark (ed) *Family Law Service* (1988) 13 in support of this definition. The court's reference in para [5] n 7 cites the former editor of this work — ID Schäfer.) The origin of this restricted definition is 'Canon Law and Germanic Law influences at a time when churches controlled the lives of people, when a woman was deemed to be of a lower status than a man, and when a party to a promise to marry could be obliged to marry by an action for specific performance' (para [5]). The 'world has moved on and morals have changed' (para [6]). Divorce is now granted on no-fault grounds. As it is illogical to attach more serious consequences to an engagement than to a marriage, termination of an engagement because one party no longer wants to marry the other should be considered to be for a just cause regardless of whose 'fault' it is that the marriage is no longer desired (ibid).

Harms DP then dealt with contractual damages for breach of promise, that is, contractual damages for termination of the engagement by one of the parties for a reason which is not a just cause. He first indicated his misgivings about awarding contractual damages for breach of promise by stating that '[i]t is difficult to justify the commercialisation of an engagement in view of the fact that a marriage does not give rise to a commercial or rigidly contractual relationship' (para [7]). In his view, '[a]n engagement is . . . more of an unenforceable pactum de contrahendo providing a spatium deliberandi — a time to get to know each other better and to decide whether or not to marry finally' (para [8]). He further distinguished between prospective loss and actual loss suffered as a result of breach of promise. He rejected the notion

that when they become engaged, the parties contemplate that a breach of their promise to marry would result in the imposition of the financial consequences their marriage would have had (ibid). He further stated that claims for prospective loss, such as loss suffered because the jilted party would no longer acquire the benefits the intended matrimonial property system would have conferred on him or her, are difficult to rationalize. Parties do not usually agree on their matrimonial property system when they become engaged, and even if they do, either of them could still change his or her mind before the wedding. It is accordingly impossible to work on any assumption about the parties' future matrimonial property system. Having to take the jilted party's loss of the maintenance he or she would have received during the marriage into account complicates matters even more, for such loss depends on the anticipated duration of the marriage and the orders the court would probably have made upon divorce (paras [9]–[10]). Harms DP approvingly cited the dictum in *Holt v United Security Life Insurance & Trust Co* (1909) 72 Atlantic Reporter 301 as quoted in *Mainline Carriers (Pty) Ltd v Jaad Investments CC* (1998 (2) SA 468 (C) para [44]) that prospective losses are 'not capable of ascertainment, or are remote and speculative, and accordingly not proper to be adopted as a legal measure of damage' (para [10]). He concluded that courts should not 'involve themselves with speculation on such a grand scale by permitting claims for prospective losses' (ibid).

He then turned to claims for actual loss in the case of breach of promise, such as expenses or loss incurred because the parties had agreed on wedding preparations or had agreed that one of them would resign in anticipation of the wedding and is now unable to find employment. He stated that such loss 'does not flow from the breach of promise *per se* but from a number of express or tacit agreements reached between the parties during the course of their engagement' (para [11]). He did not explain the nature of these agreements, but stated that the jilted party who suffered an actual loss which was within the contemplation of the parties 'must be placed in the position in which she or he would have been had the relevant agreement not been concluded; and what the one has received must be set off against what the other has paid or provided' (ibid, citing *Probert v Baker* 1983 (3) SA 229 (D) at 234–5). Put differently, the jilted party must be awarded negative interest.

After giving all of the above guidelines, Harms DP proceeded to deal with the claim for damages in the present case. In respect

of Ms Bridges' claim that she was entitled to delictual damages, he held that she could succeed only if Mr Van Jaarsveld had committed a wrongful overt act. The objective test of reasonableness is used to determine whether or not the act complained of is wrongful. Thus the act is tested against the prevailing norms of society (para [19]). The content of the text messages Mr Van Jaarsveld had sent was not objectively insulting. However, Ms Bridges was more troubled by the termination having made newspaper headlines and having occurred via text message and Mr Van Jaarsveld's having given an interview to a newspaper after breaking off the engagement. Harms DP found that none of these circumstances was injurious or changed the non-injurious termination of the engagement into an iniuria. He held that Ms Bridges' reputation was such that anything about her love life would have been newsworthy. Moreover, the source of the newspaper report about the cancellation of the wedding was one of her friends, not Mr Van Jaarsveld. Mr Van Jaarsveld's sending of text messages instead of calling the engagement off in person was not injurious as text messaging was the parties' normal form of communication. Furthermore, the tone of the messages was self-recriminatory and apologetic rather than injurious. The newspaper interview Mr Van Jaarsveld gave, took place after Ms Bridges had already spoken to the media. Read in context, the newspaper article was not derogatory and did not convey an animus iniuriandi on the part of Mr Van Jaarsveld (paras [20]–[22]). In view of Ms Bridges' 'history, her quick recovery in the arms of another, her eagerness to claim damages, Van Jaarsveld's uncertainty about their future, the lack of prospects of a happy marriage on the farm, and the bad relationship with her future in-laws' Harms DP concluded that any injury or insult that might have occurred was minimal and that the claim based on iniuria should have been dismissed.

He also dismissed Ms Bridges' claim for actual financial loss. He held that the court below had failed to take an amount of R200 000 Ms Bridges had earned into account when it awarded her R137 316 for loss of income for the year after the intended marriage (paras [24]–[27]). Had the court taken the R200 000 into account, it would have dismissed her claim (para [27]). The court had also incorrectly allowed Ms Bridges various amounts for wedding preparations, removal costs, renovations to her future matrimonial home and costs in relation to the possible move of her child to a different school, since it failed to take all the

amounts Mr Van Jaarsveld had paid as contributions to those expenses into account. Had the court taken the correct amount in account, it could not have awarded Ms Bridges any damages (para [29]). On the facts of the case, the Supreme Court of Appeal accordingly unanimously upheld the appeal with costs (para [30]).

The court should be lauded for its disapproval of claims for prospective loss for breach of promise and for its realistic view that lack of desire to continue with the wedding should constitute a just cause for terminating an engagement. The implications of both views are far-reaching, but it is especially the latter view that will have an impact on the majority of cases where an engagement is broken off. If a court which develops the common law in the future accepts the obiter, but very persuasive, view of the Supreme Court of Appeal that one party's lack of desire to proceed with the marriage should be a just cause for termination of the engagement regardless of whose 'fault' it is that the marriage is no longer desired, termination of an engagement would, in the vast majority of cases, no longer give rise to claims for contractual damages for breach of promise. As the termination would be based on a just cause, the party who terminates the engagement by refusing to proceed with the marriage would no longer be committing breach of promise. He or she would no longer be 'punished' by having to pay contractual damages purely because he or she broke off the engagement, for, as Harms DP stated, 'an engagement may be cancelled without financial consequences if there is a just cause for the cancellation' (para [5]). Even in those cases where a party does not start off by expressly refusing to proceed with the wedding but acts in a manner that violates a commitment implicit in an engagement, for example by having a sexual relationship with a third party, a claim for breach of promise would not lie since the party who violated the commitment would be able to argue that the violation was simply a symptom of his or her lack of desire to proceed with the marriage (just as many adulterous spouses argue that their adultery is merely a symptom of the irretrievable breakdown of their marriage and not its cause).

However, as Harms DP indicated, the party who does not wish to proceed with the marriage may still have to compensate the jilted party for expenses or loss incurred in terms of another agreement between the parties. Harms DP stated that the jilted party who suffered an actual loss which was within the contemplation of the parties (such as expenses relating to the wedding

invitations, wedding dress, bridesmaids' dresses, a venue for the wedding reception, the honeymoon, and furniture removal) 'must be placed in the position in which she or he would have been had the relevant agreement not been concluded' (para [11]). In other words, the amount he or she must receive is calculated by way of negative interest. This issue requires brief scrutiny. The case on which Harms DP bases his obiter statement is *Probert v Baker*. In *Probert*, Nienaber J (as he then was) did not restrict the aggrieved party's compensation to negative interest. He held that in the case of breach of contract, the aggrieved party may claim either positive or negative interest, provided that he or she cancelled the contract after the breach of contract occurred (*Probert* at 234D–E; the then Appellate Division confirmed the decision on appeal, but for reasons which made it unnecessary to decide the negative/positive interest issue: *Baker v Probert* 1985 (3) SA 429 (A)). *Probert* deviates from the formerly accepted general rule that damages for breach of contract are calculated according to positive interest, that is, the injured party is entitled to damages which would place him or her in the position he or she would have been in had the contract been fulfilled. Nienaber J's view has not been unanimously adopted in other divisions. In *Hamer v Wall* 1993 (1) SA 235 (T), the majority of the court refused to follow *Probert* and in *Mainline Carriers v Jaad Investments* (which Harms DP cites in a different context in his guidelines). Farlam J (as he then was) declined to follow either *Probert* or *Hamer* and held that negative interest could be claimed without the aggrieved party having cancelled the contract. Farlam J further held that wasted expenses could be claimed as either positive or negative interest. However, in *Masters v Thain t/a Inhaca Safaris* 2000 (1) SA 467 (W), *Probert* was applied. That, and when, the party to a contract that is broken may claim negative interest is accordingly not as clear-cut as Harms DP's obiter dictum suggests.

Finally, it should be noted that Harms DP did not deal with the return of engagement gifts upon the breaking off of an engagement. If his obiter views on termination of an engagement were to be accepted, they would not alter the rules regarding engagement gifts, for those rules originate in the law governing donations (as a species of contract). They are not intrinsically linked to the recognition of an engagement as a contract. (On return of engagement gifts, see Jacqueline Heaton *South African Family Law* 3 ed (2010) 13; Chuma Himonga 'Marriage' in Francois du

Bois *et al* (ed) *Wille's Principles of South African Law* 9 ed (2007) 236; Joubert in Clark (ed) *Family Law Service* para A15; June D Sinclair assisted by Jacqueline Heaton *The Law of Marriage Volume 1* (1996) 331–2; Ann Skelton & Marita Carnelley (eds) *Family Law in South Africa* (2010) 31–2; FP van den Heever *Breach of Promise and Seduction in South African Law* (1954) 41; Johan David van der Vyver & David Johannes Joubert *Persone-en Familiereg* 3 ed (1991) 479–80; Daniel Visser *Unjustified Enrichment* (2008) 543–6; PJ Visser & JM Potgieter *Introduction to Family Law* 2 ed (1998) 35–6).

Children

Children's rights

Singh and Another v Ebrahim (1) [2010] 3 All SA 187 (D) concerns a delictual claim for damages arising from the defendant's medical negligence which caused the plaintiffs' child to suffer from cerebral palsy. For purposes of the present chapter, it should be noted that the court held that, since a child was involved, the assessment of damages should be guided by section 28(2) of the Constitution of the Republic of South Africa, 1996, which provides that a child's best interests are of paramount importance in every matter concerning the child. However, this provision does not mean that delictual claims by or on behalf of children should be accepted or treated more benevolently simply because children are involved. The court reiterated the now familiar principle that although the child's best interests are paramount, justifiable limitations can be placed on those interests (para [27]).

Schneider NO and Others v AA and Another 2010 (5) SA 203 (WCC) deals with a dispute regarding an unmarried mother's decision to home school her two children. The children's parents lived together at the time of the children's birth but subsequently split up. The father died some years later. Shortly after the father's death, the mother decided that the children, who were then eleven years old, should be home schooled instead of attending an educational institution. The executor of the father's estate and the children's paternal grandmother were opposed to home schooling. They sought the appointment of a curator ad litem whose task would be to report to the court on the most appropriate schooling for the children. The children's mother opposed their application. The parties subsequently agreed that a certain

Dr W would be appointed to prepare a report on the best interests of the children in so far as their education was concerned. Dr W's report did not recommend home schooling. The mother thereupon obtained a report from another expert who advised that the children should be home schooled. The dispute ended up before Davis J. On the morning of delivering his judgment, he was informed that the mother had relented and had undertaken to enrol the children at one of the schools recommended by Dr W. He nevertheless set out the reasons for the order he would have made in the absence of the mother's undertaking.

He stated that the best interests of the child must be paramount and that a child-centred approach must be adopted (at 214–15). Evaluating the experts' evidence, he stated that Dr W's evidence had to be preferred (at 211–13). He further found that the children's mother had violated sections 3 and 51 of the South African Schools Act 84 of 1996 by removing the children from the school at which they had been enrolled and failing to obtain permission to home school them (at 217I–J). He indicated that, had the mother not agreed to enrol the children in a school, he would have made an order compelling her to comply with the Act and to seek authorization to home school the children. Pending authorization for home schooling, he would have compelled her to enrol the children in a school (at 217–18). After raising serious concerns about the way in which the case had been conducted and about attempts to turn the case into a test case for home schooling instead of focussing on the best interests of the individual children, Davis J turned to the matter of costs (at 218–21). As a mark of his displeasure regarding the manner in which the case had been conducted, he made a partial order for costs de bonis propriis on attorney and client scale against the mother's attorney (at 221B–C; order para 6). He further made an order in keeping with the mother's undertaking to enrol the children at a school recommended by Dr W and to have the children monitored by Dr W (order paras 1 and 2). His order also dealt with maintenance for the children and contact between the children and their paternal family as agreed by the parties (order paras 4 and 5). Davis J's firm stance on the best interests of the children is welcomed and his view that the best interests of the individual children must remain foremost in the minds of all persons involved in each individual case is strongly supported. For this reason the costs order he made against the mother's attorney is also supported.

Customary adoption

Maneli v Maneli 2010 (7) BCLR 703 (GSJ) is the third case in which recognition has been afforded to customary adoption. In *Kewana v Santam Insurance Co Ltd* 1993 (4) SA 771 (TkA), customary adoption was recognized for purposes of a claim for compensation for loss of support resulting from the negligent killing of a child's adoptive parent. In *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T), the court made a similar ruling which resulted in the Motor Vehicle Accidents Fund being liable for compensation for loss of support resulting from the death of an adoptive father in a motor vehicle accident. In the latter case there was some uncertainty whether or not the customary adoption was valid as the children's mother had not been informed of the adoption. The court however held that even if the adoption were invalid at customary law, the deceased 'adoptive' father had been liable for the children's maintenance because he had undertaken to maintain them. For this reason and because it was in the best interests of the children, the Fund had to compensate the children for their loss of support.

In *Maneli*, the adoptive father was still alive, but had separated from the adoptive mother and refused to pay maintenance for the adopted child. The adoptive mother approached the maintenance court for a maintenance enquiry and an order in terms of the Maintenance Act determining the amount of maintenance the adoptive father had to contribute to the child's maintenance. The adoptive father denied liability for the child's maintenance on the ground that he was not the child's biological parent and had never adopted or fostered her in terms of the Child Care Act 74 of 1983 (which applied at the relevant time, but has since been replaced by the Children's Act). The presiding officer in the maintenance court developed the common law to hold that a man who adopted a child in terms of customary law has a legal duty to maintain the child which can be enforced in terms of the Maintenance Act. She then requested the High Court to determine whether her finding that she could develop the common law to hold the adoptive father liable was correct.

The High Court per Mokgoatlheng J gave an affirmative answer. The judge held that customary adoption does not violate the Constitution and the Child Care Act, and that recognizing the duty of support that flows from a customary adoption serves the child's best interests as is demanded by section 28(2) of the Constitution and section 9 of the Children's Act (paras [13], [18], [19], [21], [24]

and [36]). He further held that the words '[t]o provide . . . for the adoption of children' in the preamble of the Child Care Act must be 'interpreted purposively not to exclude adoption by customary law' (para [23]). By this he presumably meant, not that the Act should be purposively interpreted to include customary adoption, but that the recognition of adoption in terms of the Act does not exclude the possibility of customary adoption being recognized too, for he went on to conclude that a child who is adopted in terms of customary law can be 'deemed to be legally adopted in terms of the common law and the Constitution of the Republic of South Africa' (ibid).

It is not clear what the latter quoted phrase means. A child cannot be adopted in terms of the Constitution, for the Constitution does not regulate adoption. Nor can a child be adopted in terms of the common law, for adoption did not exist at common law (Van der Linden *Regtsgeleerd, Practicaal en Koopmans Handboek* (1806) I.IV.II; *Robb v Mealey's Executor* (1899) 16 SC 135; *Edwards v Fleming* 1909 TH 232; *Rex v Du Plessis* 1922 TPD 191; Tshepo Mosikatsana 'Adoption' in Belinda van Heerden, Alfred Cockrell & Raylene Keightley (gen eds) *Boberg's Law of Persons and the Family* 2 ed (1999) 435; Erwin Spiro *Law of Parent and Child* 4 ed (1985) 4 and 62; Sandra Ferreira 'The origin of adoption in South Africa' (2007) 13 *Fundamina* 4). Legislation was required to introduce adoption into South African (non-customary) law. (The first such legislation was the Adoption of Children Act 25 of 1923, which came into operation in 1924.) Perhaps the judge sought to convey that the Constitution permits the recognition of customary adoption so that common-law rights, such as the right to claim support from one's parent, can be conferred on the adopted child. However, because adoption did not exist at common law, an adopted child never had a common-law right to claim maintenance from his or her adoptive parent. Legislation imposed the duty of support on adoptive parents by conferring parental responsibilities and rights on them and deeming the adopted child to be their child (see, for example, section 20(2) of the Child Care Act; section 242(2)*(a)* of the Children's Act).

Be that as it may, Mokgoatlheng J concluded that the presiding officer in the maintenance court could indeed develop the common law to hold that a man who had adopted a child in terms of customary law has a legal duty to maintain the child which can be enforced in terms of the Maintenance Act. Finally, he made an order in two parts. He firstly ordered the Director-General of the

Department of Home Affairs 'in terms of section 2 of the Births and Deaths Registration Act 51 of 1992' to register the child as the adopted child of her adoptive parents. Secondly, he ordered the presiding officer in the maintenance court to determine the amount of maintenance the adoptive father had to contribute to the child's support (paras [25], [30] and [46]).

Several aspects of Mokgoatlheng J's judgment, conclusion and order are problematic. First, development of the common law was not the real issue in this case. The issue that should have been at the heart of the decision was one of legislative interpretation, namely whether section 2(1) of the Maintenance Act can be interpreted to cover the duty of support that is created by customary adoption. In my view the answer is 'yes'. Section 2(1) provides that the Act 'shall apply in respect of the *legal duty* of any person to maintain any other person, *irrespective of the nature of the relationship between those persons giving rise to that duty*' (emphasis added). The Constitution recognizes customary law and obliges courts to apply customary law when it is applicable, subject to the Constitution and any legislation that specifically deals with customary law (s 211(3)). Customary law creates a legal duty of support between an adoptive parent and his or her adopted child. Thus, there is a legal duty to maintain as is required by the first part of section 2(1). Further, the part of section 2(1) which renders 'the nature of the relationship between those persons giving rise to that duty' irrelevant strengthens the view that the legal duty of support arising from customary adoption is included in the section, for it renders the fact that the relationship giving rise to the legal duty of support is created by way of a customary adoption rather than an adoption in terms of the Child Care Act or the Children's Act irrelevant. The outcome of my interpretation of section 2(1) is the same as that of the second part of Mokgoatlheng J's order. However, the way Mokgoatlheng J arrived at this part of his order is problematic.

Furthermore, the judgment is littered with inconsistent statements regarding the two distinct bodies of law that make up customary and common law and regarding development of the two bodies. For example, Mokgoatlheng J indicates that customary law is being developed in this decision (para [24]; see also para [39]). However, he also states that recognition of the adoptive father's duty to support his adopted child is 'a consequence of the development of the common law' (para [32]; in paras [33], [40], [42] and [44] he again refers to development of

the common law). Incomprehensibly, the judge seems to confuse common law and customary law or to think that the two are somehow interchangeable in some circumstances. At no point in the judgment did the judge actually develop customary law — and rightly too, for it was not necessary for him to do so. As is explained above, it was never necessary to develop the common law either. The Maintenance Act provided the answer to the legal issue all along.

Further, the first part of the order Mokgoatlheng J made suggests that he wanted all the legal consequences of an adoption in terms of the Child Care Act (or the Children's Act) to operate in respect of the customary adoption — the child was to be registered as the adopted child of the parents who had adopted her in terms of customary law in exactly the same way that a child who had been adopted in terms of the Child Care Act would be registered as the adopted child of his or her adoptive parents. (Section 25(1) of the Child Care Act authorized an adoptive parent to apply for an amendment of the adopted child's birth register to reflect 'the fact of adoption and a statement whether the surname of the adoptive parent was or was not conferred upon the child by virtue of the adoption'. Section 45(1) of the Children's Act contains a similar provision.) This part of Mokgoatlheng J's order accordingly has a much broader scope than was required by the legal issue that arose in the case, namely whether the adoptive father could be held liable for the child's maintenance in terms of the Maintenance Act (para [9]). It is also much broader than the scope of the judgments and orders in *Kewana* and *Metiso*.

Another difficulty with the first part of the order is that, although the Child Care Act authorized, and the Children's Act now authorizes, an adoptive parent to apply for an amendment of the adopted child's birth register to reflect the adoption, the Births and Deaths Registration Act does not expressly permit the recording of an adoption in the birth register. Section 2 of the Births and Deaths Registration Act does not empower the Director-General to 'register the minor child . . . as the adopted child' of her adoptive parents, like Mokgoatlheng J's order suggests. Section 2 reads as follows:

> 'The provisions of this Act shall apply to all South African citizens, whether in the Republic or outside the Republic, including persons who are not South African citizens but who sojourn permanently or temporarily in the Republic, for whatever purpose.'

No other section allows the Director-General to register a child as the adopted child of his or her adoptive parents; nor do the regulations under the Act. Support for this view is found in the recent enactment of section 14 of the Births and Deaths Registration Amendment Act 18 of 2010. (The Births and Deaths Registration Amendment Act will come into operation on a date to be proclaimed by the President (s 21).) This section inserts a new section, section 27B, into the Births and Deaths Registration Act specifically to deal with the recording of adoptions. Section 27B(1) allows the recording of an adoption in the birth register as 'contemplated in section 245(1) of the Children's Act'. In the Memorandum on the Objects of the Births and Deaths Registration Amendment Bill, 2010, it is indicated that this provision is required to align the provisions of the Births and Deaths Registration Act with those of the Children's Act 'in that it provides for the recording of adoption' (para 1.3). Why would a new provision have been necessary if the Births and Deaths Registration Act already provided for the recording of adoptions in the birth register in some oblique way? (See also Slide 24 of 'Department of Home Affairs on the South African Citizenship Amendment Bill, Births & Deaths Registration Amendment Bill presentation', available as a link at <http://www.pmg.org.za/report/20100803-department-home-affairs-south-african-citizenship-amendment-bill-b17->, accessed 16 February 2011, which indicates that the Births and Deaths Registration Act does not set out a procedure for recording adoptions in the birth register as envisaged in the Children's Act.) If the Act permitted such recording in terms of the Child Care Act, the reference to the Child Care Act could simply have been substituted with a reference to the Children's Act. (Compare ss 1, 5*(d)* and 6 of the Births and Deaths Registration Amendment Act which update ss 11 and 12 of the Births and Deaths Registration Act by replacing references to the Child Care Act with references to the Children's Act.) (On the Births and Deaths Registration Amendment Act, see also the chapter on Law of Persons in this survey.)

A final criticism of the judgment in *Maneli* is that Mokgoatlheng J quotes legislation incorrectly and cites incorrect references to legislation — and this is true not only in respect of section 2 of the Births and Deaths Registration Act. At paragraph [12] he quotes a version of section 15(3) of the Maintenance Act which bears little resemblance to the real wording of the section. His quotation reads as follow:

'Section 15(3) of "the Act" provides:

"the duty of biological parents to support children exists irrespective whether the child was born in or out of wedlock. An adopted minor child is for all intents and purposes regarded as a legitimate child of the adoptive parent as though it was born from such parent or from his or her marriage".'

The real wording of section 15(3) is as follows:

'*(a)* Without derogating from the law relating to the support of children, the maintenance court shall, in determining the amount to be paid as maintenance in respect of a child, take into consideration —

(i) that the duty of supporting a child is an obligation which the parents have incurred jointly;

(ii) that the parents' respective shares of such obligation are apportioned between them according to their respective means; and

(iii) that the duty exists, irrespective of whether a child is born in or out of wedlock or is born of a first or subsequent marriage.

(b) Any amount so determined shall be such amount as the maintenance court may consider fair in all the circumstances of the case.'

Another incorrect reference to legislation appears at paragraph [19]. In an awkward sentence, the judge states:

'Xhosa customary law of adoption is not in conflict with The Bill of Rights or s 18(1)*(a)* of the Child Care Act 74 of 1983 and ss 23 and 25 of the Children's Act 38 of 2005, decree that adoption or guardianship must be effected by an order of the Children's Court'.

This sentence suggests that section 18(1)*(a)* of the Child Care Act and sections 23 and 25 of the Children's Act require an adoption or guardianship order to be made by the children's court. Section 18(1)*(a)* of the Child Care Act indeed deals with adoption and indeed provides that adoption is to be effected by an order of the children's court. However, section 23 of the Children's Act does not deal with adoption or guardianship at all. It deals with assignment of contact or care. Section 25 of the Children's Act deals with adoption and guardianship, but it does not provide what the judge avers. It provides that when a non-South African citizen who has an interest in the care, well-being and development of a child applies to the High Court for an order granting guardianship of the child to him or her in terms of section 24 of the Act, the application must be regarded as an inter-country adoption. Possibly the judge had section 228 read with section 239(1)*(a)* of the Children's Act in mind in so far

as adoption is concerned. These sections provide that a child is adopted if he or she has been placed in the permanent care of a person in terms of a court order that has the effects of an adoption order as contemplated in section 242, and that an adoption application must be made to the children's court. Even if the judge simply referred to the wrong sections of the Children's Act in so far as adoption is concerned, his statement regarding guardianship is still wide of the mark, for the Children's Act does not empower a children's court to decide matters concerning guardianship (see ss 22(7), 24 and 45(3)*(a)* and *(b)* which exclude the jurisdiction of the children's court in respect of matters concerning guardianship; see also *Ex parte Sibisi* 2011 (1) SA 192 (KZP); Jacqueline Heaton 'Parental Responsibilities and Rights' in CJ Davel & AM Skelton (eds) *Commentary on the Children's Act* (2007) 3-18–3-19).

Duty to support parent

The duty of support between parent and child is reciprocal. Therefore, a child must support his or her parent if the parent is unable to provide his or her own maintenance. However, the child's duty arises only if the parent is indigent (see, for example, *Oosthuizen v Stanley* 1938 AD 322). In *Smith v Mutual & Federal Insurance Co Ltd* 1998 (4) SA 626 (C), it was held that indigence refers to being in extreme need of what should, considering the person's station in life, be regarded as the necessities of life. In *Jacobs v Road Accident Fund* 2010 (3) SA 263 (ECP), Grogan AJ held that this test is stricter than that which had been applied in earlier authorities (para [17]). He held that the correct test was whether the parent was dependent on his or her child's contribution for the necessities of life (para [20]). *Jacobs v Road Accident Fund* is discussed in more detail in the chapter on the Law of Delict.

International relocation

In terms of section 18(3)*(c)* read with section 18(4) and (5) of the Children's Act, the consent of all the child's guardians is required for the child's departure or removal from South Africa, unless the court orders otherwise. In *HG v CG* 2010 (3) SA 352 (ECP), a mother sought court approval to emigrate with her children against the wishes of the children's father. The children were three boys and a girl. The eldest child was fourteen years of age and the others (triplets) eleven years of age. The children's parents were awarded joint physical and legal care when they

divorced, with the children spending alternate weeks with each parent. The parents lived in the same housing development and the children had rooms and pets at each home. The children had contact with each parent every day. Their mother was the main breadwinner until she was retrenched some three years after the divorce. At around the same time, she became engaged to a man who worked in Dubai. She wanted to relocate to Dubai with the children to live with her future husband. She sought an order awarding primary care of the children to her and authorizing her to remove the children to Dubai. Her future husband was financially comfortable and could maintain her and the children at a high standard of living. She provisionally enrolled the children in a school in Dubai which was close to the house she would share with her future husband. The children's father opposed the relocation due to the close bond he had with the children. He indicated that if the children's mother were to obtain a job somewhere else in South Africa, he would move to the same town or city so that the joint care arrangement could continue. Even though their mother alleged that they were unhappy with joint care, the children unanimously and consistently indicated that they wanted the current care arrangements to continue. They indicated that they did not know how they would cope if they had to move to Dubai. They also indicated that they felt pressured by their mother, who kept talking about their future in Dubai as a *fait accompli*. One of the experts who assessed the children recommended the children's emigration with their mother even though she found that it would not be in their best interests to live in another country away from their father.

The court held that the recommendation of the expert who supported the children's emigration was inconsistent with her finding that emigration would not be in their best interests and that the recommendation was based solely on financial considerations (paras [16] and [18]). The court found that the expert's assumption that the children would enjoy an 'enriched lifestyle' in Dubai was fallacious, for although the mother's lifestyle might be enriched, the children would lose their deep bond with their father and would suffer trauma (para [18]). Further, sections 10 and 31 of the Children's Act had not been complied with, for the experts who evaluated the children had failed to give proper consideration and afford due weight to the children's views and wishes (para [21]). In terms of section 10, every child who is of an age, maturity and stage of development to be able to participate in any

matter concerning him or her has the right to participate in an appropriate way and to have due consideration given to his or her views. Section 31 requires that a person who holds parental responsibilities and rights must give due consideration to any views and wishes expressed by the child before he or she takes any decision in connection with a matter *(a)* listed in section 18(3)*(c)* of the Act; *(b)* which affects contact between the child and a co-holder of parental responsibilities and rights; or *(c)* which is likely to significantly change or have an adverse effect on the child's living conditions, education, health, personal relations with a parent or family member or, generally, on the child's well-being. Emigrating with the children falls within the scope of all of these categories. In terms of section 31, the child's age, maturity and stage of development must be borne in mind in giving due consideration to his or her views and wishes. In view of the strong bond between the children and their father and the consistent view of the children that joint care should continue, the court concluded that it was not in the best interests of the children that the joint care award be changed (para [23]). The mother's application was accordingly dismissed (order para 1).

Although the court's decision causes great hardship for the mother, the court is to be commended for its child-centred approach to the case before it. (For a critical comparison of the sometimes conflicting approaches of the courts in relocation cases, including *HG v CG*, see Latiefa Albertus 'Relocation disputes: has the long and winding road come to an end? A South African perspective' 2009 (2) *Speculum Juris* 70. As the author's discussion preceded publication of *HG v CG* in the law reports, she refers to the decision as *De Groot v De Groot* (1408/2009) [2009] ZAECPEHC 48 (10-09-2009).)

Maintenance and liability for school fees

In *Fish Hoek Primary School v GW* 2010 (2) SA 141 (SCA), the Supreme Court of Appeal overturned the decision in *Fish Hoek Primary School v Welcome* 2009 (3) SA 36 (C) (see 2009 *Annual Survey* 448). The case concerns payment of school fees by the father of a child born of unmarried parents. The court below had held that only a custodian parent, that is, a parent who has care of his or her child, is liable for school fees in terms of the South African Schools Act. On appeal, the Supreme Court of Appeal held that on a literal and ordinary interpretation of the legislation

and in accordance with the ordinary meaning of the word 'parent', the father of a child born of unmarried parents qualifies as such (paras [8] and [12]). Thus both parents are liable for the child's school fees regardless of who has care of the child. The Supreme Court of Appeal further held, quite correctly, that this interpretation is consistent with the constitutional objective of attaining gender equality, the common-law duty of support and section 28(2) of the Constitution, which provides that the child's best interests must be paramount in all matters concerning the child (paras [13]–[14]). It should be noted that in delivering its judgment, the Supreme Court of Appeal did not deal with the part of the decision of the High Court in which it was held that section 21 of the Children's Act does not operate with retroactive effect (*Fish Hoek Primary School v Welcome* 45–6).

MB v NB 2010 (3) SA 220 (GSJ) also deals with liability for school fees. In this case, a stepfather (defendant) was held liable for part of his stepchild's school fees following his divorce from the child's mother (plaintiff). The child's father was dead. The stepfather initially agreed to adopt the child, but the adoption was never pursued although the child's surname was changed to that of his stepfather. The child's mother and stepfather jointly completed and signed documentation relating to his admission to a private school in Grahamstown as the child's 'parents'. After the child had been enrolled at the school for some time, the marriage between the child's mother and stepfather broke down and divorce proceedings were instituted. In those proceedings, the child's mother sought an order compelling the stepfather to pay the child's school fees or to make a contribution to those fees for as long as the child remained at the school. She argued that the stepfather had entered into a contract with her to contribute to the child's school fees by endorsing the decision to send the child to the school and by completing and signing the application form in which he undertook to be jointly and severally liable for the child's school fees. The court rejected this contention but nevertheless ordered the stepfather to pay a third of the child's school fees. It held that the evidence did not support an inference that the mother and stepfather had entered into an agreement that the stepfather would pay the child's school fees. The decision to send the child to the particular school and the completion of the documentation relating to the child's admission to the school merely reflected a domestic arrangement between the mother and stepfather. It did not constitute a contract between them (paras [15]–[16]).

However, the court did not stop there. In an extraordinary decision, Brassey AJ held that by agreeing that the child should have his surname and by signing the documentation relating to the child's admission to the school, the stepfather had impliedly represented to the child, the child's mother and the world at large that he intended to be in the same position as the child's father (paras [18], [19] and [21]). As he had made that representation, the child and his mother relied on this representation, and he and the child's mother jointly decided to enrol the child in the school and jointly and severally undertook liability for the child's school fees, the stepfather was liable to contribute to those fees (paras [21] and [22]). Thus, even though a step-parent is not legally obliged to support his or her stepchild, the stepfather in the present case became liable to contribute to his stepson's school fees (paras [21], [22] and [28] read with para [13]).

Furthermore, Brassey AJ held, because the child had become his stepfather's 'ostensible son', the child had the right to expect his stepfather to provide him with the family and parental care section 28(1)*(b)* of the Constitution refers to (para [20]). Holding the stepfather liable for a contribution to the school fees accordingly also gave due recognition to the child's right to family and parental care (para [21]). (See also *Heystek v Heystek* 2002 (2) SA 754 (T) in which the court, in an application for interim maintenance in terms of Uniform Rule 43, held that the child's constitutional right to parental care extends to step-parents and encompasses the child's maintenance needs.)

As regards the scope of the stepfather's duty to pay the child's school fees, Brassey AJ held that the duty the stepfather owed to the child entailed that he must contribute to the child's schooling at the particular school only for as long as the family could afford the school fees. The burden of keeping the child at the school as a boarder had become excessive, while keeping the child at the school as a day scholar was still feasible (para [28]).

Brassey AJ then held that the child's deceased father's estate should also be liable for a share of the child's school fees even though the liquidation and distribution of the estate had been finalized. He accordingly divided the school fees by three. As the child's mother had inherited the estate of the child's father, she was ordered to pay two-thirds of the expenses and the child's stepfather one-third (paras [29]–[30], order para 5).

Despite the above finding, Brassey AJ also considered it necessary to deal with de facto adoption. He held that it was

unnecessary to treat the child as having been factually, but not legally, adopted by his stepfather (paras [21] and [22]). However, he continued, if it were indeed necessary to find that the child had indeed been de facto adopted, he would 'have little hesitation in doing so' (para [23]). De facto adoption is not yet recognized by South African law. Brassey AJ referred to *Flynn v Farr NO and Others* 2009 (1) SA 584 (C), in which the court held that a child whom the deceased had treated as his de facto child did not qualify as the deceased's intestate heir in terms of the Intestate Succession Act 81 of 1987. Brassey AJ acknowledged that some passages in *Flynn* suggest that de facto adoption should not be recognized if an official, legal adoption in terms of the Child Care Act (now, the Children's Act) was possible (para [25]). Although an official, legal adoption was possible in both *Flynn* and the present case, Brassey AJ distinguished *Flynn* from the present case on the ground that in *Flynn* a finding that the child qualified as the deceased's intestate heir would have affected the rights of third parties, while in the present case the stepfather's liability for the child's school fees affected only the parties inter se (paras [23]–[24]). Furthermore, unlike the situation in *Flynn*, the stepfather in the present case had initially undertaken legally to adopt the child. Without providing clear, factual evidence for his conclusion, Brassey AJ stated that the parties in the present case did not proceed with the legal adoption purely because they saw no need for it (para [26]). He further referred to *Metiso v Padongelukfonds* (supra), in which an adoption which complied with the requirements of customary law but not with the requirements of the Child Care Act was recognized for purposes of a dependant's action for damages for loss of support. He held that in the present case non-compliance with the statutory requirements for adoption should not be a barrier to recognizing a de facto adoption, since the rights of third parties were not at stake (para [26]).

Although the child-centred focus of the judgment is laudable, the legal foundation for the court's decision to hold the stepfather partly liable for the child's school fees is suspect.

In the first instance, by basing the stepfather's liability on the impression he had supposedly created that the child was his son, Brassey AJ seems to have adopted the view that a step-parent can incur liability for a stepchild's maintenance, or at least for some expenses relating to a child's education, on the ground of some sort of application of estoppel. This is a novel approach,

which is not supported either by the principles regarding estoppel or by any hitherto known principle of Family Law. Little wonder then, that Brassey AJ cited no relevant authority in support of his finding. The only authority he cited is a passage from RH Christie *The Law of Contract* 4 ed (2001) 34 which indicates that a father's undertaking to reward his son if the son does well at college does not constitute a contract but is merely 'an offer to render assistance when called upon', which — according to Christie — is suggestive of some kind of duty of support (paras [15] and [18]). Relying on this single, inapposite reference in a book on the Law of Contract, Brassey AJ used some sort of application of estoppel to impose liability on the stepfather.

Secondly, Brassey AJ's obiter statements regarding de facto adoption indicate that he concluded too readily that the stepfather's conduct amounted to a de facto adoption. He paid insufficient regard to the fact that, while initially agreeing legally to adopt the child, the stepfather never did so. Brassey AJ stated that the reason for the failure to proceed with the legal adoption was that the parties saw no need to do so. This statement seems to reflect mere conjecture, for the judgment does not set out evidence which supports it. It might just as easily have been concluded that the stepfather's failure to proceed with the legal adoption indicated that he really did not want to adopt the child — especially since he might have foreseen the breakdown of his marriage due to his long-standing adulterous relationship with another woman.

MB v NB further deals with costs, division of the accrual and post-divorce maintenance for a spouse. Those aspects of the decision are discussed below in this chapter.

Divorce

Costs

MB v NB is discussed above in the context of a step-parent's liability for school fees. The decision is noteworthy in other contexts too, one of which is costs in an acrimonious divorce action. In this case, the parties incurred between R500 000 and R750 000 in costs in their contested divorce action. The parties' attorneys did not try to convince them to go for mediation. At a pre-trial conference both parties' legal representatives dismissed the possibility of arriving at a settlement through mediation. When the judge to whom the case was originally allocated attempted to

get the parties to arrive at a settlement, the wife's legal representative successfully sought the judge's recusal on the ground of statements the judge had made during the settlement attempt. The case was subsequently allocated to Brassey AJ. When the wife testified before him, Brassey AJ asked her whether mediation had been suggested by her lawyers. She answered in the negative and added that mediation would have served no purpose. Brassey AJ rejected the wife's view on the futility of mediation in the present case. He held that because the wife was not 'an expert', she could not hold an informed view (para [50]). It is not clear what type of expertise Brassey AJ had in mind. The wife certainly was an expert on her marital situation and on the nature of the relationship between the parties and their capacity and willingness to settle disputes. Was it perhaps expertise in alternative dispute resolution he had in mind? If so, his attitude would render mediation compulsory in virtually all contested divorces, for few divorcing couples have expertise in alternative dispute resolution.

All the same, Brassey AJ stated, quite correctly, that the stances adopted in litigation are not to be attributed solely to the litigating parties and that their legal representatives profoundly influence the demands they make and the strategies that are adopted in the litigation. In view of, amongst others, the tone adopted in various letters and documents drafted by the attorneys, the petty deflection of requests for particulars on the ground of minor mistakes in the formulation of questions, the 'production of bundles of documents totalling almost 1 000 pages, few of which have any direct bearing on the matter at hand', and the parties having threatened each other with criminal proceedings, Brassey AJ quipped that the present case was one in which, 'if the parties did not need mediation, the legal representatives certainly would have profited by it' (para [54]). He concluded that the parties' attorneys did not counsel them on the benefits of mediation (para [59]). As a mark of the court's displeasure regarding the attorneys' failure to have the matter mediated at an early stage, Brassey AJ ordered the fees of the attorneys to be limited to the costs they could tax on party and party scale (para [60], order para 7).

Brassey AJ's support for mediation has subsequently been endorsed in an obiter dictum by the Supreme Court of Appeal. Referring to *MB v NB*, Lewis JA stated in *FS v JJ and Another* 2011 (3) SA 126 (CC), that mediation in family matters is a useful

way to avoid protracted and expensive legal battles, and that litigation should not necessarily be a first resort in these matters. She further warned legal practitioners to heed section 6(4) of the Children's Act which provides that in matters concerning children a conciliatory and problem-solving approach should be followed and a confrontational approach avoided (para [54]). It is abundantly clear that the parties in *MB v NB* and their legal representatives ignored section 6(4) of the Children's Act in so far as the parties' dispute related to payment of school fees (see above in this chapter). Punishing the parties' attorneys for this failure by limiting the costs they may claim is just. The same applies to the production of inordinately lengthy bundles of documents, the unnecessary deflection of requests for particulars and other petty conduct on the part of the attorneys. However, as mediation is not compulsory in family disputes that do not concern children, and the parties in *MB v NB* seem not to have been amenable to mediation and had sufficient funds for a fiercely contested legal battle in respect of the division of their matrimonial property and post-divorce maintenance for the wife, the extent of the wrath the attorneys incurred does not seem entirely justified.

Deed of settlement

Middleton v Middleton 2010 (1) SA 179 (D) confirms the familiar principle that a settlement agreement creates contractual rights between the parties to the agreement (paras [10] and [11]). Thus, a clause that provides that one spouse will acquire immovable property belonging to the other spouse or will acquire the other spouse's half share in immovable property which falls into the joint estate does not transfer ownership of the property. As South African law subscribes to the abstract theory of transfer of ownership (see, for example, *Legator McKenna Inc v Shea* 2010 (1) SA 35 (SCA); *Du Plessis v Prophitius* 2010 (1) SA 49 (SCA)), the court in *Middleton* held that ownership of immovable property or a share in immovable property passes only once transfer or an endorsement has been effected in the deeds registry in terms of the Deeds Registries Act 47 of 1937 (paras [8]–[10] and [13]). *Middleton* is discussed in more detail in the chapter on Law of Property.

Division of matrimonial property

MB v NB is discussed above in the context of liability for school fees and costs in divorce proceedings. The case also concerns

division of matrimonial property upon divorce. The spouses were married subject to the accrual system. Upon their divorce, it was clear that the wife's estate showed the smaller accrual and that she thus had a claim against her husband for half the difference between the accrual in their respective estates (s 3(1) of the Matrimonial Property Act 88 of 1984). However, the spouses could not agree on the date which was to be used to determine the value of their respective estates for purposes of calculating the accrual in each estate.

Brassey AJ distinguished the date on which the values of the spouses' respective estates should be determined from the date on which the spouse with the smaller accrual acquires a claim against the spouse whose estate shows the larger accrual. In respect of the latter date, he referred to *Reeder v Softline Ltd* 2001 (2) SA 844 (W) in which it had (correctly) been held that, pending the dissolution of the marriage, one spouse merely has a contingent right to the accrual in the other spouse's estate. On the date when the divorce order is made, this contingent right becomes a vested right. The date on which the values of the spouses' estates must be calculated is a different issue, which is determined by applying procedural rules. Brassey AJ held that litis contestatio should be used as the date on which the values of the respective estates are to be determined (para [40]). Thus, transactions which occur after litis contestatio should be ignored (para [41]). In a statement that is most welcome, he held that using the date at which litis contestatio occurs would not only expedite the trial but also 'limit the temptation to squander assets that some spouses seem to find irresistible' (para [42]). Using the date of litis contestatio, Brassey AJ set the wife's accrual claim at R771 482 (para [46]). The husband was ordered to pay this amount to his wife before the end of the second month after the date of the divorce order (order para 6.1).

Interim relief

Uniform Rule 43 governs an application by a spouse for interim maintenance and/or a contribution towards the costs of a pending matrimonial action. In *AM v RM* 2010 (2) SA 223 (ECP) and *Hoosein v Dangor* 2010 (4) BCLR 362 (WCC), the issue arose whether a spouse in a Muslim marriage may invoke rule 43 even though Muslim marriages are not fully recognized in terms of South African law. These decisions are discussed below in this chapter under Muslim marriages.

Post-divorce spousal maintenance

MB v NB, which is discussed above in the context of liability for school fees, costs in divorce proceedings and division of matrimonial property, also relates to post-divorce maintenance for a spouse. The wife sought post-divorce maintenance for herself. During cross-examination, the husband's counsel attempted to show that some of the wife's expenses were too high when compared to the standard of reasonableness. Brassey AJ held that the issue was not what people generally would regard as reasonable, but what the parties had become used to. The correct test is that of fairness. Furthermore, each of the parties should be entitled to continue living in the style to which the parties were accustomed. If the spouses' resources do not enable them to live in that style, each of them should reduce their requirements (para [33]). Brassey AJ further held that the potential income of the spouse who is claiming maintenance must be determined in order to establish whether he or she will be able to meet his or her maintenance needs from such income. If the answer is in the negative, the income of the other spouse must be determined in order to establish whether, with due regard to his or her own comparable maintenance needs, he or she can make good the shortfall in the applicant's income (para [34]). In determining a spouse's maintenance needs due allowance must be made for 'much more than just the party's personal expenditure: for instance the cost of providing for dependants has to be brought into account, and this may range beyond those with a legal claim, and embrace moral claims by siblings, parents and even friends' (ibid). In view of the facts of the present case, Brassey AJ concluded that the husband's income of R60 000 per month was sufficient to enable him to pay R5 000 per month to his wife, which would very nearly make good the entire shortfall of R6 500 in the wife's income (paras [35]–[36]). However, as the wife was 'a person of considerable talent', who would be able 'to make good the shortfall by her own enterprise fairly soon' and because she had capital resources and would acquire an additional R771 482 when her husband paid her accrual claim to her, he restricted the duration of the maintenance order to three years (para [36], order para 6.2).

As the judgment contains no detail on the extent of the wife's employment (other than a statement that the husband contested her claim for maintenance on the ground that 'she earns, or will be able to earn, enough to be self-supporting' and a reference to

the wife's 'career' (paras [10] and [36], respectively)) it is impossible to evaluate the soundness of Brassey AJ's decision to limit the wife to rehabilitative maintenance. However, it is clear that his statements regarding the wealthier spouse having to make good the shortfall in the applicant's income contradicts the decision of Satchwell J in the same division of the High Court in *Botha v Botha* 2009 (3) SA 89 (W). She held that proving that one spouse's income is insufficient to enable him or her to sustain the marital standard of living and that the other spouse can afford to pay maintenance does not comply with section 7(2) and does not achieve justice (*Botha* paras [48]–[49]). Furthermore, Brassey AJ's view that much more than the party's personal expenditure must be taken into account in determining his or her maintenance needs is remarkably lenient. It too conflicts with Satchwell J's decision in *Botha*, in which the wife was specifically criticized for including amounts which related to friends and her adult daughter from a previous relationship in her personal claim for post-divorce maintenance (*Botha* paras [89], [90], [91] and [100]).

The second case on post-divorce spousal maintenance which was reported during the period under review is *Thomson v Thomson* 2010 (3) SA 211 (W). Upon their divorce, the parties had entered into a settlement agreement in which the husband (now the appellant) agreed to pay maintenance at the rate of R400 per month to his wife (now the respondent) and to retain her on his medical aid scheme or to pay her contributions to a medical aid scheme which afforded her benefits equal to those his medical aid scheme afforded her. If he were to fail to provide such medical aid benefits, he would personally be liable for her reasonable and necessary medical, dental, optical, hospital and pharmaceutical expenses. The appellant subsequently remarried. The respondent was removed from the appellant's medical aid scheme and his new wife was registered as his dependant under the scheme. The appellant never obtained other medical aid benefits for the respondent. The respondent joined her employer's medical aid scheme and paid her own contributions. Some years later she sued the appellant, who had a fairly modest income, for R78 088,68. This amount was equal to the cost of a heart operation her medical aid had paid for. When the appellant failed to pay the amount, a writ of execution was issued against him in the High Court. He thereupon launched an application to have the writ set aside. The respondent opposed the application to have the writ set aside, and simultaneously applied for an

increase in the amount of maintenance payable to her. The latter claim was referred to the maintenance court and was still pending. The respondent eventually did not pursue the writ of execution as it was technically defective. However, she still sought payment of the R78 088,68. The issue whether the appellant was liable for this amount was referred to the High Court (the court below). Without investigating the financial and other circumstances of the parties, the High Court ordered the appellant to pay the amount to the respondent on the ground that she was entitled to specific performance in respect of the contractual obligations the appellant had agreed to in the settlement agreement. The court held that the amounts the respondent's medical aid had paid for her heart operation related to res inter alios acta, and that the appellant consequently remained liable for them.

On appeal, the full court held that the issue was not purely one of specific performance on a contract, but rather enforcement of a maintenance obligation arising from a settlement agreement (paras [11] and [23]). The full court held that enforcement is primarily to be dealt with by the maintenance court in terms of the Maintenance Act (para [23]). This is so because, in the absence of exceptional circumstances, the maintenance court is the proper forum to decide on variation or enforcement of a maintenance order even if the original maintenance order was made by the High Court upon divorce (para [14]). Therefore, the matter should have been referred to the maintenance court, where the personal, financial and other relevant circumstances of the parties would have been taken into account. Such an enquiry in the maintenance court was particularly desirable if an aspect of maintenance, such as whether an increase in maintenance should be ordered, had already been referred to the maintenance court — as had happened in the present case (para [20]). Furthermore, in the present case all the relevant circumstances of the parties had not been placed before the court below (paras [21], [22] and [23]).

The full court accordingly upheld the appeal against the order compelling the appellant to pay R78 088,68. It referred the issue of payment of medical expenses to the maintenance court and ordered this matter to be heard together with the respondent's pending claim for an increase in the amount of maintenance payable to her (para [26]). In an obiter dictum, and without explaining its view at all, the court stated that it doubted whether the principle of collateral benefits (res inter alios acta) should be applied in the context of maintenance claims (para [23]).

A third decision relating to post-divorce spousal maintenance is *Kruger NO v Goss* 2010 (2) SA 507 (SCA). Prior to this decision it was unclear whether an order for maintenance made in terms of section 7(2) of the Divorce Act can be enforced against the deceased estate of the spouse who was ordered to pay maintenance. The facts of the case were that an order for rehabilitative maintenance had been made in favour of the wife in terms of section 7(2). The maintenance was to be paid for five years regardless of whether the wife obtained employment and an income. The husband died after having paid rehabilitative maintenance for three years. The wife thereupon lodged a claim against the deceased estate for the remainder of the rehabilitative maintenance, which came to R144 000. The executor rejected the claim. The wife obtained an order for payment of the amount plus mora interest from Hartzenberg J in the court below on the ground that the rehabilitative maintenance that had been awarded was 'an animal of its own' to which section 7(2) did not apply (*Kruger NO v Goss* para [14]). The executor appealed to the Supreme Court of Appeal.

In the first instance, the Supreme Court of Appeal per Navsa JA (Brand and Ponnan JJA concurring), correctly, rejected Hartzenberg J's view that rehabilitative maintenance was 'an animal of its own' which is not subject to the principles relating to enforcement of orders made in terms of section 7(2) (para [14]). Rehabilitative maintenance is simply a species of maintenance (para [15]).

Secondly, the court held that section 7(2) must be seen against its common-law background. In terms of the common law, the spousal duty of support terminates on termination of the marriage (para [10]). The Maintenance of Surviving Spouses Act 27 of 1990 changed the common law with regard to surviving spouses in that they now have a claim for maintenance against their deceased spouses' estates if they are unable to provide for their reasonable maintenance needs from their own means and earnings (s 2(1) of the Maintenance of Surviving Spouses Act). However, when section 7(2) of the Divorce Act was enacted some ten years earlier, surviving spouses had no such claim. Navsa JA concluded that when the legislature enacted section 7(2) it could never have intended to put surviving divorced spouses in a better position than widows or widowers by allowing them to claim maintenance from their former spouses' estates while surviving spouses had no such claim. He held that, except for the changes brought about by the Maintenance of Surviving Spouses Act, the

common law 'remained otherwise untouched' (para [11]). He approved *Hodges v Coubrough* 1991 (3) SA 58 (D) in which it was held that section 7(2) did not alter the common law by permitting enforcement of a maintenance order against the deceased estate of the maintenance debtor (para [13]). Navsa JA further held that although a spouse is empowered to bind his or her deceased estate for payment of post-divorce maintenance in a settlement agreement, section 7(2) does not empower the court to impose such an obligation on a spouse's deceased estate (para [16]). Furthermore, allowing divorced wives to claim maintenance from their late former husbands' estates if the maintenance was payable in terms of section 7(2) might 'have all sorts of undesirable consequences', such as the maintenance claims of the deceased's minor children being diminished or excluded, the rights of beneficiaries being implicated, and the divorcee's claim competing with the claims of the deceased's widow and children (ibid). The Supreme Court of Appeal accordingly upheld the appeal (para [19]).

The decision that a divorced woman's claim for maintenance does not operate against her deceased former husband's estate strikes one as most unjust (see also JC Sonnekus 'Huweliksgevolge eindig in die reël met ontbinding van die huwelik? *Kruger NO v Goss* 2010 2 SA 507 (HHA)' 2010 *TSAR* 626 at 635, 637).

In the first instance, in an extreme, pathological situation it enables the maintenance debtor successfully to scupper his or her ex-spouse's court-awarded maintenance claim by committing suicide.

Secondly, if a settlement agreement which has been made an order of court in terms of section 7(1) is silent on whether the maintenance recipient's claim survives the death of the maintenance debtor, the courts favour continuation of the claim (*Colly v Colly's Estate* 1946 WLD 83; *Owens v Stoffberg NO and Another* 1946 CPD 226; *Hughes NO v The Master and Another* 1960 (4) SA 936 (C)). Section 7(2), which applies in the absence of an order in terms of section 7(1), empowers the court to limit the duration of the maintenance order it makes to 'any period until the death or re-marriage of the party in whose favour the order is given, whichever event may first occur'. Nothing in this wording precludes the court from regulating the duration of the maintenance order with reference to the *maintenance debtor's* death. Thus, the court may order that the maintenance is payable only for the period until the death of the maintenance debtor. Yet, like

spouses who enter into settlement agreements, the courts rarely, if ever, regulate termination of the maintenance claim by the death of the maintenance debtor. Why should a maintenance recipient be deprived of his or her maintenance claim because the order the court made in terms of section 7(2) is silent on termination of the maintenance obligation by the maintenance debtor's death, while the maintenance recipient retains his or her claim if it arises from a settlement agreement that is silent on termination of the maintenance obligation by the maintenance debtor's death?

Navsa JA would presumably justify this differentiation by relying on the common-law background of section 7(2), *Hodges v Coubrough*, and his view that, apart from the changes brought about by the Maintenance of Surviving Spouses Act, the common law has 'remained otherwise untouched' (para [11]). However, such justification assumes that the current state of the common law is acceptable, while this is not so. The current state of the common law gives rise to glaring injustice, namely the loss of a court-awarded maintenance claim purely on the ground of the fortuitous event of the death of the maintenance debtor while he or she still owes maintenance to the maintenance recipient. This glaring injustice brings section 173 of the Constitution into play. It provides that the Supreme Court of Appeal has the inherent power to develop the common law, taking into account the interests of justice. Unfortunately, in *Kruger* the court failed to consider using its power to develop the common law in the interests of justice. It chose to approve *Hodges* without bearing in mind that that decision was made before the coming into operation of the Constitution and that the common-law position as set out in *Hodges* should no longer uncritically be accepted as the be-all and end-all. (On the courts' obligation to develop the common law regardless of whether or not the parties request the court to consider such development, see *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); *Matatiele Municipality v President of the Republic of South Africa (No 1)* 2006 (5) SA 47 (CC); *CUSA v Tao Ying Metal Industries and Others* 2009 (1) BCLR 1 (CC); *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC)).

Even leaving aside the issue of development of the common law in the interests of justice, the Supreme Court of Appeal failed

to comply with the constitutional injunctions to which all courts are subject. It did not apply section 39(2) of the Constitution, which obliges the courts to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation. It has by now become trite that the spirit, purport and objects of the Bill of Rights include protecting and promoting the constitutional values of equality and dignity. The interpretation in *Kruger* fails to promote equality and dignity. It creates a differentiation between various maintenance recipients whose former spouses die by denying some of them their court-awarded maintenance on the ground of whether the court made the maintenance award in terms of section 7(1) or section 7(2) of the Divorce Act and it infringes the dignity of some divorced maintenance recipients by denying them their court-awarded maintenance without any regard to their possible vulnerability, even though the courts have repeatedly emphasized the duty to protect the vulnerable (see, for example, *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC) paras [36], [43] and [46]; *Hassam v Jacobs NO* 2009 (5) SA 572 (CC) paras [41] and [49]; *Oshry and Another NNO v Feldman* 2010 (6) SA 19 (SCA) para [35]). As, in a different maintenance case, *Oshry and Another NNO v Feldman*, Navsa JA (with Saldulker AJA) was very much alive to the need to construe legislation in accordance with constitutional norms and values such as dignity and he declared that 'dignity, particularly of the vulnerable, is a prized asset', his failure to approach the decision in *Kruger* in the same way is puzzling and disappointing. (The quoted phrase appears at para [35] of *Oshry*. *Oshry* is discussed below in this chapter.)

Apart from the arguments set out above, the decision in *Kruger* can be criticized on yet another point. Navsa JA's observation that allowing divorced wives to claim maintenance from their late former husbands' estates if the maintenance was payable in terms of section 7(2) might 'have all sorts of undesirable consequences' (para [16]) is neither here nor there. If somebody has a maintenance claim in terms of a court order, why should enforcing the claim against the maintenance debtor's deceased estate lead to undesirable consequences if the enforcement of maintenance claims by surviving spouses and dependent children against deceased estates does not lead to undesirable consequences? The examples of 'undesirable consequences' which Navsa JA mentions create the impression that he is of the opinion that there should be a bar against maintenance claims by more

than one woman (ie a claim from a widow plus a claim from a divorced wife) against a deceased estate. Surely, the number of potential claimants cannot determine whether any individual person's claim is legitimate or a 'desirable' consequence? Furthermore, one wonders whether Navsa JA bore polygynous customary marriages in mind. The maintenance claims of more than one widow in a polygynous customary marriage would most definitely diminish the maintenance claims of each widow and of the deceased's children, but this is no reason to deny any or all of the widows their claims. (For more detailed criticism of the decision in *Kruger*, see Madelene de Jong & Jacqueline Heaton 'A missed opportunity to achieve justice in respect of maintenance for divorced spouses whose former spouses die: *Kruger v Goss*' (2011) 128 *SALJ* 211.)

Maintenance

Duty of support between parent and child

In *Jacobs v Road Accident Fund* (supra), the court dealt with the requirements for a child's duty to support his or her parent. The decision is discussed above in this chapter under Children.

Enforcement of maintenance

S v Driescher 2010 (1) SACR 443 (WCC) is an appeal against an order convicting a maintenance debtor of the offence of failing to comply with a maintenance order. The maintenance debtor and his former wife had been married in community of property. When they divorced, they entered into a settlement agreement which provided that the husband would pay maintenance to his wife until their assets had been equitably distributed by a receiver. Neither of them took steps to have a receiver appointed. The agreement did not specify which party had to take the initiative in appointing the receiver; nor was the implementation of the settlement agreement explained to them. They were under the impression that the 'receiver' the agreement referred to was the Receiver of Revenue. The husband paid maintenance for two months and then stopped because he was 'waiting to hear from the Receiver of Revenue' (para [5]). Approximately a year after the divorce, he was charged with the offence of failing to pay maintenance in terms of a maintenance order. At the trial, he did not raise the defence of inability to pay, but denied that he was liable to pay maintenance. He was convicted of the offence, but appealed against the order.

In an uncontentious decision, Yekiso J (Williams AJ concurring) held on appeal that the only defence to a charge of failing to pay maintenance in terms of a maintenance order is inability to pay due to lack of means, provided that the incapacity is not due to unwillingness to find employment. The maintenance debtor had never raised this defence. However, he did indicate that he no longer considered himself bound to pay maintenance, presumably because he was still waiting to hear from the receiver. Yekiso J held that this view on the part of the maintenance debtor, coupled with the non-appointment of a receiver and the lack of proper advice on the implementation of the settlement agreement should have caused the magistrate to convert the criminal trial into a maintenance enquiry in terms of section 41 of the Maintenance Act (para [7]). The conviction of the maintenance debtor was accordingly set aside and the matter remitted to the magistrates' court for a maintenance enquiry to be held (paras [8]–[9]).

Maintenance of surviving spouse

Oshry and Another NNO v Feldman 2010 (6) SA 19 (SCA) is a very important decision of the Supreme Court of Appeal on lump-sum maintenance. Although the facts of the decision limit the judgment to maintenance of a surviving spouse, some of the dicta are framed in broad terms and are equally applicable to lump-sum maintenance after divorce.

In this case, a surviving spouse claimed lump-sum maintenance in terms of the Maintenance of Surviving Spouses Act and R50 000 in terms of a deed of donation her deceased husband had effected in her favour. She and her deceased husband had been married out of community of property. She had modest means and a modest income which were inadequate to meet her maintenance needs. Her assets consisted of an apartment in a residence for senior citizens, some furniture, a motor vehicle and a small investment. Her husband had bequeathed R150 000 to her and she was allegedly still owed R50 000 in terms of the deed of donation. She received a small income from her investment and inheritance, and her sons from her first marriage had been making voluntary contributions to her maintenance since her second husband's death. In the court below the executors of the deceased estate argued that the voluntary payments of the surviving spouse's sons should be taken into account in calculating her means. They further argued that a lump-sum maintenance

award was not competent under the Act. Finally, they disputed that the surviving spouse was entitled to the donation of R50 000, as they alleged that the deceased had given her that amount before his death.

In so far as the payments by the surviving spouse's sons were concerned, the court below held that these payments could not be considered part of the surviving spouse's 'means' as contemplated in the Act, as she had no more than a spes in respect of such payments. On the evidence, the court further held that the surviving spouse was indeed entitled to the donation of R50 000, as the executors had failed to prove that the obligation in terms of the deed of donation had already been met. The court concluded that the estate was liable for maintenance, but held that, in the absence of an agreement providing for payment of a lump sum, it could not make an order for lump-sum maintenance. It held that the ordinary grammatical meaning of the word 'maintain' entails elements of continuity and repetition and that an order for the payment of a single lump sum was accordingly impermissible. It further found that an order for payment of a lump sum would be undesirable on policy grounds, inter alia because the surviving spouse might survive longer than anticipated and might accordingly outlive the lump sum. In such event, the surviving spouse would be prejudiced by the lump-sum award having been made. Or the surviving spouse might die much earlier than expected or might remarry, in which event the deceased estate and the heirs would be prejudiced by the lump-sum award having been made. Although the surviving spouse's claim for lump-sum maintenance was rejected, the court held that it would be unfair to dismiss her claim entirely. It awarded her maintenance in the amount of R9 628,63 per month until her death or remarriage or until the order was otherwise varied, suspended or discharged. The court also made a costs order against the executors. (The decision of the court below was discussed in 2009 *Annual Survey* 482–5: see *Feldman v Oshry and Another NNO* 2009 (6) SA 454 (KZD)).

The executors appealed against the order of the court below. On appeal they reiterated that the surviving spouse was not entitled to the R50 000 donation as she had received it before her husband's death, and that she had not established a need for maintenance as her sons were maintaining her and had to continue doing so. The surviving spouse brought a cross-appeal against the court's refusal to make a lump-sum award in her

favour and against the costs order that had been made in her favour. She sought an order compelling the executors to pay her trial costs on attorney and client scale and compelling them to pay the costs of the appeal and cross-appeal on attorney and client scale from their own funds.

In the first instance, the Supreme Court of Appeal, per Navsa JA and Saldulker AJA (Mhlantla and Bosielo JJA concurring) agreed with the court below that, on the evidence, the deceased had not met his obligation in terms of the deed of donation and that the surviving spouse was accordingly entitled to the R50 000 she claimed in terms of the deed of donation (para [20]).

Secondly, the Supreme Court of Appeal confirmed that voluntary payments made by a surviving spouse's children do not form part of the surviving spouse's means for purposes of the Act. It held, quite correctly, that the Act placed the primary duty to support a surviving spouse who is unable to maintain himself or herself on the estate of the deceased spouse, and not on the children of the surviving spouse (paras [27] and [35]). The court further held that, contextually, the 'existing and expected means' the court must consider in terms of section 3*(b)* when determining the surviving spouse's reasonable maintenance needs refer only to the surviving spouse's own means. The omission of the word 'own' in section 3*(b)*, in comparison to section 2(1), which confers a claim for payment of his or her reasonable maintenance needs on the surviving spouse only in so far as he or she is unable to provide for those needs 'from his own means and earnings', does not signify that the legislature intended to draw a distinction between 'own means' and 'existing and expected means'. Furthermore, the provisions of the Act must be construed in accordance with constitutional norms and values such as dignity. The court stated that 'dignity, particularly of the vulnerable, is a prized asset' (para [35]). The surviving spouse was clearly incapable of meeting her reasonable maintenance needs from her own means and income. To make her dependent on the largesse of her sons would be to defeat the aims of the Maintenance of Surviving Spouses Act and would violate her dignity (ibid).

Thirdly, in order to determine the value of the deceased's estate with a view to establishing what maintenance could be obtained from it for the surviving spouse, the Supreme Court of Appeal considered whether the proceeds of insurance policies of which the deceased's children were the nominated beneficiaries formed part of the deceased's estate. The court below had

included those proceeds in the value of the deceased's estate. Referring to its decision in *Pieterse v Shrosbree NO* 2005 (1) SA 309 (SCA), the Supreme Court of Appeal held that the inclusion of the proceeds of the insurance policies was incorrect. In *Shrosbree* it was held that nomination of a third party as beneficiary by the policy holder amounts to a stipulatio alteri (*Shrosbree* para [8] as quoted in *Oshry* para [42]). When the nominated beneficiary accepts the offer, a contract comes into existence between the beneficiary and the insurer. The contract entitles the beneficiary to claim the proceeds from the insurer (*Shrosbree* para [9] as quoted in *Oshry* para [43]). As the beneficiary is entitled to claim the proceeds directly from the insurer, the estate of the deceased policy holder or the trustee of an insolvent policy holder is not entitled to those proceeds (*Shrosbree* para [12] as quoted in *Oshry* para [44]). Applying *Shrosbree*, the Supreme Court of Appeal held in *Oshry* that the value of the proceeds of the insurance policies of which the deceased spouse's children were the nominated beneficiaries did not form part of the deceased's estate and could not be taken into account in determining the value of the estate (para [45]). It further held that if the court below had been made aware of the fact that the proceeds had to be excluded because beneficiaries had been nominated, or if the court had of its own accord appreciated this fact, 'it would necessarily have come to the conclusion that the amount available for an award of maintenance . . . was limited' (para [49]). After deducting the costs of the trial to be paid from the estate by the executors, administration costs, funeral expenses, the surviving spouse's inheritance, creditors' claims against the estate and the exclusion of the proceeds of the policies, the value of the deceased estate was some R205 000, from which the executors' fees still had to be deducted (paras [31] and [61]).

Fourthly, with regard to lump-sum maintenance, the Supreme Court of Appeal held that a lump-sum award was competent under the Act. It pointed out that in argument before it the executors' legal representatives had conceded that a lump-sum award could be made (para [51]). In the court's view, this concession had been rightly made (para [59]). The court held that the earlier cases in which it had been held that maintenance excludes a single, lump-sum amount were no longer applicable as they were either based on the Maintenance Act 26 of 1963 which expressly restricted maintenance to periodical amounts, or failed to take into account that the definition of 'maintenance

order' in the 1963 Act was no longer in operation (paras [51] and [52]). As the Supreme Court of Appeal points out in paragraph [51] footnote 9, this statement is true even of its own earlier decision on lump-sum awards in terms of section 7(2) of the Divorce Act, namely *Zwiegelaar v Zwiegelaar* 2001 (1) SA 1208 (SCA) on which the court below had relied. (Other cases in which it has been held that maintenance must be paid by way of periodical amounts include *Purnell v Purnell* 1989 (2) SA 795 (W) and *Greenspan v Greenspan* 2000 (2) SA 283 (C). The latter case dealt with interim maintenance in terms of Uniform Rule 43.) The Maintenance Act 99 of 1998, which replaced the 1963 Act, defines a maintenance order as 'any order for the payment, including the periodical payment, of sums of money towards the maintenance of any person issued by any court in the Republic' (s 1). Although this definition does not expressly mention a lump-sum award, the provisions of the Act do not expressly exclude such an award (para [54]).

In another very welcome statement, the Supreme Court of Appeal dismissed the policy considerations the court below had raised against lump-sum awards in terms of the Maintenance of Surviving Spouses Act. It held that the difficulties that are part and parcel of the process of estimating an appropriate lump sum with reference to assumptions which might later turn out to have been unfounded 'do not present insurmountable difficulties' and are not unique to maintenance claims by surviving spouses (para [55]). For example, in delictual claims, damages for loss of support are calculated having regard to the claimant's life expectancy and other assumptions. The court must consider the totality of the circumstances of the case 'to arrive at a just result' (para [56]). Factors involving assumptions may be taken into account as part of the totality of the circumstances that are relevant in making an appropriate award. The courts cannot assure '[t]otal accuracy'; they simply 'do the best they can' (para [55]). In terms of section 3 of the Maintenance of Surviving Spouses Act, the court must consider three listed factors 'in addition to any other factor which should be taken into account' in determining the surviving spouse's reasonable maintenance needs. The three factors are *(a)* the amount in the deceased estate available for distribution to heirs and legatees; *(b)* the existing and expected means, earning capacity, financial needs and obligations of the survivor and the subsistence of the marriage; and *(c)* the surviving spouse's standard of living during

the subsistence of the marriage and his or her age at the death of the deceased spouse (para [56]). As the section expressly refers to 'any other factor which should be taken into account', the three factors do not constitute an exhaustive list. Additional administrative burdens, including the costs attendant on an award for periodical maintenance which might continue for longer than anticipated, are other relevant factors to be taken into account (para [57]). For the above reasons the Supreme Court of Appeal concluded that a lump-sum award is competent under the Act and that the court below had erred in this regard (paras [57] and [64]).

The court then considered the desirability of making a lump-sum award in the present case. Taking into account that by the time of the judgment of the court below the deceased had been dead for approximately four years, during which time his widow had not received any maintenance from his estate; the long duration of the marriage; the advanced age of the surviving spouse; her significant contributions to the common household; her limited means; the non-extravagant extent of her maintenance claim; the limited value of the deceased estate; the means of the deceased's children and their being the nominated beneficiaries of insurance policies of which their deceased father was the policy holder, the Supreme Court of Appeal concluded that the surviving spouse was entitled to maintenance from her deceased husband's estate (paras [60]–[62]) and that 'no useful purpose would be served by ordering periodical maintenance payments' (para [62]). If the arrears of the periodical amount plus interest were to be 'brought up to date', the value of the deceased estate would in any event be wiped out (ibid). The court accordingly concluded that there was no reason why the court below should not have made a lump-sum award in favour of the surviving spouse (paras [63]–[64]). It accordingly set aside the order of the court below and ordered the executors to recognize the surviving spouse's claim and to pay her a lump sum equal to the net value of the estate after payment of the claims of other creditors, funeral expenses, administration fees and executors' fees. It also ordered the executors to pay R50 000 to the surviving spouse plus mora interest on that amount (para [73]). In view of the limited funds in the deceased estate, the court held that it would serve no purpose to order payment of mora interest on the lump sum it awarded to the surviving spouse (para [64]).

Finally, the court was intensely critical of the executors for the intractable and obstructive attitude they had adopted from

the inception of the surviving spouse's claim. It chastized them for not attempting to reach an agreement with the surviving spouse, which would have avoided a waste of money and depletion of the estate's assets (paras [68]–[70]). The court nevertheless refused to interfere with the costs order made by the court below, inter alia because a stricter costs order would reduce the value of the deceased estate even further (para [68]). However, the executors incurred the wrath of the court in so far as the costs of the appeal and cross-appeal were concerned, for they were ordered to pay the costs of both on attorney and client scale in their personal capacities (paras [71] and [73]).

The decision of the Supreme Court of Appeal is extremely welcome — especially in so far as its dicta on lump-sum maintenance are concerned. Some of the dicta are clearly limited to lump-sum awards made in terms of the Maintenance of Surviving Spouses Act. However, the scope of the dictum regarding the change brought about by the 1998 Maintenance Act extends beyond the Maintenance of Surviving Spouses Act. The statement that, since the coming into operation of the 1998 Maintenance Act, maintenance can be ordered by way of a lump sum augurs extremely well for a future claim that lump-sum maintenance awards are also competent in terms of section 7(2) of the Divorce Act. In the past, it has been held that section 7(2) does not empower the court to order that maintenance must be paid by way of a single lump sum (*Purnell v Purnell* at 797D–E). The analogy provided by the definition of 'maintenance order' in the 1963 Maintenance Act was relied on in support of this view. As the decision in *Oshry* makes clear, the latter analogy and argument fell away when the 1998 Maintenance Act came into operation.

Another argument that has been raised in support of the view that a lump-sum award is not competent in terms of section 7(2) of the Divorce Act is that, as section 7(2) provides that the court may make a maintenance order 'for any period' until the death or remarriage of the party in whose favour the order operates, the legislature had periodic payments — and not a single payment — in mind (Heaton *South African Family Law* 155; Skelton & Carnelley (eds) *Family Law in South Africa* 134–5). This argument is based on the definition of the word 'periodic' in dictionaries. The definition refers to 'appearing or occurring at intervals' or 'recurring at regular intervals' (Catherine Soanes & Angus Stevenson (eds) *Concise Oxford English Dictionary* revised 11 ed

(2006) 1066; Robert Allen (consultant ed) *The Penguin English Dictionary* (2002) 655, respectively). However, it is arguable that a single lump-sum payment does fall within the scope of section 7(2). The word 'period' refers to 'a length or portion of time' or 'a portion of time' (Soanes & Stevenson (eds) *Concise Oxford English Dictionary* 1066; Allen (consultant ed) *The Penguin English Dictionary* 655, respectively). The length or portion of time could be of *any* duration — even only one day or one month (Heaton *South African Family Law* 156; but see Alick Costa 'Section 7(2) of the Divorce Act — how much elasticity?' Dec 2006 *De Rebus* 28 who submits that section 7(2) does not empower the court to make a lump-sum maintenance award). Furthermore, denying divorcing spouses the option of seeking a lump-sum maintenance award while allowing surviving spouses and maintenance applicants in terms of the Maintenance Act to obtain lump-sum maintenance would be absurd and unfair, which is a result that Parliament could surely not have intended.

Post-divorce spousal maintenance

The decisions in *MB v NB*, *Thomson v Thomson* and *Kruger NO v Goss* on post-divorce maintenance for a spouse are discussed above in this chapter under Divorce.

Marriage

Customary marriage

MM v MN 2010 (4) SA 286 (GNP) deals with the validity of a de facto polygynous customary marriage. The applicant and her husband entered into a customary marriage in 1984. Unbeknown to her, her husband subsequently entered into another customary marriage. After her husband's death in 2009, the applicant attempted to have her customary marriage registered. The Department of Home Affairs informed her that another woman had already registered a customary marriage with her husband and that that marriage had been entered into in 2008. This was the first time the applicant learnt of the second marriage. Although the second marriage was concluded after the coming into operation of the Recognition of Customary Marriages Act on 15 November 2000, it was not preceded by an application for court approval of a contract to regulate the future matrimonial property system of the polygynous customary marriage, as is required by section 7(6) of the Act. The applicant approached the

High Court for an order declaring the second customary marriage void and ordering the Minister of Home Affairs to register her marriage as the only customary marriage her husband had entered into. Bertelsmann J granted the order sought.

In terms of section 7(6), a husband who already is a party to a customary marriage and wants to enter into another customary marriage after the coming into operation of the Act must, prior to the celebration of the new marriage, obtain the court's approval of a written contract which will regulate the future matrimonial property system of his polygynous marriage. The court must ensure that the spouses' property is equitably distributed, and take into account all the relevant circumstances of the family groups which would be affected if the application were granted (s 7(7)*(a)*(ii) and (iii)). Furthermore, all persons having a sufficient interest in the matter and, in particular, the husband's present and future wives must be joined in the proceedings (s 7(8)). The Act does not stipulate the consequences of failure to obtain a court-approved contract. Bertelsmann J concluded that failure to comply with section 7(6) renders the subsequent customary marriage void (paras [24], [31] and [41]). He held that the object of requiring a court-approved contract is to protect the husband's existing spouse(s) as well as his intended additional spouse (para [22]). Failure to visit a customary marriage that was concluded without compliance with section 7(6) with nullity would render the court's intervention superfluous — which is something the legislature could not have intended (para [24]). Furthermore, the word 'must' in section 7(6), read with section 7(7)*(b)*(iii) which permits the court to refuse the application if, in its opinion, the interests of any of the parties would not be sufficiently safeguarded by the proposed contract, indicates that Parliament intended non-compliance with section 7(6) to lead to nullity (para [25]). In the latter regard, the judge cited *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism v Smith* (2004 (1) SA 308 (SCA) para [32]), in which it was held that 'language of a predominantly imperative nature such as ''must'' is to be construed as peremptory rather than directory unless there are other circumstances which negate this construction' (para [26]). He further held that both the existing and the intended customary spouses have 'a vital interest in having their relative proprietary positions safeguarded by the procedure that is laid down in subsection (6)' (para [23]).

He stated that the most persuasive consideration in favour of nullity of the subsequent customary marriage is the 'gross infringement' of the existing wife's rights which would occur if her husband could enter into a further customary marriage without her knowledge and consent. He specifically mentioned the existing wife's rights to dignity and physical and emotional integrity, to be protected from emotional and economic/material abuse, to be treated on an equal footing with her husband and to enjoy an equal status as marriage partner, to receive marital support from her husband, and to enjoy marital intimacy and trust. He held that all of these rights 'flow naturally from those guaranteed by the Act and the Constitution (para [27]). Furthermore, the husband's intended additional spouse had a right to be fully apprised of her future husband's existing customary marriage and its consequences (para [28]). According to Bertelsmann J, the absence of an express provision in the Act requiring the consent of the existing wife to the future customary marriage indicates all the more that the court has to consider the views and needs of the existing spouse and that an additional marriage may not be concluded without the court having approved the contract contemplated in section 7(6) (para [29]).

The rights of dependent children born from an existing customary marriage may also 'be vitally affected' by their father's entering into another customary marriage (para [30]). Bertelsmann J held that the children's mother would usually be in the best position to assess the children's needs and to enlighten the court in that regard. He added that if the children were of sufficient maturity, they would also have to be joined in the proceedings to obtain a court-approved contract as they would qualify as having a sufficient interest in the matter (ibid).

Bertelsmann J rejected the view that non-compliance with section 7(6) renders the subsequent customary marriage voidable rather than void because few husbands are likely to comply with section 7(6) and nullity would cause hardship for the wives and children of non-complying husbands, and because the long-term interests of wives who do not raise protest against a subsequent marriage may be better served by treating their polygynous customary marriage as valid (para [31]). He held that this view is not supported by the legislature's 'clear intention to accord existing wives the full protection of the Bill of Rights in the context of customary marriages' (para [32]). He pointed out that '[a]n existing wife may very often be entirely dependent upon her

husband together with her children, may be unaware of her rights, may be illiterate or too timid or impecunious to seek legal advice and may suffer the economic and emotional deprivation brought about by a subsequent marriage long before a separation as a result of death or divorce' (ibid). He held, quite correctly, that if the absence or presence of protest by an existing wife were to be the yardstick, the result would be 'a morass of uncertainty' which the legislature never could have intended to create (ibid). Furthermore, recognizing a subsequent customary marriage that was concluded without obtaining a court-approved contract might confer considerable financial and other benefits on the new wife to the detriment, or even the total impoverishment, of the existing spouse and her children, which could also not have been the legislature's intention (para [33]).

In an obiter dictum, Bertelsmann J stated that a woman who enters into a customary marriage while under the mistaken impression that her husband was unmarried might be able to sue him in delict, 'while her children would have been born in a putative marriage, which fact would protect their status' (paras [34]–[35]; the quoted phrase appears in para [35]).

Bertelsmann J's decision has led to much controversy and media attention (see, for example, Franny Rabkin 'Judgment puts the Validity of Zuma's Marriages in Doubt' *Business Day*, 7 July 2010, available at http://www.businessday.co.za/articles/Content.aspx?id=113949, accessed 23 February 2011; Wendy Jasson da Costa & Tanya Broughton 'Only One Wife Legally Wed to Zuma?' 2 August 2010, available at http://www.iol.co.za/ news/south-africa/only-one-wife-legally-wed-to-zuma-1.671604?, accessed 23 February 2011; Wendy Jasson da Costa 'Zuma's Brood gets Bigger', available at http://www.iol.co.za/news/south-africa/zuma's-brood-gets-bigger-1.673038, accessed 23 February 2011). Even before the decision was handed down, authors held conflicting views on the effect of non-compliance with section 7(6). Some authors held the same view Bertelsmann J adopted in *MM v MN* — that the subsequent marriage is void (Heaton *South African Family Law* 212; R-M Jansen 'Family Law' in JC Bekker, C Rautenbach & NMI Goolam *Introduction to Legal Pluralism in South Africa* 2 ed (2006) 44; Victoria Bronstein 'Confronting custom in the new South African State: an analysis of the Recognition of Customary Marriages Act 120 of 1998' (2000) 16 *SAJHR* 558 at 562–3; MS Mekwe 'The effect of non-compliance with section 7(6) of the Recognition of Customary Marriages Act

(Act 120 of 1998) and validity of customary marriages' (2005) 7 *South African Deeds Journal* 23 at 24).

TW Bennett (*Customary Law in South Africa* (2004) 247 and 248) adopted the view that the marriage is voidable. Bennett's view was rejected by Bertelsmann J in his judgment. A legal opinion obtained by the Department of Home Affairs which is cited by the Chief Registrar of Deeds, Allen West ('Black marriages: the past and the present' (2005) 7 *South African Deeds Journal* 11 at 22), also stated that the absence of a court-approved contract rendered the subsequent marriage voidable.

In contrast, Lesala L Mofokeng (*Legal Pluralism in South Africa: Aspects of African Customary, Muslim and Hindu Family Law* (2009) 73) was of the view that non-compliance with section 7(6) does not affect the validity of the subsequent marriage at all. He called the need to obtain a court-approved contract an 'administrative requirement'. He argued that since a court-approved contract is not stated as a requirement for the validity of a customary marriage by section 3 of the Act, the absence of such a contract only affects the validity of the matrimonial property system that operates in the polygynous marriage. However, as Mekwe (op cit at 24) points out, the omission from section 3 of a reference to a court-approved contract does not mean that such a contract is not a peremptory requirement for the validity of a polygynous customary marriage. Mekwe cogently argues that section 3 sets the requirements which apply to all customary marriages, while section 7(6) imposes an additional requirement for the validity of a polygynous customary marriage. (Mandi Streicher 'Meervoudige gebruiklike huwelike' June 2004 *De Rebus* 27 at 29 also stated that the absence of a court-approved contract does not affect the validity of the marriage, but he did not explain his view. Moreover, at 31 of the same contribution he stated that it was unclear whether the absence of such a contract affects the validity of the marriage.)

Pieter Bakker ('The new unofficial customary marriage: application of section 7(6) of the Recognition of Customary Marriages Act 120 of 1998' (2007) 70 *THRHR* 481 at 487–9) was also of the view that the marriage should be valid. He relied on the purpose of the Act, namely to advance the interests of women in customary marriages, in support of his view. He further argued that any prejudice to an existing wife could be overcome upon divorce by the court's making an equitable order in terms of section 8(4)*(b)*, which provides that the court which dissolves a marriage of a

man who is a spouse in a polygynous customary marriage must take all relevant factors into consideration and 'make any equitable order that it deems just'. However, it is doubted whether section 8(4)*(b)* offers a sufficient solution to the very real prejudice the existing wife will suffer if, for example, she is married in community of property. If the subsequent customary marriage is valid, the existing wife will lose her entitlement to an undivided half share of all the assets her husband acquires after entering into the subsequent marriage, for she will no longer be his only wife. It is most unlikely that the court will, in terms of section 8(4)*(b)*, award the existing wife the full half share to which she would have been entitled had her husband not entered into another customary marriage, for such an award would drastically reduce or even eliminate the property the husband's subsequent wife/wives can receive upon termination of the marriage. I share Bertelsmann J's view that such prejudice of the existing wife could not have been the legislature's intention. Moreover, the prejudice is likely to arise even during the subsistence of the marriage, when section 8(4)*(b)* cannot be invoked. And the marriage may never be dissolved by divorce and thus the court may never have an opportunity to use section 8(4)*(b)* to correct any prejudice suffered by the existing wife.

Jan Bekker and Gardiol van Niekerk ('*Gumede v President of the Republic of South Africa*: Harmonization, or the creation of new marriage laws in South Africa?' (2009) 24 *SA Public Law* 206 at 213) originally adopted a cautious approach to the issue of the status of the subsequent marriage. They stated that a court-approved contract 'might be' a requirement for the validity of the subsequent marriage. However, in their recent discussion of *MM v MN*, they are highly critical of Bertelsmann J's decision (JC Bekker & GJ van Niekerk 'Broadening the divide between official and living customary law *Mayelane v Ngwenyama* 2010 4 SA 286 (GNP); [2010] JOL 25422 (GNP)' (2010) 73 *THRHR* 679). Relying, inter alia, on the absence of an express provision that the subsequent marriage is void and on the fact that Parliament adopted a lenient approach to non-registration of a customary marriage by stating that non-registration does not affect the validity of the marriage, they now state that Parliament might have intended that the subsequent marriage should not be void (at 684). They also state that a 'consideration of the significance of marriage in indigenous African culture, as espoused in the abundant written material on polygyny and the important debate

on its advantages and disadvantages, may well have induced the court to come to a different and more equitable conclusion, with less far-reaching consequences' (at 687). They do not indicate what that conclusion could or should have been or how the court could have reconciled the conflicting interests of the husband's first and subsequent wives. Puzzlingly, they conclude that Bertelsmann J's decision has strengthened 'the new evolving official statutory customary law that may be in harmony with constitutional principles, but that retains few traces of fundamental African values' (at 689). There can be no gainsaying that the Constitution is the supreme law in our country against which all other legal provisions must be tested (s 8(1) and (2) of the Constitution). Surely, the authors do not wish to suggest that the position ought to be different and that customary laws and values ought somehow to have a privileged status that renders them subject to a less rigorous constitutional test than that which applies to other legal systems and values which operate in South Africa?

Although it is conceded that invalidity of a marriage that is concluded without a court-approved contract having been obtained may occasion hardship to the errant husband's subsequent wife/wives, the view that the marriage is valid is not supported by the provisions of the legislation. Furthermore, an interpretation of the legislation which does not make the husband's capacity to enter into a further customary marriage dependent on the court's approval of his proposed matrimonial property contract would imply that court approval is unnecessary (and a waste of time and money), and would leave the interests of the existing customary wives and their family groups unprotected. The interests of the subsequent wife in knowing that she is not the husband's only wife would also not be protected. For this reason, Bertelsmann J's emphasis on the need for both the existing and future wives to be fully apprised of the existence, or planned existence, and the patrimonial consequences of more than one customary marriage is particularly welcome.

It is unlikely that *MM v MN* will be the final judicial word on the matter. The issue is sure to come before the courts again — especially in view of the ignorance of many people regarding the need to obtain a court-approved contract. It is unclear how many husbands have obtained such contracts since the coming into operation of the Act. The figures indicate that either none or three such contracts have been registered in the past decade, while it

is clear that more than three polygynous customary marriages have been concluded during that time (Bekker & Van Niekerk (2010) 73 *THRHR* 683 and 684; Rabkin, 7 July 2010, http://www.businessday.co.za/articles/Content.aspx?id=113949). President Zuma alone has concluded two more marriages, and even he seems to have failed to comply with section 7(6) (Jasson da Costa & Broughton, 2 August 2010, ,http://www.iol.co.za/news/south-africa/only-one-wife-legally-wed-to-zuma-1.671604?.; Rabkin, 7 July 2010, <http://www.businessday.co.za/articles/Content.aspx?id=113949>).

Finally, in respect of Bertelsmann J's obiter dictum regarding the position of the children born of a customary marriage in which the husband failed to comply with section 7(6), it should be borne in mind that our law no longer draws a rigid distinction between children on the ground of the marital status of their parents. The legal position of children born of a void customary marriage will usually not be detrimentally affected by the nullity of their parents' marriage. As the children's parents are likely to have lived together at the time when the children were born and/or the children's father is likely to have consented to being identified as their father or to have paid damages in terms of customary law and to have contributed to their upbringing and maintenance for a reasonable period, both parents will have full parental responsibilities and rights in respect of the children (ss 19(1) and 21(1) of the Children's Act), as do parents in a valid customary marriage (ss 19(1) and 20 of the Children's Act). Therefore, in so far as the children are concerned, there will usually be no need to rely on the existence of a putative marriage between the children's parents, as Bertelsmann J stated in his obiter dictum. This is fortunate, for it is doubted whether a putative marriage can arise in terms of customary law. The concept 'putative marriage' originated in Canon law, whence it was adopted into Dutch law and later became part of the South African common law relating to civil marriages (*Moola v Aulsebrook NO* 1983 (1) SA 687 (N) at 690–1; Himonga in *Wille's Principles of South African Law* 310n753; Sinclair *The Law of Marriage* 404n108; Van der Vyver & Joubert *Persone- en Familiereg* 519; RW Lee 'Putative marriages' 1954 *Butterworths SA Law Review* 36). No mention is made of customary putative marriages in the Recognition of Customary Marriages Act. Nor do they feature in the standard works on customary law (such as TW Bennett *Human Rights and African Customary Law under the South African Constitution* (1995);

Bennett *Customary Law in South Africa*; AJ Kerr 'Customary Family Law' in Clark (ed) *Family Law Service*; NJJ Olivier, NJJ Olivier (jr) & WH Olivier *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 3 ed (1989); NJJ Olivier, JC Bekker, NJJ Olivier (jr) & WH Olivier *The Law of South Africa* (*LAWSA*) vol 32 *Indigenous Law* (1995); see also Himonga in *Wille's Principles of South African Law*; R-M Jansen in *Introduction to Legal Pluralism*; Mofokeng *Legal Pluralism in South Africa*) or in the discussion paper and report of the South African Law Reform Commission on customary marriages (South African Law Commission *Project 90 The Harmonization of the Common Law and the Indigenous Law. Discussion Paper on Customary Marriages* (1997); South African Law Commission *Project 90 The Harmonization of the Common Law and the Indigenous Law. Report on Customary Marriages* (1998)). The only mention of a putative customary marriage that could be found appears in *Makholiso v Makholiso* 1997 (4) SA 509 (Tk). Here, the court declared a customary marriage that was concluded during the subsistence of a civil marriage in community of property in contravention of the Transkei Marriage Act 21 of 1978 putative. However, the authorities the court cited all relate to putative civil marriages and accordingly do not support the existence of the concept of a customary putative marriage.

Marraige in community of property

In terms of the Matrimonial Property Act, the consent of both spouses who are married in community of property must be obtained for certain transactions relating to the joint estate. One such transaction is entering into a contract to alienate a real right in immovable property which forms part of the joint estate (s 15(2)*(b)*). In *Visser v Hull* 2010 (1) SA 521 (WCC), a husband sold the spouses' former matrimonial home to members of his family without his wife's consent or knowledge. In the documentation relating to the sale and transfer of the property the husband falsely indicated that he was unmarried. The spouses had separated, but the wife and the spouses' children were still living in the house. While the spouses were still living together, the third parties to whom the husband sold the property had visited the couple at the house. The third parties knew that the couple had children together and that the children and their mother still lived in the house. Further, they bought the property for much less than its market value. The wife sought an order setting the sale aside.

The third parties opposed the application. They alleged that they were protected by section 15(9)*(a)* of the Matrimonial Property Act and that the sale was valid. Section 15(9)*(a)* provides that if a third party does not know, and cannot reasonably be expected to know that the consent of the spouse of the other party to the transaction had to be obtained or that the necessary consent was not obtained, the transaction is deemed to have been entered into with the required consent. Thus, in so far as a bona fide third party is concerned, the transaction is valid and enforceable.

The court rejected the third parties' contention that they were bona fide. In *Distillers Corporation Ltd v Modise* 2001 (4) SA 1071 (O), it had been held that an objective test must be used to determine whether a third party is bona fide and that the issue must be considered from the point of view of the reasonable person in the third party's position. Applying this test, the court had concluded that a third party is bona fide if the spouse with whom he or she entered into a contract of suretyship signed a deed of suretyship which contains a clause stating that the surety was legally competent to execute the deed. Deviating from this approach, the court in *Visser v Hull* held that a third party must undertake 'an adequate inquiry' and not merely 'rely upon a bold assurance by another party regarding his or her marital status' (para [8]). As the third parties in the present case were the seller's blood relations and knew that the seller's children and their mother had lived in the house for many years, they should have made enquiries regarding whether the seller was married and, if so, whether the marriage was in community of property (ibid). The court held that in the particular circumstances of this case, the third parties could reasonably have been required to make enquiries from the children and their mother and/or members of the close-knit local community where the children and their mother lived (paras [8] and [11]). As the third parties did not undertake an adequate inquiry, they were not bona fide and were not protected by section 15(9)*(a)*. The court set the agreement between the third parties and the applicant's husband aside and ordered the re-registration of the immovable property in the husband's name, with the result that the property again fell into the joint estate (para [23]). Invoking unjustified enrichment, the court also ordered the return of the purchase price to the third parties (paras [21]–[22]).

The court's order setting the transaction aside is in keeping with *Bopape v Moloto* 2000 (1) SA 383 (T) where a woman who

had received donations totalling approximately R200 000 from her married lover was ordered to repay the money. Neither *Bopape* nor *Visser* sets out the legal ground for returning the property in issue in the two cases. Analysing *Bopape*, JC Sonnekus ('*Bopape v Moloto* Reperkussies van heimlike skenkings deur 'n vrygewige gade' 2000 *TSAR* 576 at 588) and L Neil van Schalkwyk ('Onlangse regspraak ten opsigte van die toestemmingsvoorskrifte ingevolge artikel 15 van die Wet op Huweliksgoedere 88 van 1984' (2001) 33 *De Jure* 147 at 152) argue that the ground for return in that case could not have been the rei vindicatio because money can ordinarily not be returned with the rei vindicatio. The judgment in *Bopape* does not indicate that the court used a condictio to order the return of the money either (Sonnekus op cit at 580–1 and 590; Van Schalkwyk op cit at 152). Van Schalkwyk concludes that the ground for the return must have been delictual and that the amount awarded was delictual damages (ibid). In *Visser's* case, the ground for returning the immovable property was in all likelihood the rei vindicatio even though the court did not specify it as the remedy.

Muslim marriage

Uniform Rule 43 governs applications for interim maintenance and a contribution towards the costs of a pending matrimonial action. In *AM v RM* 2010 (2) SA 223 (ECP) and *Hoosein v Dangor* 2010 (4) BCLR 362 (WCC), the issue arose whether a spouse in a Muslim marriage may invoke rule 43 even though Muslim marriages are not fully recognized in terms of South African law. In both cases the wife had instituted proceedings to have the spouses' Muslim marriage declared valid in terms of South African law or to have the non-recognition of Muslim marriages declared unconstitutional, and to have the Muslim marriage dissolved by divorce in terms of the Divorce Act. The courts had to decide whether a person who has instituted such proceedings qualifies as a 'spouse' as contemplated in rule 43. In both cases the courts gave an affirmative ruling and held that such a spouse may seek an order for interim maintenance and a contribution towards the costs of a pending matrimonial action even if the validity or lawfulness of his or her Muslim marriage is in dispute.

In *AM v RM*, the husband alleged that the spouses' marriage had been terminated by *talaq* (ie divorce) in terms of Islamic law and that the applicant could accordingly not be a 'spouse' as envisaged in rule 43. The wife alleged that the marriage still

existed. Revelas J held that the pending constitutional challenge regarding the non-recognition of Muslim marriages and the inapplicability of the Divorce Act to such marriages encompassed a challenge to divorce by *talaq*. As a result, the status and effect of a *talaq* would have to be scrutinized by the court which decides the constitutional challenge. Consequently, the pending action entailed that the parties' alleged divorce by *talaq* was suspended until the action was decided. Whether the alleged divorce had in fact taken place was accordingly irrelevant for purposes of the wife's application in terms of rule 43 (para [10]).

Revelas J further relied on *Zaphiriou v Zaphiriou* 1967 (1) SA 342 (W) in deciding that the wife could invoke rule 43 (paras [11]–[13]). In *Zaphiriou*, the parties were in agreement that they had married, but the husband alleged that the marriage had been terminated by divorce. In that case, the court held that rule 43 can be invoked even if the validity or subsistence of the marriage that the matrimonial action relates to is in dispute and that, in the context of rule 43, the word 'spouse' must be interpreted to include not only a person who is admitted to be a spouse but also a person who alleges that he or she is a spouse but whose allegation is denied (*Zaphiriou* at 345G). Revelas J accepted and applied this view to the case before her.

She further pointed out that the courts are increasingly enforcing the rights which flow from Muslim marriages even though these marriages are not fully recognized (paras [5]–[6]). She specifically referred to *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA), *Khan v Khan* 2005 (2) SA 272 (T) and *Daniels v Campbell NO* 2004 (5) SA 331 (CC) (para [6]). She further referred to two unreported decisions in which interim maintenance had been awarded to a Muslim wife and a former Muslim wife, respectively, in cases where constitutional challenges regarding the non-recognition of Muslim marriages were pending, namely *Cassim v Cassim (Part A)* (unreported, case no 3954/06, 15 December 2006 (T)) and *Jamalodeen v Moola* (unreported, case no 1835/06 (N)) (paras [7]–[9]). (The unreported cases are discussed by Marita Carnelley 'Enforcement of the maintenance rights of a spouse, married in terms of Islamic Law, in the South African courts' (2007) 28 *Obiter* 340.) Finally, she held that the applicant's entitlement to interim maintenance arose from a general duty by a husband to support his wife and

children (para [12]). She accordingly made an award for interim maintenance in respect of the applicant and the minor child born of the marriage and for a contribution towards the applicant's costs in the pending matrimonial action (para [15]).

In *Hoosein v Dangor*, the subsistence of the spouses' marriage was not in dispute. In this case, Yekiso J also relied on *Zaphiriou* and the courts' increasing willingness to recognize specific aspects of Muslim marriages for specific purposes (paras [14], [16], [20], [21] and [27]). He specifically referred to *Ryland v Edros* 1997 (2) SA 690 (C), *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening), Daniels v Campbell NO* and *AM v RM*. He pointed out that the increasing recognition of aspects of Muslim marriages is largely due to the enactment of the Bill of Rights and, in particular, the rights to equality, dignity, freedom of religion, belief and opinion, and to belong to a cultural, religious or linguistic community (ss 9, 10, 15 and 31 of the Constitution; see paras [15]–[19] of the judgment). He further referred to the right to have access to courts (s 34 of the Constitution). He held that rule 43 regulates access to courts in a case such as the present. He further held that the right to have access to courts encompasses a right to claim interim maintenance and a contribution towards costs. Rule 43 must, accordingly, be interpreted in a manner which protects and promotes the right of access to courts (para [26]). Yekiso J accordingly made an award compelling the applicant's husband to pay interim maintenance and specific expenses and to make a contribution towards the applicant's costs in respect of the pending matrimonial action (paras [28] and [31]).

I support the courts' view that a Muslim spouse can invoke rule 43, as it is in keeping with recent constitutional developments (but see Helen Kruuse 'Drawing lines in the sand: *AM v RM* 2010 2 SA 223 (ECP)' (2009) 2 *Speculum Juris* 127).