FAMILY LAW

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SUBORDINATE LEGISLATION

The General Regulations Regarding Children 2010, issued in terms of the Children's Act 38 of 2005, have been amended. The amendments relate to the reporting of abuse or deliberate neglect of a child; the inclusion of a person in the National Child Protection Register; removal of a child to temporary safe care; and the fees payable to accredited child protection organisations. The amendments came into operation on 29 June 2012 (GN R497 *GG* 35476 of 29 June 2012).

CASE LAW

Accrual System

In *Barnard NO v Van der Merwe* 2012 (3) SA 304 (GNP), the court held that a surviving spouse whose estate shows the smaller accrual, and who therefore has an accrual claim against the estate of the deceased spouse in terms of section 3(1) of the Matrimonial Property Act 88 of 1984, must quantify the claim and lodge it against the deceased estate (paras [13] and [14.1]). Hence, the surviving spouse in a marriage subject to the accrual system is not in the same position as the surviving spouse in a marriage in community of property in so far as claiming his or her share of the matrimonial property is concerned. In the case of a marriage in community of property, the surviving spouse's half of the joint estate is excised from the deceased estate without a claim having to be lodged against the estate, while a claim must be lodged against the deceased estate if the marriage was subject to the accrual system (para [14]). The reason for this difference is that if the accrual system operates in a marriage, the amount of the accrual claim must be determined in view of the

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accrual of the deceased estate *and the estate of the surviving spouse*. Therefore, unlike in a marriage in community of property, the executor is not in a position to quantify the claim (para [14.1]). The decision is discussed in greater detail in the chapter on The Law of Succession.

On the division of accrual on divorce, see the discussion of *BC v CC and Others* 2012 (5) SA 562 (ECP) below.

Antenuptial Contract

In *JG v MG* 2012 (3) SA 12 (FB), the parties had been married subject to complete separation of property. Before their marriage, the husband had concluded an agreement with a retirement village in terms of which he obtained a life interest in a unit in the village. The agreement prohibited cession of the right of occupation of the unit without the prior written approval of the society that controlled the retirement village. In their antenuptial contract, the husband had ceded his right to occupy the unit to his wife and had entitled her to live in the unit until her death. This clause was included in the antenuptial contract without the approval of the society. The spouses divorced less than three years after getting married. Upon their divorce, the wife sought post-divorce maintenance and implementation of the provisions of the antenuptial contract. The trial court declined to order implementation of the clause authorising the wife to live in the unit, as it found that the clause was void because it violated the prohibition on cession in the agreement the husband had concluded with the retirement village. However, the court made a maintenance award in favour of the wife which compelled the husband to pay her monthly amounts, to pay her reasonable dental and medical expenses, and to allow her to occupy the unit. The husband appealed against the order.

On appeal, Van der Merwe J (Jordaan J and Kubushi AJ concurring) held that the trial court's finding that the clause in the antenuptial contract was invalid, was incorrect. It stated that the prohibition on cession contained in the agreement simply meant that the husband could not give effect to the clause in the antenuptial contract without the cooperation of the society. Thus, the position was analogous to that which applied when somebody concluded a contract to sell property of which he or she was not the owner (para [10]). Van der Merwe J held that the interpretation that should be given to the clause in the antenuptial contract was that the husband had abandoned his right to

occupy the unit for the duration of his wife's occupation (para [12]). Accordingly, the trial court should have awarded the right to occupy the unit to the wife as she was entitled to it by virtue of the clause in the antenuptial contract, and not because it was part of her post-divorce maintenance (para [13]).

Van der Merwe J further reduced the wife's post-divorce maintenance to rehabilitative maintenance for a period of one year. The most important factors which persuaded the judge to do so were the short duration of the marriage, the income the wife received from an investment, her right to occupy the unit, and her ability to earn an income as a teacher or hairdresser (paras [17]–[18] and [21]).

Children

Abduction

A number of cases dealing with applications for children's return under the Hague Convention on the Civil Aspects of International Child Abduction ('the Convention') were reported during the period under review. The first of these is *KG v CB and Others* 2012 (4) SA 136 (SCA). In terms of the Convention, the court in a contracting state to which a child has been wrongfully removed, or in which a child is wrongfully retained, is normally compelled to order the child's immediate return to the state in which the child was habitually resident before the unlawful removal or retention. The court may, however, refuse to order the child's return if a defence (exception) to the mandatory return of the child is proved. One of the defences is that 'there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation' (art 13*(b)*). This defence has been raised in South African courts on several occasions (see, for example, *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC) also reported as *LS v AT and Another* 2001 (2) BCLR 152 (CC); *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* 2004 (3) SA 117 (SCA); *Family Advocate v B* [2007] 1 All SA 602 (SE); *Family Advocate Port Elizabeth v Hide* [2007] 3 All SA 248 (SE)). In *KG v CB*, the defence was in issue yet again. The case concerns a five-year-old girl who was born of unmarried parents and who had been placed in the care of a local authority in England. The child's mother brought her to South Africa without the knowledge and consent of her father or the local authority. An application for the

child's return was made in South Africa. The mother unsuccessfully resisted the application, and the High Court ordered the child's return to England. The mother appealed to the Supreme Court of Appeal.

As in several earlier decisions, the Supreme Court of Appeal reiterated that the primary purpose of the Convention is to secure the prompt return of children wrongfully removed to or retained in a contracting state. This purpose is based on the assumptions that abduction is generally prejudicial to a child's welfare, and that it is generally in the best interests of the child to return to the state of his or her habitual residence as the courts in the area of the child's habitual residence are best placed to resolve the merits of a custody dispute (para [19]; see also *K v K* 1999 (4) SA 691 (C) also reported as *Kirsh v Kirsh* [1999] 2 All SA 193 (C); *Sonderup v Tondelli and Another* above; *Smith v Smith* 2001 (3) SA 845 (SCA); *Chief Family Advocate v G* 2003 (2) SA 599 (W); *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* above).

The Supreme Court of Appeal further reiterated that the right to prevent the removal of a child from a particular jurisdiction, or to withhold consent to such removal, constitutes a right to determine where the child is to live, and that it consequently qualifies as a 'right of custody' as envisaged in the Convention (para [26]; see also *Sonderup v Tondelli and Another* (above)). Consequently, a custodian parent who removes his or her child from the state of the child's habitual residence, or allows a third party to do so without the consent of the other parent or leave of the court, wrongfully removes the child (para [26]). In *KG v CB*, the removal of the child was wrongful because the father had parental responsibilities in respect of the child (para [33]).

The court then considered and rejected the three defences the mother raised against an order compelling the child's return to England. First, it held that the defence that the child was fully settled in South Africa did not apply as proceedings for the child's return had not commenced more than a year after the child's wrongful removal to South Africa, as is required by article 12 of the Convention (paras [35]–[36]). On the facts of the case, the court also dismissed the mother's contention that the court should not order the child's return because the person having care of the child had consented to or acquiesced in the child's removal or retention (para [41]; this defence is contained in art 13*(a)* of the Convention).

As regards the defence that there is a grave risk that the child's return would harm him or her physically or psychologically, or place him or her in an intolerable position (art 13*(b)*), the court approved the approach adopted by the United Kingdom Supreme Court in *Re E* (*Children*) (*Wrongful Removal: Exceptions to Return*) [2011] 4 All ER 517 (SC) (para [48]). In that case, the Supreme Court held that the defence need not be narrowly construed as it is, by its very terms, of restricted application. This is so, among other reasons, because the risk to the child 'must have reached such a standard of seriousness as to be classified as "grave"' (*Re E* quoted at para [50] of *KG v CB*). The United Kingdom Supreme Court further held that:

> [a]lthough 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as 'grave' while a higher level of risk might be required for other less serious forms of harm (ibid).

It further held that the reference to physical or psychological harm to the child is coloured by the alternative that follows the reference, that is, 'or otherwise place the child in an intolerable situation'. A situation is intolerable for a child if the particular child in the particular circumstances of the case should not be expected to tolerate it (*Re D* [2007] 1 All ER 783 at [52], as quoted in *Re E*, which was, in turn, quoted at para [50] of *KG v CB*). The same applies to the assessment of the risk of physical or psychological harm to the child, for, although every child 'has to put up with a certain amount of rough and tumble, discomfort and distress' as part of growing up, 'there are some things which it is not reasonable to expect a child to tolerate . . .' (*Re E* quoted at para [50] of *KG v CB*). On the facts of *KG v CB*, the Supreme Court of Appeal held that the child's mother had failed to show that the child's return would expose her to the type of risk envisaged by the Convention, or otherwise place her in the type of situation that is intolerable in terms of the Convention (paras [52]–[60]). The appeal was accordingly dismissed (paras [60] and [62]).

As the facts and circumstances of each case determine whether there is a grave risk that the child's return would expose him or her to physical or psychological harm, or otherwise place the child in an intolerable situation, it is impossible to lay down definite guidelines or to list various situations in which such risk exists. As a result, the guidance the court offered in *KG v CB* on

the basis of *Re E* is necessarily vague. Nevertheless, the *dictum* of the Supreme Court of Appeal provides welcome guidance by making it clear that the risk to the child must be evaluated subjectively by considering the position of the particular child in the particular circumstances, and that the objective concept of reasonableness must be used to determine whether the child should be required to tolerate the harm or situation.

The second case on the defences in the Convention reported during the period under review, is *Central Authority for the Republic of South Africa and Another v B* 2012 (2) SA 296 (GSJ). Here, the article 13 defence that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take his or her views into account was at issue. In this case, a thirteen-year-old boy remained behind with his father in South Africa at the end of a visit his Australian mother had consented to. His mother sought his return to Australia, but he strenuously objected to returning. The child had, over time, in Australia resolved to reside with his father, and had planned all along not to return to Australia. He had objected to returning to Australia ever since having arrived in South Africa. He was unhappy at home and at school in Australia; his home environment was not harmonious; he did not have a wide circle of friends in Australia; he did not like the kind of life he and his mother were leading; and his mother did not participate in activities with him or take him on holidays. He had settled in well at school in South Africa; had a wide circle of friends; actively participated in sport; had a very close bond with his father; was supported by his father in his sporting activities; joined his father in various outdoor activities; had a good relationship with his father's new wife; and felt secure within a stable family.

The first issue the court had to decide was whether the part of article 13 that relates to the child's objection, constitutes a separate defence, or whether the court may only refuse to order the child's return if it finds that the child objects to being returned in circumstances where his or her return would expose him or her to physical or psychological harm or otherwise place him or her in an intolerable situation. Article 13 reads as follows:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that —
>
> *(a)* the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the

time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. . . .

Meyer J held, correctly, that even though the part of article 13 dealing with the child's objection is not separately numbered, it is separate from article 13*(a)* and *(b)* and constitutes a separate defence (para [5]).

He further held, also correctly, that article 13 confers a discretion on the court whether to refuse to order the child's return (para [6]). In exercising this discretion, the court must take the best interests of the child into consideration and, in the words of the Constitutional Court in *Sonderup v Tondelli and Another* (above), 'place in the balance the desirability, in the interests of the child, of the appropriate court retaining its jurisdiction, on the one hand, and the likelihood of undermining the best interests of the child by ordering her or his return to the jurisdiction of that court' (para [7]; see also para [10]). (The quoted portion appears at para [35] of *Sonderup*.)

Referring to the Scottish cases of *Singh v Singh* 1998 SLT 1084 and *M, Petitioner* 2005 SLT 2, Meyer J specifically dealt with the factors which are to be taken into account in the exercise of the court's discretion and the approach it should adopt when weighing the various factors. He approved of the view that the court must consider the fact of the child's objection; the nature and basis of the objection; the strength of the objection; whether the objection was formed freely and independently of parental influence; the child's age and degree of maturity; whether the child understands the purpose of an order compelling his or her return; the welfare/best interests of the child; and the general policy of the Convention to secure the prompt return of children wrongfully removed to or retained in a contracting state. This policy is important and should be deviated from only in exceptional circumstances. Meyer J found that the child in this case was confident, articulate and of above average intelligence. He also found that the boy had firm and cogent views on where he wished to live that were not caused by paternal manipulation (paras [11]–[16]).

Meyer J held that the child's views should be taken into account and be given 'considerable weight' (para [11]). The child had settled well in South Africa and was happy with his father's family. Ordering his return to Australia would disrupt his life (para [17]). The child had been living with his father in South Africa for more than a year and there had been a long delay in bringing the matter before the court (para [19]). Meyer J agreed with the *dicta* in the Australian and English cases of *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640 and *In re L (A Minor) (Abduction: Jurisdiction) (Fam D)* [2002] 1 WLR 3208, that the longer the delay in returning a child, the greater the potential is for harm to the child, and that a delay in the resolution of the proceedings is a factor which may be taken into account in deciding whether or not a child should be returned (para [17]). In keeping with the instruction in article 11 of the Convention that court proceedings for a child's return must be dealt with expeditiously, Meyer J warned that delays in Convention cases should not be tolerated (para [19]; see also *Brown v Abrahams* 2004 (4) BCLR 349 (C)). He concluded that a balancing of all the relevant considerations in the case dictated that the child's objection should prevail (para [20]). The application for the child's return was, accordingly, dismissed (para [21]). (For another case where the court refused to order the child's return, inter alia, on the ground of his objection to being returned, see *Family Advocate v B* (above). In the latter case, the child was only seven years old but was mature for his age.)

The court's identification of the factors which are to be taken into account in exercising its discretion under article 13, and the approach it should adopt in weighing the various factors, is most welcome. (On this case, see further Trynie Boezaart 'The child's objection and the Child Abduction Convention: Lessons from South Africa?' in Sylvia Kierkegaard (ed) & Mikael Kierkegaard (assistant ed) *Law, Governance and World Order* (2012) 268–70.)

The final case on the Convention is *B and Others v G* 2012 (2) SA 329 (GSJ), which was also decided by Meyer J. This case primarily concerns procedural issues and the right that section 279 of the Children's Act confers on a child to be represented in applications in terms of the Convention. In this case, a practising attorney employed by Legal Aid South Africa was appointed to report to the court. Meyer J held that the role of the legal representative section 279 has in mind is similar to that of a *curator ad litem* if the child is very young, while in the case of

older children, the legal representative takes instructions from the child, acts in accordance with those instructions and represents the views of the child in the application (para [12]).

Assignment of parental responsibilities and rights

CM v NG 2012 (4) SA 452 (WCC) deals with the acquisition of parental responsibilities and rights by the former same-sex life partner of the birth mother of a child who was conceived as a result of the birth mother's artificial fertilisation. This case is discussed in the chapter on the Law of Persons.

Child removal

In *C and Others v Department of Health and Social Development, Gauteng and Others* 2012 (2) SA 208 (CC), the Constitutional Court declared certain provisions of the Children's Act dealing with removal of children into care unconstitutional. The judgment is discussed in the chapter on Constitutional Law. For purposes of this chapter, it suffices to state that the majority decision is supported because it clearly affords proper protection to the best interests of children who are removed from their parents, and also to the rights of the persons from whom the children are removed. (On this case, see also IM Rautenbach 'Die samehang van die reg op gesin- of ouerlike sorg en die reg op toegang tot die howe *C v Department of Health and Social Development, Gauteng* 2012 4 BCLR 329 (KH)' 2012 *TSAR* 559.)

Child's right to bring a matter to court and to be assisted in bringing a matter to court

FB and Another v MB 2012 (2) SA 394 (GSJ) relates to an application by a sixteen-year-old boy who wanted to have his own legal representative appointed to represent him in a dispute between his divorced parents regarding his proposed removal by his father to Portugal. The boy wanted to live and study in Portugal. He wanted to have independent legal representation because he was advised by counsel that he should be so represented, and because he wanted to ensure that there could be no suggestion that he was being influenced in his view that he should live and study in Portugal.

Meyer J granted the boy's application. He referred to the child's right to legal representation in terms of section 28(1)*(h)* of the Constitution and section 14 of the Children's Act. In terms of section 28(1)*(h)* of the Constitution, every child has the right to

have a legal practitioner assigned to him or her by the state, at state expense, in civil proceedings affecting him or her, if substantial injustice would otherwise result. Section 14 of the Children's Act affords every child the right to bring, and to be assisted in bringing, a matter to a court, provided that the particular matter falls within the jurisdiction of the particular court. Meyer J pointed out that the statutory entitlement to assistance in legal proceedings, which section 14 of the Children's Act confers on every child, is broader in scope than that conferred by section 28(1)*(h)* of the Constitution, because it does not limit the right to cases where substantial injustice would otherwise result, or restrict the child to a legal practitioner assigned by the state (para [12]). He held that, since section 14 does not prescribe the manner in which a minor must bring a matter to court, or the way in which he or she must be assisted in bringing the matter to court, the court must decide these matters in light of the best interests of the child (para [13]). He further held that the court would refuse a minor's request in terms of section 14 to be assisted by his or her own legal representative in exceptional circumstances only, particularly if the minor is a party to the legal proceedings (ibid).

In this case, the minor's father was prepared to foot the bill for the minor's legal representation. In the absence of a financial benefactor, the minor would only be able to obtain legal representation in terms of section 28(1)*(h)* of the Constitution, in which event it would have to be shown that substantial injustice would result if the minor were unrepresented. (On s 14 and the difficulties it creates, as well as the benefits it offers, see Lawrence Schäfer *Child Law in South Africa: Domestic and International Perspectives* (2011) 173–4; Ann Skelton & Hanneretha Kruger (eds) *The Law of Persons in South Africa* (2010) 113–114 and 136; Trynie Davel 'General Principles' in CJ Davel & AM Skelton (eds) *Commentary on the Children's Act* (2007) 2–25-2–32; T Boezaart & DW de Bruin 'Section 14 of the Children's Act 38 of 2005 and the Child's Capacity to Litigate' (2011) 44 *De Jure* 416 (online).)

Contact

LH and Another v LA 2012 (6) SA 41 (ECG) involves a dispute between a mother and the paternal grandparents of her child, about the grandparents' contact with the child. The child was born after his father's death. For three years after his birth, his

mother allowed his grandparents to have contact with him and they developed a close bond with him. The child's mother then abruptly terminated contact because it caused problems between her and her new husband, and because she was unhappy that the child's grandparents had told him that her new husband was not his real father. For the next three years she denied the grandparents contact with their grandson. The grandparents eventually approached the court under section 23 of the Children's Act for an order allowing them contact.

The court pointed out that in terms of the Children's Act, it is obliged to consider the child's best interests, including his or her need to remain in the care of his or her parents, family or extended family, and to maintain a connection with his or her family, extended family, culture or tradition (paras [11]–[12]; see ss 7(1)*(f)*(i) and (ii) and 23(2)*(a)* of the Act). The court stated:

> The Act therefore recognises that a child is a social being, and that members of the extended family, more often than not, play an important part in a child's social and psychological development. Grandparents, more than other relatives, usually take a keen interest in the upbringing of their grandchildren and this relationship, provided that it is kept within reasonable bounds and does not interfere with parental duties and responsibilities, often assists and complements parental care. There can therefore be little doubt that it is usually in a child's best interests to maintain a close relationship with his or her grandparents (para [13]).

On the facts of the case, the court concluded that the child's mother was motivated by her personal difficulties with the child's paternal grandparents rather than by her child's best interests (para [16]). It accordingly made an order for contact between the child and his grandparents. However, it circumscribed the contact in view of the long break in the relationship between the child and his grandparents and to avoid interfering with the parental responsibilities and rights of the child's mother and her new husband (paras [17]–[19] and [21]).

Foster care

SS v Presiding Officer, Children's Court, Krugersdorp and Others 2012 (6) SA 45 (GSJ) is an appeal against an order by the presiding officer of the children's court in Krugersdorp which declared that a twelve-year-old orphan, who was voluntarily being cared for by his aunt and uncle, was not in need of care and protection as envisaged by section 150(1)*(a)* of the Children's Act, and that he could consequently not be placed in

foster care with his aunt and uncle. Section 150(1)*(a)* provides that a child is in need of care and protection if he or she has been abandoned or orphaned and is without any visible means of support. The presiding officer held that a child who is being cared for voluntarily by a person who does not have parental responsibilities and rights in respect of the child is not without visible means of support and is therefore not in need of care and protection. The presiding officer further held that there was no need to place such child in foster care since the child's legal position was governed by section 32 of the Act. Section 32(1) provides that a person who does not have parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially must safeguard the child's health, well-being and development, and protect the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or mental harm or hazards, whilst the child is in that person's care.

On appeal, the South Gauteng High Court rejected the view of the children's court that section 32 governs the matter. It held that this view was misplaced and ignored the existing legislation on foster care (paras [14] and [16]). The High Court also rejected the view that if a child has a *de facto* caregiver, he or she has visible means of support and consequently cannot be a child in need of care and protection. The High Court considered the latter view to be short-sighted and to constitute an implausible interpretation of the legislation which is not in keeping with the intention of the legislature (para [38]).

The High Court held that the children's court must employ a two-stage test to determine whether a child is in need of care and protection on the ground of section 150(1)*(a)*. During the first stage the court must determine whether the child has been abandoned or orphaned (para [28]). The terms 'orphan' and 'abandoned' are defined in section 1 of the Act as referring, respectively, to 'a child who has no surviving parent caring for him or her' and:

> a child who —
> *(a)* has obviously been deserted by the parent, guardian or care-giver; or
> *(b)* has, for no apparent reason, had no contact with the parent, guardian, or care-giver for a period of at least three months.

This stage of the enquiry consists of a factual determination in which the reports of the social workers who are involved in the

case must be considered (paras [28] and [29]). If the first stage of the inquiry reveals that the child has indeed been abandoned or orphaned, the second stage of the enquiry comes into play (ibid).

During the second stage the court must determine whether the child is 'without any visible means of support' (ibid). In doing so, the court must determine whether the child has his or her own means of support and, if not, whether there is someone who has a legal duty of support towards the child. This enquiry is also factual, and must focus on the personal financial resources of the child instead of those of any person who may in fact be caring for the child (paras [30], [31] and [40]; see also para [24]). If the second stage of the enquiry reveals that the child is not readily able to access any means of support, he or she is in need of care and protection and may be placed in foster care. If a foster care order is made, the child's foster parents qualify for a foster care grant regardless of their own means and income (paras [31] and [32]; see also para [24]).

The High Court briefly summarised the legal position as to who has a duty to support a child. It indicated that married, unmarried and adoptive parents have such a duty, as do maternal and paternal grandparents and siblings (paras [33]–[35]). It then indicated that even though the child might, in principle, have a claim for support, it might not be possible to enforce the claim. For example, even though parents have a duty to support their children, the definition of an abandoned child in section 1 of the Act reduces the number of instances where a parent will be indicated as a source of maintenance for the child (para [34]). And, in the case of the duty to support between siblings, a sibling might not be able to provide such support because he or she might also be a child and/or be without the means to provide support (para [35]). The High Court then held, correctly, that even if there is somebody somewhere who has a legal duty of support towards the child, the court could still find that the child falls within the ambit of section 150(1)*(a)* if the facts of the particular case indicated this (para [38]).

Having regard to all the circumstances of the case, the court concluded that the child was in need of care and protection as envisaged in section 150(1)*(a)*. It placed him in the foster care of his aunt and uncle and ordered that the foster care grant be paid to his aunt and uncle for the duration of the foster care order. The appeal was, accordingly, upheld (para [44]). The decision is clearly correct.

Maintenance

In so far as child maintenance is concerned, see the discussion of *MS v KS* 2012 (6) SA 482 (KZP) below.

Divorce

Deed of settlement

PL v YL 2012 (6) SA 29 (ECP) deals with an application for leave to appeal against an order in uncontested divorce proceedings, in which Alkema J had refused to make a portion of a settlement agreement, which dealt with division of the parties' immovable property, an order of court in terms of section 7(1) of the Divorce Act 70 of 1979. Alkema J had earlier raised objections against making settlement agreements orders of court. In *Thutha v Thutha* 2008 (3) SA 494 (TkH), he pointed out that incorporating settlement agreements in court orders frequently leads to problems relating to enforcement, and held that only terms which are readily capable of execution, such as unconditional maintenance payments and some arrangements relating to care of the parties' children should be embodied in court orders (see, for example, *Thutha* paras [10], [16] and [22]). In his decision on the application for leave to appeal in *PL v YL*, he remained steadfast in his view that making a settlement agreement — which is, in essence, a contract — an order of court is undesirable, and that only those terms that are readily executable should be embodied in the court order (see, for example, paras [46]–[48]). Nevertheless, he granted leave to appeal to the full bench on whether *Thutha* had been correctly decided and, if so, whether the guidelines he had offered in *Thutha* on when a settlement agreement could be made an order of court should be followed in the Eastern Cape Division (paras [10], [31] and [52]).

The practice of incorporating settlement agreements in divorce orders does not apply throughout South Africa. In KwaZulu-Natal and the Free State, the parties' settlement agreement is not incorporated, but those clauses of the agreement that the court considers readily enforceable are embodied in the divorce order (*Thutha* paras [35] and [40]). However, in most divisions the settlement agreement is incorporated, and thus turned into an order of court (*Thutha* para [17]). The latter divisions include the Gauteng South and Gauteng North High Courts and the Western Cape High Court (*Thutha* paras [18], [34] and [39]; *JW v HW* 2011

(6) SA 237 (GSJ) para [7]). It is hoped that we shall soon have certainty about the practice in the Eastern Cape.

Division of accrual on divorce

In *BC v CC and Others* (above), the spouses were married subject to the accrual system. They were involved in matrimonial proceedings in which the wife, inter alia, sought an order that her husband render an account to her detailing full particulars of his estate, including the value of assets in a trust, and that the value of the trust assets be taken into account in determining the accrual in his estate in terms of the Matrimonial Property Act. She alleged that her husband had full control over the trust and the acquisition, management and sale of trust assets; had made extensive use of the trust to buy property; had increased his assets by substantially increasing his personal loan account with the trust; had drawn funds from trust assets; and was the source of the funds for the acquisition of the assets of the trust. In a point *in limine* her husband sought to have certain passages in her particulars of claim deleted on the ground that the trust assets could not be taken into account in determining the accrual in his estate, as she had not sought an order that the trust assets were his assets or had to be deemed to be his assets, and she had not pleaded facts to support her claim.

Dambuza J dismissed the point *in limine* (para [19]). She held that the value a person derives from trust assets should not be ignored in circumstances such as the present. She held that the legislature did not intend that the value of trust assets should be excluded from section 4 of the Matrimonial Property Act, as an interpretation of section 4 which precluded the court from considering the value of trust assets would 'lead to abuse of protection of assets held on behalf of trusts and would open a leeway for spouses, on realising that the marriages might terminate, to acquire assets ''on behalf of the trust'' in the knowledge that courts may not inquire into the value enjoyed by them from such assets' (para [9]). She pointed out that the legislature expressly set out the assets which may not be taken into consideration in calculating the accrual in a spouse's estate in section 4(1)*(b)*(i) and (ii), and that trust assets were not among them (paras [13] and [14]). (The judge neglected to include s 5(1) and (2) in the list of excluded assets, but they, too, do not deal with trust assets.)

Referring to *Jordaan v Jordaan* 2001 (3) SA 288 (C), *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA), and *Smith v Smith and*

Another (SECLD case no 619/2006 unreported), Dambuza J pointed out that the courts have been willing to treat beneficial owners as the true owners of trust assets in cases dealing with redistribution of assets upon divorce in terms of section 7(3) to (6) of the Divorce Act (para [10]; see also *Brunette v Brunette and Another NO* 2009 (5) SA 81 (SE)). Dismissing the husband's contention that the court may take trust assets into account when it decides on redistribution of property but not when the value of the accrual in a spouse's estate is at issue, she supported the decision in *Smith* (above) that there is no basis for a different approach when considering accrual as opposed to redistribution if the evidence shows (or allegations are made) that the trust is the alter ego of one of the spouses in the divorce action (para [12]).

She concluded that if the wife's allegations were proved to be correct, the wife would have succeeded in proving that all or some of the trust assets are *de facto* the property of her husband, and that their value ought to be taken into account in determining the accrual in his estate (para [18]). She held that the fact that the wife had failed specifically to plead that the trust assets had to be deemed to be her husband's assets was not fatal to the wife's case since the basis on which the wife's claim was made was clear from the summons, and the wife's allegations sufficiently made out the case that her husband holds the trust assets for his own benefit (paras [9], [16] and [18]). Like *Jordaan*, *Badenhorst* and *Smith*, this decision is most welcome as it discourages spouses from attempting to prejudice one another financially by ensconcing their assets in discretionary trusts over which they have *de facto* control.

Maintenance pendente lite *in terms of Uniform Rule 43*

Both parents have a legal duty to support their children (s 15(3)*(a)* of the Maintenance Act). This duty does not automatically terminate when the child becomes an adult. It lasts until the child becomes self-supporting, regardless of when this occurs (see, for example, *Raichman's Estate v Rubin* 1952 (1) SA 127 (C); *Kemp v Kemp* 1958 (3) SA 736 (D); *Ex parte Pienaar* 1964 (1) SA 600 (T); *Smit v Smit* 1980 (3) SA 1010 (O); *S v Mujee* 1981 (3) SA 800 (Z); *Hoffmann v Herdan NO and Another* 1982 (2) SA 274 (T); *Gliksman v Talekinsky* 1955 (4) SA 468 (W); *Bursey v Bursey* [1997] 4 All SA 580 (E) (confirmed on 1999 (3) SA 33 (SCA) (also reported as *B v B* [1999] 2 All SA 289 (SCA))).

It has been held that if an adult child is dependent on his or her parents for support and still lives with one of them, the parent with whom the child lives may generally not claim maintenance on behalf of the child, because the child — being an adult — is the person who has *locus standi* to sue for his or her maintenance (*Smit v Smit* above; *Butcher v Butcher* 2009 (2) SA 421 (C)). In *JG v CG* 2012 (3) SA 103 (GSJ), the parent with whom the adult, dependent child lived did not claim maintenance on behalf of the child. She claimed interim maintenance for herself in terms of Uniform Rule 43. However, the maintenance was quantified with reference not only to her own expenses, but also with reference to expenses relating to general household items in which the child shared (such as groceries which were, in part, consumed by the child) and expenses relating specifically to the child (such as his clothing, pocket money, haircuts and studies). The legal question that arose was whether these expenses could be included in the mother's interim maintenance. The child was a full-time student who could not support himself. He was not a party to his parents' divorce proceedings, and the papers in the proceedings in terms of rule 43 did not indicate whether he was even aware of his mother's application in terms of rule 43. The child and his parents lived together in the matrimonial home pending the divorce.

The question whether expenses relating to an adult, dependent child could be included in his mother's interim maintenance had previously arisen in *Butcher v Butcher* (above). In *Butcher*, Gassner AJ held that because neither the Divorce Act nor the Children's Act expressly authorises a parent with whom an adult, dependent child resides to claim maintenance from the other parent on behalf of the child, only the adult child has *locus standi* to sue the other parent for maintenance (paras [14] and [15]). Consequently, the parent with whom the child lives may not institute a claim on behalf of the child in terms of rule 43 for expenses such as the child's cell phone charges, pocket money, clothing and motor vehicle expenses (para [16]). Such amounts must be claimed by way of maintenance by the adult, dependent child personally. However, Gassner AJ held that the parent with whom an adult, dependent child lives may include amounts relating to the child's general expenses (such as the child's food and groceries, and general household expenses that relate, at least partly, to the child) in the parent's own interim maintenance. This *dictum* was based on the argument that one of the factors

section 7(2) of the Divorce Act lists as a consideration that the court must take into account when deciding a spousal maintenance claim is the parties' respective financial needs and obligations. If an adult, dependent child lives with one of the parents, that parent has to 'use her household budget to run the family home and provide groceries for a three-member household'. (In *Butcher*, the three members of the household were the mother and the spouses' two adult, dependent daughters.) In having to do so, the parent incurs an 'obligation' within the meaning of section 7(2) (para [17]). Gassner AJ took this financial burden into account in determining the *quantum* of the interim maintenance to which Mrs Butcher was entitled (ibid). Thus, she held that general expenses relating to an adult, dependent child may be included in his or her parent's interim maintenance, but amounts relating specifically to the child's expenses may not be included; they must be claimed as maintenance by the child.

In *JG v CG*, Symon AJ discussed *Butcher* in some depth. He agreed that general expenses relating to an adult, dependent child may be included in the interim maintenance of the child's mother. However, he differed from the decision in *Butcher* in respect of the exclusion of amounts relating to the child's personal expenses, such as haircuts and pocket money (para [20]). He held that, from a procedural point of view, the child may be joined in the proceedings in terms of rule 43, should the presiding judge require this (paras [21] and [33]). However, rule 43(1)*(a)* does not restrict a spouse to claiming maintenance only for himself or herself (para [25]), and the court enjoys a broad discretion in terms of rule 43(5) to 'make such order as it thinks fit to ensure a just and expeditious decision' (para [27]). Therefore, rule 43 can be interpreted expansively, in so far as procedure is concerned, to permit the parent to claim interim maintenance that extends to amounts relating to the child's expenses (ibid).

As to whether substantive law permits a court to make a maintenance award that is quantified by including the parent's general and specific expenses relating to an adult, dependent child, Symon AJ first referred to the definition of 'divorce action' in section 1 of the Divorce Act which includes an application in terms of rule 43. He held that, since the definition includes an application in terms of rule 43, the court may take the same considerations into account in an application in terms of rule 43 that it may take into account in a divorce action (para [28]). Since section 6(1) of the Divorce Act provides that the court may not

grant a divorce until it is satisfied that the provisions contemplated in regard to the welfare of 'any minor or dependent child of the marriage' are satisfactory or the best that can be effected in the circumstances, it is clear that the court must take the welfare of both minor and dependent children of the spouses into account in a divorce action (para [29]). Further, in terms of section 6(3), the court may 'make any order which it may deem fit' with regard to the maintenance of a dependent child of the marriage, and, in terms of section 7(2), the court may take 'any other factor' into account and make a maintenance order 'which the court finds just in respect of the payment of maintenance by the one party to the other' (para [30]). Symon AJ concluded that the discretionary and empowering provisions in sections 6 and 7 are wide enough to empower the court to make an order directing one spouse to pay post-divorce maintenance to the other spouse in respect of expenses incurred to maintain the spouses' adult, dependent child. By inference, the court has a similar power in proceedings in terms of rule 43 (paras [31]–[32]).

Symon AJ then referred to a parent's common-law right to recover from the other parent amounts he or she spent in excess of his or her *pro rata* share of the child's maintenance (para [35]; the court specifically cited *Woodhead v Woodhead* 1955 (3) SA 138 (SR); *Farrell v Hankey* 1921 TPD 590; and *Herfst v Herfst* 1964 (4) SA 127 (W) as authority for the existence of this right). He deduced that this right 'is consistent with an acceptance in principle that one spouse can be directed to pay a contribution to another in respect of expenses incurred in regard to a dependent child, *pendente lite*' (para [35]), because 'it would defy logic and principle to only recognise such right in the form of a remedy for recovery after the event, and not accept the court's right to direct that it be paid in advance *pendente lite* and particularly in the robust discretionary process postulated by rule 43' (para [36]).

The third reason Symon AJ gave for his view that substantive law allows a parent to claim maintenance for expenses he or she incurred in respect of his or her child. was that an interim order made in terms of rule 43 without the participation of the dependent child as a party, would not *per se* bind the dependent child, and would not prohibit the child from bringing his or her own maintenance proceedings against one of his or her parents (paras [37] and [39]). Symons AJ held that the fact that an order in terms of rule 43 does not dispose of the child's maintenance rights because he or she may still institute his or her own

maintenance proceedings, favours the view that a parent may claim maintenance relating to expenses he or she incurs in respect of the child (para [40]).

Fourthly, recognising that a parent may include expenditure incurred in respect of an adult, dependent child in rule 43 proceedings 'avoids the need for the creation of artificial distinctions which are perhaps unnecessary, difficult to apply, and which will generate additional controversy' (para [41]). In this context, Symon AJ referred to the distinction Gassner AJ had drawn in *Butcher,* between various expenses relating to the child so that she could allow some of them as items falling within the mother's financial obligations which could be taken into consideration in calculating the interim maintenance the mother could claim for herself (ibid). Symon AJ stated that this distinction 'obscures the principle and creates too fine a set of distinctions to be applied in the robust rule 43 court' (para [42]). Further, the distinction between common household expenses and the child's personal expenses could prove unworkable in practice. As an example, Symons AJ cited costs associated with the use of a computer which 'may be partly communal in respect of the entire household, or personal to the dependent child, depending on the use thereof by the different members of the family' (ibid). Likewise:

> [a] monthly DVD contract, in terms of which videos are selected by either one spouse or the dependent child, or sometimes both of them, has the potential to render the distinction obtuse. Even if groceries are used as an example, it would simply not be practicable to exclude certain items from the spouse's claim, on the basis that they are only consumed by the dependent child (ibid).

Fifthly, recognising that one spouse may claim relief against the other in respect of expenses relating to an adult, dependent child is in keeping with the policy objectives sought to be achieved by rule 43:

> The rule attempts to establish a rough-and-ready regimen to address the fallout of a failed or failing marriage in a robust and efficient manner, and pending a proper resolution of the disputes in the trial. Of necessity, there is a need for the application of a degree of common sense to achieve the objective of minimal disruption to what remains of the fragile and disintegrating family unit, while the divorce proceedings which will finally determine the consequences of the dissolution are pending (para [44]).

Like Gassner AJ in *Butcher*, Symon AJ adopted the well-founded view that the spouses' children — even adult, depen-

dent children — should not unnecessarily be drawn into the matrimonial conflict. Symon AJ stated that it is particularly important not to draw the children into the conflict while the divorce is pending and if they reside in the matrimonial home (paras [45] and [46]). He also pointed out that, due to the lowering of the age of majority from 21 to 18 years by section 17 of the Children's Act, the number of adult, dependent children has increased massively, and that many of these children still live in the family home (see also *Butcher* para [14]). For this reason, the number of cases where maintenance for adult, dependent children is at issue pending their parents' divorce has also increased (para [47]). According to Symon AJ, the interests of these children need to be taken into account in proceedings in terms of rule 43 in the usual robust manner (para [48]).

Sixthly, Symon AJ referred to the decision by the Supreme Court of Appeal in *Bursey v Bursey* (above), that if parents entered into a divorce settlement agreement which provides that one parent must pay child maintenance to the other parent until the child becomes self-supporting, the maintenance award can be enforced by the latter parent after the child attains majority. Symon AJ held that this decision also established a guiding principle for applications in terms of rule 43 (paras [50] and [52]; but see *Butcher* above where Gassner AJ distinguished *Bursey* on factual grounds). This principle is that, 'at least as between the parents, the attainment of majority does not *per se,* in all circumstances, automatically prevent the court from endorsing arrangements already made between the parents *inter se* in respect of the support of their children, albeit concluded when they were minors' (para [52]). Symon AJ inferred that in *Bursey* the Supreme Court of Appeal had recognised that such arrangements continued to be binding and enforceable between the parents after the child attained majority, without the dependent children necessarily having to be joined in the proceedings. Furthermore, the Supreme Court of Appeal did not 'deny one parent the right to make a claim against the other in respect of expenses associated with the now major child, simply because majority had intervened' (ibid). Consequently, Symon AJ held that, in principle, the court is not prohibited from making an order as between parents in terms of rule 43 in respect of expenses relating to their adult, dependent child if they and their child live in the matrimonial home (ibid).

He therefore concluded that by adopting a proper and purposive interpretation of rule 43 read with sections 6 and 7(2) of the

Divorce Act and the common law, 'a court can in rule 43 proceedings make a maintenance award in favour of one spouse against the other in respect of expenses incurred by it in supporting a major dependent child living in the matrimonial home together with both parents, *pendente lite*, and even if they are specific to the child and not part of the general household expenses' (para [20]; see also para [55]). However, he stated that this type of award would not be appropriate in every case. The facts and circumstances of each case must determine whether the court should order one spouse to pay maintenance to the other spouse *pendente lite* in respect of expenses incurred in respect of an adult, dependent child who lives in the matrimonial home with both parents (para [55]). He held that in the case under discussion, such an order was appropriate (ibid). He accordingly ordered the husband to pay interim maintenance to his wife for herself and for expenses she incurred in respect of the spouses' adult, dependent child (para [62]).

Although the approach Symon AJ adopted in *JG v CG* is simpler, more practical, and more convenient than the approach Gassner AJ adopted in *Butcher*, it remains to be seen which of these decisions will be followed in future. As was pointed out in the discussion of *Butcher* in 2009 *Annual Survey* 478, the legislature ought to address the situation by enacting legislation expressly conferring *locus standi* on a parent with whom a dependent adult child lives to sue the other parent for maintenance on the child's behalf. The legislation should not limit the adult dependent child's *locus standi* in any way. It should, instead, afford *locus standi* to the parent with whom the child lives while retaining the child's *locus standi*.

Pension interests on divorce

Russouw v Reid [2011] 3 All SA 106 (GSJ) deals with the liability for tax that arises when a non-member's portion of the member's pension interest is paid to the non-member after the spouses' divorce. The decision was discussed in 2011 *Annual Survey* 456. Since then, the judgment has also been reported as *NR v ER* 2012 (2) SA 481 (GSJ).

Eskom Pension and Provident Fund v Krugel was also discussed 2011 *Annual Survey* 454. At the time, the decision was still unreported. It has since been reported as *Eskom Pension and Provident Fund v Krugel* 2012 (6) SA 143 (SCA).

In *Wiese v Government Employees Pension Fund and Others* 2012 (6) BCLR 599 (CC), the Constitutional Court considered the confirmation of the order of unconstitutionality of the Government Employees Pension Law 1996 (Proc 21 *GG* 17135 of 19 April 1996) that had been made in *Wiese v GEPF* [2011] 4 All SA 280 (WCC). (The decision of the Western Cape High Court was discussed in 2011 *Annual Survey* 415, 457, 1166, 1167.) As the substantive cause of the applicant's complaint had become moot because it was addressed by the Government Employees Pension Law Amendment Act 19 of 2011 before the matter came before the Constitutional Court, the court declined to pronounce on the validity of the Law (para [24]). (The Amendment Act was also discussed in 2011 *Annual Survey* 414.)

In *Fritz v Fundsatwork Umbrella Pension Fund and Others* (unreported, referred to as [2012] ZAECPEHC 57; 28 August 2012; available online at http://www.saflii.org/za/cases/ZAECPEHC/2012/57.html), a divorced woman sought a declaratory order stating that section 7(7)*(a)* of the Divorce Act 70 of 1979 entitled her to a portion of her former husband's pension. (Section 7(7)*(a)* provides that the pension interest of a spouse is deemed to be part of his or her assets for purposes of the determination of the patrimonial benefits to which the parties to the divorce action may be entitled.) The application was made after the death of the applicant's former husband. At the time of the spouses' divorce, no order was made specifically in respect of the husband's pension interest; the court simply ordered division of the joint estate. The joint estate was subsequently divided in accordance with a written agreement between the spouses, which did not expressly deal with the pension interest.

Goosen J dismissed the application (paras [29] and [30]). He held that once a joint estate has been divided, a court can no longer make an order in respect of a spouse's pension interest, as, at that point, there is no longer a joint estate into which the pension interest can be deemed to fall (para [27]). In arriving at this conclusion, he considered the conflicting judgments in *Sempapalele v Sempapalele and Another* 2001 (2) SA 306 (O) and *Maharaj v Maharaj and Others* 2002 (2) SA 648 (D).

In *Sempapalele*, Musi J held that section 7(7)*(a)* entails that a spouse's pension interest is not ordinarily part of the joint estate, but that it may be taken into account upon divorce. Therefore, unless a pension interest is dealt with expressly at the time of the divorce, it can never be shared between the spouses. This view

was rejected in *Maharaj*, where Magid J pointed out that section 7(7)*(a)* 'states quite unequivocally that a pension interest is deemed to be part of the assets of a party "in the determination of the patrimonial benefits to which the parties to a divorce action may be entitled"' (651D). Magid J found that a spouse is not precluded from claiming a share of the other spouse's pension interest simply because the divorce order does not expressly refer to such pension interest (650J–651A and 651E). In *Maharaj*, the joint estate had not yet been divided. Therefore, the spouses' pension interests could still be deemed to fall in the joint estate and effect could still be given to section 7(7)*(a)* (*Fritz* para [21]).

Goosen J approved of the view in *Maharaj* and held that, until the joint estate has in fact been divided by agreement between the parties or by a receiver or liquidator, the court may make an order regarding the spouses' pension interests (para [24]). As the joint estate of the spouses in *Fritz* had already been divided in accordance with an agreement between the parties, the application had to be dismissed (para [29]).

The judgments in *Fritz* and *Maharaj* are clearly preferable to the judgment in *Sempapalele*. (See also L Neil van Schalkwyk '*Sempapalele v Sempapalele* 2001 2 SA 306 (O). Egskeiding — Moet 'n pensioenbelang verdeel word waar die skikkingsakte niks meld nie' (2002) 35 *De Jure* 170 173, 175; JC Sonnekus 'Verbeurdverklaring van voordele — Welke voordele? *JW v SW* 2011 1 SA 545 (GNP)' 2011 *TSAR* 787 793 and 794–5.) If a pension interest is deemed to be part of a person's assets — as section 7(7)*(a)* expressly states is the position — the pension interest cannot but fall into that person's estate, and if the person is married in community of property, the interest obviously falls into the joint estate. Therefore, the court order need not specifically mention that the pension interest is part of the joint estate. After all, if it is not necessary specifically to mention any of the other assets that fall into the joint estate in the divorce order, why should it be necessary to single out pension interests?

However, the issue of whether the divorce order expressly deals with the member's pension interest is important in so far as the ability of the non-member spouse to claim his or her portion of the member's pension interest from the member's pension fund is concerned. Pension funds are, by legislation, only permitted to deduct specified amounts from a member's pension benefit, and to pay them to somebody other than the member. In terms of section 37D(1)*(d)*(i) of the Pension Funds Act 24 of 1956, a

pension fund may only deduct the non-member's share of the member's pension interest from the member's pension benefit if the amount has been 'assigned from such benefit or individual reserve to a non-member spouse in terms of a decree granted under section 7(8)*(a)* of the Divorce Act'. Thus, even though the pension interests of a spouse who is married in community of property automatically falls into the joint estate upon divorce and does not have to be specified to be part of the joint estate, an order in terms of section 7(8)*(a)* is required in order to enable the non-member to compel the pension fund to pay his or her portion of the member's pension interest to him or her. In the absence of an order in terms of section 7(8)*(a)* of the Divorce Act, the pension fund would refuse to pay any portion of the member's pension benefit to the non-member. In such event, the non-member spouse would have to claim his or her portion of the pension interest from the member personally, or arrive at some other arrangement with the member that takes account of the non-member's portion of the member's pension interest. This might well prove to be a difficult task, especially if, as in the majority of divorces, the spouses are not wealthy.

Finally, the finding in *Fritz* that a spouse cannot obtain an order in respect of pension sharing after the joint estate has been divided, is correct. A former spouse should not be allowed to re-visit the division of the joint estate after it has been completed by a receiver or liquidator or in terms of an agreement between the spouses, unless, of course, assets which ought to have been included in the estate were incorrectly excluded (for example, because one spouse successfully kept the existence of the assets secret), or the validity of the agreement between the spouses regarding the division of the assets can be attacked on ordinary grounds for setting a contract aside, such as fraud.

Post-divorce child maintenance

MS v KS (above) is an appeal to the High Court against an order by a maintenance court that reduced the amount of maintenance payable in respect of the parties' children. When the parties divorced, the court made an award for maintenance of the children by their father. A few years later, the maintenance court reduced the amount of maintenance the father had to pay on the ground that his salary had dropped. The parties appealed and cross-appealed against the order of the maintenance court — the mother alleging that the reduction should not have been

granted, and the father alleging that the reduction was not big enough.

On appeal, the children's mother sought to have new evidence admitted of substantial payments that had been made into the father's account. Relying on *Girdwood v Girdwood* 1995 (4) SA 698 (C), the High Court held — quite correctly — that, as upper guardian of all minors, it has the power to establish what is in the best interests of children and to make corresponding orders to ensure that their best interests are effectively served and safeguarded (para [25], citing *Girdwood* 708J). The court concluded that the present case was one where additional evidence should be admitted on appeal, in the best interests of the children (para [27]). It consequently took the evidence of the payments into account.

As regards whether the reduction should have been ordered by the maintenance court and, if so, in what amount, the High Court pointed out that the father did not dispute the extent of the children's needs; he relied solely on the drop in his salary as the basis for the reduction (paras [5], [7] and [12]). Consequently, the crux of the matter was whether he had proved his inability to pay the original amount of maintenance (paras [7] and [12]). To discharge this burden, it was insufficient to show that his salary had dropped; he had to prove inability to afford the original maintenance (para [13]). On the evidence, the court found that the father had failed to present such proof. It held that the most important factor is the best interests of the children, and that '[t]he payment of maintenance for minor children is a priority in the demands upon the resources of the individual liable for the payment of such maintenance' (para [11]). It found that the father could achieve savings by temporarily suspending his retirement annuity payments, the repayments he was making on a loan his father had granted to him, and his clothing and entertainment expenses. The court held that the children's proper maintenance had to be the father's priority, and that this priority demanded that the abovementioned expenses take a backseat to the proper maintenance of the children. It stated that the children's grandfather would understand the predicament his son was in, and would appreciate that the repayments were being temporarily suspended so that his grandchildren could be properly supported. As regards the father's clothing expenses, it pointed out that there was no evidence that the state of the father's clothing was such that his dignity was being impaired (para [14]).

Consequently, the court concluded that the father was able to afford the original maintenance amount. His appeal was, accordingly, dismissed and the mother's appeal upheld (para [30]).

In view of the conclusion the court reached as regards the father's ability to afford the original maintenance, it did not have to decide whether a change in circumstances was required before an order for child maintenance can be varied — as had been alleged by counsel for the children's mother (para [16]).

The High Court's focus on the best interests of the children and the priority afforded to their maintenance are most welcome and in keeping with the judgment of the Constitutional Court in *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae*) 2003 (2) SA 363 (CC). In this case, Mokgoro J held that the maintenance courts and maintenance laws are important mechanisms to give effect to children's rights, and that failure to ensure the effective operation of the maintenance system amounts to a failure to protect children. She also indicated that the maintenance system functions on a gendered basis that disadvantages women and undermines the achievement of gender equality. Effective mechanisms for the enforcement of maintenance obligations were therefore 'essential for the simultaneous achievement of the rights of the child and the promotion of gender equality' (para [30]; see also *S v Visser* 2004 (1) SACR 393 (SCA); *S v November and Three Similar Cases* 2006 (1) SACR 213 (C)).

Post-divorce spousal maintenance

In *MG v RG* 2012 (2) SA 461 (KZP), a divorced woman appealed against an order of the former North Eastern Divorce Court (now a regional court) which granted a decree of divorce and dissolved the joint estate of the spouses, but refused to award her any maintenance, and also refused to make an order for forfeiture of patrimonial benefits in her favour. The appellant contended that her husband's abusive conduct, alcohol and gambling addiction, and his profligacy in squandering approximately R1,2 million in only a few years, justified a forfeiture order. The matter was unopposed and the only evidence led was that of the appellant. When the appeal was argued, counsel agreed that justice had not been done in the trial court as the issue of whether the requirements for making a forfeiture order had been satisfied had been insufficiently canvassed. They agreed that the matter should be remitted to the trial court for a hearing *de novo* on the

issue of forfeiture of benefits (paras [37] and [38]). Consequently, the main bone of contention on appeal was whether a maintenance order should have been made in favour of the appellant.

Gabriel AJ (Ndlovu J concurring) pointed out that the North Eastern Divorce Court fulfils a critical social need by affording access to courts to people who are generally poor and uneducated (paras [14] and [25]). (The right to access to courts is enshrined in s 34 of the Constitution.) Therefore, 'there is a particular duty on presiding officers, indeed on those who represent them [that is, poor, uneducated clients], to take divorces seriously, to remain vigilant and to ensure that sufficient and proper evidence is elicited and presented' (para [25]). In the present case, the presiding officer had failed to ask questions that would have ensured that all factors relevant to maintenance were canvassed (para [29]).

Gabriel AJ held that the trial court should have made an award for token (or nominal) maintenance in favour of the wife. Token maintenance is sometimes awarded, even if the spouse who claims it does not need maintenance at the time of the divorce (para [20]). A token award may also be made if the spouse in whose favour the order operates does need maintenance on divorce, but the other spouse is unable to pay maintenance at that stage but is likely to be able to do so at some future stage (*Buttner v Buttner* 2006 (3) SA 23 (SCA)). The reason for making an order for token maintenance is that if a maintenance award is not made upon divorce, it cannot subsequently be made because the spousal duty of support terminates upon divorce (paras [18], [20] and [30]; see also, *Kemp v Kemp* above; *Portinho v Portinho* 1981 (2) SA 595 (T); *Santam Bpk v Henery* 1999 (3) SA 421 (SCA); *Khan v Khan* 2005 (2) SA 272 (T); *Welgemoed v Mennell* 2007 (4) SA 446 (SE); *Botha v Botha* 2009 (3) SA 89 (W)). (At para [18] in *MG v RG* the court erroneously refers to the 'duty of care' between spouses terminating on dissolution of the marriage. It is clear that the court had the duty of support in mind.)

In *MG v RG*, the appellant was a poor woman, whose evidence as to need and her husband's conduct were uncontested, and whose claim for token maintenance 'could not have held any prejudice to the respondent, given his lack of opposition to the divorce' (para [22]). Making an award for token maintenance in favour of the appellant would have been in keeping with the judgments of the Constitutional Court which require judicial

awareness of the vulnerability of women as a group, and also demand that the courts be responsive to such vulnerability (para [23], citing *Daniels v Campbell NO* 2004 (5) SA 331 (CC) para [22]). Gabriel AJ further referred to the court's duty to ensure that the rights in the Bill of Rights are protected, 'particularly in cases where because of particular vulnerability those who approach courts for relief might not fully understand their rights or court processes' (para [24], citing *S v Williams* 1995 (3) SA 632 (CC)). The acting judge held that these factors made the trial court's reluctance to grant token maintenance difficult to understand, as the failure to grant token maintenance meant that the appellant could never claim maintenance from her (former) husband — not even if her circumstances changed. The court concluded that '[t]he consequences in such scenario are self-evidently disastrous for the appellant' (para [28]). The appeal was accordingly upheld and the court made an award for token maintenance in the amount of R1 per year in favour of the appellant (paras [32] and [38]).

The court must be lauded for its accommodating approach towards the appellant. However, a warning should be sounded of the impression being created that women from poor, uneducated backgrounds are more or less entitled to token maintenance. Granting orders for token maintenance, more or less as a matter of course, to such women, or, for that matter, to any other 'category' of women, would not be in keeping with the judgment of the Supreme Court of Appeal in *Buttner v Buttner* (above). In *Buttner*, it was held that the factors in section 7(2) of the Divorce Act must be taken into account in order to decide whether there is a need for maintenance (including token maintenance) to be paid and, if so, by whom to whom; the amount to be paid; and the period for which it is to be paid. An order for token maintenance should, therefore, be made only if application of the factors in section 7(2) to the facts and circumstances of the particular case, indicates that such an award is just (see also *Nel v Nel* 1977 (3) SA 288 (O) and *Portinho v Portinho* above).

The second case on post-divorce spousal maintenance reported during the period under review is *PT v LT and Another* 2012 (2) SA 623 (WCC). It deals with enforcement of arrears payable in terms of a maintenance order the High Court made when it terminated the parties' marriage by divorce. After the divorce, the husband fell into arrears and obtained a reduction in the maintenance payable to his wife in terms of section 16(1)*(b)*

of the Maintenance Act 99 of 1998. However, he never paid the arrears that he owed in terms of the order of the High Court. His wife obtained a writ of execution in respect of the arrears from the Registrar of the High Court. The husband thereupon sought an order setting aside the writ. He contended that the order made by the maintenance court in terms of the Maintenance Act had replaced the order of the High Court and had thereby extinguished of the High Court order and the arrears owed in terms of it.

Binns-Ward J rejected this argument. He pointed out that, in terms of section 22 of the Maintenance Act, an order by a maintenance court in substitution of an existing order entails that the existing order 'shall cease to be of force and effect'. The judge correctly held that the ordinary meaning of the quoted words is that the existing order ceases to operate as from the moment when it is substituted; in other words, it ceases to be of force and effect *ex nunc*. He further correctly held that the words did not mean that the order of the maintenance court *ipso facto* extinguished the rights that had accrued under the order of the High Court, because the substitution of the order of the High Court did not mean that the order was deemed never to have existed. He held that a substituting maintenance order operates prospectively unless, and only to the extent that, the order expressly states that it has retroactive effect. As the substituting order in the present case did not provide for retroactive operation, the arrears owed as a result of the husband's failure to comply with the order of the High Court before its substitution by the maintenance court, had not been extinguished by the order of the maintenance court. Consequently, the husband remained liable to pay them (para [9]).

The second issue in *PT v LT* was whether the maintenance order made by the High Court could be enforced by means of a writ of execution issued by the Registrar. In this regard, Binns-Ward J referred to the amendment of section 26(1) of the Maintenance Act on 31 March 2005 (paras [12] and [13]). Before the amendment, the section provided only for civil enforcement of maintenance orders made in terms of the Maintenance Act. (The amendment removed the phrase 'under this Act' in s 1*(a)* of the Act.) Since the amendment, the section has applied to all maintenance orders. Binns-Ward J held that it was unlikely that the legislature intended that maintenance orders made by the High Court could be enforced civilly by way of a writ of execution

issued either in the High Court or in terms of the Maintenance Act (para [19]). He concluded that the legislature intended that the Maintenance Act should comprehensively regulate the civil enforcement of maintenance orders made by any court in South Africa, and that the Registrar of the High Court no longer had the power to issue writs of execution in respect of maintenance orders (para [24]). Binns-Ward J accordingly set aside the writ of execution issued by the Registrar (Order para [1]). He further declared that the wife could approach the maintenance court to have a writ of execution issued by the clerk of the court in terms of the Maintenance Act in respect of the arrears owed under the substituted order of the High Court (Order para [2]).

In *EH v SH* 2012 (4) SA 164 (SCA), the Supreme Court of Appeal confirmed existing legal principles regarding the need for maintenance, and also brought about certainty as regards the entitlement to post-divorce maintenance of a spouse who is living with a life partner. In this case, a husband who had been ordered to pay R2 000 per month to his former wife in terms of section 7(2) of the Divorce Act appealed against the order of the High Court on the ground that she had been living with another man for some eight years. (The decision of the High Court is discussed in 2011 *Annual Survey* 461.)

The Supreme Court of Appeal, firstly, confirmed that the common-law duty of support between spouses comes to an end when the marriage is terminated (para [12]; see also *Ex parte Standard Bank Ltd* 1978 (3) SA 323 (R) 325A; *Pillay v Pillay* 2004 (4) SA 81 (SEC) 86B; *Welgemoed v Mennell* above 447H). It also confirmed that post-divorce maintenance will not be awarded to a spouse who does not need maintenance. It went so far as to state that it is 'trite' that the person who claims maintenance must establish a need for maintenance (para [13]). The court further held that in the absence of proof of such need, 'it would not be "just" as required by this section [section 7(2)] for a maintenance order to be issued' (ibid). Therefore, proving a need for maintenance is vital in obtaining a maintenance order in terms of section 7(2). On the facts, the Supreme Court of Appeal found that the wife had failed to prove that she needed maintenance from her husband, since her life partner was maintaining her in full. Consequently, the appeal succeeded and the order of the High Court was set aside (paras [13]–[15] and [17]).

What is particularly significant about the decision in *EH v SH* is that the Supreme Court of Appeal expressly stated that living with

another person does not, on its own, preclude a spouse from claiming post-divorce maintenance (para [11]). It stated that the view that it is against public policy for a woman to be supported by two men simultaneously, 'speaks of values from times past' and is inapplicable in 'the modern, more liberal (some may say more "enlightened") age in which we live' (ibid). This *dictum* is most welcome, and is in keeping with the position that applies if an application for rescission or variation of a maintenance award made upon divorce is sought, and if a maintenance order made in terms of section 7(1) of the Divorce Act does not exclude continuation of payment of maintenance after the maintenance recipient's remarriage. (As regards this point, see further the comment on the decision of the trial court in 2011 *Annual Survey* 461.)

Finally, the *dictum* ought to result in reconsideration of the custom in applications in terms of rule 43 not to award maintenance to a spouse who is living in a permanent relationship with another (see, for example, *Carstens v Carstens* 1985 (2) SA 351 (SE); *Dodo v Dodo* 1990 (2) SA 77 (W); *SP v HP* 2009 (5) SA 223 (O)). In such applications — as in applications for post-divorce maintenance — the court should deny an applicant (interim) maintenance only if he or she is being fully maintained by the person with whom he or she is living. (See also *Qonqo v Qonqo* ([2010] ZAFSHC 107, 11 March 2010 (unreported) available online at http://www.saflii.org/za/cases/ZAFSHC/2010/107.html).)

Universal partnership on divorce

In *JW v* CW 2012 (2) SA 529 (NCK), a wife who was being sued for divorce unsuccessfully sought a declaratory order that a universal partnership existed in the spouses' marriage out of community of property. The case was discussed in 2011 *Annual Survey* 465 when it was published in Judgments Online (*JPW v CW* [2011] JOL 27572 (NCK)).

Domestic Violence

Daffy v Daffy [2012] 4 All SA 607 (SCA) mainly falls within the ambit of criminal law. For purposes of family law, it should be noted that the Supreme Court of Appeal considered the definition of a 'domestic relationship' in the Domestic Violence Act 116 of 1998, in the context of alleged domestic violence perpetrated by one middle-aged brother on another, while the brothers did not share a residence. Although subpara *(d)* of the definition of

'domestic relationship' provides that a domestic relationship exists between 'family members related by consanguinity, affinity or adoption', the court held that the legislature could never have intended that all family members are automatically in a domestic relationship. It concluded that 'the ordinary connotation of a domestic relationship involves persons sharing a common household', and that in view of the other provisions of the definition, 'some association more than mere consanguinity is clearly required for there to be a domestic relationship' (para [8]). As the brother who sought the protection order relied solely on the fact that he and the appellant are brothers to found his claim that he qualified as a complainant who is in a domestic relationship, his application was doomed (para [9]). On the facts of the case, the court's interpretation of 'domestic relationship' is supported.

Life Partnerships

In *Paixão v Road Accident Fund* 2012 (6) SA 377 (SCA), the Supreme Court of Appeal developed the common-law action for loss of support to allow a surviving partner in a heterosexual life partnership to institute a claim for loss of support against the Road Accident Fund. Earlier, in *Verheem v Road Accident Fund* 2012 (2) SA 409 (GNP), the High Court had likewise permitted a surviving partner in a heterosexual life partnership to institute a claim for loss of support against the fund. These decisions are discussed in the chapter on The Law of Delict.

Two of the cases on the financial consequences of the termination of a life partnership that were reported in 2012 were discussed in 2011 *Annual Survey* 467, 469 when they were still unreported. They are *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) and *McDonald v Young* 2012 (3) SA 1 (SCA). *Ponelat* deals with a universal partnership between life partners, while *McDonald* deals with a claim for post-separation maintenance and division of the assets of an alleged joint venture between unmarried former life partners.

Butters v Mncora 2012 (4) SA 1 (SCA) also deals with the financial consequences of the termination of a life partnership. In this case, the existence of a universal partnership between the life partners was also in dispute. The case concerns an appeal against an order by Chetty J in the Eastern Cape High Court, Port Elizabeth, compelling a man (B) to pay an amount equal to 30 per cent of his net asset value to the woman (M) with whom he had

lived in a life partnership for nearly twenty years (*Mncora v Butters; Butters v Mncora* ([2010] ZAECPEHC 72, 7 December 2010 (unreported) available online at www.saflii.org/za/cases/ZAECPEHC/2010/72.html)). During their life partnership, B had built up a successful business, while M had performed the domestic duties and had raised her child from a previous relationship, the couple's two children and B's child from a previous relationship. The High Court found that a universal partnership relating to all their assets had been tacitly concluded by the parties and that M's contributions to the partnership entitled her to an amount that was equal to 30 per cent of the value of the assets of the partnership as at the time of its dissolution.

B appealed against the order of the High Court. He contended that M had failed to prove that a universal partnership existed between the parties, first, because she had failed to prove that she had brought something into the alleged partnership, and, secondly, because she had failed to prove that the alleged partnership had been carried on for the parties' joint benefit. He further contended that M had done no more than could be expected of a life partner, and that the position of life partners should not be equated with that of spouses who are married in community of property.

The majority decision of the Supreme Court of Appeal was delivered by Brand JA, in whose decision Mhlantla and Tshiqi JJA concurred. Brand JA pointed out that life partners/cohabitees do not automatically share in each other's estates, because living together outside of marriage does not lead to special legal consequences as marriage does (para [11]). However, life partners may rely on legal remedies such as those available in terms of the law of partnership. In the present case, M had relied on the coming into existence of a universal partnership between the parties. Therefore, she had to prove that she and B did not simply live together as husband and wife, but were partners in the legal sense of the word. In order to do so, she had to prove that the requirements for a partnership had been satisfied (ibid). These requirements are: (a) each of the parties must bring something into the partnership or bind himself or herself to bring money, labour or skill into it; (b) the partnership must be carried on for the joint benefit of the parties; (c) the object of the partnership must be to make a profit (RJ Pothier *A Treatise on the Law of Partnership* (Tudor's Translation 1.3.8) as approved in *Bester v*

Van Niekerk 1960 (2) SA 779 (A) at 783H–784A; *Mühlmann v Mühlmann* 1981 (4) SA 632 (W) at 634C–F; and *Pezzutto v Dreyer* 1992 (3) SA 379 (A) at 390A–C).

Brand JA rejected all of B's contentions as to why M had failed to prove the existence of the partnership. First, he rejected the contention that M had failed to establish that she had brought anything into the partnership as she had only made contributions to the home and the children, and had played no part in the acquisition or running of the business. Citing historical research, Brand JA held that a partnership need not consist of a commercial undertaking, and that a *societas omnium bonorum* or *societas universorum bonorum* (partnership of all the present and future property of the parties), was permissible in our law (paras [13]–[18]). He expressly held that the historical research showed that *Isaacs v Isaacs* 1949 (1) SA 952 (C) was incorrect, in so far as the court had held that a commercial undertaking was required (para [13]). In an important *dictum*, Brand JA further held that '[o]nce it is accepted that a partnership enterprise may extend beyond commercial undertakings, logic dictates . . . that the contribution of both parties need not be confined to a profit making entity' (para [19]). As, in the present case, M had contended that the parties had entered into a universal partnership of all their property, her failure to contribute to B's business did not mean that she had made no contribution to the partnership. Instead, she had contributed by looking after the household and the children (ibid). Thus, the first requirement for the coming into existence of a partnership had been satisfied.

Relying on the historical research he cited, Brand JA also found that a universal partnership — even one relating to all the property of the parties — can come into existence tacitly as a result of the conduct of the parties (paras [14]–[18]). If the conduct of the parties is capable of more than one inference, a universal partnership will be found to have come into existence only if it is more probable than not that a tacit universal partnership agreement had been reached (para [18]; see also para [34] of the minority judgment). In this case, the facts showed that it was more probable than not that a tacit universal partnership had come into existence.

As regards B's contention that M had failed to prove that the alleged partnership was carried on for the joint benefit of the parties, Brand JA pointed out that B's counsel had conceded that if both parties had earned an income and had shared such

income, M would have gone a long way to proving that the alleged partnership had indeed been carried on for the parties' joint benefit, and that this would have been the position even if M had earned much less than B. However, the contention went, because B had earned all the income, he could retain everything he had acquired from such income (para [21]). In other words, B's contention was that 'it must be inferred from the conduct of the parties that, though they intended to share the benefits of their joint contribution, the defendant would retain the surplus income and accumulate assets only for himself' (para [26]). Brand JA held that such intent would be 'quite remarkable' viewed from M's perspective, as it 'would mean that she intended to contribute her everything for almost 20 years to assist the defendant in acquiring assets for himself only . . .' (ibid). Brand JA held that this contention by B:

> harks back to the model of a partnership confined to a commercial enterprise. Taken to its logical conclusion, it would mean that even a negligible monetary contribution would outweigh an invaluable non-financial contribution to the family life of the parties (para [22]).

He proceeded:

> I must admit some sense of relief that, freed from the restraints of regarding universal partnerships as being confined to commercial enterprises, we are now able to evaluate the contribution of those in the position of the plaintiff [M] in its proper perspective. This also accords with a greater awareness in modern society of the value of the contribution of those who are prepared to sacrifice the satisfaction of pursuing their own careers, in the best interests of their families (ibid).

He concluded that the second requirement for the coming into existence of a partnership had also been satisfied because B had shared the benefits of M's contributions to the household and children, while M had shared the benefits of B's financial contributions (paras [23]–[27]).

Brand JA also rejected B's contention that M had done no more than could be expected of a life partner. He held that the statement in *Mühlmann v Mühlmann* 1984 (3) SA 102 (A) 124D–E that 'unless a wife had rendered services manifestly surpassing those ordinarily expected of a wife in her situation, a Court will not easily be persuaded to infer a tacit agreement of partnership between the spouses' could not be 'transposed, without any qualification, on a relationship between cohabitees [that is, life partners]', since, unlike the relationship between life partners, the spousal relationship 'is governed by well-established standards,

both legally and socially imposed'. He explained that while it is fairly clear what can 'ordinarily be expected of a wife in her situation', a norm has not yet been legally and socially established for life partners. Therefore, it was not feasible to transpose the statement regarding spouses onto life partners (para [29]).

B's final contention — that the position of life partners should not be equated with that of spouses who are married in community of property — was also rejected because the law obviously distinguishes between a universal partnership and a marriage in community of property as there are many differences between marriage in community of property and a universal partnership (para [30]).

Consequently, the majority of the bench of the Supreme Court of Appeal found that M had succeeded in proving that a tacit universal partnership had come into existence between the parties. The appeal was, accordingly, dismissed (paras [31]–[32]).

Heher JA (Cachalia JA concurring) delivered a minority judgment upholding the appeal on the ground that M had failed to discharge the onus of proving that a universal partnership had tacitly arisen between the parties (paras [44]–[45]). The minority specifically found that M had failed to prove that the parties had said or done anything to manifest the intention to establish a universal partnership (para [44] read with para [36]).

According to a newspaper report, B has lodged an appeal to the Constitutional Court ('Konstitusionele Hof moet Weer Besin oor Saamblyverhoudings' *Die Burger* 23 April 2012, available at http://www.dieburger.com/Suid-Afrika/Nuus/Konstitusionele-hof-moet-weer-besin-oor-saamblyverhoudings-20120422, accessed 24 April 2012). It is hoped that if the Constitutional Court decides to hear the appeal, the progressive interpretation by the majority of the Supreme Court of Appeal of the requirement regarding the partners' contributions will be confirmed.

Maintenance

Maintenance pendente lite *in terms of Uniform Rule 43*

On maintenance *pendente lite* in terms of Uniform Rule 43, see the discussion of *JG v CG* 2012 (3) SA 103 (GSJ) (above).

Post-divorce child maintenance

On post-divorce child maintenance, see the discussion of *MS v KS* (above).

Post-divorce spousal maintenance

On post-divorce spousal maintenance, see the discussions of *MG v RG* (above), *PT v LT and Another* (above) and *EH v SH* (above).

Marriage

Customary marriage

Section 4 of the Recognition of Customary Marriages Act 120 of 1998 governs the registration of customary marriages. Section 4(3)*(a)* stipulates that a customary marriage that was entered into before the commencement of the Act (that is, before 15 November 2000) must be registered within twelve months after the commencement of the Act, or within such longer period as the Minister of Home Affairs may from time to time prescribe by notice in the *Government Gazette*. In *MG v BM and Others* 2012 (2) SA 253 (GSJ), the applicant sought an order compelling the Director-General of Home Affairs to register the customary marriage she had entered into with her deceased husband in June 2000. This marriage was the deceased's second customary marriage. He had already concluded a customary marriage with the first respondent in 1996. His customary marriage to the first respondent was registered in December 2002. Both customary marriages existed when the deceased died. The Department of Home Affairs refused to register the applicant's customary marriage when she sought such registration in 2010. As indicated in a letter addressed to the applicant in June 2010, the Department was of the view that section 4(3)*(a),* read with the notices of extension issued by the Minister of Home Affairs, did not permit registration after 14 November 2002. This advice was wrong, as the Minister had extended the period for registration until 31 December 2010 (GN 51 *GG* 32916 of 5 February 2010). As a result of its shamefully out-of-date knowledge regarding the ministerial extensions, the department advised the applicant to seek a court order in terms of section 4(7) of the Act compelling the department to register the marriage — which is what the applicant did. She also sought an order condoning the late registration of the marriage and an order directing the department to issue a marriage certificate to her.

In his judgment, Moshidi J mentioned that the Minister had granted a further extension for registration of customary marriages entered into before the coming into operation of the Act

(paras [11] and [13]), but he did not indicate that the incorrect date stated by the Department of Home Affairs meant that the advice offered to the applicant was incorrect and resulted in wasted expenditure and court time. He simply proceeded to determine whether the deceased and the applicant had entered into a valid customary marriage, as, in the absence of a valid customary marriage, he clearly could not grant the orders sought.

On the facts of the case and his interpretation of section 4 of the Recognition of Customary Marriages Act, Moshidi J concluded that a customary marriage indeed existed between the deceased and the applicant (paras [7], [12] and [14]). This ought to have been the end of the matter. However, Moshidi J also dealt with an issue that ought not to have featured in the proceedings at all. He considered whether the deceased's failure to obtain an order in terms of section 7(6) of the Act meant that the deceased's customary marriage to the applicant was invalid. Section 7(6) provides as follows:

> A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.

As the section explicitly refers only to 'a further customary marriage . . . after the commencement of this Act', while the deceased had entered into both customary marriages before the commencement of the Act, section 7(6) was clearly inapplicable in *MG v BM*. However, because the applicant alleged that in 2006 — long after the conclusion of her customary marriage — she and the deceased had instructed an attorney to register their customary marriage and to prepare a contract in terms of section 7(6), Moshidi J nevertheless considered whether the deceased's non-compliance with section 7(6) was fatal to granting the application. In view of the express wording of section 7(6), the answer is obviously in the negative, and this is also the conclusion Moshidi J arrived at (para [18]). However, he employed an unnecessarily long argument in which he specifically considered whether he should follow the decision in *MM v MN* 2010 (4) SA 286 (GNP) that non-compliance with section 7(6) results in nullity of the marriage.

He distinguished the facts in *MM v MN* from those in the present case. He pointed out that the marriage in *MM v MN* was concluded after the coming into operation of the Act, while the

applicant's marriage was concluded before the coming into operation of the Act; that the first customary marriage in the present case was registered, while the first customary marriage in *MM v MN* was not registered; that in the present case the deceased's first customary wife was aware of the second marriage and actively participated in the arrangements for it, while the applicant in *MM v MN* was unaware that her husband had entered into another customary marriage; and that in the present case an attempt was made to enter into a contract in terms of section 7(6), while no such attempt was made in *MM v MN* (para [20]). Only after referring to all of these differences, did Moshidi J get to the real point, namely that section 7(6) expressly provides that it applies only to customary marriages concluded after the coming into operation of the Act, while the applicant's marriage had been concluded before the coming into operation of the Act. It was for this reason that Moshidi J declared that he was 'reluctant' to follow *MM v MN* (ibid). It must be emphasised that there was clearly no need at all to follow, or not to follow, *MM v MN*, as *MM v MN* was wholly inapplicable as it dealt with non-compliance with section 7(6), which section is wholly inapplicable in the present case!

Moshidi J then cited 'another difficulty' he had in following *MM v MN*. He stated that it could not have been the legislature's intention that a customary marriage that was concluded without complying with section 7(6) should be invalid, as such invalidity would prejudice the wife in such customary marriage even though it was her husband — and not she — who had to obtain the order for the court-approved contract (paras [21]–[22]). This concern is valid but *obiter* due to the inapplicability of section 7(6) in this case.

All in all, *MG v BM* was a storm in a teacup. First, had the Department of Home Affairs been up to date in so far as the ministerial extensions for registration of customary marriages were concerned, it would not have advised the applicant to approach the court in terms of section 4(7) of the Act. The registering officer of the Department would simply have had to satisfy himself or herself as to the existence of the marriage — which he or she would have been able to do fairly easily in view of all the evidence the applicant had of the conclusion of the marriage. The registering officer would then have registered the marriage without any court proceedings being required. Secondly, despite the Department's lack of knowledge about the

latest ministerial extension, the matter could have been decided far more simply. Had the court pointed out from the outset that section 7(6) of the Act was inapplicable in the present case, the application could have been dealt with speedily and easily on a purely factual basis, and there would have been no need for Moshidi J to explain why he was unwilling to follow *MM v MN*. After all, it would then have been clear from the outset that *MM v MN*, like section 7(6), was inapplicable in this case.

Coincidentally, the second case on customary marriages that deserves consideration is *MN v MM and Another* 2012 (4) SA 527 (SCA) (also reported as *Ngwenyama v Mayelane* [2012] 3 All SA 408 (SCA), 2012 (10) BCLR 1071 (CC)) in which the Supreme Court of Appeal overturned *MM v MN* (above) on appeal. The decision of the Supreme Court of Appeal was, in turn, overturned by the Constitutional Court in *Mayelane v Ngwenyama and Another* (CCT 57/12) [2013] ZACC 14 (30 May 2013) http://www.saflii.org.za/za/cases/ZACC/2013/14.html, which will be discussed in the 2013 edition of *Annual Survey*. Because it was overturned, the decision of the Supreme Court of Appeal is not commented on in detail.

The case concerns the contentious issue of the validity of a further customary marriage a husband in a subsisting customary marriage concludes after the coming into operation of the Recognition of Customary Marriages Act ('the Act') without having obtained a court order in terms of section 7(6) of the Act. As indicated in the discussion of *MG v BM and Others* (above), section 7(6) requires a husband who is a party to a customary marriage, and who wishes to enter into another customary marriage after the coming into operation of the Act, to obtain court approval of a written contract which will regulate the future matrimonial property system of his polygynous marriage. The Act does not stipulate the consequences of failure to obtain a court-approved contract.

The applicant and her husband had married in terms of Tsonga customary law in 1984. Unbeknown to the applicant, her husband entered into another customary marriage in 2008. He did not obtain a court-approved contract before entering into the second customary marriage. After her husband's death, the applicant attempted to have her customary marriage registered in terms of section 4(2) of the Act. The Department of Home Affairs refused to register the marriage on the ground that another woman was already registered as the deceased's wife. The applicant

approached the High Court for an order declaring the second marriage void, and ordering the Minister to register her marriage as the only customary marriage her husband had entered into. The High Court granted the order sought. The deceased's second wife appealed to the Supreme Court of Appeal.

The Supreme Court of Appeal rejected the view that failure to comply with section 7(6) renders the subsequent customary marriage void as the section is couched in peremptory terms, and the validity of the subsequent customary marriage would negatively affect the rights of the first wife. Ndita AJA (Mthiyane DP and Ponnan JA concurring) held that the trial court had failed to interpret section 7(6) in a contextual and purposive manner, as was required as the issue of the validity of the further customary marriage had implications for the fundamental rights to dignity and equality (paras [12] and [14]; see also para [30]). Furthermore, the trial court had failed to interpret the legislation in accordance with section 39(2) of the Constitution, which requires courts to promote the spirit, purport and objects of the Bill of Rights when they interpret any legislation (para [15]; see also paras [35] and [38]). Ndita AJA held that the Act was intended to advance the rights of women in customary marriages by affording them rights to matrimonial property that they did not have before the Act came into operation. Consequently it was 'difficult to reason that section 7(6) could be intended solely for the protection of the wife in an existing marriage' (para [19]). She further held that the legislature did not intend non-compliance with section 7(6) to result in any sanction as the purpose of the section was simply to govern the spouses' matrimonial property rights (paras [12] and [13]; see also para [37]). She held that the objective of equality that the Act seeks to uphold would be undermined by holding that non-compliance with section 7(6) results in nullity of the subsequent customary marriage (paras [20] and [21]; see also para [37]). She consequently concluded that a further customary marriage a husband concludes after the coming into operation of the Act is valid regardless of whether or not section 7(6) is complied with (paras [23]–[24]; see also para [38]). She dismissed the application to have the second customary marriage declared void and ordered the Minister to register the first marriage alongside the second (para [28]).

In community of property

Booysen and Others v Booysen and Others 2012 (2) SA 38 (GSJ) primarily deals with the law of succession. For purposes of

family law, it should be noted that the court held, quite correctly, that the surviving spouse in a marriage in community of property does not have the power to sell immovable property of the joint estate that existed between him or her and his or her deceased spouse while the marriage lasted; only the executor of the estate has the power to do so (paras [11]–[12] and [15]).

Strydom v Engen Petroleum Ltd ([2012] ZASCA 187; 30 November 2012 (unreported) available online at http://www.saflii.org/za/cases/ZASCA/2012/187.html; reported in 2013 as *Strydom v Engen Petroleum Ltd* 2013 (2) SA 187 (SCA)) is an appeal against an order holding a surety liable under a deed of suretyship he had signed. At the time when the deed was executed, the appellant (Mr Strydom) was a director of a company (Soutpansberg) that distributed petroleum products for Engen. Under the suretyship, Mr Strydom bound himself as surety and co-principal debtor with Soutpansberg for the payment of all moneys Soutpansberg might owe to Engen. Soutpansberg was subsequently wound up. Engen thereupon sought an order for payment of Soutpansberg's debts against Mr Strydom on the ground of the suretyship agreement. Mr Strydom opposed the claim on the ground that the suretyship was invalid because he was married in community of property and had not obtained his wife's consent to the suretyship when he executed the deed, as is required by section 15(2)*(h)* of the Matrimonial Property Act. The trial court dismissed this argument as it found that Mr Strydom had signed the suretyship in the ordinary course of his business, with the result that the juristic act fell within the ambit of section 15(6) of the Act and was valid. (Section 15(6) provides that '[t]he provisions of paragraphs *(b)*, *(c)*, *(f)*, *(g)* and *(h)* of subsection (2) do not apply where an act contemplated in those paragraphs is performed by a spouse in the ordinary course of his profession, trade or business'.)

On appeal, the majority of the Supreme Court of Appeal (Wallis and Tshiqi JJA and Swain and Saldulker AJJA) agreed with the trial court's finding. Referring to its earlier decision in *Amalgamated Banks of South Africa Bpk v De Goede en 'n Ander* 1997 (4) SA 66 (A), it held that the key issue in determining whether a person has executed a deed of suretyship in the ordinary course of his or her business is 'whether the surety's involvement in that business is his or her business, and whether the execution of the suretyship was in the ordinary course of the surety's business, not the business of the company, close corporation, partnership or

trust' (para [10]; see also *Amalgamated Banks of South Africa Bpk v De Goede en 'n Ander* above 77A–B). In this regard the court stated that if the surety is 'a mere salaried employee, having no commercial interest in the business' success or failure', it could be that he or she did not execute the suretyship in the ordinary course of his or her business (para [10]). However, someone who holds a number of non-executive directorships that are the principal source of his or her income 'may well when executing a deed of suretyship for one of those companies be acting in the ordinary course of [his or her] business' (ibid). According to the majority, the abovementioned examples illustrate that the issue of whether a deed of suretyship was executed in the ordinary course of a person's business is a question of fact (para [11]). The majority pointed out that this was also the manner in which it had approached the matter in *De Goede* (ibid). The majority further referred to the unreported decision in *Investec Bank Ltd and Another v Naidoo and Others* (DCLD case 9640/98 unreported), in which Hurt J had held that the question of whether somebody had executed a suretyship in the ordinary course of his or her business must be judged objectively with reference to what is expected of a businessperson (para [12]).

The majority then considered the issue of who bears the onus of proving that a particular juristic act occurred in the ordinary course of a person's business. It pointed out that section 15(6) cannot be viewed in isolation of section 15(2), and that section 15(2) operates only if the juristic act in question does not fall within the ambit of section 15(6). Consequently, the consent requirement in section 15(2) applies only if section 15(6) does not apply. Therefore, a person who relies on section 15(2) must prove that this particular section (s 15(2)) applies. In order to do so, he or she must prove not only that he or she was married in community of property when the juristic act occurred and that his or her spouse did not consent to it, but also that section 15(6) does not apply. Therefore, in substance, section 15(6) is a proviso to section 15(2) (paras [13]–[14]). In the present case, Mr Strydom consequently bore the onus of proving that he was entitled to the protection offered by section 15(2)*(h)*. For that reason, he had to prove that he was married in community of property; that his wife had not consented to the suretyship; and that the suretyship was not executed in the ordinary course of his business (para [16]). On the facts, the majority concluded that Mr Strydom had failed to discharge this onus. It held that the

suretyship was indeed executed in the ordinary course of Mr Strydom's business, inter alia, because the marketing functions he fulfilled were integral to Soutpansberg's operations; he had a debit loan account with Soutpansberg; he signed directors' resolutions; and he was present at meetings between Soutpansberg and Engen (paras [16]–[19]). The majority accordingly dismissed the appeal (para [26]).

In a dissenting judgment, Heher JA held that Mrs Strydom should have been joined in the proceedings as she had a financial, direct and substantial interest in the relief claimed by Engen (paras [49]–[50]). As joinder is a procedural matter, this issue is not discussed in the present chapter. Suffice to say that the majority disagreed with Heher JA's view (paras [23]–[25]).

For purposes of family law, Heher JA's *obiter dictum* on onus of proof is of greater interest — as will become clear below. He stated that the onus of proving that the suretyship was executed in the ordinary course of Mr Strydom's business rested on Engen, because it had to prove that it had a legally enforceable deed of suretyship (para [34]). On the facts, Heher JA doubted whether Engen had discharged this onus (paras [35]–[41]). The majority dismissed Heher JA's *obiter dictum* as well. It held that a person who relies on a deed of suretyship need only prove that the surety had full legal capacity in accordance with section 6 of the General Law Amendment Act 50 of 1956. In the view of the majority, such proof does not involve proving that the surety was not married in community of property; or, if he or she was, that his or her spouse had consented to the execution of the deed, or that consent was unnecessary because the deed was executed in the ordinary course of the surety's profession, trade or business (para [22]).

The judgments in *Strydom* give rise to two comments. First, the reference by the majority of the court to section 6 of the General Law Amendment Act as authority for the proposition that the surety must have full legal capacity is somewhat puzzling, since this section requires only that the deed of suretyship be contained in a written document signed by or on behalf of the surety; it does not expressly refer to capacity (see also the *locus classicus* on section 6, *Sapirstein and Others v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A) at 12B–D, which does not indicate that capacity is covered by the section). Perhaps the majority considered the requirement of capacity to be implicit because suretyship is based on a contract, and capacity to act is

required for the validity of any contract. Be that as it may, the statement by the majority relating to full legal capacity implies that the majority accepts that a person who is married in community of property has 'full legal capacity'. One might ask whether this view is correct, as a spouse who is married in community of property must obtain the consent of his or her spouse for certain transactions. Does the consent requirement not mean that the capacity to act of spouses who are married in community of property is limited? The answer is 'no'. Spousal consent is different in nature from the consent that is required in the case of, for example, the limited capacity of a minor. In the latter case, the starting point is that the minor cannot enter into legal transactions without consent because he or she needs to be protected from his or her own immaturity of judgment (*Edelstein v Edelstein NO* 1952 (3) SA 1 (A)). In contrast, in the case of spouses married in community of property, the starting point is that the spouses can enter into legal transactions, although the consent requirement applies to certain juristic acts (ss 14 and 15(1) of the Matrimonial Property Act). Further, in the case of spouses married in community of property, the object of the consent requirement is not to protect the person who is entering into the juristic act (as is the case in respect of a minor), but to protect the other spouse. Any doubt in this regard is removed by the wording of section 14 of the Matrimonial Property Act, which states that 'a wife in a marriage in community of property has the same powers with regard to the disposal of the assets of the joint estate, the contracting of debts which lie against the joint estate and the management of the joint estate as *those which a husband in such a marriage had immediately before the commencement of this Act*' (emphasis added). Before the commencement of the Act, such husband had full capacity to act. Consequently, both spouses now have full capacity to act.

The second comment relates to the view of the court on the onus of proof. The view of Heher JA in this regard would have afforded greater protection to non-consenting spouses, because the burden of proof on the party seeking to enforce the deed of suretyship would have been heavier. The view of the majority favours the latter party who, in this case and so many others, was a large business entity. One wonders whether the *obiter* view of Heher JA as regards onus, would not have struck a better balance between commercial interests and the protection of non-consenting spouses.

Right to Family Life

Hattingh and Others v Juta 2012 (5) SA 237 (SCA) deals with the right to family life of an occupier under the Extension of Security of Tenure Act 62 of 1997. For purposes of family law, the statements by the Supreme Court of Appeal on the right to family life should be mentioned briefly. Section 6(2)*(d)* of the Extension of Security of Tenure Act provides that an occupier shall have the right to family life in accordance with the culture of that family. The Supreme Court of Appeal held, quite correctly, that the Constitution must be used as the backdrop for interpreting legislation (para [17]). It pointed out that even though the Constitution does not expressly protect the right to family life, the Constitutional Court has ruled that the right to dignity encompasses and protects the right to family life (*Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC); see *Hattingh* paras [15]–[17]). It further pointed out that the Constitutional Court has held that a person's constitutional right to culture is not a matter of individual practice, but of association and practices pursued by a number of persons as part of a community (*MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC), cited at paras [18]–[19] of *Hattingh*; see also para [20]). Thus, 'family life in accordance with the culture of that family', as envisaged by the Extension of Security of Tenure Act, does not relate to the individual culture of the particular family, but of the family as part of a community (para [21]).