

Our reference: 7/2/1
Enquiries: P Padayachee
Email: PPadayachee@justice.gov.za
Tel.: (012) 622 6311

Dear Sir / Madam

REQUEST FOR COMMENTS: ISSUE PAPER 34 ON PROJECT 100E – REVIEW OF ASPECTS OF MATRIMONIAL PROPERTY ACT

The South African Law Reform Commission (SALRC) hereby requests your comment on the above issue paper.

The South African Law Reform Commission (SALRC) was established by the South African Law Reform Commission Act 19 of 1973. The main object of the SALRC, in terms of section 4 of the South African Law Reform Commission Act 19 of 1973, is to do research with reference to all branches of the law in order to make recommendations for the development, improvement, modernisation or reform of the law of South Africa on a continuous basis.

The Matrimonial Property Act 88 of 1984 was passed in order to address certain shortcomings in the law at the time. The Act has been in place for more than 30 years. Apart from certain ad hoc issues, which have been brought to the attention of the Commission, a number of social and legal changes since 1984 suggest that a review of the law with regard to matrimonial property is necessary to ensure that it meets current needs.

Publication of the issue paper for comment is the first step in this investigation. The main purpose of the paper is to establish the extent of the review necessary.

Comments on the issue paper will be used to inform a discussion paper. The discussion paper will contain the SALRC's preliminary findings and will be published in order to test public opinion on the preliminary findings (including draft legislation, if necessary), before a report with final recommendations is developed for submission to the Minister of Justice and Constitutional Development.

The closing date for comments is 16 November 2018. Comments may be submitted to Private Bag X668, Pretoria, 0001 or to **Ms P Padayachee** (the researcher assigned to the investigation) via email at PPadayachee@justice.gov.za

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Promotion of Access to Information Act 2 of 2000.

Issue Paper 34 is available on the Internet at <http://www.justice.gov.za/salrc/ipapers.htm>. A hard copy may be requested from Mr. Jacob Kabini at Jakabini@justice.gov.za or (012) 622 6346.

For enquiries contact the assigned researcher, Ms. P Padayachee via e-mail at PPadayachee@justice.gov.za or (012) 622-6311



MR TN MATIBE

SECRETARY: S A LAW REFORM COMMISSION

Date:

28/8/18



ISSUE PAPER: 34

PROJECT 100E

REVIEW OF ASPECTS OF MATRIMONIAL PROPERTY LAW

30 JUNE 2018

CLOSING DATE FOR COMMENTS:

15 NOVEMBER 2018

ISBN: 978-0-621-46810-6

© Copyright South African Law Reform Commission

First published: 28 August 2018

SOUTH AFRICAN LAW REFORM COMMISSION

The South African Law Reform Commission (SALRC) was established by the South African Law Reform Commission Act, 1973 (Act 19 of 1973). The terms of office of the following Commission members appointed by the President, who were in office at the time of approval of this paper, namely:

Judge J Kollapen (Chairperson)

Prof M Carnelley

Prof V Jaichand

Mr I Lawrence

Prof A Oguttu

Adv M Sello

Judge N Siwendu

have expired.

The new Commissioners are in the process of being appointed.

The Secretary of the SALRC is Mr TN Matibe. The Commission's offices are at Spooral Park Building, 2007 Lenchen Ave South, Centurion, Gauteng.

Correspondence should be addressed to:

The Secretary, South African Law Reform Commission

Private Bag X668, Pretoria 0001

Telephone: (012) 622 6311

E-mail: PPadayachee@justice.gov.za

Website: <http://salawreform.justice.gov.za>

The members of the Advisory Committee for this investigation are –

Judge D van Zyl (Chairperson)

Adv M Sello (former designated Commission member and project leader)

Prof E Bonthuys

Prof F Bosman

The researcher assigned to the investigation was Mrs AM Havenga.

The current researcher assigned to the investigation is Ms PK Padayachee.

REQUEST FOR COMMENTS

The main object of the South African Law Reform Commission (SALRC) in terms of section 4 of its establishing legislation, the South African Law Reform Commission Act 19 of 1973, is to do research with reference to all branches of the law of the Republic, and to study and investigate all such branches of the law in order to make recommendations for the development, improvement, modernisation or reform thereof.

Pursuant to a request from the Gender Commission to the SALRC to conduct an investigation into a matrimonial property related issue, a wide review of aspects of the law related to matrimonial property was included in the SALRC's research programme.

This issue paper is the first document published during the course of this investigation. The paper aims to announce the investigation, initiate and stimulate debate, seek proposals for reform, and will serve as a basis for further deliberation by the Commission. Since this issue paper is the first step in the investigation, the paper does not contain clear recommendations for law reform.

The issue paper is presented in the form of a questionnaire. The comment of any person on any issue contained in the issue paper, or in respect of any related issue that may need to be included in the debate, is sought. Such comment is of vital importance to the Commission, as it will assist in providing direction with regard to the scope and focus of the investigation.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Promotion of Access to Information Act 2 of 2000.

Respondents are requested to submit written comment, representations or requests to the Commission **by 16 November 2018**. Any request for information and administrative enquiries should be addressed to the Secretary of the Commission or the allocated researcher, Ms PK Padayachee. This document is available on the Internet at: <http://salawreform.justice.gov.za>

CONTENTS

BACKGROUND	1
PURPOSE OF THIS ISSUE PAPER / QUESTIONNAIRE	2
MATTERS NOT COVERED IN THIS PAPER	3
OUTLINE OF CURRENT LEGAL POSITION	5
QUESTIONNAIRE	13
A MATRIMONIAL PROPERTY AGREEMENTS AND COMMUNITY OF PROPERTY	
1 Exclusion of accrual sharing in a marriage out of community of property	13
2 Change of matrimonial property system after marriage	15
3 Suitability of the current position with regard to customary marriages	17
4 Balancing party autonomy and state interference in determining the consequences of intimate relationships	18
B MATRIMONIAL PROPERTY ISSUES ON DIVORCE	
5 Definition of assets that qualify as "property" upon divorce	19
6 Settlement agreements	21
7 Judicial discretion to vary the matrimonial property consequences as agreed on by the parties on divorce	23
8 Pension sharing upon divorce	28
9 Dissipation of marital assets	31
10 Substantive gender financial equality in the division of matrimonial property	34
11 Selected procedural aspects	35
12 Private international law and the patrimonial consequences of divorce	39
13 Possible problems related to "joint" bank accounts	42
C OTHER MATTERS	
14 Possible approaches to reform	43
15 Availability of statistics relevant to the investigation	47
16 Additional issues	48
LIST OF SOURCES	49
LIST OF QUESTIONS FOR COMMENT	

BACKGROUND

The South African Law Reform Commission (SALRC) is currently involved in an investigation reviewing aspects of matrimonial property law.

The investigation was initiated when the Commission for Gender Equality raised concerns about possible discrimination in the banking industry as a result of married couples not being allowed to open joint accounts with both partners enjoying equal status as account holders. The Commission at the same time took cognisance of a number of concerns raised and suggestions for reform of the Matrimonial Property Act 88 of 1984 (the Matrimonial Property Act), being made in public by the attorney's profession. With a view to ensuring that the scope of the investigation is sufficiently broad to include a range of problems, a broad investigation on review of aspects of matrimonial property law was included in the Commission's programme.

The Matrimonial Property Act was passed in order to deal with shortcomings in the matrimonial property law at the time. The Act came into operation on 1 November 1984 and has been in place for more than 30 years. Apart from certain ad hoc issues which have in particular been brought to the attention of the SALRC, a number of social and legal changes since 1984 suggest that a review of the law with regard to matrimonial property is necessary to ensure that it meets current needs. Judicial interpretation of the Act, the adoption of the 1996 Constitution, the recognition of customary marriages¹ and of civil unions² all suggest that a reconsideration of the Matrimonial Property Act is necessary.

The underlying aim of the investigation is to review the current law with regard to matrimonial property for greater legislative fairness and justice governing interpersonal relationships between spouses. The wide ambit of the investigation as approved by the Minister of Justice and Constitutional Development will ensure that the Commission is not limited in its review of current law.

¹ Refer to the Recognition of Customary Marriages Act 120 of 1998.

² Refer to the Civil Unions Act 17 of 2006.

PURPOSE OF THIS ISSUE PAPER / QUESTIONNAIRE

The main purpose of the Issue Paper is to establish the extent of this review. Clarity is needed on whether a complete review with the aim of a full-scale overhaul of the current matrimonial regime and its patrimonial consequences on divorce is necessary, or whether particular aspects could be addressed to bring relief. Ad hoc as well as wider issues are thus covered in the questions posed. The Commission anticipates that this exploratory consultation with the public and experts will assist in guiding the ambit of the investigation.

Following an evaluation of the responses on this Paper, the Commission will publish a discussion paper, setting out preliminary recommendations, and if necessary draft legislation. The discussion paper will once again be distributed for comment. On the strength of these responses a report will be prepared with the Commission's final recommendations. The report (including draft legislation, if necessary) will be submitted to the Minister of Justice and Constitutional Development for his consideration.

The Issue Paper is presented in the form of a questionnaire, covering issues relating to the current matrimonial property systems in South Africa, as well as the financial consequences of divorce. The nature of the Paper does not allow for in depth discussion on the issues raised at this stage. Comprehensive research results will be presented in the discussion paper following on this issue paper.

The questionnaire is aimed not only at experts and practitioners, but also at the general public. The background information and questions have been drafted to facilitate responses by different stakeholders and the Commission specifically invites members of the public who have experienced the consequences of divorce, to respond to the call for comments. Respondents are requested to respond as comprehensively as possible and are invited to raise additional issues, which are not covered in the questions, should they wish to do so.

MATTERS NOT COVERED IN THIS PAPER

- **Other divorce related aspects**

The current investigation deals with the narrow issue of marital property and its regulation before, during and after marriage (i.e. on termination of marriage by divorce). The investigation does not address related issues of divorce, such as the provision for care of and contact with children, and maintenance. These two issues are currently dealt with under separate investigations by the SALRC under its broader project on Family Law (Project 100).

The SALRC's review of the Maintenance Act 99 of 1998 (the Maintenance Act) investigates certain problematic issues in the Act at the request of the Minister of Justice and Constitutional Development. It is however envisaged that the investigation will also address possible outstanding aspects from an SALRC investigation which preceded the current Act and in respect of which the Commission reported in 1998.³ An Issue Paper was published in September 2014 on this matter. The closing date for comments was end November 2014. A Discussion Paper with preliminary recommendations is currently being developed for public comment.

The Commission's investigation into Family Dispute Resolution: Care of and Contact with Children, deals with an integrated approach of family disputes with specific reference to disputes relating to the care of and contact with children after the relationship breakdown of the parents. The aim of the investigation is to develop recommendations for the further development of a family justice system orientated to the needs of children and families with a view to early resolution of disputes and minimising family conflict. An Issue Paper on this matter was published in February 2016.⁴ A discussion paper on mandatory mediation is currently being prepared.

Although the three issues (matrimonial property; maintenance; and care of and contact with children), are reviewed under different investigations, the interrelatedness between property

³ SALRC Issue Paper 28 (Project 100) "Review of the Maintenance Act 99 of 1998" 108.

⁴ SALRC Issue Paper 31 (Project 100) "Family dispute resolution: Care of and contact with children".

division on divorce, care of and contact with children, and post-divorce maintenance are acknowledged and will be taken into account in the reform process.

- **The position with regard to domestic partnerships**

The Questionnaire does not address the current lack of legal recognition and regulation of domestic partnerships (i.e. living together in an intimate relationship without marrying), and its proprietary consequences.

The SALRC in its 2006 Report on Domestic Partnerships⁵ directed its recommendations at the need to regulate permanent life partnerships of heterosexual as well as same-sex couples. The recommendations were informed by the Constitutional Court judgments in *Volks NO v Robinson* and *Minister of Home Affairs v Fourie*, respectively.⁶ The subsequently enacted Civil Union Act 17 of 2006 (the Civil Union Act) provides for same-sex and opposite-sex couples to formalise their relationships by entering into either a “marriage” or a “civil partnership”, both of which enjoy the same legal recognition as, and give rise to the same legal consequences of, a civil marriage under the Marriage Act 25 of 1961 (the Marriage Act).

Couples who live together (whether of the same or opposite sex), who do not choose to register a “civil partnership” or a “marriage”, however still enjoy limited protection under the law. A large number of South Africans live together in intimate relationships without marrying. These relationships have never been fully legally recognised, although there is a mistaken belief that they are “common law” marriages. There is, however, no such thing as a “common-law marriage” in South Africa. This means that a large category of people cannot access the law and the courts when their relationships dissolve. They are denied fair access to assets accumulated during the relationship, maintenance and other benefits that people who are married are accorded by the law.⁷

Provision for the legal recognition of such partnerships (initially included in the Civil Union Bill), was removed by the Home Affairs Portfolio Committee in November 2006 (before the

⁵ SALRC (Project 118) Report on Domestic Partnerships March 2006.

⁶ 2005(5) BCLR 446 (CC); and 2006(1) SA 524 (CC).

⁷ Heaton SA *Family Law* 243-244; Smith in *The Law of Divorce* 389 – 394; Barratt *Stell LR* 2015 110.

enactment of the Civil Union Act), in order for the matter to be dealt with in a separate Bill.⁸ A proposed Draft Domestic Partnerships Bill was published by the Department of Home Affairs for public comment in 2008. The Draft Bill is under consideration by that Department and has as yet not been introduced into Parliament.⁹

The lack of a statutory remedy to claim a share of partnership property outside of valid marriages, is a problem with significant gendered consequences, potentially leading to the social and economic vulnerability of women (and often children) when intimate relationships end.¹⁰ Although the law has been developed by the courts to provide life partners with the possibility of entering into a universal partnership, disputes about the existence and the terms of universal partnerships in the context of cohabitation are common; and the need for a statutory framework to bring clarity with regard to the position of cohabitants has been increasingly emphasised by academic commentators.¹¹

OUTLINE OF CURRENT LEGAL POSITION

- **Current matrimonial property regimes in South Africa**

The Matrimonial Property Act regulates the matrimonial property system in South Africa. It moved away from administration of the joint estate by the husband to a system of concurrent administration. At present in South African law, there are practically two categories of matrimonial regime: Marriages in community of property; and marriages with an ante-nuptial contract. The chosen regime governs the position during subsistence of the marriage and determines how the spouses' property will be divided upon dissolution of the marriage.¹²

⁸ SALRC Report on Domestic Partnerships xi-xiii; Tshwaranang Factsheet May 2016; Didishe *De Rebus* 2012 26.

⁹ Government Notice 36 in GG No 30663 of 14 January 2008; SALRC Annual Report 2013/14 111.

¹⁰ Bonthuys *SALJ* 2017 263.

¹¹ Bonthuys *SALJ* 2015 98 – 99; Barrett *Stell LR* 2015 112, 130 – 131; Rule *Stell LR* 2016 632 – 633; Bonthuys *SALJ* 2017 264, 273;

¹² See in general on the current different marriage regimes Heaton in *The Law of Divorce* 59 – 67; Heaton *SA Family Law* par 6.1 – 6.5.6, and 7.1 – 7.5.4; Sonnekus in *Family Law* par B1, B7 – B14 and B18 – B20.

Marriages are *in community of property* unless an ante-nuptial contract has been entered into which excludes community of property (i.e. it is the default position).¹³ An ante-nuptial contract may contain anything that is not illegal, immoral or *contra bonos mores*. The contract must be entered into before marriage, must be notarially executed and must be registered in the deeds registry.¹⁴ An informal ante-nuptial contract (i.e. a contract that is not registered), is valid only between the parties (i.e. it is not valid as against third parties). Thus, the marriage is considered to be in community of property in so far as the spouses' debtors and creditors are concerned.¹⁵

The primary purpose of an ante-nuptial contract is to deviate from (some of) the common law or statutory rules regarding the matrimonial property consequences of marriage. Apart from this, ante-nuptial contracts often include marriage settlements (that is, donations between spouses). Sometimes the spouses create a trust, enter into an agreement about succession, or govern their right of recourse in respect of expenses for household necessities in their ante-nuptial contract.¹⁶

With respect to marriages *out of community of property*, there are broadly two possibilities:¹⁷

- 1 *Marriages subject to accrual* (all marriages entered into after 1984 in terms of an ante-nuptial contract are automatically subject to the accrual system unless the accrual system has been explicitly excluded). This is a system of deferred sharing of gains, with the relationship during marriage being the same as with a marriage out of community of property. Operation of the accrual system takes effect only on dissolution of the marriage. Each party's estate is given a net commencement value (which can be inserted in the ante-nuptial contract). On dissolution, the net value is determined again. Accrual is the amount by which the value at dissolution exceeds the commencement value (which is adjusted according to the consumer price index). The spouse whose estate shows the smaller accrual has a claim (for half of the difference between the accruals of the

¹³ Heaton in *SA Family Law* par 6.2.

¹⁴ Sec 86 of the Deeds Registries Act 47 of 1937. See also Heaton in *SA Family Law* par 7.1.2.

¹⁵ Heaton in *SA Family Law* and the sources quoted by the author par 7.1.2.

¹⁶ *Ibid* 7.1.1.

¹⁷ Before 1984 marriages were either in or out of community of property – the option of accrual did not exist. The Matrimonial Property Act also abolished the marital power.

respective estates) against the spouse whose estate shows the larger accrual.¹⁸ This system does not compel sharing of property acquired prior to marriage; and certain items are excluded from the accrual (such as an inheritance received from a third party). On divorce, the court may order forfeiture in whole or in part of the right of a party to share in the accrual of the other if failure to make the order would unduly benefit the one party.¹⁹

- 2 *Marriages where the accrual system has been expressly excluded* (i.e. marriages out of community of property in terms of an ante-nuptial contract). This system results in a complete separation of property and the capacity and proprietary rights of spouses married under this system remain unaffected by the marriage. The parties' assets remain separate and they do not share in each other's accrual on the dissolution of the marriage. Parties are not liable for each other's debts, except for the capacity of both to bind each other in contract for the cost of household necessities. The reciprocal duty of support applies between them. Parties may sue each other in contract or delict as if they were unmarried. A departure from this complete separation of property is the judicial discretion, under certain circumstances, to redistribute the property of the spouses on divorce in terms of section 7(3) of the Divorce Act. The purpose of section 7(3) is to mitigate the harshness of complete separation of property. This is a controversial provision as it interferes with contractual freedom. On the other hand, however, it is regarded as a necessary tool to avoid unfairness and the limited extent of this discretion has been criticised.²⁰

The more recent developments with regard to the recognition of universal partnerships (particularly with regard to the recognition of tacit agreements, and non-commercial contributions in the form of homemaking and childcare) raise the question whether there could be a universal partnership (the essence of which is profit sharing) in a marriage out of community of property.²¹ Such claims are frequently encountered in divorce litigation where parties were married out of community of property with the exclusion of the accrual system in an

¹⁸ Example: Larger estate = R100 000; smaller estate = R70 000; difference = R30 000. Half of R30 000 = R15 000.

¹⁹ Sec 9 of the Divorce Act. See also the discussion on forfeiture of benefits under par 7 below.

²⁰ See the discussion under par 7 below on redistribution of property.

²¹ Bonthuys *SALJ* 2015 76 et seq, Barratt *SALJ* 2013 688 et seq, De Klerk *De Rebus* 2016 27-28, and the judgments referred to by the authors.

attempt to avoid the consequences of their no-sharing ante-nuptial contracts. In these cases, the parties have been left without a formal statutory remedy for judicial redistribution of matrimonial property upon divorce.²²

The High Court may authorise the postnuptial execution of a contract having the effect of an ante-nuptial contract under certain circumstances (including that the parties must show good reason as to why they have failed to execute the contract before they were married).²³ Parties who jointly wish to change the terms of their ante-nuptial contract can do so by joint application to the High Court in terms of the Matrimonial Property Act.²⁴

Customary marriages

The Recognition of Customary Marriages Act 120 of 1998 (the Customary Marriages Act) came into force in 2000. All "customary marriages"²⁵ entered into after 2000 are a hybrid of concepts of civil marriages²⁶ and customary marriages.²⁷ By extending certain provisions of the Divorce Act and of the Matrimonial Property Act to customary marriages, the Customary Marriages Act has given the courts the same powers to deal with matrimonial property that they have in respect of civil marriages.²⁸

The Customary Marriages Act differentiates between monogamous and polygamous marriages, and prior to the Constitutional Court's decision in 2009 in the *Gumede* case, the patrimonial

²² De Klerk *De Rebus* 2016 27. The SALRC's review of section 7(3) as discussed in its 1991 Report on this matter (*SALRC Report on the Review of the Law of Divorce*) did not extend judicial discretion in marriages entered into after the cut-off dates as this would introduce legal uncertainty about the outcome of divorce, and would 'interfere with the contractual preferences for total separation of property expressed by the parties at the time of the marriage and would create legal uncertainty (Heaton *SA Family Law* 136).

²³ Sec 88 of the Deeds Registries Act 47 of 1937.

²⁴ Sec 21 of the Act. Requiring these formalities may be very unfair towards spouses who agree to change their property system, but who do not apply to court to change the property regime (*S B v R B* Unreported High Court Case No 13622/2011 Eastern Local Circuit Division, George).

²⁵ A marriage that is "concluded in accordance with customary law" (sec 1 of the Customary Marriages Act).

²⁶ Meaning marriages entered into in accordance with the common law and the Marriage Act 25 of 1961.

²⁷ Himonga in *The Law of Divorce* 232.

²⁸ *Ibid* 245.

consequences of customary marriages also differed depending on whether the marriage was concluded before or after the coming into operation of the Act.²⁹

Currently, (i.e. subsequent to the decision in the *Gumede* case),³⁰ the matrimonial property system in monogamous customary marriages (entered into before or after the coming into operation of the Customary Marriages Act), is determined by the same rules that apply to civil marriages: parties are automatically married in community of property unless they enter into an ante-nuptial contract in which case the contract then determines their matrimonial property system.³¹ This includes that spouses who enter into a marriage out of community of property may subject their matrimonial property system to the accrual system.³² Thus, the marriage is out of community of property subject to the accrual system by default if the parties do not exclude the accrual system, and out of community of property without the accrual system if they exclude the system in their ante-nuptial contract.³³

The *Gumede* decision did not change the position with regard to polygamous customary marriages entered into before the coming into operation of the Customary Marriages Act. In a subsequent case, the Limpopo High Court in 2016 held that section 7(1) of the Act is also unconstitutional with regard to its application to polygamous marriages entered into before the coming into operation of the Act.³⁴ The Court ordered that for the interim (pending intervention by the legislature), wives in old polygamous customary marriages should enjoy equal rights in

²⁹ *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC). See Heaton in *SA Family Law* par 17.4; Himonga in *The Law of Divorce* 246 – 247.

³⁰ In terms of sec 7(1) of the Customary Marriages Act all customary marriages entered into before the commencement of the Act is governed by customary law (in terms of which, broadly speaking, the husband owned and controlled all family property and the wife had no claim to family property during the marriage and on its dissolution). In terms of sec 7(2) all monogamous customary marriages entered into after the coming into operation of the Customary Marriages Act is automatically in community of property unless the parties entered into an ante-nuptial contract (i.e. the latter type of marriages are governed by the same rules as civil marriages). In the *Gumede* case, the Constitutional Court held that depriving wives in some monogamous customary marriages of a claim to family property because of the date on which they entered into their marriage is unconstitutional (with the result that all monogamous customary marriages – and not only those entered into after coming into operation of the Act – can now be regarded as being in community of property unless an ante-nuptial contract has been entered into). The Court also declared sec 7(1) unconstitutional to the extent that it related to monogamous customary marriages (see the discussion in Heaton *SA Family Law* par 17.4.1).

³¹ Sec 7(2) of the Customary Marriages Act (in light of the *Gumede* decision referred to above). Heaton in *SA Family Law* par 17.4.2; Himonga in *The Law of Divorce* 246 et seq.

³² Himonga in *The Law of Divorce* 247 – 248.

³³ Ibid.

³⁴ *Ramuhovhi v President of the Republic of South Africa* 2016 (6) SA 210 (LT). See the discussion by Kohn *SAJHR* 2017 120 et seq.

the matrimonial property between each of them and their husband.³⁵ Therefore, these wives will have the rights to equally manage and control matrimonial property. The court in its effort to retain the customary concept of a polygamous marriage ensured that a distinction is maintained with regard to house property, family property and personal property. Since in polygamous marriages separate property comes into being, the court in its judgment ensured that only the husband and the wife of the property concerned, jointly enjoy equal rights to the benefit of the house.³⁶ The Constitutional Court recently confirmed the High Court order declaring section 7(1) of the Act inconsistent with the Constitution and invalid in that it discriminates unfairly against women in polygamous customary marriages entered into before the commencement of the Act on the bases of first gender, and second race, ethnic or social origin.³⁷

Polygamous customary marriages entered into after the coming into operation of the Customary Marriages Act are currently regulated by a contract the parties are required to conclude in terms of section 7(6) of the Act.³⁸ Section 7(7) requires the court to terminate the matrimonial property system if the existing marriage is in community of property or subject to the accrual system. The Act does not provide for the consequences of non-compliance with section 7(6), and the position in this regard is still unclear.³⁹

Civil unions

Civil unions are recognised since the enactment of the Civil Union Act 17 of 2006. The legal consequences of a civil union are identical to those of a civil marriage.⁴⁰ The effect is that the current legislation and legal principles on matrimonial property and divorce apply also to civil unions.⁴¹

³⁵ Malisheha and Radebe *De Rebus* 2017 16 – 17; and Kohn *SAJHR* 2017 133 – 134, referring to the *Ramuhovhi* decision.

³⁶ *Ibid.*

³⁷ *Ramuhovhi and Others v President of the Republic of South Africa and Others* [2017] ZACC 41.

³⁸ See the discussion by Himonga in *The Law of Divorce* 248 – 249.

³⁹ *Ibid.*

⁴⁰ Sec 13 of the Civil Union Act.

⁴¹ Glover in *Family Law* 1 – 2.

- **Consequences of divorce**

The purpose of a divorce action is to dissolve a marriage concluded in terms of the Marriage Act, the Recognition of Customary Marriages Act, or a civil union concluded in terms of the Civil Union Act.⁴²

At present divorce and its consequences are largely determined by statute (The Divorce Act and the Matrimonial Property Act).⁴³ Prior to 1979 divorce was based on the guilt principle (except for insanity which was also a ground for divorce).⁴⁴ The SALRC in 1977 recommended a change based on the view that disintegration of marriage resulted from a variety of factors and social problems and was not always due to marital misconduct. As a result, the Divorce Act of 1979 recognises only three grounds for divorce: irretrievable breakdown and mental illness, or continuous unconsciousness.⁴⁵

The legal consequences of divorce mainly impact on the division of the parties' assets, the payment of maintenance, and the interests of the children, if any. The following two factors determine the effect of divorce on the division of the spouses' assets⁴⁶ –

- the matrimonial property system applicable to their marriage; and
- whether the court orders forfeiture of benefits and/or a redistribution of the spouses' assets.⁴⁷ Although to a much lesser extent than before the Divorce Act came into operation in 1979, fault can still play a role in determining the consequences of divorce. The reason for this is because fault is taken into account in respect of forfeiture of benefits, can be taken into account in respect of redistribution of assets, and can be considered in respect of spousal maintenance.⁴⁸

⁴² See in general Kruger in *Family Law* par F53; Robinson in *The Law of Divorce* 7 et seq; Heaton in *The Law of Divorce* 57 et seq.

⁴³ Ibid.

⁴⁴ Before 1979, there were two common law grounds for divorce: adultery and malicious desertion. In 1935 the legislature added two further grounds: Incurable insanity and habitual criminality (see the Divorce Laws Amendment Act 32 of 1935).

⁴⁵ See sec 3 of the Divorce Act.

⁴⁶ Heaton *SA Family Law* 125 – 126.

⁴⁷ See also the information and questions under par 7 below.

⁴⁸ Heaton *SA Family Law* 126.

Divorces are, generally speaking, either contested (opposed) or uncontested (unopposed).⁴⁹ In an uncontested divorce, the parties usually achieve agreement on the division of their assets. The agreement (which is generally referred to as a “settlement agreement”), becomes part of the divorce order made by the court. In the case of a contested divorce, the parties may, however, also agree to settle before they go to court. In the latter case, the division of their assets is usually similarly included in a settlement agreement.

The majority of divorces are uncontested and settlement agreements therefore play an important role in regulating the patrimonial consequences of divorce. In the majority of cases the spouses themselves (within the parameters of their respective rights and duties as determined by the law) thus regulate the financial consequences of the divorce. The Divorce Act’s provisions dealing with the financial consequences of divorce are in fact formulated on the basis that it is accepted practice in South Africa that such consequences are regulated by means of an agreement between the parties. The settlement agreement can, but need not, reflect the terms of the parties’ ante-nuptial contract, or their marriage regime. Where parties do not reach an agreement on how to divide their joint estate, the court has the power to appoint a receiver or liquidator to realise and divide the assets of the joint estate on its behalf.⁵⁰ The court also has the discretion (but does not often exercise this discretion⁵¹) not to accept the parties’ settlement agreement, or to accept only parts of the agreement, if it regards the agreement or certain terms as unconscionable or contrary to public policy.⁵²

⁴⁹ Refer in general to Heaton in *SA Family Law* par 12.2; Heaton in *The Law of Divorce* 86 –90; Glover in *Family Law* par D10.

⁵⁰ Ibid.

⁵¹ See eg to the case of *Baart v Malan* 1990(2) SA 862 (E) referred to by Heaton *SAJHR* 2005 568 – 569.

⁵² Sec 7(1) of the Divorce Act. Heaton in *SA Family Law* par 12.2; Heaton in *The Law of Divorce* 124 and the sources quoted by the author. See also the information and questions under par 6 below.

QUESTIONNAIRE

MATRIMONIAL PROPERTY AGREEMENTS AND COMMUNITY OF PROPERTY

1. Exclusion of accrual sharing in a marriage out of community of property

Simply described, the concept of accrual means that parties to a marriage share equally in the growth shown by both estates between the date of the marriage and its termination by divorce or death.⁵³

One of the main aims of the reform brought about by the introduction of the concept was to allow spouses who marry out of community of property to share the growth their estates have shown during the subsistence of the marriage by their joint efforts.⁵⁴ In particular it was aimed at acknowledging the wife's contribution to the enlargement of her husband's estate (in running the home, looking after the children, and/or foregoing her own career to enable the husband to build up his own estate). Another major benefit of the accrual system is that for the duration of the marriage (apart from household necessities), each party has her or his own estate and the ability to administer this estate independently from the other; and that they do not share liabilities.⁵⁵

The Matrimonial Property Act provides parties to marriages after 1 November 1984 (the date of commencement of the Act) with the option to exclude accrual sharing in terms of an ante-nuptial contract.⁵⁶ Excluding accrual would in practice mean that a spouse has no proprietary claim for any capital payments on divorce, regardless of the duration of the marriage or the contributions made by him or her.⁵⁷ The effect of the exclusion (which could be regarded as being similar to the effect of the standard ante-nuptial contract prior to the introduction of the concept of accrual,

⁵³ Heaton in *The Law of Divorce* 63 – 66. See also in general on the accrual system Heaton in *SA Family Law* par 7.4; Sonnekus in *Family Law* par B7 – B17A.

⁵⁴ SALRC *Report on Matrimonial Property Law* 1982 par 12.1.4.

⁵⁵ *Ibid* par 12.1.4 – 12.1.4.6.

⁵⁶ Sec 2 of the Act.

⁵⁷ Van Niekerk *Patrimonial Litigation* par 2.4.

and of section 7(3) of the Divorce Act which allows for a judicial redistribution of assets on divorce) could be the impoverishment of the party whose estate did not significantly grow – usually that of the wife.⁵⁸ The choice of the accrual system may be a hugely advantageous one for many couples. Gross unfairness could however be the result in situations where clauses are inserted into the contract which effectively negates the possibility of any share in the growth of the wealthier spouse's estate or where the accrual system is excluded in its entirety.⁵⁹ In this regard the question arises whether parties should be allowed to enter into ante-nuptial contracts without having received independent legal advice.⁶⁰

It has been submitted that if the standard ante-nuptial contract concluded prior to 1 November 1984 was unfair (in that it failed to give due recognition to the contributions made by the one party), the Matrimonial Property Act is defective and unfair in affording parties the right to exclude accrual sharing in an ante-nuptial contract (although its exclusion may be understandable or justified in some cases – for example second or subsequent marriages between elderly couples or a marriage where both parties are wealthy).⁶¹ It is further submitted that the exclusion of accrual sharing is contrary to the partnership spirit of marriage, that it is undesirable that commercial bargaining should precede the marriage, and that for these reasons the right to exclude it should be prohibited. In accordance with this line of argument, ante-nuptial contracts which include accrual sharing but which in effect will negate such sharing having regard to the nature of the assets to be excluded, should likewise be prohibited.⁶²

Questions

1. Is the concept of accrual sharing as justified today as it was in 1984?
- 1.1. If not, state what the current concerns are.
2. Is the current system of accrual sharing adequate regarding future growth of assets as provided for in S 4(b)(ii)?
- 2.1. If not adequate, indicate what the deficiencies are and how same can be addressed.

⁵⁸ Costa *De Rebus* 2003 23; see also the discussion by Barratt SALJ 2013 704.

⁵⁹ Lowndes 20.

⁶⁰ See e g *Barnard v Barnard* 2003(3) SA 741 (C) and reference thereto by Lowndes 20; see also Barrett in SALJ 2013 696.

⁶¹ Costa *De Rebus* 2003 23.

⁶² Ibid.

3. Is the criticism levelled at the right to exclude accrual sharing valid in the context of current socio-economic circumstances and the growing economic empowerment of women in South Africa?
4. Should parties be allowed to effect complete separation of estates, and if so, should there be safeguards provided for by the legislature (for instance, requiring independent legal advice before entering into such a contract, or a general judicial discretion to deviate from the parties' agreement)?⁶³

2. Change of matrimonial property system after marriage

The Matrimonial Property Act, in section 21, allows married parties (whether married in or out of community of property, and regardless of whether the marriage was entered into before or after 1 November 1984), to jointly apply to the High Court for permission to change the matrimonial property system which applies to their marriage.⁶⁴ The court must be satisfied that there are sound reasons for the proposed change; that sufficient notice of the proposed change has been given to all the creditors of the spouses; and that no other person will be prejudiced by the proposed change. With regard to protection of third parties, the absence of prejudice to other persons must be explained in the application for change and the rights of pre-existing creditors must be expressly reserved in the proposed contract. If satisfied, the court may order the parties to enter into a notarial contract by which their future matrimonial property system is regulated on such conditions as the court may think fit.⁶⁵ It is currently not clear whether the court can authorise an alternation of the matrimonial property system with retroactive effect.⁶⁶

⁶³ Refer also to the information and questions under Item 7 (Judicial discretion to vary the matrimonial consequences as agreed on by the parties on divorce), below.

⁶⁴ Sonnekus in *Family Law* par B4. See also Heaton in *The Law of Divorce* 67 – 69.

⁶⁵ Ibid.

⁶⁶ Ibid.

Section 21 also applies to spouses in a customary marriage entered into after the commencement of the Customary Marriages Act in which the husband does not have more than one spouse.⁶⁷

Those who believe that contractual freedom is important to provide parties with autonomy with regard to the regulation of their personal lives, support a view that parties should have the opportunity to, during the course of the marriage, more freely be able to amend their marriage agreement. It is submitted that parties, at the time when concluding an ante-nuptial contract, could not possibly foresee the impact of all factors (such as amongst others, children, a change in careers, or changing financial circumstances) on the marriage.⁶⁸ It has been suggested that the strict reliance on the intervention by the court (as provided for in the Matrimonial Property Act's section 21) should make way for less formal ways to effect change. It has been suggested that the digital registration of a notarially executed amendment to the initial agreement could be a solution.⁶⁹ Such a procedure would also deal with the need to protect the rights of third parties (as the digital registration of the amendment would provide for immediate publicity of the change effected).⁷⁰ In opposition to this, it could however be argued that digital registration would not be accessible to the majority of the South African population.

The question also arises (as in the case of the complete separation of estates discussed under the previous heading), whether there should be protective mechanisms to ensure that one of the parties does not pressure the other into a change of the matrimonial regime.⁷¹ The current protective measures focus on their creditors, but nothing requires the parties to have independent legal advice about the consequences of such a change.

Questions

4. Is there a need to widen the possibilities for altering ante-nuptial contracts or for post-nuptial agreements, and if so why in your opinion is this necessary? How could change

⁶⁷ Heaton *SA Family Law* 214 – 215.

⁶⁸ See the discussion by Bonthuys *SALJ* 2004 899; Heaton *SAJHR* 2005 554.

⁶⁹ Sonnekus *TSAR* 2010 217 – 218.

⁷⁰ *Ibid.*

⁷¹ Refer to the remarks with regard to the exclusion of accrual sharing under the previous heading (par 1)

of contract be effected, for instance, without the necessity for court intervention but ensuring sufficient protection of the rights of third parties?

5. Do the current provisions emphasise the interests of third parties (creditors in effect), over the interests of the spouses and if so, is this justified? Should the interests of third parties be balanced against the interests of spouses?
6. If post-nuptial agreements should be allowed, on what conditions should this be possible? Should proper safeguards be built into the process to protect the financially weaker party (for instance, by requiring independent legal advice)?
7. Are the existing measures to protect the rights of third parties in the case of a change of matrimonial property regime adequate? Are any additional measures needed to protect third parties from, for instance, an attempt by spouses to engineer their property regime to avoid the repayment of debts?

3. Suitability of the current position with regard to customary marriages

Refer to the information on customary marriages on p 8 – 10 of this issue paper, under the outline of the current legal position.

Questions

8. What are the most pressing needs of women in monogamous and polygynous customary marriages?
9. Is the way in which the proprietary consequences of customary marriages are currently regulated as reflected in the Customary Marriages Act⁷² serving the needs of the relevant communities, and is it in fact protecting the rights of, specifically, rural women? If not, in what way is it out of step with such needs, and what could be done to address this?

⁷² Refer to the discussion under the current legal position on p 8 - 10 above.

10. What should the proprietary consequences of a customary marriage be if section 7 of the Customary Marriages Act is not complied with (i.e. should there be a default position for polygamous marriages which will operate unless it is excluded by way of contract?)

4. Balancing party autonomy and state interference in determining the consequences of intimate relationships

In South Africa, the economic consequences of an intimate relationship are increasingly being regulated by contract. Parties to civil and customary marriages, and to civil unions, are allowed to conclude ante-nuptial contracts to regulate the variable consequences of their marriages. In practice, the ante-nuptial contract determines the matrimonial property system of the parties. It is moreover accepted practice for divorcing parties to enter into a settlement agreement upon divorce. Although the courts do not have to endorse a settlement agreement, they have a discretion to make an order in accordance with such agreement.⁷³

Proponents of the regulation of intimate relationships by contract, regard a contractual approach to intimate relationships as beneficial, as such an approach honours party autonomy and creates finality and legal certainty in family matters. Those opposed thereto, however, criticise a contractual approach for upholding unfair contracts rather than risking future uncertainty and conflict. Considerable criticism has been levelled against a possible approach of *exclusive* contractual regulation as it is believed that state interference in certain circumstances would be necessary to protect the rights of vulnerable parties (such as children and indigent family members).⁷⁴

Questions

11. To what extent are contracts between spouses similar to, and different from, "normal" commercial contracts and what should be done to ameliorate any disadvantages which may flow from differences? In this regard, the following specific questions arise -
- i) Are there any matters which should not be contractually regulated, and if so, why not?

⁷³ Bakker *PELJ* 2013 131 – 133 and the sources referred to by the author; Heaton *SAJHR* 2005 553 –556.

⁷⁴ Ibid.

- ii) Are there any special circumstances, or vulnerabilities, at the time of the conclusion of contracts between spouses which the law should take account of?
- iii) Are there any interests of third parties, or public interests, which should be taken into account, and if so, how best to do this?
- iv) Are there any special circumstances relating to the proof of contracts between spouses which require special legal rules, or should the normal rules on proving written, oral and tacit contracts apply?
- v) Would the considerations referred to in the questions above be the same for all contracts between spouses – or should different considerations apply for instance to settlement agreements vis-à-vis ante-nuptial contracts?
- vi) Should there be a general judicial discretion to override the idea of *pacta sunt servanda* and what should be the factors for doing so?

MATRIMONIAL PROPERTY ISSUES ON DIVORCE

5. Definition of assets that qualify as “property” upon divorce

Generally speaking, a spouse's estate, or if the parties are married in community of property, the joint estate, consists of all the assets and liabilities of the spouse or spouses.⁷⁵

In a broader context, some submit that the courts' current understanding of what qualifies as "property" for purposes of determining the financial consequences of divorce is generally viewed too narrowly. The narrow view, which excludes so-called “new property” (i.e. employment-related and human capital assets, such as formal training and earning capacity), usually prejudices the spouse who is not the main breadwinner – resulting in substantive gender inequality.⁷⁶ Proponents of this view thus believe that a broad, non-exhaustive definition of "property" should be inserted in the Matrimonial Property and Divorce Acts and that such a definition should apply for purposes of determining all the financial consequences of marriage and divorce, in all marriages.⁷⁷

⁷⁵ Heaton in *The Law of Divorce* 70 et seq. There are certain exceptions which apply in respect of marriages in community of property and marriages subject to the accrual system (Ibid.)

⁷⁶ Heaton *SAJHR* 2005 570 – 573.

⁷⁷ Ibid.

In a narrower context, there are calls for the inclusion, in certain cases, of trust assets as part of the assets of a spouse in matrimonial proceedings.⁷⁸ The Trust Property Control Act 57 of 1988 provides that trust property shall not form part of the personal estate of the trustee.⁷⁹ Courts are however often required to decide whether trust assets, when one of the spouses is a trustee of the trust, should be regarded as part of the parties' joint estate.⁸⁰ In divorce proceedings one of the spouses (usually the husband) invariably pleads that trust assets are not owned by him and that they are not to be taken into account in determining the value of his estate. This approach is inequitable where the husband's own estate has been impoverished by his contributions to the trust during the course of the marriage. It is often difficult for a wife to establish the facts in support of her claim that trust assets form part of the husband's estate. Proponents of this view therefore suggest that legislation should provide that on the termination of a marriage (whether by death or divorce), assets acquired by a trust from a spouse during a marriage – which would but for the trust have been owned by such spouse - should form part of such spouse's estate.⁸¹

Questions

12. Do you agree with the view that there is a “narrower” interpretation by the courts of the concept of “property” on divorce? If so, why? If not, why?
13. What problem/s does/do the “narrower” interpretation cause in practice, if any?
14. Should the legislature intervene in the current interpretation of the concept of “property” on divorce, by formally defining it in relevant legislation? Or should the interpretation of this concept be left to the courts depending on the circumstances of an individual case? Please motivate your response.

⁷⁸ Costa *De Rebus* 2003 23.

⁷⁹ Sec 12.

⁸⁰ See the discussion of this issue by Marumoagae *Obiter* 2017 34 et seq; Smith *De Rebus* 2017 22 et seq; De Jong *THRHR* 2017 198 et seq;

⁸¹ Costa *De Rebus* 2003 23.

15. If you believe that the redefinition of the concept of "property" for purposes of divorce is inadvisable, are there other ways in which "intangible / non-traditional" marital property such as career assets can be taken into account in the distribution of assets on divorce?

16. What problems are currently encountered in practice with regard to trust assets upon divorce? Should such assets form part of "property" on divorce, and if so, under what circumstances? Should the legislature interfere in this regard or should it be left to the courts to address problems in this regard on a case-by-case basis?

6. Settlement agreements

Currently divorcing spouses are permitted to regulate the division of their property in a settlement agreement, which the court may incorporate into the divorce order in terms of the Divorce Act on condition that the agreement is in writing.⁸² The terms of the agreement must not be impossible, illegal, contra *bonos mores* or contrary to public policy.⁸³ If the agreement or its terms are not made an order of court, the agreement is merely a contract and cannot be enforced in the same way as an order of court.⁸⁴ A settlement agreement that has been made an order of court binds only the parties to the divorce proceedings.⁸⁵

The main advantage of a settlement agreement is that parties can tailor the agreement in accordance with their particular circumstances and in most divorces the parties enter into a settlement agreement. They can regulate matters such as the division of their assets, payment of maintenance, the allocation and exercising of parental responsibilities and rights, and liability for the cost of the proceedings. Parties may thus agree on a division of their assets and

⁸² Sec 7(1) of the Divorce Act. See in general Heaton in *The Law of Divorce* 86 – 90; Heaton *SA Family Law* 123 – 125.

⁸³ Heaton in *The Law of Divorce* 87.

⁸⁴ Heaton in *SA Family Law* par 12.2; Heaton in *The Law of Divorce* 89.

⁸⁵ Heaton in *The Law of Divorce* 88 – 89. It has come to the Commission's attention, for instance, that where the settlement agreement has not been made an order of court in the case where transfer of property was part of the agreement, the claim for transfer of the property could be subject to prescription should the property not be transferred as agreed.

liabilities which deviates from the common law or statutory rules which govern their matrimonial property system.⁸⁶

The court is not compelled to make an order in accordance with the settlement agreement but has discretion in the matter and could also incorporate parts of the agreement only.⁸⁷

It has been submitted, however, that spouses are, for various reasons, often in an unequal bargaining position when they negotiate divorce settlement agreements and that the weaker spouse is often prejudiced.⁸⁸ Although courts can refuse to include a settlement agreement in a divorce order under certain circumstances, it has been pointed out that courts generally do not afford settlement agreements the necessary scrutiny.⁸⁹ Commentators suggested that the court should be compelled by legislation to properly investigate settlement agreements and to take the circumstances in which each agreement was concluded into account. It should be expressly required that the respective bargaining positions of the parties when the agreement was entered into should be taken into account. The court should also be required to take into account the extent to which the agreement was inequitable and unjust in view of the circumstances at the time it was entered into or of any subsequent change to the spouse's circumstances.⁹⁰

Questions

17. Does the current practice with regard to settlement agreements lead to problems, and if so, what are these problems and why do they occur? Is change necessary, and should settlement agreements be dealt with differently in the Divorce Act, 1979?
18. Under which circumstances should a settlement agreement be set aside? Should they be just the usual grounds for setting aside contracts (including duress, undue influence and misrepresentation), and should these be interpreted differently in the context of divorce settlements?

⁸⁶ Ibid 87; Heaton in *SA Family Law* par 12.2.

⁸⁷ Heaton in *The Law of Divorce* 87 – 88.

⁸⁸ Heaton *SAJHR* 2005 566 – 570.

⁸⁹ Ibid 568 – 569.

⁹⁰ Ibid.

19. Are there any special safeguards which should be applied to settlement agreements (for instance, legal representation of the parties)?

7. Judicial discretion to vary the matrimonial property consequences as agreed on by the parties on divorce

As indicated earlier, the effect of the divorce on the division of the spouses' property depends on whether they are married in or out of community of property, and if the latter, whether the accrual system applies to their marriage. In addition, the Divorce Act makes special provision for pension sharing upon divorce (see paragraph 8 below). The division of the spouses' assets further depends on whether or not the court orders forfeiture of patrimonial benefits. In certain marriages out of community of property, the court also has the discretion to order a redistribution of assets.⁹¹

Forfeiture of patrimonial benefits

In terms of section 9 of the Divorce Act, the court has the discretion, when granting a divorce on the ground of the irretrievable breakdown of the marriage, and in marriages in community of property and subject to the accrual system, to order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other. The court may order forfeiture only if it is satisfied that the one party will, in relation to the other, be unduly benefited if the order is not made.⁹² Prior to the Divorce Act, the power to order forfeiture of benefits was based on the common law, the underlying principle being that no person ought to benefit financially from a marriage which he or she caused to fail.

⁹¹ Heaton *SA Family Law* par 12.3.1.

⁹² See in general Heaton in *The Law of Divorce* 91 – 94; Heaton *SA Family Law* 130 – 132; Bonthuys *SALJ* 2014 439 et seq; Marumoagae *De Rebus* 2011 21 – 22; Marumoagae *Obiter* 2015 232 et seq; De Klerk *De Rebus* 2014 37 et seq; and Marumoagae *De Jure* 2014 85 et seq.

In answering the question whether one party would be unduly benefited were the forfeiture order not made, the court must take into account the following closed list of factors, the presence of one of the factors being sufficient to make the order:⁹³

- The duration of the marriage.
- The circumstances which led to the breakdown of the marriage.
- Any substantial misconduct on the part of either of the parties.

A forfeiture order cannot be granted automatically by the court and must be specifically requested by one of the parties at the time of the divorce.⁹⁴ The forfeiture order relates only to the benefits of the marriage (i.e. those that arise upon marriage).⁹⁵ A gift received during the marriage does not fall within the assets that a party can forfeit and a spouse cannot forfeit assets that he or she brought into the joint estate. The court has a wide discretion in that it may order forfeiture with regard to the whole of any part of the benefits. However, the court may not use a forfeiture order as a mechanism for deviating from the normal consequences of the spouses' matrimonial property system, and to achieve a redistribution of assets simply because it considers this fair and just.⁹⁶

Although section 9 does not state this, the courts have interpreted this provision to the effect that a spouse cannot forfeit what he or she contributed to the joint estate.⁹⁷ It entails that the party loses his or her claim to the matrimonial property the other spouse contributed. In this regard it has been argued that forfeiture is often a rather empty remedy.⁹⁸ For instance, in the case of a marriage in community of property, the spouse against whom total forfeiture is ordered receives those assets he or she contributed to the joint estate only. If the party contributed more than half the assets, he or she still gets that half which he or she contributed. If the accrual system applies to the marriage, the spouse whose assets show the larger accrual retains his or her half of the difference in value of the accrual. It has thus been submitted that a forfeiture

⁹³ Heaton in *The Law of Divorce* 91.

⁹⁴ Ibid.

⁹⁵ Ibid 94.

⁹⁶ Ibid 92.

⁹⁷ Heaton *SAJHR* 2005 557.

⁹⁸ Ibid; Bonthuys *SALJ* 2014 439, 455 et seq.

order is effective only if it is made against the poorer spouse.⁹⁹ The party (usually the wife) who acquires fewer assets and contributes less to the joint estate therefore stands to lose much more than the party (usually the husband) who contributed more to the estate.¹⁰⁰ In this context, it is argued that the differentiation in the impact of a forfeiture order, could be regarded as an impairment of substantial gender equality and might thus be unconstitutional.¹⁰¹ Even if this were addressed, forfeiture would still be of limited use in attaining substantive gender equality, as forfeiture cannot be used as a generally adjustive remedy to ensure a just and equitable distribution of the assets of the parties.¹⁰²

Related to the above, is the fact that the courts do not usually take into account non-monetary contributions in calculating the spouses' respective contributions (for instance, women's typical contributions in the form of domestic work, childcare, and contributions relating to their husbands' careers). Therefore, wives who do not contribute in monetary terms to the joint estate are usually the parties who made the lesser contribution to the estate and thus the person who, as indicated in the previous paragraph, in the case of a forfeiture order being made against them, stand to lose much more in financial terms.¹⁰³

Questions

20. Is the concept of forfeiture of benefits, and the courts' interpretation of this concept, constitutionally sound? If not, should the legislature interfere and what should be done to obtain a sound outcome in applying section 9 of the Divorce Act?
21. Which factors should a court consider in ordering forfeiture?

⁹⁹ Heaton *SAJHR* 2005 557.

¹⁰⁰ This has been explained thus: If a total forfeiture order is made against a wife who entered the marriage without significant assets and has always been a home maker, she will not be entitled to any assets whatsoever even if the parties were married in community, or out of community subject to the accrual system. A total forfeiture order against a husband (who brought in the bulk of the assets to the joint estate or to his estate in the case of a marriage out of community but subject to accrual), will however not deprive him of all the matrimonial assets as he will retain whatever he brought into the marriage and forfeit only his half-share of the joint estate (in the case of a marriage in community) or his half of the difference between the accrual of his larger estate and his wife's portion of the accrual.

¹⁰¹ Bonthuys *SALJ* 2014 457.

¹⁰² Marumoagae *De Rebus* 2011 21 – 22.

¹⁰³ *Ibid.*

22. Specifically, should misconduct leading to the breakdown of the marriage be relevant? If so, should misconduct be defined, and if so, what should it include? (Could domestic violence, for instance, be regarded as misconduct in the context of forfeiture?)
23. Would the introduction of a general redistributive discretion to the courts bring relief with regard to the current situation, or are there other alternatives to deal with the current problem?

Redistribution of assets

The provisions of an ante-nuptial contract are usually rigidly enforced on divorce. As a result, spouses who married subject to complete separation of property cannot share in each other's assets on divorce, unless they enter into a settlement agreement in which they agree on asset sharing. However, in certain "older" marriages, the court has a discretion to order redistribution of assets if the spouses do not enter into an agreement about the division of their assets.

Section 7(3) of the Divorce Act broadly speaking provides that a court, on granting a decree of divorce in respect of a marriage out of community of property entered into before 1 November 1984,¹⁰⁴ or 2 December 1988 in the case of African civil marriages,¹⁰⁵ has a judicial discretion to order that the assets or part thereof of the one party be transferred to the other party as the court may deem just.¹⁰⁶ (The standard ante-nuptial contract concluded prior to 1 November 1984 was unfair in that, save for a possible claim for maintenance, the wife had no claim for patrimonial relief, regardless of the duration of the marriage and the contributions she made. The purpose of section 7(3) was thus to rectify this position.¹⁰⁷)

Section 7(3) is available with regard to a very limited number of marriages; it is not available with regard to marriages concluded after the specified date; it is not available with regard to civil unions (due to the express limitation of the remedy to parties who married before the specified

¹⁰⁴ The commencement date of the Matrimonial Property Act.

¹⁰⁵ The commencement date of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988, in terms of section 22(6) of the Black Administration Act. 38 of 1927.

¹⁰⁶ See in general Heaton in *The Law of Divorce* 101 et seq.

¹⁰⁷ Costa *De Rebus* May 2003 23.

date); and it is not available on the termination of a marriage on the death of one of the spouses.¹⁰⁸

The court may not make a redistribution order of its own accord, and the claim for redistribution arises only on divorce.¹⁰⁹

The court will not make a redistribution order unless satisfied that the claimant contributed directly or indirectly to the maintenance or increase of the other spouse's estate during the subsistence of the marriage.¹¹⁰ The courts have however applied this requirement inconsistently and the relevant provisions contain no express factors that must be considered in exercising the discretion to order a redistribution of assets.¹¹¹ The criteria the courts use for establishing the extent of the redistribution are moreover also unclear.¹¹²

A number of commentators have identified a need for the wider application of section 7(3) in different respects in the interests of fairness and equity between parties.¹¹³ It has also been said that the manner in which the courts currently exercise their power to redistribute assets does not meet the constitutional objective of substantive equality.¹¹⁴ A further concern is that even if the judicial discretion is widened by the legislator to apply to a wider category of marriages, or even to all marriages on divorce, the courts could still apply the discretion in a restrictive manner.¹¹⁵

The restrictions on the application of the judicial discretion to redistribute assets in civil marriages are also a cause for concern. This issue has become more pertinent in view of the Constitutional Court decision in the *Gumede* case that the judicial discretion to redistribute

¹⁰⁸ Heaton *SAJHR* 2005 558.

¹⁰⁹ Heaton in the *Law of Divorce* and the sources quoted by the author 101.

¹¹⁰ Sec 7(4) of the Divorce Act. Heaton in *The Law of Divorce* 102 – 103; Heaton *SAJHR* 559 et seq.

¹¹¹ See the discussion in Heaton *SAJHR* 2005 559 et seq.

¹¹² *Ibid*; Heaton in *The Law of Divorce* 106.

¹¹³ Heaton *SAJHR* 2005 558 – 562; Costa De Rebus *May* 2003 23; Bonthuys *SALJ* 2014 459 – 460.

¹¹⁴ Heaton *SAJHR* 2005 559.

¹¹⁵ See eg Heaton *SAJHR* 2005 559; Bonthuys *SALJ* 2014 460.

assets in customary marriages applies to every customary marriage which is dissolved by divorce, regardless of when the marriage was concluded and regardless of the matrimonial property system that operates in it.¹¹⁶ Even leaving aside the differentiation between spouses in civil marriages and customary marriages, it has been submitted that the restrictions with regard to the application based on the parties' wedding date may be unconstitutional.¹¹⁷

Questions

24. Should the courts generally speaking be able to, on divorce, alter the matrimonial property consequences as agreed upon by the parties in the interests of fairness between the parties (as for instance in the case of a long term marriage out of community of property where the wife did not work outside the home), in the interest of minor children, or as a result of how circumstances have changed after the conclusion of the ante-nuptial contract? In other words, is an extension of the judicial discretion to grant a redistribution of assets as provided for in section 7(3) of the Divorce Act, necessary, and why is it necessary?
25. Should there be specific factors, which a court should consider in order to grant a redistribution order? If so, what kind of factors should they be and what weight should be given to specific factors? What weight should be given to women's non-financial contributions? Or should there be no prescribed factors? Would the factors, which are currently considered in respect of a forfeiture order, be relevant to a redistribution order?
26. Should there be a "starting point" or a "default" distribution (for instance of one third, or any other specific proportion)?
27. How could the legislature ensure that an extension of the discretion to order a redistribution of assets is not applied in a restrictive manner which would in practice perpetuate the existing unfairness?

¹¹⁶ *Gumede v President of the Republic of South Africa* 2009(3) SA 152 (CC).

¹¹⁷ Heaton in *The Law of Divorce* 107.

8. Pension sharing upon divorce

Generally, the pension fund is the largest asset in a divorce next to the marital home. Traditionally, a future pension benefit was not included in a spouse's estate (or the joint estate) upon divorce as the right to claim the benefit only vests in the spouse when he or she retires, resigns or is dismissed or retrenched. Since 1989, the provisions of the Divorce Act's section 7 allow a divorced spouse or partner to share in the pension interests of the other spouse or partner even though it is not yet payable.¹¹⁸ Spouses' pension interests are therefore included for purposes of dividing their assets upon divorce. This now also applies to partners in a civil union. The only situation where it does not apply is where the spouses or partners were married on or after 1 November 1984 in terms of an ante-nuptial contract by which community of property, community of profit and loss and the accrual system are excluded.¹¹⁹

Pension "interest" should be distinguished from pension "benefit". A pension "interest" refers to an interest which has not yet accrued by the time of the divorce, while a pension "benefit" relates to a benefit which has accrued (during the subsistence of the marriage). The provisions of the Divorce Act regarding pension sharing relate only to a pension "interest".¹²⁰ A pension interest is thus that amount a member of a pension fund would have received had he or she resigned as a member of the fund on the date of divorce. Where the pension benefit has accrued because the relevant spouse or partner has already retired or resigned from the fund, the pension benefit must be dealt with as an asset according to the ordinary rules of the matrimonial property regime under which the parties were married, or a settlement, if there is one.¹²¹

A court is empowered to make an order to the effect that the part of the pension interest of the member to be assigned to the other party be paid out to that other party. Prior to 2007, such funds had to be paid out to the other party only when the pension benefits accrued to the member spouse. This could be only many years after the divorce occurred. In addition, the

¹¹⁸ Sec 7(7) and (8) of the Divorce Act, and sec 37D(1)(d) of the Pension Funds Act 24 of 1956 (as amended).

¹¹⁹ See in general Heaton *SA Family Law* par 12.3.2; Heaton in *The Law of Divorce* 74 – 80; Van Niekerk *Divorce Litigation* par 7.2.4 – 7.2.4.5; Glover in *Family Law* par D8; Marumoagae *PELJ* 2014 2488 et seq; Marumoagae *Obiter* 2016 312 et seq. Sec 7(7) refers to patrimonial benefits, and not to maintenance which is not a patrimonial benefit (van Niekerk *Divorce Litigation* par 7.2.4).

¹²⁰ Heaton *SA Family Law* par 12.3.1.

¹²¹ Glover in *Family Law* par D8.

member spouse was not liable to pay interest on the amount from the date of the divorce until the time the funds were paid out when the pension benefit actually accrued to the member.¹²²

The SALRC in 1999 submitted a report to the then Minister of Justice dealing with the above and with several other problems.¹²³ It was, amongst others, proposed that pension benefits should **not** be regarded as matrimonial assets and the SALRC's proposed draft Bill, in accordance with this, provides for a radically different system of calculation of the benefit than the current system.¹²⁴ These proposals have not been implemented yet.

In the meantime, the Pension Funds Amendment Act 11 of 2007 brought relief in addressing some of the practical problems referred to above (including, providing that the pension interest be calculated and paid out to the non-member spouse at the time of the divorce¹²⁵). This Act is, however, applicable to private pension funds only. Hence, members of the excluded pension funds have approached the courts in certain instances in order to force their funds to implement similar changes. This discrepancy was addressed with regard to government employees in 2011; and with regard to employees of the National Post Office in 2013.¹²⁶

Sharing of pension interests on divorce remains a controversial matter and has been subjected to intense litigation in recent times.¹²⁷ A number of complex issues have also been raised by academic and other commentators (including for instance, whether a pension interest automatically forms part of the spouse's estate or whether it must be claimed by the non-member spouse on divorce;¹²⁸ whether it is possible for an already divorced spouse who did not claim pension interest during the divorce to claim same after the divorce when the joint

¹²² Ibid.

¹²³ SALRC *Report on Sharing of Pension Benefits* 1999.

¹²⁴ Ibid 44 et seq. See also the discussion of the SALRC's recommendations by Marumoagae *Obiter* 2016 317 et seq.

¹²⁵ Glover in *Family Law* par D8. (Refer to the amended sec 37D(4) of the Pension Funds Act 24 of 1956.)

¹²⁶ Sec 21 of the Government Employees Pension Laws Amendment Act 19 of 2011; and sec 10E of the Post and Telecommunications Matters Act 1958 (as amended by the South African Post Office SOC Ltd Amendment Act 38 of 2013). See Glover in *Family Law* par D8; and the extensive discussion by Marumoagae *PELJ* 2014 2488 et seq.

¹²⁷ Marumoagae *Obiter* 2016 313.

¹²⁸ Pienaar *De Rebus* 2015 38 – 39; Jeram *De Rebus* 2017 28 – 32; Ramabulana *De Rebus* 2017 51; Marumoagae *De Rebus* 2017 34.

estate has already been divided;¹²⁹ and whether there is a need for legislation to protect the non-member spouse's interest in the member spouse's accrued pension benefits before divorce¹³⁰).

The question arises whether comprehensive reform with regard to the matter of sharing of pension interests on divorce is currently necessary – also in light of the fact that the SALRC's 1999 recommendations have not been implemented yet.¹³¹

Question

28. Commentators are invited to point the Commission to specific problems with regard to pension interests which are in need of clarity or reform and which should receive the attention of the legislature; or to a need to address the entire issue of sharing of pension benefits on divorce – especially in view of the fact that the Commission's 1999 report on the matter has not been implemented yet. Please motivate your response.

9. Dissipation of marital assets

Although the law provides clear rules and instructions regarding the division of the parties' assets upon divorce, there are certain difficulties and practical problems which are often experienced. One of these is the dissipation of marital assets pending the divorce.¹³² It often happens that when one spouse is contemplating a divorce he or she starts concealing, diminishing or squandering assets that might otherwise be eligible for the division of assets upon divorce. A party who dissipates marital assets creates an unequal playing field which prevents courts from rendering a fair and equitable distribution of marital assets and obviously affects the party who intends to institute financial claims against the other party. Because

¹²⁹ Marumoagae *PELJ* 2014 2497.

¹³⁰ Marumoagae *Obiter* 2016 312 et seq.

¹³¹ See eg the view expressed by Marumoagae on a need to review how pension benefits are viewed as far as marriages in community of property are concerned (Marumoagae *Obiter* 2016 319 et seq).

¹³² Dissipation in its simplest form occurs when a party conceals, conveys or wastes marital assets during divorce proceedings or in anticipation of divorce (Driskell *Journal of the AAML* 2006 135).

husbands are usually financially better off than wives are, women usually bear the brunt of such squandering of assets.¹³³

The common law as well as statutory law provides several avenues for protecting a spouse's proprietary rights pending the finalisation of divorce proceedings. Some of these remedies are difficult to invoke successfully because of the heavy onus of proof that must be discharged, while others do little to address past financial wrongs.¹³⁴

Where parties are married in community of property a party whose consent in respect of a transaction was required in terms of the Matrimonial Property Act and was not obtained, can apply to the court to have the transaction (entered into by the other party) set aside under certain circumstances.¹³⁵ An aggrieved party can also approach the court to suspend any power of the other spouse in respect of the joint estate altogether, for a definite or indefinite period under certain circumstances.¹³⁶ Or alternatively, a spouse can seek a court order immediately dividing the joint estate during the subsistence of the marriage if the other spouse's conduct seriously prejudices (or will probably prejudice) the aggrieved spouse's interest in the joint estate.¹³⁷ If one of the spouses fraudulently (with the intent to prejudice the other spouse) alienate assets of the joint state without the consent of the other party, or intends to so alienate assets, the spouse who has been, or stands to be, defrauded has several common law remedies at his or her disposal. The spouse must prove intention to prejudice – a very heavy onus to discharge. If the asset has not yet been alienated, the spouse who stands to be defrauded may also apply for an interdict to prevent alienation of assets – similarly difficult, as the ordinary requirements for obtaining an interdict will apply.¹³⁸ If the assets has already been dissipated or hidden, it can also be extremely difficult and expensive (as forensic auditors will have to become involved in most instances), to prove this.

¹³³ See the discussions by De Jong *Stell LR* 2012 225, 232-233; Heaton in *The Law of Divorce* 108 – 115; van Niekerk *Patrimonial Litigation* par 4.1 – 4.3.2; see also *M B v N B* 2010 (3) SA 220(GSJ) .

¹³⁴ Heaton in *The Law of Divorce* 108.

¹³⁵ Sec 15 of the Matrimonial Property Act; van Niekerk *Patrimonial Litigation* par 4.2.1.1; Heaton in *The Law of Divorce* 109.

¹³⁶ Sec 16 of the Matrimonial Property Act; Heaton in *The Law of Divorce* 109.

¹³⁷ Sec 20 of the Matrimonial Property Act. Heaton in *The Law of Divorce* 120; van Niekerk *Patrimonial Litigation* par 4.2.1.

¹³⁸ See the discussion by Heaton in *The Law of Divorce* 109 – 112; van Niekerk *Patrimonial Litigation* par 4.3 – 4.3.2.

In the case of parties married subject to the accrual system, a spouse whose right to share in the accrual on divorce has been seriously prejudiced or will probably seriously be prejudiced by the conduct of the other spouse, may apply to the court for the immediate division of the accrual. The court may in such an instance order the immediate division of the accrual and may also replace the accrual system with complete separation of property from the date of the court order.¹³⁹ If one of the spouses has alienated assets to a third party with the intention of prejudicing the other spouse, the latter spouse can recover the property from the third party in terms of common law, and where the alienation has not yet occurred, the spouse who stands to be defrauded may apply for an interdict to prohibit the alienation.¹⁴⁰

Where spouses are married subject to complete separation of property and are generally not entitled to share in each other's assets on divorce, they do not as a rule need to protect their proprietary rights pending divorce. However, such couples may seek redistribution of assets on divorce in certain limited circumstances as indicated above.¹⁴¹ A spouse who falls into this category may be able to obtain an interdict to prevent his or her spouse from fraudulently alienating assets with a view to frustrating the possibility of a redistribution order being made.¹⁴²

A possible solution that has been put forward to address dissipation of marital assets is statutory provision for the acceleration of the effective date for determining patrimonial claims.¹⁴³ The rationale underlying this solution would be to prevent spouses from concealing or diminishing their financial assets and any accrued gains upon the deterioration of their marriage relationship and in the heat of the moment after summons has been served.¹⁴⁴ Another possibility would be divorce mediation – in the course of which the parties would have ample

¹³⁹ Sec 8(1) and (2) of the Matrimonial Property Act. Van Niekerk *Patrimonial Litigation* par 4.2.2; Heaton in *The Law of Divorce* 112 – 113.

¹⁴⁰ See the discussion of the relevant remedies by Heaton in *Law of Divorce* 112 – 113.; van Niekerk *Patrimonial Litigation* par 4.3 – 4.3.2.

¹⁴¹ Heaton in *The Law of Divorce* 114. Refer to the discussion on redistribution of assets in par 7 above.

¹⁴² Heaton in *The Law of Divorce* 114.

¹⁴³ De Jong (*Stell LR* 2012 233 – 234) refers, e g, to the position in Germany, where legislation provides that the date for the calculation of the amount of accrued gains is the date when the divorce summons is served and not the date of the termination of the matrimonial property regime (German Civil Code sec 1384); and to the position in the Netherlands, where a similar provision has been enacted (Netherlands Civil Code sec 1:99 (b)).

¹⁴⁴ De Jong *Stell LR* 2012 233 – 234.

scope, at an early stage, for an informed but informal debate on the levels of their estates and would be able to solve monetary disputes by a facilitative intermediary.¹⁴⁵

Questions

29. What are the most common problems experienced in practice with regard to the dissipation of assets; and at what stage does dissipation of assets mostly occur?
30. What would be the current costs of legal intervention to prevent the dissipation of assets upon divorce? Would special measures be necessary to preserve assets in cases where a spouse cannot necessarily afford the cost of legal representation to prevent dissipation?
31. If one accepts the difficulties related to the currently available remedies to prevent or deal with asset dissipation, what alternative interventions could be useful to get parties to disclose information about financial assets to each other and to prevent dissipation or hiding away of assets on divorce?

10. Substantive gender financial equality in the division of matrimonial property

There are various types of marriages and various circumstances within marriages which have real economic consequences upon divorce, but our law largely ignores this. South African law proceeds from the premise that the financial consequences of divorce can be regulated by fixed rules, that apply to all marriages. This current one-size fits all approach could often result in substantive gender inequality.¹⁴⁶

Section 9 of the Constitution protects the right to equality. In terms of Constitutional Court decisions over the years, substantive equality, not mere formal equality, is what is required in

¹⁴⁵ *M B v N B* 2013 SA 220 (GSJ) par 58; *F S v J J* 2011 3 SA 126 (SCA) 126 par 54 as referred to by De Jong *Stell LR* 2012 235 - 235.

¹⁴⁶ See in general Heaton *SAJHR* 2005 547 et seq.

this regard. In the context of marriage and divorce, substantive gender equality inter alia seeks to place spouses in an equal position – taking into account the impact certain factors (such as the unequal division of domestic and family-care responsibilities, and differences in bargaining power) have on spouses in general, and on the spouses in the particular marriage.¹⁴⁷

Question

32. Are there specific steps the legislature could take with the aim to achieve substantive gender equality in the division of matrimonial property on divorce? What are these, and how will they assist in achieving the desired outcome?

11. Selected procedural aspects: Mediation and interim relief pending a divorce action

Mediation of financial aspects

As observed above, South African law provides clear rules and instructions regarding the division of the spouses' assets upon divorce. In spite of this, there are certain difficulties and practical problems which frequently arise and which make the division of assets one of the most difficult issues to resolve in divorce litigation. These problems could characteristically relate to the postponement of patrimonial claims (or the finalisation thereof) to a date after the divorce order;¹⁴⁸ uncertainty about the extent of the parties' assets;¹⁴⁹ and dissipation of marital assets.¹⁵⁰ It has been suggested that divorce mediation could be the solution to address such practical problems with the division of assets upon divorce.¹⁵¹

Divorce (or family) mediation has been described as a process in which the mediator, an impartial third party who has no decision-making power, facilitates the negotiations between

¹⁴⁷ Ibid.

¹⁴⁸ Refer eg to the problems in this regard discussed by De Jong *Stell LR* 2012 228 – 231.

¹⁴⁹ Ibid 231 – 232.

¹⁵⁰ Ibid 232 – 233. See also the discussion in respect of dissipation of assets in par 9 above.

¹⁵¹ See in general De Jong *TSAR* 2005 33 et seq; De Jong *TSAR* 2010 515 et seq; De Jong *Stell LR* 2012 225; Heaton in *The Law of Divorce* 582 – 585.

separating parties with the object of getting them back on speaking terms and helping them to reach a mutually satisfactory settlement agreement that recognises the needs and rights of all family members.¹⁵²

Proponents of divorce mediation envisage that mediation would grant parties the opportunity, in the early stages of the divorce process, to (with the assistance of trained and accredited mediators), holistically negotiate on patrimonial claims as well as other relevant issues such as care of and contact with children, and maintenance. It has been said that early stage mediation (which could include the determination of patrimonial claims and informal discovery), could provide parties with certainty about the extent of matrimonial assets and minimise the risk of preventative estate planning (placing assets out of the reach of the other spouse by means of discretionary trusts or similar measures). Mediation would moreover be immediately and readily available to divorcing parties; it would be a useful way to avoid protracted and expensive legal battles; and would give parties an opportunity to reflect and negotiate on all divorce related issues in an unthreatening atmosphere (as the mediation process is not bound by the rules of procedure that dominate the adversarial system of litigation).¹⁵³

The Mediation in Certain Divorce Matters Act 24 of 1987 introduced mediation to family matters. The Act only makes provision for limited court-connected mediation by the office of the family advocate in certain children's issues upon divorce.¹⁵⁴ Our courts have however more recently increasingly recognised the importance of mediation upon or after divorce.¹⁵⁵

As regards the mediation of financial aspects of divorce, it has been suggested that such mediation should precede mediation of matters regarding children and maintenance, and should form the basis of mediating the further aspects of divorce.¹⁵⁶ In this regard the belief is held that once the division of assets and the way in which the assets are to be divided have been settled, it would be much easier to deal with possible maintenance claims for the spouses and with

¹⁵² De Jong *TSAR* 2010 517; Heaton in *The Law of Divorce* 582.

¹⁵³ See the advantages listed by Schultz 15 –19; Heaton in *The Law of Divorce* 603 – 605; De Jong *Stell LR* 2012 235 et seq.

¹⁵⁴ Refer to the discussion of the Act by Heaton in *The Law of Divorce* 607 et seq.

¹⁵⁵ See the discussion of the relevant case law by Heaton in *The Law of Divorce* 612 – 614.

¹⁵⁶ De Jong *Stell LR* 2012 228 – 231, 238 – 239.

children's issues.¹⁵⁷ Early mediation of financial matters on divorce would also facilitate reasonable settlement offers.¹⁵⁸

The introductory information to this issue paper indicates that the SALRC is currently also involved in an investigation into family dispute resolution. Although a need for mediation of financial aspects of divorce, and any specific needs with regard thereto, will have to be made out under the current investigation, the broader issue of divorce mediation will be dealt with in conjunction with the SALRC's investigation into family dispute resolution.

The questionnaire, at this stage of the current investigation, focuses on the substantial question of whether mediation of financial aspects of divorce is necessary or desirable; and whether there are any specific needs with regard to such mediation.

Questions

33. To what extent could mediation of financial aspects of divorce assist the divorce process and contribute to an equitable outcome between the parties? Are there any specific needs with regard to such mediation?
34. Are there any reasons why the legislature should not introduce procedures for mediation of financial aspects of divorce; or are there situations where mediation on financial aspects of divorce would not be appropriate?
35. Are there any alternative options, apart from mediation, which could be explored to assist divorce parties to resolve the financial aspects of their divorce?

Interim relief (Rule 43)

An application in terms of Rule 43 of the Uniform Rules of Court¹⁵⁹ is intended to provide an inexpensive, expeditious method of determining issues relevant to a divorce action that require

¹⁵⁷ Ibid 238.

¹⁵⁸ Ibid.

regulation pending the outcome of the main action (including interim maintenance of spouses and children, and interim care of and contact with children); and regulating contributions towards costs of the main divorce action.¹⁶⁰

The application in terms of Rule 43 consists of only a founding affidavit, and no replying affidavit is allowed. Such affidavits should be concise and the rule should not be abused in the sense of unnecessary lengthy affidavits and annexures.¹⁶¹ The court may hear such evidence as it considers necessary and may dismiss the application or make such order as it deems fit to enable it to make a just and expeditious decision.¹⁶² Because of the complexity of issues and the need to ensure an expeditious decision, further evidence may be allowed on good cause shown.¹⁶³ Rule 43 proceedings are not appealable and the outcome of the interim proceedings is generally final pending the finalisation of the divorce proceedings.¹⁶⁴

Rule 43 governs procedure and does not affect the substantive law.¹⁶⁵ It has however been submitted that Rule 43 should be reviewed in its totality, as there are a number of important considerations that are affecting access to justice in its current format.¹⁶⁶ The main issues of criticism against the current position include the following:

The intention of the rule is to provide for the expeditious adjudication of matters relevant to matrimonial proceedings that cannot be left unregulated pending divorce litigation. Because of the limited scope of the proceedings, it is difficult to determine disputed versions of factual

¹⁵⁹ Uniform Rules of Court: Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa

(accessible at www.justice.gov.za/legislation/rules/UniformRulesCourt.pdf)

¹⁶⁰ See in general with regard to Rule 43, van Niekerk *Divorce Litigation* par 6.1 – par 6.3.4; Catto in *The Law of Divorce* 539 – 546; Kruger in *Family Law* par F51 – 52; Glover in *Family Law* par D.12; Heaton in *SA Family Law* 188 – 190.

¹⁶¹ Rule 43(2) and (3).

¹⁶² Rule 43(5).

¹⁶³ Catto in *The Law of Divorce* 540.

¹⁶⁴ Sec 16(3) of the Superior Courts Act 10 of 2013.

¹⁶⁵ Herbstein et al 1535.

¹⁶⁶ Catto in *The Law of Divorce* 546.

allegations in the absence of evidence.¹⁶⁷ It is moreover expected of parties to act with the utmost good faith and to disclose fully all material information regarding their financial affairs or risk the court refusing relief.¹⁶⁸

The courts frequently make limited costs orders on the basis that awarding a greater contribution only encourages litigation. This approach undermines the dependent spouse who then faces an uphill battle against the financially stronger spouse who has the resources to fund litigation. The fact that the applicant spouse has no access to resources in such circumstances, becomes a weapon to bully an inequitable settlement from an under-resourced spouse who faces the other spouse's legal arsenal without funds for his or her own legal team. Often Rule 43 proceedings put an end to divorce proceedings or affect the matter inequitably with the result that settlements are reached or orders are granted which serve neither equity nor justice.¹⁶⁹

The provision that decisions under Rule 43 are not appealable is regarded as problematic because orders are frequently granted on a robust basis. The founding and answering affidavits often contain several disputed factual allegations. Without the benefit of further evidence or a replying affidavit, the court is called upon to make a decision without being able to ascertain the veracity of the allegations. Financial hardship can result either way where an order (which may endure for some time until the main action is heard), is granted under these circumstances.¹⁷⁰

Question

36. Are the current requirements and application of Rule 43 equitable and fair with regard to providing interim relief, especially to the financially weaker party in divorce litigation?
37. If not, what options should be explored to establish a fair and equitable outcome for interim relief pending divorce litigation?
38. Are there any alternative options that could be explored

¹⁶⁷ Ibid 541.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid 544.

¹⁷⁰ Ibid 540-541.

12. Private international law and the patrimonial consequences of divorce

Marriages between parties from different nationalities are increasing. Couples also often live and work in different countries so that they do not share the same matrimonial home at all times during their marriage. While the latter type of marriages may well be the exception, there is a definite increase in global immigration as married couples or spouses travel across the world in search of better employment opportunities. These are complicating factors in divorce cases.¹⁷¹

In terms of South African private international law, the proprietary consequences of marriage are governed by the law of matrimonial domicile.¹⁷² The *lex domicilii matrimonii* refers to the legal system of the country where the husband is domiciled¹⁷³ at the time of marriage, unless the parties in their ante-nuptial contract chose another legal system to apply.¹⁷⁴ This is the position in spite of the fact that married women no longer automatically acquire the domicile of their husbands upon marriage (a married woman can acquire her own domicile of choice¹⁷⁵). The law of the husband's domicile at the time of marriage (i.e. the current "connecting factor") applies to all matrimonial property, both movable and immovable.¹⁷⁶ Matrimonial domicile is moreover determined at the time of marriage only – with the result that subsequent changes in the husband's domicile do not affect the proprietary consequences of the marriage.¹⁷⁷

¹⁷¹ Schoeman *TSAR* 2004 115.

¹⁷² Schultze in *The Law of Divorce* 648 and the sources quoted by the author; Roodt *THRHR* 2006 224; van Niekerk *Patrimonial Litigation* par 8.2.

¹⁷³ Domicile is the place where a person is legally deemed to be permanently present for the purpose of exercising rights and fulfilling obligations, even in the case of factual absence. Domicile and citizenship may coincide although this is not necessarily the case. Although one of the elements of domicile is that normally it is also the permanent residence of the person concerned, residence in the ordinary sense of the word as the place where one eats and sleeps is not necessarily the same as domicile in the legal sense, because to acquire a domicile in the legal sense it is necessary for the person to have the intention of settling at the place concerned for an indefinite period (Cronje *The South African Law of Persons and Family Law* 37; Himonga in *Wille's Principles* 152).

¹⁷⁴ Schultze in *The Law of Divorce* 648 and the sources quoted by the author; Neels and Werthman-Lemmer *TSAR* 2008 587; Roodt *THRHR* 2006 224; van Niekerk *Patrimonial Litigation* par 8.2; Edwards in *LAWSA Vol 2(2)* par 309.

¹⁷⁵ Domicile Act 3 of 1992 sec 1(1). (Enacted subsequent to the SALRC's *Report on Domicile* 1990. The SALRC at the time did not recommend the reform of the rule relating to the patrimonial consequences of marriage (see par 6.2 to 6.8 of the report)). See the discussions by Neels and Werthman-Lemmer *TSAR* 2008 587; Schoeman *TSAR* 2004 116; Edwards in *LAWSA* par 309.

¹⁷⁶ Edwards in *LAWSA* par 309; Neels and Werthman-Lemmer *TSAR* 2008 587; McConnachie *SALJ* 2010 434 – 435.

¹⁷⁷ *Ibid.*

“Proprietary consequences” in this context mainly include the following: Questions with regard to the nature of the parties’ matrimonial property regime (whether matrimonial property is held in or out of community of property, or whether a partial community of property regime applies); the law governing the joint or separate estates of the spouses; the law governing ante-nuptial and postnuptial contracts; the effect on the matrimonial property on divorce or death; and any other issue strictly related to the estates of the parties.¹⁷⁸

The current rule subjects the proprietary consequences of marriage to a single personal legal system, based solely on the connection of the husband to that specific legal system – thus excluding the wife’s personal law.¹⁷⁹ Several objections are levelled against the rule. The main objection is that it is in conflict with the constitutional principle of gender equality and will sooner or later be declared unconstitutional.¹⁸⁰ The rule also does not make provision for marriages or civil unions in terms of the Civil Union Act.¹⁸¹ A further objection is that in the light of the increased global migration of couples or spouses, the exclusive use of domicile as the connecting factor to establish the proprietary consequences of the marriage needs to be reassessed.¹⁸² It has in fact been submitted that the time for reform of the conflict rule for the proprietary consequences of marriage is overdue.¹⁸³

Questions

39. If a connecting factor that refers to *one* spouse only can no longer be applied because of the discriminatory nature of such a premise, what would be an equitable alternative? What should the connecting factor be for the proper law on matrimonial property issues? Or should there be more than one connecting factor, or a hierarchy of connecting factors?

¹⁷⁸ Edwards in *LAWSA* Vol 2(2) par 309; Schoeman *TSAR* 2004 116.

¹⁷⁹ Schoeman *TSAR* 2004 115.

¹⁸⁰ The rule constitutes discrimination on the basis of gender and is therefore in conflict with section 9(3) of the Constitution which provides that “(T)he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including ... gender ...”. See Schultze in *The Law of Divorce* 658 et seq; Schoeman *TSAR* 2004 116 et seq; Neels and Werthman-Lemmer *TSAR* 2008 587 et seq.

¹⁸¹ Schultze in *The Law of Divorce* 660; M McConnachie *SALJ* 2010 435 et seq.

¹⁸² For a discussion of the objections against the current rule see in general Schultze in *The Law of Divorce* 658 et seq; Neelson and Werthman-Lemmer *TSAR* 2008 587 – 588; Schoeman *TSAR* 2004 116 et seq.

¹⁸³ Schoeman *TSAR* 2004 115.

40. Should the same law apply to both movable and immovable property?
41. What issues should be ruled by the law that governs the matrimonial property of the spouses?
42. What should be paramount in guiding reform of the current rule (including for instance, the constitutional principle of gender equality, the reality of global migration, the protection of the justified expectations of the spouses, the demands of conflicts justice, legal certainty etc)?
43. Individuals would have ordered their affairs over many years in terms of the existing rule. In the event of the rule being changed by the legislature, what could be done so as not to disturb vested rights in terms of the old rule?

13. Possible problems related to “joint” bank accounts

It has been submitted that, although the banking industry allows married couples to have a joint bank account, both partners do not enjoy equal status in respect of such account.¹⁸⁴ It is pointed out that the so-called "joint" account can be accessed by the main account holder and a secondary person who uses the account on the basis of a power of attorney. In most instances, the main account holder is the husband, while the secondary account holder (usually the wife) has limited options with regard to operating the account.

The S A Banking Council however held the view that the concept of a true "joint" account is not part of South African banking practice as the South African legal environment (as opposed to that of the United States of America, for example), does not create a framework conducive to the operation of joint accounts. In the latter regard, the Council referred to the disadvantages and problems that would occur in disputed, acrimonious divorces where one party gets a court injunction to freeze the account until the dispute is resolved. The Council indicated that in

¹⁸⁴ Submission by the Commission for Gender Equality at the time of inclusion of the current investigation into the SALRC's research programme.

certain other jurisdictions the doctrine of "survivorship" resolves the status of the joint account holders on death or divorce and suggested that the Commission investigate this matter.¹⁸⁵

Questions

44. To what extent are difficulties experienced with "joint" bank accounts in practice, and to what extent does it present problems in the context of matrimonial property law and divorce?
45. Is this a matter which should be investigated and resolved in conjunction with the other issues of matrimonial property law as presented in this Questionnaire?

OTHER MATTERS

14. Possible approach to reform

It will assist the Commission considerably if it could have a clear idea of what would be realistic to achieve as regards reform of the law in the area under investigation. Although a change to the law could bring relief, there could be problems which the law would not be able to solve. Law reform is inevitably influenced by broad social policy issues, professional practice, ethics, and the availability of resources.

In this context the approach to reform could be one of ad hoc amendments or additions to provide for the most pressing needs identified in responses to this issue paper. This would probably bring relief but might not address any possible underlying dissatisfaction with the current matrimonial property regimes. On the other hand, a more extensive review of the law could be necessary or desirable which may result in recommendations for comprehensive law reform. In the latter regard there have been increasing calls emphasising the need for an extensive overhaul of the South African matrimonial property system, including the rights of

¹⁸⁵ Response of the S A Banking Council on the submission by the Commission for Gender Equality to the SALRC.

unmarried partners which have fallen by the wayside along with the second part of the Draft Bill on domestic partnerships.¹⁸⁶

Some of the most recent reform in the area of matrimonial property was done by the law reform bodies for England and Wales, and Nova Scotia (Canada).

In the recent investigation by the Law Commission of England and Wales (which resulted in its 2014 report on "Matrimonial Property, Needs and Agreements"¹⁸⁷), the Commission concentrated on relatively simple statutory reform to make the law more transparent and accessible for divorcing couples at both ends of the financial spectrum – the majority who need clear and accessible law and who may have to manage without professional advice, and the minority for whom sophisticated financial arrangements may be appropriate.¹⁸⁸

The Law Commission acknowledged that many couples resolve the financial consequences of divorce or dissolution without going to court. Where this is not possible, the courts have a very broad discretion to redistribute the parties' property and income. An important element of those awards is meeting both parties' "financial needs". The meaning of "needs" in this context has generated uncertainty and there is confusion, for those separating, about the extent to which one spouse should be required to meet the other's needs after their formal relationship has come to an end. The courts, moreover, took an inconsistent approach in awarding needs. The Commission recommended that authoritative guidance should be provided to help to reinforce consistency to how the law is applied in the courts, increasing public confidence in this area of the law. In this regard it was recommended that the Family Justice Council should produce a guide designed to help litigants in person to negotiate their own agreements in the context of divorce and family break-down.¹⁸⁹

The investigation also considered the treatment of pre-nuptial, post-nuptial and separation agreements. These are agreements made between couples before or during their marriage or civil partnership as to how their property and finances will be dealt with if they were to separate.

¹⁸⁶ Bonthuys *PELJ* 2016 24; De Jong *TSAR* 559 et seq; Heaton 2005 *SAJHR* 547, 573 – 574; see also Bakker *PELJ* 2013 par 4; Lowndes 47 – 52.

¹⁸⁷ The Law Commission *Report on Matrimonial Property, Needs and Agreements* 2014.

¹⁸⁸ *Ibid* 1 – 4.

¹⁸⁹ *Ibid*. See Family Justice Council "Sorting out Finances on Divorce" 2016. (The Council was established to promote an inter-disciplinary approach to family justice and monitors the system in the United Kingdom.)

Under current law such agreements are allowed but they are not binding and the parties cannot be certain that the courts will uphold these agreements. In response to this, the Commission recommended introducing "qualifying nuptial agreements" by legislation. The latter type of agreements would be enforceable contracts, which would enable couples to make binding arrangements prior to marriage or a civil partnership for the financial consequences of divorce or dissolution. Qualifying agreements could not, however, be used by parties to contract out of meeting the "financial needs" of each other and of any children.¹⁹⁰ Commentators emphasised that, while qualifying agreements will give couples greater autonomy to determine the financial outcome in the event of a future separation, the outcome of future separation will be more predictable and less expensive, and the proviso that the agreement must meet the parties' and children's "needs" will avoid unfair agreements.¹⁹¹

For South Africa, this type of reform could raise important questions about limits to personal autonomy and freedom of contract in the constitutional era. It has been submitted that an uncritical enforcement of ante-nuptial contracts will often have an inequitable, unfair and gendered outcome, and that personal autonomy should not extend to contracts that have potentially unconstitutional outcomes. Divorce Courts should thus have discretion to intervene and ensure a more equitable financial outcome through redistribution of property.¹⁹²

The Law Commission's 2014 report was followed in December 2016 by a further report relevant to financial matters on divorce – "Report on Enforcement of Family Financial Orders".¹⁹³ Each year thousands of separating couples apply to the courts for family financial orders. These orders are made by the court for the transfer of property or payment of money between the former partners after divorce. If the property is not transferred or the payment is not made the judgment creditor will need to take enforcement action. The Law Commission's research showed that non-compliance with such orders is a significant problem and made recommendations to make enforcement more effective, accessible and fair.¹⁹⁴

¹⁹⁰ See the proposed Nuptial Agreements Bill included in the Report.

¹⁹¹ Family Law Week 3 March 2014.

¹⁹² See the discussion by Barratt *SALJ* 2013 696; Lowndes 42 – 46.

¹⁹³ Law Commission of England and Wales *Report on Enforcement of Family Financial Orders* Report No 370 2016.

¹⁹⁴ *Ibid* 1 – 16.

Under the Nova Scotia Commission's review of matrimonial property legislation (reported on in September 2017 in its report on "Division of Family Property"¹⁹⁵), which was done on a similar basis as the current SALRC review,¹⁹⁶ the Commission set out to strengthen and clarify the current law rather than change the existing model of property division. The Commission focussed on a number of critical issues, including whether domestic partners should have access to the regime of property division provided for in the current matrimonial property legislation; how to make matrimonial property disputes more certain; and what assets should be included in the division of property on divorce.¹⁹⁷ In the latter regard, the Commission specifically addressed the position of the family home, trust assets, and business assets of one of the partners.¹⁹⁸ Significantly, the Commission recommended changes to the existing legislation expressly to provide for recognition that childcare, household management and financial support are the joint responsibilities of partners and that partners are presumed to have made an equal contribution in these respects for purposes of equal division of the family assets.¹⁹⁹ It was also recommended that legislation should provide for the full and complete financial disclosure (including the enforcement of such obligations) by partners involved in property disputes for purposes of resolving such disputes.²⁰⁰ These recent detailed recommendations on aspects which could also be relevant for reform in South Africa, will serve as useful sources of comparison for the SALRC's current investigation once the specific areas in need of reform have been clarified.

Questions

46. What would be the appropriate general approach to adopt? Would ad hoc amendments to the current law suffice, or is a more comprehensive review of the law called for? Please motivate your response.

¹⁹⁵ Law Reform Commission of Nova Scotia *Final Report on Division of Family Property* September 2017.

¹⁹⁶ I.e. reviewing the law after the relevant legislation has been in place for many years amid a number of societal and other changes and developments (Law Reform Commission of Nova Scotia *Report on Division of Family Property* 2017 8 – 9; Law Reform Commission of Nova Scotia *Annual Report 2016 – 2017* 3).

¹⁹⁷ Law Reform Commission of Nova Scotia *Report on Division of Family Property* 2017 8 – 9; Law Reform Commission of Nova Scotia *Annual Report 2016 – 2017* 3.

¹⁹⁸ Law Reform Commission of Nova Scotia *Report on Division of Family Property* 2017 165 – 188, 143 – 152, and 129 – 139 respectively.

¹⁹⁹ *Ibid* 12 – 13, 71 – 74.

²⁰⁰ *Ibid* 13, 75 – 80.

47. If you believe that ad hoc changes to specific aspects could bring relief, which aspects should the SALRC prioritise in this respect and why?
48. Are there any specific principles or values that should underpin legislative reform with regard to matrimonial property issues and what are they? Why do you regard these principles and values as important and why should they form the basis of reform in this area of the law?

15. Availability of statistics relevant to the investigation

The aspects under investigation are of significance for many families. The availability of broad-based or other empirical research results, or information on aspects relevant to the investigation would assist the Commission. Relevant aspects would include matters such as, but not limited to, the following:

- The extent to which ante-nuptial contracts are being entered into and.
- The extent to which the accrual system is excluded in ante-nuptial contracts.
- The extent to which parties make use of the possibility to amend their ante-nuptial contracts and the reasons for amending such contracts.
- Whether ante-nuptial contracts are useful in reaching a fairer outcome on divorce.
- The extent to which certain factors are being taken into account in reaching private settlements on divorce (for instance parties' financial contributions to the marriage; concerns for the future financial welfare of the children involved; future financial needs of the former spouse; etc).
- The nature and value of assets on divorce.
- The share of the matrimonial property women and men, respectively, receive at settlement.
- The extent to which divorce matters are finalised on an undefended basis.
- The nature and extent of any dissatisfaction with the current system of matrimonial property; and the consequences it has on the dissolution of the marriage by divorce and death.
- The extent to which marriages concluded in South Africa are "international" marriages (i.e. where either one or both of the parties are not South African nationals)?

In respect of the above questions, the Commission would also be interested to establish who enters into ante-nuptial contracts and who experience the problems addressed in this issue paper. Some research, for instance, suggest that marriage has continued to decline in certain areas in South Africa.²⁰¹

Questions

49. Do you know of any relevant empirical studies, or information, which could assist the Commission in its review of aspects of matrimonial property law? If yes, please provide particulars in your response.

16. Additional issues

Questions

50. Are there any issues not mentioned in this questionnaire, which should receive attention under the Commission's review of aspects of matrimonial property law? What are these issues, and why should they receive attention? Please motivate your request/s.

²⁰¹ See eg Hosegood et al *Demogr Res* 2009 279 – 312.

List of sources

Bakker *PELJ* 2015

P Bakker "Chaos in Family Law: A model for the recognition of intimate relationships in South Africa" *Potchefstroom Electronic Law Journal* January 2013 (16) (<http://www.scielo.org.za>)

Barratt *SALJ* 2013

Amanda Barratt " 'Whatever I acquire will be mine and mine alone': Marital agreements not to share in constitutional South Africa" *South African Law Journal* 2013 (4) 688 – 704

Barratt *Stell LR* 2015

Amanda Barratt "Private contract or automatic court discretion? Current trends in legal regulation of permanent life-partnerships" *Stellenbosch Law Review* 2015 (26):1 110 – 131

Bonthuys *SALJ* 2004

Elsje Bonthuys "Family Contracts" *South African Law Journal* 2004 (121):4 879 – 901

Bonthuys *SALJ* 2014

Elsje Bonthuys "The rule that a spouse cannot forfeit at divorce what he or she has contributed to the marriage: An argument for change" *South African Law Journal* 2014 (131):2 439 – 460

Bonthuys *SALJ* 2015

Elsje Bonthuys "Developing the common law of breach of promise and universal partnerships: Rights to property sharing for all cohabitants?" *South African Law Journal* 2015 (132):1 76 – 99

Bonthuys *PELJ* 2016

Elsje Bonthuys "Exploring universal partnerships and putative marriages as tools for awarding partnership property in contemporary family law" *Potchefstroom Electronic Law Journal* December 2016 (19) (<http://dx.doi.org>)

Bonthuys *SALJ* 2017

Elsje Bonthuys "Proving express and tacit universal partnership agreements in unmarried intimate relationships" *South African Law Journal* 2017 (134):2 263 – 273

Catto in *The Law of Divorce*

Amanda Catto "Jurisdiction, procedure and costs" (Chapter 12) in *The Law of Divorce and Dissolution of Life Partnerships in South Africa* edited by J Heaton Juta 2014

Costa *De Rebus* 2003

Alick Costa "A Plea for enlightened reform" *De Rebus* May 2003 23

- Cronje *The South African Law of Persons and Family Law*
 DSP Cronje *The South African Law of Persons and Family Law* Third Edition reprinted
 Butterworths 1997
- De Jong *TSAR* 2005
 M De Jong "An acceptable, applicable and accessible family-law system for South Africa – some suggestions concerning a family court and family mediation" *Journal of South African Law* 2005 (1) 33 – 47
- De Jong *TSAR* 2010
 M De Jong "A pragmatic look at mediation as an alternative to divorce litigation" *Journal of South African Law* 2010 (3) 515 – 531
- De Jong *Stell LR* 2012
 M De Jong "The need for new legislation and/or divorce mediation to counter some commonly experienced problems with the division of assets upon divorce" *Stellenbosch Law Review* 2012 (23):2 225 – 240
- De Jong *THRHR* 2017
 M De Jong "Attacking trusts upon divorce and in maintenance matters: Guidelines for the road ahead (1)" *Journal for Contemporary Roman-Dutch Law* 2017 (80):2 198 – 210
- De Klerk *De Rebus* 2014
 M De Klerk "Misconduct does not play a role in forfeiture claims" *De Rebus* April 2014 37 – 38
- De Klerk *De Rebus* 2016
 M De Klerk "Claims based on universal partnerships in divorce matters" *De Rebus* June 2016 27 – 28
- Didishe *De Rebus* 2012
 V Didishe "Legal recognition for non-nuclear families" *De Rebus* December 2012 26
- Driskell *Journal of the AAML* 2006
 E Driskell "Dissipation of marital assets and preliminary injunctions: A preventative approach to safeguarding marital assets" *Journal of the American Academy of Matrimonial Lawyers* 2006 135 -154
- Edwards in *LAWSA* Vol 2(2)
 AB Edwards "Conflict of laws" in *The Law of South Africa (LAWSA)* Vol 2 Part 2 Lexis Nexis 2003
- Family Law Week March 2014
 "Law Commissoin recommends that 'qualifying nuptial agreements' should be enforceable" Family Law Week March 2014 (www.familylawweek.co.uk)
- Glover in *Family Law*
 G Glover "Divorce" in *Family Law* Lexis Nexis Family Law Service

Heaton in *The Law of Divorce*

Jacqueline Heaton "The proprietary consequences of divorce" (Chapter 4) in *The Law of Divorce and Dissolution of Life Partnerships in South Africa* edited by J Heaton Juta 2014

Heaton *SA Family Law*

DSP Cronje and J Heaton *South African Family Law* Third Edition by J Heaton Lexis Nexis 2010

Heaton *SAJHR* 2005

J Heaton "Striving for substantive gender equality in family law: Selected issues" *South African Journal on Human Rights* 2005 (21):4 547 – 574

Herbstein et al

Joseph Herbstein et al *The Civil Practice of the High Courts in South Africa* Fifth Edition Juta 2009

Himonga in *The Law of Divorce*

Chuma Himonga "The dissolution of a customary marriage by divorce" in *The Law of Divorce and Dissolution of Life Partnerships in South Africa* edited by J Heaton Juta 2014 231 – 278

Himonga in *Wille's Principles*

Chuma Himonga "Persons and family" in *Wille's Principles of South African Law* 9th edition Juta 2007

Hosegood et al *Demogr Res* 2009

Victoria Hosegood et al "Dispensing with marriage: Marital and partnership trends in rural KwaZulu-Natal, South Africa 2000 - 2006" *Demographic Research* 2009 (20): 279 - 312

Jeram *De Rebus* 2017

N Jeram "Is it still necessary to obtain a court order against a fund? A rebuttal" *De Rebus* June 2017 28 – 32

Kohn *SAJHR* 2017

L Kohn "*Ramuhovhi v President of the Republic of South Africa*: A bittersweet victory for women in 'old' polygamous customary marriages" *South African Journal on Human Rights* 2017 (33):1 120 – 137

Kruger in *Family Law*

R Kruger "Family law procedures" in *Family Law* Lexis Nexis Family Law Service

Law Commission of England and Wales *Report on Matrimonial property, needs and agreements* 2014

The Law Commission *Report on Matrimonial property, needs and agreements* Report No 343 2014

Law Commission of England and Wales *Report on Enforcement of Family Financial Orders* 2016

The Law Commission *Report on Enforcement of Family Financial Orders* Report No 370 2016

Law Reform Commission of Nova Scotia *Report on Division of Family Property* 2017

Law Reform Commission of Nova Scotia *Final Report on Division of Family Property* September 2017

Law Reform Commission of Nova Scotia *Annual Report 2016 – 2017*

Law Reform Commission of Nova Scotia *Annual Report 2016 – 2017*

Lowndes

GC Lowndes "*The need for a flexible and discretionary system of marital property distribution in the South African law of divorce*" Unpublished LLM dissertation University of South Africa 2014

Marumoagae *De Jure* 2014

C Marumoagae "The Regime of Forfeiture of Patrimonial Benefits in South Africa and a Critical analysis of the concept of unduly benefited" *De Jure* 2014 (47):1 85 –100

Marumoagae *De Rebus* 2011

C Marumoagae "Forfeiture of patrimonial benefits – it's not about what's fair" *De Rebus* July 2011 21 – 22

Marumoagae *De Rebus* 2013

C Marumoagae "Breaking up is hard to do, or is it? The clean-break principle explained" *De Rebus* October 2013 38

Marumoagae *De Rebus* 2017

C Marumoagae "Enforceable orders against retirement funds after divorce: A rejoinder" *De Rebus* June 2017 34 - 36

Marumoagae *Obiter* 2015

C Marumoagae "Factors justifying forfeiture of patrimonial benefits order" *Obiter* 2015 (36):1 232 – 242

Marumoagae *Obiter* 2016

C Marumoagae "Can a non-member spouse protect his or her interest in the member spouse's accrued pension benefits before divorce?" *Obiter* 2016 (37):2 312 – 324

Marumoagae *Obiter* 2017

C Marumoagae " 'Protecting' assets through a discretionary trust in anticipation of divorce" *Obiter* 2017 (38):1 34 – 48

Marumoagae *PELJ* 2014

C Marumoagae "A non-member spouse's entitlement to the member's pension interest" *Potchefstroom Electronic Law Journal* January 2014 (17):6 2488 – 2524 (<http://www.scielo.org.za>)

Malisheha and Radebe *De Rebus* 2017

N Malisheha and K Radebe "I do, I do, I also do: Equal right to matrimonial property" *De Rebus* March 2017 16 - 18

McConnachie *SALJ* 2010

C McConnachie "With such changes as may be required by the context": The legal consequences of marriage through the lens of section 13 of the Civil Union Act" *South African Law Journal* 2010 (21):4 424 – 442

Neelson *Conflict of Laws.Net*

J Neelson "Recognition and proprietary consequences of a UK civil partnership in South Africa" *Conflict of Laws.Net* September 2011 (<http://conflictoflaws.net>)

Neelson and Werthman-Lemmer *TSAR* 2008

J Neelson J and M Werthman-Lemmer "Constitutional values and the proprietary consequences of marriage in Private International Law – Introducing the *lex causae proprietatis matrimonii*" *Journal for South African Law* 2008 (3) 587 – 596

Pienaar *De Rebus* 2015

M Pienaar "Does a non-member spouse have a claim on pension interest?" *De Rebus* December 2015 38

Pieterse-Spies *TSAR* 2014

A Pieterse-Spies "The role of legislation in promoting equality: A South African experience" *Journal of South African Law* 2014 (4) 676

Ramabulana *De Rebus* 2017

M R Ramabulana "*Ndaba v Ndaba* – reconciling the irreconcilable" *De Rebus* June 2017 51

Reinhartz *TSAR* 2009

B E Reinhartz "International matrimonial property law: Developments in the Netherlands, Europe and South Africa" *Journal of South African Law* 2009 (1) 124

Robinson in *The Law of Divorce*

J A Robinson "The Grounds for Divorce" (Chapter 2) in *The Law of Divorce and Dissolution of Life Partnerships in South Africa* edited by J Heaton Juta 2014

Roodt *THRHR* 2006

C Roodt Conflict of Law(s) and autonomy in ante-nuptial agreements (1)" *Journal for Contemporary Roman-Dutch Law* 2006 (69):2 215

Rule Stell LR 2016

BJ Rule "A square peg in a round hole? Considering the impact of applying the law of business partnerships to cohabitants" *Stellenbosch Law Review* 2016 (3) 610 - 633

SALRC Annual Report 2013/14

South African Law Reform Commission Fortieth Annual Report 2013/14

SALRC *Report on Matrimonial Property Law* 1982

South African Law Reform Commission "Report pertaining to the matrimonial property law with special reference to the Matrimonial Affairs Act, 1953, the status of the married woman, and the law of succession in so far as it affects the spouses" RP 26/1982

SALRC *Report on Domicile* 1990

South African Law Reform Commission *Report on Domicile* (Project 60) 1990

SALRC *Report on the Review of the Law of Divorce* 1991

South African Law Reform Commission *Report on the Review of the Law of Divorce: Amendment of section 7(3) of the Divorce Act, 1979* (Project 12) 1991

SALRC *Report on Sharing of Pension Benefits* 1999

South African Law Reform Commission *Report on Sharing of Pension Benefits* (Project 112) 1999

SALRC *Report on Domestic Partnerships* 2006

South African Law Reform Commission *Report on Domestic Partnerships* (Project 118) 2006

Schoeman *TSAR* 2004

E Schoeman "A legal discussion of the development of the South African conflict rule for proprietary consequences of marriage: Learning from the German experience" *Journal of South African Law* 2004 (1) 115

Schultz

H Schultz "A legal discussion of the development of Family Law mediation in South Africa with comparison mainly with the Australian Family Law system" Unpublished LLM dissertation University of KwaZulu Natal 2011

Schultze in *The Law of Divorce*

Christian Schultze "Conflict of Laws" in *The Law of Divorce and Dissolution of Life Partnerships in South Africa* edited by J Heaton Juta 2014

Sinclair *The Law of Marriage*

June Sinclair assisted by Jaqueline Heaton *The Law of Marriage* Vol 1 Juta 1996

Smith *De Rebus* 2017 22

B Smith "Trust assets and accrual claims at divorce: The SCA opens the door" *De Rebus* August 2017 22 – 24

Smith in *The Law of Divorce*

Bradley Smith "The dissolution of a life or domestic partnership" (Chapter 10) in *The Law of Divorce and dissolution of Life Partnerships in South Africa* edited by J Heaton Juta 2014

Sonnekus in *Family Law*

J C Sonnekus "Matrimonial property law" (updated by Brigitte Clark) in Lexis Nexis Family Law Service

Sonnekus *TSAR* 2010

J C Sonnekus "Grense van kontrakvryheid vir eggenote en voornemende eggenote (Deel 2)" *Journal for South African Law* 2010 (2) 217

Tshwaranang Factsheet 2016

Tshwaranang Factsheet 1 "Advocating for the legal recognition of domestic partnerships" May 2016 (<http://www.out.org.za>)

Van Niekerk *Patrimonial Litigation*

PA van Niekerk *A practical guide to patrimonial litigation in divorce actions* Lexis Nexis

Wille's Principles

Wille's Principles of South African Law 9th edition Juta 2007

LEGISLATION REFERRED TO

Civil Union Act 17 of 2006

Constitution of the Republic of South Africa Act 1996

Divorce Act 70 of 1979

Domicile Act 3 of 1992

Maintenance Act 99 of 1998

Marriage Act 25 of 1961

Matrimonial Property Act 88 of 1984

Mediation in Certain Divorce Matters Act 24 of 1987

Recognition of Customary Marriages Act 120 of 1998