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**MEDIA STATEMENT BY THE SOUTH AFRICAN LAW REFORM COMMISSION:
DISCUSSION PAPER 160 ON THE REVIEW OF ASPECTS OF MATRIMONIAL PROPERTY
LAW (PROJECT 100E) PUBLISHED FOR GENERAL INFORMATION AND COMMENT**

The South African Law Reform Commission (Commission) announces the availability for general information and comment on its Project 100E, Discussion Paper 160, which deals with the review of aspects of matrimonial property law.

On 6 September 2021, the Commission published *Issue Paper 41: Extension of the Consultation Process: Revised Issue Paper 34* for general information and comment. The responses to *Issue Paper 41* were considered in the development of Discussion Paper 160.

Discussion Paper 160 serves to elicit responses and to serve as a basis for the Commission's further deliberations. It contains the Commission's **preliminary proposals**. The views, conclusions and recommendations should therefore not be regarded as the Commission's final views on this investigation.

In considering the discussion paper, the Commission would like to draw the respondents' attention to the major options for reform which appear below. Some follow naturally from court judgments where judges have bemoaned the lack of legislative action in the partnership sphere. Other proposals follow from respondents' experience in and/or litigating matrimonial property issues.

The Commission provisionally proposes the following:

1. Default matrimonial property regime

The Commission suggests changing the default matrimonial property regime from an in community of property regime to an out of community of property regime with accrual.

2. Changing the choice of law rules on matrimonial property for marriages concluded outside of South Africa.

The Commission proposes replacing the rule that the *lex domicilii matrimonii* (the law of the country where the husband is domiciled) determines the matrimonial property consequences with a rule which takes account of a range of factors.

3. Deviations from the default matrimonial property system.

(a) *Antenuptial contracts (ANCs)*: The Commission provisionally recommends that the scope of ANCs and prohibited terms be explicitly legislated, and that parties be subject to specific duties of disclosure. The Commission also provisionally suggests that parties receive independent legal advice prior to entering into an ANC.

(b) *Judicial discretion to redistribute upon the dissolution of marriages and other life partnerships*: The Commission recommends that a general judicial discretion to redistribute – fettered by a set of factors – should be available at the dissolution of all marriages, regardless of the matrimonial property regime.

(c) *Changing the matrimonial property system during the subsistence of a marriage*: The Commission recommends various mechanisms to replace the onerous and costly processes required for spouses to change their matrimonial property regime while the marriage subsists.

4. Customary marriages

Recommendations address family property in customary and civil marriages, the division of assets in polygamous marriage contexts where there was no application to court in terms of s 7(6) of the Recognition of Customary Marriages Act 120 of 1998 and the conversion of a customary marriage to a civil marriage and vice versa. The Commission suggests that family property not be regarded as marital property, but that a spouse's improvements to the family property should be compensated and that a court be given a general discretion to divide the property in cases where there is no s 7(6) compliance, with reference to a variety of factors.

Finally, it recommends that specific rules be adopted to deal with the conversion of a customary marriage to a civil marriage.

5. Religious marriages

The Commission provisionally recommends that the default regime for monogamous religious marriages should be out of community of property with accrual (but has set out different options), that the *nikah* be recognised as a valid marriage contract and that polygynous religious marriages should be out of community of property without accrual, but with the court exercising a general discretion to redistribute. The Commission provisionally recommends that, when entering a second or subsequent marriage, an application to court – similar to the one set out in section 7(6) of the Recognition of Customary Marriages Act of 1998 – should be followed (with consequences of non-compliance being dealt with in terms of the court’s general discretion).

6. Unmarried life partnerships

The Commission recommends that courts should have discretion to deal with the assets of the parties in a life partnership upon dissolution, setting out different options. In addition, the committee suggests codifying the putative marriage and universal partnership requirements to ensure that these remedies are applicable to putative customary and religious marriages.

7. Dissipation of assets pending divorce

The Commission makes various recommendations to prevent the dissipation of assets pending divorce, including mechanisms ensuring full financial disclosure upon divorce. The Commission also provisionally recommends that the date of the calculation of accrual be moved from the date of divorce to the date of the close of pleadings.

8. Technical issues

The Commission makes various provisional recommendations relating to the following:

- (a) *Trusts*: That a duty to disclose trust information upon divorce is imposed and legislating the test for courts to apply to assess whether the trust is a sham or an alter ego trust.
- (b) *Career assets*: That a court take career assets into account upon divorce.
- (c) *Family home*: That a special provision is legislated which will allow courts to make special arrangements for vulnerable spouses and/or children to remain in the marital home.
- (d) *Pensions*: That the clean break principle should apply to all spouses and that pension fund administrators may withhold payouts where a divorce is pending – subject to context. In

respect of living annuities, the Commission also recommends that legislation could provide a method of valuing the non-member's interest in the right to a future income stream in the form of a lump sum payment, and then provide a similar mechanism for an insurer to pay that amount directly into a retirement fund or similar vehicle.

- (e) *Settlement agreements*: That protection against duress and power imbalances be improved in the settlement agreement finalisation process, including financial disclosure.

This discussion paper is published in full to provide persons and bodies wishing to comment with enough background information to enable them to place focused submissions before the Commission. Responses to the discussion paper will be collated and evaluated to prepare a report setting out the Commission's final recommendations. The report (with draft legislation) will be submitted to the Minister of Justice and Correctional Services.

Respondents are requested to submit written comments or representations on the discussion paper to the Commission by no later than **30 September 2023** for the attention of Maureen Moloji to the following address:

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Discussion Paper 160 is available on the Internet at the following site:
<https://www.justice.gov.za/salrc/dpapers.htm>

Discussion Paper 160 can also be obtained free of charge from the Commission on request. Kindly contact Mr Jacob Kabini at Jakabini@justice.gov.za or (012) 622 6346 in this regard.

Contact for enquiries in respect of media statement: Maureen Moloji

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THE SECRETARY, SA LAW REFORM COMMISSION, CENTURION DATE: 16 August 2023.