

SOUTH AFRICAN LAW COMMISSION

PROJECT 22

REVIEW OF THE LAW OF SUCCESSION

The introduction of a legitimate portion
or the granting of a right to maintenance
to the surviving spouse

REPORT

August 1987

Aan mnr H J Coetsee, LP, Minister van Justisie

Dit is my voorreg om ingevolge artikel 7(1) van die Wet op die Suid-Afrikaanse Regskommissie, 1973 (Wet 19 van 1973), die Kommissie se verslag oor die hersiening van die erfreg (die instelling van 'n legitieme porsie of die verlening van 'n reg op onderhoud aan 'n langsliewende gade) aan u vir oorweging voor te lê.



G VILJOEN

VOORSITTER

28 Augustus 1987

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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HIERDIE STUK IS OOK IN AFRIKAANS BESKIKBAAR

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1. INTRODUCTION

1.1 There is concern about the fact that a first-dying spouse is able to disinherit the surviving spouse in circumstances leaving the surviving spouse destitute. This concern is apparent from the contributions of writers,¹ and also from other sources.² It was also expressed in the parliamentary debate³ on the Matrimonial Property Bill.⁴ It was clear that speakers considered that the matter justified investigation. On the occasion of that debate the Minister of Justice announced that the Commission had been requested to consider the introduction of a legitimate portion for or the granting of a right to maintenance to the surviving spouse as part of the Commission's review of the law of succession.⁵ The Commission took note of the request, and the investigation into the law of succession was extended accordingly.

1.2 The Commission published a Working Paper dealing with the possible introduction of a legitimate portion or the granting of a right to maintenance to a surviving spouse, and with other relevant matters. The object of the Working Paper was to elicit comments. The Working Paper was sent on the Commission's own initiative to the individuals and bodies listed

1 Barnard Cronjé & Olivier Die Suid-Afrikaanse persone- en familiereg 175; Beinart "Liability of a deceased estate for maintenance" 1958 Acta Juridica 111; Hahlo "The sad demise of the Family Maintenance Bill 1969" 1971 SALJ 201 et seqq; Lee & Honoré Family, things and succession 121; Rowland "Freedom of testation in South Africa" 1970 (2) Codicillus 8; Van der Merwe & Rowland Die Suid-Afrikaanse erfreg 627.

2 Cf: South African Law Commission Report pertaining to the matrimonial property law 28-29; South African Law Commission Law of succession: intestate succession 1 (response to an invitation to various bodies to identify deficiencies in the area of the law of succession); unpublished comments on the Second Matrimonial Property Bill 1984 (cf Government Gazette 8993 of 9 December 1983 30) - those comments were made available to the Commission by the Department of Justice.

3 1984 Hansard 8588 8612-8613 8757 9009-9010.

4 Now the Matrimonial Property Act 88 of 1984.

5 1984 Hansard 8584.

in Annexure A. A further sixty-five individuals and bodies asked for the Working Paper.

1.3 The individuals and bodies listed in Annexure B commented on the Working Paper and will hereinafter be referred to as commentators. The Working Paper was also the subject of an article by Mr Frans Marx.⁶ The Commission would like to extend a special word of thanks to all these persons and bodies for their valuable contributions.

1.4 The Commission would also like to thank Miss Rita Jordaan, a lecturer in private law at the University of South Africa, who is engaged in post-graduate studies on the present subject, for her contribution. Not only did she place the sources she had collected at the disposal of the Commission's researcher, but her door was always open for discussions with the researcher.

2. THE SOUTH AFRICAN LEGAL POSITION

2.1 There were no great problems in Roman-Dutch law regarding a surviving spouse left unprovided for, mainly because marriage in community of property was so common in Roman-Dutch times. The practice of providing for bequests to spouses in antenuptial contracts also accounted for the absence of problems. Consequently there is no clear analogy to be found in Roman-Dutch law regarding the protection of a disinherited surviving spouse. A maintenance claim, as the concept is understood today, against the estate of a first-dying spouse did not exist in Roman-Dutch law.⁷

2.2 It has been argued that a disinherited widow should have a claim against her deceased husband's estate in South African law on the strength

6 "n Reg op onderhoud vir die langsewende gade" 1986 Obiter 84.

7 Glazer v Glazer 1962 2 SA 548 (W) 552; Beinart 1958 Acta Juridica 105; Beinart "The forgotten widow: provision by a deceased estate for dependants" 1965/66 Acta Juridica 301; Boberg The law of persons and the family 284; Hahlo The South African law of husband and wife 327.

of Justinian's Novels 53.6 and 117.5.⁸ Novel 53.6 made the indigent widow (married without dos or donatio antenuptialis who had received nothing from her well-off husband's estate) an heir of that husband. After the amendment of Novel 53.6 by Novel 117.5, the position was that a widow was entitled to a quarter of the estate (but only up to an amount of 100 pounds of gold) where the deceased had no more than three children, including children from a previous marriage. In cases where there were more than three children, the widow was entitled to inherit per capita with them, provided the children were not the issue of her marriage to the deceased. If the children were indeed her and the deceased's children, she only received the usufruct of her share, with ownership vesting in the children.⁹ However, the Appellate Division¹⁰ could not be persuaded that these Novels formed part of the law of Holland since this did not appear clearly from common law sources, and common law authority to the contrary did exist.

2.3 Moreover, the approach of the Appellate Division¹¹ was that the fact that the Novels had never been applied in South Africa indicated that they had been abrogated by disuse, even if it were assumed that the Novels had formed part of the Roman-Dutch law. The Appellate Division pointed out that it was arguable that the wording of the legislation¹² abolishing legitimate portions in the various provinces extended no further than the legitimate portions of children, parents, relatives or descendants, and left whatever claim a widow may have had unaffected. The Court also

8 Glazer v Glazer 1963 4 SA 694 (A) 702-703.

9 Glazer v Glazer 1963 4 SA 695 (A) 703; Beinart 1965/66 Acta Juridica 288; Carey Miller "Rights of the surviving spouse: a distinct system in Scotland and developments in England" 1980 Acta Juridica 53; Dannenbring "Die kwart van die arm weduwee" 1966 THRHR 19-20.

10 Glazer v Glazer 1963 4 SA 694 (A) 705; however, cf Beinart 1965/66 Acta Juridica 301.

11 Glazer v Glazer 1963 4 SA 694 (A) 705-706.

12 Sec 2 of The Succession Act 23 of 1874 (Cape); sec 1 of Law 7 of 1885 (Natal); sec 128 of the Administration of Estates Proclamation 28 of 1902 (Transvaal); sec 3 of Chapter 92 of the Law Book (OFS).

found support in this argument for the view that the Novels had been abrogated by disuse. The Court's view was that the lawgivers would also have done away with this claim of the widow, if it did exist, in view of the policy to further freedom of testation.

2.4 Since Roman-Dutch law therefore does not provide support for a disinherited surviving spouse's claim to part of the deceased spouse's estate,¹³ it was argued by analogy of the child's claim to maintenance against his deceased parent's estate that such a claim is also due to the surviving spouse.¹⁴ A parent must support his child. Ordinarily a duty of support is terminated by the death of the person on whom it rests.¹⁵ However, in 1906 the Cape Court¹⁶ allowed a maintenance claim by children against their father's estate. According to some writers, the decision rested upon an erroneous interpretation of a passage in a Roman-Dutch source.¹⁷ This precedent has nevertheless been followed and the child's claim to maintenance against his deceased parent's estate is now generally accepted as settled law.¹⁸ It might now be argued that it would be illogical not to allow a claim to maintenance against the estate of any person who, if living, would have been under a duty of support.¹⁹ Such a claim should therefore also be allowed against the estate of the first-dying spouse, since

13 Cf: Carey Miller 1980 Acta Juridica 52 & 53; Hahlo "The case against freedom of testation" 1959 SALJ 436.

14 Glazer v Glazer 1962 2 SA 548 (W) 551.

15 Lee & Honoré Family, things and succession 188.

16 Carelse v Estate De Vries (1906) 23 SC 532.

17 Beinart 1958 Acta Juridica 96 & 106; Hahlo 1959 SALJ 436.

18 Boberg The law of persons and the family 279; Corbett Hahlo & Hofmeyr The law of succession in South Africa 35; Hahlo "Widow's claim to maintenance out of deceased husband's estate" 1962 SALJ 361; Lee & Honoré Family, things and succession 188; Van der Merwe & Rowland Die Suid-Afrikaanse erfreg 626; Van der Vyver & Joubert Persone- en familiereg 629-630; however, cf the (unduly) careful wording of a statement in this regard in Spiro Law of parent and child 390.

19 Lloyd v Menzies 1956 2 SA 97 (D) 102.

living spouses are under a duty to support each other. The Appellate Division was not prepared to accept, however, that a principle based upon an erroneous interpretation of Roman-Dutch law should be extended to the case of the disinherited widow.²⁰ It is now generally accepted that the surviving spouse does not have an ex lege claim to future maintenance against the estate of the deceased spouse.²¹

2.5 It is evident that a testator is able to disinherit his surviving spouse without the spouse's having any recourse against the estate of the testator.²² The question is whether this position creates a need for reform.

3. THE NEED FOR REFORM

Matrimonial property law

3.1 Where a marriage is contracted without an antenuptial contract, the matrimonial property régime which applies is one of community of property and community of profit and loss. However, if the parties are Blacks, the marriage is out of community of property and of profit and loss, unless the parties make a joint declaration before the marriage that they wish the marriage to be in community of property.²³ A consequence of marriage in community of property and of community of profit and loss is

20 Glazer v Glazer 1963 4 SA 694 (A) 707; also see: Barnard v Miller 1963 4 SA 426 (C) 428; Glazer v Glazer 1962 2 SA 548 (W) 551-552.

21 Boberg The law of persons and the family 250 & 281; Bouwer Die beredderingsproses van bestorwe boedels 346; Hahlo The South African law of husband and wife 327; Lee & Honoré Family, things and succession 121; Van der Merwe & Rowland Die Suid-Afrikaanse erfreg 627; Van der Vyver & Joubert Persone- en familiereg 690.

22 Corbett Hahlo & Hofmeyr The law of succession in South Africa 34.

23 Sec 22(6) of the Black Administration Act 38 of 1927; Ex parte Minister of Native Affairs in re Molefe v Molefe 1946 AD 315; however, cf South African Law Commission Report on marriages and customary unions of Black persons par 11.3 where changes are envisaged in this regard which would result in the position of Blacks not differing from the general position.

that the surviving spouse receives his or her half of the joint estate where the marriage is dissolved by death. In most cases this would result in the surviving spouse's being cared for after the death of the first-dying spouse. However, it is not inconceivable that cases may occur where the surviving spouse's share is inadequate to provide for his support, while supplementation from the deceased's share of the estate could have solved the problem.²⁴

3.2 Prospective parties to a marriage may determine the terms, conditions and matrimonial property régime of their marriage themselves by means of an antenuptial contract. One possibility is to provide in the antenuptial contract for the devolution of the first-dying spouse's property upon the surviving spouse. Provisions regarding succession are apparently rare in antenuptial contracts. By means of marriage settlements the antenuptial contract can also be used to meet a prospective couple's specific needs. One spouse could, for example, contract to provide an income for the other. A problem in this regard is that it is difficult to decide on a realistic marriage settlement before contracting a marriage since the parties do not know what the future holds for them.²⁵ A marriage settlement intended to provide for the surviving spouse could therefore at a later stage prove to be inadequate.

3.3 The normal type of antenuptial contract which had been in general use before the Matrimonial Property Act 88 of 1984 came into operation on 1 November 1984 excluded community of property and community of profit and loss. The result of such a matrimonial property régime is that each spouse retains his or her separate estate, including assets and liabilities acquired or incurred after the marriage was contracted. If one spouse dies the other has his own estate to live on. It is precisely in this situation that the possibility of an indigent surviving spouse arises. It is still customary for one spouse (usually the husband) to act as breadwinner, while the other keeps house. Because the wife does

24 Cf: Van der Vyver & Joubert Persone- en familiereg 690.

25 Hahlo The South African law of husband and wife 257 261 & 278-279; Van der Vyver & Joubert Persone- en familiereg 570-574.

not amass an estate of her own, she is not able to support herself. If the husband disinherited her on purpose or inadvertently, she would have to seek help elsewhere. Considering that marriage by antenuptial contract has been fairly popular in South Africa,²⁶ the possibility of a disinherited surviving spouse's being left indigent becomes even greater. The marriage out of community of property and of profit and loss is the marital property régime also applying to Blacks by law. However, it appears that Blacks prefer marriage in community of property.²⁷ Furthermore indications are that the majority of Blacks do not make wills.²⁸

3.4 All marriages out of community of property and of community of profit and loss contracted after 1 November 1984, however, are subject to the accrual system, except in so far as the accrual system is expressly excluded by the antenuptial contract.²⁹ Under the accrual system each spouse retains his or her separate estate, but at the dissolution of the marriage the spouse whose estate shows the smaller accrual acquires a claim to an amount equal to half of the difference between the accrual of the spouses' respective estates.³⁰ The first-dying spouse would not be able to nullify the surviving spouse's claim under the accrual system by means of a will.³¹ Notwithstanding the fact that the accrual system does much to ensure that a surviving spouse will be left provided for, some writers still seem to think that further protection of a disinherited surviving spouse is

26 Cf: Hahlo "New look in community systems" 1967 SALJ 89; Sinclair "Financial provision on divorce - need, compensation or entitlement?" 1981 SALJ 479; South African Law Commission Report pertaining to the matrimonial property law 20.

27 South African Law Commission Report on Marriages and Customary Unions of Black persons par 10.8.11.

28 Ibid par 10.8.10.

29 Sec 2 of the Matrimonial Property Act 88 of 1984.

30 Sec 3(1) of the Matrimonial Property Act 88 of 1984; Van der Vyver & Joubert Persone- en familiereg 567.

31 Sec 4(2) of the Matrimonial Property Act 88 of 1984.

necessary.³² Reasons³³ for this view are, first, that the accrual system does not always ensure adequate support for the surviving spouse. Say, for example, the first-dying spouse was an affluent man at the time the marriage was contracted, but that his estate showed no accrual after that date: In such a case the widow would receive nothing from her husband under their matrimonial property régime. Secondly, prospective parties to a marriage can still exclude the accrual system. According to statistics collected by the Department of Justice from the various registrars of deeds a total of 21 471 antenuptial contracts were registered for the period December 1984 to December 1985. In 13 242 cases the accrual system applies, in other words in 61 % of the cases. The period July 1985 to December 1985 shows a 4 % increase in the number of cases where the accrual system applies, compared with the period December 1984 to June 1985. Nevertheless there are still many cases where the accrual system is excluded. Thirdly, the accrual system does not apply to marriages contracted before 1 November 1984. The parties to such a marriage in which community of property and of profit and loss are excluded can, however, make the accrual system applicable to their marriage. This is done by the execution and registration of a notarial contract, but it must be done before 1 November 1988.³⁴ Prof June Sinclair³⁵ predicts that the option of changing a matrimonial property régime will be exercised by relatively few spouses: While the couple remain happily married they will pay little attention to the financial implications of their marriage, and if they are contemplating divorce, the one who would be prejudiced by the

32 Cf: Corbett Hahlo & Hofmeyr The law of succession in South Africa 35; Lee & Honoré Family, things and succession 119 & 121; Sinclair 1981 SALJ 479; cf contra Sonnekus "Legitieme porsie of verlengde onderhoudsaanspraak" 1984 De Rebus 120.

33 Corbett Hahlo & Hofmeyr The law of succession in South Africa 35; Hahlo The South African law of husband and wife 31; Lee & Honoré Family, things and succession 119.

34 Sec 21(2)(a) of the Matrimonial Property Act 88 of 1984 as amended by the Matrimonial Property Amendment Act 91 of 1986 and read with GN R2114 promulgated in Government Gazette 10481 of 9 October 1986 1. Also see sec 21(1) allowing a married couple to approach the court at any time for leave to change their matrimonial property system.

35 1981 SALJ 479.

accrual system will not want to co-operate. The statistics referred to above show that 1005 couples used this procedure to apply the accrual system to their marriages during the period December 1984 to December 1985.

Intestate succession

3.5 Where the first-dying spouse has no will, or dies partly intestate, section 1 of the Succession Act 13 of 1934 provides that the surviving spouse is an intestate heir of the deceased. The amount the surviving spouse would inherit would depend on which other intestate heirs survived the deceased and on the matrimonial property régime which applied. The Succession Act 13 of 1934³⁶ results, however, in the surviving spouse's receiving at least R50 000 (if, of course, the estate is large enough) before other heirs begin to share in the estate. If recommendations made by the Commission³⁷ are accepted, the above-mentioned amount will be increased to R100 000, and the Minister of Justice will be entitled to adjust the amount from time to time by notice in the Government Gazette.

Other sources of support

3.6 Even the disinherited surviving spouse who has no estate of his or her own can be left provided for as a result of the possibilities of, for example, life insurance and pension schemes. It is precisely because of such possibilities that some writers question the justification for protective measures for the disinherited surviving spouse in the USA.³⁸ These doubts should be viewed against the background of the American system:³⁹

36 Sec 1.

37 South African Law Commission Report on the review of the law of succession: intestate succession 33-34.

38 Chaffin "A reappraisal of the wealth transmission process: the surviving spouse, year's support and intestate succession" 1976 Georgia Law Review 469; Clark "The recapture of testamentary substitutes to preserve the spouse's elective share" 1970 Connecticut Law Review 545.

39 Benson "Totten trusts - rights of surviving spouse prevail over
(Footnote continued)

Most states in the USA give the surviving spouse the right to elect between a testamentary benefit from the first-dying spouse, or a fixed statutory share of the estate of the first dying. The size of the statutory share often corresponds with what the surviving spouse would have inherited had the deceased died intestate. The objection is therefore more against the inflexibility of the system which does not take the actual needs of the surviving spouse into account.⁴⁰ On the other hand the introduction of a family maintenance system in Washington was also advocated,⁴¹ notwithstanding the fact that Washington already had a matrimonial property system of community of property⁴² at that stage.

The incidence of disinheritance of surviving spouses

3.7 Data on the number of surviving spouses left indigent by disinheritance are somewhat scanty. Apparently this kind of case is thought to be an exception, but it does occur.⁴³ That it is the exception is confirmed by a limited sample of 1 000 estates which were reported to the Master of

(Footnote continued)

illusory transfers" 1974 De Paul Law Review 1248-1249; Chaffin 1976 Georgia Law Review 459; Clark 1970 Connecticut Law Review 514 & 517; Hardgrove "Protection of the base for the surviving spouse's election" 1978 Capital University Law Review 423; Haskell "The power of disinheritance: proposal for reform" 1964 The Georgetown Law Journal 503; Pierce "The protection of the surviving spouse against disinheritance" 1975 Georgia Law Review 948 & 954; Schmidt "Family protection under the Uniform Probate Code" 1973 Denver Law Journal 145.

40 Cf: Chaffin 1976 Georgia Law Review 464; Clark 1970 Connecticut Law Review 545.

41 Rein "A more rational system for the protection of family members against disinheritance" 1979 Gonzaga Law Review 47.

42 In respect of property obtained during the marriage - Rein 1979 Gonzaga Law Review 38.

43 Hahlo 1959 SALJ 444; Hahlo 1971 SALJ 202; South African Law Commission Report pertaining to the matrimonial property law 84-85; cf also Glazer v Glazer 1962 2 SA 548 (W) - however, the court did not find it necessary to investigate the plaintiff's assertion that she was not in a position to support herself.

the Supreme Court, Pretoria, from 1 January 1979 to 15 October 1979.⁴⁴ In 788 cases of the sample, the estates devolved under a will. In 64 % of the cases there was a surviving spouse and in 82 % of these cases the surviving spouse was the sole heir. Of the 71 cases where the surviving spouse was not the sole heir, there were only 10 where the surviving spouse inherited nothing and got nothing under the matrimonial property law. On closer investigation it emerged that in seven of the 10 cases the surviving spouse was a man. Since most men have an income of their own, these men were probably not left indigent. In one case it appeared that the widow had probably been provided for from other sources. In the remaining cases it was not possible to deduce whether the widow had been left indigent. In a few cases the widow, who had been married out of community of property, received very little and acquired no usufruct, while the estate was large enough to be able to make better provision for her needs. In these cases it was not possible either to deduce whether the widow was in a position to provide for her own needs, despite being disinherited.

3.8 The conclusion is drawn from a 100 wills which were filed at the Principal Probate Registry in London during 1963 that the disinheritance of spouses is rare, even though it could not be said with certainty that cases occurred in which the testator was survived by his spouse, but the spouse was not mentioned in the will. One such case of disinheritance was encountered, but the surviving spouse was apparently well cared for.⁴⁵ In 1978, 507 claims came before the British Courts under the Inheritance (Provision for Family and Dependents) Act of 1975. However, this Act also allows certain other persons besides a surviving spouse to submit a claim for maintenance. Of the seven cases reported in 1978 not one pertained to a surviving spouse's claim.⁴⁶

44 South African Law Commission Law of Succession: intestate succession 10-11 & 35-38.

45 Browder "Recent patterns of testate succession in the United States and England" 1969 Michigan Law Review 1304 & 1354-1355.

46 Hand "Family provision: are the right people receiving it?" 1980 Family Law 141.

3.9 The conclusion is drawn from 223 estates recorded in the administration of estates registers of a part of Michigan (USA) for the year 1963 that the assumption that the greater majority of testators will provide for their widows, even in the absence of obligations imposed by legislation, is correct.⁴⁷ A writer⁴⁸ who reviewed the available statistics in the USA reaches the conclusion that there are few cases of the testator's wanting to revenge himself on the surviving spouse after death. In the hundred years in which a surviving spouse could elect to take a statutory share, case law in Connecticut in the USA produced only one case in which a man disinherited his wife.⁴⁹ It would have been interesting to know to what extent the existence of a compulsory statutory share influenced testators in the USA in deciding on bequests.

3.10 In Manitoba (Canada) there were at least 28 claims under the Testators Family Maintenance Act for the period 1947 to 1983, five of which were unsuccessful. However, under this Act other persons besides the surviving spouse can also bring a claim against the testator's estate.⁵⁰ The claimants in the 28 cases were therefore not necessarily all surviving spouses.

3.11 Comments on the Working Paper also indicated that the disinheritance of a surviving spouse is the exception, but that it does occur. It appears from comments received from the ranks of the attorneys (Association of Law Societies) that there may be a good reason for the disinheritance of a surviving spouse. On the other hand it appears from comments of the Masters of the Supreme Court that cases do occur in which one would like to accommodate the surviving spouse. Such cases occur where the surviving spouse is inadvertently disinherited (the first-dying spouse having omitted to change

47 Browder 1969 Michigan Law Review 1304 & 1311.

48 Plager "The spouse's nonbarrable share" 1966 The University of Chicago Law Review 715.

49 Clark 1970 Connecticut Law Review 543.

50 Law Reform Commission (Manitoba) Report on "The Testators Family Maintenance Act" 8.

his will after the marriage, for example) or where the first-dying spouse had no reason, looked at objectively, to disinherit the other spouse.

3.12 The Commission considered analysing a more comprehensive sample of estates reported to the Masters' offices, but decided against it, because it felt that the expense could not be justified. It is clear from the comments of some of the Masters that unjustifiable and prejudicial disinheritance of surviving spouses does occur.

Conclusion

3.13 In theory a surviving spouse can be left destitute by disinheritance. Although scanty, statistics support the view that prejudicial disinheritance of a surviving spouse is the exception. This was confirmed by the comments on the Working Paper.

3.14 The need for reform is therefore of limited scope.

4. ARGUMENTS AGAINST REFORM

4.1 Arguments against reform centre mainly on the following aspects:

freedom of testation;

the fact that prejudicial disinheritance of surviving spouses is the exception; and

the fact that the surviving spouse was a party to the decision on what his or her matrimonial property régime should be.

4.2 First, it is argued that legislation to provide for the needs of the disinherited surviving spouse would encroach upon the principle of freedom of testation and that it is therefore undesirable. The principle of freedom of testation applies in South Africa, but certain exceptions to the

principle are acknowledged.⁵¹ Absolute freedom of testation may be taken to be undesirable, mainly because the social control that ensures that most living persons conform to the norms of society is absent in a decision on something that is to happen after one's death. Provisions in wills can therefore affect persons in a morally unacceptable way.⁵² The question is to what extent freedom of testation should be limited. It is said that South Africa takes the principle of freedom of testation further than any other Western legal system by not protecting the surviving spouse against disinheritance.⁵³ Western legal systems either allow the surviving spouse a claim for maintenance against the deceased spouse's estate or provide for a fixed inheritance, and often use the matrimonial property law to protect the surviving spouse.⁵⁴

4.3 The argument in favour of freedom of testation would hold good if public sentiment were in favour of absolute freedom of testation in the area under consideration. However, it appears from the concern referred to in paragraph 1.1 that public sentiment is generally rather on the side of the disinherited surviving spouse. That this is indeed where the sympathy of society largely lies was furthermore confirmed by the comments received on the Working Paper. Of the 23 commentators only three were positively

51 Van der Merwe & Rowland Die Suid-Afrikaanse erfreg 621.

52 Cf: Beinart 1965/66 Acta Juridica 312-313; Rowland "Controlling the dead hand" 1967 (2) Codicillus 30.

53 Beinart 1958 Acta Juridica 92; Corbett Hahlo & Hofmeyr The law of succession in South Africa 33; Hahlo "Maintenance out of a deceased estate: an epitaph" 1964 SALJ 2.

54 Clark 1970 Connecticut Law Review 514; Hahlo "The case for family maintenance in Quebec" 1970 McGill Law Journal 536; Hahlo 1971 SALJ 204; Hahlo "Recent trends in family law: a global survey" 1983 Acta Juridica 10; Hahlo The South African law of husband and wife 328; Hardgrove 1978 Capital University Law Review 423; Law Reform Commission (Manitoba) Summary of report on an examination of "The Dower Act" 5; Lee & Honoré Family, things and succession 119; Sherrin "Disinheritance of a spouse: a comparative study of the law in the United Kingdom and the Republic of Ireland" 1980 Northern Ireland Legal Quarterly 21; Van der Merwe & Rowland Die Suid-Afrikaanse erfreg 632; Van der Vyver & Joubert Persone- en familiereg 566-567.

opposed to the principle of providing for the indigent surviving spouse by legislation. The Commission feels that this is an area in which society would readily accept, and expect, that the principle of freedom of testation be moderated.

4.4 In 1969 the Select Committee on the Family Maintenance Bill⁵⁵ rejected the Family Maintenance Bill.⁵⁶ The Committee's reason for this was inter alia that it did not deem it to be in the public interest to enact legislation which would make serious inroads upon the well-established principle of freedom of testation merely to provide for the exceptional case. The said Bill would have granted the surviving spouse, a minor child, brother or sister, and, in certain circumstances, a divorced spouse, major child, brother or sister, and a parent a claim to maintenance against the estate of a deceased.⁵⁷ If only a needy surviving spouse were to be granted a claim to maintenance the practical effect on freedom of testation would be slight.

4.5 Secondly, the argument is that one has to do here with the exception. Since the legislature should not enact legislation for exceptional cases, legislation is undesirable in this instance. On the other hand, the public sentiment referred to in paragraph 4.3 is indicative of the existence of a norm in our society that surviving spouses should not be left unprovided for. The fact that the prejudicial disinheritance of surviving spouses so rarely occurs confirms the existence of such a social norm. The law often supports a social norm by compelling those who do not conform to it to do so. Seen in this light, the fact that prejudicial disinheritance is the exception should rather serve as an indication that the law should intervene to accommodate the surviving spouse, than as an indication that, because such disinheritance is the exception, intervention is unnecessary or undesirable.

55 Report (SC 9-'69) as quoted in Hahlo 1971 SALJ 209.

56 AB 27-'69.

57 Clause 2(1) read with the definition of "dependant" in clause 1 of the Family Maintenance Bill (AB 27-'69).

4.6 The third argument runs that a surviving spouse is party to the choice of his or her matrimonial property régime and therefore has only himself or herself to blame if that choice proved to be prejudicial, should he or she be disinherited. This argument has been considered somewhat unreasonable in the South African context as regards marriages contracted before the Matrimonial Property Act 88 of 1984 came into operation: In the past, marriage out of community of property was thought to be a good choice in a broad sense, and this view could have misled young couples.⁵⁸ This view of marriage out of community of property is probably due to objections levelled against marriage in community of property (applying ex lege) - for example that it restricts the woman's contractual capacity. The Matrimonial Property Act 88 of 1984⁵⁹ eliminated some of the objections against marriage in community of property by, for example, abolishing the marital power. None the less it might take some time for the negative view of marriage in community of property to disappear. Should this view continue to influence prospective parties to a marriage to prefer marriage out of community of property, the accrual system would, unless expressly excluded, apply ex lege since the coming into operation of the Matrimonial Property Act 88 of 1984.⁶⁰ The law therefore gives an indication that the accrual system is a preferable matrimonial régime. The argument is then that the parties have only themselves to blame if their choice, in the face of the indication given by the law, to exclude the accrual system later proves to be prejudicial to either of them. It may be argued⁶¹ further that those who contracted a marriage out of community of property before the new Act came into operation also accepted the risk of possible prejudice, through disherison, by not electing to have the accrual system made applicable to their marriages.⁶² From a purely juridical point of view these are weighty arguments. On the other hand it must be remembered that the

58 Rowland 1970 (2) Codicillus 11.

59 Chapter II.

60 Sec 2.

61 Sonnekus 1984 De Rebus 120.

62 In terms of sec 21(2) of the Matrimonial Property Act 88 of 1984.

accrual system would not necessarily always adequately protect a surviving spouse.⁶³ The choice of the prospective parties to a marriage could also at a later stage prove to have been the wrong one because of changing circumstances, or merely because the choice was the wrong one from the outset. Once one accepts that the social norm requires surviving spouses to be left provided for, it is hard to see why surviving spouses should be penalised for such a wrong choice.

4.7 In comments on the Working Paper it was also argued that the claim for maintenance proposed in the Working Paper would be abused, and that it would lead to litigation and delay in the winding-up of estates. These are weighty objections, which would have to be taken into account when implementing the principle, but which should not be allowed to stand in the way of the principle that provision should be made out of the estate of a deceased spouse for the needy spouse who is left behind.

4.8 The three commentators who specifically objected to the principle that provision should be made for the indigent surviving spouse by legislation were the Association of Law Societies, the Association of Trust Companies, and the Clearing Bankers Association of South Africa. The Commission went carefully into the objections raised by these associations, even more so because they are pre-eminently involved in the administration of estates in practice. Over against this the Commission also weighed the positive support of the Masters of the Supreme Court (Bloemfontein and Pretoria) for the principle. The Masters, after all, are also in the front line in this sphere. The Commission's conclusion is that those cases in which a surviving spouse is left indigent on account of disherison by the first-dying spouse do justify statutory intervention. There is no convincing reason why the estate of the first-dying spouse, if it is able to do so, should not continue to care for the surviving spouse after the death of the first-dying spouse.

63 See par 3.4.

5. METHODS OF PROTECTING THE SURVIVING SPOUSE

5.1 The choice of a way of providing for a disinherited surviving spouse lies between a claim to maintenance and a legitimate portion. A claim to maintenance is analogous to a child's claim to maintenance against the estate of its deceased parent, while the legitimate portion has been said to have had a long and honourable history.⁶⁴ Although the widow's right under Novels 53.6 and 117.5 is sometimes referred to as a legitimate portion,⁶⁵ and this right does correspond to the legitimate portion in some respects, it differs from the legitimate portion. It has been suggested that the widow's right should rather be described as a statutory legacy or as maintenance ex lege.⁶⁶ Sentimental reasons from the past therefore do not compel one to see the legitimate portion as the solution.

5.2 It has been submitted that it would be more correct, dogmatically speaking, to choose the legitimate portion as the solution since matrimonial obligations normally terminate on the dissolution of a marriage, but it has also been pointed out that this principle has not been consistently applied, as may be seen inter alia from the possible continuation of a duty of support after divorce.⁶⁷ Prof H R Hahlo⁶⁸ has correctly argued that the legitimate portion is the solution if one wants to protect the surviving spouse's moral right to share in the estate of the deceased spouse. However, if the idea is to enforce the deceased's moral duty to provide for the surviving spouse, a claim to maintenance is the solution. The argument that the surviving spouse has a moral right to take a share of the deceased spouse's estate⁶⁹ is probably based on the view that both spouses contribute to the income of the marriage, even if one of them keeps house

64 Van der Merwe & Rowland Die Suid-Afrikaanse erfreg 636.

65 Beinart 1965/66 Acta Juridica 290-291.

66 Glazer v Glazer 1963 4 SA 694 (A) 705; Beinart 1965/66 Acta Juridica 290-291; Dannenbring 1966 THRHR 20.

67 Rowland 1970 (2) Codicillus 9.

68 1959 SALJ 444; cf Kurtz "The augmented estate concept under the Uniform Probate Code: in search of an equitable elective share" 1977 Iowa Law Review 1010.

69 Pierce 1975 Georgia Law Review 958.

to enable the other to be the breadwinner⁷⁰. It is a principle of our law that prospective parties to a marriage are free to choose a suitable matrimonial property régime.⁷¹ Nevertheless, the Matrimonial Property Act 88 of 1984⁷² gives an indication of a preferable matrimonial property régime where the marriage is out of community of property, by prescribing the accrual system by law.⁷³ But, in these circumstances, to disregard the choice of the prospective parties to a marriage not to share in each other's estates by giving the surviving spouse the right to do so, would be to negate the principle of freedom of choice of a matrimonial property régime. The moral right of a surviving spouse to share in the estate of the first-dying spouse should therefore not serve as a basis for the protection of the surviving spouse left unprovided for. The basis should rather be sought in the social norm that requires that surviving spouses should not be left unprovided for. Since the approach is that the surviving spouse should be provided for, a claim to maintenance is the more acceptable choice.

5.3 A surviving spouse who is left destitute is the exception. If the institution of a legitimate portion is chosen as the solution, all surviving spouses would benefit, instead of only a few. It might indeed be argued that such a step would constitute unjustifiable infringement upon freedom of testation. For this reason, too, a claim to maintenance is the obvious choice.

5.4 It is also necessary to weigh up practical aspects. The greatest single advantage a claim to maintenance has over the legitimate portion is its flexibility.⁷⁴ The legitimate portion does not normally take the actual

70 Van der Vyver & Joubert Persone- en familiereg 562-563.

71 Ibid 565.

72 Ch II.

73 Sec 2 of the Matrimonial Property Act 88 of 1984.

74 Beinart 1965/66 Acta Juridica 318; Laufer "Flexible restraints on testamentary freedom - a report on decedents' family maintenance legislation" 1955 Harvard Law Review 314.

needs of the surviving spouse into account,⁷⁵ whereas a claim for maintenance can specifically be adjusted to do so by taking the claimant's financial position into account. That would include benefits received by the surviving spouse from the deceased spouse before the death of the latter. It is of course possible to enact legislation providing for a legitimate portion to be reduced commensurately with such benefits. However, that could impose on the surviving spouse the burden of having to prove which part of her (or his) estate is not derived from the deceased spouse. It seems simpler merely to ascertain the surviving spouse's financial position, without having to refer to the sources of the income. Furthermore, the fact that the surviving spouse is financially independent in his or her own right would not be taken into account in the case of the legitimate portion. The fact that the fixed portion of many states in the USA does not always produce equitable results is ascribed to its inflexibility.⁷⁶ Since the legitimate portion is usually fixed at a fraction of the estate, it may easily fail to achieve its aim of providing the surviving spouse with maintenance. If one circumvents this objection by prescribing a minimum amount in the case of smaller estates (as in the case of intestate succession) one again comes up against the argument of unjustifiable interference with the freedom of testation.

5.5 The advantage of flexibility, however, also gives rise to criticism of a claim to maintenance as the solution.⁷⁷ If a claim to maintenance is based on need, there can hardly be any objection to its discretionary nature. The measure of discretion inherent in any claim to maintenance obviously does not present problems in practice. Furthermore quite a few guidelines on the subject have been placed on record in case law, which weaken⁷⁸ the objection that discretion creates uncertainty.⁷⁹

75 Beinart 1965/66 Acta Juridica 314.

76 Clark 1970 Connecticut Law Review 542.

77 Law Reform Commission of British Columbia Report on statutory succession rights 74.

78 Cf Laufer 1955 Harvard Law Review 314.

79 Cf: Kurtz 1977 Iowa Law Review 1011; Sonnekus 1984 De Rebus 120.

5.6 One objection levelled against family maintenance systems is that the claimant has to go to court.⁸⁰ This is sometimes an important reason why a fixed portion is considered preferable in the USA.⁸¹ The costs attached to a court application are seen as a problem.⁸² In fact, it is apparently this very problem which persuaded some⁸³ to prefer the legitimate portion to a claim for maintenance. This problem can be overcome by not requiring that the claim for maintenance must be brought in a court, the court being involved only in the event of a dispute.⁸⁴ Another possibility is to give the lower courts the necessary jurisdiction.⁸⁵ The work a claim for maintenance would create for the courts is also seen as a problem.⁸⁶ However, were the courts to be involved only in the event of a dispute, the work-load should not present insurmountable problems. Thirdly, the embarrassment of a public court case in which the surviving spouse's financial position is laid bare is referred to.⁸⁷ This does not appear to be sufficient reason for rejecting the claim for maintenance as a solution. Fourthly, there is the delay in the administration of the estate which a claim for maintenance would cause.⁸⁸ Such delays could also occur even if it were not necessary to go to court. Prof Hahlo⁸⁹ pointed out that there has been no public protest in Australia, New Zealand or Canada regarding hardships experienced by heirs as a result of delays brought

80 Law Reform Commission of British Columbia Report on statutory succession rights 74.

81 Cf: Chaffin 1976 Georgia Law Review 463; Clark 1970 Connecticut Law Review 543.

82 Beinart 1965/66 Acta Juridica 318.

83 Lee & Honoré Family, things and succession 121.

84 See par 6.19 & 6.20.

85 Rowland 1970 (2) Codicillus 10.

86 Vgl Van der Merwe & Rowland Die Suid-Afrikaanse erfreg 638.

87 Ibid.

88 Report (SC 9-'69) of the Select Committee on the Family Maintenance Bill (AB 27-'69), as quoted in Hahlo 1971 SALJ 209.

89 1970 McGill Law Journal 540.

about by family maintenance systems in those countries, and that no complaints are made in this country about inordinate delays brought about by children's maintenance claims against their parents' estates.⁹⁰ As has been mentioned, the prevention of unacceptable delays is something that should be borne in mind in the drafting of legislation, rather than be taken as pointing to the legitimate portion as the solution.

5.7 Any attempt to institute a legitimate portion which would be equitable in as many cases as possible would involve very complicated legislation. It has been submitted⁹¹ that the complexity of the law developing around the legitimate portion elsewhere is an argument against it.

5.8 It seems that the above-mentioned practical objections against a claim to maintenance should not affect its choice as the solution on grounds of principle. On the contrary practical objections against the legitimate portion rather point to a claim to maintenance as the obvious solution. Certain writers⁹² also prefer a claim to maintenance to a legitimate portion.

5.9 Apart from the commentators who supported the Commission's tentative proposal of a claim to maintenance for the surviving spouse, five commentators (Department of Justice; Master, Pietermaritzburg; Master, Pretoria; Prof Sonnekus; and Mr H N Theunissen) said explicitly that a claim to maintenance was preferable to a legitimate portion. The National Council of Women of South Africa advocated the introduction of a legitimate portion as well as a claim to maintenance. Their view appears to be based on the moral right of a spouse to share in the estate of the other spouse.

90 Hahlo 1971 SALJ 203.

91 Van der Merwe & Rowland Die Suid-Afrikaanse erfreg 637: in the context of relations other than surviving spouses.

92 Beinart 1958 Acta Juridica 111; Hahlo 1970 McGill Law Journal 538; Marx 1986 Obiter 86-87; cf contra Lee & Honoré Family, things and succession 121; also see the view in Van der Merwe & Rowland Die Suid-Afrikaanse erfreg 629 & 632 that a combination of a claim to maintenance and a legitimate portion presents the solution, but cf the approach in par 5.2 above.

It has already been argued in paragraph 5.2 that the moral right of a surviving spouse to share in the estate of the first-dying spouse should not serve as basis for the protection of the spouse left unprovided for.

5.10 Prof D J Joubert was in favour of a legitimate portion. His view was that considerations of simplicity and costs call for a fixed amount (a "vastebedragreëling", as he referred to it). His reasoning was as follows (our translation):

It is difficult to provide for future maintenance, especially in the long term, since inflation and changing needs have to be taken into account. Say the widow is 30 years of age with three small children (leaving her unable to work). She would then be entitled to maintenance until she is 70 years old and might at that stage also be entitled to expect even more, should her health fail her.

As soon as the calculation of periodical payments or a lump sum becomes intricate, those concerned either have to call in the help of specialists, or proceed with long and expensive consultations or litigation. While this is in progress the estate cannot be wound up. The result would be that the administration of estates of breadwinners would become more expensive and would also take longer to dispose of. In cases where capital had to be set aside for future payments, all the funds in the estate could be tied up until the death of the surviving spouse.

These practical objections must certainly be taken in account. On the other hand one is faced with the principle of freedom of testation. Prof J C Sonnekus puts it as follows in his comments (our translation):

I am in no doubt that the resurrection of a right to a legitimate portion in any disguised form has no place in South African law at this late stage. Over the past 100 years or more the tradition of freedom of testation has simply become so entrenched that it would constitute a drastic diminution of our law were one to interfere with that tradition, either by introducing a legitimate portion directly or by camouflaging it under a discretionary power of the courts ostensibly to allocate an equitable share of the first-dying spouse's estate to the surviving spouse. In both cases the infringement on the testator's freedom of testation is too drastic and too discretionary to be justified in the light of the need indicated.

The Commission associates itself with the latter view.

5.11 Another possible solution is to grant the court the power to order a redistribution of the estate. In their comments the Women's Legal Status Committee even submitted that the courts should have such a power in addition to a surviving spouse's claim to maintenance. The Select Committee on Matrimonial Property Law⁹³ included a clause with this object in their recommended legislation. It empowers the court (on the application of the surviving spouse) to order that an equitable share of the deceased spouse's estate be made over to the surviving spouse. This power would operate with regard to marriages out of community of property where the deceased had disposed of his property by will. However, the equitable share is restricted to a child's share or a quarter of the estate, whichever is the greater.

5.12 Prof Sonnekus⁹⁴ believes that the "equitable share" was derived from the "reasonable financial provision" of the English Inheritance (Provision for Family and Dependents) Act, 1975, and rightly says that borrowing from the English law is inappropriate in this case. Section 1 of the said Act allows the surviving spouse a claim for reasonable financial provision, whether or not this is needed for maintenance. This must be seen against the background of the matrimonial property régime (excluding community of property) operating in England.⁹⁵ The idea is rather to provide for the moral right of the surviving spouse to share in the estate of the deceased spouse.⁹⁶ This brings one to the main objection against the redistribution of an estate on death in the South African context - it is not based purely on the principle of providing for the surviving spouse. Moreover, restricting the "equitable share" to a fraction can easily result in the fraction being too small to meet the surviving spouse's needs.

93 Report 22 24 & 26.

94 1984 De Rebus 119.

95 Hahlo 1983 Acta Juridica 11.

96 Cf Law Commission Family law: second report on family property: family provision on death 70.

5.13 The court's discretion is not fettered by guidelines laid down for maintenance, since the redistribution of an estate is also based on the idea that the surviving spouse has a moral right to share in the estate.⁹⁷ The uncertainty as to what a court will do is much greater than in the case of maintenance, since a decision on whether such a moral right exists must to a large extent depend on a subjective opinion.⁹⁸ Because the deceased is not able to state his (or her) side of the case, evidence before court as to what would be equitable will often be one-sided. On grounds of principle and because of the greater uncertainty it would create, a redistribution of an estate cannot be supported as the solution.⁹⁹

6. RECOMMENDATIONS

6.1 The Commission recommends that a duty of support be placed by law on the estate of a deceased spouse in favour of the surviving spouse.

Basis of the claim to maintenance of a surviving spouse

6.2 The line of approach of South African law is that a person is entitled to maintenance from another only if in need of support.¹ In the only case where a claim for maintenance against the estate of a deceased is at present allowed by law (the claim of a child against the estate of his parent), the approach is also that the person entitled to maintenance must be in need of support.² It is submitted in paragraph 5.2 that the moral right of one spouse to share in the other spouse's estate should not serve

97 Cf clause 22(3)(g) of the legislation recommended in Select Committee on Matrimonial Property Law Report 24, authorising the court to "take into account ... any other factor 7 in addition to those listed in clause 22(3) 7 which should in the opinion of the court be taken into account".

98 Cf Law Reform Commission of British Columbia Report on statutory succession rights 153.

99 Also see Marx 1986 Obiter 87.

1 Van der Vyver & Joubert Persone- en familiereg 632 & 691.

2 Ibid 630.

as a basis for the surviving spouse's claim to maintenance. The aim is merely to prevent a person from being left destitute. The basis of a claim to maintenance of a surviving spouse is therefore a need for support.³

6.3 A need for support mostly occurs in cases where the deceased did not provide for the surviving spouse in a will, and the parties were married out of community of property with the exclusion of profit and loss and the accrual system. In cases where another matrimonial property régime applies, the surviving spouse can still be in need of support in exceptional cases.⁴ It therefore seems desirable to allow a claim for maintenance irrespective of the matrimonial property régime applying to the marriage. It is interesting that the Law Reform Commission of Manitoba⁵ recommended that the protection of a disinherited surviving spouse should continue to exist in addition to the new matrimonial property system of deferred community of property which that Commission recommended.

6.4 There are legal systems where the mechanisms to prevent a surviving spouse from being left indigent are also applicable to intestate estates.⁶ The approach should be to keep the intestate portion of the surviving spouse realistic, which would make further protection redundant. However, if the first-dying spouse dies partially intestate, the possibility still exists that the part of the estate devolving by intestate succession would not be large enough to provide for the surviving spouse's needs. Should the claim for maintenance not be available in cases where an estate devolves partially intestate, the possibility of evading it is also only too obvious. A testator could leave a nominal amount to the surviving spouse,

3 This is also the view of: Rowland 1970 (2) Codicillus 10; Sonnekus 1984 De Rebus 121.

4 See par 3.1 & 3.4 above.

5 Report on "The Testators Family Maintenance Act" 5.

6 E g in England sec 1(1) of the Inheritance (Provision for Family and Dependants) Act, 1975; Sherrin 1980 Northern Ireland Legal Quarterly 29 and Canada Institute of Law Research and Reform (Alberta) Family relief 27; Law Reform Commission (Manitoba) Report on "Testators Family Maintenance Act" 8 7.

thus defeating a claim for maintenance, and the surviving spouse would still be left destitute. In the Commission's view legislation should provide for the maintenance of the surviving spouse, regardless of whether the estate of the deceased spouse devolves testate, intestate or partially intestate, as long as the claim to maintenance is based on a need for maintenance.

6.5 Basing a claim to maintenance on a need for support implies that the person entitled to support must be unable to support himself or herself. Consequently everything falling into the estate of the surviving spouse should be taken into account to determine whether the surviving spouse has a claim to maintenance against the estate of the first-dying spouse. Amounts due to the surviving spouse on account of the matrimonial property régime which applied, a bequest by the deceased, a usufruct on the property of the deceased, life insurance, pension schemes and a settlement by the deceased during his lifetime, must therefore be taken into account. The capital of the surviving spouse should also be taken into account in establishing whether a need for support can be said to exist. If the surviving spouse is capable of being self-supporting by going out to work, there is no need for support. The Commission therefore recommends that legislation should lay down clearly that the surviving spouse will be entitled to maintenance only if he or she is not able to provide for his or her maintenance needs out of his or her own means and earnings. Legislation should also make it clear that the surviving spouse's "own means" include everything received by the surviving spouse under the law of matrimonial property or the law of succession or otherwise as a result of the death of the first-dying spouse.

6.6 A question that arises is whether a divorced spouse of the deceased whom the deceased had to support before his death should also be entitled to maintenance out of the deceased's estate. The court granting a decree of divorce may make an agreement between the parties with regard to the payment of maintenance an order of court.⁷ Such an order may at

7 Sec 7(1) of the Divorce Act 70 of 1979.

any time be varied by the court.⁸ It would lapse at the death of the party who has to pay maintenance only if the agreement so provides, and the person entitled to maintenance therefore usually has a claim against the estate of the other party.⁹ If the parties were unable to agree on maintenance, the court may make an order in respect of the payment of maintenance.¹⁰ Whether such an order can continue after the death of the debtor is uncertain.¹¹ The position is therefore that a person who, in terms of a court order, received maintenance from a former spouse usually finds that that support ceases at the death of that spouse.

6.7 The Association of Law Societies argued that it would be unfair to give a surviving spouse who had left the first-dying spouse before his death the benefit of a claim for maintenance, while the divorcee has no such claim. However, this argument is diminished by the fact that since the introduction of the irretrievable break-down of marriages as a ground for divorce¹² the law no longer restrains parties who want to get divorced from doing so by unnecessary formalism. It was said that this could result in a woman not divorcing her spouse when she leaves him to live with another man, so as to retain a claim for maintenance against her spouse. It should be remembered, however, that the husband would still be able to divorce the wife. The approach is to restrict infringement upon freedom of testation to a minimum. This is done by providing only for the immediate family out of the deceased's estate. If a former spouse is included, it can justifiably be argued that it is unjust not also to grant a parent, brother or sister who had been supported by the deceased a claim to maintenance.

8 Sec 8(1) of the Divorce Act 70 of 1979.

9 Van der Vyver & Joubert Persone- en familiereg 694.

10 Sec 7(2) of the Divorce Act 70 of 1979.

11 Compare Copelowitz v Copelowitz 1969 4 SA 64 (C) 69-71 with the views of: Hahlo The South African law of husband and wife 357; Lee & Honoré Family, things and succession 138; Van der Vyver & Joubert Persone- en familiereg 694.

12 Cf Sec 4 of the Divorce Act 70 of 1979. Also see Marx 1986 Obiter 90.

The approach is to grant only the surviving spouse the claim to maintenance.

6.8 The Master, Pretoria, posed the question whether provision should not be made for the appointment of a curator ad litem in cases where the surviving spouse claims maintenance for herself as well as for her children in her capacity as guardian. The surviving spouse who is both parent and guardian to the children would have to support those children if the estate did not do so. Her interests and the interests of the children therefore actually coincide. The General Council of the Bar also pointed out that the Master of the Supreme Court could look after the interests of the children by virtue of his powers under section 35(9) of the Administration of Estates Act 66 of 1965. In cases where a dispute arise and the matter goes to court the court would be able to appoint a curator ad litem for the children.¹³ It therefore appears to be unnecessary to make specific arrangements in this connection.

Order of precedence of the claim for maintenance

6.9 The courts correctly¹⁴ regard the duty of a deceased parent's estate to support a child as a sui generis debt of the estate.¹⁵ Consequently the claims of ordinary creditors have to be met first, thereafter the claim of a maintenance claimant and only then are legacies

13 Boberg The law of persons and the family 685-686.

14 Cf Beinart 1958 Acta Juridica 110.

15 Davis' Tutor v Estate Davis 1925 WLD 168 at 172; Goldman v Executor Estate Goldman 1937 WLD 64 at 69; Lloyd v Menzies 1956 2 SA 97 (D) 102; Ex parte Estate Pitt-Kennedy 1946 NPD 776 at 779; Ritchken's Executors v Ritchken 1924 WLD 17 at 23; In re Estate Visser 1948 3 SA 1129 (C) 1135; Ex parte Zietsman: in re Estate Bastard 1952 2 SA 16 (C) 21.

and bequests settled.¹⁶ It seems appropriate that the debt of an estate for the maintenance of the surviving spouse should rank equally.¹⁷

6.10 A more difficult question is whether the surviving spouse's claim or the child's claim should take precedence. Since the surviving spouse is entitled to maintenance only if he or she needs it, it seems desirable to place the surviving spouse and the child on an equal footing. They should therefore share proportionately in the amount available in the estate for maintenance in cases where the estate is too small to satisfy all claims fully. Mr A M Brokensha suggested that the different claims for maintenance should be assessed on their respective merits. This would mean that the court would have to be approached in all cases where there are such competing claims - after all, such an assessment would depend on the exercise of a discretion. As against this the line of approach is that as few cases as possible should end up in court.¹⁸ This proposal is therefore not supported.

6.11 The Master, Pietermaritzburg, raised objections against placing the claim of the surviving spouse and the claim of children on an equal footing. He mentioned the example of an opportunist marrying the deceased while the latter was dying. However, the opportunist would still have to show a need for maintenance, and earning capacity would be taken into account in establishing such a need. The Master's objections, of course, were raised in the context of the tentative line of approach taken in the Working Paper, namely that the amount of maintenance must be determined with reference to the standard of living of the surviving spouse before the death of the first-dying spouse. However, the criterion now advocated is one of reasonable maintenance.¹⁹

16 Christie v Estate Christie 1956 3 SA 659 (N) 661-662; Ex parte Insel 1952 1 SA 71 (T) 74; see sources in the previous footnote.

17 Van der Merwe & Rowland Die Suid-Afrikaanse erfreg 631.

18 See par 6.20.

19 See par 6.14.

Criteria for determining the amount of maintenance

6.12 The amount of maintenance to which a party to a marriage can lay claim depends on the standard of living (which usually also gives an indication of the social standing of the parties) of the family.²⁰ The court granting an order with regard to the payment of maintenance on divorce must inter alia have regard to the standard of living of the parties prior to the divorce.²¹ The ideal that maintenance should enable a person to maintain his or her standard of living is however subordinated to the principle that the person under a duty to support must be able to pay maintenance on such a scale.²² In the case of a child's claim for maintenance against the estate of his deceased parent, too, the amount of maintenance is determined with reference to the standard of living of the family (and therefore that of the child) before the death of the parent, in so far as the size of the estate allows this.²³

6.13 The question is whether the spouses' standard of living before the death of the first-dying spouse should also serve as the criterion to determine the amount of maintenance to which the surviving spouse is entitled. In his comments Prof D J Joubert submitted that minimum maintenance for the necessities of life should be the sole criterion in the present context. At least the surviving spouse should not be allowed to become a burden on society. He said that it was not justifiable from a social point of view to take the standard of living before death as the criterion after the breadwinner had passed away. Mr Marx²⁴ agreed with this view. He argued that in the first place the contemplated legislation

20 Cf: Hahlo The South African law of husband and wife 135; Lee & Honoré Family, things and succession 183.

21 Sec 7(2) of the Divorce Act 70 of 1979.

22 Van der Vyver & Joubert Persone- en familiereg 632.

23 Bank v Sussman 1968 2 SA 15 (O) 17; Davis' Tutor v Estate Davis 1925 WLD 168 at 173; Ex parte Insel 1952 1 SA 71 (T) 74; Ex parte Jacobs 1982 2 SA 276 (O) 277; Lloyd v Menzies 1946 2 SA 97 (D) 102; In re Estate Visser 1948 3 SA 1129 (C) 1136.

24 1986 Obiter 88 - 89.

was intended for those exceptional cases where the spouse had been left indigent - it is therefore unacceptable that many spouses would also be able to make use of the contemplated claim for maintenance because of their reduced financial position (owing to the death of the first-dying) notwithstanding the fact that they had not been left indigent. Secondly, such a claim for maintenance infringes on the principle of freedom of testation. Although infringement is justifiable, it should be restricted to what is essential. In his comments Prof J C Sonnekus submitted that the claim for maintenance of a surviving spouse provides for the exceptional case and the provision should therefore be restrictive. The claim to maintenance should therefore be allowed only in so far as the claimant is by objective standards not in a position to provide for his or her reasonable needs, while the estate is able to do so.

6.14 In general the Commission agrees with the views in the preceding paragraph. Therefore the Commission recommends that a surviving spouse should have a claim to maintenance only if he or she is unable to provide for his or her own reasonable maintenance needs.

6.15 What would constitute a reasonable need for maintenance would depend on the circumstances of each case. Several factors would have to be taken into account including for example the standard of living of the surviving spouse before the marriage. Mr A M Brokensha and the Association of Law Societies argued that no distinction should be made in principle between the factors taken into account on the dissolution of a marriage by death and those taken into account on the dissolution of a marriage by divorce. The Divorce Act 70 of 1979 lists the following factors to which the court may have regard when making an order with regard to the payment of maintenance:²⁵

- (a) the existing or prospective means of each of the parties;
- (b) the parties' respective earning capacities;

25 Sec 7(2) of the Divorce Act 70 of 1979.

- (c) the parties' financial needs and obligations;
- (d) the age of each of the parties;
- (e) an order regarding the transfer of assets from one party to the other;
- (f) the duration of the marriage;
- (g) the parties' conduct in so far as it may be relevant to the break-down of the marriage;
- (h) any other factor which in the opinion of the court should be taken into account.

6.16 Factors (a) to (e) relate to the need for support and whether the person who has a duty of support is able to pay maintenance. These factors are naturally of importance.²⁶ In so far as these factors are not expressly included in clauses 1(1) and 1(2) of the Bill in Annexure C, they are included by implication. The age of the surviving spouse, for example, will be of importance in establishing whether that spouse will be able to provide out of his or her own earnings for his (or her) reasonable maintenance needs. Factor (f) (the duration of the marriage) should in the Commission's opinion play a role only in so far as it does not introduce a moral judgment into the decision as to whether a surviving spouse is entitled to maintenance.

6.17 Factor (g) above (the parties' conduct) necessarily introduces a moral judgment into the decision regarding maintenance. Other "moral" factors mentioned by commentators which should, according to them, be included, are factors leading to disherison and the surviving spouse's unworthiness to receive maintenance. Mr Marx,²⁷ however, rightly feels

26 Cf par 6.5 above.

27 1986 Obiter 89.

that the practical problems that would arise should moral factors also play a role compel one to leave such factors out of account. In the Commission's opinion the conduct of a party to a marriage should not be allowed to be raked up to refute a claim for maintenance. It should be borne in mind that it is not a question of a right to a share in the estate of the deceased spouse, but merely of reasonable maintenance for someone in need. The conduct of the surviving spouse (including the fact that the spouses had separated) and statements of the first-dying spouse on reasons for disinheriting the surviving spouse should therefore not be taken into account. If the surviving spouse has been disinherited because he or she is provided for from other sources, the testator's will would in any case prevail, since the surviving spouse would not be in need of support. The Commission's recommendations in this regard are embodied in clause 1 of the Bill in Annexure C. The emphasis is on the need for maintenance of the surviving spouse.

The lodging of the claim

6.18 In the case of a child's claim for maintenance against the estate of his deceased parent, a written agreement is concluded between the child's guardian and the executor of the estate. The agreement is then submitted to the Master of the Supreme Court for his consideration. The Master decides whether the agreement is acceptable and whether it should be submitted to the court for ratification. The general rule is that the court as upper guardian of all minors has the final say. If the Master is satisfied that the agreement is the best possible one under the circumstances (for example, the whole of the remainder of the estate is to be paid into the Guardian's Fund for the child's benefit), he himself approves the agreement.²⁸ The court's competence to intervene derives from its duty to protect minors.

6.19 There is no such reason in the case of a surviving spouse. Instead of copying overseas family maintenance systems and forcing the

28 Bouwer Die beredderingsproses van bestorwe boedels 329-330; also see Davis' Tutor v Estate Davis 1925 WLD 168.

surviving spouse to apply to court, the South African example could rather be followed.²⁹ Legislation could merely provide that the surviving spouse has a claim to maintenance against the estate. The provisions of the Administration of Estates Act 66 of 1965 would then apply to such claim. Any person interested in the estate would be able to lodge any objection with the Master to the provision of maintenance for the surviving spouse. The Master would then, after considering such an objection, or apart from any objection, be able to give the executor such directions as he might think fit. Any person aggrieved by the Master's decision would be able to approach the court.³⁰

6.20 The approach outlined in paragraph 6.19 would in practice result in the executor's and surviving spouse's deciding by agreement in most cases on the provision of maintenance. Even if such an agreement proved to be unacceptable to anyone, it would still be unnecessary to approach the court in view of the Master's powers. Legal costs and the delay in winding up the estate caused by a court case would therefore arise only if the Master's decision were unacceptable to an interested party. Certain commentators (Master, Grahamstown; Standard Trust Ltd; Association of Law Societies) were not optimistic that relatively few claims for maintenance would be lodged by surviving spouses and that such claims would be settled without the intervention of a court. Their view is that a surviving spouse who is dissatisfied with the will of the first-dying spouse would use the claim for maintenance to circumvent that will. The Commission is aware of the fact that a rule of practice exists in the ranks of the Masters of the Supreme Court not to adjudicate on factual disputes, notwithstanding the scope of section 35(9) of the Administration of Estates Act 66 of 1965. Especially in cases of second marriages, or where surviving spouses were disinherited because the spouse was seen as unworthy to inherit, the circumstances would be conducive to objections from heirs. A surviving spouse left indigent on account of disinheritance is however the exception. Therefore deserving claims should be rare. The problem rather lies with

29 Cf Beinart 1965/66 Acta Juridica 321.

30 Sec 35(7) to (10) of the Administration of Estates Act 66 of 1965.

unfounded claims. The Commission foresees that such unfounded claims, which would after all have to end up in court if the claimant persisted, would be discouraged by orders to pay costs against claimants.

6.21 The question was raised whether a special procedure should be set up for the handling of claims for maintenance of surviving spouses. The Standard Trust Ltd suggested that the Master or a magistrate be appointed an adjudicator where parties could not reach an acceptable agreement. The Commission is not disposed to impose duties on the Master that overlap those of a judicial officer. There is an established procedure for dealing with the surviving spouse's claim for maintenance. The sanction of orders to pay costs will discourage unfounded claims where such claims cause problems. The Commission does not wish to set up a new procedure merely for the exceptional case.

6.22 The Standard Trust Ltd and the Association of Trust Companies called attention to the clash of interests which may arise where the surviving spouse who has a claim against the estate is also the executor. It is not unusual for an executor also to be a beneficiary or a claimant of a deceased estate.³¹ No insurmountable problems are foreseen in this regard.

Restrictions on the claim

6.23 A matter to which the Commission gave its attention is whether the contemplated claim of a surviving spouse to maintenance should be subject to any time limits. Although the claim to maintenance of a minor child of the deceased is subject to the provisions of the Administration of Estates Act 1965 regarding the lodging of a claim with the executor (sections 29 and 31 of the Act), that child can, even after distribution of the estate, by means of the condictio indebiti claim maintenance from an heir or a legatee to whom payment has been made in accordance with a valid distribution of the estate.³² This is a drastic rule which can be most

31 Bower Die beredderingsproses van bestorwe boedels 371-372.

32 Bank v Sussman 1968 2 SA 15 (O) 17; Couper v Flynn 1975 1 SA 778 (R) 779.

prejudicial to an heir or a legatee. When interests of this nature have to be weighed up, the scale tips more readily in favour of a needy minor than in favour of a surviving spouse. A surviving spouse who unreasonably delays lodging a claim against the estate of the deceased spouse probably has no serious need of support.

6.24 The question was also raised whether a surviving spouse whose need for support arises only after the death of the other spouse should be able to claim maintenance from heirs or legatees to whom payment has been made in accordance with a valid distribution of the estate. Considerations of legal certainty and equity compel one not to grant a claim to the surviving spouse in such a case either.

6.25 The conclusion is that it is unnecessary and undesirable for a surviving spouse to be able to hold the heirs liable where the estate has already been distributed.³³ Clause 3 of the Bill contained in the Working Paper tried to prevent such a claim against an heir. Clause 3 provided that the surviving spouse's claim may not be lodged after the distribution of the estate. Clause 3 presented commentators with problems (Mr L A Kernick; Master, Bloemfontein; Master, Grahamstown; Standard Trust Ltd). The problems mentioned were that it is difficult to say when an estate has been distributed in practice, and that the surviving spouse's claim should be treated in the same way as any other creditor's claim. It was suggested that the cut-off point should rather be the expiry of the inspection period of the final liquidation and distribution accounts, or the moment the estate becomes distributable in terms of section 35(12) of the Administration of Estates Act 66 of 1965. If so, specific provision might have to be made for cases falling under section 18(3) and section 25 of the Administration of Estates Act 66 of 1965. The Commission believes that the solution is to lay down what is intended, namely that the surviving spouse shall have no right of recourse against anyone who has received anything out of the estate in accordance with a valid distribution of the estate.

33 Also cf Marx 1986 Obiter 90.

6.26 The General Council of the Bar proposed that the surviving spouse's claim should be restricted by protecting a bequest to an indigent relation who had the right of support prior to death in so far as that bequest is required for maintenance. The argument is that the deceased's freedom of testation should not be infringed by preventing the deceased from providing for an indigent relation. The surviving spouse might perhaps have been disinherited for good reasons, while the relation may for example be an aged and ailing father of the deceased. In such a case the policy considerations in favour of the surviving spouse are less cogent. The commentator suggests that clause 2 be adapted so as to let such a relation share equally with children and the surviving spouse in that part of the estate which is available for maintenance. The effect would be in fact to recognise a claim of other relations in certain circumstances. The Commission is not disposed to do so.

Discharging the claim

6.27 The question is in what way the surviving spouse's claim to maintenance should be discharged. In the comments the practically minded took the view that a capitalised amount should be paid to meet such a claim in every case. The advantage of meeting a claim with a capitalised amount lies in the elimination of administrative problems and delays in the winding-up of estates. On the other hand the theoretically minded were in favour of periodical payments. Periodical payments were advocated because they can be adjusted as maintenance needs change and because the capital remaining when the need for maintenance comes to an end can be distributed among the heirs.

6.28 However, the Commission agrees with the Law Society of the Transvaal which submitted that there should be a wide discretion as to how a claim to maintenance is to be met. The Commission recommends that legislation should not prescribe how a claim for maintenance is to be met. The door would be left open for negotiating the appropriate way to meet a claim in the circumstances concerned. It would be possible, for instance, to meet a claim for maintenance with a capitalised amount, by periodical payments deriving from a trust, or by periodical payments deriving from an

amount invested for this purpose.³⁴ Other possibilities are a redistribution of the estate, or the taking over of the duty to pay maintenance by the heirs.

6.29 The Commission considered the question whether a specific system should be instituted to provide for the control of periodical payments, should periodical payments be preferred for meeting a claim to maintenance. In his comments Prof J C Sonnekus for example suggested that a fund similar to the Guardian's Fund should be instituted. The Master could then make monthly payments to the surviving spouse out of that fund. Mr H N Theunissen, again, proposed that the Administration of Estates Act 66 of 1965 should specifically provide for a process by which an executor could keep an amount in trust, the maintenance then being paid out of the interest on that amount. The Commission considers that the possibility of setting up a trust makes it unnecessary to provide for a specific system of controlling periodical payments. Where the heirs and the surviving spouse come to an agreement through the mediation of the executor to create a trust the deed of trust could be drawn up in such a way as to couple the benefits of periodical payments with the advantage that the estate can be finalised. The deed of trust could for instance provide that amounts payable to the surviving spouse must be adjusted to the changes in that spouse's maintenance needs. The deed of trust could also provide for the distribution among the heirs of the capital remaining after the trust has come to an end.

34 Cf Bouwer Die beredderingsproses van bestorwe boedels 330 to 334.

ANNEXURE A

INDIVIDUALS AND BODIES TO WHOM THE WORKING PAPER WAS SENT ON THE COMMISSION'S OWN INITIATIVE

Association of General Banks and Finance Houses

Association of Legal Advisers of South Africa

Association of Trust Companies in South Africa

Bar Councils (8)

Chief Justice and Judges President (7)

Clearing Bankers Association of South Africa

Family and Marriage Society of South Africa

Government departments:

Justice

National Health and Population Development

Rita Jordaan

Justice Training

Law Journals (19)

Law Societies (7)

Libraries (57)

Magistrates' Association of South Africa

Masters of the Supreme Court (7)

Merchant Bankers' Association of South Africa

Minister of Justice

National States (6)

Organisation of South African Law Libraries

Research Bulletin

Society of Actuaries

Society of University Teachers of Law

Prof J C Sonnekus

South African Nursing Association

State Attorneys (6)

Union Acceptances Ltd

Universities: Faculties of Law (18)

Women's Organisations:

Action 75

Afrikaanse Christelike Vrouevereniging

Black Sash

Christian Women's Club

Citizen's Advice Bureau

Constantia Damesklub

Defence Force Ladies' Association

Durban Business and Professional Women's Club

Federale Vroueraad

Federale Vroueraad Volksbelang

Housewives' League of South Africa

Natalse Christelike Vrouevereniging

National Council of African Women

National Council of Women of South Africa

National Women's Register

Oranje-Vrouevereniging

Pretoria Women's Club

Pretoria Women's Zionist League

Randburg Business and Professional Women's Club

Soroptimists International: South African Council

South African Association of University Women

South African Catholic Women's League

South African Union of Jewish Women

South African Federation of Business and Professional Women
South African Society of Medical Women
South African Union of Homemakers
South African Wives of Veterinary Surgeons
South African Women's Agricultural Union
Suid-Afrikaanse Vrouefederasie
Temple Menorah Sisterhood
Toastmistresses Club
Tuesday Forum
Unisa Women's Club
Women's Bureau of South Africa
Women in Action
Women's Legal Status Committee
Young Women's Christian Association

ANNEXURE B

INDIVIDUALS AND BODIES WHO COMMENTED ON THE WORKING PAPER

Association of Law Societies of the Republic of South Africa

Association of Trust Companies in South Africa

A M Brokensha, Natal Law Society

Clearing Bankers Association of South Africa

Department of Justice

General Council of the Bar of South Africa

Prof D J Joubert, University of Pretoria

L A Kernick, Webber Wentzel

Law Society of the Transvaal

Master of the Supreme Court, Bloemfontein

Master of the Supreme Court, Grahamstown

Master of the Supreme Court, Pietermaritzburg

Master of the Supreme Court, Pretoria

National Council of Women of South Africa

Oranje-Vrouevereniging

Society of Advocates, OFS Division

Prof J C Sonnekus, Rand Afrikaans University

South African Association of University Women

South African Institute of Chartered Secretaries and Administrators

Standard Trust Limited

H N Theunissen, Natal Law Society

W R van der Merwe, Natal Law Society

Women's Legal Status Committee

ANNEXURE C: DRAFT LEGISLATION

BILL

To provide for the future maintenance of a surviving spouse, and for matters incidental thereto.

To be introduced by the Minister of Justice

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:-

Claim for main=
tenance by sur=
viving spouse.

1. (1) The surviving spouse of a marriage which is dissolved by the death of the other spouse after the commencement of this Act who is unable to provide for his own reasonable maintenance needs out of his own means and earnings, shall have, in so far as he is thus unable, a claim for maintenance against the estate of the deceased spouse, which claim shall be lodged and proved in accordance with the provisions of the

Administration of Estates Act, 1965 (Act 66 of 1965).

(2) For the purposes of subsection (1) "own means" shall include any property or money or other financial benefit accruing to the surviving spouse under matrimonial property law, or the law of succession or otherwise as a result of the death of the deceased spouse.

(3) The claim referred to in subsection (1) shall not create a right of recourse against anyone to whom a payment or a transfer of an asset, an inheritance or a legacy has been made in accordance with a valid distribution of the estate of the deceased spouse.

Order of precedence.

2. The claim referred to in section 1(1) shall occupy the same order of precedence vis-à-vis other claims against the estate of the deceased spouse as the claim for maintenance on behalf of a dependent child of the deceased spouse has against such estate, or would have had if there were such a claim, and if such claim of a surviving spouse

competes with the claim of a dependent child referred to, such claims shall, where necessary, be reduced proportionately.

Short title.

3. This Act shall be called the Maintenance of Surviving Spouses Act, 19__.

