RESPONSE TO SOUTH AFRICAN LAW REFORM COMMISSION ISSUE PAPER 41, PROJECT 100E

REVIEW OF ASPECTS OF MATRIMONIAL PROPERTY LAW

Introduction

1. The SALRC Issue Paper 41, dealing with the Review of Aspects of Matrimonial Property Law, poses a string of far-reaching questions regarding our existing matrimonial property law. In particular, the Commission is investigating the need for possible legislative reform to our matrimonial property law to meet constitutional requirements and changing social norms.

2. The Commission requested input by 14 January 2022 with the aim to publish a discussion paper setting out the Commissions preliminary proposals. The Issue Paper emphasizes that:

> *"In the context of marriage and divorce if substantive gender equality is to be achieved, laws relating to matrimonial property must, among others, seek to place spouses in an equal position, considering the impact of factors like the unequal division of domestic and family-care responsibilities between wives and husbands, and differences in bargaining power between men and women."* [1]

3. In this presentation I will highlight four topics raised in the Issue Paper:

   3.1 First, whether a judicial discretion to distribute assets in marriages out of community of property excluding the accrual system should be available in all marriages irrespective of the date of marriage;

   3.2 Second, the desirability of introducing statutory requirements and

[1] Paragraph 1.12 of the Issue Paper.

procedural safeguards for the execution of antenuptial contracts ("ANC");

3.3 Third, whether the common law private international rule that the proprietary consequences of marriages are governed by the law of the husband's domicile at the time of marriage should be revisited;

3.4 Fourth, whether in divorce matters our courts should have a wider discretion to go behind the trust form and distribute trust assets between spouses.

These topics are controversial and likely to have solicited wide-ranging responses to the Commission. My input today represents my personal views which are shared by several family law practitioners at the Cape Bar.

Judicial discretion to distribute assets in marriages out of community of property without accrual in terms of s 7(3) of the Divorce Act

4. In paragraph 4.23 of the Issue Paper, views were requested whether the court should have an overall discretion to distribute assets in all out of community of property marriages without the accrual system irrespective of the date of marriage.

5. Section 7(3) of the Divorce Act 70 of 1979 confers on the court granting a decree of divorce a broad equity discretion to make a redistribution order to the effect that assets may be transferred between spouses where a spouse has made direct or indirect contributions to the maintenance or increase of the other spouse's estate. When the Issue Paper was released our courts had no

power to exercise the s 7(3) equity discretion in out of community of property marriages excluding the accrual system concluded after 1 November 1984.

6. The question raised by the Commission has now been judicially considered. In the recent case of *Greyling v Minister of Home Affairs and Others* (40023/2021) [2022] ZAGPPHC 3 (11 May 2022) it was held that the cut-off date of 1 November 1984 in s 7(3) of the Divorce Act is unconstitutional and that s 7(3) distribution relief should be available to all out of community of property marriages excluding accrual sharing.[2] The ruling does not affect divorce proceedings that have already been finalised.[3]

7. The matter has been referred to the Constitutional Court for confirmation in terms of s 172(2)(a) of the Constitution. Until the Constitutional Court has confirmed the *Greyling* judgment, the legal position remains uncertain.

8. It seems from my discussions with colleagues that the *Greyling* judgment has significant support.

9. If the decision in *Greyling* is confirmed by the Constitutional Court, I anticipate that this will:

    9.1 prompt more couples to opt for marriages subject to the accrual system in their ANCs;

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[2]The words *"entered into before the commencement of the Matrimonial Property Act, 1984",* are notionally severed from s 7(3)(a) of the Divorce Act 70 of 1979.
[3] See para 64 of the Judgment and order 3.

9.2 give rise to more accrual ANCs with exclusions and high commencement values.[4]

Antenuptial Contracts ("ANC")

10. Paragraphs 4.3 to 4.10 of the Issue Paper raise the desirability of:

(a) a statutory requirement that parties must make a full disclosure of their assets and liabilities when concluding ANCs;

(b) a mandatory requirement that parties receive separate legal advice when concluding ANCs;

(c) introducing other procedural safeguards for ANCs.

11. In the anecdotal experience of Cape Bar members many South African divorce parties advise that they were asked to sign their ANC shortly before their wedding without taking separate legal advice and that they did not fully appreciate the legal consequences of what they were signing at the time. 'Shotgun' ANCs may have serious shortcomings, for example:

11.1 One-sided ANCs can give rise to unfair consequences, leaving a financially weaker spouse without any property rights on divorce, irrespective of the length of the marriage;

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[4] In this connection see *BF v RF* 2019 (4) SA 145 GJ (a full bench decision) where the court held, obiter, that couples cannot exclude in their ANC's assets acquired in the future, that is, during the marriage from the operation of the accrual system (at para 24 *"No clause in an antenuptial contract addressing the exclusion of assets can validly contradict that principle, and the text of any clause must be read in this context."*). See also para 27 *"It would make a nonsense of the accrual system if assets in respect of which no rights existed at the commencement of the marriage could be excluded in anticipation of acquisition in the future. A potential spouse could, on this thesis, exclude everything he would acquire in future and produce a hollow 'accrual'."*

11.2 There is more scope for disputes regarding the enforceability of ANCs in circumstances where parties allege they were pressurised to sign them and did not obtain independent legal advice;

11.3 There is also a greater risk that without the input of independent legal advice and full financial disclosure the ANCs may be challenged in a foreign court if parties are divorced in other jurisdictions. (There are several foreign jurisdictions where there are such mandatory requirements).

12. In my view, separate legal advice is important to ensure that ANC parties fully understand its implications and make informed decisions. There are, however, reasons weighing against a statutory legal advice requirement. This may be too expensive for young couples starting out. Legal advice may not be necessary where parties choose the default accrual system to apply to their marriage. Also, failure to take separate legal advice could be used by one of the parties to argue later that they should not be held to the terms of the ANC.

13. I am also of the view that disclosure of material financial information should be actively encouraged before parties finalise and execute an ANC. Financial information may be important for making informed decisions when signing ANCs with far reaching consequences. However, a mandatory disclosure requirement may present difficulties. Disclosure can be expensive if assets require professional valuation. Parties may also be reluctant to perform a full-blown disclosure exercise when they are optimistic and hope that divorce will never happen. Further, a statutory disclosure requirement may potentially give rise to unnecessary litigation and disputes about the adequacy of disclosures.

14. Given the difficulties with mandatory statutory requirements regarding disclosure and separate legal advice, consideration could be given to introducing a code of best practice governing the preparation and execution of ANCs which should guide and be binding on attorneys and notaries when preparing and notarising ANCs. Some of the key requirements which may be considered are:

Separate legal advice:

14.1 Before ANCs are finalised and executed the attorney preparing the ANC and the notary attesting it should recommend to both parties that they should obtain separate legal advice. If the parties obtained independent legal advice, this should be recorded in a certificate attached to the ANC. Should they elect not to obtain legal advice as recommended, this too should be certified.

Sufficient time:

14.2 There should be sufficient time before the marriage for parties to consult and reflect on the terms of the ANC. (The Law Commission - Final Report 2014 (UK): Matrimonial Property Needs and Agreements recommended that antenuptial agreements should be concluded at least 28 days before the marriage or civil union). Although fixing an appropriate time limit before marriage for the signing of the ANC may be regarded as arbitrary, the risk of pressure influencing the parties' decision may in that way be limited.

Disclosure:

14.3 Before the finalisation and execution of ANCs the parties should each be requested to make a fair and reasonable written disclosure of their assets and financial obligations which should be retained in the notary's protocol. (Should the parties waive the requirement of full disclosure, the reasons for non-disclosure should be recorded in the ANC).

Common law rule of matrimonial domicile

15. Paragraph 3.10 of the Issue Paper poses the following question:

> *"Which country's legal rule should determine the proprietary consequences of a marriage?"*

16. In terms of our common law private international law rules the proprietary consequences of marriages are governed by the law of the husband's domicile at the time of marriage (*lex domicilii matrimonii* or the law of matrimonial domicile).[5] This rule applies to movable as well as immovable property.

17. Our courts have indicated that this long-established rule may have to be revisited because:

17.1 It is no longer acceptable within a gender equal society (see: *L v L* (120/13) [2013] ZASCA 104 (2 December 2013) at para 10; *Sadiku v Sadiku* (30498/06) [2007] ZAGPHC 1 (26 January 2007) at para

[5] This rationale for this rule, according to Roman-Dutch authorities, is that the parties are assumed, in the absence of any indications to the contrary, to have intended to have established their matrimonial home in the country where the husband was domiciled at the date of the marriage and to have submitted themselves to the matrimonial property system

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17.2 It cannot simply be applied to same-sex marriages or civil unions (*Steyn v Steyn* (6427/2010) [2010] ZAWCHC 224).

18. A useful starting point for a gender-neutral rule may be the model suggested by Stoll and Visser[6] for determining the law governing the proprietary consequences of marriages:[7]

> *The proprietary consequences of a marriage are subject to:*
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> *1. The law of the country indicated by the express or implied intention of the spouses in an antenuptial contract;*
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> *2. In the absence of (1), the law of the country of the common domicile of the spouses at the time of marriage;*
>
> *3. In the absence of (2), the law of the country of the common habitual residence of the spouses at the time of marriage;*
>
> *4. In the absence of (3), the law of the country of which both spouses are nationals at the time of the marriage;*
>
> *5. In the absence of (4), the law of the country to which the spouses are jointly most closely connected at the time of marriage.* [8]

Trusts

19. Paragraph 9.5 of the Issue Paper poses the question whether our courts should have a discretion to go behind the trust form and distribute trust assets

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[6] H Stoll and PJ Visser "Aspects of the Reform of German (and South African) Private International Family Law" (1989) 22 *De Jure* 330.

[7] This model is supported by Neels and Wethmar-Lemmer: JL Neels and M Wethmar-Lemmer "Constitutional Values and Proprietary Consequences of Marriage in Private International Law - Introducing the *Lex Causae Proprietatis Matrimonii"* (2008) 3 TSAR 587.

[8] As to an assessment of the proposed model for legislation see, "*'With such changes as may be required by the context',* s 13 of the Civil Union Act, Absurdity and Gender Discrimination in the Legal consequences of Marriage", by Chris McConnachie, pp 19 - 22.

where a spouse can show that the other spouse has used the trust assets as their personal assets.

20. The Supreme Court of Appeal in *M v M* [9] has raised the bar for piercing the trust veil in divorce cases. In summary, it is not enough for the spouse alleging that trust assets should form part of the assets to be shared/distributed that their spouse violated the principle of the trust, shirked their fiduciary duties or violated the core idea of the trust. The aggrieved spouse has to show an element of dishonesty to establish that the trust assets should be shared or form part of the personal estate of the other spouse on divorce. The fact that the other spouse is in control of the trust assets is no longer, in itself, sufficient to go behind the trust form.

21. For the reasons set out in paragraph 9 of the Issue Paper, this stringent test for the inclusion of trust assets as part of the matrimonial property subject to distribution or accrual sharing may have unfair consequences and undermine the fundamental principle, underpinning the accrual and in community property systems, that assets built up during the marriage should be shared.[10]

22. There are foreign jurisdictions in which legislation has been introduced which confer authority on divorce/family courts to make special orders with regard to trust assets in the family law context.[11] Although there seems to be a need for legislative reform concerning trust assets in matrimonial proceedings, I am of the view that legislative reform in this area should be cautious and that proper consideration should be given, among others, to the following limiting factors:

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[9] 2017 (3) SA 371 (SCA).
[10] Further, if the court's s 7(3) distribution discretion is extended to all out of community of property marriages the question how to deal with trust assets on divorce will also arise in out of community of property marriages, excluding accrual.
[11] See, for example, s 24(1)(c) of the Matrimonial Causes Act (England); Mark Harper et al, International Trust & Divorce Litigation, pp 48 - 62.

22.1 The interests of third parties will have to be safe-guarded. There may be third party loans and transactions in respect of trust assets which cannot simply be unravelled;

22.2 The beneficiary interests of all the trust beneficiaries will have to be taken into account when distributing trust assets. This may involve persons other than the spouses and their children;

22.3 A distinction should be made between, on the one hand, dynastic and intergenerational trusts which have been legitimately established and grown by non-spouse founders (in practice often one of the spouse's parents or grandparents) and, on the other hand, trusts established at the instance of one of the spouses during their marriage;

22.4 It may also be sensible to distinguish between business trusts created during the marriage and family trusts (holding the matrimonial home and other investments) as inroads into the use of the trust form for business purposes may have an adverse impact on business continuity and unduly restrict business activity;

22.5 Often trust structures involve complex subsidiary corporate structures which do not allow assets to be cherry-picked for distribution between spouses;

22.6 Distributing trust assets or unbundling trusts on divorce may have significant tax implications;

22.7 The desirability of introducing special and wider principles governing the piercing of trusts in matrimonial proceedings, which would apply in tandem with the stricter well-established legal principles governing the

piercing of corporate structures in general, will have to be fully assessed.[12]

23. A possible starting point for introducing legislative reform is the extension of the discretionary powers of our courts in terms of s 13 of the Trust Property Control Act 57 of 1988 to vary trust deeds and terminate trusts.[13] The circumstances in which trust deeds can be varied and trusts collapsed could be widened in respect of family trusts set up during marriages. The factors which our courts could take into account when exercising their discretion in terms of the broadened provisions of s 13 of the Trust Property Control Act could include the factors developed in our case law before the decision in *M v M*, for example, in *Badenhorst v Badenhorst.*[14] The actual control of trust assets should, however, not be a decisive criteria in the court exercising its distribution discretion because there may be family trusts where both spouses are trustees but, given the breakdown in their relationship, are unable to continue co-administering the trust assets. Often spouses are deadlocked as to how their family trust should be unbundled on divorce: accordingly, it may be desirable to have a legislative mechanism to allow them to achieve a clean break in their family trust on divorce (e.g. a broader discretion in terms of s 13 Trust Property Control Act).

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[12] See the analysis of Lord Sumption in *Prest v Petrodel Resources Ltd* of how the Family Division of the High Court of England and Wales had been misdirected when piercing the corporate veil. He held that *"if there was no justification as a matter of general legal principle for piercing the corporate veil, I find it impossible to say that a special and wider principle applies in matrimonial proceedings...."*.

[13] Section 13 of the Trust Property Control Act provides as follows: *"Power of court to vary trust provisions. - if a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which - (a) hampers the achievement of the objects of the founder; or (b) prejudices the interests of beneficiaries; or (c) is in conflict with the public interest, the court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust."* [own emphasis]

[14] 2006 (2) SA 255 (SCA)

Conclusion

24. The Commission has indicated that following its investigation it will publish a discussion paper setting out its preliminary proposals and possible draft legislation to amend aspects of our existing matrimonial property law. Given the fresh judicial winds in recent cases like *Greyling*, I anticipate that there will be fundamental shifts in South African matrimonial property law in the near future.

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