



THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA



**Practical issues and pitfalls of a claim under the  
Maintenance of Surviving Spouses Act**

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- Common law: marriage = consensual agreement between two parties
- Obligations e.g. reciprocal duty of support. Based on each party's ability to provide the other party with the support required by him or her
- Duty of support ended with death
- Legitimate portion
- Legitimate portion abolished:
  - Cape = Cape Acts 26 of 1873, 23 of 1874
  - Natal = Act 22 of 1863, read with Act 7 of 1885
  - Transvaal = Proclamation 28 of 1902
  - Free State = *Vrystaatse Wetboek* 1892, Ordinance 18 of 1905
- Result = complete freedom for testator to deal with assets in will
- Surviving spouse no longer had inherent entitlement to any assets of deceased spouse's estate

# BACKGROUND: CASE LAW

## **Ex parte Leegenveld (1885) 4 SC 64**

➡ Doubtful whether parent's duty to support child transmits to his estate.

## **Carelse v De Vries (1906) 23 SC 532**

➡ Where estate of a deceased person is sufficient to pay for maintenance of legitimate children, it would be competent to award maintenance from estate to illegitimate children.

## **Lloyd v Menzies 1956 (2) SA 97 (N)**

➡ Grandparent's duty to support his grandchildren - "... it would be illogical not to maintain the liability upon the estate of anyone who, if living, is under the duty to provide support".

## **Barnard v Miller 1963 (4) SA 426 (C)**

→ Deceased estate not liable for maintenance of grandchildren.

## **Glazer v Glazer 1963 (4) SA 694 (A)**

→ Fundamental difference between relationship between spouses and that between parent and child. Relationship between parent and child is “immutable natural relationship”; relationship between spouses could be severed at any time. Acceptance of child’s claim for maintenance does not imply that spouse’s claim for maintenance should also be accepted.

Denial of spouse’s claim not an anomaly in our law.

# DEVELOPMENTS

- **Family Maintenance Bill** referred to select committee of Parliament for consideration in 1969 .
- Purpose of Bill = “to make provision for the maintenance, out of the estate of a deceased person. of certain members of his family”.
- Underlying principle of Bill = person claiming maintenance must be incapable of supporting him- or herself.
- Maintenance to be paid by way of periodical instalments out of income of estate, unless income insufficient or dependant and heirs agreed differently.
- Maintenance to be paid by someone other than executor.
- Master can vary, suspend or rescind an order if satisfied that a material fact was not disclosed or if any substantial change occurred in circumstances of dependant or heir.
- Master has power to order refund of amounts paid.

# DEVELOPMENTS (continued)

- Select committee rejected Bill - report 8 May 1969.
- Reasons:
  - “..it will not be in the public interest to enact legislation which will result in a serious inroad being made into the well-established principle of freedom of testation merely to provide for what is, in the opinion of your Committee, the exceptional case”;
  - “..liquidation and distribution of estates affected by the provisions of the proposed legislation may be “inordinately delayed”;
  - “..it will not be equitable for a dependant in all cases to be paid maintenance out of an estate”.

# DEVELOPMENTS (continued)

- 1984 - **South African Law Commission** tasked with considering introduction of legitimate portion or granting of right to maintenance to surviving spouse as part of review of law of succession.
- *SALC Review of the Law of Succession: The introduction of a legitimate portion or the granting of a right to maintenance to the surviving spouse.*

## Reasons for reform:

- Default matrimonial property regime = in community of property. No guarantee that  $\frac{1}{2}$  share of joint estate adequate to provide for survivor's support;
- Default matrimonial property regime for Black persons = out of community of property;

# DEVELOPMENTS (continued)

- Growing popularity of marriages out of community of property (pre-1984);
- Marriage out of community of property - no guarantee that marriage settlement in antenuptial contract would be adequate;
- Marriage out of community of property after 1984 - option of accrual system. No guarantee that claim would be adequate;
- Intestate estate – spouse’s share relatively small.

# DEVELOPMENTS: OPTIONS TO PROTECT SPOUSE

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## Claim for maintenance OR legitimate portion of estate

- Legitimate portion most appropriate solution if intention to protect surviving spouse's moral right to share in estate of deceased spouse. Claim for maintenance most appropriate solution if intention to enforce deceased's moral duty to provide for surviving spouse;
- Legitimate portion would benefit all surviving spouses, regardless of need. It is inflexible and takes no cognisance of actual needs of surviving spouse. Claim for maintenance can be tailored according to spouse's financial position and needs;
- Legitimate portion usually fixed percentage or part of estate - no guarantee that it will achieve aim of providing spouse with sufficient means;
- Legitimate portion would require complicated legislation.

# DEVELOPMENTS: PROPOSAL

## Commission proposed **maintenance claim**:

- Available only for surviving spouse of marriage - not for divorced spouse;
- Basis for claim = need for support;
- Available regardless of matrimonial property regime;
- Regardless of testate or intestate estate;
- Available if surviving spouse is unable to support him- or herself - spouse's capital should be exhausted and spouse not in position to earn income;
- Claim would rank after that of ordinary creditors, but before legacies and bequests;
- Claim would rank equally with that of minor children;
- Objective criteria applied to determine maintenance - factors necessitating moral decision should be avoided;

# DEVELOPMENTS: PROPOSAL (continued)

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- Provisions of Administration of the Estates Act would apply.
- Any party dissatisfied with acceptance or not of claim could lodge objection with Master of the High Court. Legal costs and delay in administration of the estate would only arise if Master's decision was unacceptable to interested party.

# MAINTENANCE OF SURVIVING SPOUSES ACT 27/1990

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## 2. Claim for maintenance against estate of deceased spouse.

(1) If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his **reasonable maintenance needs** until his death or remarriage in so far as he is **not able to provide** therefor from his **own means and earnings**.

(2) The survivor shall, in respect of a claim for maintenance, **not have a right of recourse** against any person to whom money or property has been paid, delivered or transferred in terms of section 34 (11) or 35 (12) of the Administration of Estates Act, 1965 (Act No. 66 of 1965), or pursuant to an instruction of the Master in terms of section 18 (3) or 25 (1) (a) (ii) of that Act.

# MAINTENANCE OF SURVIVING SPOUSES ACT 27/1990

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(3)(a) The proof and disposal of a claim for maintenance of the survivor shall, subject to paragraphs (b), (c) and (d), be dealt with in accordance with the provisions of the **Administration of Estates Act**, 1965 (Act No. 66 of 1965).

(b) The claim for maintenance of the survivor shall have the same **order of preference** in respect of other claims against the estate of the deceased spouse as a claim for maintenance of a dependent child of the deceased spouse has or would have against the estate if there were such a claim, and, if the claim of the survivor and that of a dependent child compete with each other, those claims shall, if necessary, be reduced proportionately.

(c) In the event of a conflict between the interests of the survivor in his capacity as claimant against the estate of the deceased spouse and the interests in his capacity as guardian of a minor dependent child of the deceased spouse, the Master may defer the claim for maintenance until such time as the court has decided on the claim.

(d) The executor of the estate of a deceased spouse shall have the **power to enter into an agreement** with the survivor and the heirs and legatees having an interest in the agreement, including the creation of a trust, and in terms of the agreement to transfer assets of the deceased estate, or a right in the assets, to the survivor or the trust, or to impose an obligation on an heir or legatee, in settlement of the claim of the survivor or part thereof.

# FACTORS - Section 3

Factors taken into account when determining surviving spouse's reasonable maintenance needs:

- Amount available for distribution to heirs in the deceased's estate;
- Survivor's existing and expected means, earning capacity, financial needs and obligations;
- Duration of the marriage;
- Survivor's standard of living during the subsistence of the marriage;
- Survivor's age at the time of the deceased's death;
- Any other relevant factor. **Mann v Leach [1998] 2 All SA 217 (E).**

# DEFINITIONS – Section 1

“**court**” means a court as defined in section 1 of the Administration of Estates Act, 1965 (Act No. 66 of 1965);

“**executor**” means an executor as defined in section 1 of the Administration of Estates Act, 1965, or any person who liquidates and distributes an estate on the instructions of the Master;

“**Master**” means a Master as defined in section 1 of the Administration of Estates Act, 1965;

“**own means**” includes any money or property or other financial benefit accruing to the survivor in terms of the matrimonial property law or the law of succession or otherwise at the death of the deceased spouse;

“**survivor**” means the surviving spouse in a marriage dissolved by death, and includes a spouse of a customary marriage which was dissolved by a civil marriage contracted by her husband in the customary marriage to another woman on or after 1 January 1929 (the date of commencement of sections 22 and 23 of the Black Administration Act, 1927 (Act No. 38 of 1927)), but before 2 December 1988 (the date of commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988 (Act No. 3 of 1988)).

## Oosterbroek v Grobler [2005] JOL 14792 (W)

➔ Very few cases dealing with claim.

### Determining if claim is “reasonable”

- Marriage ending in divorce - maintenance dealt with by court of law.  
Marriage ending in death – maintenance dealt with by executor.  
**Q: Is executor qualified to decide on what is probably a legal question?**
- No guidelines for application of factors, weighting (if any) or order of preference (if any).
- Executor has limited information on deceased’s lifestyle or standard of living.  
**Q: Can s 32 be applied?**
- Executor must act objectively and without favouring one party over another. **Van Niekerk v Van Niekerk [2011] 2 All SA 635 (KZP)**

# PRACTICAL ISSUES (continued)

- Decision often involves moral judgment.  
**Q: Are executors equipped to make such decisions?**
- No provision for payment of maintenance in period between death and final acceptance of claim.
- Nature of assets often do not allow for quick and easy settlement of claim.
- Calculation of claim requires taking into account medical inflation, interest inflation, other inflation and mortality tables - attorney and/or actuary required - costs.  
**Q: Is executor equipped to do necessary calculations or check whether calculation is correct?**
- Aggrieved party - only option is objection with Master of the High Court.

## No mechanism to govern remaining funds on death or remarriage of spouse

- Claim is until death or remarriage - in practice calculated over life expectancy of claimant. No mechanism to address situation where death happens earlier than anticipated or where spouse remarries.
- Executor has power to enter into agreement with claimant and heirs, which includes creation of a trust.

**Q: can executor force an agreement?**

- Practical effect - claim almost always settled by way of lump sum or award of asset *in specie* with no right of recourse against spouse in the event of early death or remarriage.  
**Feldman v Oshry NO and another 2009 (6) SA 454 (KZD)** – practical difficulty in making periodic payments.
- No provision for any significant change in circumstances of spouse other than death or remarriage.

## Inconsistent application of the Act

- “Spouse” or “marriage” not defined.
- “Survivor” defined as surviving spouse in marriage dissolved by death, and includes spouse of customary marriage dissolved by civil marriage contracted by husband in customary marriage to another woman on or after 1 January 1929 but before 2 December 1988.
- SA law recognises most relationships for purposes of the Act:
  - Same sex partners – **Gory v Kolver 2007 BCLR 249 (CC) (ISA)**
  - Muslim marriages – **Daniels v Campbell 2004 (5) SA 331 (CC)**  
**Hassam v Jacobs 2009 (5) SA 572 (CC)**
  - Customary marriages – **Kambule v The Master 2007 (3) SA 403 (E)**

- Exception = relationship between heterosexual life partners.

## **Volks v Robinson 2005 (5) BCLR 446 (CC)**

Exclusion of heterosexual life partners from protection of Act is discrimination on the basis of marital status BUT not unfair as Constitution recognises marriage as an institution. Same-sex life partners had no legal mechanism to formalise their relationship – no option of marriage, whereas heterosexual life partners had that option.

## Civil Union Act 17 of 2006 – section 13

(1) The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union.

“Civil union” = voluntary union of two persons .... solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act...”.

(2) With the exception of the Marriage Act and the Customary Marriages Act, any reference to—

(a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and

(b) husband, wife or spouse in any other law, including the common law, includes a civil union partner.

## Domestic Partnerships Bill 2008

- Preamble: section 9 of Constitution provides that everyone is equal before the law and has right to equal protection and benefit of the law, but currently no legal recognition or protection for opposite sex couples in permanent domestic partnerships.
- Recognition of legal status of domestic partners, regulation of their rights and obligations and protection of their interests on termination of the partnership.
- Parties have option to register their partnership → duty of support. Reference to “spouse” in the MSSA must be construed to include registered domestic partner.
- Unregistered partnerships → no corresponding duty to support and maintain each other and neither partner entitled to claim maintenance from the other unless there is a contractual duty. Court may on application of one or both partners make such an order.

## Maintenance claim does not qualify for roll-over relief

Para 67(2)(a) of Eighth Schedule: deceased person must be treated as having disposed of an asset to his or her surviving spouse, if ownership of that asset is acquired by the surviving spouse

- by intestate or testamentary succession
- as a result of a redistribution agreement between heirs and legatees in the course of liquidation and distribution of the estate

## **Jewaskewitz v The Master of the High Court, Polekwane**

Unreported, case number 53514/2012, judgment delivered on 15 May 2013

 Two-legged approach to maintenance claim:

1. Is claimant legally entitled to claim for maintenance against estate?  
Yes, if claimant was married to deceased and marriage subsisted at the time of death.
2. Is claimant in the circumstances factually entitled to claim maintenance?  
Requires an application of factors in section 3 to relevant facts of each case.

## **Feldman v Oshry 2009 (6) SA 454 (KZD)**

Are voluntary contributions taken into account under “own means”?

➡ No

Nature of award – lump sum or monthly maintenance?

➡ Monthly maintenance as lump sum is not appropriate.

## **Oshry v Feldman [2011] 1 All SA 124 (SCA)**

Was a lump sum award competent?

➡ Yes

Was a lump sum award appropriate?

➡ Yes

