

WELCOME

MARRIAGE, DIVORCE AND DEATH AMONGST THE INDIGENOUS PEOPLE OF
SOUTH AFRICA AND THE LEGAL CONSEQUENCES THEREOF

(as it relates to the Fiduciary field)

11 August 2022

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INTRODUCTION

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1. CUSTOMARY MARRIAGES IN SOUTH AFRICA

a) Recognition of Customary Marriage 120 of 1998 (15 Nov 2000)

- Customary marriages are recognized as **valid marriages** in terms of the Recognition of Customary Marriages Act 120 of 1998.
- In terms of section 2 of the Act all customary marriages, entered into before or after the commencement of the Act, which are valid marriages under customary law and which comply with the requirements of the Act, are for all purposes recognized as marriages, irrespective of whether a person is a spouse in more than one customary marriage.

REQUIREMENTS OF CUSTOMARY MARRIAGES (S3(1))

- (a) the prospective spouses—
 - (i) must both be above the age of **18 years**; and
 - (ii) must both **consent** to be married to each other **under customary law**; and
- (b) the marriage must be **negotiated and entered into** or **celebrated** in accordance with customary law.
- **S3(2)** Save as provided in section 10(1), no spouse in a customary marriage shall be competent to enter into **another marriage** under the Marriage Act, 1961 (Act 25 of 1961), during the subsistence of such customary marriage.
- **S4(9)** stipulate that failure to **register a customary marriage** does not affect the validity of that marriage.

Important aspect 1:

Entered into or celebrated in accordance with customary law (S3(1)(b))

- The requirement that ‘**the marriage must be negotiated and entered into or celebrated in accordance with customary law**’ is one that has proven to be problematic in its application. The ‘**or**’ in the above sentence implies that the marriage can either be celebrated or not, namely, a **celebration is not a prerequisite** for the valid existence of the marriage.
- It is normally only the **client(s) that can confirm** whether or not the marriage was entered into in terms of their traditions and/or customs.
- (For ANC and Conveyancing purposes, we will simply require a **Marriage Certificate OR an Affidavit** by the clients confirming the above. For Divorce and Estate purposes, more proof will be required. This will be discussed later.)

Important aspect 1 (continue 1): *Entered into or celebrated in accordance with customary law (S3(1)(b))*

- In the case of *M v K (LP)* (unreported case no 2017/2016, 7-11-2018) (Makgoba JP), the High Court considered whether the **handing over of the bride** is an element to be taken into account when considering the validity of a customary marriage, and provided that the mere fact that **lobola** was handed over to the bride's family – significant as it is – is not conclusive proof of the existence of a valid customary marriage.
- The **handing over of the bride** is not only about celebration with the attendant feast and rituals. It also encompasses the essential aspect associated with the married state, namely 'go laya' that is coaching or briefing of both the bride and groom by the elders of their rights, duties and obligations, which a marriage imposes on them. The court regarded this as the **most important and final step** in the chain of events.
- The court held that the handing over of the bride is what distinguishes mere cohabitation from marriage. Until the bride has formally and officially been handed over to the groom's people, there can be no valid customary marriage. Based on this argument the court found that there was no valid customary marriage entered into between the plaintiff and the defendant, despite the payment of *lobola* in full by the plaintiff there has not been any handing over of the defendant to the plaintiff.
- There are several High Court decisions where the ruling is similar or aligned to the views held in the above-mentioned case. **However**, we have seen contrary interpretations through the lens of the **Supreme Court of Appeal (SCA)**.
- *Sengadi v Tsambo; In re Tsambo* [2019] 1 ALL SA it was held that there are two types of customary laws: **Living customary law and official customary law**. (**Handing over** of bride is discriminatory.)

Important aspect 1 (continue 2):

Entered into or celebrated in accordance with customary law (S3(1)(b))

- In *Tsambo v Sengadi (SCA)* (unreported case no 244/19, 30-4-2020) (Molemela JA (Maya, P and Mbha and Zondi JJA and Mojapelo AJA concurring)), the SCA found that the **custom of the handing over of the bride was an important element, but not a key determinant of a valid customary marriage**. The SCA shed some insight into the fact that certain customs, which were practiced long ago, have been replaced with western customs. The court stated that rituals and customs have never been static or frozen in time, as they develop and change along with the society in which they are practiced. The insights of the SCA teaches us that **customs are not static, the world is evolving, and times have changed**. Accordingly, customs as they were applied in ancient times cannot strictly be applied in the same manner and form in the modern age because such strict application may result in undesirable consequences.
- In *Mbungela and Another v Mkabi and Others [2020] 1 All SA 42 (SCA)*, the SCA highlighted that ‘the importance of the observance of traditional customs and usages that constitute and define the provenance of African culture cannot be understated. Neither can the value of the custom of bridal transfer be denied. But it must also be recognised that an inflexible rule that there is no valid customary marriage if just this one ritual has not been observed, ... especially **spousal consent**, have been met, ... could yield untenable results’. The SCA held that the purpose of the ceremony of the **handing over of a bride is to mark the beginning of a couple’s marriage and introduce the bride to the groom’s family**. It is **an important but not necessarily a key determinant of a valid customary marriage**. Thus, **it cannot be placed above the couple’s clear will and intent**.
- Interesting case wherein the judge also deferred from rigid rules regarding customs and traditions: *Diba v Miselo and Another (5768/2021) [2021] ZAWCHC 234 (18 November 2021)*. Although the family members after the death of the parties, were of the opinion that there was no marriage as the rules of their customs and traditions weren’t followed 100% the judge, looking at the surrounding facts, thought the **intention of the parties clear**.
- In *Mbungela and Another v Mkabi and Others 2020 (1) SA 41 (SCA)* at para 17 and 18 it was said:
- “[17] ... It is established that customary **law is a dynamic, flexible system, which continuously evolves within context of its values and norms, consistently with the Constitution, so as to meet the changing needs of the people who live by its norms**. The system, therefore, requires its content to be determined with reference to both the history and the present practice of the community concerned. As this court has pointed out, although the various African cultures generally observe the same customs and rituals, it is not unusual to find variations and even ambiguities in their local practice because of the pluralistic nature of African society. Thus, the legislature left it open for the various communities to give content to s 3(1)(b) in accordance with their lived experience.
- [18] The Constitutional Court has cautioned courts. The courts must strive to recognize and give effect to the principle of living, actually observed customary law, as this constitutes a development in accordance with the ‘spirit, purport and object’ of the Constitution.

Important aspect 2:

Enter into [another] marriage under the Marriage Act (S3(2))

- Although provision is made for a monogamous couple to “convert” their customary marriage to a civil marriage (S10(1)), a spouse in a customary marriage **cannot enter into another marriage** and a spouse in another marriage cannot enter into a customary marriage, as is the rule with any other recognized marriage.
- In *Monyepao v Ledwaba and Others* (case no 1368/18) [2020] ZASCA 54 (27 May 2020) the court confirmed that a **civil marriage entered into with a third party after** the person was already a party to a customary marriage did not invalidate the customary marriage, but made the subsequent civil marriage void ab initio.
- In *Phele and Another v Sibanyoni and Others* (28059/2021) [2022] ZAGPPHC 544 (19 July 2022) the court held that “There is no doubt in my mind that the first applicant is the surviving spouse of the deceased and therefore the customary marriage entered into between the first applicant and the deceased on 29 September 1991 is valid. This despite the fact that it was not registered as section 4(9) of the Act clearly states that **failure to register a customary marriage will not affect the validity of the customary marriage**. **In light of this finding, the civil marriage between the first respondent and the deceased is invalid in terms of section 3(2) of the Recognition of Customary Marriages Act as it is clear that the deceased was not competent to enter into the civil union with the first respondent under the Marriages Act on 8 February 2007 and therefore the civil marriage is null and void.”**
- This must not be confused with the options parties have to “convert” their own marriage to a civil marriage.

Important aspect 3:

Failure to register a customary marriage does not affect the validity of that marriage (S4(9))

- Clients are under the impression (and I regret to say, being advised by attorneys) that until the marriage was **not registered**, they are regarded as unmarried. This is not the case, if all the customs and traditions have been complied with, they are a party to a valid and recognized customary marriage.
- **Notaries** beware! The parties cannot enter into an ANC after the marriage because it is not registered yet. The ANC must be entered into prior to the marriage. (This will be discussed later.)
- Nevertheless, it is highly advisable for a customary marriage to be registered to **avoid the trouble** of going through the court of law to query the validity of such marriage.
- In the unfortunate event of **death**, unregistered customary marriages may also prove to be problematic to the executor in an estate or the Master when an estate is reported, especially where family members are disputing the validity or existence of the marriage. For this reason, the Master may insist or request proof of registration of a customary marriage as it serves as proof of the existence of the marriage. (This will be discussed further later.)
- *Peter and Others v Master of the High Court: Bisho and Another (547/2020) [2022] ZAECBHC 22 (2 August 2022)* the court held that “With regard to the second respondent’s failure to have registered the customary marriage, section 4(8) of the Act provides that a certificate of registration constitutes prima facie proof of the existence thereof. However, **section 4(9) clearly stipulates that the failure to register does not affect the validity of the marriage**. The second respondent has furnished an acceptable explanation and nothing more turns on this.”
- Also see *Phele and Another v Sibanyoni and Others (28059/2021) [2022] ZAGPPHC 544 (19 July 2022)* (previous slide)

b) Matrimonial Property System BEFORE 15 November 2000 (S7)

- **Monogamous** marriage entered into prior to 15 Nov 2000 – **In community of property** (*Gumede v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC)) – This is different for polygamous marriage and therefore discriminatory).
- After the act came into operation, these parties could apply to court to **change** their matrimonial property system S7(4). (Customary marriage entered into after 15 November 2000, can change their matrimonial system in terms of S21 of the Matrimonial Property Act 88 of 1984).
- **Polygamous** marriage entered into prior to 15 Nov 2000 (polygamous) – continues to be governed by the **customary law**.
- *In Ramuhovhi and Others (Maphumulo as Intervening Party) v President of the Republic of South Africa and Others (Trustees of the Womens' Legal Centre Trust as amicus curiae)* 2018 (2) BCLR 217 (CC), the CC found that s 7(1) limits the right to human dignity and not to be unfairly **discriminated** against. Accordingly, the court held that '[p]ending the remedying of the legislative defect, **a husband and his wives in pre-Act polygamous customary marriages would share equally** in the right of ownership of, and other rights attaching to, family property, including the right of management and control of family property; and a husband and each of his wives in each of the marriages constituting the pre-Act polygamous customary marriages must have similar rights in respect of house property'.
- In July 2019, the Cabinet approved the submission of the Recognition of Customary Marriages Amendment Bill B12 of 2019. The Bill aims to amend s 7(1) and (2) of the RCMA to ensure alignment with the judgments of the CC.

b) Matrimonial Property System AFTER 15 November 2000 (S7)

- **Monogamous** marriage entered into after 15 November 2000 – **Matrimonial Property Act** applies.
- Thus, in community of property unless and ANC has been entered into prior to the marriage (and registered 3 months thereafter).
- **Polygamous** marriage entered into after 15 November 2000 – the **first marriage's** matrimonial property system will be dealt with in terms of the **Matrimonial Property Act**.
- The **court must be approached** for any **subsequent marriage**.

b) Matrimonial Property System after 15 November 2000 (S7)

Polygamous marriage

- A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of the Act, must comply with a further requirement set out in section 7(6) of the Act, namely an **application to the Court** to approve a **written contract** which will regulate the future matrimonial property system of his marriages.
- If the current marriage(s) are in community of property or with the accrual, the court will also deal with the **division of assets**.
- **Non-compliance** does not render the subsequent marriage null and void, but will render it to be a **marriage out of community of property**.
- In the case of Mayelane v Ngwenyama and another (Womens' Legal Centre Trust and others as amici curiae) 2013 (8) BCLR 918 (CC) it was confirmed that the husband must **obtain the consent of the first wife** before he may enter into a further customary marriage. Failure to do so will render the further marriages automatically as out of community of property.
- The court order and certified copy of the contract must be recorded as an **interdict** against the names of the parties concerned.

Change matrimonial property system (after 15 November 2000)

- Remember that an ANC must be entered into prior to the marriage (and registered 3 months thereafter) for the marriage not to be in community of property.
- Notaries take note that it is prior to the marriage NOT prior to the registration thereof. It is very important to confirm that the parties are not married to anyone else or each other prior to signing the ANC.
- Legislation does make provision for the change of a matrimonial property system after a party entered into a marriage.
- S88 of the Deeds Registries Act 47 of 1937 caters for the postnuptial registration of an antenuptial contract. This can only be used by parties who prior to the marriage agreed to an antenuptial contract but did not execute and register timeously (before the marriage).
- S89 of the Deeds Registries Act 47 of 1937 caters for the registration of a postnuptial contract (read together with S21 of the Matrimonial Property Act). This is for parties who entered into a marriage with one marriage regime and want to change the regime after the marriage. This is a court application. Mariska can provide more information on the court process.
- In Mashisane V Mhlauli (2020/11024) [2021] ZAGPJHC 645 the parties entered into a customary marriage (without an ANC). Thereafter they wished to enter into a civil marriage with each other (“convert”). They wanted to register an ANC prior to the civil marriage so that they could be seen as married out of community of property. The court declared that they are married in community of property because the ANC was not prior to the customary marriage.

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(HOW) ARE THEY MARRIED?

• Q1: Marriage registered?

- Yes – valid customary marriage (marriage certificate is *prima facie* evidence)
- No – ask questions to determine validity:

BEFORE 15 NOV 2000	AFTER 15 NOV 2000
S2(1) A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage	S2(2) A customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage. <ul style="list-style-type: none"> • Above 18 years; and • consent to be married to each other under customary law; and • negotiated and entered into <u>or</u> celebrated in accordance with customary law

Q2: When did they get married?

	BEFORE 15 NOV 2000	AFTER 15 NOV 2000
Monogamous marriage	In community of property	Ito Matrimonial Property Act: No ANC - in community of property ANC – out of community of property
Polygamous marriage	Governed by the customary law (awaiting legislation – share equally)	1st marriage: Ito Matrimonial Property Act: No ANC - in community of property ANC – out of community of property 2nd & following marriages: Ito Court Order Failure – out of community of property

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2. TERMINATION OF MARRIAGES IN SOUTH AFRICA

- Marriages, whether in terms of Customary Law or civil marriages in terms of the Matrimonial Property Act **can only be terminated by one of two events: death or divorce.**
- A marriage **automatically** (by operation of law) terminates on the **death** of one of the spouses whether an indigenous marriage (customary law) or civil marriage.
- In terms of a divorce the marriage is **terminated by the court** in the form of the final decree of divorce: **a court order.**
- Either death OR divorce: Marriages can never be terminated by both death and divorce and it will always be either death or divorce.
- Be aware of **the limitations with regard to normal rules regarding executors being able to litigate on behalf of deceased.** Executor **cannot step into the shoes of a deceased person for purposes of finalising the divorce proceedings.** The marriage will **automatically terminate on death** of one of the spouses regardless of the pending divorce proceedings that might have been instituted already.

DIVORCE: THE GENERAL PROCESS

- Divorce proceedings are instituted in either the **High Court or a Regional Court**. Lower Courts (Magistrate Courts) do **not have the necessary statutory jurisdiction** to deal with divorces (if it affects a person's status it must be dealt with by a High Court).
- Can institute without attorney- Not advisable due to important aspects to be considered (discussed later).
- A divorce is **either unopposed (uncontested) or opposed (contested)** and the distinction normally becomes applicable/clear when dealing with the division of assets, maintenance (children or spouses) and accrual claims.
- The division of assets and proprietary consequences are regulated by the Marital regime (IN, OUT (with or without accrual))- whether civil or customary marriage.

Opposed Divorces:

- Extremely costly depending on nature of disputes. Extremely time consuming.
- Detrimental to children if extremely acrimonious.
- Go to trial: **Court decides** after considering all evidence and circumstances (as per the body of case law and legislation) as to the contact/access rights (may be referred to the Children's Court), maintenance (spousal and children- can be referred to the Maintenance Court), division of assets (movable and immovable, including shares, investments, vehicles), accrual claims. And pension interests.

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Unopposed Divorces (Settlement)

- The parties **reach an agreement** with regards to the division of assets (movable and immovable), liabilities, policies and pension funds, maintenance (spousal and for children) and access and contact rights pertaining to children.
- Cheaper, quicker, less traumatizing.
- **Settlement agreement is made an order of court and is enforceable against third parties** such as the executor of a deceased spouse that is obliged in terms of the decree of divorce (and settlement agreement made an order of court) to transfer for example a property to the former spouse, payment of maintenance, accrual claims.
- Can agree to almost anything in the settlement agreement (not against statute or public interest). Note if children involved the contact rights, maintenance etc must be in the child's best interest (prevailing principle considered by the Office of the Family Advocate and the courts in accordance with the Children's Act).
- Where minor children involved the settlement agreement must be endorsed by the relevant Family Advocate's office- they determine if such settlement agreement is in the best interest of the minor child. If queried -issues can be addressed to the satisfaction of the Family Advocate, alternatively can be argued during the divorce proceedings.
- Family advocate can be requested to launch an investigation to determine what is in the best interest of the children and make suggestions to be incorporated in the settlement agreement.
- The plaintiff must be present on the day in court and some court even require the defendant to be there to verify details and signatures on any agreements.

Indigenous marriages (in terms of Customary law):

- Still need to do a divorce for customary marriage (whether registered or not).
- Section 8 of the RCMA provides that:
 - *[a] 'customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage'.*
- Important to note that the RCMA does not provide that such marriage must be registered before it can be dissolved. Therefore, all valid customary marriages, whether registered or not, can be dissolved by the court (decree of divorce).
- Despite provisions being made in the RCMA for a dissolution of a customary marriage, many couples married under customary law **informally separate** and move on with their lives respectively, without formally getting a decree of divorce.
- The issue with such informal separation is that such couples are unaware that despite their informal separation, **they are still considered to be validly married to each other, and this can create unintended consequences.**
- As most customary marriages are in community of property (where an antenuptial contract was not concluded), couples that just separate informally are not aware that they **remain legally entitled to an equal division of the joint estate and to claim certain benefits from the other party and remain liable for the debts of the joint estate** and need certain **forms of consent to enter certain transactions.**
- Failure to dissolve a customary marriage may also create **barriers for a party that wants to marry again**; for example, a spouse in a customary marriage will be prevented from entering a civil marriage with another during the subsistence of a customary marriage.

IMPORTANT ASPECTS WITH REGARDS TO DIVORCES AND DEATH

- Division of assets
- By agreement (settlement agreement in an unopposed divorce) where **parties agree how** assets are to be divided amongst them.
- Or by way of a **court order (decree of divorce)**: A determination made by court after various circumstances and aspects are considered (usually in opposed divorces) how the assets must be divided between the parties.
- Or **polygamous marriage**: upon entering a **further customary union- the court must decide** as to how the current assets must be distributed (re-distributed) and how future assets will be dealt with (both spouses must participate).

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Children (general & “wife”)

- Can inherit as per the will, alternatively intestate succession (all descendants included whether born out of wedlock and whether marriage was deemed to be valid (for example where a further customary marriage entered when there was already a civil marriage), adoptive children and a child accepted in accordance with Customary Law as own child.
- **A child accepted in accordance with Customary Law as own child.**
- A person who is not a descendant to the Intestate Succession Act, but who, during the lifetime of the deceased person, was accepted by the deceased person in accordance with customary law as his or her own child: This person forms part of the definition of “descendant” in Section 1(a) of the Reform of Customary Law of Succession and Regulation of Related Matters Act, of 2009.
- Maintenance orders : Child that reaches majority but is not self sufficient can institute a claims against the estate for maintenance in accordance with decree of divorce (settlement or court’s determination) or common law duty to maintain.

Intestate Succession Act and Reform of Customary Law of Succession and Regulation of Related Matters Act— **woman / descendants**

- **Section 2(1) of the Reform of Customary Law of Succession Act** provides that the estate or part of the estate of any person who is subject to customary law and who died after 20 September 2010, and who did not leave a will, must devolve in accordance with the Intestate Succession Act, **subject to the provisions of section 2(2)**.
- According to **Section 2(2) of Reform of Customary Law of Succession Act**, where the deceased is survived by a spouse as well as a descendant, such spouse inherits the greater of R250 000 or a child's share of the intestate estate.
- In **Section 2(2)(b) & (c)**, reference is made to **two types of "women"**, namely-
 - a. A woman (other than the spouse of the deceased) with whom the deceased entered a union in accordance with customary law for the **purpose of providing children for his spouse's house**; and
 - b. A woman who was under customary law married to the deceased (who also was a woman), for the purpose of providing children for the deceased's house.

These two types of women are descendants, they are **deemed to be "spouses" in the interpretation of Section 1 of the Intestate Succession Act.**

Where the deceased is survived by spouses (and woman) as well as descendants, each surviving spouse (and woman) is entitled to a child's share or R250 000 whichever is the greater.

Where the intestate estate is not sufficient to provide each surviving spouse and woman referred to in section 2(2)(a), (b) and (c) of the Reform of Customary Law of Succession Act with R250 000 the estate shall be divided equally between such spouses and women – Section 1(1)(c) of the Intestate Succession Act read together with Section 3(2) of Act 11 of 2009.

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Intestate succession act – woman / descendants (continued)

Certain definitions stipulated in the Customary Law of Succession Act that are relevant to the correct application of the Act that are important (for purposes of this discussion) is:

“Descendant”: means a person who is a descendant in terms of the Intestate Succession Act, and includes-

- a. A person who is not a descendant in terms of the Intestate Succession Act, but who, during the lifetime of the deceased person, was accepted by the deceased person in accordance with customary law as his or her own child; and
- b. A woman referred to in Section 2(2)(b) or (c)

The interpretation and definition for descendant and spouse has therefore been adopted to provide for the inclusion of these persons.

Spousal maintenance (pursuant to a decree of divorce)

- If not prayed for in the divorce summons or incorporated in settlement agreement then the **right to claim spousal maintenance lapses in its entirety**. A spouse cannot try to claim spousal maintenance once the divorce is finalized. **Cannot be revived in the future**.
- **The wording/clauses of a settlement agreement (court order) will be pivotal when dealing with such claims**. If the person liable for these payments has died there is a claim against his/her estate on strength of the settlement agreement (made an order of court/decreed of divorce) and specific clauses- taking into account general clauses pertaining to **death or remarriage of spouse**.
- Can institute a claim against a deceased estate for arrear payments in relation to spousal maintenance as well as maintenance towards children. **SR v DR and Another (2980/2007) [2022] ZAGPJHC**
- **Rehabilitative maintenance/permanent maintenance**: To put a spouse in a financial position to satisfy herself/himself to re-enter and settle in the labor market again. Fixed period and after the period the liability terminates. BUT in **Kruger NO v Goss and Another** rehabilitative maintenance for a period of 60 months but after paying 33 months Mr. Kruger passed away and Mrs Goss lodged a claim against the estate for the remainder of the rehabilitative maintenance. Court held that ito **Section 7(2) of the Divorce Act courts have the power to grant rehabilitative maintenance for the duration of the life of the beneficiary**- Court pointed out (despite common law position: death brought duty to an end) that ***“a spouse is free to bind his/her estate to pay maintenance after death”***
- ***Duty to support normally terminated on death or divorce, may survive such an event in case of a divorce by agreement between the parties or by court order.***
- **DUM CASTA CLAUSE**: ***When drafting the deed of settlement it should clearly be stipulated that the maintenance obligation will cease when the other party remarries or lives together as husband and wife with another person (or any other restrictive condition the parties agree upon) otherwise the maintenance will continue even if the receiver of maintenance remarries.***

Termination of the responsibility to maintain

- Maintenance can be for a specified period, like rehabilitative maintenance, but the maintenance order for a wife will **lapse after remarriage or death of the wife** if order made in terms of **Section 7(2) of the Divorce Act**.
- If the order was made in terms of Section 7(1)- **in terms of an agreement-** the maintenance **will not lapse after the death or remarriage unless so specified**. The maintenance will also **lapse on the death of the payer unless specifically agreed otherwise**.
- In the event of the death of the payer of maintenance the survivor (ex-spouse) will only have a **claim against the estate** of the payer if it is **in terms of an agreement** (not an order ito Section 7(2)- Kruger NO v Goss).
- *Practitioners must take note of the provisions of the co-called Act for Maintenance of Surviving Spouses which provides for the maintenance of the surviving spouse (married), and in which regard **Section 2(1) declares as follows**: “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/her reasonable maintenance needs until his death or remarriage in so far as he/she is not able to provide therefor from his/her own means and earning”*
- *Note that this Act is retrospectively enforceable. This applies only to the surviving spouse- Children have a common law claim whether it is a claim for maintenance or whether it be in a court order or settlement.*

Pension Interest

RETENTION OF WITHDRAWAL BENEFIT IN PROVIDENT FUND FOR PAYMENT OF FUTURE MAINTENANCE

- In *Mngadi V Beacon Sweets and Chocolates Provident Fund and other*: Issue before the court was whether it was competent to order that a lump sum be retained by a provident fund to secure future payment of a member's maintenance obligations.
- The court noted that Section 37A(a) of the Pension Funds Act 24 of 1956 prohibits the alienation of a benefit to the Pension Funds Act, except as provided for in the Pension Funds Act, Income Tax Act (58 of 1962), the Maintenance Act (99 of 1998) or a court order.
- The court granted a declaratory order that the minor children were entitled to share in the withdrawal benefit while they were in need of support and maintenance. Ordered to retain the full amount of the benefit and to pay the monthly maintenance amounts. His estate would be entitled to payment of the balance remaining in the fund once the children were no longer in need of support (not necessarily age of majority).
- NOTE: Section 37D(1)(d)(iA) of the Pension Funds Act now provides that the Fund may deduct from a member's benefit or minimum individual reserve, any amount payable to a maintenance order as defined in Section 1 of the Maintenance Act.

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Pension Interest : Non-member spouse's entitlement in terms of Section 7(8) of Divorce Act

- Due to the **strict provisions of Section 37A of the Pension Funds Act (24 of 1956)** which imposes a **prohibition on reducing, transferring or attaching pension benefits**, the Fund may only act upon a decree of divorce (divorce order) if it **complies** with the **requirements of section 7(8) of the Divorce Act**.
- The settlement agreement or order must contain the following: **The correct name and registration number of the Fund to which the member spouse belongs; the reference number or member number of the spouse; which party's pension interest is involved- Plaintiff or Defendant; the percentage or amount of the pension interest, when and to whom the amount will be payable and to whom and how payment must be made or whether it must be transferred to another fund; an order that the funds has to endorse/note the agreement regarding the pension interest in its records.**
- Ensure the wording in a settlement agreement is correct to avoid pension interest not being able to be processed and paid out. **Best practice to phone the relevant pension/annuity fund's legal department and submit your wording for approval.**
- If not incorporated in a settlement agreement one has the option to bring in application to court in order to attach the funds or a portion thereof.

Example:

- *The Defendant is a member of the OLD Mutual Superfund, with policy number _____ and Member Number _____. The parties agree that 50% of the Defendant's pension interest in the abovementioned policy, be awarded to the Plaintiff, at the date of divorce, as contemplated in terms of Section 1 of the Divorce Act of 1979, as amended, and to be transferred to the Plaintiff within 30 days from date of the notation being made to the funds records, and to be paid out within 60 days thereafter, be transferred in terms of Section 37D of the Pension Funds Act, Act 24 of 1956. The OLD Mutual Superfund is ordered in terms of Section 7(8) of the Divorce Act, Act 70 of 1979 (as amended), to note in the OLD Mutual Superfund's records that the Plaintiff is entitled to 50% of the Defendant's pension interest.*

Divorce and Wills (important aspects continued)

SECTION 2B OF THE WILLS ACT

- Section 2B of the Wills Act provides that where a person has made a Will prior to getting divorced and then passes away within three months of the date of their divorce, the Will made prior to the divorce would regard the now ex-spouse as having predeceased the testator. This means that the now ex-spouse would not be eligible to inherit under the testator's Will.
- *Getting divorced doesn't automatically rewrite your will. Three-month grace period to consider your options.*
- **The ambit and purpose of s2B**
- As a general rule in our legal system unlike some other jurisdictions, the **change of status of a testator, such as getting married, getting divorced or having children does not automatically result in the revocation of an existing Will.**
- By deeming the ex-spouse predeceased, s2B ensures that the ex-spouse does **not inherit even though they are named as a beneficiary while the rest of the Will stays intact.** The section affords a recently divorced testator a grace period of three months, within which to get his affairs in order, review his Will and if necessary,
 - amend it on account of his changed status. In other words, a testator has three months to consider whether **he wishes his now ex-spouse to still be a beneficiary in his Will.**

In J W v Williams-Ashman NO and Others, the constitutionality of Section 2B was challenged in the Western Cape High Court. The Applicant and the deceased were married in 2011. In 2015, their marriage subsequently became strained, and a final decree of divorce was issued on 24 October 2016. The deceased died on 8 December 2016, one month and fourteen days after their divorce. Prior to their marriage, the deceased had made a Will in which she bequeathed her entire estate to “her husband”.

Divorce and Wills (continued)

- The court drew the conclusion that section 2B “serves a legitimate and compelling social purpose”. It is generally accepted that when spouses get divorced, they do not intend to continue benefiting each other after their divorce. Of course, it is possible for there to be cases where the ex-spouses are civil and friendly and do, in fact, intend on benefiting each other in their Wills. For that reason, section 2B caters for both scenarios by offering a **choice**.
1. *Harvey NO v Crawford NO* 2019 (2) SA 1 53 (SCA) at para [53] the Supreme Court of Appeal confirmed that the ‘deeply entrenched’ principle of freedom of testation enjoys constitutional protection not only in terms of s 25(1) of the Constitution but also in terms of the founding constitutional value of, and the right to, dignity.
- In this regard it held that freedom of testation is an important facet of the right to dignity which protects not only a testator’s right to dispose of their property, but also their right to choose their beneficiaries.
 - Important to note that the relief does not apply after the 3 month period. If the Will was not amended, it is deemed that the deceased spouse intended for the ex-spouse to continue to benefit.

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3. DEATH

- A marriage whether in terms of Customary law or a civil marriage in terms of the Marriages Act will **automatically terminate on the death** of one of the spouses by operation of law.
- Intestate Succession, Section 2B Will Act, Court Orders and claims against the estate (wording pivotal), duty to maintain and accrual claims are all elements that can become very applicable and relevant to the administration of an estate.
- Refer to the type of marriage to determine the consequences at death taking into account the will or principals in terms of Intestate Succession, and the important aspects discussed above.

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4. SUMMARY

Customary Marriage

- It is advisable for couples who intend to get married under customary law to:
- Be clear on their **intentions** – what needs to be done in terms of their customs and traditions for the marriage to be valid.
- Conclude an **ANC** prior to entering into the marriage if they wish not to be married in community of property.
- **Register** their marriage as it serves as proof of the existence of the marriage.
- **Approach court** before entering into a polygamous marriage.

4. SUMMARY

Divorce & Death

- Divorces can have various consequences on a person's estate once he/she dies.
- Specific attention is needed to particular sets of legislation and a decree of divorce or settlement agreement that is made an order of court.
- Aspects relating to Divorce can influence a deceased estate. There are some instances where there is a interdependent relationship and the one can influence the other.
- Divorce Law (litigation in relation thereto and drafting of agreements or court papers are of paramount importance as it regulates the consequences and duration or application of certain aspects.
- Always seek legal advise from a practitioner that works with these matters regularly to stay up to date with legislation and case law relevant to an issue that you might face when administering an estate.

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5. APPLICABLE LEGISLATION & IMPORTANT CASE LAW

Customary Marriage

- Legislation

- Recognition of Customary Marriages Act 120 of 1998 & the amendment(s) thereto
- Matrimonial Property Act 88 of 1984
- Marriage Act 25 of 1961
- Deeds Registries Act 47 of 1937
- Reform of Customary Law of Succession
- Intestate Succession Act

- Case law

- *M v K* (LP) (unreported case no 2017/2016, 7-11-2018)
- *Sengadi v Tsambo*; In re Tsambo [2019] 1 ALL SA
- *Mbungela and Another v Mkabi and Others* [2020] 1 All SA 42 (SCA)
- *Diba v Miselo and Another* (5768/2021) [2021] ZAWCHC 234 (18 November 2021)
- *Mbungela and Another v Mkabi and Others* 2020 (1) SA 41 (SCA)
- *Monyepao v Ledwaba and Others* (case no 1368/18) [2020] ZASCA 54 (27 May 2020)
- *Gumede v President of the Republic of South Africa and Others* 2009 (3) BCLR 243 (CC)
- *Mayelane v Ngwenyama and Another* (CCT 57/12) [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC)
- In *Ramuhovhi and Others (Maphumulo as Intervening Party) v President of the Republic of South Africa and Others (Trustees of the Womens' Legal Centre Trust as amicus curiae)* 2018 (2) BCLR 217 (CC)
- *Mashisane V Mhlauli* (2020/11024) [2021] ZAGPJHC 645
- *Phele and Another v Sibanyoni and Others* (28059/2021) [2022] ZAGPPHC 544 (19 July 2022)
- *Peter and Others v Master of the High Court: Bisho and Another* (547/2020) [2022] ZAECBHC 22 (2 August 2022)

5. APPLICABLE LEGISLATION & IMPORTANT CASE LAW

Divorce & Death

- Legislation

- Recognition of Customary Marriages Act 120 of 1998 & the amendment(s) thereto
- Matrimonial Property Act 88 of 1984
- Marriage Act 25 of 1961
- Divorce Act 70 of 1979
- Pension Fund Act 24 of 1956
- Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009
- Intestate Succession Act 81 of 1987
- Children's Act 38 of 2005
- Maintenance Act
- Wills Act 7 of 1953

6. Q & A

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