THE PROPRIETARY CONSEQUENCES OF FOREIGN MARRIAGES FOR THE PURPOSES OF ESTATE PLANNING AND SUCCESSION IN SOUTH AFRICA

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ABSTRACT

This thesis is intended to provide clarity regarding the proprietary consequences of foreign marriages in the context of estate planning and succession in South Africa. It includes an exploration into the impact of specific legislation on foreign marriages, the implications of matrimonial property regimes on a deceased estate in South Africa, private international law principles affecting matrimonial property and succession claims, the scope of antenuptial contracts and postnuptial contracts as existing remedies for foreign remedies, and the harmonisation of succession and matrimonial property law in the European Union (EU). It furthermore suggests potential reforms for the overhaul of the *lex domicilii matrimonii* principle and associated issues arising therefrom. Various specific issues discussed include the waiver of accrual claims, maintenance claims by surviving spouses of a foreign marriage, choice-of-law rules for matrimonial property rights and succession rights, the registration of a domestic or foreign antenuptial contract for foreign marriages, the formal validity and proper law of antenuptial contracts, the operation of the immutability principle on a domestic and international level, and the common-law approach to the recognition of postnuptial contracts and spousal donations.

Contents

PREFACE

This thesis is presented in fulfilment of the requirements for the degree of Master of Laws at Rhodes University, Makhanda. The research contained herein was completed under the supervision of Sarah Driver in the Faculty of Law at Rhodes University and was conducted from January 2021 to October 2022.

This research is the original work of myself, Aimee Liza Thorne, except where reference has been made to other works. Neither this thesis nor any substantially similar work by myself has been submitted in fulfilment of any other higher degree, diploma, or the like. To my knowledge, none of the research contained herein has been published.

AL Thorne

TABLE OF TERMINOLOGY

Term	Definition
Administration of deceased estate	The process in which a deceased estate is administered by an executor or executrix, which is overseen by the Master of the High Court with jurisdiction.
Antenuptial contract	A contract concluded by prospective spouses before a marriage that contains provisions regulating the spouses' proprietary rights.
Characterisation	The identification of the part of a branch of law, namely the legal category, that could be the *lex causae* of a matter.
Choice-of-law decision	A decision regarding a choice of law applicable to a matter.
Choice-of-law rules	The rules found in private international law which confirm the correct *lex causae.*
Connecting factor	A fact that creates a connection to a legal system.
Deceased estate	The estate of a natural person, comprising of their assets and liabilities, that comes into existence at the time of a person's death.
Deed of transfer	The deed by which right of ownership in immovable property is transferred from one person to another.
Domicile	The place or country that is determined by law as a person's permanent home.
Donatio mortis causa	A donation in contemplation of the donor's death that requires compliance with formalities to be valid.
Endorsement	A statement made on a document by the deeds registry, where the endorsement confirms the existence of a specific fact or transfer of ownership.
Estate planning	The process in which a person makes decisions about the devolution of their estate on or after their death.
Executor/executrix	A person who is authorised to administer a deceased estate.
Foreign marriage	A marriage where domestic law does not apply to the proprietary consequences of the marriage.
Formalities	Formal legal requirements.

Fraus legis	Fraudulent evasion of law.
Governing-law clause	Also commonly referred to as a 'choice-of-law clause', this is a contractual term setting out the applicable proper law.
Habitual residence	Regular and physical residence in a place, without the necessity of having an intention to remain indefinitely.
Immutability principle	In the context of matrimonial property law, the principle that an applicable matrimonial property regime is fixed.
Intestate succession	The body of rules that apply when a deceased dies without having a valid will governing their estate, either in whole or in part.
Law of closest connection	The closest law connected to a matter, as objectively determined.
Law of succession	The body of rules that govern the succession of a deceased estate when a testamentary disposition is applicable.
Legal category	A conceptin private international law that refers to part of an area of law for the purposes of characterisation.
Lex causae	The proper law governing a matter.
Lex domicilii	The law of a person's domicile.
Lex domicilii matrimonii	The law of the husband's domicile at the time of the marriage.
***Lex domicilii matrimonii* principle**	The principle that, in the absence of an agreement otherwise, the law of the husband's domicile at the time of the marriage determines the proprietary consequences of the marriage.
Lex loci celebrationis	The law of the place at which a marriage is celebrated.
Lex loci contractus	The law of the place in which a contract is concluded.
Lex rei sitae	The law of the place in which a property is located.
Lex situs	The law of the place in which an immovable property is located.
Lex ultimi domicilii	The domicile of the deceased at the time of death.
Marriage in community of property	A South African matrimonial property regime that results in a joint estate existing between spouses.
Marriage out of community of	A South African matrimonial property regime that results in complete separation of the spouses' property.

property excluding the accrual system	
Marriage out of community of property including the accrual system	A South African matrimonial property regime that results in spouses being able to share in the growth of their estates on termination of the marriage, without a joint estate existing.
Master of the High Court	A statutory institution in South Africa that oversees *inter alia* the administration of deceased estates.
Matrimonial property	Any asset of a spouse that is eligible for division due to the existence of a marriage.
Matrimonial property regime	A variable consequence of a marriage, being the property rules that apply to a spouse due to the commencement or termination of a marriage.
Nationality	The state in which a person is a legal citizen.
Notarial contract	A contract that has been executed by the parties in the presence of a Notary Public.
Postnuptial contract	A contract regulating the proprietary rights of spouses which is executed after their marriage has been concluded.
Private international law	A branch of domestic law that regulates the legal relationship between individuals when a foreign element is involved.
Procedural law	The law that governs procedure, which is used to enforce substantive law.
Proprietary consequence of a marriage	The patrimonial consequences of a marriage on the spouses' estate.
Renvoi	The referral of a matter from one legal system to another for the purpose of applying the correct *lex causae*.
Scission principle	The principle that different legal systems apply to the succession of a deceased's movables and immovables.
Surviving spouse	The spouse who survives after the death of their spouse.
Testamentary disposition	A testamentary document voluntarily disposing of property of a testator/testatrix, including a will or a codicil, that complies with requisite formalities.

Testator/testatrix	A natural person who bequeaths their estate, or a part of it, in a testamentary disposition.
Testate succession	The body of rules that apply when a a deceased dies after executing a valid testamentary disposition.
Unitary principle	The principle that a single legal system governs the devolution of a group of property.

CHAPTER 1: The context, goals, and methodology

1.1 The context

Worldwide migration is being driven by varying factors such as economic opportunities, environmental disasters, conflict, political instability, and education.[1] Worldwide estimates for 2019 indicate that one person out of every 30 people is a migrant, with approximately 281 million migrants existing globally.[2] South Africa is no exception to migration. In 2019, South Africa was ranked fifteenth in the top destinations worldwide for resident migrants, and it was the only African country in the top twenty destinations.[3] Moreover, in 2020, approximately four million migrants were estimated to be living in South Africa,[4] which is equivalent to approximately 7.2% of the population.[5] This percentage has increased from the estimate number of migrants in 2005, being 2.8%.[6] One of the potential effects of migration is that people of different domiciles enter into a marriage which can, in turn, contribute to the occurrence of foreign marriages in South Africa.[7]

1.1.1. The identification of a foreign marriage: the *lex domicilii matrimonii* principle

Private international law[8] in South Africa differentiates between the legal validity of a marriage, the personal consequences of the marriage, and the proprietary consequences of a marriage. The latter is of notable relevance to this thesis.

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[1] Statistics South Africa "Migration Dynamics of Women, Children and the Elderly in South Africa" http://www.statssa.gov.za/publications/Report-03-51-04/Report-03-51-042020.pdf (accessed 6 April 2021) 1; International Organization for Migration "World Migration Report 2020" https://publications.iom.int/system/files/pdf/wmr_2020.pdf (accessed 1 December 2021) 61-63.
[2] International Organization for Migration "World Migration Report 2020" 23.
[3] International Organization for Migration "World Migration Report 2020" 26.
[4] International Organization for Migration "World Migration Report 2020" 57.
[5] International Organization for Migration "World Migration Report 2020" 23.
[6] International Organization for Migration "World Migration Report 2020" 56.
[7] South African Law Reform Commission *Issue Paper 34 of Project 100E: Review of Aspects of Matrimonial Property Act* (2018) 40.
[8] Private international law will be considered in further detail in chapter 4.

The formal validity of a marriage is generally determined by the laws of the state in which the marriage took place, which is referred to as the *lex loci celebrationis*.[9] The personal consequences of the marriage, being the spouses' personal rights and obligations, are governed by the *lex domicilii* of both spouses at the time of the act in question, being the law of their domicile.[10] 'Domicile' means "the place or country which is considered by law to be a person's permanent home".[11] The parties' domicile at the date of marriage is therefore not applicable to their personal consequences, and if there is no joint domicile, the rule tends to fail.[12]

The proprietary consequences of a marriage are determined by the *lex domicilii matrimonii*, being the law of the husband's domicile at the time of the marriage unless the spouses have contracted otherwise, such as in an antenuptial contract.[13] This principle is known as the *lex domicilii matrimonii* principle although the 'law of the matrimonial domicile' is used interchangeably.[14] The place in which the marriage occurs, if it is different from the husband's domicile, has no effect on the proprietary consequences of the marriage.[15] In this context, 'foreign marriage' can therefore be defined as a marriage where domestic law does not apply to the proprietary consequences of the marriage. This could result either from the spouses making a choice of foreign law, or when the *lex domicilii matrimonii* points to the application of foreign law. Any reference to 'domestic' throughout this thesis shall mean a reference to 'South African', whereas 'foreign' would mean 'non-South African'.

If the spouses have not contracted otherwise, the *lex domicilii matrimonii* will be the *lex causae,* or the proper law that will be used to govern any substantive questions regarding the spouses' proprietary relations.[16] No subsequent change of domicile will change the applicable law.[17] The husband's domicile is furthermore proven on a balance of probabilities.[18]

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[9] CF Forsyth *Private International Law* 5 ed (2012) 280; Based on Kahn and Forsyth, Schulze finds that the essential validity of the marriage, in addition to its formal validity, is determined by the *lex loci celebrationis* [C Schulze "Conflict of Laws" in J Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships* (2014) 643].
[10] Forsyth *Private International Law* 291.
[11] *Mason v Mason* (1884-1885) 4 EDC 330 at 337.
[12] Forsyth Private International Law 291.
[13] Forsyth *Private International Law* 93, 292; *Frankel's Estate & Another v The Master & Another* 1950 (1) SA 220 (A) 244, 251. This principle was reiterated in *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C) 494C.
[14] *Sperling v Sperling* 1975 (3) SA 707 (A) 716G.
[15] *Frankel's Estate & Another v The Master & Another* 1950 (1) SA 220 (A) 223.
[16] *Sperling v Sperling* 1975 (3) SA 707 (A) 716G. The *lex causae* is not frozen at the time of the marriage hence the whole of the law is used as it exists in its current form, subject to the overriding test of public policy – see 721E-F, 722C-D.
[17] *Sperling v Sperling* 1975 (3) SA 707 (A) 716G-H.
[18] Section 5 of the Domicile Act 3 of 1992.

The *lex domicilii matrimonii* principle follows a unitary approach to its application to property in that the same law will apply to both immovable and movable property.[19] In the case of immovable property, if the *lex domicilii matrimonii* allows for land to pass by operation of law but this transfer of ownership conflicts with the *lex situs*, being the legal system of the place in which the immovable property is located,[20] an equivalent personal right in the *lex situs* will arise in favour of the non-holder spouse, unless there is no such equivalent.[21] There is not a similar position for movables but an identical approach has been suggested.[22]

Although the *lex domicilii matrimonii* principle applies one law to both immovables and movables, the law of succession does not follow this unitary approach.[23] Instead, the law of succession follows the scission principle where a deceased's movables are distributed according to the deceased's *lex domicilii* notwithstanding their location, and immovable property are distributed in terms of the *lex situs* of the asset.[24] The *lex situs* is the law at the place where an immovable property is situated.

One of the main consequences of the *lex domicilii matrimonii* principle is that there is no opportunity for the spouses to choose an alternative legal system to apply for the duration of the marriage,[25] even if the spouses did not understand the impact of the foreign law on their estates when they married.[26] This fixed nature, or immutability, is intended to be advantageous because a change could disadvantage a spouse's proprietary position.[27] It has, however, been suggested that since the remedy of *fraus legis*, a remedy available for fraudulent evasion of law, could be used if a spouse attempts to disadvantage the other,[28] the underlying reason for immutability has been linked in the now-overruled prohibition of spousal donations.[29] Spousal donations are now expressly authorised by section 22 of the Matrimonial Property Act[30] (the

[19] PEJ Brooks "Matrimonial property regimes and succession in South African private international law" (1978) 11 *CILSA* 289 at 290.
[20] Forsyth *Private International Law* 1xvii.
[21] Forsyth *Private International Law* 298.
[22] Forsyth *Private International Law* 298.
[23] Forsyth *Private International Law* 392.
[24] Forsyth *Private International Law* 392.
[25] *B v B* (10019/2014) [2014] ZAWCHC 178 (2 December 2014) para 11.
[26] *B v B* (10019/2014) [2014] ZAWCHC 178 (2 December 2014) para 11.
[27] Forsyth *Private International Law* 298.
[28] Forsyth *Private International Law* 298.
[29] Forsyth *Private International Law* 298.
[30] Act 88 of 1984. Section 22 states that no transaction is voidable or void simply due to it being a donation between spouses, although section 22 states this is subject to the Insolvency Act 24 of 1936 with no reference to any specific sections of the latter.

'MPA'), as well as for residents in South Africa by virtue of the Income Tax Act.[31] Spousal donations and immutability will be considered in further detail in chapter 5.[32]

The immutability of the *lex domicilii matrimonii* principle is relevant to estate planning and succession for two main reasons. First, there is no opportunity for the spouses to change the application of the matrimonial law in South Africa. Second, if the marriage subsists until the death of the first-dying spouse, the applicable matrimonial property law will apply to the dissolution of any matrimonial assets held by a domestic deceased estate.[33]

The continued application of the *lex domicilii matrimonii* principle is, however, unlikely. Section 9(1) of the Constitution of the Republic of South Africa, 1996, states that everyone is entitled to equal benefit of, and protection under, domestic law. The *lex domicilii matrimonii* principle is considered to be inconsistent with section 9(3),[34] notably because it discriminates against women, and fails to apply to both transgender individuals[35] and same-sex civil unions.[36] For example, in relation to its discrimination against women, it can subject a woman in a heterosexual marriage to the domicile of her husband, giving the husband an advantage of being familiar with the applicable legal system.[37] In light of this alleged unconstitutionality, it is probable that the *lex domicilii matrimonii* principle will in due course be declared unconstitutional and would need to be replaced with a constitutionally valid principle.[38]

Regardless of any alternative principle that may be adopted into domestic law, foreign marriages will still continue to occur in South Africa, albeit determinable in terms of a new principle. The principles explained herein may, therefore, still continue to provide guidance in future.

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[31] Section 56(1)(a) of the Income Tax Act 58 of 1962.
[32] See, in particular, chapter 5 § 5.3.
[33] A Barratt *Law of Persons and the Family* (2012) 278.
[34] *Steyn v Steyn* (6427/2010) [2010] ZAWCHC 224 (27 October 2010) para 54; TM Makola *A Comparative Legal Analysis of the Effects of Divorce on Marital Property* (LLM thesis, University of South Africa, 2018) 3.
[35] Centre for Applied Legal Studies "Submission to the South African Law Reform Commission on Issue Paper 35 on a single marriage statute (Project 144)" (2019) https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/CALS%20Comments%20on%20SALRC%20Issue%20Paper%20on%20a%20Single%20Marriage%20Statute%20August%202019.pdf (accessed 5 March 2021) 13.
[36] South African Law Reform Commission *Issue Paper 34 of Project 100E: Review of Aspects of Matrimonial Property Act* (2018) 13; Forsyth *Private International Law* 296.
[37] C McConnachie "'With such changes as may be required by the context': the legal consequences of marriage through the lens of section 13 of the Civil Union Act" (2010) 127 *SALJ* 437.
[38] Makola *Comparative Legal Analysis* 28.

1.1.2. Estate planning and the law of succession

This thesis is centred around the impact of foreign marriages on estate planning and succession. Accordingly, a brief discussion of estate planning and succession will follow to understand these concepts.

1.1.2.1. Estate planning

Estate planning is central to this thesis because planning and decision-making regarding the proprietary consequences of foreign marriages, including postnuptial changes to matrimonial property regimes, frequently occur whilst spouses are still alive. A 'matrimonial property regime' can be described as a variable consequence of marriage,[39] being the proprietary rules that apply to a spouse's estate due to the commencement or termination of a marriage.[40]

Estate planning can be defined as the process where a person makes decisions in advance, or makes an estate plan, regarding the devolution of their estate, namely their assets and liabilities, on or after their death.[41] An estate plan is the route chosen by that person setting out the use, preservation, or transfer of their assets with the usual intention being post-death implementation.[42] Decisions regarding a person's liabilities are also common.[43]

The reduction of taxes, including estate duty or capital gains tax, has become a well-known motive in estate planning, which may have led to a misconception that estate planning is only useful for wealthier individuals.[44] This perception is misguided because many people routinely engage in estate planning, regardless of the value of their estates,.[45] Furthermore, the objectives of estate planning can be widely different and can include well-known tools. For example, the act of executing a will, taking steps to financially protect dependents,[46] choosing a matrimonial property system via an antenuptial contract, or putting in place measures to allow a person's

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[39] J Heaton and H Kruger *South African Family Law* 4 ed (2015) 41.
[40] Heaton and Kruger *Family Law* 41.
[41] WM van der Westhuizen "The relevancy of *inter vivos* and *mortis causa* estate planning when choosing a matrimonial property system" (1988) 13 *Journal for Juridical Science* 46 at 48.
[42] DM Davis, C Beneke, and RD Jooste *Estate Planning* (2012) 1-4.
[43] Davis, Beneke, and Jooste *Estate Planning* 1-4; 1-5.
[44] Van der Westhuizen 1988 *Journal for Juridical Science* 48.
[45] Van der Westhuizen 1988 *Journal for Juridical Science* 47.
[46] UHY "Estate Planning Guide" (2018) http://www.uhy.co.za/wp-content/uploads/2018/02/Estate-Planning-Guide.pdf (accessed 11 May 2022) 7.

business to continue smoothly after their death[47] are all examples of estate planning. Estate planning, therefore, encompasses a wide variety of tools that can be useful to any person, regardless of their financial standing.

1.1.2.2. The law of succession

As mentioned above, estate planning is usually focused on advanced planning in anticipation of death. The law of succession, on the other hand, is concerned with the impact of law on a person's assets and liabilities once they have died.[48]

The law of succession is the body of rules that determines how the devolution or distribution of a deceased estate should occur.[49] When a person dies, their assets and liabilities form part of a deceased estate.[50] The law of succession will identify *inter alia* the beneficiaries, the extent of the beneficiaries' benefits, and the rights of creditors.[51]

Succession can take place in three ways, namely testate succession, intestate succession, or succession by contract.[52] Testate succession refers to the body of rules that apply when the deceased died after executing a valid testamentary disposition.[53] Intestate succession refers to the body of rules that would apply if the deceased died without a valid testamentary disposition.[54] Succession by contract validly occurs in two instances, namely a *donatio mortis causa*[55] or an antenuptial contract.[56]

Domestic succession law recognises the principle of freedom of testation, which means that a testator or testatrix[57] is free to dispose of their property on their death and choose their own

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[47] Davis, Beneke, and Jooste *Estate Planning* 1-9.
[48] C Rautenbach "Introduction" in J Jamneck and C Rautenbach (eds) *The Law of Succession in South Africa* 3 ed (2017) 1.
[49] Rautenbach *The Law of Succession* 1.
[50] Rautenbach *The Law of Succession* 1.
[51] Rautenbach *The Law of Succession* 1.
[52] Rautenbach *The Law of Succession* 1.
[53] Rautenbach *The Law of Succession* 6.
[54] Rautenbach *The Law of Succession* 7.
[55] A *donatio mortis causa* is a donation made in contemplation of the death of the donor, which must comply with the same formalities as a testamentary disposition in order to be valid – Rautenbach *The Law of Succession* 13.
[56] C Rautenbach "Succession by contract (*pactum successorium*)" in J Jamneck and C Rautenbach (eds) *The Law of Succession in South Africa* 3 ed (2017) 259-260.
[57] A testator or testatrix is a natural person who bequeaths their estate in a testamentary disposition – Rautenbach *The Law of Succession* 18.

beneficiaries.[58] The principle of freedom of testation gives certainty to the law of succession.[59] The principle of freedom of testation is linked to the constitutional right to dignity,[60] as well as the constitutional right not to be deprived of property arbitrarily except in terms of a law of general application.[61] This principle is subject to certain limitations, such as those found in antenuptial contracts[62] or testamentary dispositions that are unlawful and against public policy.[63] A surviving spouse's right to maintenance is a further example of a limitation on freedom of testation.[64]

1.1.3. The proprietary consequences of a marriage in the context of estate planning and succession

A marriage is dissolved either on divorce or on the death of the first-dying spouse.[65] Matrimonial property law determines the proprietary consequences that will apply to matrimonial property on commencement and dissolution of the marriage.[66] Domestic matrimonial property law is primarily regulated by the MPA although certain common-law rules still apply.[67] The spouses' antenuptial or postnuptial contract, if applicable, also provides guidance as to the proprietary consequences of the marriage on death.[68] For example, if spouses are married in community of property, on the death of the first-dying spouse, the assets of both spouses must be jointly administered as the spouses are co-owners and hold equal shares *ex lege*.[69] Moreover, in relation to a marriage concluded out of community of property subject to the accrual system, section 4(2) of the MPA states that the accrual right must be determined before an executor or executrix[70] gives effect to any testamentary instructions of the deceased, a *donatio mortis causa,* or intestate succession.

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[58] *JW v Williams-Ashman NO and Others* 2020 (4) SA 567 (WCC) para 56.
[59] *JW v Williams-Ashman NO and Others* 2020 (4) SA 567 (WCC) para 135.
[60] Section 10 of the Constitution of the Republic of South Africa, 1996.
[61] Section 25(1) of the Constitution; *JW v Williams-Ashman NO and Others* 2020 (4) SA 567 (WCC) para 55.
[62] J Heaton and H Kruger *South African Family Law* 4 ed (2017) 87.
[63] JW v Williams-Ashman NO and Others 2020 (4) SA 567 (WCC) para 58; *King and Others NNO v De Jager and Others* 2021 (4) SA 1 (CC) 94.
[64] Section 2(1) of the Maintenance of Surviving Spouses Act 27 of 1990.
[65] Heaton and Kruger *Family Law* 90, 115.
[66] A Skelton and M Carnelley *Family Law* 9 ed (2018) 71.
[67] Skelton and Carnelley *Family Law* 71.
[68] Heaton and Kruger *Family Law* 102-103.
[69] Section 9(2)(a)(ii) of the Administration of Estates Act 66 of 1965.
[70] An executor or executrix is the person who is authorised to administer a deceased estate – Rautenbach *The Law of Succession* 13.

When a spouse who is married in terms of a foreign marriage dies, the domestic assets of that deceased person may be subject to the matrimonial property laws of a foreign jurisdiction. This foreign matrimonial property law may attach proprietary consequences to the assets of either or both spouses due to the termination of the marriage. In these circumstances, the primary point of departure is to determine that a foreign marriage was applicable, and confirm which foreign law applied. The proprietary consequences of the foreign marriage, if any, on the spouses' assets must thereafter be determined. If any proprietary consequences attach to an asset forming part of a domestic deceased estate, the executor must fully understand these proprietary consequences because they may limit the succession of matrimonial assets.

1.1.4. The potential impact of intimate relationships

When discussing the occurrence and consequences of marriages, one cannot ignore the apparent global shift away from marriages. Although the concept of marriage still has social significance,[71] the number of annual marriages occurring globally appears to be declining[72] coupled with a steady increase in the number of intimate life partnerships.[73] For example, estimates from the South African Census suggest that, as of 2016, approximately 3.2 million South Africans were co-habiting with their partner without being married.[74] This approximate number would not include intimate partners who do not cohabit for a number of reasons, such as different places of work.[75] Non-heterosexual intimate partners may also be choosing to avoid entering into a civil union for various reasons, including to protect themselves from societal homophobia, or a perceived stigma locally or abroad.[76] It may also as a result of laws against homosexuality in other states. For instance, a neighbouring country, Namibia, does not legally recognise homosexual marriages and certain homosexual acts are still illegal, despite being rarely prosecuted.[77]

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[71] *Bwanya v Master of the High Court, Cape Town and Others* 2020 (12) BCLR 1446 (WCC) para 39.
[72] E Bonthuys "A Duty of Support for All South African Unmarried Intimate Partners Part I: The Limits of the Cohabitation and Marriage Based Models" (2018) 21 *Potchefstroom Electronic Law Journal* 2 at 4; E Ortiz-Ospina and M Roser "Marriages and Divorces" (2020) *Our World in Data* https://www.ourworldindata.org/marriages-and-divorces (accessed 6 October 2022).
[73] Ortiz-Ospina and Roser "Marriages and Divorces".
[74] *Bwanya v Master of the High Court, Cape Town and Others* 2020 (12) BCLR 1446 (WCC) para 1.
[75] E Bonthuys 2018 *Potchefstroom Electronic Law Journal* 6.
[76] MC Wood-Bodley "Intestate succession and gay and lesbian couples: notes" (2008) 125 *SALJ* 46 at 57-58.
[77] Human Rights Watch "Namibian Court Rules It Cannot Require Recognition of Same-Sex Marriages" (2022) https://www.hrw.org/news/2022/01/25/namibian-court-rules-it-cannot-require-recognition-same-sex-marriages (accessed 9 September 2022); Law Reform and Development Commission, Republic of Namibia *Report on the abolishment of the Common Law offences of Sodomy and Unnatural Sexual Offences* (2021) 6, 9.

Given the growing number of permanent intimate partners who are choosing not to marry, it is likely that, in future, wide-ranging proprietary consequences will also attach to these types of relationships. As Madlanga J stated in *Bwanya v Master of the High Court, Cape Town and Others*,[78] "…manifestations of families are many and varied and all are worthy of respect and legal protection."[79] In this regard, the draft Domestic Partnerships Bill of 2008[80] may be an indicator of the general legal protections to be extended in future. Should further protection be granted, perhaps the scope of foreign relationships giving rise to proprietary consequences will be widened.

Nevertheless, there is already a domestic trend towards attaching proprietary consequences to life partnerships. For example, the South African Revenue Service recognises that life partners can fall within the definition of a 'spouse' in terms of the Estate Duty Act.[81] This recognition allows life partners to qualify as a surviving spouse in terms of section 4(q), thereby entitling the deceased estate to claim a deduction for estate duty purposes for the value of property accruing to the life partner.[82] As a result of *Bwanya v Master of the High Court, Cape Town and Others*,[83] a life partner is now recognised as a 'survivor' and a 'spouse' in terms of the Maintenance of Surviving Spouses Act[84] as well being included with 'spouse' in the Intestate Succession Act.[85] Furthermore, a life partner is included in the definition of a 'spouse' in terms of the Pension Funds Act.[86]

1.2. Structure

This thesis is split into eight chapters including this introductory chapter. In chapter 2, the impact of specific legislation will be discussed. Chapter 3 will examine the proprietary consequences of domestic marriages, including their consequences for a deceased estate, and maintenance claims of spouses in a foreign marriage. Chapter 4 addresses conflicts of law

[78] 2020 (12) BCLR 1446 (WCC).
[79] *Bwanya v Master of the High Court, Cape Town and Others* 2020 (12) BCLR 1446 (WCC) para 32.
[80] Notice 36 of 2008, *Government Gazette* 30663, 14 January 2008.
[81] Section 1 of the Estate Duty Act 45 of 1955; South African Revenue Service "Frequently Asked Questions: Deceased Estates" https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-IT-G31-FAQs-on-Deceased-Estates.pdf (accessed 1 December 2021) 6.
[82] South African Revenue Service "Frequently Asked Questions: Deceased Estates" 6.
[83] 2020 (12) BCLR 1446 (WCC).
[84] Act 27 of 1990.
[85] Act 81 of 1987; *Bwanya v Master of the High Court, Cape Town and Others* 2020 (12) BCLR 1446 (WCC) para 95.
[86] Act 24 of 1956.

between domestic and foreign law, as well as how to identify the correct law to apply when establishing a surviving spouse's matrimonial property rights and succession rights. The applicability of antenuptial contracts and postnuptial contracts as existing remedies will be examined in chapter 5. In chapter 6, the approach of the European Union (EU) to harmonising succession law and matrimonial property law across participating Member States will be considered. Recommendations for the reform of the *lex domicilii matrimonii* principle will be examined in chapter 7. Chapter 8 serves as the conclusion.

1.3. Research question and objectives

The primary research question of this study is to obtain guidance regarding determining the proprietary consequences of a foreign marriage for estate planning and succession in South Africa. This thesis seeks, in essence, to provide clarity for the purposes of pre-death estate planning and the administration of a deceased estate where a foreign marriage is relevant.

The main research objectives are as follows:

1. To analyse the effect of existing domestic legislation on understanding the proprietary consequences of a foreign marriage;

2. To understand what constitutes matrimonial property with reference to domestic matrimonial property regimes, as well as their consequences on the death of the first-dying spouse;

3. To consider the scope of two existing legal remedies, namely antenuptial contracts and postnuptial contracts, for their current applicability to foreign marriages;

4. To examine the EU's solutions to harmonising succession and matrimonial property law to understand its application to domestic estate planning and the domestic administration of a deceased estate, as well as for comparative purposes; and

5. To determine whether there is a need for legal reform, and if so, to provide solutions.

1.4. Methodology

The research methodology is desktop research based on primary resources such as legislation and case law, as well as secondary sources such as scholarly articles. No empirical research was conducted, and all sources are already in the public domain. As such, no ethical issues are expected to arise.

CHAPTER 2: The impact of existing domestic legislation on the proprietary consequences of a foreign marriage

2.1. Introduction

A variety of domestic legislation must be taken into account when understanding the proprietary consequences of a foreign marriage for either estate planning or administering a deceased estate. This chapter will focus on the impact of specific legislation on estate planning and succession. The discussed legislation will be the following: the Administration of Estates Act[87] ('the 'AEA'), the Matrimonial Property Act[88] (the 'MPA'), and the Deeds Registries Act[89] (the 'DRA').

2.2. The Administration of Estates Act

The AEA, which came into force in 1967, is the primary legislation that provides practical direction for the administration of a variety of estates, including deceased estates. In relation to the administration of deceased estates, the AEA's main purpose is to provide rules for the liquidation and distribution of a deceased estate.[90] For example, matters covered by the AEA and its Regulations include *inter alia* the regulation of documents required to report a deceased estate,[91] rules relating to the appointment of an executor,[92] managing claims against a deceased estate,[93] rules relating to the sale of property,[94] the consequences of incorrect distributions,[95] and the discharge of executors.[96]

The AEA has wide-reaching application for deceased estates, including those of non-residents in limited instances. In terms of section 7(1)-(2) of the AEA, if any person dies leaving any asset in South Africa, or any document purporting to be a will in South Africa, their deceased

[87] Act 66 of 1965.
[88] Act 88 of 1984.
[89] Act 47 of 1937.
[90] Long title of the Administration of Estates Act (AEA).
[91] Sections 7-9 of the AEA.
[92] Section 14 of the AEA.
[93] Sections 31-33 of the AEA.
[94] Section 47 of the AEA.
[95] Section 50 of the AEA.
[96] Section 56 of the AEA.

estate should be reported to the Master of the High Court[97] (the 'Master'). The domicile or non-residence status of a deceased person does not affect this reporting provision.[98] This means that the necessity for reporting is triggered for any person who dies in South Africa or elsewhere, if that person either owns an asset located in South Africa or executed a domestic will before their death. The AEA is, however, silent in relation to the proprietary consequences of a foreign matrimonial property regime on a deceased estate. In fact, all references in the AEA to matrimonial property regimes only appear to contemplate domestic matrimonial property regimes. Three examples are provided below.

In every deceased estate, a J294 form, being the death notice form, is required as one of the mandatory reporting documents.[99] If the deceased is survived by a spouse, the current J294 form requires that the signatory insert the applicable matrimonial property regime, however the form only contemplates a choice of domestic matrimonial property regimes.[100] In 2005, the South African Law Reform Commission preliminarily recommended that the form must be changed to indicate the domicile of the parties at the time of the marriage.[101] This change has not yet been implemented.

An additional example can be found in section 9(1)(a)(ii) of the AEA. This section states that, in an inventory, the joint estate of spouses married in community of property must be declared. The creation of a joint estate via a foreign matrimonial property regime is not contemplated. The inventory form is an additional mandatory reporting document and is used to provide information to the Master concerning all property known to have belonged to the deceased or a joint estate.[102] The inventory is accordingly important because it is the first document in which a deceased's assets, or the assets of a joint estate, are declared to the Master.

The last example relates to the matrimonial property regime declared in a liquidation and distribution account. Regulation 5(1)(vi) states that, when preparing a liquidation and

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[97] The Master of the High Court is a statutory institution that has jurisdiction to oversee the administration of deceased estates – see C Rautenbach "Introduction" in J Jamneck and C Rautenbach (eds) *The Law of Succession in South Africa* 3 ed (2017) 24.
[98] Davis, Beneke, and Jooste *Estate Planning* 4-3.
[99] Department of Justice and Constitutional Development "Deceased Estates: How to report an estate to the Master or to a Service Point of the Master" https://www.justice.gov.za/master/deceased-how.html (accessed 05 March 2021).
[100] Point 15 of J294 form.
[101] South African Law Reform Commission *Discussion Paper 110: Project 134* (2005) xv.
[102] Section 9(1)(a) of the AEA.

distribution account, if a deceased was married at the date of death, the applicable matrimonial property regime must be specified. Only domestic matrimonial property systems are listed as potential choices.

The general lack of rules and guidance in the AEA and its Regulations concerning foreign marriages means that there is no law or guidance providing direction to an executor, and any incorrect assumption by the executor would need to be actively noticed by the Master. The executor is, however, the person who is ultimately responsible for determining the correct devolution of a deceased estate, including the identification of the correct beneficiaries.[103] As such, the executor will ultimately be personally responsible for any loss suffered if a distribution was made either negligently or in bad faith.[104] The *condictio indebiti* may be available as a remedy to recover incorrect distributions.[105]

2.3. The Matrimonial Property Act

The second instance of legislation to be discussed is that of the MPA, which is the main legislation governing matrimonial property in South Africa. The self-stated purpose of the MPA is to "amend matrimonial property law and to provide for matters connected therewith".[106]

Before the commencement of the MPA in November 1984, there were two main matrimonial property regimes available in South Africa: first, the default system of a marriage in community of property, and second, a marriage out of community of property.[107] It was possible to choose other matrimonial property regimes prior to the introduction of the MPA but this rarely occurred.[108] This was possibly because legal practitioners felt uncomfortable with advising clients to choose alternative regimes that had not been expressly set out in legislation nor had been adequately tested by the courts.[109]

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[103] D Meyerowitz *The Law and Practice of Administration of Estates and their Taxation* (2010) 12.32-12.33.
[104] Meyerowitz *Administration of Estates* 12.32-12.33.
[105] Meyerowitz *Administration of Estates* 12.32-12.33.
[106] Long title of the Matrimonial Property Act.
[107] J Heaton and H Kruger *South African Family Law* 4 ed (2017) 61.
[108] Heaton and Kruger *Family Law* 61.
[109] KJ Douglas "Change of matrimonial property system without an order of court" (1991) *De Rebus* 205 at 211.

One of the purposes for the introduction of the MPA was to remedy the inflexibility of the two regimes mentioned above.[110] The remedy for this inflexibility was the introduction of a third regime: a variation of a marriage out of community of property that allowed for the inclusion of the accrual system.[111] The three regimes will be discussed in further detail in chapter 3,[112] where the identification of marital property will be considered along with its general consequences for a domestic deceased estate.

In relation to the application of the MPA to foreign marriages, some commentators have stated that the MPA does not apply to foreign marriages at all.[113] This conclusion may have arisen because there is no reference to foreign marriages in the MPA, except for a brief mention in section 29.

Section 29 of the MPA is titled as: "Substitution of section 17 of Act 47 of 1937, as amended by section 1 of Act 15 of 1953, section 8 of Act 43 of 1957, section 8 of Act 43 of 1962 and section 5 of Act 3 of 1972". In effect, section 29 created a substitute for the previous section 17 of the DRA. Section 17 of the DRA, as it existed before the MPA, contained special provisions relating to women only. These provisions included that husbands alone were authorised to deal with property forming part of a joint estate,[114] and if a woman was married in terms of a foreign marriage, this needed to be declared in any deed to be registered in a deeds registry.[115] The substituting section, as contained in section 29, states that any registrable deed – such as a deed of transfer[116] which is commonly referred to as a title deed[117] – must contain the marital status of any person mentioned in that deed, and if a person is married in terms of the laws of a foreign country, the deed must state that the marriage is governed by the relevant country. There is, thus, a very brief mention of foreign marriages in the MPA, albeit not within the main body of the legislation. It is therefore possible that the drafters of the MPA may have

[110] *Ex parte Krös en 'n Ander* 1986 (1) SA 642 (NC) 646D.
[111] Heaton and Kruger *Family Law* 61.
[112] See chapter 3 § 3.3.
[113] A West *The Practitioner's Guide to Conveyancing and Notarial Practice* 3 ed (2016) 453; L Mandry "South Africa: Foreign, Muslim and Hindu Marriages" (2020) https://www.mondaq.com/southafrica/family-law/952344/foreign-muslim-and-hindu-marriages (accessed 2 January 2021).
[114] Section 17(4) of the Deeds Registries Act 47 of 1937.
[115] Section 17(1) of the Deeds Registries Act 47 of 1937.
[116] A deed of transfer is the document transferring ownership from one party to another (G le Roux and E Frantzen *Part 1: Conveyancing Practice and the Deeds Registries Act* 31A ed (2017) 1-9). The deed of transfer contains information such as the identity of the existing owner, the identity of the new owner, the reason for the transfer known as the *causa*, and a description of the property (A West *Conveyancing Practice Guide* 4 ed (2015) 41).
[117] A West *The Practitioner's Guide to Conveyancing* 185.

contemplated the existence of foreign marriages, even if there is no other reference to foreign marriages throughout the remainder of the MPA.

The ambiguity of the application of the MPA is arguably the most relevant for the registration of postnuptial contracts. Postnuptial changes of a matrimonial property regime are covered in section 21(1). If the Act is not applicable to foreign marriages, section 21(1) would not be available to spouses married in a foreign marriage, even if they are citizens, permanent residents, or domiciled in South Africa. The importance of section 21(1) cannot be understated as a remedy for the immutability of matrimonial property regimes in circumstances where it is just and fair to allow a change of regime. These potential circumstances are discussed in chapter 5.[118]

Section 21(1) states the following:

> "*A husband and wife, whether married before or after the commencement of this Act, may jointly apply to a court for leave to change the matrimonial property system, including the marital power, which applies to their marriage, and the court may, if satisfied that –*
>
> *(a) there are sound reasons for the proposed change;*
> *(b) sufficient notice of the proposed change has been given to all the creditors of the spouses; and*
> *(c) no other person will be prejudiced by the proposed change,*
>
> *order that such matrimonial property system shall no longer apply to their marriage and authorize (sic) them to enter into a notarial contract by which their future matrimonial property system is regulated on such conditions as the court may think fit.*"

In effect, section 21(1) allows spouses to apply jointly to court for leave to change the matrimonial property regime applicable to their marriage. If the requirements contained in section 21(1)(a)-(c) are met, the court may grant an order authorising the spouses to conclude a postnuptial contract.

[118] See chapter 5 § 5.3.3.

Section 21(1) is important to estate planning because the remedy provided therein is not available in the common law.[119] An application in terms of section 21(1) is therefore the only remedy available in South Africa for postnuptially changing a matrimonial property regime. The application of section 21(1), or its non-applicability, is therefore crucial to assisting spouses in a foreign marriage with managing their estate planning if a change of matrimonial property regime is advisable in their circumstances.

There is no express indication from the wording of section 21(1) whether or not it applies to a foreign marriage. There are, however, a number of cases that have either a direct or indirect impact on this question, most notably *Union Government (Minister of Finance) v Larkan*,[120] *Ex Parte Marx et Uxor*,[121] and *Ex Parte Senekal et Uxor*.[122] These cases, along with writers' opinions, will be canvassed in chapter 5.[123] Until then, it can be concluded that the main body of the MPA is silent on foreign marriages, thereby providing no guidance nor law for establishing the proprietary consequences of foreign marriages.

2.4. The Deeds Registries Act

The DRA, the third instance of legislation to be discussed in this chapter, is relevant for estate planning and succession because it provides the formal requirements for the registration of deeds,[124] including deeds of transfer,[125] antenuptial contracts,[126] and postnuptial contracts.[127] The DRA's importance for estate planning is linked particularly to the provisions relating to antenuptial contracts and postnuptial contracts, whereas its importance for succession is relevant, notably, for transferring real rights held by a deceased estate. The DRA may not be applicable in certain deceased estates, such as when a deceased does not hold a real right.

In practice, it is a common occurrence to encounter foreign marriages in conveyancing transactions, either when both spouses are still alive or after the death of the first-dying

[119] MFB Reinecke and JC Sonnekus "Insurance policies, the Matrimonial Property Act and alienation of assets of the joint estate without value to the detriment of the non-consenting spouse" (2021) 1 *TSAR* 123 at 126.
[120] 1916 AD 212.
[121] (2) 1936 CPD 499.
[122] 1989 (1) SA 38 (T).
[123] See chapter 5 § 5.3.3 and 5.3.3.2.
[124] Preamble to the Deeds Registries Act (DRA).
[125] Section 16 of the DRA.
[126] Section 86 of the DRA.
[127] Section 89 of the DRA.

spouse.[128] Unlike the MPA and the AEA, the DRA acknowledges the existence of foreign marriages in many instances. Five examples will be discussed: first, mandatory assistance by spouses; second, joining of executors in terms of section 21; third, a change of status via an endorsement in terms of section 17(4); fourth, an endorsement in terms of section 45(1) due to the existence of a joint estate; and fifth, the registration of antenuptial contracts and postnuptial contracts.

2.4.1. Mandatory assistance by spouses

The first example, mandatory assistance by spouses, applies to foreign marriages in a pre-death scenario. The DRA recognises the existence of a foreign marriage in this example by expressly confirming that if a person is married in a foreign marriage, the existence of that marriage must be declared in every document lodged in the deeds registry where a spouse is described.[129] This is to avoid any issues with the capacity of spouses married in terms of foreign law as the spouses must jointly assist each other with any transaction, regardless of whether or not this correctly reflects the proprietary consequences of their marriage.[130] An exemption is possible if approved by the Registrar of Deeds.[131] 'Assistance' in this context means that the spouses would jointly sign any documents required and they would both need to produce any documents requested by the conveyancer or the deeds registry.[132]

2.4.2. Joining of executors in terms of section 21

The second example is set out in section 21 of the DRA. In terms of section 21, if a joint estate exists, a surviving spouse is required to join the executor as a co-signatory in specific circumstances when passing transfer or cession of land.[133] The DRA itself makes no mention of section 21 applying to foreign marriages when a joint estate is applicable, but this was addressed in number 16 of the Registrars' Conference Resolutions, 2014.[134] In the Resolutions of 2014, the Registrars agreed that section 21 applied to joint estates resulting from foreign

[128] D Lee "Foreign marriages and deeds" (2010) *Lexis Digest* http://www.ghostdigest.com/articles/foreign-marriages-and-deeds/52509 (accessed 24 May 2021).
[129] Section 17(2)(b) of the DRA.
[130] Section 17(6) of the DRA.
[131] Section 17(6) of the DRA.
[132] Section 17(6) of the DRA.
[133] Section 21 of the DRA.
[134] Lexis Digest "Registrars Conference Resolutions 2014" (2015) http://www.ghostdigest.com/articles/registrars-conference-resolutions-2014/54724 (accessed 24 May 2021).

marriages. This illustrates that the Registrars identified a gap in the DRA and attempted to remedy it.

Generally speaking, Registrars' Conference Resolutions are the result of an agreement amongst all registrars of deeds registries[135] countrywide concerning a practice directive for solving specific problems.[136] The agreed solutions are then implemented throughout all deeds registries to maintain uniformity.[137] The effect of the Registrars' Conference Resolutions is that a practical guideline is created for all deeds registries to uphold. These resolutions can, however, be judicially set aside.[138]

2.4.3. Endorsement in terms of section 17(4)

The third example is an endorsement in terms of section 17(4). An endorsement is a statement made on a document by the deeds registry, where the endorsement confirms the existence of a specific fact.[139] The endorsement can be seen by the placement of either a stamp or written text, or both, onto a document such as a title deed.[140] There are a wide variety of endorsements which are commonly used including, for example, the transfer of expropriated land[141] or the noting of a change in a company's name.[142]

Following the commencement of the MPA in 1984, section 17 of the DRA, as amended by section 29 of the MPA, requires that any immovable property forming part of a joint estate must be registered in the joint names of the spouses.[143] Before then, if a joint estate existed, the registration of any real rights in a wife's name was prohibited.[144] The effect of an endorsement in terms of section 17(4) is that if a title deed does not reflect the existence of a joint estate, it needs to be updated before any further transactions can occur. This endorsement is not considered to be a transfer of a half share of land to the surviving spouse; it is simply the

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[135] *McKersie v SDD Developments (Western Cape) (Pty) Ltd and Others* 2013 (5) SA 471 (WCC) para 18.
[136] *Edkins v Registrar of Deeds, Johannesburg and Others* 2012 (6) SA 278 (GSJ) para 11.
[137] *Edkins v Registrar of Deeds, Johannesburg and Others* 2012 (6) SA 278 (GSJ) para 11.
[138] *Edkins v Registrar of Deeds, Johannesburg and Others* 2012 (6) SA 278 (GSJ) para 11.
[139] A West *The Practitioner's Guide to Conveyancing* 21.
[140] Page 1 of the Chief Registrar's Circular 2 of 2009.
[141] Section 31(1) of the DRA.
[142] Section 93(1) of the DRA.
[143] Section 17(1) of the DRA. There is an exception listed in section 17(1) if either spouse is contracting in their capacity as a partner in a partnership.
[144] Section 17(3) of the DRA prior to substitution by section 29 of the Matrimonial Property Act (MPA); *Ex Parte Menzies ex Uxor* 1993 (3) SA 799 (C) 807.

recordal of a fact, being the existence of a right acquired by operation of law.[145] For example, if an unmarried person owns land, their title deed will reflect their marital status as unmarried. If the owner subsequently marries in community of property, the title deed should be updated to reflect the existence of the joint estate. The owner can apply in terms of section 17(4) for an endorsement to be made on their title deed reflecting their change in status.[146] Section 17(4) states that this particular endorsement can be used when a foreign marriage has ended due to death or divorce,[147] thereby extending it to foreign marriages.

2.4.4. Endorsement in terms of section 45(1)

The fourth example to be discussed is that of an endorsement in terms of section 45(1). Section 16 of the DRA states that ownership of land shall be transferred by virtue of a deed of transfer unless an exception is permitted by the DRA. This means that a title deed will always be required to pass ownership of land to a new owner unless an exception is allowed by the DRA.[148] Section 45(1) is one such exception to the general rule.

This endorsement applies when a spouse of a joint estate has died and the surviving spouse has obtained a right to a half share of immovable property registered in their deceased spouse's name where that right does not arise by operation of law.[149] A surviving spouse could be entitled to the deceased's half share due to various reasons including testate or intestate succession, a redistribution agreement, a take-over in terms of section 38 of the AEA, or because the surviving spouse purchased the right from the deceased estate.[150] The endorsement allows the surviving spouse to deal freely with the half share once the endorsement has been registered in a deeds registry.[151] For joint estates, an endorsement is usually the more cost-effective route[152] and is, therefore, regularly used. The alternative, being a conventional transfer, will be discussed below.

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[145] *Ex Parte Menzies ex Uxor* 1993 (3) SA 799 (C) 807.
[146] West *The Practitioner's Guide to Conveyancing* 279.
[147] Section 17(4)(b) of the DRA.
[148] JWS Heyl "Conveyancing problems - transfer of immovable property by endorsement: spouses married in community of property (1)" (1980) 147 *De Rebus* 151 at 151.
[149] West *The Practitioner's Guide to Conveyancing* 185.
[150] G le Roux and E Frantzen *Part 1: Conveyancing Practice and the Deeds Registries Act* 31A ed (2017) 7-38.
[151] West *The Practitioner's Guide to Conveyancing* 20.
[152] In terms of section I(A)(1) the Conveyancing: Conventional Deeds (Act 47/1937) Guideline of Fees, effective from 16 May 2022, the fees for an endorsement in terms of section 45 is levied at 75% of the value of the property, which reduction is not applicable if a transfer in terms of section 16 occurs. The Guideline of Fees is available at:

The DRA itself does not confirm that section 45(1) applies to a joint estate resulting from a foreign marriage. This means that, based on the DRA alone, the position is uncertain. In 2003, the annual Registrars' Conference Resolutions determined that section 45 could apply to joint estates created by a foreign marriage provided that the proprietary consequences of the marriage are akin to a marriage in community of property.[153] In 2004, the annual Registrars' Conference Resolutions expanded on the Resolutions of 2003 by stating that an expert opinion, or proof from the foreign mission of the relevant country, would need to be obtained in order to make use of the endorsement for foreign marriages.[154] It is admirable that the Registrars noted the gap occurring in practice and attempted to remedy it, however, the remedy is unnecessarily onerous.

According to West, a sufficiently qualified expert could be a professor specialising in private international law.[155] Given the niche speciality of private international law as well as its inherently wide nature, it is submitted that West's suggestion is impractical. According to the common law, an expert would be a person who is qualified to practise law in the relevant foreign country by having attained a qualification to that effect, even if they do not actually practise law.[156] Furthermore, in *Levy v Levy,*[157] a certificate from a Consul-General was rejected by a court as being insufficient proof of foreign law,[158] which *prima facie* indicates that proof from a foreign mission should not be acceptable. In any event, the requirement of an expert opinion, or proof from the foreign mission, means that there is an additional administrative and financial burden placed on deceased estates where foreign marriages are applicable. Although the rationale for this requirement may be to understand the proprietary consequences of the foreign marriage with certainty, perhaps this additional burden is not necessary to achieve this assumed purpose because the endorsement[159] cannot be effected until section 42(1) of the AEA has been complied with.[160]

J de Villiers "Conveyancing Fees – May 2022" (2022) *LexisNexis* https://www.lexisnexis.co.za/lexis-digest/conveyancing/conveyancing-fees-may-2022 (accessed 11 October 2022).

[153] There does not appear to be a copy of the Registrars' Conference Resolutions, 2003, available electronically but Registrars' Conference Resolutions 1/2003 was repeated in Registrars' Conference Resolutions 5/2004. The latter is available at: The Legal Practice Council "Deeds Office. CRCs and RCs. 2000s" https://www.lawsoc.co.za/default.asp?id=1823 (accessed 24 May 2021).

[154] Registrars' Conference Resolutions 5/2004, available at: The Legal Practice Council "Deeds Office. CRCs and RCs. 2000s" https://www.lawsoc.co.za/default.asp?id=1823 (accessed 24 May 2021).

[155] West *The Practitioner's Guide to Conveyancing* 187.

[156] Forsyth *Private International Law* 111.

[157] (1904) 188 EDC 113.

[158] *Levy v Levy* (1904) 188 EDC 113 at 114.

[159] Lee "Foreign marriages and deeds".

[160] West *The Practitioner's Guide to Conveyancing* 174.

To register an endorsement in terms of section 45(1), a certificate in terms of section 42(1) must be signed by a conveyancer and lodged in the deeds registry.[161] When the conveyancer signs such a certificate, the conveyancer takes responsibility for the accuracy of the facts contained therein.[162] In turn, section 42(1) of the AEA requires that the executor must have prepared a liquidation and distribution account confirming the deceased's marital status[163] and containing the immovable property to be endorsed. Compliance with section 42(1), in turn, means that the executor must have complied with section 35 of the AEA. To comply with section 35, the Master must have examined and approved the liquidation and distribution account, and the account must have lain open for inspection for a period of twenty-one days for interested parties to object to the account.[164] Regardless of whether a foreign marriage is relevant or not, this process would need to be followed for deceased estates valued at over R250,000.00.[165]

The practical effect of section 42(1) is that the Master's approval for the liquidation and distribution account must have already been obtained, and a conveyancer has to take responsibility for compliance with this step. Since the Master, not the deeds registry, is the state institution that is tasked with the oversight and examination of deceased estates, a liquidation and distribution account accepted by the Master should be sufficient proof of the proprietary consequences of the foreign marriage since the Master, not the deeds registry, specialises in the examination of this area.[166] Indeed, the lodgement of a liquidation and distribution account is regularly used by the deeds registry to prove the existence of a fact including, for example, the disqualification of an inheritance.[167]

Accordingly, it is submitted that Registrars' Conference Resolutions 5/2004 should be withdrawn in so far as it requires an expert opinion or proof from the foreign mission of the relevant country, except, for example, if extraordinary circumstances justify further proof.

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[161] West *The Practitioner's Guide to Conveyancing* 174.
[162] Section 15A(1) of the DRA.
[163] Regulation 5(1)(a)(v) of the AEA.
[164] Section 35(4) of the AEA.
[165] Section 2.1(ii) of the Chief Master's Directive 3 of 2015, available at: Department of Justice and Constitutional Development "The Master of the High Court: Chief Master's Directives" https://www.justice.gov.za/master/directives.html (accessed 24 May 2021).
[166] Lee "Foreign marriages and deeds".
[167] Registrars' Conference Resolutions 14/2019, available at: Lexis Digest "Registrars Conference Resolutions – 2019" (2019) https://www.ghostdigest.com/articles/registrars-conference-resolutions-2019/55901 (accessed 24 May 2021).

These circumstances could be determinable at the discretion of the Registrar of Deeds. Although the deeds registry does not consider itself to be bound to the positions of the Master or an executor,[168] this would not be an attempt to restrict the oversight of the deeds registry. Rather, it removes the additional administrative and financial burden unnecessarily placed on certain deceased estates whilst still allowing for discretion to be exercised. If Registrars' Conference Resolutions 5/2004 is to remain, at the very least, further formal guidance should be given regarding the suitable qualification of the expert or representative of the foreign mission.

As an alternative to using section 45(1), a conveyancer can also choose to effect a transfer of the deceased spouse's half share of land using a conventional transfer based on section 16 of the DRA (a 'conventional transfer').[169] This means that an actual transfer of ownership of a half share occurs, not an endorsement. In other words, there is not simply a recordal of a right but an actual transfer of a right. The conveyancer would, however, need to endorse the title deed in terms of section 3(1)(v) – a further endorsement – stating that the surviving spouse is the owner of the remaining half share.[170] The conveyancer can also choose to transfer the whole of the property to the surviving spouse[171] in which case the endorsement in terms of section 3(1)(v) would not be required.[172] The section 45(1) endorsement route is, however, preferable to a conventional transfer due to the former's cost-effectiveness, as mentioned above. In the case of a foreign marriage, a conventional transfer may, therefore, be preferable to avoid the requirement of proof of foreign law.

2.4.5. Registration of antenuptial contracts and postnuptial contracts

The last example to be discussed is the registration of antenuptial contracts and postnuptial contracts for spouses whose marriage will be, or is, governed by foreign law. The registration of antenuptial contracts and postnuptial contracts is addressed in chapter 7 of the DRA.

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[168] HS Nel Jones *Conveyancing in South Africa* 4 ed (1991) 268.
[169] West *The Practitioner's Guide to Conveyancing* 185.
[170] West *The Practitioner's Guide to Conveyancing* 185.
[171] West *The Practitioner's Guide to Conveyancing* 185.
[172] Le Roux and Frantzen *Part 1: Conveyancing Practice and the Deeds Registries Act* 11-32.

2.4.6. Antenuptial contracts

In terms of section 86(1) of the DRA, an antenuptial contract needs to be registered within a specific time otherwise it will be of no force or effect against third parties, such as creditors. An antenuptial contract that is signed but not registered will only be valid between the spouses, not third parties.[173] If an antenuptial contract is signed outside of South Africa, it can be executed in front of a notary or otherwise concluded "in accordance with the law of the place of its execution".[174] Once validly concluded, the contract would need to be registered within six months from its conclusion.[175]

If an antenuptial contract is not registered in the deeds registry in time, its late registration must be authorised by a court.[176] Late registration can even occur after the death of one or both the spouses, as in the case of *In Re Langston's Estate*.[177] In this case, the beneficiary of a deceased estate applied for approval to register an antenuptial contract concluded 50 years before.[178] Despite the length of time that had passed as well as the death of both spouses, the court authorised the late registration of the antenuptial contract.[179]

Foreign antenuptial contracts duly executed in other jurisdictions can be registered in a deeds registry but registration is not necessary for the rights contained therein to be recognised in South Africa.[180] For this to apply, the husband cannot be domiciled in South Africa.[181] Furthermore, there is precedent for foreign antenuptial contracts being registered in South Africa after the spouses have become domiciled in South Africa, or if they wish to purchase land.[182] The scope of antenuptial contracts for foreign marriages will be examined more closely in chapter 5.[183] If the antenuptial contract is written in a foreign language, this should not be a bar to registration provided that the contract has been validly concluded.[184]

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[173] Section 86 of the DRA.
[174] Section 87(1) of the DRA.
[175] Section 87(2) of the DRA.
[176] Section 87(1) of the DRA.
[177] 1932 NPD 191.
[178] *In Re Langston's Estate* 1932 NPD 191 at 192-193.
[179] *In Re Langston's Estate* 1932 NPD 191 at 194.
[180] *Ex Parte van Borselen et Uxor* 1942 TPD 206 at 208.
[181] Forsyth *Private International Law* 306.
[182] *Ex Parte van Borselen et Uxor* 1942 TPD 206 at 208.
[183] See chapter 5 § 5.2.
[184] *Ex Parte Wismer et Uxor* 1950 (2) SA 195 (C) 199.

2.4.7. Postnuptial contracts

The registration of postnuptial contracts is addressed in section 89 of the DRA. Section 89 allows for the registration of a postnuptial contract in terms of either section 20 or section 21 of the MPA.[185] Section 20 would largely not be relevant as it relates to the power of a court to order the immediate division of a joint estate.[186] With regard to section 21, as mentioned in chapter 2, section 21(1) may not be available to spouses married in terms of a foreign marriage. If section 21(1) does not apply to foreign marriages but postnuptial contracts are still permitted, perhaps allowed directly from the foreign law, there would not be a section available in the DRA to register such a postnuptial contract, unless section 89 is amended or the Registrars of Deeds issue a resolution.

2.5. Conclusion

The AEA and the MPA provide no general guidance or law regarding foreign marriages and therefore do not assist with establishing the proprietary consequences of a foreign marriage for estate planning and succession. This has a direct impact on the ability of legal practitioners to provide adequate estate planning advice or administer a deceased estate involving a foreign marriage. The DRA, on the other hand, despite coming into operation decades before the AEA and the MPA, expressly addresses foreign marriages as shown by the five discussed examples. Moreover, practical guidance is regularly provided by the Registrars of Deeds to fill gaps that arise during the practice.

[185] Section 89 of the DRA.

[186] Section 20 allows a court to order an immediate division of a joint estate of a marriage in community of property if it is satisfied that the interests of a spouse will, or are likely to be, severely prejudiced by the conduct of their spouse.

CHAPTER 3: Identification of matrimonial property and the implications of a matrimonial property regime on a domestic deceased estate

3.1. Introduction

The aims of this chapter are to provide insight into the identification of matrimonial property and to understand the general implications of a matrimonial property regime on a domestic deceased estate. Although foreign marriages are central to this thesis, domestic matrimonial property regimes will be used to illustrate these aims. This approach has been chosen since the consequences of a foreign marriage would need to be decided on a case-by-case basis using foreign law. In foreign marriages, the correct legal system, as well as its rules, should be confirmed before matrimonial property can be accurately identified. Chapter 4[187] contains further guidance on how to achieve this. Moreover, many foreign matrimonial property regimes may resemble one of the domestic matrimonial property regimes, therefore a discussion of domestic regimes can give indicators of the potential consequences of a foreign marriage.

In this chapter, the types of domestic marital relationships will be briefly canvassed, followed by an outline of the different domestic matrimonial property regimes. The identification of matrimonial property arising from each regime will thereafter be discussed, accompanied by an explanation of the general implications of each regime on a deceased estate. The implications will include the practical effects that arise during the administration of a deceased estate, such as the potential costs of administration and conveyancing implications. This chapter will also include a short outline of the recent developments regarding the position of Black spouses married before 2 December 1988, as well as the waiver of accrual claims in the succession context. Lastly, claims in terms of the Maintenance of Surviving Spouses Act[188] (the 'MSSA') will be considered.

[187] See chapter 4 § 4.3.
[188] Act 27 of 1990.

3.2. Recognised domestic marital relationships

In South Africa, different types of marital relationships attract varying legal consequences. These types of relationships include civil marriages, civil unions, customary marriages, and religious marriages. There is currently a pluralist approach to governing these types of relationships, but unified legislation may apply in future.[189] The term 'civil' that attaches to both civil marriages and civil unions connotes that the relationship is sanctioned by the state.[190] Customary marriages do not contain this prefix but are similarly state-sanctioned.[191] Each type of marital relationship will be briefly defined below.

The Marriage Act,[192] which commenced in 1962, does not define a 'marriage'. The common-law definition of 'marriage' is a legally recognised voluntary union between one man and one woman which is intended to last for their lifetimes and is to the exclusion of all other persons.[193] Given the gendered and sex-based nature of this definition, it excludes same-sex couples who are required to use the Civil Union Act[194] (the 'CUA') as an alternative. The Matrimonial Property Act[195] (the 'MPA') regulates the proprietary consequences of a civil marriage.[196]

A 'civil union' is defined in section 1 of the CUA as the voluntary union of two major persons, which is solemnised and registered either as a marriage or a civil partnership, in accordance with the CUA, to the exclusion of all others for so long as it lasts.[197] This definition is neutral to gender and biological sex. The definition distinguishes between the use of the term 'marriage' or 'civil partnership'. If the couple chooses the former, the term 'spouse' can be used to describe each party. If a civil partnership is chosen, the term 'partner' may be appropriate.[198] According to the CUA, the proprietary consequences of a civil union are the same as a heterosexual marriage concluded in terms of the Marriage Act.[199]

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[189] South African Law Reform Commission *Project 144: Single Marriage Statute Discussion Paper 152* (2021) 11-12.
[190] A Skelton and M Carnelley *Family Law* 9 ed (2018) 168.
[191] Section 2(1) of the Recognition of Customary Marriages Act 120 of 1998 (RCMA).
[192] Act 25 of 1961.
[193] Skelton and Carnelley *Family Law* 34; *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC) para 3.
[194] Act 17 of 2006.
[195] Act 88 of 1984.
[196] J Heaton H Kruger *South African Family Law* (e-book) 4 ed (2015) 21.
[197] A party to a civil union is not entitled to conclude a marriage under the Marriage Act 25 of 1961, the RCMA, or vice versa – see section 8(2)-(3) of the Civil Union Act (CUA).
[198] Section 1 of the CUA.
[199] Section 13(1) of the CUA.

A ‘customary marriage’ is defined as a marriage that has been concluded in accordance with customary law.[200] Customary marriages have been described as a hybrid blend of a civil marriage and a customary marriage.[201] The marital property of a customary marriage is furthermore identified in the Recognition of Customary Marriages Act[202] (the ‘RCMA’) is uniquely given the same meaning that would be attributed by customary law.[203] A discussion of the proprietary consequences of a customary marriage are outside the scope of this chapter. They are, however, set out in section 7 of the RCMA and are considered in detail by Skelton and Carnelley,[204] as well as Heaton and Kruger.[205]

Religious marriages, on the other hand, have only received piecemeal recognition since the advent of the Constitution of the Republic of South Africa, 1996.[206] Religious marriages would include Muslim, Christian, Hindu, and Jewish marriages. The recognition and proprietary consequences of religious marriages similarly fall outside the scope of this chapter.

3.3. Domestic matrimonial property regimes

A ‘matrimonial property regime’ can be described as a variable consequence of a marriage,[207] being the proprietary rules that apply to a spouse’s estate due to the commencement or termination of a marriage.[208] These would include any rules that apply by virtue of operation of law or that arise from agreement between the spouses.[209]

Since 1988, South Africa has recognised three main matrimonial property regimes:[210]

1. In community of property;
2. Out of community of property excluding the accrual system; and

[200] Section 1 of the RCMA.
[201] South African Law Reform Commission *Issue Paper 41: extension of the consultation process: Revised Issue Paper 34: Project 100E: review of aspects of matrimonial property law* (2021) 18.
[202] Act 120 of 1998.
[203] Section 7(1)(d).
[204] See Skelton and Carnelley *Family Law* 185-188.
[205] Heaton and Kruger *Family Law* 221-226.
[206] Skelton and Carnelley *Family Law* 193-194. Skelton and Carnelley view the differential treatment of religious marriages and customary marriages as unconstitutional – see 194.
[207] Heaton and Kruger *Family Law* 41.
[208] Heaton and Kruger *Family Law* 41.
[209] Heaton and Kruger *Family Law* 61.
[210] Skelton and Carnelley *Family Law* 72.

3. Out of community of property including the accrual system.

The primary source of legislation for matrimonial property in South Africa, the MPA, does not define 'matrimonial property' or any variation thereof such as 'marital asset'. Rather, these terms tend to be explained with reference to the types of domestic matrimonial property regimes themselves. The MPA does, however, define the term 'joint estate' and 'separate property', which will be discussed below in relation to marriages in community of property.

Notwithstanding the lack of a definition in the MPA, the terms 'matrimonial property' or 'marital asset' can be used to describe any asset that is eligible for division between spouses due to the existence of a marriage.[211] An 'asset' can be defined as any property having any nature, including a movable, immovable, corporeal or incorporeal nature, including any right or interest in such property.[212] Whether an asset is eligible for division between spouses can only be identified after an analysis of the applicable matrimonial property regime and any other applicable law.

3.3.1. Marriages in community of property

A marriage in community of property is the default matrimonial property regime in South Africa.[213] As such, any marriage is rebuttably presumed to be a marriage in community of property.[214] This presumption can be rebutted either by the existence of a valid antenuptial contract, a valid postnuptial contract, or if the husband had domicile outside of South Africa at the time of the marriage.[215] In this regime, the spouses have equal power to manage the joint estate, contract with third parties and dispose of assets although certain acts may only be performed with the consent of their spouse.[216]

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[211] South African Law Reform Commission *Issue Paper 34 of Project 100E: Review of Aspects of Matrimonial Property Act* (2018) 31.
[212] Section 1 of the Tax Administration Act 28 of 2011.
[213] Skelton and Carnelley *Family Law* 100.
[214] Skelton and Carnelley *Family Law* 80.
[215] Skelton and Carnelley *Family Law* 80.
[216] *Govender NO and Others v Gounden and Others* 2019 (2) SA 262 (KZD) para 37.

3.3.1.1. Identification of matrimonial property

When a marriage is concluded in terms of this regime, a joint estate is automatically created and it will subsist until the marriage is terminated.[217] A 'joint estate' is defined as the joint assets of spouses and 'separate property' is defined as property that does not fall within the joint estate.[218] In a joint estate, each spouse is automatically the tied co-owner of all assets belonging to both spouses in equal and undivided shares for the duration of marriage.[219] This tied co-ownership exists by operation of law and therefore subsists regardless of whether the asset is recorded in the name of one spouse only.[220]

There are certain exceptions known as 'separate property' that can be excluded from the joint estate, which would not be classified as matrimonial property. Separate property includes:

- non-patrimonial damages for any delict committed against a spouse, including a delict committed by the other spouse against their spouse;[221]
- patrimonial damages for bodily damages recovered from the other spouse;[222]
- assets originating from a bequest or donation that was excluded from the joint estate by the testator, testatrix or donor, as well as the proceeds from the sale of that asset;[223]
- assets excluded from the joint estate in an antenuptial contract, as well as the proceeds from the sale of that asset;[224]
- any asset that replaces separate property;[225]
- any asset which is subject to a *fideicommissum* or a usufruct;[226] or
- engagement gifts given by the other spouse.[227]

All the above separate property would not be classified as matrimonial property.

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[217] Skelton and Carnelley *Family Law* 81. In terms of section 20(1), a court can order the immediate division of the joint estate before the marriage terminates, if the court is satisfied that a spouse's interest in the joint estate is being, or may be, prejudiced by the other spouse's conduct. A court can furthermore grant an order in terms of section 21(1) changing the matrimonial property regime.
[218] Section 1 of the Matrimonial Property Act (MPA).
[219] Skelton and Carnelley *Family Law* 81.
[220] *Ex Parte Menzies et Uxor* 1993 (3) SA 799 (C) 807C-D.
[221] Section 18(a)-(b) of the MPA.
[222] Skelton and Carnelley *Family Law* 84.
[223] Skelton and Carnelley *Family Law* 82.
[224] Skelton and Carnelley *Family Law* 82.
[225] Skelton and Carnelley *Family Law* 84.
[226] Skelton and Carnelley *Family Law* 82.
[227] Skelton and Carnelley *Family Law* 82.

The proceeds of insurance policies will ordinarily be included in the joint estate.[228] If the proceeds result from a delict for non-patrimonial loss committed against a spouse, then the proceeds of the insurance policy will be the separate property of the relevant spouse.[229] This is because the insurance payment is a direct result of the delict even though a contract applies.[230]

The classification of an asset as separate property is only relevant to the proprietary rights of the spouses *inter partes*; it does not affect the rights of creditors to satisfy a debt from separate property.[231] This means that although an inherited asset may be excluded from the joint estate due to being separate property, the inherited asset can still be attached by a creditor of either spouse.[232] Furthermore, a spouse can receive and renounce an inheritance without the consent of their spouse even though the inheritance itself, or the right to claim it, may be an asset of the joint estate for the purposes of third parties, such as creditors.[233]

3.3.1.2. The position of Black spouses married before 2 December 1988

A recent development has occurred regarding the matrimonial property regimes of Black spouses who concluded a civil marriage before the commencement of the Marriage and Matrimonial Property Law Amendment Act[234] (the 'Amendment Act') on 2 December 1988.[235] Until the High Court decision of *AS and Another v GS and Another*[236] in 2020, Black spouses who concluded a civil marriage before the Amendment Act would be married out of community of property by default.[237] This was different to spouses of other racial groups, who were married in community of property by default.[238] This position for Black spouses originally stemmed from section 22(6) of the Black Administration Act[239] and was maintained by the Amendment Act despite the repeal of the Black Administration Act.[240]

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[228] *Van den Berg v Van den Berg* 2003 (6) SA 229 (T) para 10.
[229] *Van den Berg v Van den Berg* 2003 (6) SA 229 (T) para 11.
[230] J Heaton and H Kruger *South African Family Law* (e-book) 4 ed (2015) 65.
[231] *Du Plessis v Pienaar NO and Others* 2003 (1) SA 671 (SCA) paras 7, 9.
[232] Heaton and Kruger *Family Law* 67.
[233] *Govender NO and Others v Gounden and Others* 2019 (2) SA 262 (KZD) paras 40, 46.
[234] Act 3 of 1988.
[235] Green Paper on Marriages in South Africa, GN 44529, *Government Gazette* 671, 4 May 2021 30.
[236] 2020 (3) SA 365 (KZD).
[237] *AS and Another v GS and Another* 2020 (3) SA 365 (KZD) para 2.
[238] *Sithole and Another v Sithole and Another* 2021 (5) SA 34 (CC) para 35.
[239] Act 38 of 1927.
[240] *AS and Another v GS and Another* 2020 (3) SA 365 (KZD) para 2.

Black spouses who concluded a civil marriage after the 1988 commencement date would be married in community of property by default.[241] A marriage in community of property tends to offer more protection to disadvantaged women who may be financially dependent on their spouses, have little or no ownership of assets but nevertheless contribute towards the joint household and the raising of children.[242]

Black spouses married prior to the 1988 commencement date had a limited opportunity to change their regime due to section 21(2)(a) of the MPA.[243] This opportunity was only available for a two-year period.[244] Section 21(2)(a) allowed Black spouses to conclude a postnuptial contract changing their matrimonial property regime using section 21(1), which still required a court application. In terms of section 21(2)(a), any such change of matrimonial property regime required both spouses to be aware of the existence of the remedy, understand the legal consequences and have the financial means to use it.[245] Furthermore, a court application in terms of section 21(1) would require the consent of both spouses.[246] This prevented a change in the matrimonial property regime if one spouse's consent was not forthcoming, which could occur when the non-consenting spouse maintained a stronger financial position if the existing regime was retained.[247]

In *AS and Another v GS and Another*,[248] the High Court held that section 21(2)(a) was unconstitutional as it unfairly discriminated against Black spouses who married prior to the 1988 commencement date.[249] The Constitutional Court confirmed this declaration of constitutional invalidity in *Sithole and Another v Sithole and Another*.[250] As such, all subsisting marriages of Black spouses married prior to the 1988 commencement date are deemed to be in community of property, unless the spouses otherwise notify the Director-General of Home Affairs.[251]

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241 *AS and Another v GS and Another* 2020 (3) SA 365 (KZD) para 5.
242 *AS and Another v GS and Another* 2020 (3) SA 365 (KZD) para 3.
243 *Sithole and Another v Sithole and Another* 2021 (5) SA 34 (CC) para 1-2.
244 *Sithole and Another v Sithole and Another* 2021 (5) SA 34 (CC) para 1.
245 *Sithole and Another v Sithole and Another* 2021 (5) SA 34 (CC) para 1.
246 *Sithole and Another v Sithole and Another* 2021 (5) SA 34 (CC) para 39.
247 *Sithole and Another v Sithole and Another* 2021 (5) SA 34 (CC) para 38.
248 2020 (3) SA 365 (KZD).
249 *AS and Another v GS and Another* 2020 (3) SA 365 (KZD) para 71.
250 2021 (5) SA 34 (CC) para 59.
251 *Sithole and Another v Sithole and Another* 2021 (5) SA 34 (CC) para 59.

3.3.1.3. The consequences of a spouse's death

If spouses are married in community of property, on the death of the first-dying spouse, the assets of both spouses must be declared to the Master of the High Court (the 'Master').[252] Once the executor is appointed by the Master, the joint estate is administered.[253] The executor is the only person who has the authority to administer assets but the executor should consider the wishes of the surviving spouse during administration.[254] Subject to the consent of the Master, the executor is the person who is authorised to release money to provide subsistence for the deceased's dependents, the amount of which is left to the executor's discretion.[255]

The surviving spouse does not acquire dominium in any asset of the deceased estate; rather, the surviving spouse has a right to claim one half of the net estate after the approval, and subsequent advertisement, of the liquidation and distribution account.[256] The executor is required to discharge all liabilities of the joint estate before distribution to the surviving spouse can occur.[257] This means that the deceased estate, not the surviving spouse, is liable for settling the liabilities of the joint estate.[258] The surviving spouse's share arising from the matrimonial property regime does not include payment of liabilities such as funeral expenses and estate duty.[259]

On distribution, one half of the net estate is distributed to the surviving spouse and the other half share should be distributed to the deceased's heirs, which may be, or include, the surviving spouse.[260] If the surviving spouse were the sole heir, the surviving spouse would receive the full net estate. In other words, one half would be received by virtue of the marriage in community of property, and the remaining half share would be received by virtue of intestate or testate succession.

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[252] Section 9(2)(a)(ii) of the Administration of Estates Act (AEA).
[253] *Hare v Estate Hare* 1961 (4) SA 42 (W) 46; D Meyerowitz *The Law and Practice of Administration of Estates and their Taxation* (2010) 12-20.
[254] Meyerowitz *Administration of Estates* 12-28. Meyerowitz is of the view that the executor should not dispose of any asset of the surviving spouse without their consent, even if the deceased's will directs so – see 12.29-12.31.
[255] Section 26(1)-(1A) of the AEA; Heaton and Kruger *Family Law* 116.
[256] *Ex Parte Menzies et Uxor* 1993 (3) SA 799 (C) 813E-G.
[257] Meyerowitz *Administration of Estates* 12-21.
[258] Meyerowitz *Administration of Estates* 16-9.
[259] Meyerowitz *Administration of Estates* 15.79A-15.81
[260] Skelton and Carnelley *Family law* 120.

If immovable property falls with the joint estate but is registered in the name of one spouse only, the existence of the joint estate must be noted on the title deed of the property via an endorsement.[261] As discussed in chapter 2,[262] the endorsement notes the change of status to the effect that the owner is a spouse in a marriage in community of property.[263] This endorsement must be registered before any further transactions involving the property can be registered in the deeds registry.[264] Furthermore, a surviving spouse must be joined as a co-signatory with the executor if the immovable property is transferred to a third party, unless either massing has occurred or the land was sold to satisfy debts.[265]

The disadvantages of a joint estate on the death of the first-dying spouse are varied. For example, if the liabilities of the joint estate exceed the cash liquidity available in the residue of the estate – in other words, the deceased estate is solvent but illiquid – the assets of both the deceased and the surviving spouse are at risk of redemption to cover the costs of the liabilities.[266] Similarly, the surviving spouse's assets may be at risk of redemption if there is not sufficient liquidity to pay cash bequests of other legatees.[267]

Moreover, the cost of administering a joint estate is usually more expensive than the administration of a non-joint estate. This is because executor's fees are calculated on the value of joint estate, not the value of the deceased's assets only.[268] In terms of the current tariff, this can result in a maximum executor's fee of 3.5% of the value of the gross assets, excluding further fees on post-death gross income set at a maximum of 6%.[269] Master's fees are similarly levied on the value of the joint estate, not the value of the deceased's assets only.[270]

[261] Section 17(4) of the Deeds Registries Act (DRA).
[262] See chapter 2 § 2.4.3.
[263] Section 17(4) of the DRA.
[264] Section 17(3) of the DRA.
[265] Section 21 of the DRA; Meyerowitz *Administration of Estates* 12.29-12.31.
[266] Heaton and Kruger *Family Law* 116.
[267] Heaton and Kruger *Family Law* 116.
[268] Section 8(1)(a) of the Regulations to the AEA.
[269] Section 8(1)(a)-(b) of the Regulations to the AEA; Meyerowitz *Administration of Estates* 14.3-14.4, 14.4-14.4A.
[270] Section 1(1) of Schedule 2 of the Regulations to the AEA.

3.3.2. Marriages out of community of property excluding accrual

The second matrimonial property regime to be discussed is that of a marriage out of community of property excluding accrual. This was the second main regime available before the commencement of the MPA. This regime requires that the spouses must have concluded a valid antenuptial contract or postnuptial contract.[271]

3.3.2.1. Identification of matrimonial property

In this regime, the assets of each spouse remain their separate property throughout their marriage.[272] Spouses can co-own assets, however this co-ownership will arise by virtue of their decision to acquire assets together, not by operation of law.[273] Nor is tied co-ownership relevant as is the case with a marriage in community of property.[274] Co-owned assets would, therefore, need to be recorded in the names of both spouses.[275]

3.3.2.2. The consequences of a spouse's death

On the death of the first-dying spouse, the executor must review the antenuptial contract to determine whether there are any terms requiring fulfilment due to the spouse's death.[276] Moreover, the cost of administration of the deceased estate is usually cheaper than a marriage in community of property. The fees of the executor and the Master are chargeable based on the gross value of assets in the deceased estate,[277] being the value of the deceased's assets only. The value of the surviving spouse's assets is, therefore, irrelevant. Furthermore, since the liabilities of both spouses remain separate throughout the duration of the marriage, the only liability arising from the marriage itself could be household necessaries.[278] As such, a debt arising due to household necessaries can be lodged against the deceased estate of the first-dying spouse.[279]

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[271] Skelton and Carnelley *Family Law* 100.
[272] Skelton and Carnelley *Family Law* 100.
[273] Skelton and Carnelley *Family Law* 100.
[274] Skelton and Carnelley *Family Law* 100.
[275] Skelton and Carnelley *Family Law* 100.
[276] Skelton and Carnelley *Family Law* 120.
[277] Section 8(1)(a) of the Regulations to the AEA.
[278] Skelton and Carnelley *Family Law* 101.
[279] Meyerowitz Administration of Estates 16-10.

Unlike a marriage in community of property, the surviving spouse's estate will be unaffected in law by the administration of their spouse's deceased estate.[280] Co-owned assets or co-liabilities may, however, be practically affected by a spouse's death. For example, if the deceased co-owns land with the surviving spouse, a rates clearance certificate may be required to transfer the deceased's share.[281] To obtain this certificate, an advance rates payment calculated for the whole property would need to be paid, not only the deceased's share.[282]

3.3.3. Marriages out of community of property including accrual

The last regime to be discussed is that out of community of property including accrual (the 'accrual system'). According to section 2 of the MPA, a marriage out of community of property by default includes the accrual system unless the intended spouses expressly exclude the operation of the accrual system in their antenuptial contract. As mentioned earlier, prior to the commencement of the MPA on 1 November 1984, there was no statutory accrual option available.[283]

3.3.3.1. Identification of matrimonial property

The accrual system is known as 'deferred community of property' because the spouses' assets remain their separate property throughout the duration of the marriage.[284] Nevertheless, each spouse has a contingent or conditional right to share in the accrual of the estate of their spouse.[285] The contingent nature of the right means that there is no vested right; rather, the accrual right is an interest that is dependent on the occurrence of an uncertain future event, namely, the existence of a difference between the values of the spouses' estates on the dissolution of the marriage due to either death or divorce.[286] The contingent right or interest only becomes a vested right if this future uncertain event materialises.[287] During the marriage, a spouse does not have a right to compel their spouse, if the latter is acting *bona fide*, to

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[280] Skelton and Carnelley *Family Law* 120.
[281] Section 118(1)(b) of the Local Government: Municipal Systems Act 32 of 2000.
[282] Section 118(1)(b) of the Local Government: Municipal Systems Act.
[283] South African Law Reform Commission *Project 144: Single Marriage Statute Discussion Paper 152* (2021) 6.
[284] Skelton and Carnelley *Family Law* 108.
[285] *Reeder v Softline Ltd and Another* 2001 (2) SA 844 (W) 851D.
[286] *Reeder v Softline Ltd and Another* 2001 (2) SA 844 (W) 849D-J.
[287] *RS v MS and Others* 2014 (2) SA 511 (GJ) para 13.

administer their assets or liabilities in a way that allows for available liquidity for the settlement of a future accrual claim.[288] The spouse's accrual interest can, however, be protected if their spouse is diminishing or hiding assets with the intention of defeating an accrual claim.[289]

The spouses' debts, similarly, also remain separate throughout the marriage.[290] On the termination of the marriage, the accrual of each spouse's estate is calculated.[291] The accrual is the amount by which the net value of each spouse's estate at the termination of the marriage exceeds the value of the spouse's estate at the commencement of the marriage.[292] The accrual system provides for an accrual claim to accrue to the spouse whose estate grew the least during the marriage.[293] The accrual claim is usually calculated as being half, or fifty percent, of the difference between the accrual of their respective estates.[294] To account for inflation, the commencement value is adjusted in line with the Consumer Price Index or another method stipulated in their antenuptial contract.[295] Instead of using the standard fifty percent sharing set out in the MPA, spouses can agree to vary this shared amount provided that the variation is not against public policy.[296] For example, they can choose to claim twenty-five percent of the difference in the growth of their respective estates instead of the typical half share set out in the MPA.

When determining the growth of a spouse's estate for an accrual calculation, the following are excluded:

- non-patrimonial damages; [297]
- any asset excluded in terms of the antenuptial contract;[298]
- any asset which replaces an excluded asset;[299] and
- any donations between the spouses, except for a *donatio mortis causa*.[300]

[288] *RS v MS and Others* 2014 (2) SA 511 (GJ) para 15.
[289] *RS v MS and Others* 2014 (2) SA 511 (GJ) para 17.
[290] Section 2 of the MPA.
[291] Section 4(1)(a) of the MPA.
[292] Section 4(1)(a) of the MPA.
[293] Skelton and Carnelley *Family Law* 108; Meyerowitz *Administration of Estates* 15-27.
[294] Section 3(1) of the MPA.
[295] Section 3(1) of the MPA.
[296] Meyerowitz *Administration of Estates* 15.47-15.48.
[297] Section 4(1)(b)(i) of the MPA.
[298] Section 4(1)(b)(ii) of the MPA.
[299] Section 4(1)(b)(iii) of the MPA.
[300] Section 5(2) of the MPA.

Only assets actually held by a spouse at the commencement date can be excluded; assets to be acquired in future cannot be excluded.[301] Inheritances, legacies, or donations are automatically excluded from a spouse's accrual, as well as further assets acquired by virtue of these excluded assets.[302] Two exceptions to this rule exist, namely if spouses agree to include such an asset in their accrual, which would be set out in their antenuptial contract, or if included by virtue of a stipulation by the testator, testatrix or donor, as the case may be.[303]

3.3.3.2. The consequences of a spouse's death

Section 4(2) of the MPA states that the accrual right must be determined before an executor can give effect to either the testamentary instructions of the deceased, a *donatio mortis causa*, or intestate succession. The accrual right therefore takes precedence over determination of inheritance.

To assist the surviving spouse with calculating their accrual claim, the executor of the deceased estate is obliged to provide full details of the value of the estate.[304] The surviving spouse would then lodge their accrual claim with the executor.[305] An accrual claim is treated as an ordinary liability in the deceased estate.[306] The accrual claim is therefore generally settled via a monetary amount, not a transfer of assets, unless there is an agreement regarding an asset transfer to satisfy the claim.[307]

It is the responsibility of the surviving spouse to quantify, lodge and prove their accrual claim against the deceased estate.[308] The normal provisions for late claims as set out in section 31 of the Administration of Estates Act[309] ('the 'AEA') apply to accrual claims.[310] As such, it is not the responsibility of the executor to consider a claim that has not been lodged or is unquantifiable.[311] This places the responsibility of lodging an accrual claim squarely on the

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301 *BF v RF* 2019 (4) SA 145 (GJ) para 23.
302 Section 5(1) of the MPA.
303 Section 5(1) of the MPA.
304 Section 7 of the MPA.
305 Section 3(1) of the MPA.
306 Meyerowitz *Administration of Estates* 15.82-15.84; *Barnard NO v Van der Merwe* 2012 (3) SA 304 (GNP) para 13.
307 Heaton and Kruger *Family Law* 93.
308 *Barnard NO v Van der Merwe* 2012 (3) SA 304 (GNP) para 14.1.
309 Act 66 of 1965.
310 *Barnard NO v Van der Merwe* 2012 (3) SA 304 (GNP) para 23.
311 *Barnard NO v Van der Merwe* 2012 (3) SA 304 (GNP) para 14.1.

surviving spouse, failing which, the deceased estate can be wound up without consideration of the accrual claim.[312]

Similarly to a marriage out of community of property excluding the accrual system, the surviving spouse's estate will remain legally separated from, and therefore unaffected by, the death of their spouse, save for an accrual claim. If the spouses co-owned assets or were co-debtors, there would be the same practical implications to that of a marriage out of community of property excluding accrual.

3.4. Waiver of an accrual claim

Although an unlodged accrual claim cannot hold up the finalisation of a deceased estate, the question remains whether an accrual claim can be legally waived by either an act of the deceased whilst alive, alternatively by the surviving spouse after the death of their spouse. A waiver is defined as a bilateral or a unilateral release, which may include an abandonment of a right, remedy, or a benefit.[313]

Section 9 of the MPA states that an accrual right is a benefit "…which may on divorce be declared forfeit, either wholly or in part". Section 9 accordingly allows for forfeiture of an accrual right on divorce, but it does not state whether an accrual right can be forfeited for succession purposes. In an *obiter* in *PL v YL*,[314] the court said the following regarding forfeiture on divorce:

> "Whatever the regime of the marriage, in or out of community of property and with or without the accrual system, the parties remain at liberty to decide and agree upon the division of their assets on divorce. Once a legally enforceable and valid agreement is concluded by them in this respect, their contractual rights and obligations govern the division of their assets, not their marriage regime."[315]

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[312] Section 31(b) of the AEA.
[313] *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) para 15.
[314] 2012 (6) SA 29 (ECP).
[315] *PL v YL* 2012 (6) SA 29 (ECP) para 28.

In terms of this *obiter*, the spouses can freely decide amongst themselves on divorce as to the division of their assets. A contract is, therefore, sufficient to determine the division of their assets as they are not required to strictly adhere to their matrimonial property regime. This can include a partial or complete forfeiture, as permitted by section 9.[316] This illustrates the contractual nature of an accrual right, albeit operating in this case on divorce.

Since an accrual right can only arise if an antenuptial contract has been duly executed, the accrual right is contractual in nature and does not arise by operation of law.[317] If there is recourse to the general contractual principles of waivers, a waiver can either be express or tacit.[318] There is, however, a presumption against the existence of a waiver[319] and, as such, an express waiver is preferable to a tacit waiver.

A waiver can only occur if the person waiving their right fully understood that right, remedy or benefit, but nevertheless decided to waive it.[320] This is assessed based on the intention of that person judged in the context of their outward manifestation.[321] If a person delays the enforcement of their right, remedy or benefit, this may give rise to a tacit waiver if the outward manifestation of that person can reasonably and unequivocally be construed as a waiver.[322]

A waiver is, however, subject to two exceptions. First, a waiver cannot be unlawful, nor can someone waive a right that has been introduced for the benefit of that person and the general public.[323] In the latter case, the general public could include the state, the interests of justice, or any member of the public.[324] Second, a right cannot be waived if legislation expressly or tacitly prohibits the waiver.[325]

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316 *Reeder v Softline Ltd and Another* 2001 (2) SA 844 (W) 849D-J; *RS v MS and Others* 2014 (2) SA 511 (GJ) para 13.
317 *Barnard v Barnard* 2000 (3) SA 741 (C) para 18.
318 *Van Aswegen v Van Aswegen* 2006 (5) SA 221 (SE) para 61(a).
319 *Van Aswegen v Van Aswegen* 2006 (5) SA 221 (SE) para 61(a).
320 *Van Aswegen v Van Aswegen* 2006 (5) SA 221 (SE) para 61(a).
321 *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) para 15-16, 19.
322 *Van Aswegen v Van Aswegen* 2006 (5) SA 221 (SE) para 61(c).
323 *Ex Parte Kroese and Another* 2015 (1) SA 405 (NWM) para 37. In this case, a waiver of household necessaries in terms of section 82(6) of the Insolvency Act 24 of 1936 was denied because the section was enacted not only for the benefit of debtors, but the public at large – see para 63.
324 *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA) para 10.
325 *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA) para 9.

Since an accrual right is introduced for the benefit of one person only, the first exception does not apply. In relation to the second exception, there is no legislation expressly prohibiting the waiver of an accrual right. Regarding any potential tacit prohibition in legislation, the only section that may be relevant is section 9. It is submitted that the omission of death from section 9 should not be interpreted as a tacit prohibition against the waiver of an accrual right on death. If it was the intention of the legislature to allow for a waiver of an accrual right on divorce only, not death, it would have been appropriate to include a provision to this effect in the MPA. Accordingly, it is submitted that there should therefore be no legal impediment to the waiver of an accrual right on death, unless, as stated by Heaton and Kruger, the claimant spouse is insolvent.[326] Furthermore, this would treat spouses in the scenarios of death and divorce on equal footing.

A deceased may have similarly chosen to waive a potential future accrual right, such as in their will. It is submitted that this waiver could be classified as a *donatio mortis causa*, namely a donation made in contemplation of death.[327] To be valid, a *donatio mortis causa* must allow for unilateral revocability and meet the formal requirements of a will.[328] The donation should be made in contemplation of the donor's death[329] and should be motivated by pure benevolence to meet the general requirement of a donation.[330] Furthermore, vesting should only occur upon or after the death of the donor.[331] If such an *inter vivos* waiver by the deceased meets the above requirements of a *donatio mortis causa*, it is submitted that the waiver should similarly be considered as valid.

3.5. Maintenance claim of a surviving spouse against a deceased estate

In addition to the above consequences, an additional consideration for an executor may be a potential maintenance claim of a surviving spouse in terms of the MSSA. A maintenance claim

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[326] Heaton and Kruger *Family Law* 101.
[327] *Ex Parte Oosthuizen* 1964 (1) SA 174 (O) 176.
[328] *McAlpine v McAlpine NO and Another* 1997 (1) SA 736 (A) 750.
[329] *Ex Parte Steyl* 1951 (1) SA 275 (O) 277.
[330] *McAlpine v McAlpine NO and Another* 1997 (1) SA 736 (A) 750; C Rautenbach "Succession by contract (*pactum successorium*)" in J Jamneck *et al The Law of Succession in South Africa* (e-book) 3 ed (2017) 240.
[331] *McAlpine v McAlpine NO and Another* 1997 (1) SA 736 (A) 750.

can arise regardless of the applicable matrimonial property regime since it only requires the existence of a marriage[332] or, as recently decided, a life partnership.[333]

Maintenance is classified as a personal consequence, not a proprietary consequence, of a marriage.[334] As such, in terms of the conflict-of-law rules which feature prominently in chapter 4,[335] the applicable law will be that of the domicile of the spouses at the time of the act in question.[336] The law applicable to the proprietary consequences of the marriage should, therefore, not be used to determine the validity of a maintenance claim.

Considering this, it is submitted that the MSSA should be available to a surviving spouse of a foreign marriage if the spouses were domiciled in South Africa at the time of the maintenance claim arising, namely at the time of the death of the first-dying spouse. This would align to the position of divorcing spouses married in terms of a foreign marriage, where future maintenance can be granted based on the Divorce Act[337] provided that jurisdictional requirements are met.[338] This would also accord with section 39(2) of the Constitution of the Republic of South Africa, 1996, which requires that legislation is to be interpreted in a manner that promotes the spirit, purport, and objects of the Bill of Rights including the achievement of equality.[339]

A maintenance claim arising in terms of the MSSA is, however, slightly distinguishable from a maintenance claim resulting from the Divorce Act although that difference has no bearing on foreign marriages. The MSSA is specifically concerned with a maintenance claim arising from a marriage dissolved by death creating a legally binding obligation on a deceased estate.[340] This is distinguishable from marriages terminating due to divorce. In the case of divorce, the spouses can agree, but do not have to agree, to allow for maintenance to be paid until the death of the receiving party, thus binding the deceased estate of the paying spouse.[341] If there is no

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[332] Section 1 of the Maintenance of Surviving Spouses Act (MSSA).
[333] In 2020, the Constitutional Court confirmed that a life partner, in addition to spouses, may have a maintenance claim in terms of the MSSA where the permanent life partnership has terminated due to the death of a partner – see *Bwanya v Master of the High Court, Cape Town and Others* 2020 (12) BCLR 1446 (WCC) para 95.
[334] C Schulze "Conflict of Laws" in J Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships* (2014) 647.
[335] See chapter 4 § 4.3.
[336] Schulze *The Law of Divorce* 647.
[337] Act 70 of 1979.
[338] *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C) 504C.
[339] Section 1(a) of the Constitution of the Republic of South Africa, 1996.
[340] Section 2(1) of the MSSA.
[341] *Hodges v Coubrough NO* 1991 (3) SA 58 (D) 66C-E.

agreement between the parties regarding post-death liability, a court is not entitled by virtue of the Divorce Act to bind a deceased estate to pay maintenance.[342]

In terms of section 2(1) of the MSSA, however, a surviving spouse will have a claim for their reasonable maintenance needs until their death or remarriage if the survivor is not able to provide for themself from their own means and income. A survivor's means would include any benefit accruing to them via succession or matrimonial property law.[343] The maintenance claim must be lodged with the executor of the deceased estate, who must then address the claim in accordance with the AEA.[344] The implications of lodging such a claim are varied. For example, the executor is entitled to require proof of the claim[345] and may even reject the claim.[346] The maintenance claim will also rank as subordinate to the claims of creditors.[347] Furthermore, there is no right of recourse for a survivor if the cash or assets of the deceased estate have been lawfully distributed to heirs or legatees, as well as if the Master has authorised the payment or transfer of cash or assets.[348]

The survivor's maintenance claim will be for the "provision" of their reasonable maintenance needs.[349] The method of provision for a maintenance claim was considered in *Feldman v Oshry and Another NNO*,[350] as well as on appeal to the Supreme Court of Appeal (SCA) in *Oshry and Another NNO v Feldman*.[351] In the trial court, the court sought to determine the validity of a lump-sum claim for maintenance submitted to a deceased estate.[352] The amount was calculated by an actuary taking into account factors including the survivor's prospects of remarriage, her assets, income, and life expectancy.[353] The trial court was of the opinion that courts are only authorised to permit periodical payments by a deceased estate as the method of settlement of a maintenance claim, unless the parties were in agreement regarding an alternative arrangement, such as a lump sum payment.[354] Two reasons provided by the court were the following: the

[342] *Hodges v Coubrough NO* 1991 (3) SA 58 (D) 69D-F.
[343] Section 1 of the MSSA.
[344] Section 2(3)(a) of the MSSA.
[345] Section 32(1) of the AEA.
[346] Section 33(1) of the AEA.
[347] Meyerowitz *Administration of Estates* 15.79A.
[348] Section 2(2) of the MSSA.
[349] Section 2(1) of the MSSA.
[350] 2009 (6) SA 454 (KZD).
[351] 2010 (6) SA 19 (SCA).
[352] *Feldman v Oshry and Another NNO* 2009 (6) SA 454 (KZD) para 31.
[353] *Feldman v Oshry and Another NNO* 2009 (6) SA 454 (KZD) para 10.
[354] *Feldman v Oshry and Another NNO* 2009 (6) SA 454 (KZD) para 33.

grammatical meanings of 'to maintain' and 'maintenance' both imply continuity;[355] and there is risk and prejudice created by making assumptions, including about life expectancy, remarriage, and inflation.[356]

On appeal, the SCA found that the definition of maintenance, as relied upon by the trial court, was no longer in use.[357] Regarding the assumptions that are made to arrive at a lump-sum amount, the SCA found that courts already accept the making of assumptions in other types of claims, such as in delictual claims for loss of support.[358] A lump-sum award was therefore found to be competent.[359] This finding was supported by a Master's report confirming that in practice most, if not all, maintenance claims are settled via a lump sum to bring finality to the administration of the deceased estate.[360]

Additional flexibility for the settlement of maintenance claims is provided by the MSSA itself. For example, section 2(3)(d) expressly authorises the executor to enter into an agreement with the survivor, as well as heirs and legatees, to satisfy the maintenance claim in whole or in part. The MSSA also specifically provides alternative options to satisfy the claim such as an asset transfer to the survivor, the establishment of a trust, or the imposition of obligations on heirs.[361]

3.6. Conclusion

This chapter has discussed the identification of matrimonial property and the consequences of a matrimonial property regime on a deceased estate. The three main domestic matrimonial property regimes were used to illustrate both. The legal effect of each regime on a deceased estate was considered, along with other practical implications such as administrative costs and potential conveyancing implications. Moreover, waivers of accrual rights for succession purposes were discussed. It was submitted that a waiver of an accrual right by a surviving spouse, or the waiver of a future accrual right by deceased spouse whilst alive, should both be considered as valid. In the case of an *inter vivos* waiver by the deceased, the requirements of a *donatio mortis causa* should be met to create a valid waiver, including compliance with the

[355] *Feldman v Oshry and Another NNO* 2009 (6) SA 454 (KZD) para 33.
[356] *Feldman v Oshry and Another NNO* 2009 (6) SA 454 (KZD) para 34-35.
[357] *Oshry and Another NNO v Feldman* 2010 (6) SA 19 (SCA) para 51.
[358] *Oshry and Another NNO v Feldman* 2010 (6) SA 19 (SCA) para 55.
[359] *Oshry and Another NNO v Feldman* 2010 (6) SA 19 (SCA) para 58.
[360] Footnote 11 of *Oshry and Another NNO v Feldman* 2010 (6) SA 19 (SCA).
[361] Section 2(3)(d) of the MSSA.

formalities required by the execution of a valid will. Furthermore, it was submitted that the MSSA can apply to the surviving spouse of a foreign marriage if the spouses were domiciled in South Africa at the time of the first-dying spouse's death.

CHAPTER 4: Choice of law, and the identification of foreign matrimonial property and succession rights

4.1. Introduction

This chapter is primarily concerned with the compatibility, or incompatibility, of foreign law when interacting with domestic law, primarily in the context of matrimonial property law and succession law. Private international law in South Africa helps manage the compatibility, or lack thereof, between foreign and domestic law. Further references to 'private international law' in this chapter shall mean a reference to private international law in South Africa unless the context indicates otherwise.

Private international law is simply a branch of domestic law that stands alongside other branches of law, such as succession and matrimonial law.[362] Although states often share common legal rules, there is not a body of private international rules that are universal across all states.[363] Private international law does not focus on the legal relationship between states; rather, it is concerned with the legal relationship between individuals.[364] Its general purpose is to provide rules regarding the application of foreign law, guided by a goal of international harmony of decisions.[365] Due to a lack of codification of private international law principles, the Constitution of the Republic of South Africa, 1996, and the common law are the main sources of private international law.[366]

This chapter focuses on one of the three main areas of private international law, namely choice[367] of law, otherwise known as conflict of law. The remaining two areas of private international law are, first, jurisdiction of courts and, second, enforcement of foreign judgments,[368] however both are outside the scope of this chapter.

[362] CF Forsyth *Private International Law* 5 ed (2012) 5.
[363] M Dendy "Conflict of Laws" *LAWSA* Vol 7(1) (2019) 306.
[364] Forsyth *Private International Law* 5.
[365] Forsyth *Private International Law* 5.
[366] Forsyth *Private International Law* 17
[367] The terminology of 'choice of law' instead of 'conflict of law' will be used following the approach taken by Crouse AJ in *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 85.
[368] Forsyth *Private International Law* 3.

The underlying principle behind applying foreign law in South Africa is simply to protect a person's rights, even if those rights were acquired in a foreign legal system.[369] This principle includes foreign matrimonial property rights and foreign succession rights.[370] In chapter 3,[371] the identification of matrimonial property was discussed in the context of the three main domestic matrimonial property regimes. In foreign marriages, the correct legal system, and the rules of that system, must be established before matrimonial property rights can be identified. Succession rights, determined in terms of the correct law, similarly need to be established. Both require a decision about the correct law to apply. This chapter is intended to assist with providing the principles for both. An understanding of these principles is important to estate planning and succession because a failure to do so may result in incorrect estate planning, or the incorrect administration of a deceased estate.

This chapter will commence with a discussion of *Anderson v the Master and Others*[372] (the '*Anderson* case') as it is a practical example of the incompatibility that can arise between foreign matrimonial property law, foreign succession law, and domestic succession law. Multilateral and unilateral conflict rules will thereafter be defined. Following this, the general approach to identifying the correct law will be considered, including a description of the correct manners in which to prove foreign law. An analysis of four subsequent cases will follow for the purposes of understanding their contributions to private international law, particularly to establishing foreign matrimonial property and succession claims. The cases are *Laurens NO v von Höhne*[373] (*'Laurens'*), *Society of Lloyd's v Price; Society of Lloyd's v Lee*[374] ('*Price*'), *Burchell v Anglin*[375] *('Burchell'*), and *Representative of Lloyds and Others v Classic Sailing Adventures (Pty) Ltd*[376] ('*Classic Sailing'*). Thereafter, the identification of foreign matrimonial property rights and succession rights will be canvassed in further detail from a private international law perspective.

[369] Forsyth *Private International Law* 69.
[370] Forsyth *Private International Law* 69.
[371] See chapter 3 § 3.3.
[372] (1949) 4 All SA 520 (E).
[373] 1993 (2) SA 104 (W).
[374] 2006 (5) SA 393 (SCA).
[375] 2010 (3) SA 48 (ECG).
[376] 2010 (5) SA 90 (SCA).

4.2. *Anderson v the Master and Others*

In the 1949 *Anderson* case, the applicant was the surviving spouse of the late Thomas Anderson.[377] Mr Anderson died in 1948 leaving a deceased estate consisting of movables only.[378] The Andersons had married in Scotland in 1923 without an antenuptial contract, whilst both were domiciled in Scotland.[379] Accordingly, Scots law was the *lex domicilii matrimonii*.[380] In 1926, the couple moved permanently to the Eastern Cape and acquired domicile in that province.[381] In 1947, Mr Anderson executed a will bequeathing half of his estate plus a motor vehicle to a Miss van Dyk, who was the third respondent.[382] The remaining share of his estate was bequeathed in equal shares to his children.[383] His spouse was thereby excluded from any testamentary benefit.[384]

The executor of the deceased estate filed a liquidation and distribution account with the Master of the High Court.[385] The account was drafted in accordance with the deceased's will and excluded the surviving spouse from receiving any benefit.[386] The surviving spouse objected to the account by claiming she was entitled to one third of the deceased's movables in terms of Scots law due to the marriage.[387] Counsel for the third respondent argued that, in terms of Scots law, the deceased must have been domiciled in Scotland at the time of his death in order for Scots law to be applied and, since the deceased died whilst domiciled in the Eastern Cape, the surviving spouse had no matrimonial right.[388]

The court was of the view that the surviving spouse was essentially "attacking the validity of at least a part of a will".[389] Accordingly, it found that she bore the onus of establishing her claim of a matrimonial property right.[390] To that end, sufficient evidence of Scots law had not

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[377] *Anderson v the Master and Others* (1949) 4 All SA 520 (E) 521.
[378] *Anderson v the Master and Others* (1949) 4 All SA 520 (E) 522. A discussion of the implications of movables will occur later in this chapter in the analysis of succession rights.
[379] *Anderson v the Master and Others* (1949) 4 All SA 520 (E) 521.
[380] *Anderson v the Master and Others* (1949) 4 All SA 520 (E) 521.
[381] *Anderson v the Master and Others* (1949) 4 All SA 520 (E) 521.
[382] *Anderson v the Master and Others* (1949) 4 All SA 520 (E) 521-522.
[383] *Anderson v the Master and Others* (1949) 4 All SA 520 (E) 521-522.
[384] *Anderson v the Master and Others* (1949) 4 All SA 520 (E) 522.
[385] *Anderson v the Master and Others* (1949) 4 All SA 520 (E) 522.
[386] *Anderson v the Master and Others* (1949) 4 All SA 520 (E) 522.
[387] *Anderson v the Master and Others* (1949) 4 All SA 520 (E) 522.
[388] *Anderson v the Master and Others* (1949) 4 All SA 520 (E) 526.
[389] *Anderson v the Master and Others* (1949) 4 All SA 520 (E) 524.
[390] *Anderson v the Master and Others* (1949) 4 All SA 520 (E) 524.

been placed before the court allowing for a decision to be made.[391] The court accordingly ordered that the deceased estate should be kept intact until Scots law could be established to confirm or deny the surviving spouse's claim.[392]

The *Anderson* case illustrates that although the application of the *lex domicilii matrimonii* principle alone can be simple enough to decide, added complexity can arise when establishing a surviving spouse's rights, if any, in matrimonial property or succession law. For example, the court understood that Scots law needed to be applied to ascertain the spouse's matrimonial property right but nonetheless classified the issue as a dispute regarding the validity of a will, thus classifying the matter as falling within the law of succession.

If the spouse's claim had been based on the invalidity of the deceased's will, the law of the testator's domicile at the time of death would have applied, namely domestic succession law.[393] As mentioned in chapter 1,[394] the limitations on freedom of testation include antenuptial contracts and other matrimonial property rights. Such limitations do not affect the underlying validity of a deceased's will, even though the contrary was stated by the court. The court, therefore, failed to distinguish between Scots law and domestic succession law, and more particularly, it failed to identify which areas of Scots law applied. The lack of evidence of Scots law may have contributed to this, however, there also appears to have been an inadequate identification of domestic law. Furthermore, the *Anderson* case illustrates that proof of foreign law is an additional complexity to be addressed in matrimonial and succession claims. Adequate proof of foreign law is considered later in this chapter.[395]

4.3. Choice of law

When foreign law may apply to a matter, a domestic court or legal practitioner must ensure that the correct law is being applied using the rules found in private international law, namely the choice-of-law rules.[396] Schoeman describes this process as finding the "true seat of a legal relationship" by using the choice-of-law rules to point to the correct *lex causae* which should

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[391] *Anderson v the Master and Others* (1949) 4 All SA 520 (E) 528.
[392] *Anderson v the Master and Others* (1949) 4 All SA 520 (E) 528.
[393] TW Bennett and K Kopke "*Society of Lloyd's v Price*: Characterization and 'gap' in the conflict of laws" (2008) 125 *SALJ* 62 at 65.
[394] See chapter 1 § 1.1.2.2.
[395] See § 4.3.1.
[396] Forsyth *Private International Law* 3.

apply.[397] *'Lex causae'* means the proper law, or the substantive law, that should be applied in any matter.[398] In other words, the choice-of-law rules indicate which is the correct proper law to apply.

There are two types of choice-of-law rules: multilateral conflict rules and unilateral conflict rules.[399] Multilateral conflict rules are not biased towards the application of a particular legal system, whereas unilateral conflict rules specifically state that a specific legal system must apply.[400] Our common law does not contain any unilateral conflict rules and legislative examples of this type are rare.[401] As such, almost all existing choice-of-law rules are multilateral conflict rules.[402] In any event, as Forsyth states, multilateral conflict rules should rather be used instead of unilateral conflict rules wherever possible.[403] Unilateral conflict rules will, therefore, not be considered any further in this chapter. Additionally, any choice-of-law rule referred to in this chapter is a multilateral conflict rule since unilateral conflict rules are irrelevant.

Multilateral conflict rules are made up of two[404] elements: first, a legal category found within an area or branch of law and, second, a connecting factor pointing to the application of the appropriate legal system.[405] A connecting factor is defined as a fact that establishes a connection between specific factual circumstances and a legal system.[406]

A simple example of a choice-of-law rule is the *lex domicilii matrimonii* principle if the parties did not choose for a particular matrimonial property law to apply: the legal category is the proprietary consequences of a marriage; and the connecting factor is the husband's domicile at the time of the marriage, pointing to the application of the law of the husband's domicile.[407] Since the application of the *lex domicilii matrimonii* principle is well-established in South

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397 E Schoeman "The connecting factors for the proprietary consequences of marriage" (2001) 1 *TSAR* 72 at 80.
398 *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) para 10.
399 Forsyth *Private International Law* 7, 9.
400 Forsyth *Private International Law* 7, 9.
401 Forsyth *Private International Law* 9.
402 Forsyth *Private International Law* 7.
403 Forsyth *Private International Law* 10.
404 The rule can, however, be subdivided into three parts according to Falconbridge, the person who conceived the term – see E Schoeman *Domicile and Jurisdiction as criteria in external conflict of laws with particular reference to aspects of the South African Law of Persons* (LLD thesis, UNISA, 1997) 213.
405 Forsyth *Private International Law* 7; Schoeman *Domicile and Jurisdiction* 213.
406 *Ex Parte Jones: In Re Jones v Jones* 1984 (4) SA 725 (W) 728.
407 Schoeman 2001 *TSAR* 74.

Africa, the choice-of-law process currently tends to be less confusing in matrimonial claims than with other areas of law, such as delict.[408] The *Anderson* case, however, clearly demonstrates that the choice-of-law process can still go awry. Fortunately, since the *Anderson* case, there has been significant development in private international law concerning choice of law. The following is a discussion of the current domestic approach to the choice-of-law process. Additionally, it must be borne in mind that the *lex domicilii matrimonii* principle is likely to be replaced in future by a constitutionally acceptable rule.[409] The incoming rule may still require assistance from private international law for its correct application.

4.3.1. Identification and application of the *lex causae*: the general approach in South Africa

As stated above, private international law seeks to identify and apply the appropriate legal system as the *lex causae*, or proper law, in any given matter. The *lex causae* is distinguishable from the term '*lex fori*', which refers to a court's domestic law.[410] For example, if Namibian law needs to be applied in a matter being heard in a domestic court, Namibian law will be the *lex causae* and domestic law will be the *lex fori*.

The general private international law approach for identifying and applying the correct *lex causae* is as follows:[411]

1. Characterisation of the choice of law;
2. Selection of appropriate connecting factors; and
3. Application of the selected legal system.

Each step will be considered in further detail below. Despite the apparent distinctiveness of the three steps set out above, it may be appropriate to consider all three steps simultaneously depending on the facts of a matter.[412] Different aspects of the same claim may also require different laws to apply.[413] In other words, a claim can be a combination of matrimonial property

[408] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 19.
[409] Forsyth *Private International Law* 296.
[410] Forsyth *Private International Law* 2.
[411] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 114; Forsyth *Private International Law* 10-12.
[412] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 114.
[413] Forsyth *Private International Law* 81.

law and succession law, thereby potentially resulting in a different *lex causae* for different components of the claim. It is also noted that the jurisdiction of a matter should be confirmed prior to the start of these three steps to ensure that the matter is being heard in the correct forum.[414]

4.3.1.1. Characterisation

The first step in the choice-of-law process, characterisation, requires identification of the part of a branch of law, namely the legal category, that could be the *lex causae*.[415] Characterisation is therefore attempting to identify provisionally which part of a legal system, either domestic or foreign, could be the applicable. Characterisation is not a question of fact, rather it is a question of law since it requires identification of the part of a law that may apply to a matter.[416] In the example of the *lex domicilii matrimonii* principle, the legal category would be the proprietary consequences of a marriage, falling under the branch of matrimonial property law. If a defamation was relevant, the legal category would be defamation, falling under the branch of delict.[417]

In the past, courts have resorted to using their domestic law to decide a characterisation, thereby ignoring a characterisation based in foreign law.[418] In *Price*, the Supreme Court of Appeal (SCA) approved of characterisation occurring through the *via media* approach.[419] In terms of the *via media* approach, a court should consider the *lex fori* and the *lex causae* and thereafter make a provisional characterisation as to which one could apply.[420] The *via media* approach had been approved in the earlier *Laurens* case, which had found the *via media* approach to assist with international uniformity in decisions.[421]

In a matrimonial property claim, characterisation can be relatively unambiguous because the *lex domicilii matrimonii* is the *lex causae*, unless, for example, the parties chose otherwise in their antenuptial contract, or there is incompatibility between foreign and domestic law as to

414 Forsyth *Private International Law* 10.
415 *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 115; Forsyth *Private International Law* 11
416 *Burchell v Anglin* 2010 (3) SA 48 (ECG) paras 17-19.
417 *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 116.
418 Bennett and Kopke 2008 *SALJ* 65.
419 *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) para 12.
420 *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) para 12.
421 1993 (2) SA 104 (W) 117B.

which law applies. Moreover, if ancillary issues need to be decided, such as succession rights or the capacity of beneficiaries to inherit, an individual characterisation for each issue will be required. Choice-of-law rules for the characterisation of succession claims will be considered later in this chapter as part of the identification of succession rights. Choice-of-law rules for characterising claims relating to the validity and interpretation of antenuptial contracts, as well as the capacity of parties for these contracts, are canvassed in chapter 5.[422]

The facts of the *Anderson* case can be used to illustrate a provisional characterisation using the *via media* approach. To begin, the court would consider foreign and domestic law to identify potential categories of law that could be the *lex causae*. Based on the *lex domicilii matrimonii* principle and the husband's domicile in Scotland at the time of the marriage, a legal category found in Scots law could provisionally be chosen for deciding the spouse's potential matrimonial rights. If the spouse claimed a succession right in terms of either domestic law or Scots law, the legal category of that succession law could apply. If any additional issue needed to be decided, such as the validity of the deceased's will, the legal category would provisionally be the validity of wills in domestic succession law, pointing to domestic law being the provisional *lex causae*. Furthermore, domestic law would be the *lex fori* for deciding any procedural issues.

Forsyth notes that characterisation can lead to a recognisable claim in one category, but no claim in a different category, such as in the *Anderson* case.[423] For instance, if the surviving spouse had only based her claim on domestic succession law, she would have no claim since she had no testamentary right. If her claim, however, was framed in Scots law, she may have had a matrimonial property claim if allowed by Scots law.[424] Forsyth is of the view that the *via media* approach implicitly allows the *lex fori* to override a characterisation that would have the effect of excluding other rules.[425] As such, it is submitted that a characterisation should not allow a claim to be defeated simply because one category of law excludes another.

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[422] See chapter 5 § 5.2.
[423] Forsyth *Private International Law* 86.
[424] Forsyth *Private International Law* 77.
[425] Forsyth *Private International Law* 86.

4.3.1.2. Selection of appropriate connecting factors

The second step involves the selection of connecting factors that are used to point to the correct *lex causae*.[426] As mentioned earlier, connecting factors are simply facts that indicate which legal system is connected to the claim as a *lex causae*.[427] For example, in respect of the *lex domicilii matrimonii* principle, the connecting factor is the husband's domicile at the time of the marriage.[428] A different example would be the validity of a marriage, where the place of marriage, the *lex loci celebrationis*, would be the connecting factor pointing to the correct *lex causae*.[429]

4.3.1.3. Application of the selected legal system

Once a provisional characterisation has been made taking into account connecting factors, a final characterisation can be made. Using the *lex domicilii matrimonii* principle as an example, the legal category – the proprietary consequences of the marriage – links to the connecting factor, the husband's domicile at the time of the marriage. The connecting factor points to the correct *lex causae*, being the *lex domicilii matrimonii*, the law of the husband's domicile at the time of the marriage.

As confirmed by the *via media* approach, the *lex causae* can be a foreign law. If a foreign law is to be applied as the *lex causae*, domestic public policy must be taken into account.[430] A foreign law would offend public policy if it is "so repugnant to the values of South African law".[431] The highest yardstick of public policy is the Constitution therefore any foreign law applied as a *lex causae* must, at the very least, be constitutional.[432] This is consistent with sections 2 and 8(2) of the Constitution, which state that the Constitution applies to all law in the Republic and any inconsistent law is invalid. Examples of unconstitutional foreign law could be a marriage involving an incestual relationship between spouses or a marriage concluded despite a lack of consent from either or both spouses.[433]

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[426] Forsyth *Private International Law* 11.
[427] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 105, 114; Forsyth *Private International Law* 8.
[428] Forsyth *Private International Law* 8.
[429] Forsyth *Private International Law* 8.
[430] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 127.
[431] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) para 48.
[432] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 127.
[433] Forsyth *Private International Law* 288.

Additionally to public policy, foreign law cannot override a statutory exclusion, nor can it amount to a foreign revenue law, a foreign penal law, or *fraus legis*.[434] In terms of the doctrine of *fraus legis*, if a person is seeking to evade the application of a legal system by creating connecting factors to another legal system, the legal system being evaded should be applied as the *lex causae*.[435]After taking into account public policy and provided the above exclusions do not apply, a final characterisation can be confirmed with the foreign law being applied as the *lex causae*.[436]

4.3.1.3.1. Proof of the *lex causae*

To apply foreign law as the *lex causae*, the content of that law needs to be known, as was an issue in the *Anderson* case. Section 1(1) of the Law of Evidence Amendment Act[437] states that any court can take judicial notice of foreign law if it "can be ascertained readily and with sufficient certainty". Section 1(2) continues by stating that notwithstanding section 1(1), any party can provide evidence of foreign law. These provisions, therefore, allow judicial notice of foreign law, alternatively either party can provide evidence of foreign law.

The common-law position to proof of foreign law is similar. In the common law, foreign law is a question of fact that needs to be proven unless judicial notice is possible.[438] Courts have a wide discretion to decide whether evidence of foreign law should be admitted or excluded.[439] Proof of foreign law is usually provided by suitable experts.[440] Using a court's inherent discretion, a judge may allow judicial notice of foreign law[441] or the parties can agree in a statement without the need to produce expert evidence.[442] As to the onus of proof, the *lex causae*, not the *lex fori*, determines the person on whom the onus rests.[443] If foreign statutory law is relevant, courts have a duty to examine the statute, especially in the event that any consulted experts disagree about the statute's interpretation.[444] If foreign law cannot be proven,

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[434] Dendy *LAWSA* Vol 7(1) 317.
[435] Forsyth *Private International Law* 126. Forsyth submits that the form of intention of the evading person should be direct intention, or *dolus directus* – see 287.
[436] *Laurens NO v von Höhne* 1993 (2) SA 104 (W) 117A.
[437] Act 45 of 1988.
[438] *Laurens NO v von Höhne* 1993 (2) SA 104 (W) 116B-C.
[439] Forsyth *Private International Law* 113.
[440] *Laurens NO v von Höhne* 1993 (2) SA 104 (W) 116C.
[441] Forsyth *Private International Law* 115.
[442] Forsyth *Private International Law* 113.
[443] *Laurens NO v von Höhne* 1993 (2) SA 104 (W) 112I.
[444] *Laurens NO v von Höhne* 1993 (2) SA 104 (W) 116C-D.

a presumption arises that the foreign law is similar to domestic law, which can then be applied.[445]

4.4. Analysis of case law

Since the general choice-of-law process has been canvassed above, specific cases can now be discussed, namely *Laurens*, *Price*, *Burchell*, and *Classic Sailing*. Although none of these cases concerned matrimonial or succession claims, each case offers insight into different aspects of the process which, in turn, can assist with understanding how to approach matrimonial and succession claims. *Laurens*, *Price*, and *Classic Sailing* all dealt with contractual disputes whereas *Burchell* concerned a delict. *Laurens* gives guidance on a choice-of-law decision when proof of foreign law is unreliable. *Price* assists with providing a precedent when neither foreign law nor domestic law appears to apply. *Burchell* created a balancing test for delictual claims which could be adopted for non-delictual claims in future. Lastly, *Classic Sailing* gives an example of when parties cannot exclude domestic law in a contract.

4.4.1. *Laurens NO v von Höhne*

In the 1992 *Laurens* case, the plaintiff, who was the liquidator of a German company, claimed the payment of shares from the defendant.[446] The defendant, a resident of South Africa, confirmed that he had signed a document purporting to buy the shares of a company administered in Germany.[447] He, however, alleged that it was known to all parties involved that the sale was simply a strategy to help a friend evade his tax liabilities.[448] The defendant later alleged that in any event the consideration for the shares had been paid.[449] The sale was conducted in terms of German law[450] and the purchase price was allegedly paid by cheque in Germany.[451]

[445] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 17.
[446] *Laurens NO v von Höhne* 1993 (2) SA 104 (W) 105B.
[447] *Laurens NO v von Höhne* 1993 (2) SA 104 (W) 105I; 108G-I.
[448] *Laurens NO v von Höhne* 1993 (2) SA 104 (W) 107A.
[449] *Laurens NO v von Höhne* 1993 (2) SA 104 (W) 114I.
[450] *Laurens NO v von Höhne* 1993 (2) SA 104 (W) 105E-J.
[451] *Laurens NO v von Höhne* 1993 (2) SA 104 (W) 115A.

The court confirmed that when foreign law is applied as a *lex causae*, the whole of that law applies,[452] except for the procedural law of the *lex fori*.[453] Some aspects of the law of evidence, for example, may be substantive in nature.[454] German law was found to be the *lex causae* because the defendant's domestic residence was the only connecting factor to South Africa.[455] With regard to the law governing the payment of the shares, the court was uncomfortable with making a decision using German law since the provided proof of German law was deemed to be unreliable.[456] Accordingly, the court used policy considerations to apply the *lex fori*, being domestic law, to decide whether payment had been made.[457] It found that payment had occurred.[458] This was despite potential evidence, albeit unreliable, that German law would not consider payment as having been made in the circumstances.[459]

Laurens illustrates that although a foreign *lex causae* could apply in a matrimonial or succession claim, public policy could still be used to apply domestic law if characterisation would be based on unreliable proof of a foreign law.

4.4.2. *Society of Lloyd's v Price; Society of Lloyd's v Lee*

It is possible that a gap may present itself in the choice-of-law process and result in neither domestic law nor foreign law applying. This conundrum was illustrated in the 2006 *Price* case that dealt with a prescription claim.

The appellant, Society of Lloyd's, had obtained default judgment in England against the respondents and was seeking recognition of the English judgment in South Africa.[460] The contract underlying the dispute expressly included a clause choosing the laws of England as the contract's governing law.[461] The contract furthermore confirmed that English courts would have jurisdiction over any dispute related thereto and any English judgment would be

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[452] *Laurens NO v von Höhne* 1993 (2) SA 104 (W) 115J. This rule was previously set out in *Sperling v Sperling* 1975 (3) SA 707 (A).
[453] *Laurens NO v von Höhne* 1993 (2) SA 104 (W) 116J.
[454] *Laurens NO v von Höhne* 1993 (2) SA 104 (W) 119I.
[455] *Laurens NO v von Höhne* 1993 (2) SA 104 (W) 112I.
[456] *Laurens NO v von Höhne* 1993 (2) SA 104 (W) 120G-J.
[457] *Laurens NO v von Höhne* 1993 (2) SA 104 (W) 120G-I.
[458] *Laurens NO v von Höhne* 1993 (2) SA 104 (W) 120G-I.
[459] *Laurens NO v von Höhne* 1993 (2) SA 104 (W) 114G.
[460] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) para 1.
[461] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) para 2.1.

enforceable elsewhere.[462] The summonses had originally been served on the respondents more than three years, but less than six years, after prescription had started running.[463]

The respondents had three main defences:[464] first, that the claims had prescribed in terms of domestic law, being the Prescription Act;[465] second, that English courts cannot grant judgments with international enforceability; and third, that the English judgments would not be enforceable in South Africa as they were offensive to public policy. The claim was dismissed by the trial court on the first defence of prescription.[466] In terms of English law, the claims were not prescribed.[467] In terms of domestic law, the claim was prescribed unless the English judgment was regarded as a 'judgment debt', thereby extending the prescription period.[468] A judgment debt only prescribes in South Africa after thirty years.[469]

As to the question of whether English prescription law or domestic prescription law applied, the court confirmed that, in both domestic law and English law, substantive matters must be decided by the law underlying the transaction, namely the *lex causae*, whereas procedural matters are dealt with by the court's domestic law, the *lex fori*.[470] In terms of domestic law, prescription is a matter of substance, not procedure; in English law, however, prescription is considered to be procedural, not substantive.[471] As a result, neither law would apply in this instance, thereby creating a gap.[472]

To resolve the gap, the court held that policy considerations needed to be considered to establish which legal system has the "closest and most real connection"[473] with the dispute.[474] The court supported the use of the *via media* approach as it allows a court to choose flexibly which legal system has the closest and most real connection.[475] The court further stated that any choice-of-law decision must be made whilst taking into account uniformity in international

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[462] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) para 2.2.
[463] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) para 8.
[464] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) para 7.
[465] Act 68 of 1969.
[466] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) para 1.
[467] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) para 8.
[468] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) para 9.
[469] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) para 9.
[470] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) para 10.
[471] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) para 22.
[472] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) para 22.
[473] See chapter 7 § 7.3.4 for a discussion concerning the law of the closest connection.
[474] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) para 26.
[475] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) para 14.

decisions.[476] In this instance, the court was of the view that international uniformity would recommend that if a claim is enforceable in other legal systems, it should generally be enforceable in South Africa.[477]

The court noted that the parties had chosen English law as the governing law.[478] The court decided that English law was the *lex causae* since it had the closest and most real connection to the issue in dispute taking into account public policy, international harmony in decisions, justice, and convenience.[479] As such, the English judgment was held not to have prescribed.[480] The court furthermore commended a different case, *Society of Lloyds v Romahn, Society of Lloyd's v Ilse; Society of Lloyd's v Ilse; Society of Lloyd's v Ilse*,[481] for emphasising the need to consider the "nature, scope and purpose" of foreign law in its context during the choice-of-law process, with due regard to public policy and without attempting to fit a dispute into a pre-formed structure.[482]

In light of the above, *Price* confirmed that if there is a gap in a choice-of-law process, the law with the closest and most real connection to the matter should apply, taking into account public policy and international uniformity. Furthermore, if a claim is enforceable elsewhere, the general rule is that it will be enforceable in South Africa unless it should not be applied, for example, due to public policy. Although these principles were applied in a contractual context, there was no suggestion that these principles could not be applied to other types of disputes. As such, *Price* could be used as a precedent for matrimonial and succession claims where a gap in law arises.

4.4.3. *Burchell v Anglin*

In 2009, *Burchell* set out a balancing test for delictual claims in private international law.[483]

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[476] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) para 27.
[477] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) para 28.
[478] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) para 30.
[479] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) paras 31-32.
[480] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) para 31.
[481] 2006 (4) SA 23 (C).
[482] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) para 32.
[483] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 122.

This case has been commended as "ground-breaking" for its contribution to the choice-of-law process in delictual claims.[484]

The case primarily concerned a dispute about alleged defamatory statements made by the defendant and his nephew[485] that appeared to have been made in both South Africa and the United States of America (the 'US').[486] The parties did not agree as to where the statements had been made.[487]

The plaintiff operated a game reserve and safari business in the Eastern Cape.[488] The defendant, a resident of Texas, was a previous friend and business associate of the plaintiff.[489] The plaintiff alleged that he suffered reputational damages, general damages, and loss of profit due to defamatory statements made by the defendant and his nephew.[490] The statements were directed to employees of the plaintiff's main booking agent, located in Nebraska in the US, which had led to the booking agent to suspend its bookings with the plaintiff.[491] The defamatory statements allegedly accused the plaintiff of being involved in criminal activities, abusing his employees, hunting unethically, and non-payment of liabilities.[492]

As guidance during the choice-of-law process, the court stated:

> "… choice of law issues should not depend upon the application of rigid rules, but upon a search for the most appropriate principles to meet particular situations and achieve justice between the parties and that, very often, one size does not fit all."[493]

The court stated that the choice-of-law rules for delict had not been settled in domestic law prior to the case[494] and, as such, the court was not bound to any existing authority when identifying the correct *lex causae*.[495] In its analysis, the court provided a summary of foreign

[484] FE Marx "At last a South African property law of delict" (2011) 32 *Obiter* 224 at 230.
[485] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 3.5.
[486] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 127.
[487] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 16.
[488] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 2.
[489] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 2.
[490] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 3.5.
[491] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 3.5, 89.
[492] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 89.
[493] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 112.
[494] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 95.
[495] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 95, 113.

and domestic substantive law,[496] mentioned the general choice-of-law approach that was discussed above, and proceeded to classify the defamation issue as substantive in nature.[497]

Since it was difficult to pinpoint where the alleged defamatory statements had occurred, the court followed the international approach of choosing the jurisdiction with the most significant relationship to the parties and the alleged delict.[498] The court approved of a balancing test in this regard.[499] The court took into account the various circumstances as connecting factors to be "placed in the proverbial melting pot"[500] for the purpose of deciding the law that had the most significant relationship to the parties and the alleged delict.[501] The court examined the link between the factual circumstances, the relationship of the parties, and the two places involved, namely South Africa and Nebraska.[502] The court found that the location of the delict should weigh heavily on the balancing scale.[503] Its conclusion was that the relationship with Nebraska was more significant than with South Africa.[504] The court stated that public policy, including the Constitution, must be considered before choosing a foreign law as the *lex causae*, and then proceeded to confirm that Nebraska law was the correct *lex causae*.[505] The court was not, however, convinced that Nebraska's law should be used to ascertain the quantum of damages and left the question open for further determination.[506]

The court appeared to follow the general choice-of-law approach but adopted a balancing test for delictual matters when considering the impact of connecting factors. At no point did the court expressly state that it was following, rejecting, or deviating from the general choice-of-law approach, although there was an acknowledgement of the general approach. It is submitted that this creates ambiguity as it leaves the question open to interpretation. Since the balancing test is most likely an addition to the general approach, it has the potential to be adopted in future for non-delictual disputes. If this is the case, broader reference to the circumstances to the dispute and the relationship between parties can be considered as connecting factors. It is

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[496] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 95-111.
[497] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 116.
[498] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 122.
[499] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 122.
[500] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 92-93.
[501] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 122.
[502] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 123-124.
[503] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 124.
[504] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 125.
[505] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 127.
[506] *Burchell v Anglin* 2010 (3) SA 48 (ECG) para 129-130.

possible that this test may result in a fairer, more holistic approach to determining a *lex causae* in future non-delictual matters.

4.4.4. *Representative of Lloyds and Others v Classic Sailing Adventures (Pty) Ltd*

The 2010 case of *Classic Sailing* concerned a motorised luxury charter yacht that had sunk off the coast of Mozambique.[507] The first appellant, Lloyds, was the insurer of the yacht and declined to pay an insurance claim lodged by the respondent, who was the owner of the yacht.[508] The insurance policy contained a clause stating that it was governed by English law and that courts in South Africa would have jurisdiction.[509] The issue was whether sections 53 and 54 of the Short Term Insurance Act,[510] being domestic legislation, applied to the policy.[511] Section 53 aims to protect insured persons from insurers who seek to avoid liability simply by relying on a misrepresentation or non-disclosure from the insured.[512] Section 54 aims to prevent insurers from escaping liability because the insured has contravened a law.[513] It is noted that Lloyds' allegations regarding non-disclosure and illegality on the insured's party are not relevant to this analysis and, therefore, will not be discussed.

The court confirmed that mandatory domestic law, if South Africa is the *lex fori*, cannot be excluded from application to a matter even if the parties contractually agree that foreign law will apply.[514] If parties agree for a foreign law to govern their rights and obligations, mandatory domestic law will apply to the extent that the foreign system is inconsistent with the mandatory law.[515] To determine whether domestic law is mandatory, the question to ask is whether the parties can waive the application of the relevant provision.[516] Waiver will not be possible if the waiver offends public policy or the public interest.[517] Nor can parties contract out of the norms and values of the Constitution.[518]

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[507] *Representative of Lloyds and Others v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) para 1.
[508] *Representative of Lloyds and Others v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) para 3.
[509] *Representative of Lloyds and Others v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) para 8.
[510] Act 53 of 1998.
[511] *Representative of Lloyds and Others v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) para 8.
[512] *Representative of Lloyds and Others v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) para 24.
[513] *Representative of Lloyds and Others v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) para 24.
[514] *Representative of Lloyds and Others v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) para 21.
[515] *Representative of Lloyds and Others v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) para 29.
[516] *Representative of Lloyds and Others v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) para 23.
[517] *Representative of Lloyds and Others v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) para 23.
[518] *Representative of Lloyds and Others v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) para 25.

Due to the effect of sections 53 and 54 of the Short Term Insurance Act, the court found that the waiver of these sections would be contract to public policy and the public interest.[519] As such, the court found that sections 53 and 54 were mandatory law and must apply to the contract.[520]

When applied to matrimonial property claims, *Classic Sailing* could be used to confirm that a foreign matrimonial law chosen by the spouses will not override mandatory domestic law to the extent of its inconsistency with mandatory domestic law.

4.5. The *renvoi* doctrine

Before proceeding with a discussion of choice-of-law rules for succession and matrimonial property claims, a brief mention of the *renvoi* doctrine is useful to further understand an additional issue that arises in private international law. In some circumstances, the choice-of-law rules in South Africa may state that a foreign law should apply to a matter, but the choice-of-law rules in that foreign legal system refer the dispute back to South Africa for a decision, or to a completely different legal system.[521] A referral between two or more legal systems can continue indefinitely if no decision is taken. This problem is referred to as a problem of *renvoi*.[522] The English translation of '*renvoi*' is to 'send back' or 'return unopened'.[523]

To solve this, a court can apply the law of another legal system whilst ignoring its own choice-of-law rules.[524] For example, domestic law could determine that the *lex domicilii matrimonii* is a particular foreign law; that foreign law, however, chooses for either domestic law, or a completely different law, to apply. Using the *renvoi* doctrine, South Africa could apply foreign matrimonial property law even if the rules of that foreign law would apply domestic law or the law of a completely different legal system.

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[519] *Representative of Lloyds and Others v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) para 24.
[520] *Representative of Lloyds and Others v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) para 29. This position was supported by section 6(2) and 6(5) of the Admiralty Jurisdiction Regulation Act 105 of 1983, which governs the hearing of an admiralty claim and enforcement of maritime claims. These subsections, when read together, prohibit parties from contracting out of mandatory domestic law if the chosen foreign law is inconsistent with mandatory domestic law – see para 29.
[521] Forsyth *Private International Law* 91.
[522] Forsyth *Private International Law* 91.
[523] NM De Pontes *Renvoi in the private international law of obligations in Australia, Brazil and South Africa* (LLM thesis, University of Johannesburg, 2017) 2.
[524] Forsyth *Private International Law* 92.

According to Forsyth, the application of the *renvoi* doctrine is intended to result in uniformity of decisions across legal systems.[525] The legislature has, however, rejected the *renvoi* doctrine whenever domicile is relevant to a dispute.[526] According to section 4 of the Domicile Act,[527] if a court is faced with a question that must be decided in accordance with foreign law due to a person's domicile, the court must apply the foreign law regardless of the choice-of-law rules of that foreign law. Section 4, therefore, specifies that a domestic court must ignore *renvoi* and apply that foreign law where someone's domicile is relevant, despite a potential referral in that legal system to an alternative legal system.

It may appear, on the face of it, that section 4 solves a *renvoi* problem by disallowing it. Forsyth is, however, critical of the rigidity created by section 4 as it opens the door to forum shopping and conflicting judgments.[528] Instead, Forsyth suggests that courts should be given the discretion to apply or reject the *renvoi* doctrine when needed. In his view, this approach could enhance the uniformity of decisions across jurisdictions, and the doctrine could be rejected when its application does not lead to uniformity.[529] Nonetheless, due to section 4, it is impossible to do so for matters based on domicile.[530]

The approach of the European Union (EU) to *renvoi* in succession law and matrimonial property law is respectively set out in Regulation (EU) No 650/2012[531] (the 'Succession Regulation') and Council Regulation (EU) 2016/1103[532] (the 'Matrimonial Property Regulation'). Both Regulations will be discussed in chapter 6.[533] Twenty-five EU Member States have adopted the Succession Regulation, with Denmark and Ireland choosing not to participate.[534] As such, the Succession Regulation has broad application across the EU. The

[525] C Forsyth "Certainty versus Uniformity: *Renvoi* in the Context of Movable Property" (2010) 6:3 *Journal of Private International Law* 637 at 640.
[526] Forsyth *Private International Law* 93.
[527] Act 3 of 1992.
[528] Forsyth *Private International Law* 92.
[529] Forsyth *Private International Law* 92, 100.
[530] Forsyth *Private International Law* 93.
[531] The full title of the Succession Regulation is: 'Regulation (EU) 2012/650 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession'.
[532] The full title of the Matrimonial Property Regulation is: 'Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes'.
[533] See chapter 6 § 6.2 and 6.3.
[534] Recitals 82-83 of Regulation (EU) No 650/2012.

Matrimonial Property Regulation, on the other hand, has more limited application with participation from eighteen Member States only.[535]

4.6. Identification of a surviving spouse's matrimonial property rights: the unitary approach

As referred to in chapter 1,[536] the *lex domicilii matrimonii* principle applies to both immovables and movables, wherever situated. As such, the *lex domicilii matrimonii* principle follows the unitary principle as it does not distinguish between movables and immovables.[537] Based on this principle, the spouse's matrimonial property rights must take into account movable and immovable property worldwide. Since each legal system may give rise to unique matrimonial property rights, each foreign marriage will need to be assessed on a case-by-case basis.

One of the concerns that can arise with the application of the unitary principle is that there may be a potential incompatibility between foreign and domestic law, thereby requiring recognition, or adaption, of an unknown right. If the *lex domicilii matrimonii* allows for immovable property to pass by operation of law but this transfer of ownership conflicts with the *lex situs*, an equivalent personal right in the *lex situs* will arise in favour of the non-holder spouse unless there is no such equivalent.[538] The *lex situs* is the law of the place in which the immovable property is situated.[539] The following example illustrates this principle. If a joint estate is created by virtue of a marriage, each spouse is automatically entitled to half of each asset. In terms of the unitary principle, any immovable property will form part of that joint estate even if it is located in a different country to the matrimonial domicile. If the formal ownership of the property is, however, only registered in the name of one spouse and the *lex situs* does not automatically recognise the matrimonial property right, domestic law states that the non-owner spouse is entitled to an equivalent personal right rooted in the *lex situs*, unless there is no equivalent right.[540] There is not a similar position for movables if such a problem arises, but an

[535]European Union "Property regimes for international couples" (2021) https://europa.eu/youreurope/citizens/family/couple/property-regimes-international-couples/index_en.htm#:~:text=an%20EU%20country.,Rules%20and%20procedures,%2C%20Slovenia%2C%20Spain%20and%20Sweden (accessed 31 March 2022).
[536] See chapter § 1.1.1.
[537] Forsyth *Private International Law* 392.
[538] Forsyth *Private International Law* 298.
[539] Forsyth *Private International Law* lxvii.
[540] Forsyth *Private International Law* 298.

identical approach has been suggested by Forsyth.[541] The EU's approach to the adaption of unknown rights is considered in chapter 6.[542]

4.7. Identification of a surviving spouse's succession rights

When administering a deceased estate, it is crucial to understand whether the surviving spouse has a succession right in addition to any matrimonial property right. The determination of a succession right is dependent on whether intestate or testate succession applies.

Testate succession depends completely on the existence of a valid will.[543] The term 'will' includes any testamentary writing such as a codicil.[544] Intestate succession, on the other hand, requires that a deceased died with some part of their estate not being governed by a valid will.[545] A deceased can die intestate either in whole or in part.[546] Full intestacy means that there is no valid will whereas partial intestacy results from any asset in the deceased estate not being expressly or impliedly disposed of by a valid will.[547]

Before discussing the choice-of-law rules for succession, the *Anderson* case can be used to illustrate the significance of testate and intestate succession for succession rights. If the deceased's will was valid, the surviving spouse would have no succession right. If, however, the will was invalid for any reason, either in whole or in part, the deceased would have died partially or fully intestate. The spouse would then be entitled to receive a testamentary benefit by virtue of the Intestate Succession Act,[548] in addition to any benefit arising from a proven matrimonial property right. Although there were no facts in the *Anderson* case suggesting the existence of an invalid will, the will could have been proved invalid if, for example, the testator lacked mental capacity at the time of signature[549] or the testator was unduly influenced[550] by the third respondent.

[541] Forsyth *Private International Law* 298.
[542] See chapter 6 § 6.2.12 and 6.3.11.
[543] Forsyth *Private International Law* 395.
[544] Forsyth *Private International Law* 395; section 1 of the Wills Act 7 of 1953.
[545] Section 1(4)(b) of the Intestate Succession Act 81 of 1987 (ISA).
[546] *Ex Parte Estate Stephens* 1943 CPD 397 at 407.
[547] *Ex Parte Estate Stephens* 1943 CPD 397 at 407.
[548] Section 1(1)(c) of the ISA.
[549] *Harlow v Becker NO and Others* 1998 (4) SA 639 (D) 644A-C.
[550] *Kirsten and Others v Bailey and Others* 1976 (4) SA 108 (C) 112.

4.7.1. Choice-of-law rules for succession

As mentioned in the earlier discussion of characterisation, South African succession has its own choice-of-law rules for characterisation. The South African choice-of-law rules of matrimonial property differ from the choice-of-law rules of succession.[551] This means that a different law to the *lex domicilii matrimonii* may apply to the succession of assets in a deceased estate.

The law of succession follows the scission principle, which separates the choice-of-law rules for the succession of the deceased's movables and immovables.[552] South Africa is one of a number of legal systems that follow the scission principle for succession although other legal systems prefer a unitary approach to succession.[553] If domestic intestate succession is found to apply after the choice-of-law decision, the intestate succession right of the spouse can be determined by the Intestate Succession Act.[554] If domestic testate succession applies, the deceased's will must be assessed for its validity, which will be discussed below.

The choice-of-law rules for both testate and intestate succession are as follows. The deceased's domicile at the time of death, the *lex ultimi domicilii*, would be the law that applies to movable property.[555] This rule is linked to the doctrine of *mobilia sequuntur personam,* meaning that movables are considered to follow their owner.[556] Although the law of succession follows the scission principle, the succession of movable property follows the unitary principle because the rule applies to all movables wherever situated.[557] For example, if a deceased owns movables across a number of legal systems but is domiciled in South Africa at their death, all movables will devolve in terms of the domestic law of succession.

In contrast, the succession of immovable property is determined by the *lex situs* of each asset.[558] The succession of immovable property, therefore, follows the scission principle, not the unitary

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551 AEAM Thomashausen "Some problems in the application of South African private international law" 17 (1984) 17 *CILSA* 78 at 86.
552 Forsyth *Private International Law* 392.
553 Forsyth *Private International Law* 392.
554 Act 81 of 1987.
555 Forsyth *Private International Law* 392.
556 Forsyth *Private International Law* 368.
557 Forsyth *Private International Law* 392.
558 Thomashausen 1984 *CILSA* 86.

principle.[559] The result is that if the deceased owned immovable properties situated in more than one legal system, in terms of South African choice-of-law rules, a different law would apply to the succession of each immovable property, namely the law of each property's location.

Forsyth suggests that it would be advisable to change the rule for immovables in future.[560] Forsyth proposes that the *lex situs* should only determine the validity of the formal transfer of an immovable property, as already occurs with the oversight of the deeds registries over the transfer of immovable properties in South Africa.[561] This suggestion seems to be practical and is, accordingly, supported. In terms of Forsyth's suggestion, the *lex ultimi domicilii* would then govern the succession of movables and immovables, following the unitary principle. The following example is based on Forsyth's own example as support for the proposed change.[562] A person dies whilst owning immovable property in country X but was domiciled in country Y at death, and all possible beneficiaries are domiciled in country Y. As it stands, the succession of the immovable property in country X would be determined by the laws of country X. In terms of Forsyth's proposal, the laws of country Y should rather determine the succession of the immovable property, and the laws of country X should only govern the formal transfer of the immovable property.

The succession rules explained above for movable property and immovable property are illustrated by the case of *Estate Baker and Others v Estate Baker and Others*.[563] The deceased, Mr Baker, had been born from an illegitimate marriage between his father and the sister of his father's first spouse.[564] His father had married his late spouse's sister after the first spouse's death.[565] The deceased died intestate whilst domiciled in England but left movable property and an immovable property in the Cape Colony.[566] The court was required to determine the succession of these movables and immovables. The illegitimacy of the father's marriage gave rise to complications when determining the deceased's beneficiaries. The deceased was survived by a spouse, half-blood siblings from his father's first marriage, full-blood siblings

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[559] Forsyth *Private International Law* 392.
[560] Forsyth *Private International Law* 370.
[561] Forsyth *Private International Law* 371.
[562] Forsyth *Private International Law* 370.
[563] (1908) 25 SC 234.
[564] *Estate Baker and Others v Estate Baker and Others* (1908) 25 SC 234 at 239.
[565] *Estate Baker and Others v Estate Baker and Others* (1908) 25 SC 234 at 239.
[566] *Estate Baker and Others v Estate Baker and Others* (1908) 25 SC 234 at 239.

from the second illegitimate marriage, and descendants from a predeceased full-blood brother.[567] The *lex domicilii matrimonii* of the deceased's marriage was English law[568] resulting in his surviving spouse being entitled to one-half of the movables due to the matrimonial property regime.[569]

With regard to the succession of the remaining movables, the court confirmed that succession rights must be determined by the *lex ultimi domicilii* of the deceased, which was English succession law.[570] In terms of English succession laws, the deceased's spouse was not entitled to a testamentary benefit and none of the deceased's siblings were recognised as heirs due to their father's illegitimate marriage.[571] Accordingly, there were no recognised heirs and the movables were forfeited as *bona vacantia* to the Crown.[572] As the imperial government of the Cape Colony was the representative of the Crown, the movable property was forfeited to the imperial government.[573]

As to the succession of the immovable property in the Cape Colony, the court confirmed that the Cape Colony, as the *lex situs*, governed its succession.[574] According to the succession laws of the Cape Colony at that time, the spouse had no entitlement to a testamentary benefit but the inheritance could devolve upon the deceased's full-blood heirs.[575] Accordingly, the immovable property, or the proceeds thereof, devolved upon the deceased's full-blood sisters and the descendants of the deceased's predeceased full-blood brother.[576]

4.7.2. Testate succession

The choice-of-law rules for intestate and testate succession have been discussed above. If domestic succession law applies, testate succession is, as mentioned earlier, dependent on the existence of a valid will. The deceased's will must, therefore, comply with the formal domestic

[567] *Estate Baker and Others v Estate Baker and Others* (1908) 25 SC 234 at 239, 243-244.
[568] *Estate Baker and Others v Estate Baker and Others* (1908) 25 SC 234 at 243.
[569] *Estate Baker and Others v Estate Baker and Others* (1908) 25 SC 234 at 239.
[570] *Estate Baker and Others v Estate Baker and Others* (1908) 25 SC 234 at 241.
[571] *Estate Baker and Others v Estate Baker and Others* (1908) 25 SC 234 at 239.
[572] *Estate Baker and Others v Estate Baker and Others* (1908) 25 SC 234 at 242. Forsyth has criticised the claiming of the inheritance by the imperial government as incorrect in law. See Forsyth *Private International Law* 394.
[573] *Estate Baker and Others v Estate Baker and Others* (1908) 25 SC 234 at 240.
[574] *Estate Baker and Others v Estate Baker and Others* (1908) 25 SC 234 at 243.
[575] *Estate Baker and Others v Estate Baker and Others* (1908) 25 SC 234 at 243.
[576] *Estate Baker and Others v Estate Baker and Others* (1908) 25 SC 234 at 243-244.

requirements of a will before testate succession can be applied, which, in turn, would establish whether or not the spouse has a succession right. If the will is not valid, domestic intestate succession will apply.

If a will is executed inside South Africa, section 2 of the Wills Act[577] sets out the formal requirements for the validity of the will. The requirements of section 2 will not be discussed since they are straightforward. The formal requirements for the validity of a will executed outside of South Africa are contained in section 3*bis* of the Wills Act. The requirements of section 3*bis* will be considered as the section may have relevance in the context of foreign marriages. An analysis of *Tomlinston v Zwirchmayr*[578] (*'Tomlinston'*) will provide further insight into section 3*bis*.

Section 3*bis*(1)(a) states that the formal requirements for the execution of a will outside of South Africa shall be deemed to be met if the will complies with either:

- the internal law of the country in which the will was executed; or
- the internal law of the country in which the testator or testatrix is a citizen, domiciled, or habitually resident,[579] where in all cases this would be either at the time of execution of the will or at the time of death.[580]

Section 3*bis*(1)(b) adds to section 3*bis*(1)(a) by stating that, in respect of any immovable property, a will executed outside of South Africa shall be valid if it complies with the internal law of the *lex situs*.[581] As a result, if an immovable property is an asset of the deceased estate, the will can be valid on an additional ground to section 3*bis*(1)(a): compliance with the *lex situs*. Section 3*bis*(1)(a)-(b) therefore covers a wide variety of circumstances in which a will may be validly executed. Unlike section 3*bis*(1)(b), section 3*bis*(1)(a) does not expressly mention movable and immovable property. This is in contradistinction to the choice-of-law rules for succession.

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[577] Act 7 of 1953.
[578] 1998 (2) SA 840 (T).
[579] The meaning of habitual residence is covered in chapters 6 and 7.
[580] Forsyth *Private International Law* 398.
[581] Section 3*bis*(1)(c) and section 3*bis*(1)(e) create two further instances where a testamentary disposition would be considered valid. These sections respectively relate to power conferred by an instrument and execution on aircrafts and vessels.

The effect of section 3*bis* on movables and immovables was addressed by *Tomlinston*. In this case, the court had to consider whether an Austrian will was valid in terms of section 3*bis*.[582] The will complied with the formal requirements of Austrian law but allegedly failed to meet the formal requirements of section 3*bis*.[583] The deceased estate included immovable and movable property in South Africa.[584] Although the plaintiff's original claim was based on the deceased not having the requisite mental capacity to execute the Austrian will, she abandoned this claim during the proceedings,[585] perhaps due to a lack of evidence proving incapacity at the time of execution of the will. In her remaining claim, she alleged that the will had to comply with the *lex situs* of immovable property to be validly executed in terms of South African law.[586] In terms of this reasoning, compliance with Austrian law alone would be insufficient.[587]

The deceased was an Austrian citizen but he had been a resident of, and worked in, South Africa for a number of years.[588] The deceased had executed a will in South Africa in 1984 (the "1984 will"), as well as a codicil to the 1984 will in 1992, again in South Africa.[589] He had signed the codicil shortly after being diagnosed with a terminal illness.[590] Shortly before his death, the deceased returned to Austria.[591] He executed three further Austrian wills whilst heavily medicated during a hospital stay.[592] He died soon after the third will was signed.[593] The plaintiff, who was the deceased's long-term romantic partner, was the sole beneficiary in terms of the 1984 will and its codicil, but her inheritance decreased dramatically in the Austrian wills.[594]

The court essentially had to decide whether section 3*bis*(1)(a) applied to both immovable and movable property since there is no express wording to this effect in the section. To decide this, the court considered the common-law rules for the validity of wills prior to the introduction of section 3*bis*.[595] The common law recognised that a will was validly executed for movables if it

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582 *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 841G.
583 *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 841G.
584 *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 841I, 843B.
585 *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 845I.
586 *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 844G.
587 *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 844G.
588 *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 841I.
589 *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 842E.
590 *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 842A-E.
591 *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 842D.
592 *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 842D-843A, 845D.
593 *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 844A.
594 *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 841J-842A, 843I.
595 *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 847E-J.

complied with the formal requirements of the country of execution, the *lex loci actus*.[596] In relation to immovable property, a will had to comply with either the *lex situs* or the *lex loci actus*.[597] In its introduction, section 3*bis* had, therefore, broadened the scope for the validity of wills.

The court also considered the foundation for the introduction of section 3*bis*.[598] This section was introduced into domestic law due to South Africa accepting an agreement reached at the ninth session of the Hague Conference on Private International Law in 1960.[599] Article 1 of the Conference's agreement,[600] being the article on which section 3*bis* is based, applies to both immovable and movable property.[601] The court accordingly found that section 3*bis*(1)(a) covers movable and immovable property.[602] The court stated that an interpretation to the contrary would thwart the intention of testators or testatrixes who have immovable property located in different legal systems and wish to execute a will covering their whole estate.[603]

In further support for this interpretation, the court referred to the definition of 'internal law' in the Wills Act and described the definition as "significant".[604] The definition expressly states that it excludes the private international law of that internal law.[605] This means that the legislature intended to exclude a potential *renvoi* problem;[606] in other words, the will must simply comply with the formal requirements for a testamentary disposition of that internal law, and not the further rules of its private international law, including its choice-of-law rules.[607] The court found that the deceased's latest Austrian will was validly executed in terms of domestic law because it met the formal requirements of Austrian law, thereby complying with section 3*bis*(1)(a).[608]

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[596] *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 847E.
[597] *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 847I.
[598] *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 849D.
[599] *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 848A, 849D.
[600] Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, available at: Hague Conference on Private International Law "11: Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions" https://www.hcch.net/en/instruments/conventions/full-text/?cid=40 (accessed 2 April 2022).
[601] *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 848D-I.
[602] *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 850D.
[603] *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 849G-J.
[604] *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 849E.
[605] *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 850E.
[606] Forsyth *Private International Law* 398.
[607] *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 850F.
[608] *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 850H.

Tomlinston thus shows that the formal requirements for the validity of wills, as contained in section 3*bis*(1)(a), apply to both movables and immovables.

4.8. Conclusion

In this chapter, specific principles of private international law have been examined in detail. The choice-of-law approach was considered to ensure that the correct *lex causae* is applied in a matrimonial or succession claim involving a foreign marriage. The approach begins with a provisional characterisation, followed by the selection of appropriate connecting factors, and thereafter the application of the selected legal system. The *via media* approach should be used in this approach, thereby considering the *lex fori* and the *lex causae*. As to proving the *lex causae*, legislative provisions provide for judicial notice of foreign law. Alternatively, evidence of foreign law can be provided by either party. The common-law position is that foreign law is a question of fact that needs to be proven unless judicial notice is possible. Nonetheless, the parties can agree in a statement as to the content of foreign law without providing expert evidence.

The cases of *Laurens*, *Price*, *Burchell*, and *Classic Sailing* provided principles that can assist with matrimonial and succession claims. *Laurens* gave guidance as to the route to follow when proof of foreign law is unreliable. *Price* provided a solution for when there is a gap between foreign law and domestic law. *Burchell* created a balancing test for delictual claims that could be adopted for non-delictual claims in future. Lastly, *Classic Sailing* established a precedent for when domestic law cannot be contractually excluded by parties.

Regarding the identification of matrimonial property rights, it was confirmed that the applicable foreign law governs immovables and movables, wherever situated. Moreover, if the foreign law allows for immovable property to pass by operation of law but this transfer of ownership conflicts with the *lex situs*, an equivalent personal right in the *lex situs* should arise, unless there is no such equivalent.

The identification of a succession right depends on the *lex causae*, as well as whether intestate or testate succession applies. If domestic intestate succession applies, the succession right of a spouse is regulated by the Intestate Succession Act. If domestic testate succession applies, the validity of the deceased's will must be assessed. The scission principle separates the choice-of-law rules for succession of the deceased's movables and immovables. As such, the deceased's domicile at the time of death, the *lex ultimi domicilii*, applies to movable property, wherever situated. The *lex situs*, however, regulates the succession of immovable property.

CHAPTER 5: The scope of antenuptial contracts and postnuptial contracts as existing remedies for foreign marriages in South Africa

5.1. Introduction

A variety of general estate planning tools are used to implement estate planning objectives.[609] These tools include testamentary dispositions, trusts, antenuptial contracts, postnuptial contracts, financial products, limited interests, and corporate entities.[610] Before formulating an estate plan, a professional would usually assess the unique circumstances and objectives of the estate planner and propose a suitable estate plan. Antenuptial contracts and postnuptial contracts are two common tools used by estate planners for respectively choosing or changing a matrimonial property regime.[611] The advantages of each tool can include simplifying the administration of a deceased estate, saving costs, and minimising financial risk.[612]

In the previous chapter, various principles of private international law affecting matrimonial property and succession claims were discussed. This chapter is intended to focus on existing remedies available for spouses in a foreign marriage. The objective of this chapter is not to examine the relevance of all the estate planning tools mentioned above; rather, the focus will be to understand the scope of antenuptial contracts and postnuptial contracts as remedies for spouses in a foreign marriage. This chapter is divided into two parts: the first part focuses on antenuptial contracts and the second part concerns postnuptial contracts. Since this chapter is written from a South African perspective, a legal practitioner would need to consider any remedies, implications, or conflicts of law stemming from an applicable foreign law.

5.2. Antenuptial contracts

This part of the chapter, antenuptial contracts, will commence with an analysis of the common-law position regarding the registration of foreign and local antenuptial contracts in deeds registries in South Africa. Thereafter, the formal validity and proper law of antenuptial

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[609] P O'Halloran "The importance of estate planning" (2018) *Farmer's Weekly* 32 at 32.
[610] DM Davis, C Beneke, and RD Jooste *Estate Planning* (2012) 9-12, 10-3, 12-3, 13-3, 14-3, 15-3.
[611] Mazars South Africa "Estate Planning Guide 2018" (2018) https://www.mazars.co.za/content/download/934599/48660302/version//file/Mazars%20Estate%20Planning%20Guide%202018%20Digital.pdf (accessed 15 August 2022) 9.
[612] Mazars South Africa "Estate Planning Guide 2018" 6-8.

contracts will be considered, followed by a brief discussion of the clauses in antenuptial contracts that are used to choose a *lex causae*. As defined in chapter 4,[613] the *lex causae* is the proper law, or the law governing the substantive issues of a matter.[614] In terms of private international law, the proper law of a contract does not govern all aspects of the contract.[615] As mentioned in chapter 4,[616] certain aspects, including the parties' capacity and the contract's formal validity, must still be decided by an assigned law, which is decided by the choice-of-law rules of private international law.[617]

5.2.1. Registration of foreign or domestic antenuptial contracts

If a couple intends to marry in terms of a foreign law, they may require a legal practitioner to provide advice as to whether a domestic or foreign antenuptial contract should be registered in a deeds registry in South Africa. This section aims to provide guidance stemming from the common law when it may be advisable to register a domestic or foreign antenuptial contract. Notwithstanding this guidance, the unique circumstances of each couple, as well as developed practices of a deeds registry, should still be factored into the advice offered.

In the context of this section, the term 'foreign antenuptial contract' is intended to mean an antenuptial contract applying to a foreign marriage where the contract is prepared in terms of a foreign law. A 'domestic antenuptial contract' is intended to mean an antenuptial contract prepared in terms of domestic law, which similarly applies to a foreign marriage. In this context, the difference between the two relates to the legal system in terms of which the contract has been prepared, not the place of execution of the contract.

Prior to the introduction of the Deeds Registries Act[618] (the 'DRA') in 1937, the registration of a domestic or foreign antenuptial contract for a foreign marriage was seen in the common law to be unnecessary if the spouses' rights were already secured by the applicable foreign law.[619]

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[613] See chapter 4 § 4.3.1.
[614] *Sperling v Sperling* 1975 (3) SA 707 (A) 716G.
[615] CF Forsyth *Private International Law* 5 ed (2012) 316-317.
[616] See chapter 4 § 4.3.1.1.
[617] C Maxwell "Chapter 10: Obligations and Terms" in D Hutchison and C Pretorius (eds) *The Law of Contract in South Africa* (e-book) 3 ed (2017) 263; S Viejobueno "Private international law rules relating to the validity of international sales contracts" (1993) 26 *CILSA* 172 at 178.
[618] Act 47 of 1937.
[619] *Pollard and Pollard v Registrar of Deeds* 1903 TS 353 at 358.

In *Pollard and Pollard v Registrar of Deeds*[620] ('*Pollard*'), the spouses believed that they had been married in terms of English law, where the default matrimonial property regime was out of community of property.[621] They sought approval for the conclusion of a domestic contract, having the effect of an antenuptial contract, confirming that English law applied to their marriage.[622] The court refused to grant its approval as this would imply that the registration of an antenuptial contract is necessary when the spouses' proprietary rights have already been secured elsewhere.[623]

Despite this stance, a practice developed whereby spouses would register their foreign antenuptial contract in a deeds registry if a spouse either acquired domicile or immovable property in South Africa. For example, in *Ex Parte van Borselen et Uxor*,[624] a couple sought to have their Dutch antenuptial contract registered in South Africa after acquiring domestic domicile after their marriage.[625] The court stated that the registration of their foreign antenuptial contract was not required to recognise the spouses' proprietary rights unless the husband was domiciled in the Union at the time of the marriage, thereby resulting in the existence of a South African marriage.[626] The court, however, acknowledged the developed practice where foreign antenuptial contracts would be registered once the spouses had acquired domicile or immovable property in the Union.[627] As such, approval was granted.[628]

Additionally, the commencement of the DRA may have assisted with an increasingly lenient approach being taken by courts to the registration of foreign antenuptial contracts. This may have resulted because the DRA expressly allows for the registration of antenuptial contracts executed outside of South Africa.[629] This leniency can be illustrated in the 1945 case of *Ex Parte Thomson et Uxor*,[630] where the parties had concluded an antenuptial contract in Scotland and Scots law applied to their marriage.[631] The wife had been domiciled in South Africa.[632]

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[620] 1903 TS 353.
[621] *Pollard and Pollard v Registrar of Deeds* 1903 TS 353 at 356.
[622] *Pollard and Pollard v Registrar of Deeds* 1903 TS 353 at 354, 357.
[623] *Pollard and Pollard v Registrar of Deeds* 1903 TS 353 at 358.
[624] 1942 TPD 206.
[625] *Ex Parte van Borselen et Uxor* 1942 TPD 206 at 207-208.
[626] *Ex Parte van Borselen et Uxor* 1942 TPD 206 at 208.
[627] *Ex Parte van Borselen et Uxor* 1942 TPD 206 at 208.
[628] *Ex Parte van Borselen et Uxor* 1942 TPD 206 at 208.
[629] Section 87(2).
[630] 1946 CPD 134.
[631] *Ex Parte Thomson et Uxor* 1946 CPD 134 at 135.
[632] *Ex Parte Thomson et Uxor* 1946 CPD 134 at 135.

Shortly after the marriage, the husband moved to South Africa with the intention of settling indefinitely with his wife.[633] They attempted to register their foreign antenuptial contract in a deeds registry.[634] Registration was denied by the Registrar of Deeds due to the existence of their foreign marriage.[635] In their court application, the spouses asked for permission to register their contract in the deeds registry.[636] The court took into consideration that the DRA allowed for the registration of antenuptial contracts executed outside of South Africa and granted approval.[637]

In *Ex Parte Coutts*[638] ('*Coutts*'), the spouses were domiciled in South Africa but wished to be married in terms of the laws of England.[639] Both parties had been posted to England on military service from South Africa.[640] An English notary arranged an English antenuptial contract prior to their marriage and the marriage subsequently took place in England.[641] In their antenuptial contract, the spouses confirmed their domestic domicile but chose for English law to apply to their marriage.[642] Three years after the marriage, the husband was posted back to South Africa.[643] On receiving this posting, the spouses sought approval for the registration of a new, domestic antenuptial contract in the deeds registry, which was to be registered simultaneously with their foreign antenuptial contract.[644] Since the spouses' proprietary rights had already been secured via the foreign antenuptial contract, the court refused to grant permission for the registration of a domestic antenuptial contract, but approval was granted for the registration of the foreign antenuptial contract.[645]

In *Ex Parte Taylor et Uxor*,[646] the spouses married after concluding a Canadian antenuptial contract.[647] They were domiciled in Canada at the time of their marriage.[648] Shortly after the

[633] *Ex Parte Thomson et Uxor* 1946 CPD 134 at 135.
[634] *Ex Parte Thomson et Uxor* 1946 CPD 134 at 135.
[635] *Ex Parte Thomson et Uxor* 1946 CPD 134 at 135.
[636] *Ex Parte Thomson et Uxor* 1946 CPD 134 at 136.
[637] *Ex Parte Thomson et Uxor* 1946 CPD 134 at 136.
[638] 1944 EDL 234.
[639] *Ex Parte Coutts* 1944 EDL 234 at 235.
[640] *Ex Parte Coutts* 1944 EDL 234 at 238.
[641] *Ex Parte Coutts* 1944 EDL 234 at 235.
[642] *Ex Parte Coutts* 1944 EDL 234 at 235.
[643] *Ex Parte Coutts* 1944 EDL 234 at 238.
[644] *Ex Parte Coutts* 1944 EDL 234 at 235, 238.
[645] *Ex Parte Coutts* 1944 EDL 234 at 238.
[646] 1949 (2) SA 254 (C).
[647] *Ex Parte Taylor et Uxor* 1949 (2) SA 254 (C) 254.
[648] *Ex Parte Taylor et Uxor* 1949 (2) SA 254 (C) 254.

marriage, they moved to South Africa and became domiciled in the Cape Province.[649] At the time of their marriage, they did not register their foreign antenuptial contract in South Africa.[650] Later, when the wife bought immovable property, the deeds registry refused to recognise the effect of their foreign antenuptial contract.[651] The spouses accordingly sought approval for the registration of their foreign antenuptial contract.[652] The application was authorised by the court, provided that the rights of creditors remained unaffected.[653]

In summary, the registration of a domestic or foreign antenuptial contract is not seen to be necessary if the spouses' proprietary rights are already secured in the applicable foreign law. That being said, foreign antenuptial contracts can be registered in a deeds registry, and registration may be advisable depending on the circumstances. For example, registration may provide certainty to the spouses that their foreign proprietary rights are recognisable to third parties in South Africa. Unfortunately, *Pollard* is the only case discussed above where a domestic antenuptial contract alone was relevant and a strict approach was taken. Since *Pollard* pre-dates the DRA, it is likely that there would be leniency from deeds registries regarding the registration of domestic antenuptial contracts, even when the spouse's proprietary rights have been secured elsewhere.

5.2.2. Formal validity and proper law of an antenuptial contract

If a foreign antenuptial contract exists, it may be necessary to establish whether that contract is considered as formally valid in domestic law, for example, as may be required during the administration of the first-dying spouse's deceased estate.[654] The formal validity of a contract refers to the formalities that must be observed in the execution of a valid contract.[655] It may also be necessary to determine the proper law, or governing law, of the contract. In chapter 4,[656] the general approach to identify the proper law of a matter was considered. This section specifically discusses the formal validity and proper law of antenuptial contracts themselves.

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[649] *Ex Parte Taylor et Uxor* 1949 (2) SA 254 (C) 254.
[650] *Ex Parte Taylor et Uxor* 1949 (2) SA 254 (C) 254.
[651] *Ex Parte Taylor et Uxor* 1949 (2) SA 254 (C) 254.
[652] *Ex Parte Taylor et Uxor* 1949 (2) SA 254 (C) 254.
[653] *Ex Parte Taylor et Uxor* 1949 (2) SA 254 (C) 254.
[654] For example, as stated in chapter 2, a matrimonial property regime must be declared when reporting the deceased estate on a J294 form, known as a death notice form, as well as in the liquidation and distribution account in terms of regulation 5(1)(vi) of the Administration of Estates Act 66 of 1965.
[655] Forsyth *Private International Law* 305.
[656] See chapter 4 § 4.3.1.

As mentioned earlier, certain aspects, including the contract's formal validity, must still be decided by an assigned law decided by the choice-of-law rules.[657] To this end, *Ex Parte Spinazze and Another NNO*[658] ('*Spinazze*') is the leading authority for determining the formal validity and the proper law of an antenuptial contract in South Africa.

In *Spinazze*, the deceased, Mr Spinazze, had been domiciled in South Africa at the time of his marriage to his spouse, who survived him.[659] Before their marriage, she was domiciled in Italy hence the deceased travelled to Italy to marry her.[660] Before they married, they concluded an antenuptial contract without the involvement of a notary at a British vice-consul in Italy.[661] The contract's format was the standard type available for purchase at stationary shops in South Africa.[662]

Following the marriage, the couple travelled to South Africa and established their matrimonial home.[663] They arranged for their antenuptial contract to be registered in a deeds registry, which duly occurred.[664] During the later administration of Mr Spinazze's deceased estate, conflicting opinions arose as to the validity of the antenuptial contract and, consequently, whether the couple had been married in or out of community of property.[665] The antenuptial contract did not comply with Italy's formal requirements for antenuptial contracts and, accordingly, would be void *ab initio* if judged in terms of Italian law, thereby having no legal effect between the spouses nor against third parties.[666] If judged in terms of domestic law, the antenuptial contract would be valid between the spouses but it would need to comply with section 87(2) of the DRA to be valid against third parties.[667] Section 87(2) of the DRA states that an antenuptial contract executed outside of South Africa will be valid if it has either been executed in front of a notary, or if it complies with the formal requirements of the *lex loci contractus*, being the place of the

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[657] Maxwell *The Law of Contract* 263.
[658] 1985 (3) SA 650 (A).
[659] *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 653G.
[660] *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 653G.
[661] *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 653H-I, 655J.
[662] *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 653I.
[663] *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 653I.
[664] *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 653I.
[665] *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 654E.
[666] *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 655I.
[667] *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 658C.

contract's execution.[668] It was accepted that the contract did not satisfy either of these prerequisites and had been erroneously registered in the deeds registry.[669]

In deciding whether an antenuptial contract should only be valid if it complies with the *lex loci contractus*, the court considered the private international law rules of general contracts executed outside of South Africa.[670] The court found that there was no precedent requiring that an antenuptial contract must be tested by the *lex loci contractus* only.[671] The court found that some Roman-Dutch writers adopted a facultative approach, meaning that the formal validity of a contract could be tested by alternative systems of law to the *lex loci contractus*.[672] Voet, for instance, applied the facultative approach to both contracts and wills.[673]

The court adopted the facultative approach for the formal validity of antenuptial contracts and indicated *obiter* that this approach should apply generally to the formal validity of contracts.[674] The court viewed the facultative approach as being in conformity with modern jurisprudence in other western legal systems.[675] Moreover, this approach would meet the reasonable expectations of parties who conclude a contract in a country to which they are unconnected.[676]

Since the facultative approach was adopted, the court could use the proper law as an alternative to the *lex loci contractus* for determining the formal validity of the contract.[677] The court found that a tacit choice of domestic law had been made in the contract, alternatively that domestic law was the legal system of the closest and most real connection to the parties.[678] The law of

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[668] Forsyth *Private International Law* lxvi.
[669] *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 658G.
[670] *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 659C, 660A.
[671] *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 661G.
[672] *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 660E.
[673] *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 660F-G.
[674] *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 665A-E.
[675] *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 665B.
[676] *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 665C.
[677] *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 665B. It is noted that the Appellate Division adopted a different test in *Standard Bank of South Africa Ltd v Efroiken* 1924 AD 171 at 185. In this case, the court approved of the assigned law being the law presumed to have been the parties' intention based on the subject matter and the surrounding circumstances of the contract – see 185. Forsyth states that South African courts have been reluctant to follow this test and approve of *Spinazze*'s approach instead – see Forsyth *Private International Law* 330.
[678] *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 665G-H. Forsyth has criticised this aspect of *Spinazze* for confusing a tacit choice of law with an assigned law. The latter occurs when an express or tacit choice has not been made, hence a law must be assigned – see Forsyth *Private International Law* 326. It is submitted that the wording used by *Spinazze* does not necessarily mean that the court confused a tacit choice with an assigned law.

South Africa was therefore found to be the proper law of the contract.[679] In coming to this conclusion, the court took into account the following circumstances: the standardised form of the contract, which was common in South Africa; the spouses' intention was to avoid entering into a marriage in community of property, which was not available in Italian law; the deceased was domiciled in South Africa; and the spouses intended to create a matrimonial home in South Africa after the marriage.[680] By applying domestic law, the antenuptial contract was found to be valid between the spouses, but having no effect on third parties due to its erroneous registration.[681]

Spinazze illustrates that an antenuptial contract will be formally valid if it complies with the requirements of the *lex loci contractus*, alternatively, the proper law. Moreover, the proper law can be chosen via either an express or tacit clause, failing both, the law of the closest and most real connection to the parties. It is noted that, as confirmed in *Frankel's Estate & Another v the Master & Another*,[682] if the spouses agree to move to a different country after their marriage, this agreement will not equate to a tacit clause.[683]

In the subsequent case of *Creutzburg and Another v Commercial Bank of Namibia Ltd*,[684] the Supreme Court of Appeal, in an *obiter*, seemed to approve of the adoption of the facultative approach in *Spinazze*.[685] Furthermore, the court appeared to approve of the adoption of the facultative approach for contracts generally.[686] This will be considered later under postnuptial contracts.

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[679] *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 665E.
[680] *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 665F-HG.
[681] *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 666B-C.
[682] 1950 (1) SA 220 (A).
[683] *Frankel's Estate & Another v the Master & Another* 1950 (1) SA 220 (A) 237.
[684] (2006) 4 All SA 327 (SCA).
[685] *Creutzburg and Another v Commercial Bank of Namibia Ltd* (2006) 4 All SA 327 (SCA) para 10.
[686] *Creutzburg and Another v Commercial Bank of Namibia Ltd* (2006) 4 All SA 327 (SCA) para 10. This would be subject to the requirements of any South African legislation for specific types of contracts, such as the legislative requirements for contracts of sale of immovable property – see RJ Morgan-Smith *The validity of choice of law clauses in online contracts* (LLM minor thesis, University of Johannesburg, 2018) 8.

5.2.3. Governing-law clauses in antenuptial contracts

As can be seen in *Coutts,* it is permissible for intended spouses to choose in their antenuptial contract for a legal system to apply to their marriage.[687] This is in line with the *lex domicilii matrimonii* principle itself, which establishes that the law of the husband's domicile at the time of a marriage will apply unless the spouses have contracted otherwise.[688] In terms of *Spinazze*, this choice can be made either expressly or tacitly.

In terms of contract law generally, a term setting out the proper law is known as a governing-law clause.[689] These types of clauses are regularly found in commercial contracts.[690] Authors often refer to these clauses as a 'choice-of-law clause'[691] or a variation thereof. This terminology will be avoided in this chapter since it may lead to confusion when discussing the nuances between the choice-of-law process, the choice-of-law rules, and contractual clauses setting out a choice of law. The term 'governing-law clause' is therefore preferred in this context for the latter.

Forsyth states that the choice-of-law rules for the essential validity of governing-law clauses in antenuptial contracts are not decided by the chosen proper law.[692] In other words, there is an assigned law. The rule is that the *lex domicilii matrimonii* decides whether an antenuptial contract itself, as well as the governing-law clause, is essentially valid for movables.[693] For immovables, the *lex situs* determines the essential validity of an antenuptial contract and the governing-law clause.[694] The concept of party autonomy is, therefore, rejected for the essential validity of both antenuptial contracts and governing-law clauses since the law chosen by the parties does not supersede these choice-of-law rules.[695] Forsyth suggests that one unitary rule for both movables and immovables is advisable,[696] which is supported.

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687 *Ex Parte Coutts* 1944 EDL 234 at 236.

688 *Frankel's Estate & Another v the Master & Another* 1950 (1) SA 220 (A) 244. This ancient rule appears to stem from the induction of a newlywed wife into the house of her husband, thereby resulting in the marriage being perfected at the place of the husband's domicile – see 245.

689 Maxwell *The Law of Contract* 263.

690 Maxwell *The Law of Contract* 263.

691 See for example: Forsyth *Private International Law* 304; C Roodt "Conflict of Law(s) and Autonomy in Antenuptial Agreements (1)" (2006) 69 *THRHR* 215 at 215.

692 Forsyth *Private International Law* 304.

693 Forsyth *Private International Law* 303-304.

694 Forsyth *Private International Law* 304.

695 Forsyth *Private International Law* 304.

696 Forsyth *Private International Law* 304.

Based on *Spinazze* and *Coutts*, if domestic law is the *lex domicilii matrimonii* or the *lex situs*, a governing-law clause, on the face of it, can be used in an antenuptial contract. Regarding the scope of the choice of law itself, *Coutts* did not mention any limitations placed on that choice. This may be because the spouse's close connection to English law did not cause this issue to be raised. The following question is therefore left open: are spouses entitled to choose a legal system to which they are not closely connected at the time of their marriage? Unfortunately, there is no clear answer in legislation or the common law.

Roodt states that marriages are not commercial contracts and parties do not have unlimited autonomy to choose a proper law.[697] Moreover, Roodt asserts that antenuptial contracts are heavily legislated and the "legislative framework is unlikely to allow parties much freedom to settle or determine the full contents of their antenuptial agreement".[698] It is submitted that the Matrimonial Property Act[699] (the 'MPA') does allow parties the freedom to regulate the subtleties of their contract, albeit in the framework of listed matrimonial property regimes. In any event, since the default regime is in community of property, this regime has to be heavily regulated because the parties would not have agreed upon a regime. The scope for variation in the remaining two regimes is, however, wide. That being said, as marriages usually last for an extended period of time, it would be sensible to require that there must be at least some connection between the spouses and their chosen proper law. That being said, overly narrow limitations should be avoided, especially in the context of unprecedented levels of global migration which are predicted to continue rising.[700] Schoeman, similarly to Roodt, supports narrow limitations on a choice of proper law as it would mitigate the risk of a court striking down the governing-law clause.[701] It is submitted that mitigation of such a risk is not a sufficient reason to support narrow limitations.

[697] C Roodt "Conflict of Law(s) and Autonomy in Antenuptial Agreements (3)" (2006) 69 *THRHR* 546 at 547.
[698] Roodt 2006 *THRHR* 547.
[699] Act 88 of 1984.
[700] P Kok, D Gelderblom and J van Zyl "Introduction" in P Kok *et al* (ed) *Migration in South and southern Africa: Dynamics and determinants* (2006) 2.
[701] E Schoeman "The South African conflict rule for proprietary consequences of a marriage: learning from the German experience" (2004) 1 *TSAR* 115 at 133.

It is noted that South Africa is not a contracting party[702] to the Hague Convention on the Law Applicable to Matrimonial Property Regimes,[703] which sets out limitations on a choice of proper law. In terms of article 3 of the Convention, spouses could choose one of the following laws to apply: the law of either spouse's nationality; the law of either spouse's habitual residence; or the law of the first, new habitual residence of either spouse after the marriage. Since South Africa is not a contracting party, these options do not apply. Rather, they give insight as to what the potential limitations on governing clauses in antenuptial contracts could be. It is recommended that the limitations placed on a choice of law need to be addressed by the legislature.

5.3. Postnuptial contracts

If domestic law applies to a marriage and the spouses wish to change their marital property regime, the remedy is simple: they can make use of section 21(1)[704] of the MPA provided that its requirements are satisfied. The question contemplated in this second part of the chapter, postnuptial contracts, is whether section 21(1) is available as a legislative remedy to spouses married in terms of foreign law and, if so, whether any circumstances may be required for its use. Thereafter, the common-law approach to postnuptial contracts of foreign marriages will be considered to assess whether there is a common-law remedy available if section 21(1) does not apply to foreign marriages. During the examination of the common-law position, the immutability principle and the now-repealed prohibition of spousal donations will be discussed, followed by an analysis of governing-law clauses in postnuptial contracts.

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[702] Hague Conference on Private International Law "Member: South Africa" https://www.hcch.net/en/states/hcch-members/details1/?sid=68 (accessed 15 July 2022).

[703] Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes [available at: Hague Conference on Private International Law "25: Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes" https://www.hcch.net/en/instruments/conventions/full-text/?cid=87 (accessed 15 July 2022)].

[704] As discussed in chapter 2 § 2.3, section 21(1) states the following:

> "A husband and wife, whether married before or after the commencement of this Act, may jointly apply to a court for leave to change the matrimonial property system, including the marital power, which applies to their marriage, and the court may, if satisfied that –
> (a) there are sound reasons for the proposed change;
> (b) sufficient notice of the proposed change has been given to all the creditors of the spouses; and
> (c) no other person will be prejudiced by the proposed change,
> order that such matrimonial property system shall no longer apply to their marriage and authorize (sic) them to enter into a notarial contract by which their future matrimonial property system is regulated on such conditions as the court may think fit."

5.3.1. Immutability

Before discussing section 21(1) and the common-law position, it is necessary to understand the immutability principle since this principle is closely linked to postnuptial contracts. The immutability principle essentially means that either the applicable legal system or the matrimonial property regime cannot be changed during the marriage, regardless of any change in the spouses' domicile.[705] This is known as a once-and-for-all rule.[706]

The immutability principle can operate at an internal or international level.[707] The inability to change a matrimonial property regime would be the immutability principle operating at an internal level.[708] Prior to the MPA, there was complete immutability at the internal level since no change of matrimonial property regime was possible.[709] Section 21(1) relaxed the immutability principle since a postnuptial change of a matrimonial property regime was thereafter permitted.[710] If immutability operates at the level of private international law, or the international level, it means that spouses are not entitled to change the legal system applicable to their marriage.[711] For instance, the spouses may be able to change their matrimonial property regime via a postnuptial contract at the internal level but they would not be able to change the applicable legal system for a different one.[712]

Immutability was intended to be advantageous because it prohibited a postnuptial change that could disadvantage a spouse's proprietary position.[713] Since postnuptial changes in terms of section 21(1) require the joint consent of spouses and the postnuptial change is usually advantageous, this reason for immutability appears to be misplaced. Moreover, in the scenario where a spouse is disadvantaged, there is an existing remedy available, being *fraus legis* or fraudulent evasion of law.[714]

[705] *Brown v Brown* 1921 AD 478 at 482; H Silberberg "The determination of matrimonial property rights and the doctrine of immutability in the conflict of laws" (1973) 6 *CILSA* 323 at 350.
[706] Silberberg 1973 *CILSA* 325.
[707] Forsyth *Private International Law* 299.
[708] Forsyth *Private International Law* 299.
[709] Forsyth *Private International Law* 299.
[710] J Heaton and H Kruger *South African Family Law* 4 ed (2015) 105.
[711] Forsyth *Private International Law* 299.
[712] Forsyth *Private International Law* 299.
[713] Forsyth *Private International Law* 298.
[714] Forsyth *Private International Law* 298.

5.3.2. A potential legislative remedy: section 21(1) of the Matrimonial Property Act

Since the immutability principle has now been examined, the potential application of section 21(1) to foreign marriages can be discussed. As stated in chapter 2,[715] there is no express wording in section 21(1) confirming whether it applies to a foreign marriage. Indeed, there is no reference to foreign marriages in the MPA except for section 29, which has no impact on the content of the MPA itself. In chapter 2,[716] it was mentioned that the purpose of section 29 is to provide a new section for substitution into the DRA. Moreover, no domestic court has decided on the application of section 21(1) to a foreign marriage. There are, however, two o*biters* occurring separately in *Ex Parte Senekal et Uxor*[717] ('*Senekal*') and *Esterhuizen v Esterhuizen*[718] ('*Esterhuizen*') that offer insight into the potential approach of a court when deciding the question. These cases will be considered, followed by the submissions of various authors on the question.

5.3.3. The common law

In the *obiter* in *Senekal*, the court stated that there is a need for fairness in postnuptial situations, regardless of which law applies to a marriage.[719] The court found that there is no indication in the MPA suggesting that it is unavailable for amending the matrimonial property regimes of foreign marriages.[720] Nor did the court view a potential conflict of law as a sufficient reason to limit the availability of the MPA to foreign marriages as there are foreign laws that allow postnuptial changes.[721] Furthermore, the court stated that domestic courts already have jurisdiction over the proprietary consequences of foreign marriages in the event of divorce.[722] This can be compared to section 21(1) which gives a court the power to amend the proprietary consequences of a relationship domestically.[723] The court provided an example of the circumstances in which section 21(1) should, at the very least, apply.[724] These circumstances are when spouses are domiciled in South Africa, possess South African citizenship, and the

[715] See chapter 2 § 2.3.
[716] See chapter 2 § 2.3.
[717] 1989 (1) SA 38 (T).
[718] 1999 (1) SA 492 (C).
[719] *Ex Parte Senekal et Uxor* 1989 (1) SA 38 (T) 39E-G.
[720] *Ex Parte Senekal et Uxor* 1989 (1) SA 38 (T) 39G-40A.
[721] *Ex Parte Senekal et Uxor* 1989 (1) SA 38 (T) 39G-40A.
[722] *Ex Parte Senekal et Uxor* 1989 (1) SA 38 (T) 40B.
[723] *Ex Parte Senekal et Uxor* 1989 (1) SA 38 (T) 40D.
[724] *Ex Parte Senekal et Uxor* 1989 (1) SA 38 (T) 40C-D.

change of matrimonial property regime will have domestic application only.[725] This *obiter* can be used as support for the availability of section 21(1) to foreign marriages where the spouses are citizens of, and domiciled in, South Africa.

The *obiter* in *Esterhuizen*, which followed *Senekal*, points to the opposite conclusion, namely that the MPA is only available to domestic marriages. *Esterhuizen* was not commenting on the application of section 21(1) in particular; rather, the general application of the MPA was being discussed. The *obiter* in *Esterhuizen* was as follows:

> "It seems clear that the legislation introduced by the Matrimonial Property Act 88 of 1984 was intended to deal with local marriages concluded in circumstances where the domicile of the husband at the time of the marriage was in South Africa."[726]

According to *Esterhuizen*, the MPA should, therefore, only apply to a marriage if the *lex domicilii matrimonii* principle points to the application of domestic law. In this regard, the *obiter* contains a small oversight. The *lex domicilii matrimonii* principle expressly authorises spouses to choose a proper law to apply, which does not appear to have been considered in the *obiter*. Moreover, *Esterhuizen* did not confirm the circumstances that led to its conclusion regarding the non-application of the MPA. Perhaps the court was moved to this conclusion by the legislature's choice of wording, since foreign marriages are not expressly included in the MPA. Additionally, it could have been based on the common-law presumption of statutory interpretation that legislation does not intend to modify existing common law and international comity more than is necessary.[727]

If the above were reasons, it can be argued that courts have a constitutional duty to interpret legislation in a way that promotes the spirit, object, and purport of the Bill of Rights, including human dignity, equality, and freedom.[728] This duty takes precedence over a common-law statutory presumption.[729] Furthermore, everyone has a constitutional right to equal protection from, and benefit under, the law and legislation cannot be unfairly discriminatory.[730] The

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[725] *Ex Parte Senekal et Uxor* 1989 (1) SA 38 (T) 40C-D.
[726] *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C) 500A.
[727] *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C) 500H-I.
[728] Section 39(1)-(2) of the Constitution of the Republic of South Africa, 1996.
[729] Section 2 of the Constitution.
[730] Section 9(1) and 9(3) of the Constitution.

Promotion of Equality and Prevention of Unequal Discrimination Act[731] (the 'Equality Act') gives effect to section 9 of the Constitution of the Republic of South Africa, 1996, to prevent unfair discrimination.[732]

In terms of the Equality Act, 'discrimination' is defined *inter alia* as any law or rule that directly or indirectly imposes burdens, obligations, or a disadvantage on any person, or withholds any benefit, opportunity, or advantage from any person based on a prohibited ground.[733] A 'prohibited ground' is widely defined as including any ground where discrimination causes or perpetuates systemic advantage, undermines human dignity, or seriously affects the equal enjoyment of a person's rights and freedoms.[734] It is submitted that both these definitions would be met if section 21(1) is not applicable to foreign marriages, thereby confirming discrimination. This is because a benefit is being withheld, namely the inability to change a matrimonial property regime postnuptially, which gives a systemic advantage to non-foreign marriages over foreign marriages, and seriously affects spouses in foreign marriages from being able to arrange their affairs. Furthermore, it is noted that the *status quo* stems from an allegedly unconstitutional rule, which gives rise to an allegedly unconstitutional result.

In terms of the Equality Act, the discrimination would still need to be unfair based on factors listed in section 14(2)-(3). These include whether the discrimination has a legitimate purpose and whether there are less restrictive and less disadvantageous means to achieve that purpose.[735] It is submitted that there is no rational connection between the discrimination and a legitimate government purpose, and legislative provisions[736] could be put in place to address any adverse consequences resulting from the remedy being accessible.[737] In light thereof, prohibiting spouses in a foreign marriage from accessing a remedy available to other citizens would be unfairly discriminatory and deny these spouses their right to equal benefit under the law.

[731] Act 4 of 2000.
[732] Preamble of the Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act).
[733] Section 1.
[734] Section 1 of the Equality Act.
[735] Sections 14(3)(f) and 14(3)(h).
[736] See chapter 7 § 7.7 for a discussion of suggested legislative provisions.
[737] Section 6 read with section 14(2)-(3) of the Equality Act.

In addition, when there is no clear authority on a point, it would be proper to consider a result that favours justice and convenience, in addition to public policy.[738] There is no wording in section 21(1) preventing its application to foreign marriages, even if other sections of the MPA would not apply. Indeed, it would be unremarkable that specific sections of the MPA do not apply, as certain parts of the MPA already do not apply to some domestic marriages depending on the applicable marital property regime.

5.3.3.1. Submissions by writers

Similar to the differing views in the *obiters* discussed above, writers have expressed varying opinions as to the application of section 21(1) to foreign marriages. The submissions of Thomashausen, van Loggerenberg, Sinclair, Schulze, and Forsyth will be examined.

In an article published prior to *Senekal,* Thomashausen submitted that section 21(1) should be available for foreign marriages, even if the foreign law does not permits the change.[739] Thomashausen's conclusion was based on the abolition of the prohibition of spousal donations, which will be discussed below. Thomashausen submitted that because spousal donations are now lawful, the MPA can apply to foreign marriages.[740] Thomashausen further submitted that spouses in a foreign marriage should not be denied the proprietary rights available to them in the applicable foreign law, even if they are only temporarily resident in South Africa.[741] As such, Thomashausen advocates for postnuptial changes to be allowed, including for temporary residents.

Based on *Senekal*, Sinclair argued that section 21(1) applies to foreign marriages provided that postnuptial changes are allowed by the foreign law.[742] Schulze similarly supports the application of section 21(1) to foreign marriages.[743] Schulze submits that no harm will be done

[738] *Sperling v Sperling* 1975 (3) SA 707 (A) 722E.
[739] AEAM Thomashausen "The Matrimonial Property Act 1984: Some New Aspects for Marriages Out of Community and Marriages Governed by Foreign Law" (1985) *De Rebus* 167 at 168.
[740] Thomashausen 1985 *De Rebus* 169. Spousal donations are permitted in terms of section 22 of the Matrimonial Property Act. If this Act does not apply to foreign marriages, spousal donations are permissible for domestic residents by virtue of section 56(1)(a) of the Income Tax Act 58 of 1962.
[741] AEAM Thomashausen "Some problems in the application of South African private international law" (1984) 17 *CILSA* 78 at 85.
[742] J Sinclair "Marriage" in Boberg *et al* (ed) *Boberg's Law of Persons and the Family* 2 ed (1999) 184.
[743] C Schulze "Conflict of Laws" in J Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships* (2014) 650.

due to the section's requirements.[744] Furthermore, the purpose of the section would be fulfilled and it would allow spouses to arrange their proprietary rights sufficiently.[745]

Van Loggerenberg submitted that the legislature intended section 21(1) to apply to the marriages of all persons domiciled in South Africa, except to the extent that section 21(2) expressly regulates otherwise.[746] Accordingly, van Loggerenberg also focuses on domicile as a prerequisite to use section 21(1), rather than a combination of domicile and nationality.

Van Loggerenberg argued that the ordinary, grammatical meaning of section 21(1) allows for its application to foreign marriages[747] based on the following statement by *Standard Merchant Bank Ltd v Gordon*:

> "… if, on a proper construction of the language used in the statute, it is clear that the Legislature intended to alter the common law, full effect will be given to that intention, despite the absence of an express term."[748]

Van Loggerenberg states that, on the introduction of section 21(1), there was a clear change of the common law applicable to all marriages, therefore full effect should be given to this intention, and the requirements of section 21(1) plus the concept of public policy provide an adequate safeguard.[749] Van Loggerenberg argues that if a foreign law allows for a completely different legal system to be chosen in a postnuptial contract, the spouses should be allowed to elect for domestic law to apply to their marriages, thereby allowing the choice of a domestic matrimonial property regime.[750] Furthermore, van Loggerenberg submits that even if the foreign law does not permit a change of matrimonial property regime, the contract should still be valid on the basis of domestic public policy.[751]

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[744] Schulze *Law of Divorce* 650.
[745] Schulze *Law of Divorce* 650.
[746] C van Loggerenberg "Changing the Matrimonial Property Regime in the Case of Spouses Married Under a Foreign Domiciliary Law" (1987) *Obiter* 111 at 115.
[747] Van Loggerenberg 1987 *Obiter* 115.
[748] 1980 (4) SA 637 (C) 643A.
[749] Van Loggerenberg 1987 *Obiter* 115.
[750] Van Loggerenberg 1987 *Obiter* 114.
[751] Van Loggerenberg 1987 *Obiter* 113.

Forsyth supports the application of section 21(1) to foreign marriages.[752] Forsyth submits that even if a foreign law does not allow for a postnuptial change, the change should still be permitted if the spouses are domiciled in South Africa and all their property is located in South Africa.[753] Forsyth, therefore, similarly does not appear to support an additional prerequisite of citizenship to be able to use section 21(1). Forsyth states that a court's approval would only apply with domestic effect since a court's authority is territorially limited.[754] Forsyth submits that no harm could result from such approval for three main reasons: first, both spouses need to consent to the application; second, a court would not give its approval if any third party was prejudiced; and, third, public policy would be an ultimate check.[755]

Based on Thomashausen, van Loggerenberg, Sinclair, Forsyth, Schulze, and *Senekal*, it can be concluded that section 21(1) is likely to be available to spouses in a foreign marriage. It is submitted that *Esterhuizen* is not satisfactory support for finding against the application of section 21(1) to foreign marriages. If this position is accepted, spouses in a foreign marriage should be able to change their matrimonial property regime with domestic effect only, provided that they have a domestic domicile, at the very least.

5.3.3.1. The common-law approach to postnuptial contracts

If section 21(1) would not be available to foreign marriages, an examination of the common law is worthwhile to assess whether there may be a common-law remedy available to use as an alternative.

The common-law approach to postnuptial contracts was largely informed by cases dating from the early to mid-1900s during the existence of the Union of South Africa.[756] At that time, the Union was comprised of four colonies, namely the Cape Colony, Orange Free State, Natal and Transvaal,[757] where each colony was considered to be a separate legal jurisdiction.[758]

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[752] Forsyth *Private International Law* 299.
[753] Forsyth *Private International Law* 299.
[754] Forsyth *Private International Law* 169. In terms of the common law, a court of the domicile or residence of both spouses is competent to make a declaration regarding the spouses' matrimonial property rights. If extra-jurisdictional immovable property is affected, only the *forum rei sitae* is likely to be competent. Forsyth, however, proposes that the *forum rei sitae* should have additional competence – see Forsyth *Private International Law* 261.
[755] Forsyth *Private International Law* 299-300.
[756] S Leacock "The Union of South Africa" (1910) 4 *The American Political Science Review* 498 at 498.
[757] Leacock 1910 *The American Political Science Review* 498.
[758] *Ex Parte Evans Et Uxor* 1943 OPD 7 at 14.

The common law followed the approach that a postnuptial change of matrimonial property regime for a foreign marriage will only be permitted if the *lex domicilii* at the time of execution of the postnuptial contract allows for the change.[759] In other words, domestic law must allow for postnuptial changes, regardless of the foreign law's position. With the exception of Natal, all the colonies of the Union prohibited postnuptial changes to a matrimonial property regime, unless a deed of separation had either been approved by a court, or was capable of being approved.[760] Spouses domiciled in Natal were permitted to enter into postnuptial contracts until this right was revoked in 1956.[761] Prior to 1956, if the postnuptial contract was concluded by spouses whilst domiciled in Natal, it would be valid in the remaining colonies.[762] The difficulty arose when the spouses changed their domicile from Natal to a different colony, but wished to execute a postnuptial contract in terms of Natal law.[763] Due to the separate jurisdictions of the colonies, the cases that dealt with the conflicts of law between Natal and the remaining colonies are helpful to establish the current position of the common law in relation to foreign marriages.[764]

5.3.3.2. The common-law position in respect of postnuptial contracts

One of the most influential cases for the recognition of foreign postnuptial contracts is the 1916 case of *Union Government (Minister of Finance) v Larkan*[765] ('*Larkan*'). This is due to three main reasons. First, *Larkan* approved of a rule determining the recognition of foreign postnuptial contracts. Second, it provided the underlying reason for that rule. Third, it approved of a further rule concerning whether domestic courts are entitled to decide on the validity of a foreign postnuptial contract.

The facts of *Larkan* are briefly as follows. The spouses were married in community of property according to Natal law in 1894.[766] They were domiciled in Natal at the time of their marriage

[759] Forsyth *Private International Law* 299. Forsyth states that *Brown v Brown* 1921 AD 478 is the only case against the *lex domicilii*. This case was, however, concerned with the interpretation of legislation in Natal, particularly the legislation's application to foreign marriages, and it could, as a result, be distinguishable.
[760] This exception was based on the premise that when parties could no longer cohabit with each other, courts could give effect to the new arrangement agreed between them. See *Danovich v Danovich's Executors* 1919 TPD 198 at 212.
[761] Silberberg 1973 *CILSA* 348.
[762] Silberberg 1973 *CILSA* 349.
[763] Silberberg 1973 *CILSA* 349.
[764] Silberberg 1973 *CILSA* 349.
[765] 1916 AD 212.
[766] *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 226.

and their marriage was governed by Natal law.[767] A few years after their marriage, they moved to the Cape Colony and remained there until the husband's death in 1906.[768] Prior to the husband's death and whilst domiciled in the Cape Colony, the spouses executed a postnuptial contract amending their matrimonial property regime to exclude community of property under Natal law.[769] The contract was thereafter validly registered in a deeds registry in Natal.[770] When the deceased died, the surviving spouse inherited a number of farms from her late husband.[771] The surviving spouse contended that the postnuptial contract was inconsistent with Cape law, resulting in a marriage in community of property.[772] A marriage in community of property would result in no transfer duty being payable when the farms were transferred into the surviving spouse's name.[773]

The issue in *Larkan* was essentially whether the postnuptial contract was valid in terms of Cape law due to the spouses' domicile in the Cape at the time of the contract, even though it was valid in terms of Natal law.[774] The issue therefore revolved around the spouses not having domicile in Natal at the time of executing the postnuptial contract.

In relation to the first rule, being the recognition of postnuptial contracts, Innes CJ stated the following:

> "Apart from statute, then, community once excluded cannot be introduced, and once introduced, cannot be excluded, nor can an ante-nuptial contract be varied by a post-nuptial agreement between the spouses, even if confirmed by the death of one of them. The only exception to the rule is afforded by an underhand deed of separation either ratified or entitled at the time to ratification under a decree of judicial separation."[775]

In essence, this first rule prohibits a postnuptial change of a matrimonial property regime unless there is a legislative right to do so. This rule has been repeated with approval in various

[767] *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 218.
[768] *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 218.
[769] *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 218.
[770] *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 218.
[771] *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 219.
[772] *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 220.
[773] *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 218.
[774] *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 220.
[775] *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 244.

subsequent cases,[776] including as recently as 1991.[777] In terms of the quote above, an exception to this rule is a deed of separation that is either already approved, or capable of being approved, by a court. Since the commencement of the Divorce Act[778] in 1979, courts are no longer permitted to authorise judicial separations[779] hence this exception is no longer relevant.

As to the second finding, being the reason underlying the rule prohibiting postnuptial contracts, Innes CJ stated:

> "Speaking generally, the termination by agreement of an existing community, and the relegation of the spouses to their rights dehors that relationship, must involve a gift by one of them to the other. The case where each has contributed an exact half of the joint estate, though possible, is so improbable, that for practical purposes the rule may be regarded as of universal application."[780]

The reason for a prohibition of postnuptial contracts is, therefore, that the termination of a joint estate would result in a spousal donation. According to Innes CJ, this reason could be universally applied because it was too improbable for each spouse to contribute half of the joint estate. Similarly to the first rule, this reason has been repeated with approval in later cases.[781]

This reasoning is flawed. At the termination of a joint estate, the spouses' shares in the ownership of their assets remain unchanged; neither gives any share nor any asset to the other.[782] Rather, as has been recently confirmed by the Supreme Court of Appeal in *Municipal Employees Pension Fund and Others v Chrisal Investments (Pty) Ltd and Others*,[783] the type of ownership governing the relationship changes as there would no longer be automatic tied co-ownership in undivided shares. As such, there is a change in the legal relationship between the spouses, not a change in their ownership shares.[784] The termination of a joint estate would

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[776] See, for example: *Till v Registrar of Deeds* 1949 (3) SA 532 (C) at 534, *Ex Parte du Toit and Another* 1953 (4) SA 130 (O) at 132B-D, *Edelstein v Edelstein NO and Others* 1952 (3) SA 1 (A) 15G-H, and *Honey v Honey* 1992 (3) SA 609 (W) 611B-D.
[777] *Honey v Honey* 1992 (3) SA 609 (W) 611B-D.
[778] Act 70 of 1979.
[779] Section 14 of the Divorce Act 70 of 1979.
[780] *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 220.
[781] *Coulthard v Coulthard* 1922 WLD 13 at 16; *Ex Parte Marx et Uxor* (2) 1936 CPD 502; *Ex Parte Venter Et Uxor* 1948 (2) SA 175 (O) 179.
[782] Silberberg 1973 *CILSA* 360.
[783] 2022 (1) SA 137 (SCA) para 22.
[784] *Municipal Employees Pension Fund and Others v Chrisal Investments (Pty) Ltd and Others* 2022 (1) SA 137 (SCA) para 20.

consequently not result in a spousal donation. Nor is it very improbable, at least in modern times, that each spouse could contribute half of the joint estate.

This interpretation accords with Silberberg's submissions, who expands on it further.[785] Silberberg argues that when a joint estate is terminated, each spouse is simply renouncing a contingent future right to one-half of an unknown asset which is incapable of being defined at the time of being renounced.[786] Since it is impossible to define the subject matter or value of this contingent future right, the right cannot be a donation.[787] Furthermore, Silberberg states that it is a requirement of a donation that the donor's motive must only be either sheer liberality or disinterested benevolence.[788] This requirement has been recently confirmed by the Supreme Court of Appeal.[789] Sheer liberality or disinterested benevolence will rarely be the only motive present in the termination of a joint estate; in fact, it may not be present at all.[790] This serves as a further ground illustrating that a donation cannot be a sufficient reason for the prohibition of spousal donations.

Moreover, Sonnekus states that it is incorrect to hold that spousal donations were completely prohibited in the common law.[791] Rather, spousal donations were seen as being volatile until the death of the donor.[792] Sonnekus' view is supported, for example, by a passage from Voet which states that a spousal donation exceeding 500 *aurei*[793] will only "hold good" if either registered or confirmed by a will.[794] Additionally, in *van Blerck v van Blerck*,[795] the court differentiated between prohibited spousal donations and 'gifts of affection' based on a passage by Voet, and confirmed that the latter was permitted.[796] Spousal donations were, therefore, never completely prohibited.

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785 Silberberg 1973 *CILSA* 360.
786 Silberberg 1973 *CILSA* 360.
787 Silberberg 1973 *CILSA* 360-361.
788 Silberberg 1973 *CILSA* 360; *Commissioner for Inland Revenue v Estate Hulett* 1990 (2) All SA 220 (A) 221.
789 *B v B* (820/2021) [2022] ZASCA 123 (22 September 2022) para 8.
790 Silberberg 1973 *CILSA* 360.
791 JC Sonnekus "Onderhandse wysiging van huweliksvoorwaardekontrak onaanvaarbaar" (1992) *TSAR* 683 at 686.
792 Sonnekus 1992 *TSAR* 685-686.
793 *Aurei* are gold coins of Ancient Rome – see Merriam-Webster "aureus" https://www.merriam-webster.com/dictionary/aureus (accessed 10 July 2022).
794 *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 231.
795 1972 (2) SA 799 (C).
796 *Van Blerck v van Blerck* 1972 (2) SA 799 (C) 803C.

Based on the above, a prohibition against spousal donations is not an adequate reason for a prohibition of postnuptial contracts. Given the inadequacy of the reason provided by Innes CJ, various subsequent cases and writers have proposed alternative reasons. These reasons will be considered later in this chapter to examine the modern relevance of the rule prohibiting postnuptial contracts.

Regarding *Larkan's* third feature, *Larkan* established that when spouses acquire domestic domicile and thereafter conclude a postnuptial contract, domestic courts are entitled to decide on the validity of that postnuptial contract.[797] *Larkan* left open whether this rule was based on domestic law being the *lex domicilii* or the *lex situs.*[798] The result was that the spouses could not conclude a postnuptial contract once they had acquired local domicile, even if a postnuptial contract would have been permitted by the foreign law immediately prior thereto.[799] The court, however, recognised that the postnuptial contract may still be domestically valid if the spouses were domiciled in their matrimonial domicile at the time of concluding their postnuptial contract.[800] As such, if spouses conclude the postnuptial contract before acquiring local domicile, the contract may be recognised. Furthermore, De Villiers AJA suggested that if an alternative domicile acquired by the spouses permitted postnuptial contracts, the postnuptial contract may have been recognised domestically.[801] This indicates that even if the spouses have a different domicile to their matrimonial domicile, a postnuptial contract may be valid provided that the *lex domicilii* at the time of concluding the contract permits it. In any event, since it was suggested by De Villiers AJA that a Natal domicile, or an alternative domicile, may have affected the recognition of the *Larkan* postnuptial contract by Cape law, this points to the *lex domicilii*, rather than the *lex situs,* being the underlying basis for *Larkan's* finding. This would align with the interpretations of *Larkan* proposed by Forsyth and Thomashausen, who both interpreted *Larkan* as stating that a matrimonial property regime may not be altered by parties once they have acquired domestic domicile, regardless of the position of the foreign law.[802]

[797] *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 220.
[798] *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 220.
[799] *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 223.
[800] *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 223, 232.
[801] *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 232.
[802] Forsyth *Private International Law* 300; Thomashausen 1984 *CILSA* 84.

In *Ex Parte Evans Et Uxor*[803] ('*Evans*'), the court offered its own interpretation of *Larkan* in an *obiter*. In *Evans*, the matrimonial domicile of the spouses was similarly Natal law.[804] During their marriage and whilst domiciled in Natal, they entered into a postnuptial contract which was considered as valid in terms of Natal law.[805] A few years later, they acquired domicile in the Orange Free State and discovered that their postnuptial contract was not recognised by a deeds registry of the Orange Free State due to *Larkan*.[806]

The court in *Evans* was tasked with answering the question left open by *Larkan,* namely whether the Orange Free State, as the *lex situs* and *lex domicilii* for the spouses, should be required to recognise the spouses' postnuptial contract, or whether the *lex domicilii* held at the time of concluding the contract should prevail.[807] The court confirmed that a person's status, as conferred by their matrimonial domicile, follows them throughout their wanderings and affects that person's rights to immovable property in other jurisdictions.[808] The court found that since the parties had concluded their postnuptial contract whilst domiciled in Natal, this amounted to a change of status that should be accepted in future domiciles, including the Orange Free State.[809] In an *obiter*, the court said that any deliberations regarding the correctness of the *lex domicilii* and the *lex situs* actually lead nowhere.[810] Rather, the "true rule" that had developed, which was approved by *Larkan*, is that "our law will not allow spouses domiciled in the Union to alter the regime" regardless of the position of the applicable matrimonial property law.[811] In other words, the true rule is that there was a blanket ban on concluding postnuptial contracts in all colonies except for Natal. The court continued by further stating that it is illogical to accept that foreign law should be recognised, but then refuse to recognise the law of an associated colony.[812]

[803] 1943 OPD 7.
[804] 1943 OPD 7 at 8.
[805] *Ex Parte Evans Et Uxor* 1943 OPD 7 at 8.
[806] *Ex Parte Evans Et Uxor* 1943 OPD 7 at 8.
[807] *Ex Parte Evans Et Uxor* 1943 OPD 7 at 9.
[808] *Ex Parte Evans Et Uxor* 1943 OPD 7 at 10.
[809] *Ex Parte Evans Et Uxor* 1943 OPD 7 at 11.
[810] *Ex Parte Evans Et Uxor* 1943 OPD 7 at 11.
[811] *Ex Parte Evans Et Uxor* 1943 OPD 7 at 11.
[812] *Ex Parte Evans Et Uxor* 1943 OPD 7 at 10.

5.3.3.3. The solution to *Larkan*

Silberberg submits that the *Larkan* case is an example of domestic courts refusing to enforce the rights of foreign spouses and providing an insufficient reason for doing so.[813] According to Silberberg, an early development occurred where the immutability principle was compromised without sufficient reason being provided because the common law was disinterested in recognising foreign matrimonial rights.[814] Moreover, the common law recognised that foreign law should be applied but arbitrarily chose not to do so, even though domestic law is neutral as to the legal system or matrimonial property regime chosen by spouses.[815] As such, Silberberg submits that this conflict should not even be classified as an actual conflict of law.[816] It is rather a false conflict of law,[817] or a court's interest in only applying domestic law.

The choice of the *lex situs* or *lex domicilii* in *Larkan* was fundamental to *Larkan's* decision and should, therefore, have not been left open. This failure amounts to inadequate characterisation, including an omission of the applicable choice-of-law rule. Nonetheless, even if an attempt is made to unpack the court's characterisation, there is no choice-of-law rule that seems to comfortably fit in its reasoning.[818] Furthermore, it is widely accepted that the validity of antenuptial contracts and postnuptial contracts should be classified as a proprietary consequence of a marriage,[819] hence it is submitted that the *lex domicilii matrimonii* should have been applied.

[813] Silberberg 1973 *CILSA* 357.
[814] Silberberg 1973 *CILSA* 357.
[815] Silberberg 1973 *CILSA* 359.
[816] Silberberg 1973 *CILSA* 357.
[817] Schoeman *Domicile and Jurisdiction* 216-217.
[818] For instance, the choice-of-law rules for capacity of spouses to conclude an antenuptial contract (or, in this case, a postnuptial contract) may fit except that the spouses' capacity should not be relevant – see Forsyth *Private International Law* 304. If the issue was characterised as the essential validity of the contract, the *lex domicilii matrimonii* or the *lex situs* is the correct *lex causae* but *Larkan* specifically leaves the question open as to whether it is the *lex domicilii* or the *lex situs*, which is different – see Schulze *The Law of Divorce* 647; Forsyth *Private International Law* 294. If the formal validity of the contract was being questioned, there would be recourse to the *lex loci contractus* and, as confirmed more recently in *Spinazze*, the law applying to the proprietary consequences of the marriage – see *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 660E. If the personal consequences of the marriage was relevant, the *lex domicilii* would be used unless the *lex loci contractus*, or the place of conclusion of the contract, is required to protect creditors, which likewise does not fit – see Forsyth *Private International Law* Ixvi, 295. In any event, the personal consequences of a marriage includes the parties' capacity to contract, alienate immovable property, and make donations, but excludes antenuptial and postnuptial contracts – see Forsyth *Private International Law* 294.
[819] Schulze *The Law of Divorce* 647; Forsyth *Private International Law* 294.

Assuming that the *lex domicilii matrimonii* was the correct law to apply, *Larkan* was misguided if it intended to elevate the *lex situs* above the *lex domicilii matrimonii*. It is well established that the *lex domicilii matrimonii* applies to both immovables and movables.[820] Forsyth states that the old authorities only intended the *lex situs* to have superiority over the *lex domicilii matrimonii* when it came to any formal acts required by the *lex situs* to recognise the ownership of the spouses' proprietary rights.[821] This could be, for example, the formal registration of ownership in a deeds registry.

5.3.3.4. The reasoning behind the prohibition of postnuptial contracts

As discussed earlier, Innes CJ confirmed that a prohibition of spousal donations was the underlying reason for the rule prohibiting postnuptial contracts. Since spousal donations are now lawful, it has been suggested that the common-law rule prohibiting postnuptial contracts should, accordingly, fall away.[822] The result would be that postnuptial contracts would no longer be prohibited, and a common-law remedy for foreign marriages would exist. Nonetheless, as mentioned earlier, various writers and cases have offered alternative reasons that need to be examined before the modern relevance of the common-law rule can be firmly decided. To this end, the submissions of Bodenstein and Douglas will be assessed, along with the cases of *Powell v Powell*[823] ('*Powell*') and *Honey v Honey*[824] ('*Honey*').

Bodenstein, who specialised in Roman-Dutch law, published an article in 1917 after examining the old Roman-Dutch authorities.[825] Bodenstein concluded that the common-law rule against postnuptial contracts could not result from a prohibition of spousal donations.[826] Bodenstein's reasoning was similar to Silberberg's: Bodenstein found that neither a division of the joint estate, nor removing a husband's marital power over his wife, would result in a donation.[827] Furthermore, the division of a joint estate results in the abandonment of a future sharing in profit and loss, but this abandonment would still not equate to a donation.[828]

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[820] Forsyth *Private International Law* 297.
[821] Forsyth *Private International Law* 298.
[822] *Honey v Honey* 1992 (3) SA 609 (W) 611F.
[823] 1953 (4) SA 380 (W).
[824] 1992 (3) SA 609 (W).
[825] HDJ Bodenstein "The validity of pacts between husband and wife" (1917) *SALJ* 11 at 11, 36.
[826] Bodenstein 1917 *SALJ* 21.
[827] Bodenstein 1917 *SALJ* 21.
[828] Bodenstein 1917 *SALJ* 21.

Bodenstein believed that the correct root of the common-law rule must be located elsewhere in the nature of marriage as a *sui generis* contract.[829] Bodenstein found that marriage was often mistakenly viewed as an ordinary contract without due consideration of its unique features, including its special requirements.[830] The special requirements include the necessity for solemnisation in the presence of a marriage officer and court approval being required for dissolution on divorce.[831]

Due to the importance of marriage as a social institution, Bodenstein believed that the parties could not be lightly allowed to interfere with their marriage.[832] Since spouses were, at the time, lawfully bound to live together until death, the maintenance of harmony required that a "bone of contention", or an opportunity for discord, should not be unnecessarily introduced into the marital relationship.[833] Bodenstein submitted that a postnuptial change of matrimonial property regime would be an opportunity for discord in a marriage regardless of which matrimonial property regime was applicable.[834] Bodenstein said this reasoning would be in line with the Roman-Dutch authorities because any term of a spousal contract that encouraged the dissolution of marriages was prohibited in Roman-Dutch law.[835]

In *Powell,* the court was less concerned with the reason behind the introduction of the common-law rule, rather than the reason for the retention of the rule.[836] The court viewed the protection of creditors as the modern reason for the retention of the rule, notwithstanding any historically different rule for its introduction.[837] *Powell*, therefore, supported the continued retention of the rule based on a need to protect creditors.

In Douglas' 1991 article, he found that the general reasoning provided by Roman-Dutch authorities for the common-law rule was, as stated in *Larkan*, the prohibition of spousal donations.[838] That being said, Douglas found that other reasons had been provided, namely:[839]

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[829] Bodenstein 1917 *SALJ* 21.
[830] Bodenstein 1917 *SALJ* 22.
[831] Bodenstein 1917 *SALJ* 22.
[832] Bodenstein 1917 *SALJ* 22.
[833] Bodenstein 1917 *SALJ* 22.
[834] Bodenstein 1917 *SALJ* 23.
[835] Bodenstein 1917 *SALJ* 23.
[836] *Powell v Powell* 1953 (4) SA 380 (W) 383.
[837] *Powell v Powell* 1953 (4) SA 380 (W) 383.
[838] Douglas 1991 *De Rebus* 206.
[839] Douglas 1991 *De Rebus* 207.

- The protection of creditors;
- Spouses married in community of property were unable to contract with each other;
- A wife had the status of a minor and could not breach a contract to her prejudice;
- Antenuptial contracts were often concluded before family members and, therefore, could not be cancelled by a decision of the spouses acting alone; and
- A husband could not contract with himself.

Additionally, Douglas mentioned Bodenstein's reason, being the protection of the sanctity of marriage by not introducing a bone of contention.[840] Of all these reasons, Douglas found that the protection of creditors is the only reason that remains relevant in modern times.[841] Nevertheless, since creditors can be easily protected via numerous safeguards, he stated that this would not be a sufficient reason to justify the retention of the rule prohibiting postnuptial contracts.[842]

In the 1991 case of *Honey*, the court was tasked with determining the validity of an unauthorised postnuptial contract between the spouses.[843] As part of its decision, *Honey* found that the common-law rule stands alone and it is not an application of the prohibition of spousal donations.[844] This position was justified as follows:

> "It is true that most of the authorities quoted give the prohibition of donations between spouses as a reason for the rule, but most of them also give other, differing reasons as well. De Groot *Inleidinge* 2.12.5 states the general rule only, and *gives no reasons save that*, once the marriage has been solemnised, the law of the land takes effect and the parties cannot change it *inter vivos*."[845] (emphasis added)

Similarly to Douglas, *Honey* concluded that alternative reasons existed for the prohibition of spousal donations. In coming to this conclusion, the court considered the findings of an unpublished article by Davis, who had examined the reasons for the rule.[846] In the article, Davis concluded that all the reasons for the common-law rule are no longer relevant except for the

[840] Douglas 1991 *De Rebus* 207.
[841] Douglas 1991 *De Rebus* 208.
[842] Douglas 1991 *De Rebus* 211.
[843] 1992 (3) SA 609 (W) 610I.
[844] *Honey v Honey* 1992 (3) SA 609 (W) 613B-C.
[845] *Honey v Honey* 1992 (3) SA 609 (W) 613A-B.
[846] *Honey v Honey* 1992 (3) SA 609 (W) 613C.

protection of creditors.[847] As such, Davis came to the same conclusion as Douglas. The court found that Davis' conclusion must be incorrect because Davis had failed to consider the reasons given by other authors, and named De Groot, Arntzenius, and Bodenstein as authority for this conclusion.[848] The reasons provided by these three authors will be assessed to analyse the correctness of *Honey*'s conclusion.

De Groot's reason was, as quoted above, that once a marriage had been solemnised, the law of the land applies to the marriage and such laws cannot be changed by the spouses. It is submitted that since De Groot refers to the "law of the land" taking effect, De Groot is referring to the existence of the immutability principle operating at an international level. In other words, De Groot was stating that once a legal system applies to a marriage, a different legal system cannot be chosen by the parties. If this is correct, De Groot should not be interpreted as providing a reason for the common-law rule prohibiting postnuptial contracts, which operates at an internal level to prevent a change of matrimonial property regime.

The reason of the second author, Bodenstein, was discussed above and found to be no longer relevant. In any event, Bodenstein's reasoning is flawed, at least in modern times. According to Bodenstein, the aim of prohibiting postnuptial contracts was to prevent the introduction of a bone of contention into a marriage, thereby preventing the breakdown of a marriage. The effect is to leave a couple without a remedy, save for divorcing and re-marrying under a different matrimonial property regime.

The third author cited by *Honey*, Arntzenius, provided the following reason for prohibiting postnuptial contracts:

> "… as soon as the parties are married and thereafter such community can no longer be excluded partially or totally *by consent of the parties themselves*… In the same manner where it has been excluded by antenuptial contract, the spouses cannot subsequently by agreement revert to community. Had such an alteration been possible it would have led to all kinds of lawsuits. Then antenuptial contracts are often family agreements concluded in the presence of relations and cannot therefore readily be rescinded at the discretion of the spouses. Moreover such

[847] *Honey v Honey* 1992 (3) SA 609 (W) 613C.
[848] *Honey v Honey* 1992 (3) SA 609 (W) 613D.

alteration or rescission would be a type of donation between husband and wife, which is prohibited almost everywhere."[849] (emphasis added)

Arntzenius' reason is essentially three-fold. First, a right to change a matrimonial property regime would result in litigation. Second, antenuptial contracts are family agreements that cannot be rescinded by the spouses themselves. Third, spousal donations are prohibited. In relation to the latter, Arntzenius states that spousal donations must be prevented because they would upset the spouses' equality.[850] All Arntzenius' above reasons are either outdated or unsustainable, and consequently should not justify the modern retention of the prohibition.

Although not apparently cited by *Honey*, Arntzenius did provide three separate reasons for prohibiting postnuptial changes to a joint estate, and therefore not necessarily for prohibiting postnuptial contracts. First, Arntzenius stated that if the parties intended to exclude or alter the joint estate, that intention should have been recorded in an antenuptial contract.[851] Second, creditors must not suffer loss.[852] Third, donations between spouses are usually prohibited.[853] It is submitted that the first reason fails to recognise why spouses would be motivated to change their matrimonial property regime and should be dismissed. Although the second reason is valid, creditors' interests should not absolutely supersede spouses' interests to regulate their proprietary rights.[854] For instance, section 21(1) of the MPA is a clear example of how postnuptial changes can be permitted while creditors are simultaneously protected. Moreover, a blanket ban on postnuptial changes appears particularly absurd when spouses do not have creditors. The third reason is no longer relevant and should be dismissed.

Considering the reasons provided by these authors, it is submitted that *Honey* relied on either irrelevant or unsustainable reasons to support the continued existence of the rule prohibiting postnuptial contracts. It must be borne in mind that Arntzenius, for example, lived at a time when slavery was allowed,[855] married women had the legal capacity of minors,[856] a woman

[849] Arntzenius *Institutiones Juris Belgici de Conditione Hominum* 2.5.10 (as translated by: FP van den Heever *Hendrik Jan Arntzenius: Institutiones Juris Belgici de Conditione Hominum*: Introduction to the Civil Law of the Netherlands (1963) 147-148). It is noted that Honey referred to "2.4.10" although the page number used by *Honey* corresponds to 2.5.10.
[850] Arntzenius *Institutiones* 2.4.10.2 (van den Heever *Civil Law of the Netherlands* 113).
[851] Arntzenius *Institutiones* 2.4.10.2 (van den Heever *Civil Law of the Netherlands* 113).
[852] Arntzenius *Institutiones* 2.4.10.2 (van den Heever *Civil Law of the Netherlands* 113).
[853] Arntzenius *Institutiones* 2.4.10.2 (van den Heever *Civil Law of the Netherlands* 113).
[854] Silberberg 1973 *CILSA* 340.
[855] Arntzenius *Institutiones* 1.13.1 (van den Heever *Civil Law of the Netherlands* 11).
[856] Arntzenius *Institutiones* 1.13.1 (van den Heever *Civil Law of the Netherlands* 11).

could not marry without her parents' consent,[857] and a marriage was viewed as a property exchange between a woman's father and her husband hence a bride's father would walk her down the aisle to her new husband.[858] As Bonthuys says, courts need to be vigilant when approving or perpetuating common-law rules since these rules may no longer reflect the *boni mores* of society, especially in light of the new constitutional dispensation.[859]

Considering the above, it is submitted that there are no adequate reasons justifying the modern retention of the rule prohibiting postnuptial contracts. Creditors' interests can be adequately protected without a blanket ban being necessarily, as is already recognised by section 21(1) of the MPA.

5.3.3.5. Governing-law clauses in postnuptial contracts

The *lex domicilii matrimonii* principle expressly contemplates that spouses have a common-law right to choose a proper law in their antenuptial contract before their marriage. There has been scant discourse, however, as to whether there is an equivalent right that could be exercised in a postnuptial contract after their marriage.

If such a right existed in South Africa, the effect would be that spouses could change the legal system applicable to their marriage, thereby affecting the operation of the immutability principle at an international level. This would be particularly helpful if spouses have no connection to their applicable foreign law and could choose that a closer legal system, such as South Africa, applies to their marriage. Alternatively, it may be that the spouses are not authorised to return to a foreign jurisdiction, or perhaps one spouse has never visited it.[860]

As will be discussed in chapter 6,[861] this type of right already exists in other jurisdictions. For example, spouses in participating Member States of the European Union have a right to choose

[857] Arntzenius *Institutiones* 2.4.29.4 (van den Heever *Civil Law of the Netherlands* 140-142).
[858] Arntzenius *Institutiones* 2.1.2 (van den Heever *Civil Law of the Netherlands* 23).
[859] E Bonthuys "Public policy in family contracts, part II: antenuptial contracts" (2021) 32 *Stellenbosch Law Review* 3 at 22.
[860] Forsyth *Private International Law* 297.
[861] See chapter 6 § 6.3.6.

a proper law during their marriage.[862] This right is subject to judicial oversight and can only be exercised in limited circumstances.[863]

In *Evans*, whilst deliberating on the validity of a postnuptial contract, the court referred to the following passage by Voet:

> "Migration, [Voet] says, cannot alter antenuptial contracts or community of property, i[nter] a[lia] because the husband should not be able to affect the wife's rights detrimentally by the assumption of a new domicile. Where the spouses change their domicile, and expressly agree that the law of their newly acquired domicile should govern their proprietary relations, this will be effective only in countries where donations between spouses are not prohibited."[864]

In this quote, Voet clearly states that a change of domicile does not result in a change of matrimonial property regime but, if both spouses consent, the applicable legal system can be changed to that of the law of the newly acquired domicile. Accordingly, this passage could be used as authority for the existence of a right to choose a governing law in a postnuptial contract. Moreover, van Loggerenberg supports this position. Van Loggerenberg submits that if a foreign law allows a postnuptial change to an entirely different legal system, the spouses should be able to choose that domestic law, and a domestic matrimonial property regime, can apply.[865]

It, therefore, appears that there is support for governing-law clauses in postnuptial contracts. That being said, it is submitted that even if this right exists, legislative intervention should be required to give effect to the right. Such a right would require careful consideration of various ancillary issues, including which laws may be available to choose, whether retrospective application is allowed, and the rights of creditors. Judicial approval would be inappropriate as the role of courts is to interpret law, not to make it.[866]

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[862] Article 22(1) of Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regime.
[863] Article 26(3) of Council Regulation (EU) 2016/1103.
[864] *Ex Parte Evans Et Uxor* 1943 OPD 7 at 13-14.
[865] Van Loggerenberg 1987 *Obiter* 114.
[866] *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) para 37.

5.4. Conclusion

In summary, this chapter has investigated the scope of antenuptial contracts and postnuptial contracts as providing existing remedies for foreign marriages. Domestic and foreign antenuptial contracts should be available for registration in a deeds registry even if the spouses' rights have been secured elsewhere. Governing-law clauses choosing a proper law are similarly available in an antenuptial contract. In relation to existing foreign antenuptial contracts, their formal validity and proper law can be assessed using the facultative approach. Regarding postnuptial contracts, it appears as if section 21(1) should be available for foreign marriages, however there is no clear authority confirming this position. If section 21(1) is not available, according to *Honey*, the common-law rule prohibiting postnuptial contracts is still in force. The underlying reasons for this rule are nevertheless flawed. Furthermore, governing-law clauses in postnuptial contracts may be possible but legislative intervention is required.

CHAPTER 6: Harmonisation of EU private international law in succession and matrimonial property: Regulation (EU) No 650/2012 and Council Regulation (EU) 2016/1103

6.1. Introduction

The European Union (EU) is no exception to the global phenomenon of migration. High levels of migration are occurring between the twenty seven[867] Member States of the EU, particularly due to the freedom of movement encouraged by EU law.[868] This gives rise to cross-border ownership of assets in deceased estates located within the EU.[869] Due to a rise in cross-border conflicts of law, the EU has taken steps to harmonise rules across Member States by adopting uniform private international law rules[870] for succession and matrimonial property law.[871] The underlying reason for this harmonisation can be summarised as follows:

> "In private international law, more than in any other field, the most important thing is not the rule we have, but to have the same rule as everyone else." [872]

Regulation (EU) No 650/2012[873] (the 'Succession Regulation') and Council Regulation (EU) 2016/1103[874] (the 'Matrimonial Property Regulation') are two such laws that give effect to the

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[867] European Union "Country profiles" https://european-union.europa.eu/principles-countries-history/country-profiles_en (accessed 27 March 2022).

[868] I Kunda, S Winkler, and T Pertot "Chapter III: Jurisdiction and applicable law in succession matters" in MJC González *et al* (ed) *Property relations of cross border couples in the European Union* (2020) 110.

[869] It is estimated that annually there are approximately 450 000 deceased estates in the EU with a cross-border feature – E Nel "The impact of the EU Succession Regulation on the SA testator with assets in an EU jurisdiction" (2019) *The Fiduciary Institute of South Africa (Eastern Cape regional presentation)* https://www.fisa.net.za/regional-meeting-presentations/ (accessed 15 April 2022) 2.

[870] Recital 1 of Regulation (EU) No 650/2012.

[871] Recital 1 of Regulation (EU) No 650/2012.

[872] P Callé "Why harmonise our conflict-of-law rues in respect of matrimonial property regimes?" (2019) *Notaries of Europe* https://www.notariesofeurope.eu/wp-content/uploads/2021/09/CNUE-Supporting_Couples_120919.pdf (accessed 30 March 2022) 13.

[873] The full title of the Succession Regulation is: 'Regulation (EU) 2012/650 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession'. The text of the regulation is available at: EUR-Lex (European Union) "Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession" https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012R0650 (accessed 25 February 2022).

[874] The full title of the Matrimonial Property Regulation is: 'Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes'. The text of the regulation is available at: EUR-Lex (European Union) "Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters

EU's harmonisation objective. In this chapter, features of both will be separately considered to understand the current EU approach to succession and matrimonial property law. The purpose of this discussion is three-fold, namely: to understand an international approach in these particular fields for comparative purposes; to assess the effect on domestic estate planning and succession; and to inform a discussion in chapter 7 of possible domestic reform. In relation to the latter, since the EU has found a single solution that is acceptable to multiple states, it is worth examining the EU's approach as it may contain remedies for problems faced in South Africa.

It is noted that a reference to 'the Regulation' under each section should be interpreted as a reference to the regulation being considered in that section, unless the context indicates otherwise. A reference to 'Member State' or 'Member States' shall mean a reference to participating Member States of the relevant regulation, unless the context indicates otherwise. Moreover, non-participating Member States are considered to be third-party states for the purpose of both Regulations.[875]

6.2. The Succession Regulation

After fifteen years of preparation,[876] the Succession Regulation was adopted in 2012 to unify cross-border succession rules amongst Member States.[877] The rules set out in the Regulation take precedence over the national law of Member States.[878] Denmark and Ireland are the only Member States to whom the Regulation does not apply[879] as they chose not to participate.[880] Both are considered to be third-party states for the purposes of the Regulation.[881] Irish and Danish citizens would still be able to make use of the Regulation's provisions in varying extents

of matrimonial property regimes" https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R1103 (accessed 25 February 2022).

[875] Kunda, Winkler, and Pertot *Property relations of cross border couples in the European Union* 112; Callé "Why harmonise our conflict-of-law rues in respect of matrimonial property regimes?" 2.

[876] J Bost "Nothing Certain About Death and Taxes (and Inheritance): European Union Regulation of Cross-Border Successions" (2013) 27:2 *Emory International Law Review* 1145 at 1145.

[877] MA i Golobardes "Will Regulation 650/2012 simplify Cross-Border Successions in Europe?" (2015) 4 *European Planning Law Journal* 1 at 1.

[878] P Wautelet "Case study: Cross-border successions (basic level)" (2017) *Academy of European Law* http://www.eracomm.eu/Better_Applying_the_EU_Regulations/kiosk/pdf/case_studies/topic3/Case_study_topic3_Introductory_EN.pdf (accessed 15 March 2022) 3.

[879] European Commission "Cross-border successions – a citizen's guide" https://op.europa.eu/en/publication-detail/-/publication/61afb4c0-a71b-11e7-837e-01aa75ed71a1 (accessed 22 April 2021) 4.

[880] Recitals 82-83 of Regulation (EU) No 650/2012.

[881] Kunda, Winkler, and Pertot *Property relations of cross border couples in the European Union* 112.

for their estate planning if they are habitually resident or own assets in a Member State.[882] The meaning of habitual residence in the context of the Succession Regulation will be addressed in section 6.2.4 of this chapter. The meaning of habitual residence in domestic law will precede the conclusion of this chapter.[883]

6.2.1. Application

The Regulation applies to living EU citizens or habitual residents, or those who died on or after 17 August 2015.[884] The Regulation applies regardless of whether testate or intestate succession is relevant.[885] It has no application to non-citizens and non-habitual residents unless they own assets[886] in at least one Member State, in which case the Regulation has limited application.[887]

6.2.2. Structure and purpose

The Regulation is structured into eighty-three recitals followed by eighty-four articles. Although the legal effect of the recitals is uncertain, they appear to assist with the interpretation of the associated articles, rather than being legally binding themselves.[888] In the *Kubicka*[889] case, for example, frequent reference was made to the recitals when interpreting the associated articles.[890] The *Kubicka* case was the first decision of the European Court of Justice (ECJ) on the Regulation[891] and it will be examined in section 6.2.12 of this chapter.

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[882] i Golobardes 2015 *European Planning Law Journal* 28.
[883] See § 6.4.
[884] Article 83(1) of Regulation (EU) No 650/2012; European Commission "Cross-border successions – a citizen's guide" 5.
[885] Article 3(1)(a) of Regulation (EU) No 650/2012.
[886] Various recitals and articles of the Regulation refer to 'assets' in the plural form, rather than in the singular – see, for example, articles 6, 10, 12, and 29.
[887] Article 10 of Regulation (EU) No 650/2012; European Commission "Cross-border successions – a citizen's guide" 21-22.
[888] P Wautelet 2017 *Academy of European Law* 6.
[889] Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755. The case is available in English at: InfoCuria Case-law "ECLI:EU:C:2017:755" https://curia.europa.eu/juris/document/document.jsf?text=&docid=195430&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1341041 (accessed 1 April 2022).
[890] See for example: Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755, paras 38, 44 and 48.
[891] JP Schmidt "Challenged Legacies – First Decision of the European Court of Justice on the EU Succession Regulation (ECJ, 12 October 2017, C218-16 (*Kubicka*))" (2018) 7 *Environmental Property Law Journal* 4 at 4.

The main purpose of the Regulation is to provide procedural clarity concerning deceased estates with cross-border elements.[892] The Regulation determines *inter alia* the substantive law applying to a deceased estate and which state has jurisdiction to administer the deceased estate.[893] The Regulation allows citizens or habitual residents of Member States to plan their succession with greater certainty.[894] It also provides security for the rights of heirs, legatees, and creditors, and unifies jurisdictional rules.[895] The rules of the Regulation are designed to lead generally towards a Member State applying its own succession law, instead of having to apply the law of another state.[896]

The Regulation does not seek to regulate substantive issues such as the legal capacity of natural persons,[897] the determination of the rights of beneficiaries or creditors,[898] the recordal of assets in any register of rights,[899] nor questions relating to maintenance, matrimonial property regimes, or other comparable relationships.[900] It only seeks to apply to the transfer or creation of any rights, interests, or assets that stem from succession.[901] Nor does it apply to tax, administrative or customs matters[902] meaning that it only intends to include private-law issues.[903] Furthermore, it creates a document known as the European Certificate of Succession.[904] This is a simplified document for recording information relevant to a deceased estate that is recognisable across Member States.[905]

[892] European Commission "Cross-border successions – a citizen's guide" 4.
[893] European Commission "Cross-border successions – a citizen's guide" 6.
[894] European Commission "Cross-border successions – a citizen's guide 4; i Golobardes 2015 *European Planning Law Journal* 1.
[895] European Commission "Cross-border successions – a citizen's guide 4; i Golobardes 2015 *European Planning Law Journal* 1.
[896] Recital 27 of Regulation (EU) No 650/2012.
[897] Article 2(b) of Regulation (EU) No 650/2012; European Commission "Cross-border successions – a citizen's guide" 4.
[898] Article 2(k) of Regulation (EU) No 650/2012; European Commission "Cross-border successions – a citizen's guide" 4.
[899] Article 2(l) of Regulation (EU) No 650/2012.
[900] Article 2(d)-(e) of Regulation (EU) No 650/2012; European Commission "Cross-border successions – a citizen's guide" 4.
[901] Article 2(g) of Regulation (EU) No 650/2012. The examples provided in the Regulation include gifts, joint ownership with a right of survivorship, pension plans and insurance contracts.
[902] Article 1(1) of Regulation (EU) No 650/2012.
[903] Kunda, Winkler, and Pertot *Property relations of cross border couples in the European Union* 103.
[904] Article 62(1) of Regulation (EU) No 650/2012.
[905] Article 62(1) of Regulation (EU) No 650/2012.

6.2.3. Default substantive law

The Regulation states that the law of the deceased's habitual residence will, by default, apply as the substantive law governing the deceased's succession, regardless of the deceased's nationality.[906] Habitual residence is therefore the connecting factor adopted to govern the substantive law of succession.[907] Domicile has little relevance in the Regulation.[908]

Although the identification of nationality may have been easier to use instead of habitual residence, the EU legislature's rationale behind the adoption of habitual domicile, instead of nationality, is based on habitual residence tending to be a closer link to the deceased's assets, liabilities, and heirs.[909] The rule is, therefore, intended to result in the 'predictable law' being the substantive law that applies.[910]

The substantive succession law will govern the deceased's succession as a whole.[911] All assets and liabilities of a deceased wherever situated, and regardless of the type of asset, will be covered including those located in third-party states.[912] Unlike South Africa's approach, this means that there is no divide between immovable and movable property, nor separation across Member States.[913] The substantive law will determine *inter alia* the succession rights of spouses and other beneficiaries, the capacity of beneficiaries to inherit, disinheritance, transfer of rights, the powers of the parties involved such as the heirs and executors, liability for debts, and any restrictions on the disposal of assets.[914]

6.2.4. Choice of alternative substantive law

Despite the default rule of habitual residence, the Regulation does allow an EU citizen or habitual resident to choose an alternative substantive law to apply to their succession.[915] The

[906] Article 21(1) of Regulation (EU) No 650/2012. According to recital 41, the determination of nationality would be decided by national law, not the Regulation itself.
[907] E Nel "Estate Planning and Wills Across Borders: Sometimes a Quagmire in the Making" (2021) 24 *PER / PELJ* 2 at 15.
[908] Domicile is mentioned, for instance, as a connecting factor for the formal validity of testamentary dispositions as well as for establishing jurisdiction – see articles 27 and 45 of Regulation (EU) No 650/2012.
[909] i Golobardes 2015 *European Planning Law Journal* 9.
[910] Recital 37 of Regulation (EU) No 650/2012.
[911] Article 23(1) of Regulation (EU) No 650/2012.
[912] Article 23(1) of Regulation (EU) No 650/2012.
[913] German Federal Ministry of Justice and Consumer Protection "The EU Succession Regulation" 3.
[914] Article 23(2) of Regulation (EU) No 650/2012.
[915] Article 22(1) of Regulation (EU) No 650/2012.

testator or testatrix is, however, limited to choosing the law of their nationality held either at the time of making the choice or at the time of death.[916] This means that there must be a connection between the chosen law and the person.[917] The chosen law does not need to be that of a Member State, and could be a third-party state.[918] Persons who possess multiple nationalities are entitled to choose the law of any of their nationalities.[919]

The choice of substantive law must be recorded in a valid testamentary disposition, the validity of which will be determined by the chosen law.[920] If a person has doubts about which substantive law may apply to their succession, such as because their habitual residence is ambiguous, they should make a choice-of-law decision in their will or record their habitual residence in their will.[921] Recital 40 states that the choice of law should be considered as valid even if the chosen law does not allow such a choice.

This ability to make a choice concerning the substantive succession law applicable to one's deceased estate is a particularly helpful tool for the estate planning. For example, it can be particularly useful to avert forced heirship rules or mandatory sharing rules on death.[922] This means that unfavourable succession rules can be avoided if the testator or testatrix is a citizen or habitual resident of a state whose succession law is preferable.[923] The limitation of the choice of law to nationalities only was intended to allow flexibility without deceiving beneficiaries who may have a reasonable expectation of receiving a mandatory share.[924] For example, in the Netherlands, freedom of testation is limited by forced heirship rules.[925] The result is that half

[916] Article 22(1) of Regulation (EU) No 650/2012.
[917] SA Kramar and K Vučko "A Guide to the implementation of the Succession Regulation (EU) No 650/2012" (2020) *Croatian Law Centre* https://www.notariesofeurope.eu/wp-content/uploads/2020/07/Guide-to-Succession-Regulation.pdf (accessed 4 April 2022) 36.
[918] Article 22(1) of Regulation (EU) No 650/2012.
[919] Article 22(1) of Regulation (EU) No 650/2012.
[920] Articles 22(2)-(3) of Regulation (EU) No 650/2012.
[921] German Federal Ministry of Justice and Consumer Protection "The EU Succession Regulation" https://southafrica.diplo.de/blob/2191760/bc4d81bd762cbd23cdc9ff9f5ba95c16/merkblatt-succession-data.pdf (accessed 14 March 2022) 4.
[922] E Nel "The impact of the EU Regulations on fiduciary advice in South Africa" (2020) 18 *De Rebus* https://www.derebus.org.za/the-impact-of-the-eu-regulations-on-fiduciary-advice-in-southafrica/#:~:text=Although%20the%20general%20rule%20is,with%20its%20own%20public%20policy (accessed 29 March 2022).
[923] FC Villata "Predictability first! *Fraus legis*, overriding mandatory rules and *ordre public* under EU Regulation 650/2012 on succession matters" (2019) 4 *Rivista di diritto internazionale privato e processuale* 714 at 720.
[924] Recital 38 of Regulation (EU) No 650/2012.
[925] Article 4:64 of the of the Dutch Civil Code (Book 4: Law of succession); European Justice "Succession: Netherlands" (2021) https://e-justice.europa.eu/166/EN/succession?NETHERLANDS&member=1 (accessed 4 April 2022).

of a Dutch deceased estate is reserved for the deceased's children, or, if a child is predeceased, the children of the predeceased child.[926] If a Dutch citizen is habitually resident elsewhere, regardless of whether this is a Member State or third-party state, alternatively if they are a dual national of a country with preferable succession rules, the Dutch national could avoid Dutch forced heirship rules, if applicable.

To illustrate this in the context of South Africa, if a Dutch citizen is habitually resident in South Africa and does not choose a succession law in their will, domestic succession law will apply. Domestic succession law would cover all assets wherever situated, even though, as discussed in chapter 4,[927] domestic private international law distinguishes between movables and immovables. If this position is not satisfactory to the Dutch citizen, they could make use of the Regulation to specify in their will that Dutch succession law must apply. Since the chosen law is Dutch law, the will must be validly concluded in terms of Dutch law. Conversely, if a South African citizen has assets in the Netherlands, they could use the Regulation to confirm in their will that domestic law should apply to the succession of those assets.[928]

6.2.5. Identification of a deceased's habitual residence

According to recital 23, a deceased's habitual residence will be the state to which the deceased had the closest and most stable connection.[929] Recitals 23 and 24 state that habitual residence is determined by making an overall assessment of the deceased's circumstances prior to death, which is decided by the authority dealing with the succession. Factors to take into account include the state in which the deceased was regularly present, the reason for the presence, and the location of assets.[930] If a deceased moved to a place due to, for example, professional or economic reasons, but clearly maintained a closer connection to another state, the latter's law will be applicable.[931] This applies even if the deceased had not been physically present in the closely connected state for an extended period of time.[932]

[926] Article 4:64 of the of the Dutch Civil Code (Book 4: Law of succession); European Justice "Succession: Netherlands".
[927] See chapter 4 § 4.7.1.
[928] The example is adapted from: Nel "The impact of the EU Regulations on fiduciary advice in South Africa".
[929] Recital 23 of Regulation (EU) No 650/2012.
[930] Recitals 23-24 of Regulation (EU) No 650/2012.
[931] Recital 24 of Regulation (EU) No 650/2012; article 21(2) of Regulation (EU) No 650/2012.
[932] Recital 24 of Regulation (EU) No 650/2012; article 21(2) of Regulation (EU) No 650/2012.

The meaning of habitual residence as set out in these recitals is not cemented in any article of the Regulation. As previously mentioned, the legal effect of the recitals is uncertain but the recitals are considered to be of interpretative value. This omission was a conscious decision as, during the drafting phase of the Regulation, there were objections from Member States to the inclusion of a concrete definition because this may have created additional complexities.[933] It furthermore maintains consistency with other Hague Conferences, which to date have uniformly omitted a concrete definition of habitual residence.[934]

The determination of habitual residence as contained in the recitals can be illustrated by the following example. A deceased died in South Africa but she was a Dutch citizen and had been working in South Africa for five years. Her family was still located in the Netherlands and she had maintained a close connection to the Netherlands. According to the recitals, the deceased would be considered a habitual resident of the Netherlands. As such, the Netherlands would have jurisdiction over the succession of her deceased estate and Dutch law would be applied to her succession, unless a substantive succession law was chosen in her will. As briefly mentioned in chapter 2,[935] however, the Administration of Estates Act[936] requires the reporting of a deceased estate for any person who dies in South Africa or elsewhere, if that person either holds any asset located in South Africa, or executed a domestic will before their death.[937] If the deceased therefore held any domestic asset, or had executed a domestic will, her deceased estate would need to be reported to the Master of the High Court (the 'Master') in South Africa, who should apply Dutch law as the substantive succession law.

6.2.6. Special rules of a *lex rei sitae*

As mentioned above, the substantive succession law applies to both immovable and movable property. Article 30 does, however, limit the unitary nature of the substantive succession law. Article 30 states that if the law of a state in which an asset is located, being the '*lex rei sitae*',[938] imposes certain restrictions on the succession of special assets located therein, the rules of the

[933] M Kränzle "The notion of habitual residence in Recitals No 23 and No 24 of the Succession Regulation" (2016) *University of Milan* http://www.dirittopubblico.unimi.it/extfiles/unimidire/389501/attachment/final-study-justt-2013-jciv-ag-4666-last-version.pdf (accessed 14 March 2022) 168.
[934] M Kränzle "The notion of habitual residence in Recitals No 23 and No 24 of the Succession Regulation" 168.
[935] See chapter 2 § 2.2.
[936] Act 66 of 1965.
[937] Section 7(1)-(2).
[938] CF Forsyth *Private International Law* 5 ed (2012) 8.

lex rei sitae shall take precedence over the applicable succession law.[939] This is provided that these special rules would apply in the *lex rei sitae* regardless of the applicable succession law.[940]

These special rules should be for economic, family, or social considerations and could include special types of assets such as immovable property or commercial enterprises.[941] For example, in relation to the succession of a commercial enterprise, a right of first refusal for the sale of shares would be included as a special rule limiting the substantive succession law.[942] Recital 54 qualifies article 30 by stating that neither of the following shall be considered in the category of these special rules: first, a rule differentiating between immovable and movable property and, second, a rule allowing for a greater reserved share than permitted under the applicable succession law. Scission and reserved sharing is thus not included.

Article 30 can be practically illustrated as follows. A deceased person has dual German and South African nationality and owns a farm in South Africa. In the deceased's valid will, the deceased chose German law to govern the succession of his deceased estate. In South Africa, an undivided share in agricultural land cannot vest in more than one natural or juristic person without the consent of the Minister of Agriculture.[943] The purpose of the legislation is to prevent the fragmentation of agricultural land, thereby protecting South Africa's food security.[944] This South African rule would be considered a special economic rule contemplated by article 30 and would override German succession law. As a result, the farm could not be vested, transferred, sold or redistributed from the deceased estate to more than one natural or juristic person unless the Minister consented thereto, notwithstanding any German rule to the contrary.

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939 Article 30 of Regulation (EU) No 650/2012.
940 Article 30 of Regulation (EU) No 650/2012.
941 Article 30 of Regulation (EU) No 650/2012.
942 Kunda, Winkler, and Pertot *Property relations of cross border couples in the European Union* 121.
943 Section 3(b)-(c) of the Subdivision of Agricultural Land Act 70 of 1970. The whole of this 1970 Act has been repealed by the Subdivision of Agricultural Land Act Repeal Act 64 of 1998, however the commencement date of the latter has not yet been proclaimed by the President. A potential successor is the Preservation and Development of Agricultural Land Bill B8 of 2021, which has been introduced in Parliament – see Parliament of the Republic of South Africa "Preservation and Development of Agricultural Land Bill (B8-2021)" https://www.parliament.gov.za/bill/2296682 (accessed 8 June 2022).
944 *Maxrae Estates (Pty) Ltd v National Minister of Agriculture, Forestry and Fisheries and Another* (13769/19) [2020] ZAGPPHC 58 (4 March 2020) paras 13, 15.

6.2.7. Jurisdiction

A person cannot choose the state that will have jurisdiction over their deceased estate.[945] In terms of the Regulation, the authorities of the Member State in which the deceased was habitually resident will have jurisdiction over the deceased estate,[946] which includes the jurisdiction to confirm the applicable substantive law.[947] Habitual residence at death is therefore the connecting factor for jurisdiction.[948]

If the deceased chose the law of a Member State to apply to his or her succession, concerned parties[949] can agree in a choice-of-court agreement that such Member State will have exclusive jurisdiction.[950] A choice-of-court agreement is a mechanism that allows a competent authority to apply its own succession law.[951] These types of agreements can be concluded before or after the deceased's death,[952] thereby making it a powerful tool for estate planning and administering a deceased estate. The Member State of the deceased's habitual residence, if different from the chosen law, must decline jurisdiction if a choice-of-court agreement exists.[953] At the request of one of the parties, the Member State can also choose to decline jurisdiction if it is practical to do so.[954]

Subsidiary jurisdiction can also be established simply via asset ownership.[955] If a deceased owned assets[956] in a Member State but was not habitually resident therein at the time of death, the relevant Member State can rule on the deceased's succession as a whole if the deceased held its nationality at the time of death, failing which, if the deceased was a habitual resident within five years preceding death.[957] The effect is that a Member State can rule on a deceased's succession as a whole if there is a connection via asset ownership combined with nationality at death, failing which, habitual residence within five years prior before death. Priority is

[945] European Commission "Cross-border successions – a citizen's guide" 12.
[946] Article 4 of Regulation (EU) No 650/2012; European Commission "Cross-border successions – a citizen's guide" 14; Nel "The impact of the EU Regulations on fiduciary advice in South Africa".
[947] Article 4 of Regulation (EU) No 650/2012.
[948] Kramar and Vučko "A Guide to the implementation of the Succession Regulation (EU) No 650/2012" 18.
[949] There is no definition of concerned parties contained in the article.
[950] Article 5(1) of Regulation (EU) No 650/2012.
[951] Recital 27 of Regulation (EU) No 650/2012.
[952] Kramar and Vučko "A Guide to the implementation of the Succession Regulation (EU) No 650/2012" 23.
[953] Article 6(b) of Regulation (EU) No 650/2012.
[954] Article 6(a) of Regulation (EU) No 650/2012.
[955] Article 10 of Regulation (EU) No 650/2012; European Commission "Cross-border successions – a citizen's guide" 21-22.
[956] Article 10 specifically refers to assets in the plural form without any further qualification.
[957] Article 10(1) of Regulation (EU) No 650/2012.

therefore given to nationality over previous habitual residence as a connecting factor, but this subsidiary jurisdiction should only be exercised where general jurisdiction is not available.[958] If neither connecting factor is present, the Member State can still rule on the succession of the deceased's assets located in its jurisdiction, but not on the deceased's succession as a whole.[959]

Member States can also rule on assets located in third-party states unless the decision would not be recognised and declared enforceable in the third-party state.[960] Any decision of a Member State will become recognisable by operation of law in other Member States without any further action being required[961] unless it meets certain exceptions, such as being against public policy.[962] The ruling will only be enforceable once the procedure set out in the Regulation is followed.[963]

The Regulation also allows for a Member State with a sufficiently close connection to a deceased to be a *forum necessitatis* in exceptional circumstances.[964] In terms of this power, a Member State is entitled to rule on a deceased's succession on behalf of a third-party state.[965] This could be, for example, if there is a civil war in the third-party state or in circumstances where it would otherwise be unreasonable to expect a beneficiary to initiate proceedings in the third-party state.[966] There would need to be a sufficiently close connecting factor to the Member State such as, for example, if an heir was a citizen or a habitual resident in the Member State.[967]

6.2.8. Formal validity of testamentary dispositions

Regarding the formal validity of testamentary dispositions, the Regulation does not take precedence over international conventions already adopted by Member States.[968] The Regulation specifically states that the Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, 1961,[969] shall take precedence over the formal validity of

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[958] Kramar and Vučko "A Guide to the implementation of the Succession Regulation (EU) No 650/2012" 25.
[959] Article 10(2) of Regulation (EU) No 650/2012.
[960] Article 12(1) of Regulation (EU) No 650/2012.
[961] Article 39(1) of Regulation (EU) No 650/2012.
[962] Article 40(a) of Regulation (EU) No 650/2012.
[963] Article 43 of Regulation (EU) No 650/2012.
[964] Article 11 of Regulation (EU) No 650/2012.
[965] Recital 31 and article 11 of Regulation (EU) No 650/2012.
[966] Recital 31 of Regulation (EU) No 650/2012.
[967] European Commission "Cross-border successions – a citizen's guide" 25.
[968] Article 75(1) of Regulation (EU) No 650/2012.
[969] Convention of 5 October 1961.

wills contained in the Regulation.[970] South Africa is a contracting party to this Convention, subject to limited reservations.[971]

In terms of the Regulation itself, a testamentary disposition will be valid if it complies with the validity requirements of any of the following laws:[972]

- The state in which the disposition was "made";
- The state of the deceased's nationality, habitual residence, or domicile,[973] whether at the time of making the disposition or at the time of death; or
- The *lex situs* of an immovable property.

South Africa's formal requirements for the validity of external wills, as set out in section 3*bis* of the Wills Act,[974] were considered in chapter 4.[975] Section 3*bis* is based on article 1 of the abovementioned Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, 1961.[976] Although the phrasing of the formal requirements of the Regulation is slightly different to the phrasing used in section 3*bis*, the substance of both sets of requirements is identical. South Africa and participating Member States, therefore, have the same formal requirements for testamentary dispositions. Additionally, it is noted that neither distinguishes between movable and immovable property.

6.2.9. *Renvoi*

The meaning and application of *renvoi* in South Africa was briefly canvassed in chapter 4.[977] In some instances, the Regulation may lead to the application of the law of a third-party state.[978]

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970 Article 75(1) of Regulation (EU) No 650/2012.
971 The reservations by South Africa relate to articles 9, 10, and 12 that respectively deal with the determination of domicile, oral wills, and testamentary clauses unrelated to succession – see Hague Conference on Private International Law "Declaration/reservation/notification" https://www.hcch.net/en/instruments/conventions/status-table/ notifications/?csid=269&disp=resdn (accessed 10 April 2022).
972 Article 27(1) of Regulation (EU) No 650/2012.
973 The deceased's domicile shall be decided in terms of the law of the alleged domicile – see article 27(1) of Regulation (EU) No 650/2012.
974 Act 7 of 1953.
975 See chapter 4 § 4.7.2.
976 *Tomlinston v Zwirchmayr* 1998 (2) SA 840 (T) 848E.
977 See chapter 4 § 4.5.
978 Recital 57 of Regulation (EU) No 650/2012.

In the initial draft of the Regulation, the *renvoi* doctrine was expressly excluded.[979] The majority of Member States, however, supported the inclusion of the *renvoi* doctrine in the final draft.[980] *Renvoi* is, therefore, permitted in the final draft in a limited form, namely if the laws of a third-party state are to be applied, its rules should be applied, including its private international law rules.[981] As such, *renvoi* is allowed if the private international law of the third-party state provides for referral to either a Member State or another third-party state who would accept the referral.[982]

The Regulation expressly excludes *renvoi* in the following instances.[983] First, a choice of law, which in these circumstances would have to be the choice of a third-party state. Second, acceptance or waiver of a benefit concluded in terms of the signatory's habitual residence. Third, the special rules contained in article 30 that impose restrictions on specific assets. Fourth, the requirements for the formal validity of wills. Lastly, in exceptional cases, where a deceased is determined to have a closer connection to a state other than that of the deceased's habitual residence.

It has been suggested that the allowance of *renvoi* disrupts the Regulation's overarching purpose of unity since *renvoi* to a third-party state may result in the scission principle applying different laws to immovables and movables.[984] In such a case, it has been suggested that *renvoi* should not have been permitted although there is no exclusion in the Regulation to this effect.[985] As such, scission should not occur in the application of the Regulation, unless it is a product of *renvoi*.

6.2.10. Evasion of law and public policy

According to recital 26, a Member State is entitled to prevent evasion of law by prohibiting citizens from 'forum shopping' by choosing a Member State with preferential succession

[979] T Szőcs "The European Succession Regulation from the Perspective of the First Three Years of Its Application" (2019) *ELTE Law Journal* 45 at 56.
[980] Szőcs 2019 *ELTE Law Journal* 56.
[981] Article 34(1) of Regulation (EU) No 650/2012.
[982] Article 34(1) of Regulation (EU) No 650/2012.
[983] Article 34(2) of Regulation (EU) No 650/2012.
[984] Szőcs 2019 *ELTE Law Journal* 57.
[985] Szőcs 2019 *ELTE Law Journal* 58.

laws.[986] This recital is not, however, cemented in any article. It has been suggested that there is no real concern about the possibility of forum shopping since an assessment of a deceased's habitual residence requires an analysis of multiple factors and would tend to defeat an attempt to forum shop.[987]

Regarding public policy, known as *ordre public*, article 35 states that if the application of a foreign law is against the public policy of a Member State, the Member State is entitled to disregard the incompatible rule of that foreign law.[988] For example, a Member State would be entitled to refuse to recognise a foreign rule that discriminates against heirs based on sex, gender, or wedlock.[989]

6.2.11. European Certificate of Succession

To ensure the speedy administration of a deceased estate across Member States, a Member State is entitled to issue a 'certificate of succession', known as the European Certificate of Succession ('ECS').[990]

The ECS serves as evidentiary proof of the rights and powers of heirs, legatees, an executor, and the administrator of the deceased estate.[991] As a result, the ECS simplifies the probate process amongst Member States but this does not affect legal practitioners in third-party states such as South Africa.[992]

The content of the ECS is flexible enough to cover legal systems in which a deceased estate devolves directly onto heirs, such as in Germany, as well as those where the estate is transmitted to a third party for administration.[993] South Africa is an example of the latter since an executor or executrix is appointed.[994]

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[986] Recital 26 of Regulation (EU) No 650/2012.
[987] Villata 2019 *Rivista di diritto internazionale privato e processuale* 720.
[988] Article 35 of Regulation (EU) No 650/2012.
[989] European Commission "Cross-border successions – a citizen's guide" 14.
[990] Article 62 of Regulation (EU) No 650/2012.
[991] Article 63(1) of Regulation (EU) No 650/2012.
[992] Nel "The impact of the EU Regulations on fiduciary advice in South Africa".
[993] Kunda, Winkler, and Pertot *Property relations of cross border couples in the European Union* 125.
[994] Section 13(1) of the Administration of Estates Act.

The content contained in the ECS includes: the beneficiaries' details;[995] details of any marriage or a relationship comparable to a marriage, and the matrimonial property regime in the case of the former;[996] the applicable succession law;[997] any waiver of succession;[998] the rights of beneficiaries including their entitlement to assets;[999] the rights, powers, and restrictions of the executor or administrator;[1000] and any restrictions placed on heirs and legatees.[1001] The ECS is only valid for six months unless it is extended by the issuing authority.[1002] According to the *Oberle*[1003] case, only one ECS per deceased estate should be issued by the Member State with jurisdiction.[1004] Multiple ECSs are, therefore, not permitted.

Anyone who relies on the accuracy of an ECS, including the purchaser of any of the deceased's assets, is afforded protection unless they were aware of the inaccuracy contained in the ECS, or they were grossly negligent.[1005] The original ECS remains in the possession of the issuing authority who must only provide certified copies to specific persons.[1006] Any changes to an ECS must be communicated to every person who received a certified copy of the ECS.[1007] An ordinary, uncertified copy of the ECS can still be made available to the public according to a recital.[1008]

The distinction between the application of the Succession Regulation and spouses' matrimonial property law in an ECS was considered by the Court of Justice of the European Union (CJEU) in the *Mahnkopf*[1009] case. Ms Mahnkopf wished to have an ECS issued regarding the intestate succession of her late husband, who died on 29 August 2015.[1010] The Mahnkopfs were German

[995] Article 68(g) of Regulation (EU) No 650/2012.
[996] Article 68(h) of Regulation (EU) No 650/2012.
[997] Article 68(i) of Regulation (EU) No 650/2012.
[998] Article 68(k) of Regulation (EU) No 650/2012.
[999] Article 68(j) of Regulation (EU) No 650/2012.
[1000] Article 68(j)-(o) of Regulation (EU) No 650/2012.
[1001] Article 68(n) of Regulation (EU) No 650/2012.
[1002] Kunda, Winkler, and Pertot *Property relations of cross border couples in the European Union* 127.
[1003] Judgment of 21 June 2018, *Oberle*, C-20/17, EU:C:2018:485. The case is available in English at: InfoCuria Case-law "ECLI:EU:C:2018:485" https://curia.europa.eu/juris/document/document.jsf?text=&docid=203223&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1333659 (accessed 2 April 2022).
[1004] Judgment of 21 June 2018, *Oberle*, C-20/17, EU:C:2018:485, para 59.
[1005] Article 69(3) of Regulation (EU) No 650/2012.
[1006] Article 70(1) of Regulation (EU) No 650/2012.
[1007] Article 71(3) of Regulation (EU) No 650/2012.
[1008] Recital 72 of Regulation (EU) No 650/2012.
[1009] Judgment of 1 March 2018, *Mahnkopf*, C-558/16, EU:C:2018:138. The case is available in English at: InfoCuria Case-law "ECLI:EU:C:2018:138" https://curia.europa.eu/juris/document/document.jsf?text=&docid=199805&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2518166 (accessed 1 April 2022).
[1010] Judgment of 1 March 2018, *Mahnkopf*, C-558/16, EU:C:2018:138, paras 2, 20.

nationals and were habitually resident in Germany before Mr Mahnkopf's death.[1011] The applicable matrimonial property regime was a German statutory property regime of accrued gains with no marriage contract being applicable.[1012] In terms of German law, if intestacy is applicable, as was the case, Ms Mahnkopf was entitled to a one-quarter share of the deceased estate due to intestacy plus an additional one-quarter share by virtue of the matrimonial property regime terminating due to death.[1013]

Ms Mahnkopf applied for an ECS confirming her total one-half share, as well as the share of the remaining heir.[1014] Her application was rejected by the local court because, according to the local court's interpretation of the Regulation, one quarter of her half share resulted from the matrimonial property regime, not succession.[1015] Accordingly, that one-quarter share was excluded from the scope of the Regulation and, in turn, from the ECS.[1016] The CJEU had to decide *inter alia* whether the underlying German rule for the one-quarter share was based in succession or matrimonial property.[1017]

The CJEU confirmed that questions concerning matrimonial property regimes were excluded in terms of article 1(1) of the Regulation, however recital 9 confirms that all civil-law aspects of succession should be included.[1018] Furthermore, one of the aims of the ECS is to guarantee the succession rights of heirs.[1019] The CJEU examined the purpose of the underlying German rule, which is to compensate the surviving spouse for the interruption of accrued gains caused by their spouse's death.[1020] The CJEU found that the German rule is rooted in determining the surviving spouse's share in the deceased estate, not the division of marital assets.[1021] As a result, the CJEU stated that the German rule is rooted in succession, not matrimonial property law, thereby characterising the matter as succession.[1022] Accordingly, the Regulation was applicable and the surviving spouse's one-quarter share could be included in the ECS.[1023] Such

[1011] Judgment of 1 March 2018, *Mahnkopf*, C-558/16, EU:C:2018:138, para 20.
[1012] Judgment of 1 March 2018, *Mahnkopf*, C-558/16, EU:C:2018:138, para 21.
[1013] Judgment of 1 March 2018, *Mahnkopf*, C-558/16, EU:C:2018:138, paras 22, 39.
[1014] Judgment of 1 March 2018, *Mahnkopf*, C-558/16, EU:C:2018:138, para 23.
[1015] Judgment of 1 March 2018, *Mahnkopf*, C-558/16, EU:C:2018:138, para 24.
[1016] Judgment of 1 March 2018, *Mahnkopf*, C-558/16, EU:C:2018:138, para 24.
[1017] Judgment of 1 March 2018, *Mahnkopf*, C-558/16, EU:C:2018:138, para 30.
[1018] Judgment of 1 March 2018, *Mahnkopf*, C-558/16, EU:C:2018:138, paras 33-34.
[1019] Judgment of 1 March 2018, *Mahnkopf*, C-558/16, EU:C:2018:138, paras 33-36.
[1020] Judgment of 1 March 2018, *Mahnkopf*, C-558/16, EU:C:2018:138, para 39.
[1021] Judgment of 1 March 2018, *Mahnkopf*, C-558/16, EU:C:2018:138, para 40.
[1022] Judgment of 1 March 2018, *Mahnkopf*, C-558/16, EU:C:2018:138, para 40.
[1023] Judgment of 1 March 2018, *Mahnkopf*, C-558/16, EU:C:2018:138, para 40.

an interpretation was said by the CJEU to achieve the objective of the ECS, which may have otherwise been defeated if a comprehensive picture of the surviving spouse's rights was omitted.[1024]

6.2.12. Cross-border adaption of rights

Recital 15 states that a Member State will not be required to recognise a right unknown in its law. A common problem with cross-border succession is that a succession right may be recognisable in one state but there is no equivalent right in another state. This was an issue discussed in the *Kubicka*[1025] case, which is considered below. To remedy this conflict, article 31 states that if a person is entitled to a succession right but this right is unrecognisable in the law of a Member State, the succession right must be adapted to the closest equivalent right of the Member State, taking into account the effect of the succession right. The *Kubicka* case clarifies how to understand, according to the ECJ, the adaption of an unknown right.

In the *Kubicka* case, Ms Kubicka was a Polish national who was habitually resident in Germany.[1026] She was married to a German citizen.[1027] Ms Kubicka and her husband were the joint owners of an immovable property situated in Germany.[1028] In terms of the Regulation, Ms Kubicka had two options: first, she could choose Polish succession law as the substantive succession law for her deceased estate due to her Polish citizenship; and, second, she could make use of the default rule of habitual residence if she wished for German law to apply. She chose Polish succession law.[1029] She approached a Polish notary to assist her with drafting a will where she would include a legacy by vindication, known as a *legatum per vindicationem*.[1030] This type of legacy is recognised in Polish law but not German law.[1031] The German equivalent would be a legacy by damnation, called a *legatum per damnationem*.[1032]

[1024] Judgment of 1 March 2018, *Mahnkopf*, C-558/16, EU:C:2018:138, para 43.
[1025] Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755.
[1026] Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755, para 18.
[1027] Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755, para 18.
[1028] Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755, para 18.
[1029] Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755, para 36.
[1030] Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755, para 19.
[1031] Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755, paras 18-21.
[1032] Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755, para 20.

To briefly summarise the difference between these two legacies, a legacy by vindication allows the legatee to become the immediate owner of an asset by operation of law upon the opening of succession, namely at the time of death.[1033] A legacy by damnation means that the deceased's heirs become the owner of the asset upon death and, thereafter, the heirs have an obligation to transfer the asset to the legatee.[1034] The position of a legatee by damnation is akin to a creditor[1035] because the legatee has a personal right against the heir.[1036] The right of a legatee by vindication is much stronger.[1037]

Using a legacy by vindication, Ms Kubicka wished to bequeath her half share of the jointly-owned German immovable property to her husband.[1038] She intended to bequeath the remainder of her estate to her husband and minor children in equal shares via statutory inheritance.[1039] The Polish notary refused to draft a will along such terms as the notary believed that such a legacy, although recognised in Poland, would not be recognised by German law and would, therefore, be unlawful.[1040] The notary instead suggested the use of a legacy by damnation since it is the closest German equivalent to a legacy by vindication.[1041] Ms Kubicka did not wish to make use of a legacy by damnation as she said it would result in additional expenses plus complexities with the representation of her minor children.[1042]

In its decision, the ECJ stated that both types of the legacies in question essentially concern the transfer of ownership of an asset.[1043] Unlike a legacy by damnation, a legacy by vindication involves a direct transfer of ownership.[1044] The ECJ stated that article 31 is not concerned with the transfer of rights, rather how the content of the right is received at the *lex rei sitae*.[1045] Since the legacy by vindication is essentially the transfer of a right of ownership, there is no need for

[1033] Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755, paras 13, 49.
[1034] Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755, para 15.
[1035] Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755, para 15; B Akkermans "*Lex Rei Sitae* and the EU Internal Market – Towards Mutual Recognition of Property Relations" (2018) *Maastricht University Faculty of Law* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3289625 (accessed 27 May 2021).
[1036] P Tereszkiewicz and A Wysocka-Bar "Legacy by Vindication under EU Succession Regulation No. 650/2012 following the *Kubicka* Judgment of the ECJ" (2019) 4 *European Review of Private Law* 875 at 879.
[1037] Tereszkiewicz and Wysocka-Bar 2019 *European Review of Private Law* 880.
[1038] Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755, para 19.
[1039] Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755, para 19.
[1040] Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755, para 21.
[1041] Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755, para 22.
[1042] Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755, para 19.
[1043] Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755, para 49.
[1044] Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755, para 49.
[1045] Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755, para 63.

an adaption of a right as contemplated by article 31.[1046] In essence, Germany already recognises the right of ownership that would vest in a legatee by vindication under Polish law, without needing an adaption to a legacy by damnation.[1047]

The ECJ stated that article 31 precludes Germany from failing to recognise the material effects produced by a legacy by vindication when a person dies.[1048] Germany would consequently need to ensure that the material effects of such a legacy are reproduced in Germany if Ms Kubicka's will contains such a legacy on her death. In relation to the actual recordal of change of ownership, the ECJ stated that the requirements for recordal of rights and transfer of ownership are excluded under the Regulation, hence they would fall to Germany to determine.[1049]

The *Kubicka* case illustrates that even if the type of a succession right is unknown in a different legal system, there is no need to adapt the right if the material effect of the right can be reproduced.

6.2.13. Information made available to the public

In terms of article 77, all Member States must ensure that the European Commission is provided with a summary of their succession legislation and procedures, identification of their competent authorities for succession, and all information and documents required for registering immovable property located in their territory. The information must remain permanently up-to-date.[1050] This information, plus additional detail concerning special rules and the adaption of rights, is publicly available on the European e-Justice portal.[1051]

[1046] Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755, para 64.
[1047] Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755, para 62.
[1048] Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755, para 65.
[1049] Judgment of 12 October 2017, *Kubicka*, C-218/16, EU:C:2017:755, paras 54, 63.
[1050] Article 77 of Regulation (EU) No 650/2012.
[1051] This information is available at: European e-Justice "Inheritance: Information of the Regulation No 650/2012 on Succession and the national rules on inheritance" https://e-justice.europa.eu/517/EN/inheritance (accessed 10 April 2022).

6.2.14. Cross-border register

Recital 77 contemplates the creation of a cross-border electronic register recording pertinent information about a deceased estate.[1052] The purpose of the register is to allow creditors from different Member States to access such information.[1053]

South Africa already has such an electronic national portal run by the Master that makes important information concerning a deceased estate publicly available.[1054] The portal records notable information such as the personal details of the deceased, the unique reference number assigned to the deceased estate by the Master, whether a valid will was executed, and the contact details of the appointed representative.

6.3. The Matrimonial Property Regulation

In addition to the harmonisation of succession, the EU has created harmonised rules for matrimonial property with cross-border implications. The result is the adoption of the previously mentioned Matrimonial Property Regulation and its twin Council Regulation 2016/1104 of 24 June 2016[1055] (the 'Registered Partnerships Regulation'). The former Matrimonial Property Regulation deals with marriages whilst the Registered Partnerships Regulation deals with registered partnerships, including registered same-sex partnerships. These twin regulations mirror each other to a large extent.[1056]

The EU's objective of harmonisation with these twin regulations did not receive the same support from Member States as compared to the Succession Regulation. Eighteen of the

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1052 Recital 46 of Regulation (EU) No 650/2012.
1053 Recital 46 of Regulation (EU) No 650/2012.
1054 The portal is available at: The Department of Justice and Constitutional Development "Masters Office Home" https://icmsweb.justice.gov.za/mastersinformation/Account/Login?ReturnUrl=%2fmastersinformation (accessed 10 April 2022).
1055 The full title of the Registered Partnerships Regulation is: 'Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships'. The text of the regulation is available at: EUR-Lex (European Union) "Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships" https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R1104 (accessed 25 January 2022).
1056 F Dougan "Property Relations of Cross-Border Same-Sex Couples in the EU" (2022) https://www.intersentiaonline.com/publication/the-eu-regulations-on-matrimonial-property-and-property-of-registered-partnerships/19 (accessed 24 March 2022).

twenty-seven Member States opted for the application of the twin regulations.[1057] That being said, approximately 70% of the EU population is still included.[1058] Denmark, Ireland, Hungary, Poland, Estonia, Latvia, Lithuania, Romania and Slovakia chose not to participate.[1059] Some Member States refused to participate as it may have forced them to recognise the legal consequences of same-sex unions in their territories.[1060] Until such time, they are considered as third-party states.[1061] Non-participating Member States are entitled to participate in the twin regulations at any stage in the future.[1062]

Since marital relationships, not life partnerships,[1063] are the focus of this study, the Matrimonial Property Regulation will be solely discussed in this chapter. It must be noted, however, that in the context of same-sex unions concluded between EU nationals or habitual residents, either of the twin regulations may apply to the union depending on whether the union itself is legally classified in the Member State as a 'marriage' or a 'partnership'.[1064] In South Africa, same-sex civil unions are legally recognised and result in the same proprietary consequences as a civil marriage.[1065] As a result, if South Africa was hypothetically a signatory, the Matrimonial Property Regulation alone would cover both civil marriages and civil unions.

6.3.1. Application

The Matrimonial Property Regulation applies to any marriage, or a change to a matrimonial property regime, occurring from 29 January 2019[1066] as well as legal proceedings instituted

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1057 European Union "Property regimes for international couples" (2021) https://europa.eu/youreurope/citizens/family/couple/property-regimes-international-couples/index_en.htm#:~:text=an%20EU%20country.,Rules%20and%20procedures,%2C%20Slovenia%2C%20Spain%20and%20Sweden (accessed 31 March 2022).

1058 A Mohos "Family law in practice with a special focus on the enhanced cooperation on matrimonial and registered partnership property issues (2016/1103 and 2016/1104 EU Regulations)" *EU Law Training in English Language* https://eventi.nservizi.it/upload/223/altro/mohos%20new%20per%20e-learning_rev%20fin.pdf (accessed 29 March 2022) 5.

1059 European Union "Property regimes for international couples".

1060 Dougan "Property Relations of Cross-Border Same-Sex Couples in the EU".

1061 European Notarial Network "Matrimonial Property Regimes: Explanatory Handbook on Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes" (2019) https://www.ejtn.eu/Documents/Handbook-%20matrimonial%20property.pdf (accessed 29 March 2022) 2.

1062 Recital 13 of Council Regulation (EU) 2016/1103.

1063 The definition of a 'registered partnership' is the "regime governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation" – see article 3(1)(a) of Council Regulation (EU) 2016/1104. There is thus no gender or sex referred to in the definition, but registration of the partnership is mandatory.

1064 Dougan "Property Relations of Cross-Border Same-Sex Couples in the EU".

1065 Sections 4(1) and 13(1) of the Civil Unions Act 17 of 2006.

1066 Article 70(2) of Council Regulation (EU) 2016/1103.

after this date.[1067] A recent Dutch case confirmed that the Regulation can be used to establish the jurisdiction of a Dutch court regarding a marriage that was terminated before 29 January 2019.[1068] This was because the legal proceedings relating to the matrimonial property were instituted after such date.[1069]

6.3.2. Structure and purpose

The Matrimonial Property Regulation is structured into 73 recitals followed by 70 articles. It applies to the matrimonial property of spouses with cross-border implications.[1070] This could include spouses with different nationalities or habitual residences, or spouses who are not EU nationals nor habitual residents, but own assets in at least one Member State.

The Regulation seeks to provide clarity on matrimonial property and the liquidation of the matrimonial property regime, particularly on death.[1071] It is similar to the Succession Regulation in that it seeks to provide procedural clarity but excludes substantive issues such as the validity of a marriage,[1072] a right to maintenance,[1073] and the nature of rights relating to property.[1074] It expressly excludes the succession of a deceased estate,[1075] nor does it apply to customs or revenue matters.[1076]

[1067] Article 69(1) of Council Regulation (EU) 2016/1103.
[1068] A Rutkauskas "Application of article 6 of the Regulation on Matrimonial Property Regimes: Another judgment of a Dutch court" (2021) *E-Training on EU Family Property Regimes* https://www.euro-family.eu/news-221application_of_article_6_of_the_regulation_on_matrimonial_property_regimes_another_judgment_of_a_dutch_court (accessed 31 March 2022).
[1069] Rutkauskas "Application of article 6 of the Regulation on Matrimonial Property Regimes: Another judgment of a Dutch court".
[1070] Recital 14 of Council Regulation (EU) 2016/1103.
[1071] Recital 18 of Council Regulation (EU) 2016/1103.
[1072] Article 1(2)(b) of Council Regulation (EU) 2016/1103.
[1073] Article 1(2)(c) of Council Regulation (EU) 2016/1103.
[1074] Article 1(2)(g) of Council Regulation (EU) 2016/1103.
[1075] Article 1(2)(d) of Council Regulation (EU) 2016/1103.
[1076] Article 1(1) of Council Regulation (EU) 2016/1103.

6.3.3. Notable definitions

There is no set definition for 'marriage' in the Regulation as each Member State retains a discretion to define the term.[1077] This approach was intentional in order to accommodate the divergent positions of the twenty-seven Member States regarding same-sex marriages.[1078]

There is, however, a definition for 'matrimonial property regime' and a 'matrimonial property agreement'. A 'matrimonial property regime' is defined as the set of rules concerning the property relationships between spouses, and their relations with third parties during or as a result of the dissolution of the marriage.[1079] According to recital 18, the term would cover mandatory rules, default rules, and any optional rules of an applicable law.

A 'matrimonial property agreement' is defined as any agreement by spouses or intended spouses regarding their matrimonial property regime.[1080] Since the term refers to 'intended spouses' and 'spouses', the term inherently recognises postnuptial changes to a matrimonial property regime. It is noted that, in South Africa, the term 'agreement' is distinguishable from that of 'contract' as the former does not necessarily give rise to legally binding obligations.[1081] As such, the term 'matrimonial property contract' may be considered as more appropriate in a domestic context.

6.3.4. Default substantive law

As discussed in chapter 1,[1082] in terms of the *lex domicilii matrimonii* principle, unless the spouses have expressly contracted otherwise, the law of the husband's domicile at the time of the marriage determines the proprietary consequences of their marriage. The Regulation sets out a different position for Member States.

In the absence of a matrimonial property agreement setting out a choice of law, the default rule is that the law of the spouses' first common habitual residence shortly after the conclusion of

[1077] Recital 17 of Council Regulation (EU) 2016/1103.
[1078] Dougan "Property Relations of Cross-Border Same-Sex Couples in the EU".
[1079] Article 3(1)(a) of Council Regulation (EU) 2016/1103.
[1080] Article 3(1)(b) of Council Regulation (EU) 2016/1103.
[1081] D Hutchison *et al The Law of Contract in South Africa* 2 ed (2012) 5.
[1082] See chapter 1 § 1.1.1.

their marriage will be the applicable matrimonial property law.[1083] In other words, the matrimonial property regime will be determined by the law of the first common habitual residence shortly after the marriage. Failing a common habitual residence, the law of their common nationality at the time of their marriage will apply.[1084] This second step should be ignored if there is more than one common nationality.[1085] The determination of a spouse's nationality is left to the discretion of Member States to decide.[1086] Failing a common nationality, the applicable law shall be that of the state to which they are most closely connected at the conclusion of their marriage.[1087] The applicable law will regulate *inter alia* the rights and obligations of spouses relating to their property, liability for their spouse's debts, the effect of their matrimonial property regime on third parties, and the dissolution of the regime.[1088]

The default rule can be illustrated as follows. Two Dutch citizens establish a common habitual residence in South Africa shortly after their marriage in 2022. Since their marriage is after 29 January 2019, the Regulation applies. At the time of their marriage, they are closely connected to Namibia. They did not conclude a matrimonial property agreement setting out a choice of law prior to their marriage. According to the Regulation, South African law will apply to their matrimonial property regime despite it being the law of a third-party state. If there was no common residence established, Dutch law would instead apply as it would be the law of their common nationality at the time of the marriage. If one of the spouses is not a Dutch national, step two would be ignored. In terms of step three, the applicable law would be that of the state to which they are most closely connected at the time of their marriage, being Namibia.

6.3.5. Choice of law

Spouses or intended spouses are entitled to choose or change the legal system applicable to their marriage.[1089] This means that immutability has been relaxed at the international level. The choice of matrimonial law may be made at any point before or during the marriage in a matrimonial property agreement.[1090] Postnuptial changes will be discussed in the following

[1083] Article 26(1)(a) of Council Regulation (EU) 2016/1103.
[1084] Article 26(1)(b) of Council Regulation (EU) 2016/1103.
[1085] Article 26(2) of Council Regulation (EU) 2016/1103.
[1086] Recital 50 of Council Regulation (EU) 2016/1103.
[1087] Article 26(1)(c) of Council Regulation (EU) 2016/1103.
[1088] Article 27 of Council Regulation (EU) 2016/1103.
[1089] Article 22(1) of Council Regulation (EU) 2016/1103.
[1090] Article 22(1) of Council Regulation (EU) 2016/1103.

section. The choice of law is limited to the law of either spouse's habitual residence or nationality, which must be held at the time of concluding the choice.[1091] A choice of the law of a third-party state is permissible.[1092] The chosen law will apply to all assets falling within the matrimonial property regime, regardless of their location, therefore including both immovable and movable property.[1093]

The basic formal requirements for a choice-of-law clause is that the decision must be recorded in a written matrimonial property agreement that has been dated and signed by both parties.[1094] An electronic communication in a durable format is sufficient to meet this written requirement.[1095] If both spouses are habitually resident in the same Member State, they must comply with any additional formal requirements required by that Member State.[1096] If they are habitually resident in different Member States, they must satisfy the formal requirements of either Member State.[1097] If only one spouse is habitually resident in a Member State, the formal requirements of that Member State must be complied with.[1098] Any question regarding the existence or validity of the contract, or any term thereof, is to be decided using the chosen law.[1099] This is contrary to the current position in South Africa, where an assigned law, decided in terms of the choice-of-law rules, supersedes the proper law.

To illustrate this, the following example can be used. A German citizen and a Namibian citizen intend to marry in South Africa and remain indefinitely. They are already both habitually resident in South Africa. In terms of the default rule established in the Regulation, their matrimonial property regime will be governed by domestic law regardless of the location or type of assets due to their common habitual residence in South Africa shortly after the conclusion of the marriage. In terms of the Regulation, they may decide to choose that German law or Namibian law should govern their marriage in a written, prenuptial matrimonial property agreement. The agreement must comply with South Africa's formal requirements for an antenuptial contract since they are both habitually resident in South Africa.

[1091] Article 22(1) of Council Regulation (EU) 2016/1103.
[1092] Recital 44 and article 20 of Council Regulation (EU) 2016/1103.
[1093] Article 21 of Council Regulation (EU) 2016/1103.
[1094] Article 23(1) of Council Regulation (EU) 2016/1103.
[1095] Article 23(1) of Council Regulation (EU) 2016/1103.
[1096] Article 23(2) of Council Regulation (EU) 2016/1103.
[1097] Article 23(3) of Council Regulation (EU) 2016/1103.
[1098] Article 23(4) of Council Regulation (EU) 2016/1103.
[1099] Article 24(1) of Council Regulation (EU) 2016/1103.

6.3.6. Postnuptial change to substantive law

The legal system applicable to the marriage will remain permanently fixed unless the spouses change it via a postnuptial matrimonial property agreement.[1100] In these circumstances, either spouse can apply to a suitable judicial authority[1101] for permission to change the applicable matrimonial property law.[1102] The following requirements must be met for such an application to be successful. First, the spouses' last common habitual residence must have been held for a significantly longer period of time than their residence in the applicable state.[1103] Second, they must have relied on the law of their last common habitual residence for their property arrangement or estate planning.[1104] Third, the rights of third parties deriving from the default law must not be negatively affected by the proposed change.[1105] Fourth, the spouses must not have concluded a matrimonial property agreement prior to establishing their last common habitual residence.[1106] A postnuptial change in terms of the Regulation, therefore, requires: a long-held last common habitual residence with no matrimonial property agreement being concluded prior to then; reliance on the last common habitual residence for estate planning; and non-prejudice to rights of third parties. As a result, the requirements for such a change are not easily met.

A postnuptial choice of law in a matrimonial property agreement will generally have prospective effect only.[1107] It is, however, possible for the choice of law to apply retrospectively, provided that the rights of third parties are not negatively affected.[1108] If either spouse disagrees with prospective application, the new law will apply from the date upon which the last common habitual residence began.[1109]

A practical example is as follows.[1110] Two spouses with Dutch nationality conclude a marriage in 2021. Since their marriage is after 29 January 2019, the Regulation applies. They establish

[1100] European Notarial Network "Matrimonial Property Regimes" 10.
[1101] The authority must have the requisite jurisdiction to rule on such a matter – article 26(3) of Council Regulation (EU) 2016/1103.
[1102] Article 26(3) of Council Regulation (EU) 2016/1103.
[1103] Article 26(3)(a) of Council Regulation (EU) 2016/1103.
[1104] Article 26(3)(b) of Council Regulation (EU) 2016/1103.
[1105] Article 26(3) of Council Regulation (EU) 2016/1103.
[1106] Article 26(3) of Council Regulation (EU) 2016/1103.
[1107] Article 22(2) of Council Regulation (EU) 2016/1103.
[1108] Recital 46 and article 23(1) of Council Regulation (EU) 2016/1103.
[1109] Article 26(3) of Council Regulation (EU) 2016/1103.
[1110] The example is adapted from: European Notarial Network "Matrimonial Property Regimes" 7.

a common habitual residence in Germany shortly after their marriage and remain in Germany for one year. They then return to the Netherlands and acquire a common habitual residence. German law will govern their marriage, despite their Dutch nationality, because Germany was their first common habitual residence shortly after the marriage. If they wish for Dutch law to apply instead of German law, either spouse can institute an application for permission to change the law. They would need to meet the requirements set out above to be successful.

6.3.7. Jurisdiction

Even though the Regulation excludes succession matters, if a court[1111] of a Member State is ruling on a matter arising from the Succession Regulation, that same court can rule on a matter falling under the scope of the Matrimonial Property Regulation.[1112] This is an example of the intertwine between the Succession Regulation and the Matrimonial Property Regulation. If the deceased owned assets located in a third-party state, the court can further decide on request by a party to exclude that asset from its decision if it would not be enforced in the third-party state.[1113]

The establishment of jurisdiction in other instances is listed in articles 5 to 10. This includes the possibility of an agreement between the spouses as to exclusive jurisdiction of a Member State in specific circumstances.[1114] The Regulation furthermore creates the option of jurisdiction based on a *forum necessitatis*.[1115] If only a third-party state would have jurisdiction, a Member State with a sufficiently close connection can be a *forum necessitatis* and make a ruling on a matrimonial property regime, provided that it would be unreasonable or impossible to bring proceedings in the third-party state.[1116]

[1111] Similarly to the Succession Regulation, the definition of 'court' in the Matrimonial Property Regulation is given a wide meaning to include any judicial authority with competence in matters of matrimonial property regimes. The full definition is set out in article 3(2) of Council Regulation (EU) 2016/1103.
[1112] Article 4 of Council Regulation (EU) 2016/1103.
[1113] Article 13(1) of Council Regulation (EU) 2016/1103.
[1114] Article 7(1) of Council Regulation (EU) 2016/1103.
[1115] Article 11 of Council Regulation (EU) 2016/1103.
[1116] Article 11 of Council Regulation (EU) 2016/1103.

6.3.8. Third parties

Spouses cannot use the applicable matrimonial property law as a defence against a claim from a third party, unless the third party knew of the existence of the governing law or could have diligently gained knowledge of it.[1117] A third party will be deemed to be aware of the existence of the applicable law in certain circumstances, including if the law is the same as:

- the law governing the transaction between the contracting spouse and the third party;[1118]
- the law of the habitual residence of both the contracting spouse and the third party;[1119] or
- the *lex situs* of an immovable property, if relevant to the transaction.[1120]

Alternatively to the above, a third party will be deemed to be aware of the applicable law if either spouse complied with the disclosure requirements of any law listed in the above three instances.[1121] In other words, the third party will be deemed to possess knowledge of the applicable law if the spouses complied with the disclosure requirements of the law governing the transaction, the law of habitual residence of the spouse and third party, or the *lex situs* of an immovable property, if relevant.[1122] In cases where a third party is not deemed to have knowledge, the applicable law will be either the law regulating the transaction between the contracting spouse and third party, alternatively, the *lex rei sitae* of a registered asset relevant to the transaction.[1123]

6.3.9. *Renvoi*

Although *renvoi* is permitted to a limited extent in the Succession Regulation, the same position is not repeated in the Matrimonial Property Regulation. Article 32, titled "exclusion from *renvoi*", excludes the rules of private international law in the application of any substantive

[1117] Article 28 of Council Regulation (EU) 2016/1103.
[1118] Article 28(2)(a)(i) of Council Regulation (EU) 2016/1103.
[1119] Article 28(2)(a)(ii) of Council Regulation (EU) 2016/1103.
[1120] Article 28(2)(a)(iii) of Council Regulation (EU) 2016/1103.
[1121] Article 28(2) of Council Regulation (EU) 2016/1103.
[1122] Article 28(2)(b) of Council Regulation (EU) 2016/1103.
[1123] Article 28(3) of Council Regulation (EU) 2016/1103.

law.[1124] This means that *renvoi* is not permitted in any form as *renvoi* is a part of private international law.[1125]

6.3.10. Overriding mandatory rules and public policy

Similarly to the Succession Regulation, the mandatory rules of the Matrimonial Property Regulation can be overridden based on certain considerations of a Member State.[1126] Such considerations would include any public interest of a Member State that is "crucial" for the protection of its political, social, or economic arrangements.[1127]

The override of mandatory provisions is distinct from the Regulation's public policy provisions. Public policy, or *ordre public*, can be invoked if the law of any state is manifestly incompatible with the *lex fori*.[1128] An example of manifestly incompatible law would be any law that discriminates on the basis on sex or gender, such as a law allowing for marital power by a husband.[1129] According to recital 55, the public policy exception cannot be invoked if the exercise of the exception would be contrary to a provision of the Charter of Fundamental Rights of the European Union.[1130]

6.3.11. Cross-border adaption of rights

Regarding the recognition of cross-border matrimonial property rights, the Matrimonial Property Regulation has an identical approach to the Succession Regulation. The Regulation allows for matrimonial property rights to be created or transferred to a different Member State.[1131] A Member State does not have to recognise matrimonial property rights that are unknown in its law, however, it should adapt the right to its closest equivalent right.[1132] The adaption should take into account the aims, interests, and effect of that right.[1133] The

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[1124] Article 32 of Council Regulation (EU) 2016/1103.
[1125] European Notarial Network "Matrimonial Property Regimes" 14.
[1126] Article 30 of Council Regulation (EU) 2016/1103.
[1127] Article 30(2) of Council Regulation (EU) 2016/1103.
[1128] Article 31 of Council Regulation (EU) 2016/1103.
[1129] European Notarial Network "Matrimonial Property Regimes" 12.
[1130] The Charter is available in English at: EUR-Lex (European Union) "Charter of Fundamental Rights of the European Union" https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT (accessed 10 October 2022).
[1131] Article 29 of Council Regulation (EU) 2016/1103.
[1132] Article 29 of Council Regulation (EU) 2016/1103; recitals 24-25 of Council Regulation (EU) 2016/1103.
[1133] Article 29 of Council Regulation (EU) 2016/1103.

requirements for recordal of such rights, and the effect of such recordal, are left to the discretion of each Member State to determine.[1134]

6.3.12. Information made available to the public

Similarly to the Succession Regulation, the Matrimonial Property Regulation requires that Member States must make information public regarding matrimonial property law and procedures, identification of their competent authorities, and the effects of matrimonial property regimes on third parties.[1135] The information must remain permanently up-to-date.[1136] This information for most Member States is publicly available on the European e-Justice portal.[1137]

6.4. The meaning of habitual residence in domestic law

In both the Succession Regulation and the Matrimonial Property Regulation, the concept of habitual residence is fundamental, although no definition is provided in either. In the former, the authority dealing with the deceased's succession is allowed to make the decision regarding the deceased's habitual residence, hence there is scope for a domestic authority to make a determination regarding a deceased's habitual residence.[1138] In the latter, the recitals indicate that a judicial authority will determine the default substantive law if no choice was made based on the spouses' first common habitual residence.[1139] As such, before concluding this chapter, the definition of habitual residence in terms of domestic law will now be briefly considered to contextualise the application of both regulations in South Africa, since their use by EU citizens and habitual residents within South Africa is inevitable. The meaning of habitual residence will also inform the discussion of reforms proposed in chapter 7.[1140]

[1134] Recitals 27-28 and article 1(2)(h) of Council Regulation (EU) 2016/1103.
[1135] Article 63 of Council Regulation (EU) 2016/1103.
[1136] Article 63 of Council Regulation (EU) 2016/1103.
[1137] This information is available at: European e-Justice "Matrimonial property regimes" https://e-justice.europa.eu/36686/EN/matrimonial_property_regimes (accessed 10 April 2022).
[1138] Recital 23 of Regulation (EU) 650/2012.
[1139] For instance, see recitals 29, 32, 33, 34, and 35 of Council Regulation (EU) 2016/1103.
[1140] See chapter 7 § 7.3.3.

Habitual residence is a known concept in domestic law. It is mentioned in the Refugees Act[1141] without the full term being defined.[1142] It is used without being defined in section 3*bis*(1)(a)(ii) of the Wills Act[1143] as a connecting factor for a validly executed will. In the common law, the term has mostly been considered in the context of alleged international abduction of children.[1144] The definition of the term in the latter context will be considered with reference to the cases of *Central Authority for the Republic of South Africa and Another v LC*[1145] (*'Central Authority'*), *WS v LS*[1146] and *Senior Family Advocate, Cape Town, and Another v Houtman*[1147] ('*Houtman*'). The submissions of Schoeman will be similarly examined.

In *Central Authority*, the court approved of a definition of habitual residence as proposed by Clark:

> "(H)abitual residence should not be given a special technical definition, but should remain a question of fact to be decided by reference to the facts of each individual case. Habitual residence may be acquired by voluntarily assuming residence in a country for a settled purpose. It may be lost when a person leaves that country with a settled intention not to return... There is a significant difference between ceasing to be habitually resident in a country and acquiring habitual residence in a new country. A person can lose habitual residence in "a single day" when he or she leaves with the settled intention not to return. Habitual residence cannot, however, be

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[1141] Act 130 of 1998. Section 3, dealing with refugee status, mentions 'habitual residence'. The Immigration Act 13 of 2002, the Domicile Act 3 of 1992 and the South African Citizenship Act 88 of 1995 do not contain a definition for this term.

[1142] 'Residence' is defined in section 1 of the Refugees Act as meaning a status recognised by a particular country that allows person to sojourn in that country. 'Sojourn' is defined as a temporary residence in a place – see Merrium-Webster "Sojourn" https://www.merriam-webster.com/dictionary/sojourn#:~:text=%3A%20to%20stay%20as%20a%20temporary%20resident%20He%20sojourned%20for,month%20at%20a%20desert%20inn (accessed 25 February 2022). There appears to be no common-law discussion of habitual residence in the context of the Refugees Act.

[1143] E Schoeman *Domicile and Jurisdiction as criteria in external conflict of laws with particular reference to aspects of the South African Law of Persons* (LLD thesis, UNISA, 1997) 252.

[1144] In such cases, the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction has been used to attempt to return a child who has been wrongfully abducted. The Convention has been incorporated into South African law by the Children's Act 38 of 2005. According to section 275 of the Children's Act, the Convention is in force in the Republic and is subject to the provisions of the Children's Act. The term 'habitual residence' is used frequently in the Convention as its aim is to return a child to their habitual residence. The full-text of the Convention is available at: Hague Conference on Private International Law "Convention of 25 October 1980 on the Civil Aspects of International Child Abduction" https://www.hcch.net/en/instruments/conventions/full-text/?cid=24 (accessed 10 October 2022).

[1145] 2021 (2) SA 471 (GJ).

[1146] 2000 (4) SA 104 (C).

[1147] 2004 (6) SA 274 (C).

> acquired in a day. An appreciable period of time and a settled intention will be necessary to enable him or her to become habitually resident."[1148]

Clark's proposition is that habitual residence cannot be confused with acquiring a domicile of choice.[1149] Habitual residence, in contrast to domicile of choice, does not require that a person must be resident in a particular place combined with an intention to remain there indefinitely.[1150] As such, according to Clark, a person may be resident in a country, and have a stable territorial link to that country, without intending to reside there indefinitely. Clark's definition of habitual residence still requires a 'settled intention' or a 'settled purpose', which Clark distinguishes from an 'intention to remain indefinitely', as is required for a domicile of choice.

Before discussing *WS v LS*,[1151] it is helpful to understand the definition of habitual residence as proposed by Schoeman. According to Schoeman, there is an important distinction between ordinary residence and habitual residence.[1152] Ordinary residence is the place where a person on a daily basis would live, work, and move within society.[1153] Ordinary residence does not, however, result in a sufficiently close link between a person and a state to result in the application of that state's legal system.[1154] Notwithstanding, in South Africa, ordinary residence has still been used as a connecting factor for the jurisdiction of courts in divorce matters such as in section 2(1)(b) of the Divorce Act.[1155]

To explain the meaning of habitual residence, Schoeman distinguishes between habitual residence and domicile.[1156] The former is a question of fact whereas the latter is a question of law.[1157] According to Schoeman, a commonly held interpretation of habitual residence is that it is a regular and physical presence lasting for a duration of time.[1158] Unlike with domicile, an

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[1148] *Central Authority for the Republic of South Africa and Another v LC* 2021 (2) SA 471 (GJ) para 56.
[1149] B Clark "Child Abduction" in B Clark (ed) *Family Law Service* (2017) 4. Clark's definition is based on English case law. Although Clark's discussion is centred around child abduction, a domicile of choice is only available to majors according to section 1(1) of the Domicile Act. Her proposition accordingly is applicable to majors.
[1150] Clark *Family Law Service* 4.
[1151] 2000 (4) SA 104 (C).
[1152] E Schoeman *Domicile and Jurisdiction* 252.
[1153] Schoeman *Domicile and Jurisdiction* 246.
[1154] Schoeman *Domicile and Jurisdiction* 256, 259.
[1155] Act 70 of 1979.
[1156] Schoeman *Domicile and Jurisdiction* 253.
[1157] Schoeman *Domicile and Jurisdiction* 253.
[1158] Schoeman *Domicile and Jurisdiction* 248.

animus, or an intention, is not a prerequisite of habitual residence although an intention to acquire habitual residence may play a role in the factual matrix of its determination.[1159] Schoeman's definition of habitual residence, therefore, deviates from Clark's definition in that intention is not included in the definition, but remains relevant as a factor.

Turning to *WS v LS*, the court had to consider the habitual residence of two children who were allegedly abducted.[1160] With regard to the definition of habitual residence, the court stated that "habitual or ordinary residence refers to a person's abode in a particular place or country".[1161] According to Schoeman's definition, in this sentence, the court has conflated habitual residence and ordinary residence. If Schoeman is correct, the conflation contained in *WS v LS* should be avoided. The court continued to state that the term 'habitual' connotes a time period over which habits can arise.[1162] Following the definition in an English case, the court approved of habitual residence as meaning when a person voluntarily adopts a place or country as part of the regular structure to their life, with a settled purpose, and to remain for a short or long duration of time.[1163]

It is noted that the court in *Central Authority* and *WS v LS* refers to voluntariness in its definition of habitual residence. There has been debate as to whether voluntariness is required.[1164] Schoeman suggests that voluntariness should not be a mandatory requirement, but it should be taken into account in specific instances where a person is a forced resident.[1165] These include soldiers, prisoners, or abductees.[1166] In these cases, Schoeman argues that the involuntary residence of that person should negate the acquisition of habitual residence.[1167]

In *Houtman*, the court stated that habitual residence should be interpreted using its ordinary, grammatical meaning.[1168] In each case, the habitual residence of a person must be determined using the circumstances of the case, without creating restrictive rules.[1169] The term 'habitual'

[1159] Schoeman *Domicile and Jurisdiction* 254.
[1160] *WS v LS* 2000 (4) SA 104 (C) 107B-C.
[1161] *WS v LS* 2000 (4) SA 104 (C) 110F.
[1162] *WS v LS* 2000 (4) SA 104 (C) 111E.
[1163] *WS v LS* 2000 (4) SA 104 (C) 111A-B.
[1164] Schoeman *Domicile and Jurisdiction* 256.
[1165] Schoeman *Domicile and Jurisdiction* 256.
[1166] Schoeman *Domicile and Jurisdiction* 256.
[1167] Schoeman *Domicile and Jurisdiction* 256.
[1168] *Senior Family Advocate, Cape Town, and Another v Houtman* 2004 (6) SA 274 (C) para 8.
[1169] *Senior Family Advocate, Cape Town, and Another v Houtman* 2004 (6) SA 274 (C) para 8.

is indicative of a stable link to a place evidenced by a very close tie between the person and place.[1170] To this end, the court stated that close attention must be paid to assess whether the person had a settled intention to abandon their previous habitual residence.[1171] The court, therefore, envisages the acquisition of one habitual residence at a time, without requiring a settled purpose or voluntariness.

Based on the above cases, it is submitted that habitual residence could be understood in the domestic context as follows. Habitual residence should be decided on a case-by-case basis without set rules and using its ordinary, grammatical meaning. It concerns a person assuming a stable link, or a close tie, to a place by residing therein over a short or long period of time. It is suggested that Schoeman's approach to intention and voluntariness should be followed, namely neither voluntariness nor intention should not be a prerequisite. Rather, voluntariness should be considered in extraordinary instances, and the person's intention to acquire a habitual residence should only be a factor.

6.5. Conclusion

The EU has harmonised succession and matrimonial property law amongst Member States that chose to participate. The result is the Succession Regulation and the Matrimonial Property Regulation, which mainly seek to provide procedural clarity for cross-border conflicts of law.

The Succession Regulation establishes habitual residence as the connecting factor for the default substantive law of succession applying to the whole of a deceased's estate. In addition, a testator or testatrix has the option to make a choice of law by choosing the law of their nationality as their preferred connecting factor. Various other provisions are covered including choice-of-court agreements, the formal validity of testamentary dispositions, cross-border adaption of succession rights, public policy, *renvoi*, the ECS, publicly available information, and the existence of a cross-border register. Any person who is connected to the EU through either nationality, habitual residence, or ownership of assets, is advised to review their testamentary disposition to ensure that it correctly reflects their intentions.[1172]

[1170] *Senior Family Advocate, Cape Town, and Another v Houtman* 2004 (6) SA 274 (C) para 9.
[1171] *Senior Family Advocate, Cape Town, and Another v Houtman* 2004 (6) SA 274 (C) para 11.
[1172] I Harvey "Your will and the EU Succession Regulations" (2016) *Without Prejudice* https://0-journals.co.za.wam.seals.ac.za/doi/pdf/10.10520/EJC190791 (accessed 10 March 2022) 42.

The Matrimonial Property Regulation, on the other hand, allows spouses and intended spouses to choose or change the law applicable to the proprietary consequences of their marriage. It establishes a default rule that, in the absence of a choice of law, the applicable law will be that of the spouses' first common habitual residence shortly after the conclusion of their marriage. The subsequent connecting factors are the spouses' common nationality at the time of conclusion of the marriage, followed by the state to which they are most closely connected at the conclusion of their marriage. Postnuptial changes are permitted provided that certain requirements are met. Various other provisions covered include the rights of third parties, *renvoi*, mandatory law, public policy, and publicly available information.

Before concluding the chapter, the definition of habitual residence in domestic law was considered since its definition is fundamental to both regulations. These two regulations should be carefully considered by estate planners and administrators of deceased estates if either advising clients or administering deceased estates if there is a connection to the EU via habitual residence, nationality, or ownership of assets.

CHAPTER 7: Recommendations for domestic reform

7.1. Introduction

In previous chapters, various issues requiring reform have been raised. For example, in chapter 2,[1173] the necessity of updating the reporting documents for deceased estates was mentioned, along with the withdrawal of Registrars' Conference Resolutions 5/2004 in so far as it requires an expert opinion or proof from a foreign mission. In chapter 4,[1174] a unitary approach to the succession of immovables was recommended for succession rights. In chapter 5,[1175] it was recommended that the limitations placed on a choice of law need to be addressed by the legislature. In this chapter, instead of focussing on individual suggestions for reform considered throughout the previous chapters, the most pressing reform will be discussed, being the need to reform the *lex domicilii matrimonii* principle.

In this regard, the South African Law Reform Commission (SALRC) has been tasked with recommending the replacement of the *lex domicilii matrimonii* principle.[1176] The aim of this chapter is to answer the following questions, which are largely based on questions already posed by the SALRC:[1177]

- Should the new rule be comprised of one connecting factor, such as the use of domicile alone, or should multiple connecting factors be used?
- What should the new rule be?
- Should a unitary approach to movable and immovable property be followed?
- Should the new rule apply to existing marriages and, if so, what can be done to protect vested rights?

To answer the above questions, the choice between single or multiple connecting factors will first be considered, followed by an analysis of the meaning and importance of each possible connecting factor. Thereafter, the models for the new rule proposed by Stoll, Visser, and

[1173] See chapter 2 § 2.2.
[1174] See chapter 4 § 4.7.
[1175] See chapter 5 § 5.2.3.
[1176] South African Law Reform Commission *Issue Paper 41: extension of the consultation process: Revised Issue Paper 34: Project 100E: review of aspects of matrimonial property law* (2021) 9.
[1177] South African Law Reform Commission *Issue Paper 41: extension of the consultation process: Revised Issue Paper 34: Project 100E: review of aspects of matrimonial property law* (2021) 9.

Schoeman will be discussed. The importance of a unitary approach to movables and immovables will then be examined, followed by the potential application of the new rule to existing marriages. Lastly, a new, unified choice-of-law rule for antenuptial contracts and postnuptial contracts will be suggested. Intermittent references will be made to Regulation (EU) No 650/2012[1178] (the 'Succession Regulation') and Council Regulation (EU) 2016/1103[1179] (the 'Matrimonial Property Regulation') for comparative purposes. Both were discussed in detail in chapter 6.[1180]

7.2. The choice between a single connecting factor or multiple connecting factors

For the new rule to be constitutionally acceptable, it cannot favour either spouse over the other. If it did, an unjustifiable benefit would be conferred on that spouse. At least one connecting factor would, therefore, need to apply to both spouses for a legal system to be assigned. If no connecting factor applies to both spouses, no legal system can be assigned. If connecting factors such as common domicile, common habitual residence, and common nationality are used, it is inevitable that the rule will still fail to apply in some instances as there will be spouses who do not have a common domicile, common habitual residence, or common nationality.[1181] In light thereof, a hierarchy of certain connecting factors followed by a flexible, catch-all connecting factor is the only practical solution to ensure that a legal system will always be assigned.

[1178] The full title of the Succession Regulation is: 'Regulation (EU) 2012/650 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession'. The text of the regulation is available at: EUR-Lex (European Union) "Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession" https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012R0650 (accessed 25 February 2022).

[1179] The full title of the Matrimonial Property Regulation is: 'Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes'. The text of the regulation is available at: EUR-Lex (European Union) "Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes" https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R1103 (accessed 25 February 2022).

[1180] See chapter 6 § 6.2 and 6.3.

[1181] South African Law Reform Commission *Issue Paper 41: extension of the consultation process: Revised Issue Paper 34: Project 100E: review of aspects of matrimonial property law* (2021) 9.

7.3. The meaning and importance of the possible connecting factors

The main objective of the hierarchy of connecting factors must be to ensure that there is a sufficiently close link between the spouses and a particular legal system justifying the application of that legal system to the proprietary consequences of the marriage.[1182] Based on the academic discourse surrounding the potential connecting factors, the connecting factors are likely to be domicile, nationality, habitual residence, and the law of the closest connection. The meaning and importance of each connecting factor will be briefly discussed below.

Before continuing, it is noted that 'ordinary residence' has been excluded from the above list of connecting factors. It has not featured prominently in academic discourse surrounding the proposed replacement rule, possibly because it does not require a sufficiently close link between a person and a place[1183] and, as such, it defeats the overarching objective of the hierarchy of connecting factors. This connecting factor has already been widely used in South Africa for different circumstances ranging from tax residency,[1184] the recognition of foreign divorce orders,[1185] and voting in elections,[1186] but appears to be unnecessary in this context. It is noted that its meaning was briefly considered in chapter 6[1187] under the discussion of habitual residence.

7.3.1. Domicile

The first proposed connecting factor is that of domicile. Domicile is an important connecting factor because it ensures that there is a stable link between a person and a legal system[1188] thereby aligning with the objective of the hierarchy of connecting factors.

To acquire a domicile of choice in terms of the Domicile Act,[1189] lawful presence in a particular place is required, combined with an intention to settle indefinitely in that place.[1190] The latter

[1182] E Schoeman *Domicile and Jurisdiction as criteria in external conflict of laws with particular reference to aspects of the South African Law of Persons* (LLD thesis, UNISA, 1997) 256, 259.
[1183] Schoeman *Domicile and Jurisdiction* 246, 256, 259.
[1184] *Commissioner for Inland Revenue v Kuttel* 1992 (3) SA 242 (A) 249A.
[1185] Section 13(b) of the Divorce Act 70 of 1979.
[1186] The Electoral Act 73 of 1998; section 47(7) of Local Government: Municipal Electoral Act 27 of 2000.
[1187] See chapter 6 § 6.4.
[1188] Schoeman *Domicile and Jurisdiction* 265.
[1189] Act 3 of 1992.
[1190] Section 1(2) of the Domicile Act; Schoeman *Domicile and Jurisdiction* 266.

requirement excludes many people, especially in the context of migration, resulting in this connecting factor being unsuitable if no other hierarchical connecting factors are available. For example, people who have been employed for set contractual periods in a particular place would not be able to acquire a domicile in that place.[1191] Schoeman describes domicile as a "hard" connecting factor since it is intended to create certainty and predictability.[1192] Schoeman, however, states that this 'hardness' has resulted in confusion, uncertainty, and divergent applications, thereby causing the opposite of its intended effect.[1193]

Provided that there is a hierarchy of connecting factors available as an alternative to domicile, it is submitted that domicile fulfils an important function as a connecting factor because it ensures that there is a sufficiently close link between a person and a legal system.

7.3.2. Nationality

Nationality is the second proposed connecting factor. Nationality is perhaps the easiest connecting factor to establish since nationality can be readily proven. It does not, however, ensure that there is a sufficiently close link between spouses and a legal system. A sufficiently close link could be established when a person is attempting to acquire a nationality. The acquisition of that nationality, however, usually only occurs after significant time has passed, in addition to fulfilling other requirements. For example, to obtain citizenship in South Africa, a person must generally have been a permanent resident of South Africa for five years.[1194] Their permanent residence visa would, in turn, require that they had been the holder of a work visa for five years with an accompanying offer of permanent employment, in addition to other requirements being satisfied.[1195] This means that nationality would often not align with a person's domicile. For these reasons, it is submitted that nationality should not rank highly in a hierarchical ordering of connecting factors. Furthermore, there will be couples who do not share a common nationality, thereby always requiring an alternative connecting factor to follow nationality at a lower rank in the hierarchy.

[1191] Schoeman *Domicile and Jurisdiction* 267, 272.
[1192] Schoeman *Domicile and Jurisdiction* 285.
[1193] Schoeman *Domicile and Jurisdiction* 285.
[1194] Section 5(1) of the South African Citizenship Act 88 of 1995; Department of Home Affairs "Citizenship" http://www.dha.gov.za/index.php/immigration-services/ctizenship-requirements (accessed 9 September 2022).
[1195] Section 26(a) of the Immigration Act 13 of 2002.

7.3.3. Habitual residence

The third proposed connecting factor is that of habitual residence. The meaning of habitual residence in domestic law was considered in detail in chapter 6.[1196] In essence, it means that a person has a regular and physical residence in a place but does not require an intention to remain indefinitely.[1197] As such, habitual residence is far easier to acquire compared to domicile and nationality although it is more difficult to pinpoint. As such, it is a 'softer' but more flexible connecting factor. Importantly, habitual residence results in a sufficiently close connection to a place[1198] which makes it a suitable connecting factor in this context.

The EU has placed significant importance on this connecting factor as it is the primary connecting factor used in the Matrimonial Property Regulation for determining the applicable default matrimonial property law, albeit in the form of the first common habitual residence after the conclusion of the marriage,[1199] not at the time of the marriage. Perhaps the differentiation between, first, the time of the marriage and, second, shortly thereafter, is intended to include spouses who do not, or cannot, live together before they marry. The use of habitual residence in the second form does raise further complexities requiring additional attention. For example, a cut-off date would need to be established.

Turning back to its potential use in a domestic context, Roodt suggests the following factors to consider in an assessment of a person's habitual residence, namely: nationality; family location; the nature and location of employment; personal ties; the permanence of a person's place of residence; the location of their assets; and their reasons for departure from a particular place.[1200] Roodt's suggestion is similar to the factors contained in the recitals of the Succession Regulation.[1201] As mentioned in chapter 6,[1202] these recitals allow for an overall assessment of habitual residence to be made taking into account factors such as regular presence, the reason for the presence, and the location of assets.[1203] It is noted that there are no equivalent factors set out in the Matrimonial Property Regulation to assist for comparative purposes. It is

[1196] See chapter 6 § 6.4.
[1197] B Clark "Child Abduction" in B Clark (ed) *Family Law Service* (2017) 4.
[1198] Schoeman *Domicile and Jurisdiction* 256, 259.
[1199] Article 26(1)(a) of Council Regulation (EU) 2016/1103.
[1200] C Roodt "Party autonomy in international law of succession: a starting point for a global consensus?" (2009) 2 *TSAR* 241 at 245.
[1201] Recitals 23-24 of Regulation (EU) No 650/2012.
[1202] See chapter 6 § 6.2.5.
[1203] Recitals 23-24 of Regulation (EU) No 650/2012.

suggested that the factors of regular presence and the reason for that presence would be helpful for establishing habitual residence if added to Roodt's factors.

7.3.4. The law of the closest connection

The law of the closest connection is the last proposed connecting factor. This connecting factor was referred to in *Ex Parte Spinazze and Another NNO*[1204] as the "law of the closest and most real connection", although its meaning was not defined.[1205]

Forsyth defines it as the legal system to which the balance tilts once all relevant facts have been weighed up against each other.[1206] Spiro states that it is an enquiry into all surrounding circumstances.[1207] Viejobueno describes it as the closest law to a matter when decided from an objective perspective, and not from the subjective perspectives of the parties.[1208] This is confirmed by Forsyth who states that the parties' subjective intentions should not be included in its consideration.[1209] Schoeman states that factors such as non-transitory ordinary residence, common social ties, the intended acquisition of a first common habitual residence, and the *lex loci celebrationis*, if the latter is not casually selected, could all be factors in establishing the law of closest connection.[1210] Schoeman furthermore states that common social ties could arise through descent, culture, occupation, or trade.[1211]

Although there is no definite consensus on the exact factors or definition making up this connecting factor, it would be very useful as a catch-all connecting factor since it takes into account any relevant circumstances.[1212] Since it is the 'softest' connecting factor compared to those already discussed above, its flexibility can, however, lead to uncertainty and divergent

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1204 1985 (3) SA 650 (A).
1205 *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 665H.
1206 CF Forsyth *Private International Law* 5 ed (2012) 330.
1207 E Spiro "Autonomy of the parties to a contract and the conflict of laws: illegality" (1984) 17 *CILSA* 197 at 198.
1208 S Viejobueno "Private international law rules relating to the validity of international sales contracts" (1993) 26 *Comparative and International Law Journal of Southern Africa* 172 at 186.
1209 Forsyth *Private International Law* 330.
1210 E Schoeman "The South African conflict rule for proprietary consequences of marriage: learning from the German experience" (2004) 1 *TSAR* 115 at 132.
1211 Schoeman 2004 *TSAR* 132.
1212 C McConnachie "'With such changes as may be required by the context': the legal consequences of marriage through the lens of section 13 of the Civil Union Act" (2010) 127 *SALJ* 424 at 440.

applications. It would, therefore, be most appropriate as the lowest-ranking connecting factor in the hierarchy.

7.4. Proposals for the new rule

As the meaning and importance of the possible connecting factors have been explained above, the proposals for the new rule can now be considered. Two main proposals inform the academic discussion, namely the model proposed by Stoll and Visser, and Schoeman's later model.

In 1989, Stoll and Visser proposed the following five-step model to govern both the proprietary consequences of a marriage, as well as the "validity and effect" of an antenuptial contract:[1213]

1. An express or tacit clause in an antenuptial contract choosing a law;
2. In the absence of (1), the law of the parties' common domicile at the time of the marriage;
3. In the absence of (2), the law of the spouses' common habitual residence at the time of the marriage;
4. In the absence of (3), the law of the spouses' common nationality at the time of the marriage; and
5. In the absence of (4), the law of the spouses' joint closest connection at the time of the marriage, to be decided equitably at the court's discretion.

Schoeman later proposed the following four-step model:[1214]

1. A clause in an antenuptial contract choosing a law;
2. In the absence of (1), the law of the parties' common domicile at the time of the marriage;
3. In the absence of (2), the law of the spouses' common habitual residence at the time of the marriage;

[1213] H Stoll and PJ Visser "Aspects of the reform of German (and South African) Private International Family Law" (1989) *De Jure* 330 at 335.
[1214] Schoeman 2004 *TSAR* 133-134.

4. In the absence of (3), the law of the spouses' joint closest connection at the time of the marriage.[1215]

When comparing the two models, steps one to three of both are essentially the same, except Stoll and Visser specifically refer to an express or tacit choice whereas Schoeman does not. The fourth step of Stoll and Visser's model deviates from Schoeman's since the parties' common nationality is included as an additional step in the former model. Stoll and Visser's model has been welcomed over Schoeman's by various writers, including Neels and Wethmar-Lemmer,[1216] McConnachie,[1217] and Makola.[1218] Nevertheless, concerns have been expressed by Neels, Frederick, Forsyth, and Schulze in relation to the first and last steps.

In relation to the first step, Neels and Frederick believe that a tacit choice may not be advisable.[1219] It is submitted that this concern should not be supported. As discussed in chapter 5,[1220] a tacit choice of proper law has already been approved by *Spinazze*.[1221] Furthermore, a general contractual test to identify a tacit term already exists, being the officious bystander test.[1222]

In relation to the last step, Forsyth,[1223] Neels, and Fredericks[1224] state that it may be difficult to establish the law of closest connection if there is no common domicile, common habitual residence, nor common nationality. Schulze agrees with these concerns and believes that this connecting factor could lead to a lack of clarity, certainty, and predictability.[1225] To remedy this, Forsyth proposes that the *lex loci celebrationis* should rather be used as the fifth connecting factor.[1226] Forsyth admits this could result in arbitrary results but it would

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[1215] Schoeman 2004 *TSAR* at 133-134.
[1216] JL Neels and M Wethmar-Lemmer "Constitutional values and the proprietary consequences of marriage in private international law – introducing the *lex causae proprietatis matrimonii*" (2008) 3 *TSAR* 587 at 588.
[1217] McConnachie 2010 *SALJ* 439.
[1218] TM Makola *A Comparative Legal Analysis of the Effects of Divorce on Marital Property* (LLM thesis, University of South Africa, 2018) 116.
[1219] JL Neels and EA Fredericks "The proper law of the proprietary consequences of marriage: Mauritian law in the South African Supreme Court of Appeal – *Lenferna v Lenferna* (120/13) 2013 ZASCA 204 (02-12-2013)" (2015) 4 *TSAR* 918 at 921.
[1220] See chapter 5 § 5.2.2.
[1221] *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 665G-H.
[1222] C Maxwell "Chapter 10: Obligations and Terms" in D Hutchison and C Pretorius (eds) *The Law of Contract in South Africa* (e-book) 3 ed (2017) 245; *Seven Eleven Corporation of SA (Pty) Ltd v Cancun Trading No 150 CC* 2005 (5) SA 186 (SCA) para 34.
[1223] Forsyth *Private International Law* 301.
[1224] Neels and Fredericks 2015 *TSAR* 921.
[1225] Schulze *Law of Divorce* 661.
[1226] Forsyth *Private International Law* 302.

nevertheless result in certainty.[1227] Neels and Fredericks disagree with Forsyth as the *lex loci celebrationis* can result in a completely unconnected legal system applying if, for example, the parties married in an exotic place.[1228] Schulze agrees with Neels and Fredericks as the *lex loci celebrationis* can result in unanticipated decisions.[1229]

Taking the above into consideration, it is submitted that Stoll and Visser's five-step model is still the most appropriate model since it provides a combination of certainty and flexibility with the added advantage of an additional, ascertainable connecting factor in the form of nationality. The choice of domicile over habitual residence as the highest connecting factor is supported since domicile is a 'harder' connecting factor than habitual residence. Since the law of closest connection is vague, it is most appropriate as the last, catch-all connecting factor.

In response to Forsyth's proposal that the *lex loci celebrationis* should be used as the last connecting factor, it is submitted that the concerns raised by Forsyth, Neels, and Fredericks could rather be addressed by including the *lex loci celebrationis* as an express factor in the fifth step. For example, step five could be expanded to be the following:

5. In the absence of (4), the law of the spouses' joint closest connection at the time of the marriage, including the following factors, if relevant:

   5.1. the legal system in which the marriage was registered;
   5.2. the spouses' common matrimonial home immediately after the marriage;
   5.3. the spouses' common social ties;
   5.4. the *lex loci celebrationis*; or
   5.5. any other relevant factor.

The legal system in which the marriage was registered has been included as a factor. The reasoning behind this is that since the spouses are likely to have jointly agreed as to where their marriage should be registered before, at the time of, or immediately after the marriage, the law of that place would probably align with their legitimate expectations of the applicable matrimonial property law. It can be argued that this factor, along with the spouses' common

[1227] Forsyth *Private International Law* 302.
[1228] Neels and Fredericks 2015 *TSAR* 921.
[1229] Schulze *Law of Divorce* 661.

matrimonial home immediately after the marriage, may not be present at the time of the marriage. In response, is submitted that this argument should be rejected for two reasons: first, both factors are easily proven thereby adding certainty to a flexible connecting factor; and, second, the factors can still be indicators of the spouses' intentions at the time of the marriage. Moreover, if the factors are problematic or irrelevant, they could still be ignored.

Turning to the second factor, being the spouses' common matrimonial home immediately after the marriage, this factor has been favoured over a variation suggested by Schoeman, as mentioned above: the intended acquisition of a first common habitual residence. It is submitted that the former provides a closer link to the date of the marriage and avoids the complexities that would arise with the latter, such as cut-off dates. Furthermore, the latter has already been dismissed by *Frankel's Estate & Another v The Master & Another*[1230] as a factor that should influence the proprietary consequences of a marriage.[1231] This does not, however, exclude the possibility of it being taken into account under the last factor, 'any relevant factor', if deemed necessary.

Lastly, it is noted that the expanded step five only considers connecting factors that arise at the time of, or immediately after, the marriage. There may be many instances where couples have very close links to a place at the time of their marriage but these links are lost shortly thereafter, and never restored. If courts are to ignore highly relevant factors that arise too late after the marriage, it is appropriate that the legislature provides a remedy in the form of a postnuptial right to change the proper law governing the proprietary consequences of a marriage. Adequate safeguards can be put in place to ensure sufficient disclosure of any such change to third parties, as well as protection of third parties. If such a right is granted, step one would need to be modified to include a postnuptial contract.

7.5. The proposed new name

The new rule will need to have its own name unless the new name is to stem from the surnames of its authors, Stoll and Visser. If a phrase is to be used instead of the authors' surnames, Neels and Wethmar-Lemmer have noted that the words '*patrimonium*' and '*matrimonium*', as well

[1230] 1950 (1) SA 220 (A).
[1231] *Frankel's Estate & Another v The Master & Another* 1950 (1) SA 220 (A) 240; Neels and Wethmar-Lemmer 2008 *TSAR* 593.

as derivatives of each, stem from heteronormative, patriarchal gender roles.[1232] Their suggestion is that the new name should rather be the *lex causae proprietatis matrimonii*, which translates directly as "the proper law of property of the marriage".[1233]

It is noted that their proposed name still includes a version of *matrimonium*, which is the Latin word for marriage. Since the SALRC has expressed a possible intention to deviate from the term 'marriage' in favour of the more inclusive 'protected relationship' in future marital legislation,[1234] it is suggested that the proposed name should, if possible, avoid the use of *matrimonium*. Furthermore, although Latin words are still regularly used in domestic law due to the ongoing influence of Roman-Dutch law,[1235] there is no defensible reason to translate the name into Latin. In fact, this would be exclusionary and non-transformative. As such, if the authors' surnames are not used, it is suggested that the name could rather be 'the law of the proprietary consequences of the protected relationship', or a version thereof. It would then be flexible enough to cover various domestic relationships that may fall within the banner of protected relationships.

7.6. The approach to movable and immovable property

As discussed in chapters 1 and 5,[1236] the *lex domicilii matrimonii* principle follows a unitary approach because it applies to both movable and immovable property. In *Sadiku v Sadiku and Another*,[1237] it was suggested in an *obiter* that the *lex situs* of immovable property should govern the proprietary consequences of a marriage[1238] thereby resulting in a separate matrimonial property law applying to movables and immovables. This *obiter* arose from the court's concern that the proprietary consequences of a marriage should not override mandatory eviction legislation in South Africa.[1239] As discussed in chapter 4,[1240] mandatory rules of the

[1232] Neels and Wethmar-Lemmer 2008 *TSAR* 591.
[1233] Neels and Wethmar-Lemmer 2008 *TSAR* 592.
[1234] South African Law Reform Commission *Project 144: Single Marriage Statute: Discussion Paper 152* (2021) xii.
[1235] AJN Geduld "Teaching Latin to law students in the midst of the decolonisation of the university curriculum" (2019) 53 *In die Skriflig* 1 at 3.
[1236] See chapter 1 § 1.1.1; see chapter 5 § 5.2.3.
[1237] [2007] JOL 19342 (T).
[1238] *Sadiku v Sadiku and Another* [2007] JOL 19342 (T) para 10.
[1239] *Sadiku v Sadiku and Another* [2007] JOL 19342 (T) para 10.
[1240] See chapter 4 § 4.5.

lex fori cannot be overridden by incompatible foreign law.[1241] This concern is, therefore, unnecessary.[1242]

If the same law is not applied to immovable and movable property in a unitary approach and a spouse owns assets in more than one legal system, the spouse's estate will be legally fragmented.[1243] This could result in a foreign law being applicable to immovable property without the spouses' knowledge, and contrary to their reasonable expectations.[1244] Neels and Wethmar-Lemmer provide the following example of the consequences of a fragmented approach:[1245] A spouse is married out of community of property in terms of foreign law and purchases immovable property in South Africa. The spouse then discovers that their spouse co-owns this immovable property by operation of domestic law, contrary to their knowledge and reasonable expectations.

Accordingly, it is submitted that retaining a unitary approach to movables and immovables is the most sensible solution. Fredericks[1246] and Forsyth[1247] both support a unitary approach to movable and immovable property. Moreover, a unitary approach would align to various other legal systems including Macao, Peru, Liechtenstein, Switzerland, South Korea, Tunisia, Turkey, Venezuela,[1248] and at least eighteen other EU states,[1249] but may include many others.

Furthermore, as stated in chapter 4,[1250] if formal ownership of immovable property is registered in the name of one spouse and the *lex situs* does not automatically recognise the matrimonial property right, domestic law states that the non-owner spouse is entitled to an equivalent personal right rooted in the *lex situs*, unless there is no equivalent right.[1251] An identical approach to movable property should be confirmed, as suggested by Forsyth.[1252] This approach would align to the solution contained in the Matrimonial Property Regulation in respect of

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1241 Neels and Frederick 2015 *TSAR* 922-923.
1242 Neels and Frederick 2015 *TSAR* 922-923.
1243 Neels and Wethmar-Lemmer 2008 *TSAR* 595.
1244 Neels and Wethmar-Lemmer 2008 *TSAR* 596.
1245 Neels and Wethmar-Lemmer 2008 *TSAR* 596.
1246 Neels and Fredericks 2015 *TSAR* 923.
1247 Forsyth *Private International Law* 298.
1248 Neels and Wethmar-Lemmer 2008 *TSAR* 592, 595.
1249 These Member States agreed to Council Regulation (EU) 2016/1103 discussed in chapter 6, which included a unitary approach to movable and immovable property in article 21.
1250 See chapter 4 § 4.6.
1251 Forsyth *Private International Law* 298.
1252 Forsyth *Private International Law* 298.

cross-border adaption of rights. To summarise, a Member State does not have to recognise a matrimonial property right that is unknown in its law, however, it should adapt the right to its closest equivalent right.[1253] The requirements for recordal of such rights, and the effect of such recordal, are left to the discretion of each Member State to determine.[1254] This type of recognition could be incorporated into domestic law, if necessary, to address conflicts between the recognition of cross-border rights.

7.7. Application of the new rule to existing marriages

As raised by the SALRC, it must also be decided whether the new rule should apply to existing marriages and, if so, what transitional arrangements should be put in place. To this end, the transitional arrangements put in place for the introduction of the accrual system will be considered, along with the EU's approach in the Matrimonial Property Regulation. Lastly, Forsyth's submissions will be examined.

When the Matrimonial Property Act (the 'MPA') introduced the accrual system in 1988, spouses married out of community of property had a two-year period in which they could introduce the accrual system via a notarial contract.[1255] An opt-in approach was, therefore, followed. To do so, the spouses had to declare in a notarial contract that the accrual system would apply from the date of commencement of the marriage, alternatively the date of execution of the contract itself.[1256] Since commencement values are required to calculate an accrual, spouses were given three options. First, they could declare commencement values in the contract itself. Second, they could declare commencement values in an accompanying statement. Lastly, they could make no declaration, in which case a presumption arose that their commencement values were nil.[1257] The introduction of the accrual system to a marriage out of community of property is, however, fundamentally different to the introduction of a new legal system applicable to a marriage. The effect of the accrual system, if any, would only arise at the dissolution of the marriage. The introduction of a new legal system has an immediate effect, including on third-party rights.

[1253] Article 29 of Council Regulation (EU) 2016/1103; recitals 24-25 of Council Regulation (EU) 2016/1103.
[1254] Recitals 27-28 and article 1(2)(h) of Council Regulation (EU) 2016/1103.
[1255] Section 21(2)(a).
[1256] Section 21(2)(b) of the Matrimonial Property Act (MPA).
[1257] Section 21(2)(b) read with section 6(4) of the MPA.

If the EU approach is considered, the Matrimonial Property Regulation is largely of prospective effect only as it applies to marriages concluded or changes made to a marriage after a specific date.[1258] Spouses can, however, by agreement change the law applicable to their marriage with retrospective effect, subject to judicial oversight.[1259] An opt-in approach is, therefore, followed. As discussed in chapter 6,[1260] the requirements for such approval are extremely limited. First, the spouses need to hold at least two common habitual residences with no matrimonial property agreement being concluded prior to the former habitual residence. Second, the spouses may have relied on the previous common habitual residence for estate planning. Third, no prejudice is caused to third parties.[1261] Nor are spouses entitled to use the applicable law to defeat claims of third parties unless the third party was aware of the law or could have diligently gained knowledge of it.[1262] The circumstances in which a third party has deemed knowledge are set out in chapter 6[1263] and includes when the spouses have complied with mandatory disclosure requirements.[1264]

Forsyth suggests that, because spouses may have based their affairs on the existing rule, the rule must not be retrospective but there should be transitional arrangements.[1265] Forsyth does not expand on the nature of these transitional arrangements. It is submitted that not all spouses would have understood the impact of the *lex domicilii matrimonii* principle on their affairs. Many couples may even benefit from adopting the new rule even if they used the *lex domicilii matrimonii* principle to order their affairs. It must also be borne in mind that same-sex spouses have been entirely excluded from the existing rule so, unless they concluded an antenuptial contract or were both domiciled in South Africa at the time of their marriage, it would be impossible to identify their applicable law. As such, there needs to be at least some degree of application to existing marriages, whether this arises from an opt-in or opt-out approach.

Moreover, given that the *lex domicilii matrimonii* principle is alleged to be unconstitutional, it is not advisable to impose strict limitations on the new rule's application to existing marriages, such as those introduced in the EU. Further, the chosen approach should not be costly to avoid

1258 Article 70(2) of Council Regulation (EU) 2016/1103.
1259 Article 22(2) and 26(3) of Council Regulation (EU) 2016/1103.
1260 See chapter 6 § 6.3.6.
1261 Article 26(3) of Council Regulation (EU) 2016/1103.
1262 Article 28 of Council Regulation (EU) 2016/1103.
1263 See chapter 6 § 6.3.6.
1264 Article 28(2) of Council Regulation (EU) 2016/1103.
1265 Forsyth *Private International Law* 302.

being financially exclusionary. Nor should the approach be available for a limited time period as was the case with the introduction of the accrual system in 1984.[1266] The imposition of a time limit means that spouses need to be aware of the existence of the remedy, understand its legal consequences, and have the financial means to make use of it.[1267]

If an opt-out approach is chosen, it could be modelled on the Constitutional Court's ruling in *Sithole and Another v Sithole and Another*[1268] ('*Sithole*'), which was discussed in chapter 3.[1269] As discussed, *Sithole* resulted in a declaration of unconstitutionality in relation to section 21(2)(a) of the MPA.[1270] Section 21(2)(a) had maintained a default matrimonial property regime of out of community of property for Black spouses who married prior to 1988.[1271] The Constitutional Court declared that all applicable marriages would be automatically changed to in community of property unless the spouses notified the Director-General of the Department of Home Affairs in writing of their desire to opt out.[1272] If the spouses disagreed on whether to opt out, either spouse could apply to a High Court for permission to revert back to out of community of property.[1273] Any interested party who would be negatively affected by the rule is entitled to apply to a High Court for relief.[1274] An opt-out approach was particularly advisable in these circumstances because the default position for all other marriages was in community of property.[1275]

Given that some spouses would have arranged their proprietary rights based on the current rule and third parties can be negatively affected, it is suggested that an opt-in approach may be fairer if there is widespread public dissemination of information regarding the spouses' newly established right to change their applicable law. To ensure that the change is publicly disclosed, it is suggested that a notarial contract must be registered in a deeds registry, as is the current procedure for registering postnuptial contracts.[1276] Although notarial contracts can be somewhat costly, they are significantly cheaper than a mandatory High Court application.

[1266] Section 21(2) of the MPA.
[1267] *Sithole and Another v Sithole and Another* 2021 (5) SA 34 (CC) para 1.
[1268] 2021 (5) SA 34 (CC).
[1269] See chapter 3 § 3.3.1.2.
[1270] *Sithole and Another v Sithole and Another* 2021 (5) SA 34 (CC) para 59.
[1271] *Sithole and Another v Sithole and Another* 2021 (5) SA 34 (CC) para 1.
[1272] *Sithole and Another v Sithole and Another* 2021 (5) SA 34 (CC) para 59.
[1273] *Sithole and Another v Sithole and Another* 2021 (5) SA 34 (CC) para 59.
[1274] *Sithole and Another v Sithole and Another* 2021 (5) SA 34 (CC) para 59.
[1275] *Sithole and Another v Sithole and Another* 2021 (5) SA 34 (CC) para 47.
[1276] Section 89 of the Deeds Registries Act 47 of 1937.

Regarding third-party rights, legislative provisions can be introduced to prevent interference with existing rights. For example, the existing rights of third parties could be preserved based on the former law unless the third party expressly consents otherwise. Any rights arising after a valid change of law should be governed by the new law since the couple would have satisfied public disclosure requirements. Following *Sithole*, any interested party who would be negatively affected by the change can apply to a High Court for relief.

7.8. The choice-of-law rules

Before concluding this chapter, the issue of choice-of-law rules affecting antenuptial contracts and postnuptial contracts needs to be raised. Roodt has criticised Stoll and Visser's model for failing to address the choice-of-law rules affecting antenuptial contracts,[1277] although, as mentioned above, Stoll and Visser did intend for their model to apply to the "validity and effect" of antenuptial contracts.[1278] That being said, there would need to be clarity as to what is intended by 'validity and effect'. For example, separate choice-of-law rules currently exist for the essential validity and construction of the same antenuptial contract[1279] unless these categories become governed in future by the same choice-of-law rule.

It is recommended that a unified choice-of-law rule should be adopted to cover all aspects of the validity of antenuptial and postnuptial contracts, including governing-law clauses in both. A decision would need to be made on whether this should include formal validity. The unified choice-of-law rule could align with, for example, the five-step model resulting in a law only being assigned if there is no chosen law. This would align with the EU's approach in the Matrimonial Property Regulation where one law covers all aspects of a matrimonial contract, although the requirements for formal validity are addressed separately.[1280] If the rule for formal validity is to remain separate, it is suggested that the *lex loci contractus*[1281] remains relevant in an adapted facultative approach,[1282] where the five-step model is used instead of the law of closest connection. If separate choice-of-law rules must be kept, it is recommended that the

[1277] Roodt 2006 *THRHR* at 546 554.
[1278] H Stoll and PJ Visser "Aspects of the reform of German (and South African) Private International Family Law" (1989) *De Jure* 330 at 335.
[1279] Forsyth *Private International Law* 303-304.
[1280] Articles 23-24(1) of Council Regulation (EU) 2016/1103.
[1281] As mentioned in chapter 5, the *lex loci contractus* is the place of execution of the contract – see Forsyth *Private International Law* lxvi.
[1282] *Ex Parte Spinazze and Another NNO* 1985 (3) SA 650 (A) 660E.

meaning of each category should be adequately clarified for easier application. For example, Roodt and Forsyth do not share identical names for their listed categories.[1283]

7.9. Conclusion

The aim of this chapter was to discuss the reform of the *lex domicilii matrimonii* principle and associated issues based on questions posed by the SALRC. It was proposed that the new rule should contain multiple connecting factors organised in a hierarchy. Each proposed connecting factor was defined, and its importance was explained. It was suggested that Stoll and Visser's five-step model should be adopted with the addition of specified factors in step five to address concerns raised by various authors. It was suggested that the new rule should follow a unified approach to movable and immovable property. It was recommended that spouses in existing marriages should be entitled to opt in for the application of the new rule if disclosure requirements are complied with. Lastly, proposed changes to the choice-of-law rules for antenuptial contracts and postnuptial contracts were discussed.

[1283] See: Roodt 2006 *THRHR* 225; Forsyth *Private International Law* 305.

CHAPTER 8: Conclusion

In chapter 1, the *lex domicilii matrimonii* principle was introduced along with the concepts of estate planning and succession. The *lex domicilii matrimonii* principle was described as being a common-law principle where the proprietary consequences of a marriage are determined by the law of the husband's domicile at the time of the marriage, unless the spouses have contracted otherwise. The applicable law will be the *lex causae*, or the proper law, governing any substantive questions regarding the spouses' proprietary relations. A 'foreign marriage' was defined as a marriage where domestic law does not apply to the proprietary consequences of the marriage, resulting either from the spouses making a choice of foreign law, or where the *lex domicilii matrimonii* points to the application of foreign law. It was furthermore confirmed that the *lex domicilii matrimonii* principle applies to both immovable and movable property, thereby following a unitary approach. Given that the *lex domicilii matrimonii* principle is considered to be unconstitutional due to its failure to cater for same-sex and gender-neutral couples, it was confirmed that the principle is likely to be replaced in future.

In chapter 2, the impact of three main instances of legislation was discussed, namely the Administration of Estates Act[1284] ('the 'AEA'), the Matrimonial Property Act[1285] (the 'MPA'), and the Deeds Registries Act[1286] (the 'DRA'). It was submitted that the AEA and the MPA both provide no guidance concerning the proprietary consequences of foreign marriages. The DRA, on the other hand, despite preceding both the AEA and MPA by decades, contemplates foreign marriages and contains several provisions assisting with their implications. Furthermore, it was shown that Registrars' Conference Resolutions provide a mechanism for filling in gaps contained in the DRA as they arise in practice.

Chapter 3 concerned the identification of matrimonial property as well as the implications of matrimonial property regimes on a domestic deceased estate. Domestic matrimonial property regimes were used to illustrate both. Reference was made to the differing types of recognised marital relationships in South Africa to contextualise the discussion. The position of Black spouses who married prior to 2 December 1988 was examined due to the recent development

[1284] Act 66 of 1965.
[1285] Act 88 of 1984.
[1286] Act 47 of 1937.

arising from *Sithole and Another v Sithole and Another*.[1287] The waiver of accrual rights was considered, both in relation to a waiver by the surviving spouse and an *inter vivos* waiver by the deceased. It was submitted that both can be valid. The relevance of maintenance claims to foreign marriages in terms of the Maintenance of Surviving Spouses Act[1288] (the 'MSSA') was considered. It was argued that, for the MSSA to be available to a surviving spouse, both spouses of the foreign marriage must be domiciled in South Africa at the time of the first-dying spouse's death.

Chapter 4 involved an exploration of private international law principles that affect matrimonial property claims and succession claims. Multilateral and unilateral conflict rules were defined. The general choice-of-law approach was explained to show how to identify the *lex causae* of a matter. The approach comprises of characterisation, selection of appropriate connecting factors, and application of the selected legal system. Legislative means of proving foreign law were discussed, along with the associated common-law position. Various cases were discussed to understand their implications for general private international law, as well as matrimonial property and succession claims. The identification of matrimonial property rights was considered, along with the choice-of-law rules for succession rights. In relation to the former, it was confirmed that a unitary approach applies to immovables and movables, wherever situated. In relation to the latter, succession rights depend on whether intestate or testate succession applies. If domestic intestate succession is found to apply after the choice-of-law process, the intestate succession right of the spouse are set out in the Intestate Succession Act.[1289] If domestic testate succession applies, the deceased's will must be assessed for its validity. The deceased's domicile at the time of death, the *lex ultimi domicilii*, would be the law that applies to movable property, wherever situated, whereas the *lex situs* determines the succession of immovable property.

Chapter 5 addressed the scope of antenuptial contracts and postnuptial contracts as existing remedies for foreign marriages. In the discussion of antenuptial contracts, the registration of foreign and domestic antenuptial contracts was examined. Prior to the introduction of the DRA in 1937, the registration of a domestic or foreign antenuptial contract for a foreign marriage was seen to be unnecessary if the spouses' rights were already secured by the applicable foreign

[1287] 2021 (5) SA 34 (CC).
[1288] Act 27 of 1990.
[1289] Act 81 of 1987.

law. This position has, however, been relaxed. Foreign antenuptial contracts can be registered in a domestic deeds registry and registration may be advisable depending on the circumstances. The registrability of domestic antenuptial contracts is less considered but the introduction of the DRA may have led to increased leniency, even when the spouses' proprietary rights were secured elsewhere. The formal validity and proper law of antenuptial contracts was similarly considered. The leading authority, *Ex Parte Spinazze and Another NNO*,[1290] was analysed. This case adopted the facultative approach to the formal validity of antenuptial contracts. As a result, the proper law of an antenuptial contract can be used as an alternative to the *lex loci contractus* for determining formal validity. As to determining the proper law, the case established that an express choice or tacit choice can be made, failing which, the law of the closest connection will be assigned.

In the second part of chapter 5, the operation of the immutability principle on a domestic and international level was considered. It was suggested that section 21(1) of the MPA, which allows for a postnuptial change of a matrimonial property regime, is likely to be available as a legislative remedy to spouses of a foreign marriage. In the event that section 21(1) is not available, the common-law approach was also canvassed. In essence, the common law has not recognised the validity of postnuptial contracts. The reasoning behind non-recognition is varied but largely related to a prohibition of spousal donations. It was argued that all the reasons for prohibiting postnuptial contracts are now irrelevant or obsolete and, as such, there are no adequate reasons justifying the modern retention of the prohibition. Furthermore, it was shown that domestic courts are entitled to decide upon the validity of a foreign postnuptial contract, regardless of the position of the foreign law. Lastly, it was suggested that legislative intervention is appropriate to provide the scope of governing-law clauses in postnuptial contracts.

In chapter 6, the approach of the European Union (EU) to the harmonisation of succession and matrimonial property law was examined. Regulation (EU) No 650/2012[1291] (the 'Succession

[1290] 1985 (3) SA 650 (A).
[1291] The full title of the Succession Regulation is: 'Regulation (EU) 2012/650 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession'.

Regulation') and Council Regulation (EU) 2016/1103[1292] (the 'Matrimonial Property Regulation') were discussed. Habitual residence in the context of domestic law was considered as its definition is fundamental to both regulations and there is scope for a domestic authority to decide on a deceased's habitual residence.

The Succession Regulation makes use of habitual residence as the connecting factor chosen to govern the substantive law of a deceased's succession. Although there is no set definition of habitual residence in the Succession Regulation, a deceased's habitual residence is intended to be the state to which the deceased had the closest and most stable connection, which is decided after making an overall assessment of the deceased's circumstances prior to death. The substantive law is unitary as it applies to movable and immovable property, save to the extent that special rules of a *lex rei sitae* may apply. EU citizens and habitual residents can choose for the law of their nationality to apply instead, provided that the chosen nationality is held either at the time of making the choice or at the time of death. A person cannot choose the state that will have jurisdiction over their deceased estate, but choice-of-court agreements can be concluded before and after the deceased's death. It was confirmed that the requirements for the formal validity of testamentary dispositions are the same as in South Africa. Regarding the incompatibility of cross-border succession rights, it was shown that a succession right must be adapted to the closest equivalent right of the Member State, considering the effect of the succession right. Other matters discussed in the chapter included general jurisdiction, subsidiary jurisdiction, evasion of law, public policy, *renvoi*, the European Certificate of Succession, publicly available information, and a cross-border register.

Various provisions of the Matrimonial Property Regulation were similarly considered. The Matrimonial Property Regulation allows spouses or intended spouses to choose or change the legal system applicable to their marriage. It also sets out a default rule as to which law applies to the proprietary consequences of a marriage if the spouses have not agreed on an applicable law. The order of connecting factors in the default rule is as follows: first, the spouses' first common habitual residence shortly after the marriage; second, the spouses' common nationality at the time of conclusion of the marriage; and third, the state to which they are most closely connected at the conclusion of their marriage. Postnuptial changes of the applicable

[1292] The full title of the Matrimonial Property Regulation is: 'Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes'.

law are allowed if specific requirements are met. The effect of matrimonial property regimes on third parties was also examined. Third parties are deemed to have knowledge of the existence of spouses' matrimonial property regimes if specific requirements have been met. Regarding the recognition of cross-border matrimonial property rights, the Matrimonial Property Regulation takes an identical approach to the Succession Regulation. As such, a Member State does not have to recognise matrimonial property rights that are unknown in its law, however, the closest equivalent right should be used. Additional provisions that were discussed included *renvoi*, mandatory law, public policy, and publicly available information.

In chapter 7, the main reform discussed was the overhaul of the *lex domicilii matrimonii* principle. The meaning and importance of each proposed connecting factor was considered, namely domicile, habitual residence, nationality, and the law of closest connection. The five-step model proposed by Stoll and Visser and the four-step model proposed by Schoeman were compared. It was recommended that the five-step model replaces the *lex domicilii matrimonii* principle and the model is expanded to include express factors. The suggested new name for the rule was 'the law of the proprietary consequences of the protected relationship', or a version thereof. Regarding the application of the new rule to existing marriages, it was suggested that existing spouses should be entitled, at the very least, to opt-in for the application of the new rule, subject to any requirements being met. The rights of creditors based on the existing rule, if any, can be reserved by legislative provisions. It was furthermore recommended that a unitary approach to movable and immovable property should be followed. Lastly, it was suggested that a unified choice-of-law rule, possibly excluding formal validity, should be adopted to cover all aspects of the validity of antenuptial and postnuptial contracts, including governing-law clauses.

The main recommendations are as follows:

- Stoll and Visser's five-step model should be adopted by the legislature as the replacement for the *lex domicilii matrimonii* principle.

- Stoll and Visser's model should be expanded to include the following expressly listed factors:
    - the legal system in which the marriage was registered;

- the spouses' common matrimonial home immediately after the marriage;
- the spouses' common social ties;
- the *lex loci celebrationis*; or
- any other relevant factor.

- The new rule should cover protected relationships and should not be translated into Latin. The suggested name is 'the law of the proprietary consequences of the protected relationship'.

- The legislature should provide a remedy in the form of a postnuptial right to change the proper law governing the proprietary consequences of a marriage, thereby requiring an adaption of step one of Stoll and Visser's model.

- To avoid the fragmentation of deceased estates, the unitary principle should apply to movable and immovable property, allowing the same law of succession to apply to both types of assets.

- Cross-border adaption of rights should be expressly confirmed by the legislature. If formal ownership of immovable or immovable property does not automatically recognise the matrimonial property right in the *lex situs* or the *lex rei sitae* respectively, domestic law should confirm that the non-owner spouse is entitled to an equivalent personal right rooted in that legal system, unless there is no equivalent right. The requirements for recordal of such rights, and the effect of such recordal, should be left to the discretion of the relevant legal system.

- In respect of transitional arrangements for existing marriages, an opt-in approach should be adopted if there is widespread public dissemination of information regarding the spouses' newly established right to change their applicable law. Spouses should be required to satisfy public disclosure requirements to effect this. To this end, it is suggested that a notarial contract must be registered in a deeds registry, without the requirement of a High Court application, to avoid being financially exclusionary.

- Legislative provisions should be introduced to prevent interference with existing rights. For example, the existing rights of third parties could be preserved based on the former law unless the third party expressly consents otherwise. Any rights arising after a valid change of law should be governed by the new law if the spouses satisfied all requirements. Any interested party who would be negatively affected by the change can apply to a High Court for relief.

- A unified choice-of-law rule should be adopted to cover all aspects of the validity of antenuptial and postnuptial contracts, including governing-law clauses in both. The unified choice-of-law rule could align with the five-step model, resulting in a law only being assigned if there is no law chosen by the spouses.

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