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NEWSLETTER

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Marital property regimes: A civil marriage concluded without ante-nuptual contract has the consequence of marriage in community of property. A potentially polygamous marriage concluded under customary law is, however, out of community of property. Most Black customary law regimes have a "house" system whereby assets are allocated to each wife under the control of the husband. The closest analogy in western law is the holding company that owns asset holding subsidiaries. When the husband dies his heir acquires control and rights to all the house assets of the wives, subject to an obligation to provide the wives with support. It follows that on the death of a wife the husband (or his heir) inherits (see Seymour's Customary law 5ed at 308). Quite how long this approach can survive the rising economic power of black wives remains to be seen. Under potentially polygamous Islamic customary law it seems, however, that a wife may own assets in her own right and that the associated property regime is out of community of property.

Equal opportunity in the New South Africa: Under an equal-opportunity constitution one would expect that the right to more than one wife should be matched by the right of a woman to more than one husband. And what of a traditionally white male? May he now conclude a potentially polygamous customary marriage?

Attempts to reform intestate succession in South Africa have failed to substitute the wife (or wives) for the traditional customary law heir, usually the eldest son of the deceased. A failure to recognise the "house" system in this context can have the undesirable and unpleasant consequence that the eldest son of a first wife inherits the dwelling of his father's second or third wife. In *Bhe v Magistrate Kyayalitsha* 2004 2 SA 544 (C) the application of certain paragraphs of s23 of the Black Administration Act were ruled unconstitutional and the daughters of the deceased allowed to inherit in lieu of the father of the deceased.

s23 of the Black Administration Act 38 of 1927 still applies to most black estates for which there is no will. This means that such estates do not need to be reported to the Master of the High Court. It also means that such estates are not subject to estate duty.

Law reform in South Africa persistently ignores the inequities of s31 of the Black Laws Amendment Act 76 of 1963 which limits the damages for loss of support payable when there is more than one wife.

Same sex "marriages": In *Du Plessis v RAF* 2004 1 SA 359 (SCA) at 378 it was ruled that: 'I conclude that the plaintiff, as a same-sex partner of the deceased in a permanent life relationship similar in other respects to marriage, in which the deceased had undertaken a contractual duty of support to him, is entitled to claim damages from the defendant for loss of that support. It is not necessary for purposes of this judgment to consider whether the dependant's action should be extended to unmarried persons in a heterosexual relationship;and I expressly leave those questions open.'

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In the circumstances of this case 'The plaintiff and the deceased would have married one another if they could have done so. As this course was not open to them, they went through a "marriage" ceremony and did so before numerous witnesses...' (370H). It seems that the argument of "contractual support" will never be open to persons who could have concluded a proper marriage, had they so wished. The same applies to children supported by the deceased without there having been formal adoption procedures.

Retirement after age 65: I see it argued these days that for low income persons one should assume a retirement age of 70 and after by reason of the inability to accumulate retirement funds. However, the State pension of R8880 per year is available to such persons from age 65, and a husband and wife will have double that amount (the wife from age 60). Another factor promoting retirement for low income persons is the appalling state of public transport in South Africa. Not only does the cost of getting to and from work make a big hole in the take-home wage but getting up at 05h00 in the morning for a two hour trip to work, and two hours back, is a burden that well-to-do motorised professionals do not always grasp. In addition there is the high level of unemployment and stiff competition for jobs from agile, often better educated, younger persons.

The truth (philosophically speaking): Law courts are concerned with establishing the "truth" as regards facts relevant to a legal dispute. This is determined on the balance of probabilities in a civil matter and beyond a reasonable doubt in a criminal matter. The "truth" is established only in relation to the single matter before the Court. It is not concerned with the "truth" when some other matter comes before a court. A ruling by a civil trial court has a 49% chance of being wrong? A bridge built by lawyers has a 49% chance of falling down!

Scientific "truth" is, however, different: Scientific "truth" is based on the reproducible experiment. It is concerned with discovering rational models by which to predict future events relating to the properties of matter and the universe. Science developed probability theory to cope with "truth" which cannot be predicted with certainty. The percentage chance of an event may then be determined scientifically, even if the actual occurrence of the event remains uncertain.

In *Minister van Veiligheid v Geldenhuys* 2004 1 SA 515 (SCA) it was held that causation must be determined on the balance of probabilities and quantification of damages having regard to the value of the chance of such damages. In *Blyth v Van den Heever* 1980 1 SA 191 (A) at 226 it was observed, however, that 'it is not always possible to distinguish clearly between causation and quantification in this sphere'. The main point is, however, that damages for uncertain losses, past and future, will not be rejected merely because the percentage chance of the loss is less than 50%, ie a mere possibility.

The *Geldenhuys* ruling also emphasised the principal that loss of earnings must be determined having regard to "likely" earnings, not possible earnings ('Die vraag is nie wat Geldenhuys *kon* verdien nie, maar wat hy waarskynlik *sou* verdien' at 536I; see too *Carstens v Southern Insurance* 1985 3 SA 1010 (C) at 1020). The widespread, and unjustified, use for compensation purposes of select big corporation salary surveys (FSA, Paterson) is promoted on the basis that compensation is for "loss of earning capacity" (highest and best use) when in fact "earning capacity" in its correct legal sense means "likely earnings" (industrial psychologists take note).

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