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# TRUSTS & ESTATES ALERT

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On 24 July 2019, Cabinet approved submission of the Draft Recognition of Customary Marriages Amendment Bill of 2019 (Draft Bill) to Parliament. The Draft Bill seeks to amend certain provisions of the Recognition of Customary Marriages Act, No 120 of 1998 (Act), particularly with regard to the matrimonial property regimes applicable to polygynous, customary marriages.

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CLIFFE DEKKER HOFMEYR

## Recognition of Customary Marriages Amendment Bill: Matrimonial property regimes applicable to customary, polygynous marriages

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On 24 July 2019, Cabinet approved submission of the Draft Recognition of Customary Marriages Amendment Bill of 2019 (Draft Bill) to Parliament. The Draft Bill seeks to amend certain provisions of the Recognition of Customary Marriages Act, No 120 of 1998 (Act), particularly with regard to the matrimonial property regimes applicable to polygynous, customary marriages.

The Act came into operation on 15 November 2000.

In terms of s7(1) of the Act:

*The proprietary consequences of a customary marriage entered into **before** the commencement of this Act continue to be governed by **customary law**. (own emphasis)*

The term "customary law" is defined in s1 of the Act. The definition, however, does not specify which "customs and usages traditionally observed among the indigenous African peoples of South Africa" are to be applied.

As a result, polygynous, customary marriages entered into before the commencement of the Act were regarded as being *out of community of property*, not subject to the accrual system.

The 2016 High Court case of *Ramuhovhi and Another v President of the Republic of South Africa and Others* revisited this position and this case was confirmed by the Constitutional Court (CC) in 2017.

Section 7(1) of the Act was declared unconstitutional, *inter alia* due to its differential application of matrimonial property regimes to spouses in:

- monogamous, customary marriages;
- polygynous, customary marriages concluded before the commencement of the Act; and
- polygynous, customary marriages concluded after the commencement of the Act.

The CC identified three types of 'customary law property' (namely, family, house and personal property) and made an interim order, broadly set out below.

Spouses must **share equally in the right of ownership of, and other rights attaching to, family property**, including the right of **management and control** of family property; and each spouse must have similar rights in respect of **house property**. (own emphasis)

It is submitted that this approach envisages a *community of property approach* when it comes to 'family' and 'house' property.

In respect of 'personal' property, a party is entitled to retain his or her exclusive rights thereover.

The CC also provided that any dispute pertaining to its order should be referred to court for adjudication.

In light of the CC's ruling in the *Ramuhovhi* case, the Draft Bill was prepared. Parliament has until 30 November 2019 to rectify the Act based on the CC's ruling, failing which, the CC's interim order will become final.

## Recognition of Customary Marriages Amendment Bill: Matrimonial property regimes applicable to customary, polygynous marriages ...continued

It is worth noting that parties that conclude polygynous, customary marriages after the commencement of the Act are required to make application to court for approval of a contract between all spouses which will regulate their future matrimonial property regimes.

The Draft Bill provides that [sic]:

- (a) *The proprietary consequences of a customary marriage in which a person is a spouse in more than one customary marriage, and which was entered into before the commencement of this Act are that the spouses in such a marriage have joint and equal:*
- (i) *ownership and other rights; and*
  - (ii) *rights of management and control, over matrimonial property.*
- (b) *The rights contemplated in paragraph (a) must be exercised:*
- (i) *in respect of all house property, by the husband and wife of the house concerned, jointly and in the best interests of the family until constituted by the house concerned; and*
  - (ii) *in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses.*
- (c) *Each spouse retains exclusive rights over his or her personal property.*

- (d) *For the purposes of this subsection, the terms "marital property", "house property", "family property" and "personal property" have the meaning ascribed to them in customary law.*

For the sake of clarity, it is worth noting that parties that conclude polygynous, customary marriages after the commencement of the Act are required to make application to court for approval of a contract between all spouses which will regulate their future matrimonial property regimes. Failure to do so does not invalidate the subsequent polygynous, customary marriage, but the default will be that the latter is *out of community of property*. In this instance, the former continues to be subject to the matrimonial property regime applicable at the time of its conclusion.

While the Draft Bill is a definite step in the right direction, practically we anticipate that the provisions will be very difficult to implement. Especially on termination of the marriage by death, it is likely that the surviving spouse/s and the executor/s will need to approach the courts for direction. This is not a satisfactory result due to the costly nature of court applications, and it is accordingly likely that in these cases the benefits envisaged by the Bill are nullified.

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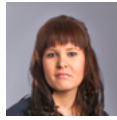
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