

# RE-THINKING FORFEITURE OF PATRIMONIAL BENEFITS WHEN A MARRIAGE DISSOLVES THROUGH DEATH\*

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## SUMMARY

People marry for different reasons; some marry for love, companionship, the desire to procreate or social security; others just marry for money. The law should provide spouses that are innocent of any marital misconduct with financial protection at the end of the marriage. At the same time, the law ought to make sure that nobody benefits from a marriage that he or she has wrecked through marital misconduct at the expense of another. Section 9 of the Divorce Act 70 of 1979 seeks to achieve this by providing for forfeiture of patrimonial benefits. Over the years, our courts have clarified the application of this provision. However, some questions remain. Is it sufficient only to have regard to the duration of the marriage, the circumstances that gave rise to the breakdown of the marriage and substantial misconduct? Should our courts not look to other factors? Should section 9 not apply when a marriage ends through death under questionable circumstances? This article seeks to address these questions.

## 1 INTRODUCTION

The purpose of this article is to analyse the forfeiture of patrimonial benefits provisions in South Africa as provided for in section 9 of the Divorce Act (DA).<sup>1</sup> While a significant portion of this article is an analysis of section 9, it also considers the question of forfeiture when a marriage ends through death under circumstances that public policy would view as rendering the surviving spouse unworthy to take any benefit. When the provision for forfeiture of patrimonial benefits was codified in the DA in 1979,<sup>2</sup> there were various aspects about it that were unclear. For instance, section 9 lists three factors for the courts to consider when dealing with forfeiture matters – namely, the duration of the marriage, the reason for the irretrievable

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<sup>1</sup> 70 of 1979.

<sup>2</sup> 1979 is the year in which the DA came into operation. Before this, forfeiture of patrimonial benefits provisions was part of the common law.

breakdown of the marriage and any substantial misconduct. There was a question on whether all these factors needed to be present before a court granted an order of forfeiture. As will be seen below, this question was answered in the negative, it is not mandatory to plead and prove all three factors. However, the interpretation of these factors, and section 9 in general, is still open to discussions such as the present one.

This article begins with a general overview of divorce and forfeiture. This overview is intended to facilitate a general understanding and to stimulate the debate that follows. This general overview also encompasses a peregrination through the common-law history of forfeiture in South Africa. It then looks at the law as stated in section 9 of the DA. This is done by analysing section 9 and referring to case law. It is clear that a handful of cases dealing with forfeiture inevitably find themselves dealing with the interpretation of section 9. A discussion on the question of forfeiture when a marriage ends through death follows and the article ends with a conclusion.

## 2 DIVORCE AND FORFEITURE: A BRIEF OVERVIEW

Section 9 of the DA provides for forfeiture. The purpose of forfeiture is to ensure that a person does not benefit from a marriage that he or she has wrecked or actively broken down.<sup>3</sup> A spouse will forfeit a benefit if, in relation to the other spouse, he or she will unduly benefit if an order of forfeiture is not made.<sup>4</sup> In its basic form, the section presents an exception to the general rules governing matrimonial property in relation to divorce in South Africa. In South Africa, there are three matrimonial property systems as stipulated by the Matrimonial Property Act<sup>5</sup> (MPA): marriage in community of property,<sup>6</sup> marriage out of community of property with accrual,<sup>7</sup> and marriage out of community of property without accrual.<sup>8</sup>

Briefly, the general rules are that where a marriage is in community of property, the spouses share equally in the joint estate. In the accrual system, the spouse whose estate shows a smaller accrual or growth acquires a right to claim from the spouse whose estate shows the most accrual.<sup>9</sup> If the parties exclude the accrual system, the general rule is that they are not entitled to a share in the estate of the other. However, despite the exclusion of the accrual, parties may still voluntarily benefit each other in the form of a spousal donation in the antenuptial contract or in a will. A spouse may also benefit through intestate succession if the deceased spouse died without a will. While the law was suspicious of spousal donations, section 22 of the MPA now specifically allows them.

Section 9 of the DA, if applicable, negates the general rules above. Parties who are married in community of property may not necessarily share

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<sup>3</sup> *Murison v Murison* 1930 AD 157.

<sup>4</sup> See wording of s 9 of the DA.

<sup>5</sup> 88 of 1984.

<sup>6</sup> Ch 3 of 88 of 1984.

<sup>7</sup> Ch 1 of 88 of 1984.

<sup>8</sup> S 2 of 88 of 1984.

<sup>9</sup> *C v C* 2016 (2) SA 227 (GP) par 20 (also referred to as *MC v JC*).

equally in the joint estate.<sup>10</sup> The court may order that a blameworthy spouse forfeit the patrimonial benefit to which he or she may be entitled by virtue of the chosen matrimonial property system.<sup>11</sup> A party may also forfeit an accrual<sup>12</sup> claim, as well as a benefit provided for in the antenuptial contract<sup>13</sup> – including uncompleted antenuptial gifts.<sup>14</sup> The meaning of patrimonial benefit is discussed below.

Regardless of the chosen matrimonial property system, no marriage is eternal; all marriages eventually dissolve through either an annulment, death or divorce. Every dissolution of a marriage has consequences. Although most marriages end in death, the divorce rate is alarmingly high in South Africa. For instance, in 2019, 23 710 divorces were finalised (or 17,6 per cent of marriages in 2019);<sup>15</sup> 43,1 per cent of these marriages had lasted for less than 10 years.<sup>16</sup> It is hereby argued that the cause of this high divorce rate is the no-fault divorce system introduced by the DA.<sup>17</sup> For this reason, South Africa is informally referred to as an easy divorce jurisdiction.<sup>18</sup> For the purposes of a divorce, all that a party has to show is that the marriage has irretrievably broken down.<sup>19</sup> This means that the marriage has reached such a stage of disintegration that no reasonable person will conclude that the marriage may still be revived to a normal marriage relationship.<sup>20</sup>

A comparison with the English system indicates that the latter system has restrictions against a divorce petition. Prior to the amendment of the incumbent Matrimonial Causes Act of 1973 (MCA), no divorce proceedings could be initiated within three years of the date of marriage.<sup>21</sup> This was the case unless a party could show there was exceptional hardship. The major problem with this exception is that it was difficult for the courts to define what constituted exceptional hardship.<sup>22</sup>

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<sup>10</sup> Barratt, Domingo, Amien, Denson, Mahler-Coetzee, Olivier, Osman, Schoeman and Singh *Law of Persons and the Family* 2ed (2017) 347.

<sup>11</sup> In this case, the spouse will keep whatever benefit they brought into the joint estate. See Heaton and Kruger *South African Family Law* 4ed (2016) 136.

<sup>12</sup> Barratt *et al* *Law of Persons* 347.

<sup>13</sup> *Swil v Swil* 1978 (1) SA 790 (W) 793. It appears that a party who had been ordered to forfeit a benefit in terms of the antenuptial contract was required to make restitution. See Evans *The Law of Divorce in South Africa* (1920) 126; *Allen v Allen* 1951 (3) SA 320 (AD) and Hahlo *The South African Law of Husband and Wife* 2ed (1963) 426.

<sup>14</sup> Evans *The Law of Divorce* 129.

<sup>15</sup> StatsSA *Statistical Release PO307: Marriage and Divorce* (2019) <http://www.statssa.gov.za/publications/P0307/P03072019.pdf> (accessed 2022-02-09) 6. The report does not reflect the divorce rate as a percentage; however, a calculation by *Moneyweb* works out the 2019 divorce rate as 17,6 per cent of existing marriages. See generally <https://www.moneyweb.co.za/financial-advisor-views/changing-marriage-patterns-and-their-impact-on-financial-planning/> (accessed 2022-02-09).

<sup>16</sup> StatsSA *Statistical Release PO307: Marriage and Divorce* 7.

<sup>17</sup> S 3 of the DA.

<sup>18</sup> Sinclair "The Financial Consequences of Divorce in South Africa: Judicial Determination or Private Ordering?" 1983 *The International and Comparative Law Quarterly* 785.

<sup>19</sup> See s 3 of the DA on grounds of divorce that do not require fault.

<sup>20</sup> S 4(1) of the DA.

<sup>21</sup> Cretney and Masson *Principles of Family Law* (1990) 95.

<sup>22</sup> Cretney and Masson *Principles of Family Law* 95.

The three-year ban referred to above was finally lifted by the promulgation of the Matrimonial and Family Proceedings Act of 1984 on the recommendations of the English Law Commission. Section 1 of the latter Act amended section 3 of the MCA. Section 3 now provides that no divorce petition may be brought within one year of marriage. This prohibition is absolute.<sup>23</sup> A summary of England and Wales divorce statistics shows that in 2019, there were 107 599 divorces; this is a rate of 8,9 per cent of existing marriages. The average duration of the marriages was just above four years.<sup>24</sup>

While English law also relies on the irretrievable breakdown of a marriage as a ground for divorce, it is the sole ground for divorce. A maximum of five facts or guidelines may be used to substantiate a claim for the irretrievable breakdown of a marriage. These are adultery, the respondent's intolerable behaviour, desertion, living apart for at least two years before the divorce and living apart for at least five years before the divorce.<sup>25</sup> Of particular importance, where the spouses have lived apart for five years before the divorce, is that the court may refuse to grant the petition for a divorce if it will cause grave financial or other hardships for the respondent.<sup>26</sup>

In South Africa, in addition to the irretrievable breakdown of a marriage, a party may also rely on mental illness and continuous unconsciousness as grounds for divorce.<sup>27</sup> However, an application for the forfeiture of benefits is not available in instances where these grounds are used. Section 9(2) specifically excludes mental illness and continuous unconsciousness as divorce grounds to which forfeiture provisions may attach. It is obvious that the purpose of section 9(2) is to alleviate unfairness that may result if forfeiture proceedings are brought against a defendant who is not present to defend him- or herself. It is worth noting that the presence of mental illness and continuous unconsciousness as grounds for a divorce has received academic criticism. There are academics who argue that having irretrievable breakdown of a marriage as the only ground for a divorce is sufficient.<sup>28</sup>

Should the legislature discard the additional grounds for a divorce, and thus mirror the English system? It is submitted that this should be the case. Section 3 of the Divorce Act should be amended so that the irretrievable breakdown of a marriage is the only ground for a divorce. It should be sufficient for a spouse wishing to bring divorce proceedings against a mentally ill spouse simply to allege that as a result of the mental illness the marriage has irretrievably broken down. However, to emphasise the protection of mentally ill and continuously unconscious spouses, section 9(2) of the DA should be retained. The retention of section 9(2) would also address decisions such as *Dickinson v Dickinson*,<sup>29</sup> *Smit v Smit*<sup>30</sup> and *Ott v*

<sup>23</sup> Cretney and Masson *Principles of Family Law* 96.

<sup>24</sup> Office for National Statistics <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2019> (accessed 2022-02-09).

<sup>25</sup> S 1 of the MCA.

<sup>26</sup> S 5 of the MCA.

<sup>27</sup> See s 3, read with s 5(1) and (2) of the DA.

<sup>28</sup> Skelton and Carnelley *Family Law in South Africa* (2010) 125; Heaton and Kruger *South African Family Law* 123 and Barratt *et al Law of Persons* 339.

<sup>29</sup> 1981 (3) SA 856 (W).

*Raubenheimer*<sup>31</sup> that seem to suggest the permissibility of bringing a forfeiture suit against such spouses.

While the purpose of section 9 appears clear and unambiguous on paper, in practice it has raised important questions. Some of the questions have, to a certain extent, been answered over the years but others remain. Initially, some questions related to the textual interpretation of the section, especially in relation to the three factors. The issue was whether a plaintiff was required to prove all the factors before an order of forfeiture could be made. Another issue was whether these factors ranked on the same footing or if one was more important than the others. Arguably, these issues have been put to rest in *Wijker v Wijker*.<sup>32</sup> However, this case was decided in a different era and since then, South Africa has committed to a constitutional mandate based on human rights and dignity. For the purpose of this article, it is important to ask whether the interpretation of section 9 of the DA allows forfeiture to be invoked in circumstances where the marriage ends through death.

### 3 FORFEITURE UNDER COMMON LAW

Forfeiture, though it developed under Roman-Dutch law, originates in Roman law.<sup>33</sup> A forfeiture order could only be made if it was ancillary to a separation or divorce order.<sup>34</sup> In *Vergottini v Vergottini*,<sup>35</sup> the court refused to grant forfeiture relief because the spouse had sought it in conjunction with neither a divorce nor a separation order. In this case, the wife had approached the court for an order declaring that the husband had forfeited all the benefits and for suspending the community of property.<sup>36</sup> Owing to the then-applicable fault system, the wife could not file for a divorce as she was leading an adulterous life.<sup>37</sup>

Under Roman law, the grounds upon which forfeiture could be made were malicious desertion, adultery, incurable mental illness, and imprisonment of at least five years.<sup>38</sup> Like divorce, forfeiture was, and still is (to a certain degree) based on fault.<sup>39</sup> However, under Roman-Dutch law, only malicious desertion and adultery could be relied upon. In cases where the petitioner relied on malicious desertion, a court was required to issue a rule *nisi* calling upon the delinquent spouse to restore conjugal rights. The purpose of this rule *nisi* was to give the guilty spouse an opportunity to restore conjugal rights. If the guilty spouse failed to restore conjugal rights before the return date, the court was duty-bound to order forfeiture.<sup>40</sup> The purpose was to

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<sup>30</sup> 1982 (4) SA 34 (O).

<sup>31</sup> 1985 (2) SA 851 (O).

<sup>32</sup> 1993 (4) SA 720 (A).

<sup>33</sup> *Swil v Swil supra* 792H.

<sup>34</sup> *Ex parte Meyer NO: In Re Meyer v Meyer* 1962 (2) SA 688 (N) 690H.

<sup>35</sup> 1951 (2) SA 484 (W).

<sup>36</sup> *Vergottini v Vergottini supra* 484G.

<sup>37</sup> *Vergottini v Vergottini supra* 485C.

<sup>38</sup> *Swil v Swil supra* 793A and C v C *supra* par 28.

<sup>39</sup> *Singh v Singh* 1983 (1) SA 781 (C) 786E.

<sup>40</sup> *Ex parte Boshoff NO: In re Boshoff v Boshoff* 1953 (3) SA 237 (W) 238B.

prevent a party who is responsible for the breakdown of the marriage from benefiting financially.<sup>41</sup> In other words, the purpose was to ensure that a person does not benefit from a marriage that he or she has wrecked<sup>42</sup> as a result of marital delinquency.<sup>43</sup> Viewed this way, forfeiture was (and still is) punitive in nature.

The idea that a forfeiture order could only be made where there was fault was not cast in stone; at Roman law, the order could be made even in cases of incurable mental illness where the question of fault or blameworthiness did not arise. This position later changed under Roman-Dutch law. An order of forfeiture could no longer be made against a mentally ill spouse solely based on the mental illness.<sup>44</sup> Section 9(2) of the DA upholds this position as it expressly excludes mental illness as a ground upon which an order of forfeiture may be made. Notwithstanding such exclusion, it is shown below that an order of forfeiture may still be made in the absence of fault – for instance, where the marriage has been of short duration.

Under the common law, a guilty spouse could forfeit everything, including what he or she contributed to the marriage.<sup>45</sup> Bonthuys also shows that at common law the court had the power to order complete forfeiture in favour of the innocent spouse.<sup>46</sup> To this end, Bonthuys relied on the decision in *Mulder v Mulder*<sup>47</sup> as authority for the assertion that a spouse could forfeit assets that he or she brought into the marriage.<sup>48</sup> Writing many years before Bonthuys, Hahlo acknowledged that our courts have not rejected the rule that a spouse could forfeit what he or she brought into the marriage. However, he argues that it has fallen into disuse.<sup>49</sup> This legal position seems to have been followed by various jurisdictions around the globe. However, in 1994, the state of Mississippi overturned it in *Ferguson v Ferguson*.<sup>50</sup> In South Africa, cases such as *JW v SW*<sup>51</sup> and *M v M*<sup>52</sup> suggest that the legal position is that a spouse cannot forfeit what he or she brought into the marriage.

Under common law, a party seeking forfeiture was expected to allege and prove any of the jurisdictional grounds highlighted above. Once a party had proved a jurisdictional ground, the court had no discretion but to grant an order of forfeiture.<sup>53</sup> The DA has brought about a fundamental change. While a party seeking a forfeiture order is still expected to plead and prove a

<sup>41</sup> *Swil v Swil supra* 792J and *Mulder v Mulder* (1885–1888) 2 SAR TS 238.

<sup>42</sup> *Murison v Murison supra* 157; Cronje and Heaton *South African Family Law* (1991) 150.

<sup>43</sup> Hahlo *The South African Law of Husband and Wife* (1963) 418.

<sup>44</sup> Marumoagae “The Regime of Forfeiture of Patrimonial Benefits in South Africa and a Critical Analysis of the Concept of Unduly Benefited” 2014 *De Jure* 85 91.

<sup>45</sup> *Mulder v Mulder supra* 238.

<sup>46</sup> See, generally, Bonthuys “The Rule That a Spouse Cannot Forfeit at Divorce What He or She Has Contributed to the Marriage: An Argument for Change” 2014 *SALJ* 439.

<sup>47</sup> *Supra*.

<sup>48</sup> Bonthuys 2014 *SALJ* 445.

<sup>49</sup> Hahlo *The South African Law of Husband and Wife* (1963) 419.

<sup>50</sup> 639 So. 2d 921 (1994).

<sup>51</sup> 2011 (1) SA 545 (GNP).

<sup>52</sup> LP (unreported) 2017-06-19 case no 1070/2014.

<sup>53</sup> *Swil v Swil supra* 794A.

jurisdictional ground, the decision whether to grant a forfeiture order now rests entirely within the court's discretion.<sup>54</sup>

Also under common law, an order of forfeiture could take one of two forms. It could either be a restorative or a declaratory order. The court could order a spouse to restore a past benefit that was due and given during the subsistence of the marriage. This was similar to a vindicatory claim. Alternatively, a declarator simply declared that a spouse forfeited any benefits that were due to him or her at the dissolution of the marriage.<sup>55</sup> The difficulty with a restoring order is that the plaintiff was required to plead exactly the benefit that he or she had given. This is something that proved difficult, especially if a marriage had been of a long duration. On the other hand, it was unnecessary for a plaintiff seeking a declarator to specify what property the guilty spouse forfeited. In other words, a blanket declaration was permissible.<sup>56</sup>

The different orders stated above still exist, although courts no longer classify them as such. Sometimes a court must specify the item that is forfeited – for example, a claim or order to the effect that “the immovable property” is forfeited can prove difficult to implement in instances where there is more than one immovable property. To eliminate any potential confusion, the claim or order must be specific. However, in some cases, a blanket declarator may be an appropriate order when dealing with smaller estates. The guiding principle is that each case must be treated based on its own circumstances.

## 4 SECTION 9 OF THE DIVORCE ACT

### 4.1 The wording

Section 9(1) of the DA provides:

“When a decree of divorce is granted on the ground of the irretrievable breakdown of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.”

### 4.2 A brief analysis of the section

The language of section 9 makes it clear that what is forfeited is a patrimonial or marital benefit. A patrimonial benefit is one that accrues to a party because of the marriage, thus excluding what a party has contributed to the marriage. Therefore, in line with the American decision in *Ferguson v Ferguson*,<sup>57</sup> a person cannot forfeit what he or she contributed to the

<sup>54</sup> Hahlo *The South African Law of Husband and Wife* 5ed (1985) 373.

<sup>55</sup> See, generally, *Swil v Swil supra* 793D–F.

<sup>56</sup> *Swil v Swil supra* 793D–F.

<sup>57</sup> *Supra*.

marriage.<sup>58</sup> Further, the reference to “patrimonial benefits” in section 9 lends itself to a suggestion that it is a rejection of the idea that a spouse may forfeit assets that he or she brought into the marriage – as espoused in *Mulder v Mulder*<sup>59</sup> and advocated by Bonthuys. Furthermore, as noted above, recent judicial authority also supports the rejection.<sup>60</sup>

A court is empowered to order partial or complete forfeiture. In light of the rejection of the common-law position that a spouse could forfeit what he or she brought into the marriage, complete forfeiture refers to a situation where the guilty spouse with a lesser estate does not get anything from the estate of the other. In other words, the guilty spouse only gets to keep what he or she brought into the marriage. An order of complete forfeiture usually does not present any practical problems. The problem lies with partial forfeiture. Partial forfeiture is awarded as a percentage of the joint estate, accrual or benefit in terms of the antenuptial contract. Ideally, before making an award of partial forfeiture, a court must be provided with sufficient information regarding the value of the estate as well as the respective contributions of each of the spouses.<sup>61</sup> Otherwise, the court is called to make a blanket or a blind order (a declarator as mentioned above). This is undesirable as it opens the gate to subsequent litigation in order to enforce the very broad (if not vague) order.<sup>62</sup>

Whether a court grants forfeiture depends solely on whether a party will, as against the other, be unduly benefited.<sup>63</sup> The meaning of undue benefit is unclear. The DA also does not define the concept.<sup>64</sup> However, in *Wijker v Wijker*,<sup>65</sup> it was decided that whether a person will unduly benefit is a two-stage inquiry. The first leg is whether a person will “benefit”, which is a question of fact; while the second leg is whether the benefit is “undue”, and this is a value judgement taking into account the facts and the three factors.<sup>66</sup> An attempt is made below to define “undue benefit”.

### 4 3 The meaning of undue benefit

Marumoogae submits that an undue benefit is “a benefit (being property subject to the joint estate) accruing to a person whose conduct does not justify such a person receiving such a benefit”.<sup>67</sup> In *Molapo v Molapo*, the

<sup>58</sup> See, generally, *JW v SW supra* and *C v C supra*.

<sup>59</sup> *Supra*.

<sup>60</sup> *JW v SW supra* and *M v M supra*.

<sup>61</sup> *Koza v Koza* 1982 (3) SA 462 (T) 465E–466C. In the *Koza* case, the parties were married in terms of the Black Administration Act 38 of 1927 and no declaration was made by the parties as envisaged in s 22(6) of the said Act. Consequently, their marriage was, by default, out of community of property. There was no antenuptial contract. This being the case, there were no patrimonial benefits, and the court could not make a forfeiture order. A forfeiture order can only be made where there is a patrimonial benefit. See, also, Hahlo *The South African Law of Husband and Wife* (1985) 376.

<sup>62</sup> See *Swil v Swil supra* 794A–C and *Molapo v Molapo* FSB (unreported) 2013-03-14 case no 4411/10 par 17 and 22.

<sup>63</sup> Cronje and Heaton *South African Family Law* 152.

<sup>64</sup> Marumoogae 2014 *De Jure* 98.

<sup>65</sup> *Supra*.

<sup>66</sup> *Wijker v Wijker supra* 727E–F.

<sup>67</sup> Marumoogae 2014 *De Jure* 98.



court held that “undue” could be described as “disturbingly unfair”.<sup>68</sup> It is submitted that “undue benefits” refers to something that one acquires in the absence of a legal or moral entitlement. An unfaithful spouse is not morally entitled to any benefit of the marriage. Equally, a spouse who kills another ought not to benefit from the estate. Otherwise, such will constitute an undue benefit. A spouse who fails to contribute to the estate in circumstances where he or she can contribute should also not benefit. The concept of a contribution must be interpreted to include both monetary and non-monetary contribution – as envisaged in *Beaumont v Beaumont*.<sup>69</sup> In order for a court to make a proper determination of whether a benefit is undue, the nature and extent of the benefit must be proved before it.<sup>70</sup>

#### 4 4 The three factors

Despite the absence of clarity on what is meant by undue benefit, it is clear that the question of whether a person has unduly benefited must be determined having regard to these three factors: the duration of the marriage, the circumstances that gave rise to the break-down, and any substantial misconduct on the part of either of the spouses.<sup>71</sup> In *Singh v Singh*, the court noted (with authority) that two of the three factors show the “lingering influence” of the guilt or fault principle.<sup>72</sup> These three factors need not all be present<sup>73</sup> and none of these factors should be considered as ranking above others.<sup>74</sup> In *T v R*,<sup>75</sup> the court awarded partial forfeiture – relying solely on the short duration of the marriage. The marriage had only lasted for 20 months.

A court may not look beyond these three factors. In *Wijker v Wijker*,<sup>76</sup> the trial court had regard to fairness. The Appellate Division disagreed with this approach and held that section 9(1) could not be used to depart from the consequences of the parties’ chosen matrimonial property system just because the court considers it fair and just to do so.<sup>77</sup> In *Botha v Botha*,<sup>78</sup> the court *a quo* misdirected itself by considering the strained relationship between the appellant and the defendant.<sup>79</sup> In *Molapo v Molapo*,<sup>80</sup> the court

<sup>68</sup> *Molapo v Molapo supra* par 22.13.

<sup>69</sup> *Beaumont v Beaumont* 1987 (1) SA 967 (A).

<sup>70</sup> *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C). Note that this judgment is written in Afrikaans. See flynote and headnote for a brief English translation.

<sup>71</sup> See *Klerck v Klerck* 1991 (1) SA 265 (W) 266A–B. Note that this judgment is written in Afrikaans, but the headnote is very helpful. See, also, Barratt *et al Law of Persons* 349.

<sup>72</sup> *Singh v Singh supra* 788F.

<sup>73</sup> See headnote in *Klerck v Klerck supra* 265J and *Binda v Binda* 1993 (2) SA 123 (W).

<sup>74</sup> See *Wijker v Wijker supra* 728–729. In this appeal decision, counsel for the appellant argued that the court could not make an order of forfeiture without a finding of “substantial misconduct”. By so doing, counsel had sought to put “substantial misconduct” above other factors. The court rejected this argument.

<sup>75</sup> *T v R* 2017 (1) SA 97 (GP); [2016] 4 All SA 251 (GP) par 20.18.

<sup>76</sup> *Supra*.

<sup>77</sup> *Wijker v Wijker supra* 727. See, also, Heaton “Striving for Substantive Gender Equality in Family Law: Selected Issues” 2005 SAJHR 547 557.

<sup>78</sup> 2006 (4) SA 144 (SCA).

<sup>79</sup> *Botha v Botha supra* par 14–15.

<sup>80</sup> *Supra*.

once again relied on fairness and this was criticised.<sup>81</sup> Therefore, the court is confined only to the factors listed in the section. Beyond that, the court has no competency.

#### 4 4 1 Application of the factors

The manner in which the factors are to be applied is now settled law. Though not voluminous, the literature on these factors is rich. Initially it was thought that the factors were to be applied cumulatively.<sup>82</sup> In other words, the thinking was that in order to succeed in an application for an order of forfeiture, a spouse was required to allege and prove all the factors.<sup>83</sup> This was due to the wording of the section, particularly the use of commas (as opposed to the word “or”) and the conjunction ‘and’ before the third factor.<sup>84</sup>

In *Wijker v Wijker*, the court settled the matter as follows:

“Now the words ‘and’ and ‘or’ are sometimes inaccurately used; and there are many cases in which one of them has been held to be the equivalent of the other. Much depends on the context and the subject-matter. I cannot think that in this instance the Legislature intended to make these provisions cumulative.”<sup>85</sup>

#### 4 4 2 Duration of the marriage

The court may consider the duration of the marriage. In *Singh v Singh*, the court held that this is the only morally neutral factor that a court may have to consider.<sup>86</sup> Furthermore, this is the only factor that serves as a reminder that our divorce jurisprudence has, to a certain extent, moved away from the fault system. It is accepted that where a marriage has been of a long duration, a court is less likely to grant an order of forfeiture. The reason for this is because it is highly probable that both the spouses have made contributions to the joint estate or the growth of the estate of the other. A shorter marriage increases the chances of the court granting a forfeiture order.

That said, it must be asked: what constitutes a short or long marriage? In *T v R*, the court accepted that 20 months was a short duration.<sup>87</sup> It is submitted that this is correct. In *JW v SW*, 17 years was regarded as a long duration.<sup>88</sup> In an earlier decision in *Botha v Botha*,<sup>89</sup> the Supreme Court of

<sup>81</sup> See Marumoagae “Factors Justifying Forfeiture of Patrimonial Benefits Orders: *Molapo v Molapo* (2013) ZAFSHC 29 14 Mar 2013” 2015 *Obiter* 232.

<sup>82</sup> *Matyila v Matyila* 1987 (3) SA 230 (W) 234G.

<sup>83</sup> *Matyila v Matyila supra* 234G.

<sup>84</sup> To illustrate (parts of s 9 of the DA): “[h]aving regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof **and** any substantial misconduct on the part of either of the parties ... (*author’s own emphasis*).”

<sup>85</sup> *Wijker v Wijker supra* 729G. This quotation was originally used by Innes CJ in *Barlin v Licensing Court of the Cape* 1924 AD 472 478. It was also used in *Binda v Binda supra*. In relying on this quote, the Appellate Division endorsed the decision in *Binda v Binda supra*.

<sup>86</sup> *Singh v Singh supra* 788F–G.

<sup>87</sup> *T v R supra* par 20.18.

<sup>88</sup> *JW v SW supra* par 17.

<sup>89</sup> 2006 (4) SA 144 (SCA).

Appeal seems to have accepted<sup>90</sup> that 10 years was a short, but not “very short duration”.<sup>91</sup> In arriving at this decision, the court took into consideration that the parties were in their twenties when they married and that had their marriage endured, they would have been married for a very long period.<sup>92</sup> This line of reasoning raises some interesting points. Where people decide to marry at a young age, how long do they have to be married before their marriage is regarded as being of a long duration? Is it the case that 10 years will be regarded as a long duration where the parties married at a younger age? Will something shorter than 10 years be regarded as a long duration if the parties married at an older age?

It is submitted that this line of reasoning is flawed. Ten years may not be very long but it is certainly not short. Many things may happen in 10 years. For instance, a child may be born of the marriage and that child may progress as far as the third or fourth grade of their school career. Perhaps the solution lies in ascertaining the average duration of marriages in South Africa. If a marriage reaches and exceeds the average duration, it should be regarded as a long marriage for the purposes of section 9.

#### 4 4 3 *The circumstances giving rise to the breakdown of the marriage*

There are many reasons that marriages break down. In *Wijker v Wijker*, the breakdown was caused by the respondent’s refusal to return shares to the appellant and the appellant’s unrelenting demand thereof.<sup>93</sup> In *JW v SW*, the marriage broke down because of physical abuse by the husband.<sup>94</sup> In *Botha v Botha*, the cause of the breakdown was the meddling of the defendant’s family in the marriage.<sup>95</sup> In *Molapo v Molapo*, the defendant attempted to burn down the family home, assaulted the plaintiff, and failed to take care of the family.<sup>96</sup> In *T v R*, the marriage broke down because the parties were constantly away from home on account of employment.<sup>97</sup>

Section 9(1) requires the courts to have regard to the reason for the breakdown of the marriage. Once the reason has been established, the court must decide whether that reason is sufficiently serious to justify an order of forfeiture. The court may not make an order of forfeiture citing the reason for the breakdown of the marriage if this reason does not establish blameworthiness on the part of the defendant. This approach was adopted in

<sup>90</sup> It must be pointed out that the SCA quoted the decision of the court *a quo* in this respect. It did not disagree with the findings of the court *a quo* that 10 years was a short, but not “very short duration”. Neither did it disagree with the reasoning behind the finding.

<sup>91</sup> *Botha v Botha supra* par 13.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Wijker v Wijker supra* par 31–32. Essentially, the court’s finding was that both the parties contributed to the breakdown of the marriage.

<sup>94</sup> *JW v SW supra* par 28. It must be noted that in this case the plaintiff had been secretly receiving maintenance from the father of her son from a previous relationship. The court found that this did not cause the marriage to break down as alleged by the defendant. It was the assault on the plaintiff that brought the marriage to its knees.

<sup>95</sup> *Botha v Botha supra* par 14–15.

<sup>96</sup> *Molapo v Molapo supra* par 24.3.

<sup>97</sup> *T v R supra* par 20.2–20.5.

*Wijker v Wijker, Botha v Botha* and *T v R*.<sup>98</sup> If the reason for the breakdown is so serious that it renders any benefit given to the defendant undue, then the court must make an order of forfeiture. This approach was followed in *JW v SW* and *Molapo v Molapo*.<sup>99</sup> The opposite is also true: if the reason for the breakdown is not so serious that it renders any benefit given to the defendant undue, the court may not make an order of forfeiture. The reason for the breakdown of the marriage is important and is central to the decision to award forfeiture. In this regard, the provision cannot be faulted.

#### 4 4 4 Any substantial misconduct

While fault no longer plays a part in arriving at a decision about whether to grant a decree of divorce, remnants of the fault principle clearly lingered in section 9 of the DA. Misconduct in this context includes marital fault. Marital fault includes adultery, imprisonment and malicious desertion.<sup>100</sup> The concept of substantial misconduct is wider than marital fault. It goes on to include issues such as assault,<sup>101</sup> late-coming, socialising, lack of intimacy, burning of wedding photographs<sup>102</sup> and financial deprivation.<sup>103</sup> However, substantial misconduct does not include a single or isolated occasion.<sup>104</sup> Furthermore, the mere existence of substantial misconduct does not, on its own, justify an order of forfeiture.<sup>105</sup>

The above does not suggest that in addition to proving substantial misconduct, the plaintiff must prove any of the other factors in section 9. As has been pointed out above, it is trite in our law that the plaintiff does not have to prove all the factors in section 9. However, what must be proved is that as a result of the substantial misconduct, the defendant will be unduly benefited. In *JW v SW*, the plaintiff managed to prove substantial misconduct in the form of an assault.<sup>106</sup> However, the court held this did not justify an order of forfeiture, because the defendant had contributed more than the plaintiff.<sup>107</sup> As pointed out above, a person cannot forfeit what they brought into the marriage.

Misconduct still does and should continue to play an important role in forfeiture. Although fault is no longer a requirement for a divorce, it is difficult to think of the application of forfeiture provisions without the question of fault. In this regard, the provision also cannot be faulted.

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<sup>98</sup> *Supra*.

<sup>99</sup> *Supra*.

<sup>100</sup> Barratt *et al Law of Persons* 334.

<sup>101</sup> *JW v SW supra* 550G.

<sup>102</sup> See *T v R supra* par 20.6.

<sup>103</sup> See the facts of *Molapo v Molapo supra* where, in addition to prolonged financial neglect, the defendant (husband) assaulted the plaintiff and attempted to burn down the family home.

<sup>104</sup> *T v R supra* par 20.6. In this case, the defendant (husband) had throttled the plaintiff on a single occasion. The court did not regard this as substantial misconduct. Nonetheless, the court used the opportunity to make its distaste over domestic violence known at par 20.7.

<sup>105</sup> *JW v SW supra* 550H.

<sup>106</sup> *JW v SW supra* 550G.

<sup>107</sup> *JW v SW supra* 550I.

## 5 FORFEITURE AND DISSOLUTION OF A MARRIAGE THROUGH DEATH

By its nature, the forfeiture provision is controversial. It has been pointed out above that it only applies when a marriage ends through divorce. The reality is that some marriages end through death under suspicious circumstances; here one may find instances of infidelity, absence of spousal support when one spouse becomes sick (malicious desertion) or murder in the form of mariticide. It is submitted that the heirs of the deceased spouse should be able to invoke forfeiture of patrimonial benefit provisions. While it is important to acknowledge that there may be remedies under the law of succession,<sup>108</sup> those remedies relate to inheritance and not a patrimonial benefit. The rogue spouse may still be entitled to half of the deceased estate by virtue of a marriage in community of property. The same applies with respect to other marital regimes where a marital benefit is conferred by antenuptial contract. The heirs of the deceased ought to be afforded a remedy to protect the entire estate through forfeiture of patrimonial benefit provisions.

It is debatable whether forfeiture can be made when a marriage ends through death. At Roman law, there is authority for the notion that the action for forfeiture was available to the deceased's heirs against a delinquent spouse on the ground of adultery.<sup>109</sup> In such cases, the right to bring an action of forfeiture was transmitted to the heirs.<sup>110</sup>

It is unclear whether this position was received into South African law. However, no court has ever rejected this principle. In *Ex Parte Boshoff NO: In re Boshoff v Boshoff*,<sup>111</sup> the deceased husband had sued for restitution of the conjugal right, failing which an order for a divorce and forfeiture. Unfortunately, the husband died before close of pleadings. The executor of the deceased estate approached the court for an order substituting himself as plaintiff in the matter. The main object was to apply for an order of forfeiture against the delinquent wife.<sup>112</sup> The court refused this application. The basis for this refusal was that the court could not grant an order of forfeiture in the absence of a decree of divorce.<sup>113</sup> However, a divorce was no longer possible following the death of the husband. Furthermore, the main suit was for an order for restitution of conjugal rights. If such an order were to have been given, the respondent would have been given an opportunity to restore conjugal rights before a divorce decree could be

<sup>108</sup> Examples of remedies under the law of succession are cases of unworthiness to inherit. These include instances where the deceased has unlawfully and intentionally caused the death of the deceased or the deceased's parent(s) or descendants (the *conjunctissimus*). See *Gafin v Kavin* 1980 (3) SA 1104 (W). Considerations of public policy may determine unworthiness to inherit. For instance, the behaviour of the beneficiary towards the deceased may disqualify them from inheriting from the deceased. See *Danielz v De Wet* 2009 (6) SA 42 (C).

<sup>109</sup> Hahlo *The Law of Husband and Wife* (1963) 419.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Supra.*

<sup>112</sup> *Ex Parte Boshoff NO: In re Boshoff v Boshoff supra* 237H.

<sup>113</sup> *Ex Parte Boshoff NO: In re Boshoff v Boshoff supra* 238A.

ordered.<sup>114</sup> It is important to note that the court did not reject the idea of transmitting the action for forfeiture to the heirs: the basis of dismissing the executor's application was procedural, rather than substantive.

In *Ex Parte Meyer NO: In re Meyer v Meyer*,<sup>115</sup> the deceased husband had instituted an action for divorce and, *inter alia*, forfeiture, relying on the ground of adultery. Before the trial could start, however, the husband died. The executor of the deceased estate approached the court for an order substituting himself as the plaintiff and for an order of forfeiture in favour of the deceased estate.<sup>116</sup> In rejecting the matter, the court held that an order of forfeiture of benefits by reason of adultery could not be granted as a stand-alone order.<sup>117</sup> It could only be made subsequent to a divorce decree.<sup>118</sup> It is interesting that the court in this case also did not reject transmission of the action for forfeiture to the heir as a matter of substantive law. Instead, citing *Ex Parte Boshoff NO: In re Boshoff v Boshoff*,<sup>119</sup> the court observed that in the latter case, the main application was for restoration of conjugal rights, and the application for an order of forfeiture was ancillary. In the present case, the executor had sought a stand-alone order. It is submitted that these are matters of procedure rather than substance and that the application of this possible order should be extended to instances where a marriage has been terminated by death.

More recently, in *Monyepao v Ledwaba*,<sup>120</sup> the Supreme Court of Appeal had to decide, *inter alia*, whether to make an order of forfeiture in favour of a deceased estate. In this case, the respondent had entered into an unregistered customary marriage with the deceased in 2007.<sup>121</sup> Approximately two years later and without dissolving the customary marriage to the deceased, the respondent entered into a civil marriage with another man.<sup>122</sup> Following this, the deceased also married the appellant in terms of customary law.<sup>123</sup> Following the death of the deceased, the respondent returned to claim from the deceased estate arguing that she was a spouse based on her customary marriage to the deceased, which was never dissolved through a divorce by a court. The appellant sought an order for, among others, forfeiture. The court *a quo* granted the order. However, in two subsequent appeals (before a full bench of the Limpopo Division of the High Court petitioned by the respondent and in the Supreme Court of Appeal petitioned by the appellant), the order was reversed. The appeal decisions were unanimous in that an order of forfeiture could only be made where a marriage ends in divorce and only a party to a marriage may seek it.<sup>124</sup>

<sup>114</sup> *Ex Parte Boshoff NO: In re Boshoff v Boshoff supra* 238B.

<sup>115</sup> *Supra*.

<sup>116</sup> *Ex Parte Meyer NO: In re Meyer v Meyer supra* 689A–E.

<sup>117</sup> *Ex Parte Meyer NO: In re Meyer v Meyer supra* 689G.

<sup>118</sup> *Ex Parte Meyer NO: In re Meyer v Meyer supra* 689H.

<sup>119</sup> *Supra*.

<sup>120</sup> SCA (unreported) 2020-05-27 case no 1368/2018 par 21.

<sup>121</sup> *Ledwaba v Monyepao LP* (unreported) 2018-04-25 case no HCAA06-2017 par 7.

<sup>122</sup> *Monyepao v Ledwaba supra* par 15.

<sup>123</sup> *Monyepao v Ledwaba supra* par 14.

<sup>124</sup> See par 23 of the decision of the full bench in *Ledwaba v Monyepao supra* and par 21 of the SCA decision.

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It is hereby argued that both the appeal courts in *Monyepao v Ledwaba* adopted a literal approach in interpreting section 9. To borrow from the court:

“It is clear from s 9(1) that the power of a court to order the forfeiture of benefits arises only as an adjunct to a decree of divorce. Moreover, a claim for the forfeiture of benefits can only be made by one party to a marriage against the other in divorce proceedings. It is not open to an outsider, such as Ms Monyepao, to claim that relief. As the proceedings in the court of first instance were not divorce proceedings, and Ms Monyepao had no standing, that court had no jurisdiction to order that Ms Ledwaba should forfeit the benefits of her marriage to Mr Phago in favour of his estate. Consequently, the full court correctly set aside the order of the court of first instance.”<sup>125</sup>

Notwithstanding the above, *Monyepao v Ledwaba* must be distinguished on its facts. In this case, relief was sought by the wife (or second wife, since the court found that the first customary marriage to the respondent was still valid) of the deceased in terms of customary law against an estranged first wife who returned solely to lay a claim from the deceased estate. It is thus submitted that *Monyepao v Ledwaba* does not necessarily extinguish possible reliance on forfeiture provisions by the heirs. In fact, the decision of the court *a quo* may give much-needed credence to the claim for forfeiture by the heirs.

It is hereby submitted that the correct interpretation is one that takes into account the context of section 9(1). The reason that section 9(1) singles out the irretrievable breakdown of the marriage as a ground on which a forfeiture order may be made is not to imply that there are no other grounds upon which the order may be made. Instead, section 9(1) is an indication that mental illness and continuous unconsciousness are excluded from the ambit of section 9(1). To emphasise this point, and as noted above, section 9(2) specifically excludes mental illness and continuous unconsciousness. This interpretation is in line with the decisions cited above that seem to support the transmission of action for forfeiture to the heirs of the deceased.

There is no doubt that such a proposal for transmission of the action for an order of forfeiture to the heirs creates room for frivolous and baseless litigation. However, this behaviour may be deterred by the possibility of a costs order in favour of the innocent litigant. This way, only legitimate cases may land in court rolls.

## 6 CONCLUSION

Much may still be said about the forfeiture of patrimonial benefits, especially on the application of these provisions. This article has presented an analytical overview of divorce and forfeiture, including a comparison with English law. It has also drawn on the common-law legal position. The changes brought about by the DA have been highlighted as far as possible. The article has also contributed, to a certain extent, to an understanding of the wider interpretation and application of section 9. It has done this by elaborating on what the factors in section 9 entail. The discussion of the factors is done with reference to case law. The article has also discussed the

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<sup>125</sup> *Monyepao v Ledwaba supra* par 21.

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possibility of an action for forfeiture where a marriage ends through death. This has also been done with reference to case law. The article has not shied away from making recommendations. It has recommended that the DA be amended so that the irretrievable breakdown of a marriage is the only ground for a divorce. It has also recommended that section 9 be interpreted in a way that makes it possible to transmit an action for an order for forfeiture to the heirs, even in cases where a marriage ends through death.