

‘With such changes as may be required by the context’

Section 13 of the Civil Union Act, Absurdity and Gender Discrimination in the Legal Consequences of Marriage

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1. INTRODUCTION

‘The one unshakeable criterion [for reform] is that the present exclusion of same-sex couples from enjoying the status and entitlements coupled with the responsibilities that are accorded to heterosexual couples by the common law and the Marriage Act, is constitutionally unsustainable. The defect must be remedied so as to ensure that same-sex couples are not subjected to marginalisation or exclusion by the law, either directly or indirectly.’¹

The passing into law of the Civil Union Act² on 29 November 2006 sought to extend the legal rights, privileges and duties of marriage to same-sex couples in accordance with the “one unshakeable criterion” for reform stipulated in *Minister of Home Affairs v Fourie*. Thus far, academic discussion on the Act has focused almost exclusively on the deeper philosophical questions that it raises.³ In the process, very little attention has been given to the practical issues that are raised by its extension of the legal consequences of marriage to same-sex civil union partners.⁴ These practical issues emerge from s 13 of the Act which stipulates that:

- (1) The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union.
- (2) With the exception of the Marriage Act and the Customary Marriages Act, any reference to-
 - a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and
 - b) husband, wife or spouse in any other law, including the common law, includes a civil union partner.

¹ Sachs J in *Minister of Home Affairs and Others v Fourie and Another* 2006 (1) SA 524 (CC) para 147.

² 17 of 2006.

³ See P de Vos ‘The Inevitability of Same-Sex Marriage in Post-Apartheid South Africa’ (2007) 23 *SAJHR* 432; D Bilchitz and M Judge ‘For Whom Does the Bell Toll? The Challenges and Possibilities of the Civil Union Act for Family Law in South Africa’ (2007) 23 *SAJHR* 466; E Bonthuys ‘Race and Gender in the Civil Union Act’ (2007) 23 *SAJHR* 526; P De Vos and J Barnard ‘Same-Sex Marriage, Civil Unions and Domestic Partnerships in South Africa: Critical Reflections on an Ongoing Saga’ (2007) 23 *SAJHR* 795.

⁴ In terms of the Civil Union Act heterosexual couples may also have the option of concluding a civil union instead of a civil marriage. For the purposes of this discussion references to ‘civil unions’, ‘civil union partners’ and ‘partners’ will predominantly relate to same-sex couples. In addition, the words ‘marriage’ and ‘civil unions’ will be used interchangeably.

The phrase ‘with such changes as may be required by the context’ suggests that the extension of the legal consequences of marriage to same-sex couples is a simple question of reading in gender-neutral terms where necessary. In reality, the application of s 13 to certain aspects of South African family law gives rise to absurdities that create an obstacle to the equal extension of the legal consequences of marriage to same-sex couples. These absurdities arise where the law assigns duties and responsibilities ‘specifically and exclusively’ to husbands or wives.⁵

This essay will identify two of the most important legal consequences of marriage that give rise to such absurdities when interpreted in light of s 13: the assumption of a common surname and the determination of the proprietary consequences of marriage.⁶ These areas of law will be considered in turn by applying a four-part framework of analysis. First, the present legal position will be explained. Second, the absurdities that arise from the application of s 13 to these areas of law will be identified. Third, it will be demonstrated that s 13 acts as a mechanism for exposing the unfair gender discrimination that underpins these legal consequences of marriage and thus strengthens calls for their reform. Finally, appropriate reforms will be suggested for each of these areas of law. These reforms will seek to both accommodate same-sex civil union spouses and rectify the present constitutional invalidity of these laws. As a result, it will be demonstrated that s 13 presents a challenge to reform the law in order to make marriage a truly non-gendered, non-discriminatory institution.

2. THE ASSUMPTION OF A COMMON SURNAME

2.1 THE PRESENT LEGAL POSITION

The assumption of a common surname is traditionally seen as one of the most important consequences of a marriage. It is a highly public expression of the unification of the spouses that plays a vital role in ‘determining identities, cultural

⁵ E Le Roux “What a Farrago” *Without Prejudice* April 2007 71.

⁶ There are two additional legal consequences of marriage that also produce absurdities when interpreted in light of s 13: the concept of the husband’s headship of the family (see DSP Cronje and J Heaton *South African Family Law* 2 ed (2004) 67-68 for analysis of the continued existence of this consequence of marriage in the common law) and s 17 of the Friendly Societies Act 25 of 1956. For the sake of brevity, these anachronistic aspects of the law will be omitted from the present discussion.

affiliations and histories'.⁷ While there is no legal requirement that women in heterosexual marriages should assume the name of their husbands, anecdotal evidence suggests that this custom is adhered to in the vast majority of cases.⁸

Section 26 of the Births and Deaths Registration Act⁹ gives legislative approval for this practice. Section 26 (1) stipulates that no individual may 'assume or describe himself or herself by or pass under any surname other than that under which he or she has been included in the population register' without approval from the Director-General of the Department of Home Affairs. However, s 26(1) goes on to state that married women do not require approval to assume a different surname in the following circumstances:

26 (1) ...

- (a) a woman after her marriage assumes the surname of the man with whom she concluded such marriage or after having assumed his surname, resumes a surname which she bore at any prior time;
- (b) a married or divorced woman or a widow resumes a surname which she bore at any prior time; and
- (c) a woman, whether married or divorced, or a widow adds to the surname which she assumed after the marriage, any surname which she bore at any prior time.

It must be noted that the Act does not provide any exceptions for men in heterosexual marriages wanting to assume the surnames of their wives. If a man wishes to do so he must submit an application to the Director-General to obtain the consent required for this change. The consent of the Director-General would also be required if the spouses wish to create an entirely new common surname. In these instances the Director-General is vested with a broad discretion to authorise the change if he or she believes there is 'good and sufficient reason'.¹⁰

2.2 DO THE SECTION 26(1) EXCEPTIONS APPLY TO CIVIL UNIONS?

Section 13(3) of the Civil Union Act stipulates that references to a 'husband, wife or spouse' must also apply to civil union partners. However, the exceptions contained in

⁷ J Scott, J Tehranian and J Mathias 'The Production of Legal Identities Proper to States: the Case of Permanent Family Names' (2002) 44 *Comparative Studies in Society and History* 4 at 6.

⁸ For an analysis of this trend in the United States see C Goldim and M Shim 'Making a Name: Women's Surnames at Marriage and Beyond' (2004) 18 *The Journal of Economic Perspectives* 143.

⁹ 51 of 1992.

¹⁰ Section 26(2). See Department of Home Affairs *Personal Amendments: Change of Surname of Majors* http://www.home-affairs.gov.za/personal_amendments.asp (Accessed 20 September 2008) for further information on this procedure.

s 26(1)(a)-(c) of the Births and Deaths Registration Act use the terms ‘man’ and ‘woman’. On a strictly literal interpretation this would suggest that s 13 does not apply to these provisions. However, given that these gender-specific terms are used in the context of marriage to refer to married men and women they must be taken as being linguistically identical to ‘husband’, ‘wife’ or ‘spouse’. Therefore, s 26(1) must be interpreted with regard to s 13(3) and the references to ‘man’ and ‘woman’ in the exceptions must be read as referring to civil union partners.

Following from this conclusion, an apparent conflict exists between s 26(1) and the annexures to the Civil Union Regulations, 2006.¹¹ The Affidavit in the Absence of an Identity Document¹² and the Civil Union Register¹³ create spaces for both spouses to indicate the surname that they will assume after the marriage. Furthermore, Part E of the Civil Union Register allows both spouses to indicate the surnames that they wish to be recorded in the population register. This suggests that the Minister of Home Affairs may have intended to create an entirely separate regime for the adoption of surnames, distinct from the requirements of s 26(1). This would appear to allow civil union partners an almost limitless range of surname possibilities¹⁴ that would not require the permission of the Director-General.

However, a Minister’s power to make regulations does not empower him or her to amend or repeal Acts of Parliament.¹⁵ Nor may delegated legislation influence the interpretation of original legislation.¹⁶ Consequently, the forms contained in the regulations cannot be interpreted as providing additional exceptions to the general rule in s 26(1) nor may they be interpreted as creating an entirely new regime for the adoption of surnames. Therefore, any deviation from the narrow range of exceptions contained in s 26 (1) would still require the permission of the Director General.¹⁷

¹¹ GN R1206, *Government Gazette* 29439, 29 November 2006.

¹² Form A.

¹³ Form D.

¹⁴ Possibilities could include the traditional choices of one partner assuming the surname of the other partner or one partner assuming a double-barrelled name or choices that extend beyond the scope of the exceptions contained in s26(1) such as both partners assuming an entirely new surname or even swapping surnames.

¹⁵ *Executive Council Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) para 62

¹⁶ *Moodley v Minister of Education and Culture, House of Delegates* 1989 (3) SA 221 (A) 233 E-F

¹⁷ It is uncertain whether the Department of Home Affairs has remained true to s 26 (1) in dealing with the adoption of surnames by same-sex civil unions in practice. It is submitted that if it has adopted a permissive approach to the adoption of surnames by same-sex civil union partners (as is suggested by the Civil Union Regulations) then this would amount to unlawful administrative action under s 6(2)(a)(i) (administrative action not authorised by the empowering provision) or s 6(2)(d)

2.3 ABSURDITIES ARISING FROM THE APPLICATION OF SECTION 13

Having established that s 26(1) of the Births and Deaths Registration Act does apply to same-sex civil unions, two absurdities arise when s 26(1) of the Births and Deaths Registration Act is read with s 13 of the Civil Unions Act.

2.3.1 THE ABSURDITY OF UNFAIR ADVANTAGE

Through the application of s 13, same-sex civil union partners are paradoxically placed in a better position than men in heterosexual marriages. As has been demonstrated, s 13 entails that the term ‘married woman’ in s 26(1) should be read as ‘civil union partner’. Either of the civil union partners could elect to assume the role of the married woman. As a result, either of the partners could elect to adopt the surname of the other partner without requiring the permission of the Director-General. This is in contrast with the position in heterosexual marriages where only the wife has this option. Thus, civil union partners enjoy certain advantages that are not available to heterosexual married men. This is an illogical situation which is in no way saved by interpreting the provision ‘with such changes as may be required’.

2.3.2 THE ABSURDITY OF HETERONORMATIVITY

While same-sex couples may at present enjoy certain advantages over heterosexual males, this is offset by a demeaning artificiality that is apparent in the application of s 26(1). Same-sex civil union partners are required to identify themselves as the husband or wife for the purposes of assuming a common surname. The implicit message contained in this process is that heterosexual marriage is the norm and that same-sex marriages are a lower class of relationship which should be made to imitate the heterosexual marriage roles. This reflects the danger of ‘heteronormativity’ identified by authors such as De Vos¹⁸ and Bonthuys.¹⁹ This is the danger that the inherent dignity of same-sex relationships will be eroded by forcing them to become

(administrative action premised on a material error of law) of the Promotion of Administrative Justice Act 3 of 2000 and would also be a violation of s 9 of the Constitution as it would deny heterosexual couples the equal benefit of this policy.

¹⁸ P De Vos ‘Same-Sex Sexual Desire and the Re-imagining of the South African Family’ (2004) 20 *SAJHR* 179 at 198.

¹⁹ Bonthuys 2007 *SAJHR* 538. Bonthuys and De Vos consider the issue of heteronormativity in the context of the institution of marriage as opposed to specific features of it. It is submitted that the assumption of a common surname represents one of the most telling manifestations of this danger.

mere simulations of heterosexual marriage rather than being recognised as marriage relationships of equal worth and significance.²⁰

A further source of unease over this prospect is that the customs and norms associated with traditional heterosexual marriage roles have in the past ‘served to maintain and perpetuate a particular set of gender relations, power structures and social and economic dynamics that are fundamentally unequal.’²¹ This is particularly apparent in the custom of the wife assuming the husband’s surname.²² This practice can be traced to the now abolished principle of marital power which vested all power in the marital relationship in the husband and rendered wives legally subservient to their husbands’ will.²³ Within this historical context, the assumption of the husband’s surname by a woman was not a neutral or harmless affair. Instead it reflected the deeper gender inequalities within heterosexual marriages. Same-sex relationships are, in principle,²⁴ free from such entrenched inequalities and power imbalances. It is therefore absurd and demeaning to require same-sex civil union partners to perpetuate these customs and traditions.

2.4 SECTION 13 AND THE CHALLENGE TO THE CONSTITUTIONAL VALIDITY OF SECTION 26(1)

Long before the advent of civil unions, commentators have argued that s 26(1) may amount to an unjustified violation of s 9 of the Constitution of the Republic of South Africa, 1996.²⁵ The arguments in favour of the unconstitutionality of this provision

²⁰ See P Ettelbrick ‘Since When is Marriage a Path to Liberation?’ in A Sullivan (ed) *Same-sex Marriage: Pro and Con* (1997) 122-8 and A Hequembourg and J Arditi ‘Fractured Resistances: The Debate Over Assimilationism among Gays and Lesbians in the United States’ (1999) 40 *Sociological Quarterly* 663.

²¹ Bilchitz and Judge 2007 *SAJHR* 474.

²² This is recognised in Article 16 (1)(g) of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (of which South Africa is a signatory) which requires all state parties to ensure that ‘on a basis of equality’ men and women should have ‘[t]he same personal rights as husband and wife *including the right to choose a family name*’ (my emphasis).

²³ E Suarez ‘A Woman’s Right to Choose Her Surname: Is It Really a Free Choice?’ (1996) 18 *Women’s Rights Law Reporter* 233. The concept of marital power gave husbands extensive control over their wives’ person and property. The assumption of the husband’s surname by a woman can thus be seen as a very public manifestation of this oppressive concept.

²⁴ However, see Bonthuys 2007 *SAJHR* 537-538 for a discussion of how the power of heteronormativity has served to force same-sex relationships (particularly in African societies) to conform with heterosexual roles and patterns of dominance in order to gain social acceptance.

²⁵ See E Bonthuys ‘“Deny Thy Father and Refuse Thy Name”: Namibian Equality Jurisprudence and Married Women’s Surnames’ (2000) 117 *SALJ* 464 at 471 ; Cronje and Heaton *Family Law* 67.

are significantly bolstered by the absurdities created by applying s 26(1) to same-sex civil unions.

2.4.1 CHALLENGE IN TERMS OF SECTION 9(1)

Section s 26(1) is a violation of s 9(1) of the Constitution in that it deprives men in heterosexual marriages of the protection and benefit of the law that is presently afforded to married women and same-sex civil union partners. Applying the first stage of the *Harksen v Lane NO*²⁶ enquiry, it is clear that s 26(1) differentiates between individuals as men in heterosexual marriages are denied benefits which are available to their wives and same-sex civil union partners.²⁷ Furthermore, this differentiation is not rationally linked to a legitimate government purpose.

What governmental purpose may be served by preventing men in heterosexual marriages from changing their surname without permission? In the case of *Müller v President of the Republic of Namibia and Another*,²⁸ the Namibian Supreme Court held that this differentiation between husbands and wives serves the purpose of promoting the ‘certainty of identity’ in state administration and in the commercial sphere. On this basis, the court held that the differentiation was rationally connected to a legitimate governmental purpose.

The promotion of certainty of identity is indeed a legitimate governmental purpose. However, certainty of identity is not promoted by allowing the female party to a marriage to change her name at will but by denying this entitlement to the male. In truth, this purpose is actively undermined by affording married women an

²⁶ 1998 (1) SA 300 (CC) para 53:

‘Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of [s 9(1)]. Even if it does bear a rational connection, it might nevertheless amount to discrimination...’

²⁷ As noted by Bonthuys, the concept of a ‘benefit’ must be interpreted broadly. While women are afforded the ‘benefit’ of not being required to apply for permission to adopt the surnames of their husbands, this benefit merely seeks to perpetuate subjugation as will be argued below.

²⁸ 2000 (6) BCLR 655 (NmS) 195D-E. This case concerned a challenge to s 9(1) of the Namibian Aliens Act on the basis that it unfairly discriminated against married men. Section 9(1) of the Act is substantially similar to s 26(1) of the Births and Deaths Registration Act in that it allows a married woman to assume the name of her husband or to revert back to a name which she had previously without needing to comply with any specific formalities. The appellant in this case sought to assume the surname of his wife. He alleged that the statutory requirement that married men must obtain express approval in order to assume the surname of their wives constituted an infringement of his right to equality in terms of article 10 of the Namibian Constitution.

unfettered entitlement to change their surnames without permission.²⁹ Certainty of identity would be far better served by prohibiting both of the parties from changing their surnames without permission.

The lack of a rational connection is made even more apparent in light of the absurdity created by affording same-sex civil union partners greater freedom to change their surnames than men in heterosexual marriages. It is not obvious how certainty of identity could be obtained if heterosexual married men are the only individuals who are prohibited from assuming the name of their spouses without official permission. This differentiation is clearly without any rational basis. Thus, the absurdity produced by applying s 13 to s 26(1) strengthens the case for the constitutional invalidity of this provision.

Due to the lack of a rational connection between the limitation and its purpose, the limitation of s 9(1) would fail the s 36 limitations analysis thus rendering s 26(1) an unjustifiable limitation of s 9(1).

2.4.2 CHALLENGE IN TERMS OF SECTION 9(3)

Section 26(1) also constitutes a violation of s 9(3) of the Constitution on the grounds that it unfairly discriminates against married women. Discrimination amounts to differentiation between individuals ‘based on characteristics that have the potential to impair the fundamental dignity of persons as human beings’ as reflected in the listed grounds in s 9(3).³⁰ Where this discrimination is based on one of the listed grounds in s 9(3) it is presumed to be unfair unless the contrary is proved.³¹

Paradoxically, while s 26(1) of the Births and Deaths Registration Act affords married women the ‘benefit’ of exemption from obtaining the Director General’s consent, this is better construed as a burden disguised as a choice. Section 26(1) creates the assumption of the husband’s surname as the norm and renders all other options as abnormal thus requiring official permission. While many married couples may legitimately choose to adopt the husbands’ surname as their common name, there may be many others that are deterred from deviating from this standard due to the

²⁹ Bonthuys 2000 *SALJ* 474.

³⁰ C Albertyn in I Currie and J De Waal *The Bill of Rights Handbook* 5ed (2005) 248. Factors considered in determining whether discrimination.

³¹ Section 9(5) of the Constitution; Currie and De Waal *The Bill of Rights Handbook* 248.

administrative obstacles which s 26(1) establishes.³² In this way this provision buttresses and strengthens the social pressures already felt by married women in making this choice. Thus, s 26(1) places a burden exclusively on women in heterosexual marriages which amounts to differentiation on the listed grounds of sex, gender and marital status. This places the onus on supporters of this provision to prove that this discrimination is fair.

The only argument in support of this discrimination is that it has the purpose of recognising an entrenched and widely followed cultural practice.³³ However, in accordance with international jurisprudence on the subject, a mere cultural practice, no matter how pervasive, cannot be used to justify discrimination by the state.³⁴ Furthermore, this custom applies solely to heterosexual spouses and does not accommodate same-sex civil union partners. In light of *Fourie*,³⁵ the legal consequences of marriage must now apply equally to heterosexual and same-sex marriages. Accordingly, a heterosexual, gender specific custom can no longer be used as a basis for a legal consequence of marriage.

It goes without saying that in the absence of a legitimate purpose for this unfair discrimination s 26(1) would not amount to a reasonable and justifiable limitation of s 9(1). As a result, the introduction of civil unions has eroded any justificatory grounds for this form of discrimination and reinforces the argument for its constitutional invalidity.

2.5 POSSIBILITIES AND PROPOSALS FOR REFORM

An amendment to s 26(1) is necessary in order to rectify the absurdities created by the application of this provision to same-sex partners and to correct the constitutional

³² E Bonthuys 'Equal Choices for Women and Other Disadvantaged Groups' (2001) 39 *Acta Juridica* 39 at 41.

³³ *Müller* 194C. The court in *Müller* expressly indicated that the Namibian Aliens Control Act recognises 'traditions and conventions that have existed from time immemorial'. The assumption that this tradition has existed from time immemorial is problematic in of itself as it is in fact a relatively modern phenomenon. See in this regard Suarez 1996 *Women's Rights Law Reporter* 234.

³⁴ International jurisprudence on this subject suggests that the violation of equality perpetuated by legislation regulating the assumption of surnames cannot be justified merely on the basis that it seeks to recognise a particular custom or cultural value. See the European Court of Human Rights decision in *Burghartz v Switzerland* 280B ECHR Service A (1994) and the decision of the United Nations Human Rights Committee in *Coeriel et al v. The Netherlands* Communication No. 453/1991, U.N. Doc. CCPR/C/52/D/453/1991 (1994) in this regard.

³⁵ Para 147.

invalidity of this provision. This requires the creation of an entirely gender neutral system for the adoption of a common surname.

Two broad approaches to reform may be adopted: the outright removal of the exemptions contained in s 26(1) or the adoption of gender-neutral extensions of these exemptions.

2.5.1 OPTION 1: OUTRIGHT REMOVAL OF EXEMPTIONS

The most drastic reform would be to remove any exceptions to the general rule that individuals must receive approval from the Director-General in order to change their surname. This would require heterosexual and same-sex spouses to apply to the Director-General for permission to adopt a common surname. This drastic approach was followed by Denmark prior to the introduction of the new Act on Names of 2006. Section 4 of the now repealed Danish Act on Names of 1981³⁶ stipulated that heterosexual spouses and same-sex partners had to apply to the relevant authorities for permission to adopt the name of the other spouse or partner.³⁷

The advantage of this approach is that it would ensure complete certainty of identity and would guarantee formal equality of opportunity. However, it would suffer from certain disadvantages in the South African context. Most importantly, the flood of applications for changes of surnames would likely exceed the already limited capacity of the Department of Home Affairs. In addition, this reform would encounter a great deal of resentment from the general public due to the substantial delays and cost involved in submitting applications. As a consequence, this reform would likely be viewed as an unnecessary hindrance. In the words of Sachs J³⁸ such a ‘levelling down’ to promote equality is undesirable as ‘parity of exclusion rather than of inclusion would distribute resentment evenly, instead of dissipating it equally for all.’ The disadvantages of this option clearly outweigh the benefits.

³⁶ 193 of 1981. See K Waaldijk *More or Less Together: Levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners* 73.

³⁷ Section 5 of the new Act exempts spouses from applying for permission where they have assumed the surname of their spouse.

³⁸ *Fourie* para 149.

2.5.2 OPTION 2: GENDER-NEUTRAL EXTENSION OF EXEMPTIONS

The preferred option is to amend s 26(1) in order to remove gender specific references in the exceptions thus allowing heterosexual and same-sex spouses an equal opportunity to assume the surname of the other spouse, either wholly or in the form of a double-barrelled surname, without being required to apply to the Director General for permission.

COMPARATIVE ANALYSIS

Many European countries have implemented reforms of this nature and provide useful direction for reform measures in South Africa. Sweden was one of the first European countries to introduce a gender-neutral approach to the assumption of a common surname. The Swedish Names Act of 1982³⁹ allows either (but not both) of the heterosexual spouses and same-sex registered partners⁴⁰ to elect to assume the surname of the other spouse or partner as their common surname without requiring permission from the relevant authorities.⁴¹ In addition, one of the parties to the relationship may elect to use his or her original surname as a middle name. Furthermore, if the spouses elect to retain their original surnames then one of the spouses may elect to use the surname of the other spouse or partner as his or her middle name.⁴² Finally, the spouses or registered partners may elect to return to their previous surname at any time. Variations on the Swedish approach have been adopted by host of countries including Norway,⁴³ Germany and Belgium.⁴⁴ Finland allows heterosexual married couples to adopt the name of either of the partners but denies this benefit to same-sex registered partners.⁴⁵

³⁹ See Swedish Tax Agency *Population Registration in Sweden* <http://www.skatteverket.se/download/18.b7f2d0103e5e9ecb08000127/717b03.pdf> (Accessed 20 August 2008); K Boehle-Woelki and A Fuchs *Legal Recognition of Same-Sex Couples in Europe* (2003) 31.

⁴⁰ Sweden's Registered Partnership Act of 1995 (*Lag om registrerat partnerskap* of 1994) establishes a form of relationship that is exclusively available to same-sex partners. A registered partnership confers the same legal consequences as those which are conferred to heterosexual marriage under the Swedish Civil Marriages Act of

⁴¹ Sections 9 and 10.

⁴² Section 24.

⁴³ The Act Relating to Names of Natural Persons (19 of 2002) allows married couples and registered partners to adopt the name of either of the partners without requiring approval. This exemption also applies to unmarried cohabitants who have lived together for more than two years or who have children together.

⁴⁴ See Waaldijk *More or Less Together* (2005) 49 and 107.

⁴⁵ See K Boehle-Woelki and A Fuchs *Legal Recognition of Same-Sex Couples in Europe* (2003) 32.

PROPOSED AMENDMENT OF SECTION 26(1)

Using this comparative analysis as a basis, it is possible to formulate a proposed amendment to s 26(1). This amendment would provide an exception to the requirement of obtaining permission from the Director-General where:

26 (1) ...

- (a) **a spouse** after **entering into a** marriage assumes the surname of **his or her spouse**;
- (b) **a spouse adds the surname of his or her spouse to the surname which he or she bore prior to the marriage; and**
- (c) **a spouse** resumes a surname which **he or she bore prior to the marriage**.

This formulation succeeds in allowing either spouse in a heterosexual or same-sex marriage to assume the surname of his or her partner either wholly or in the form of a double-barrelled name. Thus three options are effectively permitted: both spouses retain their names, one spouse assumes the name of the other in full or one or both spouses assume a double-barrelled name incorporating their original surname and the surname of their spouse. It also allows for the spouses to revert to their surnames they bore prior to the marriage. This does away with the potential uncertainty caused by the current formulation which allows women to revert to surnames which they bore 'at any prior time'.

It is submitted that this formulation does away with the arbitrary differentiation in the current provision and also succeeds in rectifying the absurdity arising in the context of same-sex couples. This solution may be attained either through legislative intervention or through the courts' power to substantially read into statutes.

POTENTIAL CRITICISMS

A likely criticism of this proposal is that it may undermine efforts to maintain certainty of identity. This could have major implications for administrative and commercial certainty. However, certainty of identity may be retained simply by extending the measures that are currently used to update the population register to reflect the choice of surname of married women. In 1999, the Department of Home Affairs created a new marriage register which requires married women to indicate to

the marriage officer whether she intends to keep her surname, assume her husband's surname or adopt a double-barrelled name.⁴⁶ This could be extended to include husbands in heterosexual marriages. Furthermore, measures are already in place to deal with the choice of surnames of civil union partners. As noted above, part E of the Civil Union Register provides a space for both civil union partners to indicate the surname that they wish to adopt after marriage for the purposes of updating the population register. If the proposed amendment to s 26(1) were to be passed, partners would be entitled to indicate their choice of surname (within the permissible bounds) on these forms. Therefore, certainty of identity can be guaranteed provided that appropriate procedures are put in place or maintained by the Department of Home Affairs.

A second criticism of the proposed formulation is that it fails to allow the spouses to adopt an entirely new common surname. It is submitted that for the sake of certainty of identity this option should not be permitted as it would allow undue scope for the changing of names that would have an impact on the certainty of identity and state administration. Given these considerations it would not be unreasonable to require couples to apply to the Director-General for permission in these instances.⁴⁷

3. THE PROPRIETARY CONSEQUENCES OF MARRIAGE WHERE SPOUSES ARE DOMICILED OUTSIDE OF SOUTH AFRICA

3.1 THE PRESENT LEGAL POSITION

It is an established principle in South African private international law that, in the absence of an antenuptial agreement stating otherwise, the proprietary consequences of a marriage are determined by the legal system of the country where the husband is domiciled at the time of marriage (the *lex domicilii matrimonii*).⁴⁸ Two important

⁴⁶ See Bonthuys 2000 *SALJ* 469. In addition, the Department of Home Affairs guidelines for the changing of a surname requests married women to notify the Department in writing of their assumption or resumption of a surname in order to update the population register, see Department of Home Affairs *Personal Amendments: Change of Surname of Majors* http://www.home-affairs.gov.za/personal_amendments.asp (Accessed 20 September 2008).

⁴⁷ The European countries discussed above impose similar restrictions on the range of surnames that may be adopted without requiring permission from the relevant authorities.

⁴⁸ C Forsyth *Private International Law: The Modern Roman-Dutch Law including the Jurisdiction of the High Court* 4ed (2007) 278; *Frankel's Estate v The Master* 1950 (1) SA 220 (A); *Sperling v Sperling* 1975 (3) SA 707 (A) 716F-G; *Brown v Brown* 1921 AD 478 at 482. See also the 1907 Hague Convention ratified by South Africa which expressly recognises this private international law principle.

consequences flow from this principle. The first is that the law of the husband's domicile applies to all matrimonial property, both movable and immovable. The second is that the matrimonial domicile is determined 'once-and-for-all' at the time of the marriage meaning that subsequent changes in domicile do not affect the proprietary consequences of the marriage.⁴⁹

3.2 ABSURDITIES ARISING FROM THE APPLICATION OF SECTION 13

In light of s 13 of the Civil Union Act, the 'husband's domicile' must be read as applying to the civil union partners 'with such changes as may be required by the context'. Effectively this would require the same-sex civil union partners to choose which partner is to be identified as the 'husband' for the purposes of establishing what legal system applies to the proprietary consequences of the marriage.⁵⁰ This is an absurd and unworkable proposition on three levels.

3.2.1 THE ABSURDITY OF ARBITRARY DESIGNATION

Questions over the proprietary consequences of marriage generally arise in circumstances where no agreement between the parties would be possible such as in divorce proceedings or upon the death of one of the spouses. In these cases no agreement may be reached as to which spouse is to be identified as the 'husband'. As a result, it would be left to a court to make this designation. This would be an inherently arbitrary exercise, a matter of chance akin to drawing lots. Such arbitrariness is entirely inappropriate to a decision of this nature as it would have a profound bearing on the rights and interests of the parties. As emphasised in *Mphahlele v First National Bank*,⁵¹ the rule of law applies equally to the courts and 'undoubtedly requires judges not to act arbitrarily'. Furthermore, such an eventuality

⁴⁹ However, in terms of s 21(1) of the Matrimonial Property Act 88 of 1984 the spouses may apply to court for the postnuptial alteration of the matrimonial property regime if "sound reasons" are shown. Applications of this nature usually involve lengthy delays and great expense.

⁵⁰ An initial difficulty that must be noted is whether the legal system of a foreign country which does not recognise same-sex marriages could be applied to a same-sex civil union entered into in South Africa. It is submitted that the wording of s 13 of the Civil Union Act suggests that it could. Section 13 refers to 'any other law' which suggests that foreign law could also be interpreted in light of this provision. As a result, the proprietary consequences of marriage in a foreign legal system which does not recognise same-sex marriage could still be applied to same-sex civil unions entered into in South Africa. This is the approach that has been adopted by Sweden in resolving similar problems. See Boele-Woelki and Fuchs *Legal Recognition* 143-144.

⁵¹ 1999 (2) SA 667 (CC) para 12. While this matter dealt with the courts' duty to give reasons the principle of non-arbitrariness is equally appropriate in the present circumstances.

would directly contradict the aim of a conflict of law rule such as the one in question which is to guarantee stability and certainty.

3.2.2 THE ABSURDITY OF FREE CHOICE

Where choice is possible, this raises the possibility that same-sex civil union partners would be afforded advantages which are presently not available to their heterosexual counterparts. Same-sex partners would be at liberty to choose which partner's legal system is to apply to the proprietary consequences of the marriage without having to create a formal antenuptial agreement. This is in direct conflict with the Appellate Division's decision in *Frankel's Estate v The Master*⁵² where it was held that the matrimonial domicile is determined *ex lege* and not by the informal intention of the parties. Consequently, heterosexual spouses would still be bound by this principle while same-sex civil union partners would enjoy greater freedoms.

3.2.3 THE ABSURDITY OF HETERONORMATIVITY

The identification of one of the spouses as the 'husband' again raises the spectre of heteronormativity. As in the case of the adoption of a common surname, the message perpetuated by this artificial assumption of heterosexual marriage roles is that heterosexual marriage are the norm and that same-sex marriages are mere copies of this norm.

3.3 SECTION 13 AND THE CHALLENGE TO THE CONSTITUTIONAL VALIDITY OF THE PRIVATE INTERNATIONAL LAW RULE

Commentators⁵³ have consistently noted that the present approach to determining the matrimonial domicile may be struck down as an unjustified violation of s 9 of the Constitution. The courts have also indicated that this rule may no longer be

⁵² Note 48 above, 251 – 261. The Roman-Dutch authorities did not express a unified position on this principle with some suggesting that the tacit agreement of the parties was the basis of this principle. This left open the possibility that the intentions of the parties could allow for deviations from the general rule. However, in *Frankel's Estate* the Appellate Division unanimously held that the intention of the parties plays no role in this regard and that the domicile of the husband applies to the marriage as a matter of law.

⁵³ See J Heaton and E Schoeman 'Foreign Marriages and Section 7(3) of the Divorce Act 70 of 1979' (2000) 63 *THRHR* 141 at 146; E Schoeman 'The South African Conflict Rule for the Proprietary Consequences of Marriage: Learning from the German Experience' (2004) *TSAR* 115 at 116-117; E Schoeman 'The connecting factor for the proprietary consequences of marriage' (2001) 1 *TSAR* 72; JL Neels and M Wethmar-Lemmer 'Constitutional Values and Proprietary Consequences of Marriage in Private International Law – Introducing the *Lex Causae Proprietatis Matrimonii*' (2008) 3 *TSAR* 587.

appropriate to the modern constitutional context.⁵⁴ Again, the absurdities produced by s 13 provide strong support for the constitutional invalidity of this aspect of South African law.

3.3.1 CHALLENGE IN TERMS OF SECTION 9(1)

Following from the absurdities identified above, it is submitted that the private international law rule is a violation of s 9(1) of the Constitution in two respects. Firstly, it denies same-sex civil union partners the equal benefit and protection of the law due to the arbitrariness inherent in the determination of the proprietary consequences of the marriage if left to the courts. Secondly, there is a clear differentiation between same-sex spouses and heterosexual spouses in respect of same-sex spouses' ability to choose which spouse's domicile is to be the matrimonial domicile. There is no legitimate governmental purpose at the basis of these differentiations and therefore the private international law rule is an unreasonable and unjustifiable limitation of s 9(1).

3.3.2 CHALLENGE IN TERMS OF SECTION 9(3)

The introduction of same-sex civil unions also bolsters the argument that the private international law rule perpetuates unfair discrimination between husbands and wives in heterosexual marriages.

It is clear that this rule is discriminatory as it differentiates between husbands and wives on the listed grounds of sex and gender. The onus is thus placed on supporters of this principle to prove its fairness.⁵⁵

⁵⁴ See *Sadiku v Sadiku and Others* Unreported Judgment of the Transvaal Provincial Division delivered on 26 January 2007, para 10. Van Rooyen AJ considered without deciding 'whether a categorical application of the *lex domicilii* of the husband is still acceptable within a gender equal society, such as ours.' For analysis of this case see Neels and Wethmar-Lemmer 2008 *TSAR* 587. See also *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C) 504 E-F where Josman AJ stated: 'The fact that the law in this respect is both complex and not entirely satisfactory is not, however, something that the Courts can set right by interpretation. The Legislature must decide whether it wishes the *lex domicilii matrimonii* principle to remain intact, even if it does produce anomalous results in some circumstances.'

⁵⁵ Even without the benefit of this presumption this discrimination may be shown to be unfair. It has the potential to subject women in heterosexual marriages to unfamiliar, alien patrimonial regimes in circumstances where the husband and wife have separate domiciles. This affords husbands the advantage of a familiar legal system while increasing the vulnerability of their wives. This private international law rule has its origins in the deeply discriminatory concept of the wife's domicile of dependence which entailed that a wife had no independent domicile and merely assumed that of her husband. This in turn gave rise to the rule that the husband's domicile constituted the *lex domicilii matrimonii*. While the wife's domicile of dependence has since been abolished by the Domicile Act 3

In response, Forsyth⁵⁶ argues that this discrimination is fair as it satisfies an important purpose. This is the purpose of resolving the choice of law conflict in a manner that is foreseeable and certain. He contends that the alternatives to this rule are undesirable which entails that we ‘might as well stick with the one we have rather than face the uncertainty of changing the rule’.⁵⁷ However, it is submitted that the absurdities produced by applying s 13 of the Civil Union Act to this rule serve to directly refute Forsyth’s argument. These absurdities demonstrate that the present private international law rule can no longer be regarded as the most expedient option. Stripped of its utility, this rule amounts to baseless, unfair discrimination.⁵⁸

Given this analysis, the private international rule would surely fail to satisfy the s 36 limitations analysis. This conclusion clearly demonstrates the role of s 13 of the Civil Union Act in contributing to the removal of elements of South African law that perpetuate gender discrimination.

3.4 POSSIBILITIES AND PROPOSALS FOR REFORM

The constitutional invalidity of the private international law rule and its absurdity when applied to same-sex civil union partners calls out for reform of this aspect of the law. This reform must establish a gender-neutral rule that resolves conflicts of law over the proprietary consequences of marriage in a certain and foreseeable manner. Ideally this reform should take place by means of legislative intervention. However, in the short term, circumstances may arise where the courts are confronted with the absurd situation canvassed above which would require an immediate solution to be adopted. Both of these possibilities for reform will now be assessed.

of 1992, the private international rule remains despite the removal of its ‘jurisprudential basis’. Schoeman 2001 *TSAR* 73; Heaton and Schoeman 2000 *THRHR* 146.

⁵⁶ Forsyth *Private International Law* 279 fn 114.

⁵⁷ This argument appears to have been accepted by the South African Law Commission’s *Report on Domicile* Project 60 (1990) para 6.7 which recommended the retention this common law rule in spite of its recommendations for the widespread legislative reform of the law of domicile that culminated in the Domicile Act.

⁵⁸ The option of establishing a bifurcated private international law rule cannot be countenanced given the need to ensure that the legal consequences of marriage must apply equally to heterosexual and same-sex marriages. Furthermore, even in the absence of the absurdities produced by s 13 there is a strong case for the abolition for this rule given the unfairness of treatment of heterosexual women (see note 55 above).

3.4.1 PROPOSALS FOR LEGISLATIVE INTERVENTION

COMPARATIVE ANALYSIS

Stoll and Visser⁵⁹ and Schoeman⁶⁰ both regard Germany's Private International Law Reform Act of 1986 as a potential model for the reform of the South African law. The Act establishes a gender neutral, multi-stage approach to determining the legal system applicable to the proprietary consequences of marriage as opposed to the gendered, one-size-fits-all approach in South Africa. Article 14 read with Article 15 of the Act provide that the proprietary consequences of marriage are determined by three alternative connecting factors. Firstly, the proprietary consequences are determined by the law of the common nationality of the spouses at the time of the marriage. Secondly, in the absence of a common nationality, the common habitual residence of the spouses at the time of the marriage applies. Thirdly, in the absence of these factors, the proprietary consequences are determined by the country with which the spouses are 'most closely connected' at the time of the marriage. While nationality does not play an important role in South African law, the form of the German approach rather than its substance is instructive for our purposes.

PROPOSED MODEL FOR LEGISLATION

Using the German approach as a reference point, Stoll and Visser,⁶¹ supported by Neels and Wethmar-Lemmer,⁶² propose a five-stage model for determining the legal regime applicable to the proprietary consequences of a marriage. This model may be represented in the form of a draft statutory provision:

The proprietary consequences of a marriage are subject to:

- (1) The law of the country indicated by the express or implied intention of the spouses in an *antenuptial contract*;
- (2) In the absence of (1), the law of the country of the *common domicile* of the spouses at the time of marriage;

⁵⁹ H Stoll and PJ Visser 'Aspects of the Reform of German (and South African) Private International Family Law' (1989) 22 *De Jure* 330.

⁶⁰ Schoeman 2004 *TSAR* 133.

⁶¹ Stoll and Visser 1989 *De Jure* 335.

⁶² Neels and Wethmar-Lemmer 2008 *TSAR* 588.

- (3) In the absence of (2), the law of the country of the *common habitual residence* of the spouses at the time of marriage;
- (4) In the absence of (3), the law of the country of which both spouses are *nationals* at the time of marriage;
- (5) In the absence of (4), the law of the country to which the spouses are *jointly most closely connected* at the time of marriage.

ASSESSMENT OF THE PROPOSED MODEL

It is recommended that this five-stage model should form the basis for legislation to rectify the present defect in the law. While the precise wording of such legislation is open to debate, it is recommended that the five alternative stages of this model should be retained. These five stages are both appropriate to South African law and are effective in identifying the legal system to be applied to the proprietary consequences of the marriage.

The first stage reflects the primacy of antenuptial contracts and is in keeping with the present legal position.⁶³ In the absence of an antenuptial contract, the use of common domicile is an appropriate second stage. This reflects the fact that domicile remains an important feature of South African law. Furthermore, Schoeman⁶⁴ contends that this ground will be sufficient to establish the matrimonial property regime in the vast majority of cases as spouses generally share a common domicile.

In the absence of a common domicile the concept of habitual residence is a useful fall-back. Habitual residence is used as a basis for determining the matrimonial property regime applicable to marriages in a number of European countries.⁶⁵ For example, in Sweden, the Act on International Legal Questions Concerning Spouses' and Cohabitees' Property Relations⁶⁶ stipulates that where one of the parties to a marriage or marriage-like relationship is not domiciled in Sweden it is the property regime of the place where the parties are 'habitually resident' upon marriage that applies.⁶⁷ The Swedish Federal Code on Private International Law defines the place of habitual residence as the place where the parties regularly reside for at least 2 years.⁶⁸

⁶³ Neels and Wethmar-Lemmer 2008 *TSAR* 589.

⁶⁴ Schoeman 2001 *TSAR* 81.

⁶⁵ These include Germany (discussed above), Finland, Iceland, Denmark and Sweden.

⁶⁶ 272 of 1990.

⁶⁷ Boehle-Woelki and Fuchs *Legal Recognition* 144.

⁶⁸ *Ibid.*

A similar definition could be adopted in South Africa. The concept of habitual residence is not completely foreign to South African law. For example, this concept has been incorporated in Schedule 1 of the Children's Act⁶⁹ in relation to inter-country adoption and child abductions.⁷⁰

The fourth stage, shared nationality, provides additional cover. Due to its relative certainty, Stoll and Visser⁷¹ suggest that nationality may even be 'a more stable, less easily manipulated connecting factor than domicile'. Like habitual residence, the concept of nationality is not entirely alien to South African law. It has found application in a number of areas including the Wills Act,⁷² the Divorce Act⁷³ and the Matrimonial Property Act.⁷⁴

Finally, the use of the legal system to which the parties are jointly most closely connected provides a useful catch-all measure. The broad and undefined nature of this concept is its greatest strength. This would allow the courts wide scope to come to an outcome which is equitable for both of the parties. Factors which may be used by the courts include:

'the common social ties of a couple to a country through descent, culture, language, occupation or trade; a common ordinary or simple residence which is of more than a fleeting nature; the intended acquisition of a first common habitual residence; the place of the conclusion of the marriage provided that it is more than merely fortuitous.'⁷⁵

An interesting feature of these guidelines is the regard that is given to the intentions and 'future planning' of the spouses. It is submitted that this is would be a positive development as it would allow the courts to give effect to the parties' legitimate expectations. This would amount to a welcome departure from the oppressive principle adopted in *Frankel's Estate* and a return to the more equitable approach of the old authorities.⁷⁶ While this basis for identifying the proprietary consequences of the marriage is less certain than the present rule, it is submitted that its flexibility would allow for outcomes that are more equitable from the perspective of the parties.

⁶⁹ 38 of 2005.

⁷⁰ Neels and Wethmar-Lemmer 2008 *TSAR* 588-589.

⁷¹ Stoll and Visser 1989 *De Jure* 331.

⁷² S 3bis (1)(a)(iii) and s 3bis (4)(a).

⁷³ 70 of 1979. Section 13(1)(c).

⁷⁴ Section 21(1).

⁷⁵ Schoeman 2004 *TSAR* 132. These guidelines are taken from the supporting documentation to the German Private International Reform Act.

⁷⁶ Note 53 above.

3.4.2 SHORT-TERM INTERVENTION BY THE COURTS

As suggested in *Esterhuizen v Esterhuizen*,⁷⁷ the development of South Africa's private international law rule is best left to the legislature.⁷⁸ However, there is a need to provide same-sex civil union partners with a solution to the present *lacuna* in the law.

At present, the only options available to same-sex civil union partners with different domiciles are to enter into an antenuptial contract or, if already married, to enter into a postnuptial contract.⁷⁹ It is important that these contracts must specify both the matrimonial domicile and the matrimonial property regime that must apply to the marriage.⁸⁰ However, this is a hollow remedy as many civil union partners may not be aware of the need for contracts of this nature or they may lack the resources required to employ legal assistance in this task. Consequently, the need for an antenuptial or postnuptial contract may be discovered too late.

In the event that the courts are faced with a conflict of laws arising from a civil union which has been entered into without an antenuptial or postnuptial contract then certain *ad hoc* reform measures would be required. As noted above, the arbitrary identification of a 'husband' for the purposes of determining the appropriate patrimonial consequences would not suffice and could amount to a profound violation of legality. In such instances it is submitted that the courts would be required to

⁷⁷ Note 54 above. 504E-F.

⁷⁸ See also *Carmichele v Minister of Safety and Security and Another* 2002 (1) SACR 72 (CC) para 36 where the court emphasised that '[in] exercising their powers to develop the common law, Judges should be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary. This approach was further stressed in *Masiya v Director of Public Prosecutions, Pretoria and Another* 2007 (2) SACR 435 (CC) para 33.

⁷⁹ A potential obstacle to this solution is the rule that the legal system of the husband's domicile determines the essential validity of antenuptial and postnuptial contracts. Aside from the difficulty of deciding which same-sex partner should be identified as the husband, there is far greater obstacle in that the majority of foreign jurisdictions still do not recognise same-sex marriages. As a consequence, antenuptial or postnuptial contracts entered into by same-sex partners may be essentially invalid on the grounds of illegality in terms of law of the applicable foreign country. However, it is submitted that in the same way that South African courts are permitted to refuse to uphold a clause of an antenuptial contract that is legal in terms of the law in a foreign country but *contra bonos mores* in South Africa, so too should the South African courts be allowed to uphold a clause that is illegal in a foreign jurisdiction where the basis of that illegality is *contra bonos mores*. Thus, foreign jurisdictions' denial of the right to marry to same-sex couples is *contra bonos mores* in South Africa and would thus allow our courts to uphold the antenuptial contracts of same-sex spouses.

⁸⁰ This follows from the principle, noted by Josman AJ in *Esterhuizen v Esterhuizen* (495H-496B) that if a married couple enters into an antenuptial agreement which merely regulates the matrimonial property regime of the marriage this does not exclude the husband's domicile as the *lex domicilii matrimonii*. See Heaton and Schoeman 2000 *THRHR* 143 for further comment on the effect of antenuptial agreements on the *lex domicilii matrimonii*. Le Roux *Without Prejudice* 2007 72.

invoke their power to develop the common law in terms of s 39(2) and s 173 of the Constitution in order to provide an equitable remedy to same-sex civil union partners. In light of the Constitutional Court's authoritative judgment in *Carmichele*,⁸¹ a court may invoke these powers *mero motu*. It is submitted that in exercising these powers the courts should have regard to the five-stage model proposed by Stoll and Visser.

4. CONCLUSION

The judgment of the Constitutional Court in *Fourie* issued a challenge to the legislature to extend the legal consequences of marriage to same-sex marriages on an equal basis. The Civil Union Act went a long way towards achieving this aim. However, there are still legal consequences of marriage that are resistant to this process. The offending laws are ones which afford entitlements or place restrictions specifically on husbands or wives thus causing confusion and absurdity when interpreted in the context of same-sex couples. It has been argued that these absurdities reveal the gender discrimination that underpins these laws. Furthermore, it has been demonstrated that the advent of same-sex civil unions has removed any justificatory basis for this discrimination. Thus, section 13 of the Civil Unions Act serves as a powerful mechanism for supporting efforts to expose and eradicate gender discrimination in South African family law. Finally, it has been emphasised that intervention by the legislature (and in the context of the private international law rule, the courts) is required both in order to remedy the present absurdities and to cure the constitutional invalidity of these legal consequences of marriage. Such interventions would require these legal consequences of marriage to be made entirely gender neutral. Only then would the "unshakeable criterion" for reform outlined in *Fourie* be fully realised.

⁸¹ See Note 78 above. Para 39.

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