

# Death of the Breadwinner and the Continuation of the Duty of Spousal Support: Discrepancies and Inequalities for Different Categories of Surviving Partners

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Online ISSN  
1727-3781

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## Date Submission

25 February 2020

## Date Revised

19 November 2020

## Date Accepted

19 November 2020

## Date published

8 December 2020

**Editor** Prof C Rautenbach

## How to cite this article

Bonthuys E "Death of the Breadwinner and the Continuation of the Duty of Spousal Support: Discrepancies and Inequalities for Different Categories of Surviving Partners" *PER / PELJ* 2020(23) - DOI

<http://dx.doi.org/10.17159/1727-3781/2020/v23i0a7996>

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## DOI

<http://dx.doi.org/10.17159/1727-3781/2020/v23i0a7996>

## Abstract

This note considers the extension of the duty of spousal support after the death of the breadwinner by comparing the rights of different categories of surviving maintenance claimants, who tend to be mostly women: widows of the deceased, unmarried intimate partners of the deceased and ex-wives and partners of the deceased. Financial support can be provided from the deceased estate in the form of a right to share in the joint matrimonial estate, a right to intestate succession, a right to claim from the estate in terms of the *Maintenance of Surviving Spouses Act* and a right to claim for loss of support from third parties who caused the death of the breadwinner. In comparing different categories of women, it emerges that the law disproportionately benefits widows over other partners, while the rights of ex-spouses are gradually reduced by the jurisprudence. There is also a discrepancy between rights to claim against deceased estates, which favour widows, on the one hand, and rights to claim against third parties, which are available to a far larger group of surviving maintenance claimants, on the other hand. The note analyses the gendered causes and consequences of these differences.

## Keywords

Spousal duty to maintain; death; unmarried intimate partners; widows; ex-wives; action for loss of support.

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## 1 Introduction

The duty of spousal support is one area of family law in which public policy plays a particularly prominent role. Perhaps as a result of changing public policy – which reflects both changes in public perceptions and a transformed constitutional landscape – it is also an area marked by inconsistency, contestation and incongruous logic. Upon closer examination, apparently clear legal rules emerge as neither clear nor consistently applied. However, this apparent disarray obscures four concealed, but consistent themes underlying these rules: they favour men over women; wives over unmarried partners; current partners over former partners; and children over wives.

This note explores some of these contradictions in relation to the specific question of whether and to what extent the duty of spousal support survives death. Obviously, a deceased person no longer needs maintenance, which terminates the duty of support at the death of the maintenance recipient.<sup>1</sup> However, sometimes the duty to maintain survives the death of the maintenance debtor and lies against the deceased estate.

Whether or not the duty is ended by the death of maintenance debtors has significant, life-altering consequences for maintenance recipients, who are usually women who lack the means to provide for themselves. To find themselves suddenly deprived of financial support, often when they are too old to support themselves, causes great hardship which may last for the remainder of their lives. Although the legal rules on this question may appear to be gender neutral, they have an indirect impact on the achievement of gender equality because maintenance recipients are generally women and because the right to maintenance originates in marriage and other intimate relationships which have gendered social consequences.<sup>2</sup>

This note sketches a broad overview of various sets of legal rules in order to compare the rights to spousal maintenance after the death of breadwinners in the following respects: the rights of wives as compared with the rights of unmarried partners; the rights of existing partners as compared with the rights of ex-partners or ex-spouses; the rights of same-sex and opposite-sex married and unmarried partners; the rights against third parties as compared with the rights against deceased estates; rights which arise

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<sup>1</sup> *Copelowitz v Copelowitz* 1969 4 SA 64 (C) 71G (hereinafter *Copelowitz*).

<sup>2</sup> There are no statistics on the gender of maintenance recipients, but the case law indicates that claimants are usually women. For an explanation of why South African women tend to be poorer than men and therefore have greater need for maintenance see De Jong and Heaton "Post-divorce Maintenance" 119-122.

*ex lege* as compared with rights arising from agreements, including agreements which have been made orders of court. It also touches upon the maintenance recipient's rights to intestate succession, because the right to maintenance and the right to intestate succession provide different avenues for meeting the financial needs of the maintenance recipient after the death of the breadwinner. A claim against the deceased estate can thus meet the maintenance needs of the surviving partner or ex-partner. However, a detailed exploration of intestate succession falls outside the scope of this note.

This note is not directly concerned with the rights to parental support of children, although the presence of children has an indirect impact on the gendered incidence of the need for maintenance and the ability to provide it. Women who fulfil traditional gender roles by undertaking primary responsibility for the daily care of children need maintenance because their unpaid childrearing labour reduces their earning power and impedes their progress in the paid labour sector. Conversely, men whose wives take responsibility for childcare can devote more of their own time to paid labour, thus increasing their earning power and advancing their careers. This dynamic continues even after marriage, when despite gender-neutral court orders about parental rights and responsibilities, women continue to do the bulk of practical, time-consuming childcare:<sup>3</sup>

... on the breakdown of a marriage or similar relationship it is almost always mothers who become the custodial parent and have to care for the children. This places an additional financial burden on them and inhibits their ability to obtain remunerative employment. Divorced or separated mothers accordingly face the double disadvantage of being overburdened in terms of responsibilities and under-resourced in terms of means. Fathers, on the other hand, remain actively employed and generally become economically enriched. Maintenance payments are therefore essential to relieve this financial burden... The enforcement of maintenance payments therefore not only secures the rights of children, it also upholds the dignity of women and promotes the foundational values of achieving equality and non-sexism.

## 2 Wives' claims against the deceased estate

The common law duty of support is an automatic and invariable consequence of marriage. However, at common law the duty does not outlast the marriage, but ends at the death of the breadwinner, unless it has been specifically extended by way of a court order or a contract.<sup>4</sup>

Because the default proprietary consequence of marriage under the *Marriage Act* and the *Civil Union Act* is community of property, many wives would automatically be entitled, at the death of their husbands, to half of the joint estate. Moreover, women who are married to the breadwinner at the

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<sup>3</sup> *Bannatyne v Bannatyne* 2003 2 SA 363 (CC) paras 29, 30.

<sup>4</sup> *Copelowitz* 76C.

time of death have rights to intestate succession. Even when these sources of income proved insufficient to provide for a surviving wife, the common law denied the widowed spouse a claim for maintenance from the deceased breadwinner's estate.<sup>5</sup> To ameliorate the plight of indigent widows, Parliament therefore enacted the *Maintenance of Surviving Spouses Act*, which provides that a surviving spouse, "including a spouse of a customary marriage",<sup>6</sup> has a right to maintenance against the estate of the deceased breadwinner, ranked on par with claims by dependent children.<sup>7</sup>

Muslim spouses who had not concluded simultaneous civil marriages and who were therefore technically unmarried partners were afforded both rights to intestate succession and maintenance claims against the deceased estate by the decision in *Daniels v Campbell*<sup>8</sup> which held that the word "spouse" in the *Maintenance of Surviving Spouses Act* and the *Intestate Succession Act*<sup>9</sup> should be interpreted to include widows from these marriages. *Hassam v Jacobs*<sup>10</sup> extended the right to intestate succession to widows from polygynous Muslim marriages.

Customary wives are on a slightly different footing. In addition to the right to claim against the deceased estate in terms of the *Maintenance of Surviving Spouses Act*, the court in *Wormald v Kambule*<sup>11</sup> held that "in customary law a husband and, upon his death, his heir, has a duty to maintain his wife or widow ...". The wife's right to support, deriving from customary rather than common law, therefore does not end when the marriage ends, but can be asserted against both the deceased estate and the customary heirs. Monogamous marriages in terms of the *Recognition of Customary Marriages Act* are automatically in community of property,<sup>12</sup> giving wives rights to half the joint estate in the absence of antenuptial contracts. This includes marriages concluded before the commencement of the Act<sup>13</sup> and marriages concluded in terms of the *Transkei Marriage Act*.<sup>14</sup> Customary wives also have rights to intestate succession.<sup>15</sup>

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<sup>5</sup> *Glazer v Glazer* 1963 4 SA 694 (A).

<sup>6</sup> Section 1 of the *Maintenance of Surviving Spouses Act* 27 of 1990. *Kambule v The Master* 2007 3 SA 403 (E).

<sup>7</sup> Section 3(b).

<sup>8</sup> *Daniels v Campbell* 2004 5 SA 331 (CC).

<sup>9</sup> *Intestate Succession Act* 81 of 1987.

<sup>10</sup> *Hassam v Jacobs* 2009 5 SA 572 (C).

<sup>11</sup> *Wormald v Kambule* 2006 3 SA 562 (SCA) para 13.

<sup>12</sup> Section 7(2) of the *Recognition of Customary Marriages Act* 120 of 1998.

<sup>13</sup> *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC).

<sup>14</sup> *Transkei Marriage Act* 21 of 1978; *Holomisa v Holomisa* 2018 JDR 1808 (CC).

<sup>15</sup> *Bhe v Magistrate Khayelitsha* 2005 1 SA 580 (CC); *Reform of Customary Law of Succession and Related Matters Act* 11 of 2009. On the implementation of these rights see Himonga and Moore *Reform of Customary Marriage* ch 9.

According to *Govender v Ragavayah*,<sup>16</sup> wives in monogamous Hindu marriages are considered spouses for the purposes of intestate succession, but there are no cases extending rights in terms of the *Maintenance of Surviving Spouses Act* to these widows. Widows from other categories of legally unrecognised religious marriages like Parsi, Baha'I, Rastafarian and so forth lack both rights to succession and rights to claim for maintenance against deceased husbands' estates.

There is therefore a difference in the rights of different categories of wives. Whereas Muslim wives and wives married in terms of the *Marriage Act* have claims against the deceased estate in terms of the *Maintenance of Surviving Spouses Act*, customary wives have claims both against the estate and against the heirs. Other wives have weaker or no rights against the estates of their deceased husbands. On the whole, however, it can be said that many wives who are married to the deceased at the time of death can share in marital property, can inherit intestate and can claim support against the estate if the inheritance is not enough to support them.

### 3 Unmarried partners' rights against the deceased estate

The result of the Constitutional Court's decision in *Volks v Robinson*,<sup>17</sup> that differentiation between married and unmarried partners is legally justified by the need to protect the institution of marriage, was that opposite sex unmarried partners could not claim against a deceased partner's estate in terms of the *Maintenance of Surviving Spouses Act*. This remains the position for both opposite- and same-sex unmarried intimate partners.

The position on intestate succession is, however, different. Whereas there is no case law affording opposite sex unmarried partners rights to inherit, intestate, same-sex intimate partners "who *have undertaken* reciprocal duties of support" do have rights to intestate succession.<sup>18</sup>

On the other hand, the jurisprudence on universal partnerships in unmarried intimate relationships has as yet applied only to opposite-sex and not to same-sex unmarried partners.<sup>19</sup> There is no logical reason why same-sex partners would not be able to establish universal partnerships in the same manner and with the same consequences as opposite sex partners. Proof of the existence of the universal partnership could entitle the surviving

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<sup>16</sup> *Govender v Ragavayah* 2009 3 SA 178 (D).

<sup>17</sup> *Volks v Robinson* 2005 5 BCLR 446 (CC) paras 51-57, 80-87. On the right of unmarried domestic partners, see the SALRC *Project 118*.

<sup>18</sup> *Gory v Kolver* 2007 4 SA 97 (CC); *Laubscher v Duplan* 2017 2 SA 264 (CC). On the difference between same-sex- and heterosexual life partners' rights, see Mochela and Smith 2020 *JSAL* (Part 1) 480; Mochela and Smith 2020 *JSAL* (Part 2) 683; Heaton and Kruger *South African Family Law* 267-268.

<sup>19</sup> For instance *Butters v Mncora* 2012 4 SA 1 (SCA); *Ponelat v Schrepfer* 2012 1 SA 206 (SCA); *Steyn v Hasse* 2015 4 SA 405 (WCC).

partner to claim a share of the assets amassed by the partnership, but not necessarily entitle the survivor to lay claim to specific assets or to remain in the former family home.<sup>20</sup>

On the whole, therefore, rights to claim for maintenance or intestate succession against the deceased breadwinner's estate are considerably weaker for unmarried intimate partners than for wives, but they are somewhat stronger for same-sex intimate partners than for opposite-sex intimate partners. Rights to claim ownership of a part of the deceased estate could be based on a universal partnership in the case of opposite-sex unmarried intimate partners, but no such claims have yet succeeded for same-sex unmarried intimate partners. Of course, universal partnership contracts do not provide rights to maintenance.

#### **4 Former wives' rights to support from the deceased estate**

In the absence of testamentary bequests, former wives have no rights to an intestate share in the estate when a former spouse dies. Because the right to spousal maintenance ends at divorce, former wives also have no rights to support from their ex-spouses, unless by way of court order or agreement at the end of marriage.<sup>21</sup>

Whether rights to post divorce spousal maintenance, once granted by agreement or court order, survive the death of the breadwinner has engaged our courts over many years. The common law position is set out in *Colly v Colly's Estate*<sup>22</sup> and *Owens v Stoffberg*,<sup>23</sup> which held that the right to maintenance, ordered by a court at divorce, survives the death of the maintenance debtor and is enforceable against his estate. In the case of *Colly* the right to maintenance flowed from a settlement agreement made an order of court, while in *Owens* it was not clear whether the court order was based on a settlement agreement. In both cases, the order was that maintenance be paid to the ex-wife until her death or remarriage.

A subsequent series of cases decided on the basis of section 10(1)(a) of the *Matrimonial Causes Act*<sup>24</sup> followed these rulings. This section determined simply that at divorce a court could make a maintenance order in favour of an innocent spouse "for any period until the death or until the remarriage of the innocent spouse", but did not mention the death of the maintenance debtor as a factor affecting the duration of the post-divorce maintenance order.

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<sup>20</sup> *Botha v Deetlefs* 2008 3 SA 419 (N).

<sup>21</sup> *EH v SH* 2012 4 SA 164 (SCA) para 12.

<sup>22</sup> *Colly v Colly's Estate* 1946 WLD 83 (hereinafter *Colly*).

<sup>23</sup> *Owens v Stoffberg* 1946 CPD 226 (hereinafter *Owens*).

<sup>24</sup> *Matrimonial Causes Act* 37 of 1953.

Van Zijl J in *Copelowitz* argued that when this provision was enacted, the legislature would have been aware of the prior interpretation of the common law in the *Colly* and *Owens* cases, yet chose not specifically to exclude a right to support against the deceased estate. It would have been simple to specify that the divorce court can order maintenance "until the death or remarriage of the innocent spouse or the death of the guilty spouse", but this was not done. The inference is, therefore, that the legislature intended the pre-1953 position to continue.<sup>25</sup>

Moreover, both the death and re-marriage of the maintenance claimant would eliminate the maintenance claimant's need for maintenance. The death of the breadwinner, however, has no bearing on the need for maintenance, but affects the source of (and possibly the ability to provide) the maintenance.<sup>26</sup> The wording of the section should therefore not be interpreted to include the death of the maintenance debtor as a factor which would end the right to post-divorce maintenance.

In analysing the ability of a court to vary an earlier maintenance order, the court also drew a distinction between "two orders of a very different nature", namely maintenance obligations which arose from operation of law or were imposed by courts in accordance with common law or statutes (*alimenta ex lege*) and those which arose from agreement (*alimenta ex contractu*) as follows:<sup>27</sup>

(a) a maintenance order founded on a right flowing from the marriage, i.e. an order by the Court directing the guilty spouse to pay maintenance to the innocent spouse; (b) a maintenance order founded upon agreement. Orders founded on agreement split again into two: (i) agreements where the parties between them regulate the maintenance which the innocent spouse could have claimed from the guilty spouse as due to him/her *ex lege*, i.e. from the state of being married and which could have been adjudicated upon by the Court in terms of sec. 10 (1)(a) of the Act; and (ii) agreements where the parties agree to the payment of maintenance in circumstances in which the Court could not have ordered the payment of maintenance, e.g. an innocent spouse undertaking to pay maintenance to a guilty spouse. The right upon which (a) and (b)(i) are founded is statutory and flows from the state of being married, that is, they are rights arising *ex lege*; the right upon which (b)(ii) is founded is in common law and flows from contract, that is, it is a right arising *ex contractu*.

According to this definition, maintenance which is negotiated between the spouses and incorporated into the divorce order may be either *alimenta ex lege* or *alimenta ex contractu*, depending on the contents of the order. Despite the dividing line between the categories not being entirely clear nor consistently applied, this distinction between rights to maintenance which arise *ex lege*, on the one hand, and rights *ex contractu*, on the other hand,

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<sup>25</sup> *Copelowitz* 70H-71A.

<sup>26</sup> *Copelowitz* 71D-G.

<sup>27</sup> *Copelowitz* 68C-F.

has remained significant in the subsequent jurisprudence on rights to maintenance against the deceased estates of breadwinners. It has also subsequently formed the basis of the extension of dependant's action for loss of support to relationships which previously carried no duty of support, like unmarried opposite-sex and same-sex intimate partners. It should be added, however, that this distinction appears not to have been significant in the earlier jurisprudence on the issue of whether the duty to support survives the death of the maintenance debtor. In *Owens v Stoffberg* the court remarked that "I do not think that if I read it merely as an agreement, [rather than an order of court] my judgment in this case would be different."<sup>28</sup>

Be that as it may, this was the accepted legal position until the enactment of the *Divorce Act*.<sup>29</sup> Section 7(2) of the *Divorce Act* replaced section 10(1)(a) of the *Matrimonial Causes Act*, authorising a court to order maintenance "for any period until the death or remarriage of the party in whose favour the order is given." The description of the period for which maintenance is ordered is therefore essentially the same in the two statutes, and neither mentions the death of the breadwinner as affecting the duration of the post-divorce maintenance order.

Nevertheless, *Hodges v Coubrough*<sup>30</sup> signalled a change in the courts' thinking on the issue, which determined the direction of subsequent case law. The case concerned a court order for maintenance which did *not* incorporate a settlement agreement – in other words, a right to maintenance which clearly arose *ex lege*.

Didcott J disagreed with the *Copelowitz* approach to the intention of the legislature, both in respect of the *Matrimonial Causes Act* and the *Divorce Act*. He argued that, before the adoption of the *Maintenance of Surviving Spouses Act* in 1990, widows had no rights to claim support against the deceased estates of their breadwinners. It was therefore unlikely that the legislature – before 1953 when the *Matrimonial Causes Act* was implemented and before the adoption of the *Divorce Act* of 1979 – would have intended for divorced spouses to have stronger rights than widows.<sup>31</sup> The interpretation in *Copelowitz* and earlier cases which extended rights to sue the deceased estate to divorced spouses while widows had no similar rights therefore rested on an incorrect interpretation of the intention of the legislature. The statutes' failure to mention that the death of the breadwinner would end the duty of support was simply an oversight. These words were

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<sup>28</sup> *Owens* 228.

<sup>29</sup> *Divorce Act* 70 of 1979. See *Hughes v The Master* 1960 4 SA 936 (C) (hereinafter *Hughes*); *Milne v Estate Milne* 1967 3 SA 362 (C) (hereinafter *Milne*); *AF Philip & Co v Adie* 1970 4 SA 251 (R) (hereinafter *AF Philip*).

<sup>30</sup> *Hodges v Coubrough* 1991 3 SA 58 (D) (hereinafter *Hodges*).

<sup>31</sup> *Copelowitz* 63-64.

not included in the statute because it was so obvious that the right to support could not be enforced against the deceased estate of the breadwinner.<sup>32</sup> Consequently, a maintenance right *ex contractu* could be enforceable against the deceased estate because the deceased spouse had, by agreeing to it, bound his estate, but a right *ex lege* could not be enforced against the estate, because that would not have accorded with the intention of the legislature.<sup>33</sup>

This reasoning lay the basis for the Supreme Court of Appeal's subsequent finding in *Kruger v Goss*<sup>34</sup> which, in a remarkably brief judgment, agreed with Didcott's reasoning on the intention of the legislature, that:<sup>35</sup>

[i]t can hardly be argued that, before the [Maintenance of Surviving Spouses Act] came into being, divorced persons, whose erstwhile spouses had died, were in a more favourable position than widowed ones, giving them rights against the estates of people no longer married to them at the time of death which widowed spouses did not enjoy against the estates of those to whom they were then still married.

The problem is that this argument ignores the subsequent enactment of the *Maintenance of Surviving Spouses Act*, which now gives widows rights to sue deceased estates, with the result that a divorced wife would not actually be in a stronger position than a widow. The very basis for the supposed intention of the legislature has disappeared with the enactment of the *Maintenance of Surviving Spouses Act*, and legislation now has to be interpreted to give effect to the values of equality and human dignity and to protect fundamental rights, rather than rigidly cleaving to the intentions which the legislature may have had more than four decades ago. However, this reasoning did not apply to a right to support arising out of an agreement (*alimenta ex contractu*), which could bind the deceased estate.<sup>36</sup>

The latest judgment, in the Free State High Court, concerned a court order incorporating a deed of settlement for maintenance until the death or remarriage of the ex-wife. Interpreting the contract, the court in *LS v Jagga*<sup>37</sup> found that it could not have been the intention of the parties to extend the duty to support against the estate of the deceased breadwinner. Such an interpretation would have afforded the ex-wife more than she would have been entitled to from a right which arose *ex lege* and the husband would not have consented to this.<sup>38</sup> In any event, the court held, older cases extending the duty to the deceased estate were decided in a different social context

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<sup>32</sup> *Copelowitz* 64G-I.

<sup>33</sup> *Copelowitz* 65G-I.

<sup>34</sup> *Kruger v Goss* 2010 2 SA 507 (SCA) (hereinafter *Kruger*). See De Jong and Heaton 2011 SALJ 211.

<sup>35</sup> *Kruger* para 12.

<sup>36</sup> *Kruger* para 16.

<sup>37</sup> *LS v Jagga* 2016 6 SA 554 (FB) (hereinafter *Jagga*).

<sup>38</sup> *Jagga* para 22.

where wives did not earn their own income and therefore expected to be maintained for life. However:<sup>39</sup>

[t]hat is obviously not the case in modern times any more. Women are regarded in all respects as equal to men and rightly so. The intention of the parties should therefore be viewed against the modern view and background.

The decision ignores the distinction, drawn since *Copelowitz* in 1969 between *alimenta ex lege* and *alimenta ex contractu*, instead transposing the arguments about the intentions of the legislature to the question of what the parties could have intended in their settlement agreement. Because the legislature would not have intended to grant divorced spouses stronger rights than was available to widows, therefore, it was said, the parties would also not have agreed to afford divorced women stronger rights than widows. This line of reasoning loses sight of the very rationale for a settlement agreement between the divorcing spouses – to deviate from what the court would have ordered without an agreement. It also fails to consider that lawyers would have drafted the agreement on the basis of the law as it stood at the time of contracting – which was that the duty of support would not be ended by the death of the maintenance debtor. There is no conceivable reason why a divorcing wife would agree to lose her right to maintenance whenever her ex-husband dies, because the time of death is uncertain and he might even die a month after the divorce. As Lord Atkin remarked in *Kirk v Eustace*,<sup>40</sup> the continuation of the maintenance claim after the death of the breadwinner is

the most ordinary obligation for him to assume on the one part, the most ordinary obligation for the wife to stipulate on her part; because if it were otherwise she would be left on his death without any provision for her maintenance, and obviously she is not in a position to expect to receive any relief from any of his testamentary dispositions.

To summarise, there is a movement in the case law from allowing *alimenta ex contractu* to bind deceased estates, with this category interpreted rather widely, to the latest case interpreting *alimenta ex contractu* as not binding the deceased estate. This movement is based on an understanding that it could not have been the intention of the legislature to give divorced wives stronger rights than those which were available to widows and, in the last case, on the basis of a sanguine assumption that gender equality has already been achieved and that women no longer need post-divorce maintenance.

## 5 The action for loss of support against third parties

The final comparison in this note considers the source from which the duty of support is claimed after the death of the breadwinner. Whereas the prior

<sup>39</sup> *Jagga* para 24.

<sup>40</sup> *Kirk v Eustace* 1937 AC 491, quoted in the *Colly* case at 6-87.

paragraphs compared the rights of different categories of dependents to claim from the deceased breadwinner's estate, this paragraph considers their claims against third parties who are legally liable for the death of the breadwinner.

Smith and Heaton posit that the decision of whether to allow the dependant's action for loss of support requires two separate considerations – first whether there is actually a duty of support between the partners, whether *ex contractu* or *ex lege*. Once the duty of support has been established, the next question is whether this duty should be recognised for the purposes of the dependant's action.<sup>41</sup> The *boni mores* or public policy plays a role in deciding the second question. Because courts usually deal with both aspects simultaneously, the exact role of public policy is not always clearly articulated.

Wives can sue third parties for loss of support.<sup>42</sup> Customary wives, including those in polygynous marriages, can sue if their husbands are not simultaneously married to other women in civil law.<sup>43</sup> Wives in monogamous Muslim religious marriages can sue.<sup>44</sup> Wives in polygynous Muslim marriages have a right to support from their husbands,<sup>45</sup> but their right to the dependant's action for loss of support has not yet been confirmed by case law. If the principles are consistently applied it is, however, likely that they will have claims for loss of support.

Same-sex unmarried intimate partners can sue third parties for loss of support<sup>46</sup> and opposite-sex unmarried intimate partners can sue, even when their breadwinners are married to other people.<sup>47</sup>

Even ex-wives with maintenance orders in their favour can sue for loss of support.<sup>48</sup>

There is therefore a clear inconsistency with cases dealing with the right to enforce duties of maintenance against the estates of the breadwinners, where the legal position differentiates markedly between different categories of partners and where unmarried and especially divorced partners are at a distinct disadvantage. Third-party actions, on the other hand, are widely afforded to wives, ex-wives and both same-sex and

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<sup>41</sup> Smith and Heaton 2012 *THRHR* 476-478.

<sup>42</sup> Clark and Van Zyl *South African Law of Maintenance* para 1.5.

<sup>43</sup> Section 31(1) of the *Black Laws Amendment Act* 76 of 1963; *Mayeki v Shield Insurance* 1975 4 SA 370 (C).

<sup>44</sup> *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 4 SA 1319 (SCA).

<sup>45</sup> *Khan v Khan* 2005 2 SA 272 (T); *Rose v Rose* 2015 2 All SA 352 (WCC).

<sup>46</sup> *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA).

<sup>47</sup> *Verheem v Road Accident Fund* 2010 2 SA 409 (GP); *Paixão v Road Accident Fund* 2012 6 SA 377 (SCA); *Jacobs v RAF* 2019 2 SA 275 (GNP). For a discussion see Smith *JSAL* 576; Scott 2019 *JSAL* 798.

<sup>48</sup> *Santam Bpk v Henery* 1999 3 SA 421 (SCA).

opposite-sex unmarried partners. The only category of women excluded is customary wives of men who are married to other women in civil law. The case law on the latter issue is, however, old and the position could well change on the basis of the argument that other unmarried cohabitants have been afforded the dependant's action in the same situation.

What could explain this difference? It could simply be that courts are more willing to hold anonymous bodies with supposedly deep pockets like employers or the Road Accident Fund liable, while baulking at the potential for claims against deceased estates which would reduce the inheritance of current wives, children and heirs who were specifically nominated by testators.<sup>49</sup> The Supreme Court of Appeal's quote from the *Kruger* case below supports such an interpretation.

A less expedient, more principled consideration could be the basis of the liability – that third parties are liable for wrongful actions resulting in the death of the breadwinner, while holding the deceased estate liable is regarded as somehow less defensible. This may link to the observation in *Hodges v Coubrough* that:<sup>50</sup>

I do not, on the other hand, find it extraordinary that Parliament should have empowered the Courts to sanction agreements burdening estates with maintenance, yet balked at their foisting the liability on the estates of those who had never consented to the imposition.

This would suggest that *alimenta ex contractu* bind the deceased estate because the deceased agreed to it. The difference between liabilities which were freely undertaken and those which were legally imposed does not, however, supply an entirely convincing motivation. The previous analysis in this note shows that the enforcement of *alimenta ex contractu* against deceased estates is quite limited in the sense that it excludes several categories of people. Third party liability, on the other hand, is never based on an agreement to compensate, but on the *ex lege* imposition of duties to compensate, yet it is more widely extended to wives and ex partners than actions against deceased estates, which often rest on the agreement of the deceased breadwinner.

The wider availability of claims for loss of support against third parties may simply be yet another internal inconsistency in the rules relating to post-relationship spousal maintenance. Alternatively, it may be a context in which it is relatively cost-free to treat all categories of women equally because it does not affect individual men or their estates, nor does it diminish the rights of existing wives, children and heirs. Institutions like the Road Accident Fund involve public goods, rather than goods over which individual men

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<sup>49</sup> See, however, Zitzke, 2018 JSAL 191.

<sup>50</sup> *Hodges* 69D-E.

assert ownership and control. There may therefore be less resistance to meeting women's needs on a more generous basis than there would be towards interfering in the distribution of individual men's deceased estates. In not reducing the money which can be distributed to children, third-party claims also don't threaten the (often patriarchal) transmission of goods from one generation to the next.

## **6 Conclusion: gender, hierarchy and the death of breadwinners**

In the introduction I remarked that, underlying the seemingly haphazard legal rules in this area, we can discern patterns which favour certain groups over others.<sup>51</sup> I have sketched the outlines of these patterns. Widows who were married in terms of the *Marriage Act*, *Civil Union Act*, *Recognition of Customary Marriage Act* and Muslim wives have the most extensive rights to share in marital property, to inherit intestate if there is no will, and to claim post-death maintenance when their breadwinners die. Fewer rights are afforded to unmarried opposite sex cohabitants – which includes those wives whose marriages are invalid, often unbeknownst to them and not due to their fault. This includes a large number of customary wives whose marriages don't comply with the various requirements in the *Recognition of Customary Marriage Act* or with customary requirements. It would also include second and subsequent widows of polygynous marriages where the consent of first wives was not obtained. Similarly disadvantaged are ex-wives, who not only lack rights to property sharing and intestate succession, but whose rights against deceased estates are being gradually eroded by the courts. The latter two categories of women are also ranked considerably lower than children of the deceased, whether dependent or adult.

Courts openly endorse this hierarchy, and have since the *Hodges* case explicitly justified their decisions by asserting that maintaining the hierarchy between widows and divorced women is legitimate.<sup>52</sup> In *Kruger v Goss* the Supreme Court of Appeal warned against affording former wives claims against the deceased estate:<sup>53</sup>

[t]o allow maintenance claims of the kind encountered here against deceased estates might have all sorts of undesirable consequences. The legitimate claims to maintenance of minor children might be diminished or excluded. And, the rights of beneficiaries might be implicated...a claim for maintenance such as the present one could compete with the claim of a surviving spouse and with claims by dependent children and beneficiaries.

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<sup>51</sup> The SALRC *Project 144* questions whether the same legal rights should be extended to intimate partners and spouses from all marriages.

<sup>52</sup> See the cases of *Hodges*, *Kruger*, and *Jagga*.

<sup>53</sup> *Kruger* para 16.

The irony, of course, is that this endorsement of hierarchies based on different forms of marriage and intimate relationships has emerged more forcefully around the time when family law became subject to a constitutional prohibition of discrimination based on marital status, which should at least mean that marital status should not be used to justify discrimination. However, perhaps the opportunity to give a progressive interpretation and implementation of that part of the constitution was irrevocably lost when the Constitutional Court decision in *Volks v Robinson* endorsed the argument that it was, in fact, legitimate to favour marriage over other family forms.<sup>54</sup>

The hierarchy between married and unmarried women which surfaces in this area of law smacks of those Victorian and early 20<sup>th</sup> century stereotypes which were used to discipline some women and keep all women in their place. Good women are wives or widows. Bad women fail to get married or get divorced. All women are less valuable than the transmission of property to children and heirs. I have argued that this hierarchy of bereft women is detrimental to certain women. But does it benefit men?

First, and subtly but pervasively, it encourages women to marry men and to stay married to them, either by not divorcing men or by being so very accommodating that their husbands will not divorce them. Awarding the strongest rights to widows and progressively curtailing the rights of unmarried and divorced women at a time when more women are becoming self-sufficient and likely to leave unsatisfactory marriages appears to be an attempt to confine women in traditional marriage or alternatively to punish those who assert their independence. In this light, the quote from the *Jagga* judgment does not reflect the reality of female economic independence, but a wish to discipline all divorced women for the fact that some women have escaped male financial control.

Second, by granting the strongest rights to widows and children, the law endorses men's emotional ties – those who please and are beloved by husbands and fathers are also favoured by the law. Those discarded wives who are no longer loved and those who are not loved enough to marry must fend for themselves. The law validates men's preferences and rewards those women who please men. Moreover, the strenuous defence of the will of the testator protects men's unfettered power to determine how “their” assets will be distributed, even beyond death. The choices of men are

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<sup>54</sup> *Volks v Robinson* 2005 5 BCLR 446 (CC) paras 51-57. See, however, the minority judgment by Froneman J in *Laubscher v Duplan* 2017 2 SA 264 (CC) para 60 that “that *Volks* cannot stand” while the majority noted that “There may be an appropriate time when this court is called upon to revisit the principles in *Volks*” para 53. See, for a discussion Smith 2018 *THRHR* 149.

sacrosanct and executed by the law, while women can only choose to remain dependent on men or face possible penury when breadwinners die.

Third, absent from the legal rules and discourses on post-death spousal maintenance is the issue of justice between spouses and former spouses. Thus, the issue of women's continued responsibility for caring for husbands and children and the long-term economic consequences of this work is either ignored or regarded as choices freely made which do not require legal compensation.

Courts, like the Free State court in the *Jagga* case, increasingly view women as having equal economic power and using this as a justification to deny them rights to property seen as legitimately belonging to men. They do not contemplate either the reality of women's continued economic disadvantage *vis-à-vis* men, nor the economic consequences of many years of unpaid household labour. Instead, in a spectacular sleight of hand, the constitutional need for gender equality is taken as evidence that gender equality has already been achieved and as justification for ignoring actual inequality. Using gender equality as a justification for denying women equality is a cynical act, but unfortunately one which is becoming increasingly common.

It is appropriate to end this note by a quote from the Supreme Court of Appeal's judgment in *Oshry v Feldman* about the purpose of the *Maintenance of Surviving Spouses Act* and the dignity of elderly widows:<sup>55</sup>

The dignity, particularly of the vulnerable, is a prized asset. The Act was intended to ensure ... that the primary obligation of a spouse, who owed a duty of support, continued after the death of that spouse ... . To construe these provisions so as to make surviving spouses dependent on the largesse of others, including their children, defeats the purpose of the Act.

The dignity of other economically vulnerable women should be no less treasured because they are not married to the breadwinner when he dies.

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<sup>55</sup> *Oshry v Feldman* 2010 6 SA 19 (SCA) para 35.

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## List of Abbreviations

JSAL	Journal of South African Law
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg