the variation, etc of an order made in terms of the Divorce Act with a report and recommendations—and an application for custody *pendente lite* in terms of Rule 43 does not fall into either such category.

Secondly, ss (1) empowers an enquiry for the purpose mentioned to be instituted by the Family Advocate if requested by any party to the proceedings mentioned or the Court concerned. Subsection (2) was in my view enacted solely to enable the initiative to come from the Family Advocate to enable him to institute the enquiry and furnish a report. There is no reason to suppose that the Legislature envisaged conferring wider powers on the Family Advocate in terms of ss (2) to enable him to approach the Court for leave to conduct an enquiry and furnish a report for the purposes of proceedings (such as proceedings in terms of Rule 43) other than the proceedings contemplated in ss (1).

Thirdly, if ss (2) should be interpreted as empowering the Family Advocate to conduct an enquiry and furnish a report for the purpose of Rule 43 proceedings, this would lead to an anomaly: as I have already pointed out, the right of the Family Advocate to appear and lead evidence is confined by ss (3) to the action for divorce or an application to vary, rescind or suspend an order made in terms of the Divorce Act; and there is no reason for the Legislature to have empowered the Family Advocate to institute an enquiry and make a report for the purposes of an application in terms of Rule 43, but deny him the right of audience at the hearing of such an application.

If it was the intention of the Legislature that the reports so frequently requested by Courts in applications made in terms of Rule 43 should be compiled by the Family Advocate, with the assistance of family counsellors, s 4 of Act 24 of 1987 requires amendment.

For the above reasons I postponed the application to 21 May 1991 and requested the Department of Social Welfare to furnish a report as a matter of urgency to enable the Court to make a suitable order as to the custody of the minor children *pendente lite*.

Applicant's Attorneys: *Krowitz, Perlow & Hertz*. Respondent's Attorneys: *Hammes & Le Roux*.

BELL v BELL

WITWATERSRAND LOCAL DIVISION

KUPER AJ

1991 March 27; June 25

Husband and wife—Divorce—Proprietary rights—Parties married in England—Husband (defendant) domiciled in England at time of marriage—Wife claiming transfer of certain immovable property and portion of defendant's net estate in terms of ss 23 and 24 of the Matrimonial Causes Act 1973 (UK)—Propriety of—In absence of antenuptial contract, proprietary consequences of a foreign marriage to be determined in accordance with law of husband's domicile at time of marriage—Claim accordingly to be decided by reference to English common law and statutes, including Matrimonial Causes Act 1973—Nothing in powers conferred upon Court in that Act which would violate fundamental principles of justice, good morals or some deep-rooted tradition of the common weal in the Republic so as to justify non-recognition of plaintiff's claim—Exception to claim dismissed.

The respondent, as plaintiff, had instituted divorce proceedings against her husband, the excipient (defendant) which claimed, *inter alia*, the transfer to her of certain immovable property and portion of the excipient's net estate in terms of ss 23 and 24 of the Matrimonial Causes Act of 1973 (UK). It appeared that, at the time of the parties' marriage in England, the excipient was domiciled in England. The excipient excepted to the claim on the ground that the Court could not adjudicate on the proprietary disputes between the parties on the basis of the law of England, more particularly the Matrimonial Causes Act of 1973, and that the averments in support of the claim accordingly did not disclose a cause of action.

Held, that it has been clear for more than 70 years that, in the absence of an antenuptial contract, the proprietary consequences of a foreign marriage have to be determined in accordance with the law of the matrimonial domicile, which is to say the domicile of the husband at the time of the marriage.

Held, further, that the Court was, therefore, bound to decide the matter by reference to the laws of England as embodied in her common law and in her statutes: included in those statutes was the Matrimonial Causes Act of 1973.

Held, further, that, in the absence of repugnance or other compelling considerations, the Courts of the Republic would give substance and effect to the notion of comity which remained the building block of private international law.

Held, further, that there was nothing in the powers conferred on the Court by ss 23 and 24 of the Matrimonial Causes Act of 1973 which would violate some fundamental principle of justice or some prevalent conception of good morals or some deep-rooted tradition of the common weal, as it is known and understood in the Republic: having regard to the broad harmony between the respective English and South African legislative enactments applicable to such claims, all these policy considerations pointed to the recognition of the plaintiff's claim. Exception dismissed.

Exception to a cause of action incorporated in the respondent's particulars of claim. The nature of the cause of action excepted to appears from the reasons for judgment.

R B Camp for the excipient (defendant).
P G Robinson for the respondent (plaintiff).

Cur adv vult.

Postea (June 25).

Kuper AJ: The plaintiff, Evelyn Bell, married the defendant in London in 1971. The defendant was then domiciled in England. Subsequently both parties acquired a South African domicile.

The plaintiff has now instituted matrimonial proceedings against the defendant, saying that the marriage relationship has irretrievably broken down and is without prospect of restoration. She includes in her particulars a claim formulated in this way:

> 'By reason of the following factors . . . (none of which are here relevant) it would be just and equitable for the above honourable Court to grant an order in terms of ss 23 and 24 of Part 2 of the Matrimonial Causes Act of 1973 of England, in terms whereof the defendant is ordered:
> (*a*) to transfer the immovable property situate at 553 Concourse Crescent, Lone Hill, into the plaintiff's name;
> (*b*) to transfer one-third of his net estate to the plaintiff.'

It is this claim and the consequential prayers for relief that attracts the defendant's exception. He complains that:

> '(*a*) the above honourable Court cannot adjudicate the proprietary disputes between the parties on the basis of the law of England, more particularly the Matrimonial Causes Act of 1973 of England;
> (*b*) accordingly plaintiff's reliance on English statutory provisions cannot support a cause of action in respect of the proprietary rights of the parties at divorce, and the plaintiff has accordingly not pleaded averments in para 8 of the particulars of claim to entitle her to the relief sought in prayer 4 thereof.'

I should add that it is not alleged in the particulars that the defendant was domiciled in England at the time of the marriage. This omission is without consequence because counsel for both parties, being rightly indifferent to technical slips, asked me to decide the matter as though such an allegation had been made.

Mr *Camp*, who appeared for the defendant, sought to attack the founding contention upon which the plaintiff's case rests, namely that the applicable law is that of the domicile of the husband at the time of the marriage. His attack, which included the contention that the applicable law is the law of the *forum*, and which sought to gain comfort from certain *dicta* in *Holland v Holland* 1973 (1) SA 896 (T), is without prospect of success. It is clear beyond doubt and has been clear for more than 70 years that in the absence of an antenuptial contract the proprietary consequences of a foreign marriage must be determined in accordance with the law of the matrimonial domicile, which is to say the domicile of the husband at the time of the marriage. (*Brown v Brown* 1921 AD 478 at 482; *Anderson v The Master and Others* 1949 (4) SA 660 (E); *Frankel's Estate and Another v The Master and Another* 1950 (1) SA 220 (A); *Sperling v Sperling* 1975 (3) SA 707 (A). In *Sperling's* case the present Chief Justice said at 716E:

> 'In considering this matter it is as well to start at the beginning. As I have mentioned, the problem is one of that branch of our law known as private international law. The claims of the parties to the matrimonial property—for the moment I leave to one side plaintiff's claim under s 3 of the Matrimonial Affairs Act—are to be classified as relating to the proprietary consequences of marriage. In a case such as this, where no antenuptial contract has been entered into, the choice of law rule is that the proprietary consequences of a marriage are to be determined by reference to the law of the domicile of the husband at the time of the marriage (*Frankel's Estate and Another v The Master and Another* 1950 (1) SA 220 (A)), sometimes referred to, for the sake of brevity, as "the law of the matrimonial domicile". This connecting factor, the domicile of the husband at the time of the marriage, fixes once and for all and by operation of law the system which will constitute the *lex causae* whenever questions concerning the property relations between the spouses arise in a South African Court. (*Frankel's* case *supra*; *Brown v Brown* 1921 AD 478 at 482.) The position is not affected by a subsequent change of domicile (the so-called doctrine of immutability being accepted); nor is any distinction drawn in this regard between movable and immovable property or between property brought into the marriage or after-acquired property (*Shapiro v Shapiro* 1904 TS 673; *Union Government (Minister of Finance) v Larkan* 1915 CPD 681 at 685). What is termed the "unity principle" is applied.'

Nor may I say is there anything in *Holland's* case to the contrary. The decision in that case repeats the well-worn rule that a court applies its own law in judging whether grounds exist to dissolve the marriage, but it holds nothing else and the *dicta* to which Mr *Camp* refers (at 900A–B) have nothing whatever to do with the appropriate choice of law governing the proprietary consequences of marriage.

I am bound to decide this matter by reference to the laws of England as embodied in her common law and in her statutes (and it is immaterial whether for that purpose the private international law system of England is itself taken into account or not). Included in those statutes, of course, is the Matrimonial Causes Act of 1973, which consolidates enactments relating to matrimonial proceedings, maintenance agreements and declarations of legitimacy, validity of marriage and British nationality. Chapter 18, part 2, s 23 reads insofar as relevant:

> '23(1) On granting a decree of divorce . . . the Court may make any one or more of the following orders, that is to say—
> (*a*) . . .
> (*b*) . . .
> (*c*) an order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified;
> (*d*) . . .
> (*e*) . . .'

And s 24, insofar as relevant, reads:

> '24(1) On granting a decree of divorce . . . the Court may make any one of the following orders, that is to say—
> (*a*) an order that a party to the marriage shall transfer to the other party . . . such property as may be so specified, being property to which the first-mentioned party is entitled either in possession or reversion;
> (*b*) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the Court for the benefit of the other party to the marriage.'

The powers thus conferred upon the Courts of England have an immediate and familiar ring to a South African lawyer. They are, after all, not dissimilar in ambit or object from those given to our own Courts under s 7

of the Divorce Act 70 of 1979. Considerations of equity and fair dealing underlie both. They both allow Judges to divide and distribute property by reference to the merits of each case, thereby discarding the previous adherence to imposed and inflexible formulae for such distribution. Both systems reflect a policy which is or was echoed in terms of para 39 of the *Lehrkommentar Familienrecht* previously applicable in the then German Democratic Republic.

Paragraph 39 reads:

'1. Upon termination of the marriage the common property and assets will be divided into equal shares. If there is no agreement the Court decides about the division, taking into consideration the situation of the parties concerned. More particularly, it can allot one party the sole ownership of certain articles or assets and impose on him the obligation to reimburse the other party for the value of their share in money, insofar as his claim is not satisfied by the allotment of other articles or assets out of the common property.

2. Upon application by one of the parties the Court can award unequal shares of the property and assets. More particularly this applies if one of the spouses requires a larger share of the assets of the common property because common children requiring to be maintained are living with him, or if one spouse has, neither through common outside earnings, nor through work in the household, made appropriate contributions to the creation of the common property and assets. In special cases the Court can award one party the whole of the common property and assets.'

Paragraph 39 of the *Lehrkommentar* is the subject-matter of the decision in *Sperling's* case. The primary question for decision in that case was whether a reference to a foreign *lex causae* included its transitional law. The Court held that, in the absence of decisive considerations of public policy, it did. It thereupon (see at 724E–725G) exercised the powers conferred upon the East German Court as described in para 39 of the *Lehrkommentar* in consequence of which the common property (as there defined) was unequally divided between the parties.

It would be surprising if this Court came to a different conclusion when asked to apply these similar although more far-reaching benefits available under an English statute to an eligible plaintiff.

Mr *Camp* draws attention to the fact that s 52 of the Matrimonial Causes Act defines 'the Court' (except where the context otherwise requires) to mean the High Court or, where a County Court has jurisdiction by virtue of the Matrimonial Causes Act of 1967, a County Court. That definition, he suggests, is a bar to the enforcement by a foreign Court of any of the provisions of the Act. It is not. These jurisdictional matters applicable in the hierarchy of domestic courts are not of consequence in the working of the principles of private international law. The foreign Court applies the law which the domestic Court, having jurisdiction, would have applied. In so doing, the foreign Court does not purport to be, nor is it, the domestic Court.

Mr *Camp* has argued that there are aspects of the provisions of the English statute which do not accord with the South African law and suggested that a South African Court should not enforce a foreign statute unless it conforms in all respects with the South African law. If sound, that contention would eviscerate the private international law system of the Republic.

The truth of the matter is that in the absence of repugnance or other compelling considerations our Courts will give substance and effect to the notion of comity which remains the building block of this branch of the law.

The opinion of Cardozo J in *Loucks v Standard Oil Company of New York* (1919) 224 NY 99 at 110, 111 adopted in England by Parker LCJ in *Phrantzes v Argenti* [1960] 2 QB 19 ([1960] 1 All ER 778 (QB)) at 782I–783D at 33, constitutes, I am sure, an authoritative articulation of principle and philosophy to which our Courts also subscribe:

'If aid is to be withheld here, it must be because the cause of action in its nature offends our sense of justice or menaces the public welfare. . . . Our own scheme of legislation may be different. We may even have no legislation on the subject. That is not enough to show that public policy forbids us to enforce the foreign right. A right of action is property. If a foreign statute gives the right, the mere fact that we do not even like the right, is no reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. Similarity of legislation has indeed this importance: its presence shows beyond question that the foreign statute does not offend the local policy, but its absence does not prove the contrary. It is not to be exalted into an indispensable condition. The misleading word "comity" has been responsible for much of the trouble. It has been fertile in suggesting a discretion unregulated by general principles (Beale *Conflict of Laws* para 71). The sovereign in its discretion may refuse A to the foreign right. . . . From this it has been an easy step to the conclusion that a like freedom of choice has been confided to the Courts, but that of course is a false view. . . . The Courts are not free to refuse to enforce a foreign right at the pleasure of the Judges to suit the individual notion of expediency or fairness. They do not close their door unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.'

I have already pointed to the fact that the social and legal policies which found the respective English and South African legislative enactments are broadly harmonious. (Specific aspects of their conformity, other than those here directly in point, are discussed in *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 991, 996 and 997.)

Even if the powers accorded to an English Court are broader than those conferred under s 7 (a proposition not raised in argument) I can find nothing in them which would violate some fundamental principle of justice or some prevalent conception of good morals or some deep-rooted tradition of the common weal as we know it and understand it in the Republic. Indeed, as it seems to me, all these policy considerations point to the recognition of the plaintiff's claim. I say that not least because counsel for both parties commenced their argument in this matter by referring to the decision in *Milbourn v Milbourn* 1987 (3) SA 62 (W). That case holds that the provisions of s 7(3) of the Divorce Act cannot apply to parties domiciled and married in England because the section covers only marriages out of community of property which have been created by way of antenuptial contract, and not by the operation of law. If that decision is correct (and I think with respect that it is, notwithstanding the judgment in *Mathabathe v Mathabathe* 1987 (3) SA 45 (W)), then it would mean—assuming the exception to be well-founded—that a person in the plaintiff's position would not enjoy her rights under the English law and

would simultaneously be disbarred from enjoying like rights under the South African law. As I see the position, that consequence does not flow, because recognition can be given to ss 23 and 24 of the English legislation. Mrs Bell, like Mrs Sperling before her, can expect a South African Court to afford her the benefits available under the law of the husband's domicile at the time of the marriage.

In the result I dismiss the exception with costs.

Excipient's (Defendant's) Attorneys: *McCarthy, Cheiman & Cruywagen.*
Respondent's (Plaintiff's) Attorneys: *Cliffe, Dekker & Todd.*

DHANSAY AND OTHERS v DAVIDS NO AND OTHERS

CAPE PROVINCIAL DIVISION

BERMAN J

1991 May 7, 22; June 7

*Administration of estates—Intestate succession—Heirs—Intestate succession to land situate in Republic—Children of deceased illegitimate according to South African law but legitimate according to law of India, where they had always been domiciled—*Lex situs *the governing law for all questions in regard to immovable property—Accordingly deceased's children cannot succeed to deceased's immovable property because of their illegitimacy under* lex situs.

The general rule in private international law in the United States of America and in most European countries is that the *lex situs* is the governing law for all questions that arise with regard to immovable property. There is acceptable authority for holding that in the Republic, as in England, while by the law of the State where land is situate an illegitimate child may be regarded as legitimate and may thus succeed to its father's movable property on intestacy, such a child cannot succeed because of its illegitimacy to its father's immovable property situate in the same country as those movables are to be found.

The Court accordingly held that the children of the deceased, who were illegitimate according to the law of South Africa but who were legitimate according to the law of India where they had always been domiciled, being the legitimate issue of a union recognised as a valid marriage in India where the ceremony took place, were disqualified from inheriting on intestacy an undivided half-share in certain immovable property situate in Athlone, Cape Town, which the deceased and his brother had acquired.

Return day of a rule *nisi* granted in an application for an interdict. The facts appear from the reasons for judgment.

M A Albertus for the applicants.
D O Potgieter for the respondents.

Cur adv vult.

Postea (June 7).

Berman J: A. The relevant facts

1. Omar Abdulkader Dhansay ('Omar') and Ebrahim Abdurahman Dhansay ('Ebrahim') were brothers, both now deceased, the former having died in India on 16 November 1964 and the latter in Cape Town on 3 May 1977. Their parents had long pre-deceased them and their only brother had died sometime during the 1940's, leaving no issue.

2. Omar was born in India and he died there. Whilst in India he was married by Moslem rites; from this union three children were born, all adults who live (and who have lived all their lives) in India. Their father died intestate.

3. Ebrahim was married to seventh applicant by Moslem rites and first to sixth applicants were the issue of this union. In terms of Ebrahim's will seventh applicant was left a life usufruct over his immovable property; subject to this usufruct this immovable property was left to first to sixth applicants in stipulated shares.

4. During their life-times Omar and Ebrahim had acquired in undivided half-shares certain immovable property in Athlone, Cape Town, and this property is still registered in their joint names.

5. First respondent is the executor dative in Omar's estate and he administers Ebrahim's estate on behalf of second respondent, the executor testamentary in Ebrahim's estate, and maternal uncle of first to sixth applicants. (The third and fourth respondents are the Master and the Registrar of Deeds; fifth respondent is a company which has entered into a deed of sale in terms of which it has purchased from first respondent Omar's half-share of the jointly-held property.)

6. Applicants contend that Omar's half-share of that property was inherited by Ebrahim according to the laws of intestate succession, Omar's three children being illegitimate according to South African law and thus disentitled from succeeding to Omar's immovable property in this country. As Ebrahim's heirs they contend that they (first to sixth applicants) are thus entitled to Omar's said property, subject to the aforementioned usufruct.

7. First, second and fifth respondents contend that Omar's three children in India are the heirs to his immovable property in South Africa, they being his legitimate issue of a union recognised as a valid marriage in India, where the ceremony took place.

8. Omar's three children are (and always have been) domiciled in India and Ebrahim was domiciled in South Arica. Insofar as Omar's domicile is concerned, applicants contend that at the date of his death he was domiciled in South Africa, but first, second and fifth respondents contend that at that date Omar was domiciled in India.

9. In order to forestall transfer of Omar's half-share in the said property being passed to fifth respondent, applicants sought as a matter of urgency (and obtained) a rule *nisi* interdicting transfer to fifth respondent pending