

**SECTION 2C(1) OF THE WILLS ACT 7 OF
1953 AND THE MEANING OF “SPOUSE”**

***Moosa NO v Minister of Justice*
2018 (5) SA 13 (CC)**

1 Introduction

It happens from time to time that a beneficiary under a will chooses not to accept his or her inheritance. One possible reason, which is relevant to the discussion below, may be the beneficiary's desire to allow persons to inherit, or inherit more than would otherwise have been the case, as a result of the renunciation. (For a fuller discussion of the various circumstances in which a beneficiary may wish to renounce, see Corbett, Hofmeyr and Kahn *The Law of Succession in South Africa* 2ed (2001) (Corbett) 17–18.)

The effect of a renunciation on the devolution of the deceased testator's estate is determined by a number of factors, including the particular provisions of the will, and varies from case to case. One determining factor is section 2C of the Wills Act 7 of 1953 (as amended) – of which the counterpart in intestate succession is s 1(6) and (7) of the Intestate Succession Act 81 of 1987 (as amended). Section 2C reads as follows:

- “(1) If any descendant of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such a benefit, such benefit shall vest in the surviving spouse.
- (2) If a descendant of the testator, whether as a member of a class or otherwise, would have been entitled to a benefit in terms of the provisions of a will if he had been alive at the time of death of the testator, or had not been disqualified from inheriting, or had not after the testator's death renounced his right to receive such a benefit, the descendants of that descendant shall, subject to the provisions of subsection (1), *per stirpes* be entitled to the benefit, unless the context of the will otherwise indicates.”

Note that, in terms of this section, if a beneficiary who is entitled to a benefit together with the surviving spouse renounces that inheritance, then the consequent devolution of the benefit will differ from that which follows renunciation in other circumstances, or that following a beneficiary's predecease or lack of capacity to inherit. In the first scenario, the benefit devolves on the surviving spouse, whereas in all the other scenarios, it devolves on the beneficiary's descendants.

The wording of the section has been criticised, and in some respects it is certainly problematic (for a critical discussion of the section, see Jamneck

“Die Interpretasie van Artikel 2C van die Wet op Testamente 7 van 1953” 2002 *THRHR* 223). Although this note does not primarily relate to these criticisms, some of the issues that have been raised are discussed below. The main focus of this note is rather on the important question of what meaning is to be attached to the term “surviving spouse” in section 2C(1). Does it encompass only the survivor of a marriage under the Marriage Act 25 of 1961? Or does it include the survivors of Hindu marriages, monogamous and polygynous Muslim marriages, and monogamous and polygynous marriages under African customary law? This question has recently been addressed in respect of Muslim marriages in *Moosa NO v Minister of Justice* (2018 (5) SA 13 (CC)), which is the first case involving a Bill-of-Rights-based challenge to the meaning of the term “spouse” in the context of testate succession. (In the context of intestate succession, the meaning of the term has been addressed in a number of cases – in particular, *Daniels v Campbell NO* 2004 (5) SA 331 (CC) (relating to monogamous Muslim marriages), *Hassam v Jacobs NO* 2009 (5) SA 572 (CC) (relating to polygynous Muslim marriages), *Govender v Ragavayah NO* 2009 (3) SA 178 (D) (relating to Hindu marriages), and *Gory v Kolver NO* 2007 (4) SA 97 (CC) (relating to unformalised same-sex partnerships).) Accordingly, it is *Moosa NO v Minister of Justice* (*supra*) that is the subject of this note, which critically evaluates the case and discusses its implications for other sections of the Wills Act.

Before discussing the *Moosa* case, however, it is useful to examine certain historical developments relating to how a beneficiary’s predecease, lack of capacity, and renunciation have been treated.

2 Historical evolution

It is not necessary for our purposes to go into the full history of how predecease, lack of capacity, and renunciation have been treated in our law, but there are certain developments leading up to the introduction of section 2C of the Wills Act in 1992 that are relevant to better understand its provisions.

These developments (as gleaned from the authorities cited below) are as follows:

- Immediately before the enactment of section 2C in 1992, the consequences of the predecease of a child of the testator were regulated by section 24 of the General Law Amendment Act 32 of 1952. Section 24 provided in essence that a benefit given to a child of the testator would go to that child’s lawful descendants *per stirpes* if the child predeceased the testator. The section was thought necessary because the common-law legal position, which was similar but not identical to the section, had become unsettled owing to a decision in *Galliers v Rycroft* ((1900) 17 SC 569) (Corbett 215). (For discussion of the *Galliers* decision, see *Horowitz v Brock* 1988 (2) SA 160 (A) 185J–186H; Corbett 215–217; Cronjé and Roos *Casebook on the Law of Succession/Erfreg Vonnisbundel* (1997) 258–259; and Jamneck 2002

THRHR 227.) Before 1992, the law did not provide for substitution by descendants if a beneficiary lacked capacity to inherit, or renounced an inheritance (Jamneck 2002 *THRHR 228*).

- As regards intestate succession, before the enactment of the Intestate Succession Act in 1987, a predeceased child was represented by his or her descendants *per stirpes* (Corbett, Hahlo and Hofmeyr *The Law of Succession in South Africa* (1980) 585). With respect to lack of capacity or renunciation, there was a practice that the descendants of an heir who lacked capacity to inherit or who renounced his or her inheritance were not permitted to represent the heir, and the inheritance was allowed to accrue to his co-heirs and the surviving spouse (South African Law Commission *Working Paper 19 Project 22 Review of the Law of Succession: Disqualification from Inheriting, Substitution, Succession Rights of Adopted Children* (September 1987) par 3.77). (The Commission was the forerunner of the South African Law Reform Commission.) There was, however, uncertainty and debate about the actual dictates of the law with respect to lack of capacity and renunciation in intestate succession, and it seems that the practice did not always accord with the law (SALC *Working Paper 19 Project 22* par 3.77–3.84).
- The motive behind the practice was presumably that it allowed the deceased's children to bestow a benefit upon a financially needy surviving spouse if all of them renounced their inheritances, thereby avoiding the donations tax, transfer duty, and other cost implications that might flow from accepting the inheritance and donating it to the surviving spouse. (This benefit flows from the established principle that a beneficiary who renounces is regarded in law as never having inherited (*Klerck and Schärge's NNO v Lee* 1995 (3) SA 340 (SE), approved in *Wessels NO v De Jager* NO 2000 (4) SA 924 (SCA) par 9).
- When the Intestate Succession Act was enacted in 1987, the legislature decided to include an interim measure to legitimate the existing practice regarding the treatment of lack of capacity and renunciation in intestate succession, pending further investigations (SALC *Working Paper 19 Project 22* par 3.85). This took the form of section 1(4)(c) of the Intestate Succession Act. The section, which has since been repealed, had the effect that the benefit of anyone who was disqualified from inheriting on intestacy, and a renounced benefit, would be shared between the surviving spouse and the other children of the deceased, and if all the deceased's children renounced, then the entire estate would accrue to the surviving spouse. (The section achieved this by deeming the heir who lacked capacity or who renounced, and all those who would otherwise be entitled to represent him or her, to be predeceased.)
- In time, it came to be seen as unfair to prevent the children of those who lack capacity from inheriting by representation (South African Law Commission *Project 22: Review of the Law of Succession – Report* (June 1991) (*Project 22 Report*) par 5.47). As the South African Law Commission pointed out, this amounts to visiting the sins of the fathers

on the children (SALC *Project 22 Report* par 5.47). Furthermore, the Commission was of the view that there is no clear reason for representation not to apply in case of renunciation (SALC *Project 22 Report* par 5.47). Although these comments were made in the context of a discussion on intestate succession, the Commission recommended that the rules applicable to renunciation and incapacity in testate succession should be the same as those in intestate succession (SALC *Report on Project 22* par 5.56).

- As a result of these criticisms, in 1991, the Commission recommended that (in both intestate and testate succession) renunciation and lack of capacity should be on the same footing as predecease – namely, that the heir would be represented by his or her descendants, except that the practice of allowing a descendant to effectively renounce in favour of the surviving spouse should be retained (see SALC *Project 22 Report* par 5.53 read with par 5.56).
- As a consequence of these recommendations, the present legal position relating to incapacity and renunciation in testate and intestate succession was enacted in 1992, in the form of section 2C(1) and (2) of the Wills Act and section 1(6) and (7) of the Intestate Succession Act. Section 2C(2) of the Wills Act creates the general rule in testate succession that a descendant of the testator who renounces, lacks capacity, or predeceases is represented by his or her descendants *per stirpes*, and its counterpart in intestate succession is section 1(7). Section 2C(1) of the Wills Act creates the exception that gives a renounced benefit in a will to the surviving spouse when the section is applicable, and its counterpart in intestate succession is section 1(6) of the Intestate Succession Act. Section 24 of the General Law Amendment Act and section 1(4) of the Intestate Succession Act were repealed.

In light of this historical development, it can be seen that section 2C appears to have three principal objectives. It removes what had come to be seen as unfair treatment of the descendants of an *indignus*, and other persons who lack capacity to inherit; it facilitates a method by which the deceased's children can benefit the deceased's surviving spouse by renunciation, without incurring the donations tax, transfer duty, and other expenses often involved in donating assets; and it promotes uniformity in the rules (in testate and intestate succession respectively) that apply to renunciation and lack of capacity.

Having explained the historical evolution of section 2C, the author sets out the facts of the *Moosa* case, which case is the genesis of this note. Some of the relevant issues that emerge from section 2C(1) are then examined, whereafter the Constitutional Court's judgment in *Moosa* is explained and evaluated. The author also suggests some respects in which the judgment may have wider significance beyond the confines of the section.

3 The facts and judgment in the Constitutional Court

The matter originated in the Western Cape Division of the High Court (the judgment of which is reported as *Moosa NO v Harneker* 2017 (6) SA 425 (WCC)), and came before the Constitutional Court by way of an application for, *inter alia*, an order confirming the declaration of constitutional invalidity and reading-in ordered by the High Court. The case concerned the proper distribution of the estate of the late Mr Osman Harneker (the deceased). The deceased was survived by two wives – namely, the second applicant whom he had married in 1957, and the third applicant whom he had married in 1964 – as well as by nine children born of these marriages (*Moosa NO v Minister of Justice supra* par 4). In what follows, the second and third applicants are referred to as the deceased’s “first wife” and “second wife” respectively. Both marriages took place in accordance with Islamic law (*Moosa NO v Minister of Justice supra* par 4), and accordingly were not legally recognised (*Moosa NO v Minister of Justice supra* par 5).

In 1982, the deceased applied for a bank loan for the purchase of a house and was advised that in order to facilitate the loan he should formalise one of his marriages by marrying in terms of the Marriage Act (*Moosa NO v Minister of Justice supra* par 5). It is not clear from the judgments why this was of any concern to the bank making the loan. Pursuant to this advice, the deceased married his first wife in terms of the Marriage Act, doing so with the consent of his second wife (*Moosa NO v Minister of Justice supra* par 5). Thereafter, the house was purchased and was registered in the names of the deceased and his first wife (*Moosa NO v Minister of Justice supra* par 5).

At the time of his death, the deceased left a will directing that his estate should devolve in terms of Islamic law in accordance with a certificate to be issued by the Muslim Judicial Council or any other recognised Muslim Judicial Authority (*Moosa NO v Harneker supra* par 7). The certificate that was duly issued prescribed the shares in which his estate was to be divided among his two spouses, four sons and five daughters (*Moosa NO v Harneker supra* par 7). There is a slight variance at this point between certain facts recorded in the respective judgments of the court *a quo* and Constitutional Court (compare *Moosa NO v Minister of Justice supra* par 7 with *Moosa NO v Harneker supra* par 8), but the material point for our purposes is that all the descendants then renounced their inheritances under the will. (Points omitted from the judgment of the Constitutional Court, but which appear from the judgment of the court *a quo* (par 8), are that the descendants specified that the renounced benefits be inherited in equal shares by the two wives, and that the executor “opted not to follow the Islamic law with regard to renunciation”.)

Following this renunciation, the executor of the estate took the view that, for the purposes of section 2C(1) of the Wills Act, each of the spouses qualified as a “spouse” (*Moosa NO v Minister of Justice supra* par 8). Accordingly, the executor believed that the inheritances that had been renounced by the deceased’s descendants should be awarded to the two

spouses in equal shares (*Moosa NO v Minister of Justice supra* par 8). The implementation of this distribution involved registration of transfer in the deeds office of the deceased's half share of the immovable property that was registered in the joint names of the deceased and his first wife (*Moosa NO v Minister of Justice supra* par 9 read with par 5). However, at this point the winding-up of the deceased's estate met an obstacle; the Registrar of Deeds took the view that only the deceased's first wife was a spouse for the purposes of section 2C(1) of the Wills Act, and that in terms of section 2C(2) of the Wills Act, the benefits renounced by the children of the second wife vested in the descendants of those who renounced them (*Moosa NO v Minister of Justice supra* par 9). Accordingly, he refused to register the transfer to the second wife (*Moosa NO v Minister of Justice supra* par 9). It is difficult to understand the Registrar's view that the descendants of the second wife's children were entitled to benefit from their parents' renunciation in terms of section 2C(2); if the marriage to the second wife was not recognised, then, in terms of section 2C(1), all renounced benefits should have gone to the first wife who was married under the Marriage Act. (This point is discussed further in part six of this note.)

In order to resolve this impasse, the executor and the two spouses sought an order in the Western Cape High Court that, *inter alia*, the failure of the relevant section to include a husband or wife in a marriage that was solemnised under the tenets of Islamic law was unconstitutional; and for an appropriate reading-in in order to rectify the unconstitutionality. The relevant orders were granted by the High Court and application was accordingly made to the Constitutional Court for confirmation of these orders as required by section 172(2)(a) of the Constitution of the Republic of South Africa, 1996 (Constitution).

In the event, the Constitutional Court, in a unanimous judgment, wholeheartedly approved the reasoning of the High Court (*Moosa NO v Minister of Justice supra* par 10) and adopted it as its own in a summary that covered the following points. It held that the words "surviving spouse" in section 2C, enacted as they were during the "pre-constitutional era", were clearly intended to refer to the survivor of a common-law monogamous marriage and could not now be interpreted to include multiple spouses (*Moosa NO v Minister of Justice supra* par 10(a)). This being so, the court held that the section differentiates in three ways – namely, (i) between those married under the Marriage Act, 1961 and those married under Islamic law; (ii) between a surviving spouse in a monogamous civil marriage and one in a polygynous Muslim marriage; and (iii) between surviving spouses in polygynous customary unions (whose marriages are recognised in terms of the Recognition of Customary Marriages Act 120 of 1988) and surviving spouses of polygynous Muslim marriages (*Moosa NO v Minister of Justice supra* par 10(b), (c) and (d) respectively). This differentiation, the court held, constitutes unfair discrimination in terms of section 9(3) of the Constitution because it bears no rational connection to a legitimate governmental purpose (*Moosa NO v Minister of Justice supra* par 10(e)). With respect to the second spouse in particular, it was held that section 2C(1) unfairly discriminates against her by recognising the first spouse as a surviving

spouse by virtue of her civil marriage but not recognising the second spouse because her marriage was in terms of Islamic law (*Moosa NO v Minister of Justice supra* par 10(f)); the court used the term “civil union” but clearly meant a marriage under civil law, not a union under the Civil Union Act 17 of 2006). The section also treated her differently to the survivor of a polygynous customary union, the court held (*Moosa NO v Minister of Justice supra* par 10(f)); the court used the term “civil union” but clearly meant a marriage under civil law, not a union under the Civil Union Act 17 of 2006).

There was no attempt by the Minister of Justice, or any other party, to justify the infringement pursuant to section 36 of the Constitution, nor could the Constitutional Court think of any justification (*Moosa NO v Minister of Justice supra* par 11). Consequently, the court concluded that section 2C(1) violated the second wife’s right to equality, and it endorsed the reasoning of the court *a quo* to that effect (*Moosa NO v Minister of Justice supra* par 12).

Before ordering the required relief, the Constitutional Court expanded on the reasoning of the court *a quo* by discussing the effect of the discrimination on the second wife’s dignity (*Moosa NO v Minister of Justice supra* par 13–16). Her non-recognition as a “surviving spouse”, the court said,

“strikes at the very heart of her marriage of fifty years, her position in her family and her standing in her community. It tells her that her marriage was, and is, not worthy of legal protection. Its effect is to stigmatise her marriage, diminish her self-worth and increase her feeling of vulnerability as a Muslim woman.” (*Moosa NO v Minister of Justice supra* par 16)

This, the court held, provided further reason for declaring section 2C(1) to be constitutionally invalid (*Moosa NO v Minister of Justice supra* par 16).

In light of the above reasons, the Constitutional Court confirmed the declaration of constitutional invalidity (par 21, part one of the order), and directed that section 2C(1) should be read as including the following words after the last word of the section:

“For the purposes of this sub-section, a ‘surviving spouse’ includes every husband and wife of a monogamous and polygynous Muslim marriage solemnised under the religion of Islam.” (par 21, part two of the order)

The court also ruled that its declaration of invalidity operates retrospectively with effect from 27 April 1994 (the commencement date of the Constitution of the Republic of South Africa 200 of 1993) except that

“it does not invalidate any transfer of ownership that was finalised prior to the date of this order of any property pursuant to the application of section 2C(1) of the Wills Act 7 of 1953, unless it is established that, when the transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicant brought the present application.” (*Moosa NO v Minister of Justice supra* par 21, part three of the order)

The applicants – in addition to asking for an order of constitutional invalidity and a reading-in – also asked the Constitutional Court to rule that, in the application of section 2C(1), the inheritance repudiated by the deceased

testator's descendants should always be divided equally among the surviving spouses (*Moosa NO v Minister of Justice supra* par 18). They argued that this would advance the constitutional value of equality (*Moosa NO v Minister of Justice supra* par 18). The Constitutional Court declined to make such a ruling, however, stating that

“a ruling of this nature may infringe on the principle of freedom of testation, which is fundamental to testate succession. It would therefore be ill-advised for this court to make any such pronouncement. If the division of assets in a particular will offends public policy, which is now rooted in our Constitution and its enshrined values, then an affected individual is entitled to apply to the High Court for relief.” (*Moosa NO v Minister of Justice supra* par 18)

The court also refused the request of the respondents and the *amicus curiae* (namely, Trustees of the Women's Legal Centre Trust) for an order allowing any interested person to seek a variation of the court's order should “any serious administrative or practical problems arise in the implementation of [the court's] order” (*Moosa NO v Minister of Justice supra* par 19). It took the view that such an order would not be warranted because its retrospectivity is limited and the applicants had not asked for it to be included (*Moosa NO v Minister of Justice supra* par 19).

Before evaluating the court's judgment, it is useful to consider certain peripheral matters in parts four to six of this note.

4 Can section 2C(1) be overridden by a testator?

An interesting question is whether the provisions of section 2C(1) are invariable, and not subject to any contrary instructions in the testator's will.

There is nothing in section 2C(1) to indicate that it is subject to the testator's wishes. By contrast, section 2C(2) expressly stipulates that its provisions apply “unless the context of the will otherwise indicates”. Similarly, section 2B, which provides for loss of an inheritance by a former spouse in certain circumstances, states that the section applies “unless it appears from the will that the testator intended to benefit his previous spouse notwithstanding the dissolution of his marriage”. Section 2D, which makes provisions regarding adopted children, persons born out of wedlock, and bequests to children of a person or a class of persons, opens with the words “unless the context otherwise indicates”. But there is no such proviso in section 2C(1), and the proviso at the end of section 2C(2) is not worded in such a way that it can be construed as also applying to section 2C(1). This omission in section 2C(1) is remarkable in view of the express protection of a testator's freedom in all the other sections in which this would be appropriate, and might suggest that the section cannot be overridden in the testator's will. However, Jamneck has suggested that the wording of section 2C(1) of the Wills Act was based on the wording of the corresponding sections of the Intestate Succession Act; and that, since in intestate succession there was no need to provide for a contrary intention of the deceased, the failure to include this reservation in section 2C(1) was simply

an oversight in the drafting of the section (Jamneck 2002 *THRHR* 395–396), rather than an indication of an intention to bind the hands of the testator.

It is submitted that the provisions of section 2C(1) are, despite the failure to include an express provision to that effect, nevertheless subject to any contrary instructions in the testator's will. An example of such a contrary instruction would be where the testator provides that if a beneficiary renounces his or her inheritance, such benefit is to go to the beneficiary's descendants *per stirpes*. In these circumstances and for the reasons set out below, it is submitted that section 2C(1) will not override the testator's wishes by giving the renounced benefit to the surviving spouse of the testator.

If section 2C(1) cannot be overridden by a testator, this represents a serious inroad into freedom of testation, which in terms of the principles of statutory interpretation should not be lightly inferred from the provisions of section 2C(1) (Du Plessis "Statute Law and Interpretation" in Joubert (founding ed) *The Law of South Africa* vol 25(1) 2ed (2011) §340). There is no apparent reason that the legislature would wish to override the testator's freedom of testation in this particular situation when it has not done so in the other instances where section 2C applies – namely, a beneficiary failing to inherit due to predecease, or incapacity to inherit. Nor has it overridden the testator's freedom of testation in situations governed by sections 2B or 2D. Furthermore, it makes no sense for a testator to be entitled to disinherit a spouse completely in terms of freedom of testation but not be able to regulate whether a spouse who has been included as a beneficiary also takes a benefit renounced by the testator's descendant. (Regarding the testator's freedom to disinherit a spouse, see Corbett 44. For an example of an outright exclusion, see *Morienyane v Morienyane* [2005] LSHC 226 <https://lesotholii.org/ls/judgment/high-court/2005/226> (accessed 2019-08-07).) Finally, since a testator's freedom of testation enjoys constitutional protection as part of his or her right to property and right to dignity (*In re BoE Trust Ltd* NO 2013 (3) SA 236 (SCA) par 26 and par 27, respectively), it should not lightly be decided that it has been interfered with. In the case of a Muslim testator, the testator's religious freedom (s 15(1) of the Constitution) is also engaged because it is part of his or her religious duty to make a will that ensures his or her estate devolves in accordance with Sharia law. (Regarding the religious duty of a Muslim testator in this respect, see Omar *The Islamic Law of Succession and its Application in South Africa* (1988) 3.)

Taking all these factors into consideration, the author believes that a testator is entitled to override section 2C(1) in his or her will, notwithstanding that the right to do so is not expressly protected by the section. This view finds some support in the court's statement (made when it rejected the request that it declare that under section 2C(1) assets should always be divided among surviving spouses) that "a ruling of this nature may infringe on the principle of freedom of testation, which is fundamental to succession" (par 19). Nevertheless, the matter is open to doubt.

5 When does section 2C(1) operate?

For section 2C(1) to operate, a descendant of the testator “who, *together with the surviving spouse of the testator*, is entitled to a *benefit*” (emphasis added) must renounce his or her inheritance.

There is a lack of clarity as to what the emphasised words mean and, therefore, as to when a renunciation will trigger the operation of the section (see De Waal and Schoeman-Malan *Law of Succession* 5ed (2015) 147 for a discussion of the possible meanings of the above quoted words; see also Jamneck 2002 *THRHR* 388–390). The words could mean that the section is only triggered when the descendant and the surviving spouse are co-beneficiaries of the same asset or assets (which the author calls the “narrow view”). Alternatively, it could mean that the section is triggered whenever both a descendant and a surviving spouse are beneficiaries under the will, even when they are each bequeathed separate assets (which the author calls the “broad view”).

Professor Kahn has suggested that the broad view should be preferred because he says it equates to the position under the corresponding section in the Intestate Succession Act (1994 *Supplement to The Law of Succession in South Africa* 71; however, the comment is not repeated in the 2001 edition of Corbett). Section 1(6) of the Intestate Succession Act employs similar wording to section 2C(1) of the Wills Act, but the surviving spouse in intestate succession will always benefit from a repudiation by the deceased’s descendants because the surviving spouse and descendants will always be co-beneficiaries of the same assets, since intestate heirs each inherit an undivided share of the estate (s 1(6) of the Intestate Succession Act, read with s 1(1)(c) thereof). Professor Kahn’s view is supported by the recommendation of the South African Law Commission that “the position in respect of testate representation should be in consonance with the position in respect of intestate representation” (SALC *Project 22 Report* par 5.56). The Commission went on to say, “it is ... recommended that if a descendant of the testator renounces his right to receive a benefit in terms of a will, that benefit should vest in the surviving spouse” (SALC *Project 22 Report* par 5.56). Thus, restricting section 2C(1) to the narrow situation described above was not part of the Law Commission’s recommendations.

If one accepts that the purpose of section 2C(1) is to provide an avenue for a descendant to benefit a needy surviving spouse – by giving up an inheritance, without incurring the possible liability for donations tax and other expenses that could result from adiating and then donating the assets to the testator’s surviving spouse – then this provides a further reason to favour the broad view (see the discussion of the rationale behind the section in part two of this note). It is most unlikely that the legislature would want to facilitate the renunciation, and protect the descendant’s sacrifice from donations tax and other costs, only when the surviving spouse and the descendant are co-beneficiaries of the same asset but not when they are bequeathed different assets.

A further argument against the narrow view is that, in many instances where the surviving spouse and the descendant are co-beneficiaries of the same asset, the surviving spouse will in any event have a right of accrual under common law, which would render section 2C(1) superfluous in those cases. (For a discussion of accrual, see Corbett 243–258; and De Waal and Schoeman-Malan *Law of Succession* 199–203.)

A comparison of the corresponding sections of the Wills Act and the Intestate Succession Act is informative on this question of interpretation. As mentioned earlier, the report of the South African Law Commission that preceded the enactment of these sections recommended that the testate and intestate positions should be in agreement (SALC *Project 22 Report* par 5.56). Section 2C(1) of the Wills Act was enacted by the Law of Succession Amendment Act (43 of 1992), which simultaneously enacted the corresponding changes to the Intestate Succession Act, including section 1(6) of that Act. Section 1(6) of the Intestate Succession Act reads as follows:

“If a descendant of a *deceased*, excluding a minor or mentally ill descendant, who, together with the surviving spouse of the *deceased*, is entitled to a benefit *from an intestate estate* renounces his right to receive such a benefit, such benefit shall vest in the surviving spouse.” (emphasis added)

It is significant to note that – with the exception of the words emphasised in the above quotation, which had to change because of the differing contexts – the wording of the two sections is identical. In particular, they both refer to the surviving spouse and the renouncing descendant being together entitled to “a benefit”. In the context of intestate succession, this requirement is unremarkable, because, as mentioned earlier, the beneficiaries always inherit the *entire estate* in undivided shares. However, in the context of testate succession, where the surviving spouse and renouncing descendant are often bequeathed separate unrelated assets, the words appear to take on a greater significance, possibly suggesting that the surviving spouse and renouncing beneficiary must inherit the same asset in undivided shares in order for the section to be triggered. Seen in this light, the reference to “a benefit” in section 2C(1) of the Wills Act may well have been a clumsy implementation of the Law Commission’s recommendation that the two provisions be “consonant”, using substantially the same words in the two sections, rather than an indication that section 2C(1) of the Wills Act only applies when the surviving spouse and renouncing descendant jointly inherit the same asset.

Taking all the above factors into account, it is submitted that section 2C(1) should be interpreted in accordance with the broad view. This is also the view of Cronjé and Roos (*Casebook on the Law of Succession/Erreg Vonnisbundel* 260). Although Jamneck discusses the issue (Jamneck 2002 *THRHR* 388–389), she comes to no firm conclusion (Jamneck 2002 *THRHR* 390). Until a court rules on the issue, however, it is impossible to say with complete certainty what the correct interpretation of the section is.

6 Persons who cannot benefit from section 2C(1)

It should be noted that, whether following the narrow or broad interpretation of section 2C(1), if the testator chose not to include his or her surviving spouse in the will at all (a choice the testator is entitled to make in terms of the principle of freedom of testation), a descendant beneficiary who would like to benefit the surviving spouse cannot use the provisions of section 2C(1) to achieve this by renouncing his or her inheritance. The section does not operate in favour of a spouse whom the testator has chosen to disinherit.

Furthermore, if the testator included in his or her will a former spouse, from whom the testator was divorced, and the testator's descendant renounced his or her inheritance, then section 2C(1) would not operate in favour of the former spouse. (A former spouse is not a "surviving spouse".) The renounced benefits would devolve in terms of section 2C(2), or in terms of other provisions of succession law if the testator's descendant had no descendants, or to the testator's new spouse if he or she had remarried. Accordingly, a descendant whose mother or father is divorced from the testator cannot benefit his or her parent using section 2C(1).

Finally, section 2C(1) does not stipulate that the surviving spouse must be the parent of the descendant who renounces, in order to benefit from the renunciation. Thus, if a male testator who married under the Marriage Act married a second time, following the dissolution of his first marriage by divorce, and his descendant by his first wife renounced in circumstances in which section 2C(1) applies, the renounced benefit would go to the descendant's stepmother and not to the descendant's actual mother. Effectively, therefore, such a descendant is deprived of benefiting his or her mother by choosing to renounce. (The same would apply *mutatis mutandis* where the testator is female.) For the same reason, if a testator who was married under the Marriage Act had children by a girlfriend (that is, a woman to whom he was not married) and they renounced their inheritances, then the benefit thereof would go to the testator's lawful wife, and not to the descendants of the children who renounced. Accordingly, in the *Moosa* case, the Registrar was incorrect to take the view that the descendants of the children of the second wife were entitled to benefit from the inheritances that their parents renounced (for his view, see *Moosa NO v Minister of Justice supra* par 9).

7 In what proportions do polygynous spouses share a renounced benefit in terms of the reading-in when section 2C(1) operates?

As mentioned earlier, the Constitutional Court was asked to rule that the renounced benefits would always be distributed equally between the surviving spouses whenever section 2C(1) applies, but it refused to do so (*Moosa NO v Minister of Justice supra* par 18). In fact, its order makes no express mention of how the renounced benefits are to be shared between the surviving spouses. It merely rules that, for the purposes of section 2C(1),

the term “surviving spouse’ includes every husband and wife of a monogamous and polygynous Muslim marriage” (*Moosa NO v Minister of Justice supra* par 21, part three of the order). The interesting question is thus how the renounced benefits are to be divided between multiple surviving spouses when section 2C(1) applies, and in particular how they are to be divided in the *Moosa* case.

The section states that the renounced benefit “shall vest in the surviving spouse”; in terms of the reading-in, this includes “every husband and wife” of a Muslim marriage. There is nothing in the section, as amended by the reading-in, that indicates the proportions in which the renounced benefits vest in the surviving spouses, and it must follow that they vest in them in equal proportions. Consequently, if a Muslim testator had more than one wife, and fathered children by each wife, but only the children by one wife renounced in circumstances in which section 2C(1) applies, then the renounced benefit would be shared between all the testator’s surviving wives, and there is no way the renouncing beneficiaries could avoid this. Or if the testator had five children by one wife and four children by another wife, and they all renounced in circumstances in which section 2C(1) applies (as was the case in *Moosa*), then the two spouses will inherit equally, even though more benefits may have been renounced by one wife’s children than by the other wife’s children. (One must bear in mind that the sum of the amounts a wife’s children inherit, and renounce, will be a factor not only of how many children each wife bore the deceased but also of how many of those children were male, because if the deceased had sons and daughters, the sons inherit twice the amount the daughters inherit (see Omar *The Islamic Law of Succession and its Application in South Africa* §10.4; see also the certificate issued by the Muslim Judicial Council (*Moosa NO v Minister of Justice supra* par 6)).

Accordingly, in the *Moosa* case, the two surviving spouses benefit equally from the renunciation, although this is not part of the order of court.

8 Evaluation and discussion

The judgment is welcome insofar as it enhances equality by providing for surviving spouses of Muslim marriages to benefit from a renunciation of a benefit by the descendant of a deceased testator in terms of the provisions of section 2C(1), on the same footing as the survivor of a marriage under the Marriage Act, in the circumstances described in the section. Although the finding of unconstitutionality and the outcome of the decision are in the author’s view correct, the author has a number of criticisms of the judgment. In what follows, these are examined and thereafter the possibly wider implications of the judgment are explored.

An unsatisfactory aspect of the judgment is that the court does not seem to have given sufficient thought to the significance of the deceased’s stipulation in his will that his estate was to devolve in accordance with Islamic law. The judgment of the court *a quo* states, surprisingly without comment, that “[t]he Executor opted not to follow the Islamic law with regard

to renunciation" (*Moosa NO v Harneker supra* par 8). Presumably, this was done because those who renounced their inheritances had stipulated that the renounced benefits were to go to the two wives (*Moosa NO v Harneker supra* par 8). Similarly, after referring to the renunciation, the Constitutional Court simply states without comment that "[the executor] specified that their shares must be distributed equally to the [two wives]" (*Moosa NO v Minister of Justice supra* par 7). There is no mention, in either the judgment of the Constitutional Court or that of the court *a quo*, of any enquiry being made of the Muslim Judicial Council as to the consequences in Islamic law of a beneficiary renouncing his or her inheritance. If a testator is entitled to override the provisions of section 2C(1) in his or her will (a right that the author has argued in favour of in part four of this note), then surely the Muslim Judicial Council ought to have been consulted as to the consequences of the renunciation, because his will states that his estate is to devolve in accordance with Islamic law? As Kernick correctly states:

"In the case of a genuine repudiation, the consequences cannot depend upon the wishes of the beneficiary who wants to repudiate. He must simply repudiate and leave it to the law to determine the consequences." (Kernick *Administration of Estates and Drafting of Wills* (1998) §58.2 fifth par)

Whether Islamic law permits such a renunciation, and the consequences in terms of Islamic law if it does not, are questions beyond the scope of this note. If Islamic law does not countenance a renunciation, could it be that the testator actually died partly intestate insofar as the devolution stipulated in his will was thwarted in part by the refusal of certain beneficiaries to accept the inheritance conferred upon them by Islamic law, and that his will only countenanced an Islamic distribution? If such is the case, then the children would presumably have renounced their intestate inheritances too and section 1(6) of the Intestate Succession Act would have given the benefits to the two surviving spouses. However, the reading-in stipulated in *Moosa NO v Minister of Justice supra* seems to have inadvertently excluded this possibility.

A further criticism relates to the particular remedy chosen by the court. Having found the provisions of section 2C(1) to be unconstitutional in its treatment of Muslim surviving spouses, the court had to choose whether the remedy lay in simply reinterpreting the word "spouse" in light of the "spirit, purport and objects of the Bill of Rights" (s 39(2) of the Constitution), or whether a reading-in was required. In the event, the court ordered a reading-in. While this decision was consistent with the treatment of polygynous Muslim marriages in the context of intestate succession in *Hassam v Jacobs NO (supra)*, the author doubts the choice was correct, as is evident below from a brief overview of the *Hassam* case and *Daniels v Campbell NO (supra)*.

In the *Hassam* case, the court had to deal with a challenge to the exclusion of survivors of a Muslim polygynous marriage from the benefits of intestate succession in that they were not hitherto recognised as "spouses" for the purposes of that Act. The court in *Hassam* ordered that the words "or spouses" be read into the Intestate Succession Act immediately after the

word “spouse” wherever that word appeared in section 1 of that Act (*Hassam v Jacobs NO supra* par 57). The court held that a simple reinterpretation of the word “spouse” in that Act was not permissible, because

“to read the word ‘spouse’ so as to include multiple spouses would be a significant departure from the ordinary, commonly understood meaning of the word, as it is used in the [Intestate Succession] Act.” (*Hassam v Jacobs NO supra* par 48)

Consequently, so the *Hassam* court held, a reading-in was required in order to rectify the unconstitutionality of the Act (*Hassam v Jacobs NO supra* par 48). This is the same approach taken in *Moosa NO v Minister of Justice (supra)*.

In the author’s opinion, however, the Constitutional Court’s treatment of polygynous Muslim marriages in these two cases is inconsistent with its comments in *Daniels v Campbell NO (supra)*. In the *Daniels* case, the court had to deal, *inter alia*, with the exclusion of the survivor of a monogamous Muslim marriage from inheritance under the Intestate Succession Act. The *Daniels* court did not order a reading-in because it found it sufficient to reinterpret the word “spouse” where it appeared in the relevant sections of the Intestate Succession Act (*Daniels v Campbell NO supra* par 37). Although Sachs J (who delivered the majority judgment in *Daniels*) cautioned that the judgment dealt only with monogamous marriages (par 36), it is difficult to see how his comments regarding the natural meaning of “spouse” do not apply equally to both monogamous and polygynous Muslim marriages. He states:

“The word ‘spouse’ in its ordinary meaning includes parties to a Muslim marriage. Such a reading is not linguistically strained. On the contrary, it corresponds to the way the word is generally understood and used. *It is far more awkward from a linguistic point of view to exclude parties to a Muslim marriage from the word ‘spouse’ than to include them.* Such exclusion as was effected in the past did not flow from courts giving the word ‘spouse’ its ordinary meaning. Rather, it emanated from a linguistically strained use of the word flowing from a culturally and racially hegemonic appropriation of it. Such interpretation owed more to the artifice of prejudice than to the dictates of the English language.” (par 19, emphasis added)

It is hard to see how Sachs J’s comments, if they are true of a spouse in a monogamous marriage, are not also true of a spouse in a polygynous marriage. After all, a man’s first bride is in a monogamous marriage unless and until he takes a second wife. Does the term “spouse” naturally cover her until such time as he takes a second wife but thereafter fail to include her? Such linguistic acrobatics make no sense. A failure to recognise such persons as “spouses” in the ordinary meaning of that term, without requiring a reading-in, merely perpetuates the notion that such marriages are somehow lesser marriages. Accordingly, it is submitted that the Constitutional Court ought to have followed the reinterpretation approach, and that doing so would not have involved a linguistically strained use of the word.

In *Moosa NO v Minister of Justice (supra)*, the Constitutional Court did not discuss the possibility of a reinterpretation of the term “spouse” and simply confirmed the reading-in order of the court *a quo*. However, in doing so, it endorsed the decision of the court *a quo*, which had relied on the decision in *Hassam v Jacobs NO (supra)*. The *Hassam* judgment sought to explain away its different treatment of polygynous Muslim marriages by arguing that, in the case of a monogamous marriage, the difference between a marriage under the Marriage Act and a Muslim marriage is merely one of religion, but that, in the case of a polygynous marriage, the additional element of polygyny takes the interpretation of “spouse” (so as to include the survivor of a polygynous marriage) too far (*Hassam v Jacobs NO supra* par 48). The author finds the explanation to be unconvincing in light of Sachs J’s comment in the *Daniels* case, as quoted in the previous paragraph.

If the purpose of section 2C(1) is to enable descendants to benefit a surviving spouse, without incurring the various costs that would be associated with receiving the inheritance and then making a donation of it (as suggested in the discussion of the historical evolution of the section in part 2 of this note), then the Constitutional Court’s refusal to make an order regarding the proportion in which the surviving spouses are to benefit is unsatisfactory as it may have disadvantaged certain descendants. The author is referring to the disadvantage experienced by beneficiaries who wish to benefit a surviving parent by renouncing an inheritance when the survivor was in a polygynous marriage. This disadvantage arises as follows. It is argued in part seven of this note that in terms of section 2C(1), as modified by the reading-in, a renounced benefit vests in all the surviving spouses in equal shares. There is nothing in the wording of the section that can justify allocating the renounced benefit in any other proportions, and nothing that indicates that the renounced benefit only goes to the parent of the descendant who renounced. Thus the result of the reading-in seems to be that (subject to the testator’s freedom of testation) the renounced benefits are always to be distributed equally between the surviving spouses, although the Constitutional Court declined to make an order in those terms. This places the descendants of a polygynous testator at a disadvantage compared to the descendants of other testators because the latter, if they wish to benefit the surviving spouse who is their parent, do not have to concern themselves with whether other beneficiaries are renouncing too, and how much they are renouncing. This is an unsatisfactory outcome of the judgment, rather than a criticism of the court; it is difficult to see how the Constitutional Court could have addressed it differently. The particular order sought by the applicants is not necessarily the best approach, even if the order were modified to protect the testator’s freedom of testation. The decision about how the renounced benefit ought to be shared between the surviving spouses is ultimately something that ought to be addressed by the legislature.

It is submitted that the wording of the order with respect to retrospectivity in the *Moosa* case is problematic. The retrospective effect of the order (backdated to the coming into operation of South Africa’s interim constitution (Constitution of the Republic of South Africa Act 200 of 1993)) is made

subject to the proviso that “it does not invalidate any transfer of ownership ... pursuant to the application of section 2C(1)” that was finalised prior to the date of the order (unless the transferee was on notice of a legal challenge to the constitutionality of the section made on the same grounds as in the *Moosa* case). Where an estate involving a Muslim surviving spouse and descendant-beneficiaries was wound up before the *Moosa* judgment, and the beneficiaries repudiated, then the proper distribution would have been for the renounced benefits to go to the beneficiaries’ children. The *Moosa* case has now retrospectively changed the wording of section 2C(1) to provide in effect that the proper distribution would be to the surviving spouse. The difficulty with making retrospective changes to distribution is that, at common law, it seems that where a wrong beneficiary has been paid, or a beneficiary has received too much, the correct beneficiary has a claim against those who benefitted from the error in distribution. As Corbett states:

“Where the wrong person has been paid out as heir ... the true heir can recover the inheritance with a *condictio* from the wrong one. Where the wrong heir had acted in good faith, recovery will be limited to enrichment at the time of the action.” (Corbett 14)

However, it would be unfair for a surviving Muslim spouse to be entitled to recover an inheritance from the descendants after the *Moosa* judgment if she had failed to challenge the distribution to them at the time of the winding-up of the estate. A suitably worded proviso that limits the retrospectivity of the reading-in order would, therefore, have been appropriate. It is submitted, however, that the particular wording of the proviso included in the actual order in the *Moosa* case is problematic, as explained below.

The problem with the proviso that the court included in its order of retrospectivity is, first, that it only protects the transferees of property that was distributed “pursuant to the application of s 2C(1)”. It does not protect the transferees of property that was distributed pursuant to the application of section 2C(2). The only persons who could have received transfer “pursuant to the application of section 2C(1)” were spouses married to the deceased under the Marriage Act. In other words, the proviso is only relevant to a family, similar to the family in the *Moosa* case, where the deceased had both a spouse married under the Marriage Act and another spouse or spouses married by Muslim rites only, and where the spouse married under the Marriage Act received transfer of the inheritance repudiated by the deceased’s descendants. However, if the deceased had had, for example, two spouses to whom he was married by Muslim rites only, and his children renounced their inheritances, then his grandchildren would have been the proper beneficiaries of the renunciation, but would have benefitted pursuant to section 2C(2), not section 2C(1). Those transferees are not protected by the proviso because its wording is too narrow. Yet this could arguably be the most common situation in which an enrichment claim might result from the retrospective change in the wording of section 2C(1). These descendants may now face a claim brought against them by surviving Muslim spouses who failed to challenge the constitutionality of section 2C when the estate

was being distributed. A full examination of this possibility is, however, beyond the scope of this note.

The proviso also poses difficulties for a descendant who, in the (then correct) belief that section 2C(1) did not apply to marriages solemnised under Muslim law, renounced his or her inheritance with the intention of benefiting his or her children in terms of section 2C(2). If the transfer pursuant to the renunciation has not yet been implemented, then the deceased's surviving spouse(s) will now be entitled to the transfer in terms of section 2C(1), and not the descendant's children. A decision to renounce, once made, is in principle irrevocable except in special circumstances. Thus a beneficiary will have to seek the court's permission to retract a renunciation on the basis that it was not his or her intention for the spouses to benefit from the renunciation. (Regarding the irrevocable nature of a renunciation and the principles governing a retraction thereof, see *Bielovitch v The Master* 1992 (2) SA 736 (N) and *Ex parte Estate Van Rensburg* 1965 (3) SA 251 (C).)

A less significant quibble with the judgment is that, in the course of its argument, the court asserts:

“*[R]egistered* customary law polygamous marriages fall within [section 2C(1)'s] ambit since partners in an African customary law marriage are 'spouses' in a legally recognised marriage.” (*Moosa NO v Minister of Justice supra*, emphasis added)

In the author's view, the correctness of this statement is to be doubted – for two reasons. First, if customary-law marriages fall within the ambit of section 2C(1), it is doubtful that they require registration in order to do so, because section 4(9) of the Recognition of Customary Marriages Act states that “[f]ailure to register a customary marriage does not affect the validity of that marriage”. Secondly, the legal validity of customary-law marriages does not *ipso facto* mean that the surviving spouses of such a marriage are entitled to benefit in terms of section 2C(1), bearing in mind that the court held that the term “spouse” in that section only embraces marriages under the Marriage Act. If the meaning of the word “spouse” in section 2C(1) cannot be reinterpreted to include the survivor of a polygynous marriage (which is the reason the court gives for requiring a reading-in in the *Moosa* case), then how can the section include the survivor of a lawful polygynous marriage entered into under customary law, even if the marriages are “for all purposes recognised as marriages” (as stipulated by s 2(3) and (4) of the Recognition of Customary Marriages Act)? Thus a reading-in, or reinterpretation of the term “spouse”, or some more appropriate provision in the Recognition of Customary Marriages Act, may be required in order to entitle the survivor of a lawful customary-law marriage to the benefits of section 2C(1) of the Wills Act. The survivor of a marriage or union under the Civil Union Act is arguably in a stronger position because of the more detailed provisions of section 13 of the Civil Union Act. Section 13(1) expressly states that “[t]he 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”. Furthermore, section 13(2)(b) states that any reference to “husband, wife, or

spouse in any other law ... includes a civil union partner" (emphasis added). Sections 2(3) and (4) of the Recognition of Customary Marriages Act do not go nearly so far. This criticism does not, however, detract from the correctness of the court's final decision in *Moosa*.

It is submitted that the Constitutional Court was unwise to refuse the request by the respondents and the *amicus curiae* for an order to be made allowing any interested person to approach the court for a variation of its order "should any serious administrative or practical problems arise in the implementation of [the] order" (*Moosa NO v Minister of Justice supra* par 19). It gave as its reasons that the retrospectivity of the order is limited, and that the applicants had not asked for such an order (paraphrased from par 19). In the author's view, this omission is unfortunate because there was no one before the court to represent the interests of other persons who may be deprived of the benefit of section 2C(2) by the court's order. This includes persons affected by the retrospectivity of the order.

It is questionable whether the court's approach to the award of costs was fair. The Constitutional Court made no order as to costs (*Moosa NO v Minister of Justice supra* par 21), and no costs order was made in the court *a quo* in respect of the proceedings there (*Moosa NO v Harneker supra* par 38). This contrasts with the costs order in *Hassam v Jacobs NO (supra)* (in which an order was made for polygynous Muslim spouses to inherit as surviving spouses on intestacy) where the Constitutional Court made a costs order against the Minister in respect of both the proceedings in the court *a quo* and those before the Constitutional Court (*Hassam v Jacobs NO supra* par 56 and 57). The court in *Hassam* supported its costs order with the comment that "the applicant launched these proceedings to vindicate her constitutional rights. Moreover she has been wholly successful" (*Hassam v Jacobs NO supra* par 56). Perhaps it is time for costs orders against the relevant Minister to be the norm in matters such as this. As Amien has correctly pointed out, such applications involve substantial financial and emotional costs to the applicants (Amien "A Discussion of *Moosa NO and Others v Harnaker [sic] and Others* Illustrating the Need for Legal Recognition of Muslim Marriages in South Africa" 2019 *Journal of Comparative Law in Africa* 115 128). One might add that they also involve undesirable delay. On the other hand, a brief survey of the range of working papers that have been issued by the South African Law Reform Commission in its Project 25, which deals with the updating of legislation in light of the equality clause, reveals what a truly Herculean task this is. (For the Commission's interim views relating, *inter alia*, to the Wills Act, see South African Law Reform Commission *Discussion Paper 129 Project 25 Statutory Law Revision: Legislation Administered by the Department of Justice and Constitutional Development* (October 2011). This discussion paper does not, however, envisage any changes to section 2C of the Wills Act (Jamneck "The Problematic Practical Application of Section 1(6) and 1(7) of the Intestate Succession Act Under a New Dispensation" 2014 *PER* 991), although it does propose certain changes to the corresponding sections of the Intestate Succession Act, which are critically evaluated in Jamneck's article.)

Putting aside these criticisms of the *Moosa* case, it is worth noting that it has potential significance in a number of situations outside the particular context of section 2C, as appears from the discussion below.

The *Moosa* case is significant for persons married by Hindu rites. The reasoning adopted there with respect to survivors of Muslim marriages is equally applicable to the survivors of marriages by Hindu rites. Clearly, the survivor of a Hindu marriage should also be entitled to enjoy the benefit of section 2C(1). Since such marriages are monogamous, this should be achievable by a reinterpretation of the term “surviving spouse” so as to include such a survivor.

The decision in the *Moosa* case may also have implications for other sections of the Wills Act in which the term “spouse” is used, such as sections 2B and 4A of the Act. Section 2B of the Act treats a “previous spouse” as predeceased if the testator dies within three months after his or her marriage to the “previous spouse” was dissolved by a “divorce or annulment by a competent court”, if the execution of the will preceded the dissolution. (For a discussion of section 2B, see Corbett 541; De Waal and Schoeman-Malan *Law of Succession* 103; Wood-Bodley “Wills, Divorce, and the Provisions of Section 2B of the Wills Act: *Louw NO v Kock*” (2018) 135 *SALJ* 418.) Persons who cannot benefit from the operation of this section, because there is still no general recognition of Muslim or Hindu marriages in our law, may wish to challenge the constitutionality of the section on the basis that, as in the *Moosa* case, the differentiation involved has no rational connection to any legitimate governmental purpose. A full constitutional analysis of this issue is, however, beyond the scope of this note.

Section 4A(1) of the Wills Act deprives persons who wrote out the will by hand, or who participated in the execution of the will in certain specified ways, of the capacity to inherit under the will (unless one of the exceptions in section 4A(2) applies). (For a discussion of s 4A, see Corbett 86–87; and De Waal and Schoeman-Malan *Law of Succession* 121–124.) The section also deprives “the spouse of such person at the time of the execution of the will” of the capacity to inherit under the will (s 4A(1)). Such person’s inheritance then goes to another beneficiary determined by the provisions of the will or, in the absence of a relevant provision, to the deceased’s intestate beneficiaries. Suppose the spouses of the testator’s two sons witnessed the testator’s will. If son “A” and his spouse were married under the Marriage Act at the time, then, in terms of section 4A(1), son “A” is deprived of capacity to take any benefit under his father’s will. However, if son “B” and his spouse were married only by Muslim or Hindu religious rites at the time, then son “B” would not be deprived of the capacity to benefit under his father’s will. It is difficult to see a rational connection to any legitimate governmental purpose in this differentiation. The decision in the *Moosa* case, in another context of the Wills Act, providing for equal recognition of marriages celebrated only by religious rites, lends support to the notion that section 4A(1) may also be open to constitutional challenge. A full constitutional analysis of this issue is, however, beyond the scope of this note.

Finally, in view of the substantial similarity between the provisions of sections 1(6) and (7) of the Intestate Succession Act and sections 2C(1) and (2) of the Wills Act, the judgment suggests that the failure to provide for Muslim and Hindu marriages in section 1(6) of the Intestate Succession Act will not pass constitutional scrutiny. (For a discussion of these sections and proposals for their amendment currently under consideration by the South African Law Reform Commission, see Jamneck 2014 *PER* 3).

9 Conclusion

The decision in *Moosa NO v Minister of Justice (supra)* is welcomed insofar as it advances equality by including the survivors of Muslim marriages (both monogamous and polygynous) in the benefits conferred on a surviving spouse by section 2C(1) of the Wills Act. The decision does not affect the position of surviving Hindu spouses, nor of the survivors of unformalised same-sex relationships who have undertaken reciprocal duties of support; these persons continue to be excluded from the benefit of section 2C(1).

It seems that the surviving spouses and partners in marriages and civil unions under the Civil Union Act already enjoy the benefits of section 2C(1) (see s 13(2)(b) of that Act). According to the *Moosa* judgment, surviving spouses in registered marriages under African customary law do so too, although the correctness of this statement is open to doubt, for reasons indicated in part eight of this note.

The applicants in the *Moosa* case were not awarded a costs order against the Minister of Justice. It is unfortunate that members of the public who successfully enforce their rights under the equality clause, to the benefit also of other similarly placed citizens, should have to carry their own costs.

The reading-in ordered by the Constitutional Court is backdated to operate from 27 April 1994 (*Moosa NO v Minister of Justice supra* par 21, part three of the order). However, a proviso to the order protects from challenge transfers of ownership pursuant to section 2C(1) that were completed before the date of the order, provided that the parties were not on notice of a challenge to the constitutionality of section 2C(1), on the same grounds as in *Moosa*, when the transfer took place (*Moosa NO v Minister of Justice supra* par 21, part three of the order). There is no similar proviso, however, with respect to transfers made pursuant to section 2C(2). It seems that this may open the way to claims by Muslim surviving spouses against persons who received benefits in terms of section 2C(2) that were renounced by a descendant of the testator after 27 April 1994. Furthermore, a descendant who after 27 April 1994 renounced his or her inheritance in the expectation that the benefit would pass to his or her descendants in terms of section 2C(2) may now need to apply to court for permission to retract the repudiation if ownership in the relevant property has not yet been transferred. This is because a repudiation (once made) is regarded in our law as irrevocable, except in exceptional circumstances. A full exploration of these issues is, however, beyond the scope of this note.

The *Moosa* judgment was not required to deal with the vexed question of the precise circumstances that trigger the operation of section 2C(1); nor with the question whether a testator can override the provisions of section 2C(1) by making an appropriate stipulation in his or her will. For the reasons set out in part five of this note, it is submitted that section 2C(1) should be broadly interpreted so that it operates whenever a surviving spouse and a descendant (who renounces) inherit under the will, not only when they are inheriting as co-beneficiaries of the same asset or assets. It is further submitted, for the reasons discussed in part four of this note, that a testator can override the provisions of section 2C(1) by appropriate provisions in his or her will. These points are open to some doubt, however, and will remain moot until addressed in the courts.

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