Innovative Approaches to the Division of an Inheritance in a Deceased Estate: Lessons from the Babylonians 2000-1600 BCE

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Abstract

This article provides insights into the legal and social contexts surrounding inheritance divisions in both Old Babylonian and South African cultures. It proposes an innovative approach to the division of inheritance in South Africa that is in line with the country's constitutional values and diverse cultural heritage. In order to compare the inheritance divisions, the study identifies the shared characteristics between Old Babylonian and South African practices. These inheritance divisions often involve disagreements and complexities among heirs, which may result in negotiations and the reorganisation of inheritances through mechanisms like sale, donation or exchange. By highlighting these commonalities the article sheds light on the differences and similarities in the legal and social contexts in which these divisions occur. While the South African approach has been influenced by Roman-Dutch legal scholars, incorporating the adaptable legal practices of the Old Babylonian tradition could introduce further innovation and adaptability to the South African inheritance division process.

Keywords

Inheritance; redistribution agreement; family division; succession law; inheritance law; customary law; comparative law, ancient Near Eastern Studies; Old Babylonia; executor.

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1 Introduction

The division of inheritance has been a long-standing practice throughout history,[1] with its origins dating back to the Babylonians over four thousand years ago.[2] While the Babylonians faced the challenge of dividing a shared inheritance from a deceased family member's estate, South African contemporary jurists recognise the precursor to inheritance division as the Roman institution of co-ownership division.[3] This concept later evolved into a family inheritance division in Roman-Dutch law, the source of South African common law.[4] In the nineteenth century South African court cases initially recognised the division of inheritance among family members.[5] However, in South Africa from the 1910s to the 1960s the scope of the family inheritance division expanded to include heirs who were not necessarily family members but were only required to be legally recognised as heirs.[6] This broader understanding of inheritance division was limited to the administration process of a deceased estate and therefore referred to as a redistribution agreement.[7] Overall, the historical evolution of inheritance

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1 Westbrook *Property and Family* 118-119 cites Daube 1950 *Jur Rev* 71-91 and Koschaker 1933 *ZA* 37-42, 46-51, 68-80 to demonstrate that the division of co-ownership is an ancient institution derived from the Bible and cuneiform documents. For more information on the Old Babylonian inheritance divisions, see Van Wyk 2013b *Fundamina* 424; Claassens *Family Deceased Estate Division Agreements* vol 1 107-150, 224-231; Van Wyk 2018a *JSem* 1-21 analysis of case studies gleaned from cuneiform recordings.

2 The article focusses on the Babylonians' inheritance division from the Old Babylonian period. See Claassens *Family Deceased Estate Division Agreements* vol 1 127-131; 175-202 discussion of the Old Babylonian inheritance division's legal practices from Sippar, Nippur, and Larsa, and Van Wyk 2014a *JSem* 195-236.

3 Westbrook *Property and Family* 118-119; Van Wyk 2013b *Fundamina* 424; Van Warmelo 1950 *THRHR* 291.

4 Kaser 1984 *Römisches Privatrecht* 123, 225; Van Warmelo 1950 *THRHR* 217, 223-227, 232.

5 *Esterhuizen's Executor Dative v Registrar of Deeds* 5 Searle 124 (the "*Esterhuizen* case"); *Testate Estate of John McDonald* (1897) 18 NLR 156 (the "*McDonald* case").

6 *Bydawell v Chapman* 1953 3 SA 514 (A) 520H (the "*Bydawell* case"); *Klerck v Registrar of Deeds* 1950 1 SA 626 (T) 630-631 (the "*Klerck* case"); ss 14(1)(b)(iii) and (iv) of the *Deeds Registries Act* 47 of 1937 (the "*Deeds Act*"). See my discussion in paras 5-6.

7 Contrarily, the division of a family inheritance may occur at any time, even years after the death of the testator. See my discussion in para 2; *Bydawell* case 520H; *Klerck*

division demonstrates its possible roots in Old Babylonian practices, its development in Roman-Dutch law, and its subsequent expansion in South African legal contexts.

In this article I explore the similarities and differences between the Old Babylonian and South African inheritance divisions[8] with a particular focus on the legal practices[9] employed by each.[10] At the heart of any inheritance division are the disagreements and complications that arise among heirs, which necessitate negotiations and the reshuffling of inheritances through mechanisms such as sale, donation or exchange.[11] These negotiations take into account a range of factors,[12] including legal restrictions, personal preferences, and agricultural and architectural factors.[13] However, I argue that while the South African approach to inheritance division has been influenced by Roman-Dutch legal scholars, there are legal practices of the Old Babylonian tradition that could inform a more innovative and adaptable approach to inheritance division in contemporary South Africa.

I start by providing background information on the Old Babylonian legal practices concerning inheritance division and the terminology associated with such divisions. Then I present a simplified example to illustrate the common qualities required for both Old Babylonian and South African inheritance divisions. Next I compare the methods of recording and documentation employed by Babylonian scribes with the approaches used in South Africa with the division of an inheritance. Afterward I explain the key features of the Old Babylonian inheritance division, with its focus on

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case 630-631 and compare with ss 14(1)(b)(iii) and (iv) of the *Deeds Act*.

8 Claassens *Family Deceased Estate Division Agreements* vol 2 451-455 identified similarities between the inheritance division in Old Babylonian society and the South African redistribution agreement in terms of their elements and division mechanisms.

9 The article refers to "legal practices" as a more appropriate term than "legal constructions" for its focus on practical procedures and methods. While it will touch on legal constructions to better understand the procedures and methods, the article's limited scope prevents an extensive examination of their legal principles.

10 See Westbrook *Property and Family* 118-141 and Claassens *Family Deceased Estate Division Agreements* vol 1 23-50 outline of the characteristics of Old Babylonian law that are not exhaustive and reflect the various dimensions of ancient Mesopotamian law traditions.

11 Regarding the South African counterpart, see Meyerowitz *Law and Practice of Administration of Estates* para 12.31*; Klerck* case 630-631; *Bydawell* case 523B. See Claassens *Family Deceased Estate Division Agreements* vol 1, 345, 356-357 analysis of the Old Babylonian inheritance division case studies.

12 In the following South African cases, reshuffling was necessary due to impractical circumstances: *Ex parte Evans and Evans* 1950 3 SA 732 (T); *Lubbe v Kommissaris van Binnelandse Inkomste* 1962 2 SA 503 (O). Regarding Old Babylonian inheritance division, see Claassens *Family Deceased Estate Division Agreements* vol 1 127, 357-368, 377-380.

13 See *Klerck* case; *Ex parte Jooste* 1968 4 SA 437 (O). Regarding Old Babylonian inheritance division, see Claassens *Family Deceased Estate Division Agreements* vol 1 127, 357-368, 377-380.

holding greater flexibility and ability to adapt to individual family circumstances. In contrast I highlight the key features of the South African approach, which prioritise certainty through established precedents. Finally I propose the incorporation of four legal practices from the Old Babylonian inheritance division into the South African context. I argue that by drawing on the adaptable legal practices of the Babylonians, South Africa can develop redistribution agreements that better cater to the unique needs of its multicultural society. Moreover, these agreements would uphold the principles of equality, fairness, and the protection of vulnerable family members of the *Constitution of the Republic of South Africa*, 1996 (hereafter the "*Constitution*").

2 Terms and expressions assigned

The division of inheritance has been referred to by various terms and expressions depending on the legal system and time period. In Roman-Dutch law it was called a family division,[14] and in nineteenth century South African law it was referred to as a family agreement,[15] similar to its Roman-Dutch counterpart. Later court decisions and sections 14(1)(b)(iii) and (iv) of the *Deeds Registrations Act* 47 of 1937 (hereafter the "*Deeds Act*") called the South African equivalent of an inheritance division a redistribution agreement.[16] South African court decisions from the 1910s until the 1960s made a distinction between a redistribution agreement and the Natal practice of a family agreement, which was similar to the legal practice supported by English Courts.[17]

In other countries it may be labelled as a family division, an inheritance division, distribution, or a partition agreement.[18]

Similarly, scholars have used a variety of terms to describe the similar agreement found in the Old Babylonian period, such as a division agreement, an inheritance division, a family division, a partition or an allotment.[19]

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14 Voet *Commentarius ad Pandectas* para 10.2.32. See Huber *Heedensdaegse Rechtsgeleertheyt* para 3.29.16; Maasdorp *Introduction to Dutch Jurisprudence* 297-298.

15 *Esterhuizen* case; *McDonald* case.

16 *Bydawell* case; *Klerck* case.

17 *Ex parte Bloch* 1936 WLD 48; *Ex parte MacPherson* 18 CTR 154; *Ex parte Forbes* 1912 NPD 352; *In re Estate Linder* 1935 NPD 99. For over 80 years the family agreement was practiced in Natal. See *Bydawell* case 518H-519A, 521A-C.

18 For example, Mitra *Hindu Law of Inheritance* 63-133 examines the partition as a well-known practice in Hindu Law. Van Wyk 2018a *JSem* 1-21 provides a comparative analysis of the division of ownership in the Book of Joshua and the Old Babylonia inheritance division, highlighting both similarities and differences.

19 For example, Kitz 2000 *JBL* 615 and Sjöberg *Sumerian Dictionary* 193 make reference to an "Old Babylonian exchange and partition document" and Ellis 1974

For the purpose of this article I will focus on two specific agreements: the South African redistribution agreement and the Old Babylonian inheritance division from Mesopotamia. The expressions "inheritance division" or "division of an inheritance" used in this article refer generally to those agreements in which heirs agree to reshuffle their inheritance property through sale, donation or exchange.

3 Who were the Babylonians?

The Babylonians from the Old Babylonian period lived in the region now known as Syria, Iraq, and parts of Turkey between 2000 and 1600 BCE.[20] For readers with religious backgrounds such as Christians, Muslims and Jews, the region may be recalled as the "Garden of Eden",[21] while others may associate it with the Iraq-wars or the social media's description of it as the "Cradle of Human Civilisation".[22] Scholars of ancient Near Eastern studies commonly refer to the region as "Mesopotamia", a term which refers to an area which is located between the Euphrates and Tigris rivers and which was part of the ancient Near East.[23] The name "Mesopotamia" derives from the ancient Greek historians who used the word *meso* to mean "between" and *potamia* to mean "river".[24] For thousands of years various nations inhabited this region, and we identify and categorise the different cultures based on specific types of tools, weapons or structures.[25]

In Mesopotamia the inhabitants were involved in legal transactions as early as 3000 BCE.[26] A significant number of cuneiform tablets[27] have been excavated from the Old Babylonian Period, but many still need to be

JCS 133 to a "division of an inheritance". Also see Claassens *Family Deceased Estate Division Agreements* vol 1 1-2; Van Wyk 2013a *Fundamina* 150-151.

20 Van de Mieroop *History* 85-86.

21 Liverani 1996 *JESHO* 1-2.

22 Van de Mieroop *History* 5. Over the past few decades, numerous newspaper reports have shed light on the ongoing destruction caused by the Iraqi wars. One such report captures the frustration experienced by Chicago's Oriental Institute scholars specialising in the ancient Near East as they strive to recover stolen cultural artefacts of the Mesopotamian culture. Jones 2003 https://www.chicagotribune.com/ct-iraq-connection-jones-2003-column.html.

23 The term "ancient Near East" was initially used by nineteenth-century scholars. Today, the region is also referred to as the Middle East. However, contemporary scholars typically define the ancient Near East as the area extending from the Aegean coasts of Turkey to central Iran, and from Northern Anatolia to the Red Sea. Although Egypt shares historical connections with the ancient Near East, its inclusion in this classification varies. The period typically associated with the ancient Near East spans from 3000 to 323 BCE. Van de Mieroop *History* 1-3, 7-10.

24 See Oppenheim *Mesopotamia* 35-48.

25 Knapp *History and Culture* 23-24; Oppenheim *Mesopotamia* 7-30.

26 See Westbrook "Character of Ancient Near Eastern Law" 5-6; Veenhof "Before Ḫammu-rāpi of Babylon" 142-143; Liverani 1996 *JESHO* 20-25.

27 See my discussion in para 4.1.

transcribed and translated.[28] In these recordings we can recognise legal practices similar to ours, such as a usufruct, fideicommissum, trust etcetera.[29] However, the legal practices and transactions reflected in these records represent only a small portion of the transactions concluded in the Old Babylonian period.[30] This is because, as Malul[31] points out, the recording of transactions was primarily intended to capture the most essential details of an agreement.[32]

In the past, museums used to categorise cuneiform tablets based on topics such as "letters" or "legal and administrative documents".[33] Contemporary scholars have now come to realise that certain recordings belong to family archives.[34] In recent years the ARCHIBAB project[35] has aimed to create an open-access database for publishing Old Babylonian documents that are identified as part of an identified family archive. This digital database platform is intended to address the gaps caused by the wide dispersal of these recordings.[36]

Also, we are fortunate that extensive studies have been conducted in the field of ancient Near Eastern legal traditions. Some notable studies during the Old Babylonian Period include Schorr's pioneering work in 1913,[37] which examined Old Babylonian civil procedure law. The late Prof Raymond Westbrook, a qualified lawyer, conducted studies on various topics such as marriage contracts, inheritance divisions, partnerships, leases, adoptions and sales.[38] Other focussed studies include those of Skaist,[39] who explored Old Babylonian loan contracts and outlined different loan types and individual formulas. Westbrook and Jasnow[40] delved into the topic of

28 According to Westbrook "Old Babylonian Period" 361-359, esp. 362 there are thousands of excavated cuneiform tablets that can be identified as legal transactions such as sales, deeds, bonds, leases, loans, partnerships, marriage contracts, adoptions, and divisions of inheritances.

29 See the analysis of case studies in Claassens *Family Deceased Estate Division Agreements* vol 1 142-145; Van Wyk 2014a *JSem* 195-236; Van Wyk 2014b *JSem* 443-483; Van Wyk 2018 *Fundamina* 170-197; Van Wyk 2019a *JSem* 1-24; Van Wyk 2019b *JSem* 1-34; Van Wyk 201b *JSem* 1-27.

30 Westbrook "Character of Ancient Near Eastern Law" 11.

31 Malul Studies in *Mesopotamian Legal Symbolism* 449-450.

32 See *Westbrook Old Babylonian Marriage Law* 16.

33 Jacquet "Family Archives" 70; Charpin "Historian" 26-30.

34 Jacquet "Family Archives" 63-85, 70; Charpin "Historian" 24-58.

35 Charpin 2008 http://www.archibab.fr/en/accueil.htm. "Archives Babyloniennes" (*ARCHIBAB*) was developed by Dominique Charpin and Antoine Jacquet, under the direction of Charpin.

36 Charpin 2008 http://www.archibab.fr/en/accueil.htm.

37 *Schorr Urkunden des Altbabylonische Zivil-und Prozessrechts*.

38 Some of Westbrook's list of contributions are *Old Babylonian Marriage Law*; *Property and Family*; 1991 *JAOS*; "Old Babylonian Period"; "Adoption Laws of Codex Hammurabi".

39 *Skaist Old Babylonian Loan Contract.*

40 Westbrook and Jasnow "Old Babylonian Period" 63-91.

security for debt, while Roth[41] made significant contributions to the understanding of marriage and gender issues. Stone and Owen,[42] along with Van Wyk,[43] Suurmeijer[44] and Obermark[45] researched case studies on different types of adoptions and inheritance divisions. Spada[46] made a contribution in the in-depth study of an array of contracts.

Westbrook, the editor of a two-volume comprehensive analytical survey of ancient Near Eastern law,[47] in a collaborative effort involving twenty-two scholars, stated that the ancient Near East was the birthplace of the world's oldest known law and serves as the precursor to present-day Western legal systems, namely the Common Law and the Civil Law.[48] According to Westbrook[49] the legal traditions of the ancient Near East, including Mesopotamia, are "the product of many societies with different languages and cultures that flourished, declined and were replaced by others over the course of thousands of years". To gain a better perspective on the timeframe being referred to in relation to others, scholars often say that the Babylonians were as ancient to the Romans as the Romans are to us.

3.1 Requisite qualities of inheritance division: an overview

In order to compare the inheritance divisions of the Old Babylonian and South African legal traditions, it is necessary to identify their commonalities, which are referred to as the *tertium comparationis*, also known as "the third element of comparison". It is an analogical method of reasoning for establishing legal principles and involves comparing two cases that have many similarities but also important differences. The *tertium comparationis* serves as the common factor connecting the two cases, allowing for the inference of a legal principle from one case to another.[50] This method will serve as the basis for comparing the legal and social contexts in which these inheritance divisions occurred, as well as their similarities and differences. An example of an inheritance division will be used to illustrate the requisite qualities that all such divisions have in common. Subsequently, a brief outline of the identified requisite qualities of inheritance divisions will be provided.

41 For instance, Roth "Gender and Law" 173-184 and Roth 1987 *Comp Stud Soc Hist* 715-747.
42 Stone and Owen *Adoption,* esp. Stone "Adoption in Nippur" 1-33.
43 Van Wyk 2019a *JSem* 1-24; Van Wyk 2019b *JSem* 1-34.
44 Suurmeijer 2010 *RA* 9-40.
45 Obermark *Adoption*.
46 *Spada Model Contracts*.
47 *Westbrook History of Ancient Near Eastern Law* vols 1 and 2.
48 Westbrook "Character of Ancient Near Eastern Law" 1. Also see Veenhof "Before Ḫammu-rāpi of Babylon" 137.
49 Westbrook "Character of Ancient Near Eastern Law" 2.
50 For details on the methodology employed, see Sacco 1991 *Am J Comp Law* 1-34; Van Reenen 1995 *CILSA* 175-199.

3.2 A simplified example of the common qualities of both Old Babylonian and South African inheritance divisions

Heirs can agree to reshuffle their inheritance property through a sale, donation or exchange. For example, A, B and C inherit undivided shares in 5000 hectares of farmland and two motor vehicles. However, legal restrictions and practical challenges make the co-ownership of vehicles and the transfer of farmland to more than one heir difficult. To address these challenges the heirs can sell the inheritance property and distribute the proceeds equally or reshuffle the property to reach a mutually agreeable solution. For instance A could receive the farmland in exchange for B and C each receiving a vehicle. A could then contribute cash to cover the estate debts and balance A's award of the farmland. This division would allow each heir to receive a benefit that was practical and legally permissible.

3.3 Division of an inheritance: common requisite qualities

Inheritance division in both South Africa[51] and Old Babylonia[52] has certain requisite qualities that include:

Disagreement or complication: The division of inheritance begins with disagreement or complication, as observed by the Roman-Dutch legal scholar Voet, who famously stated that co-ownership is "the source of disagreement and carelessness".[53]

Negotiations to reshuffle inheritance: Heirs could avoid these issues by negotiating and agreeing on the allocation of the inheritance property while adhering to legal requirements and restrictions to ensure fairness.[54] In all of the inheritance divisions the intention of the heirs taking part in the agreement to re-allocate estate assets must be clear.[55]

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51 Nel *Jones Conveyancing* 80-86; Claassens 2004-2005 *Tydskrif vir Boedelbeplanningsreg* 65-93; Meyerowitz *Law and Practice of Administration of Estates* paras 12.31, 13.17.

52 For more information on the requisites of Old Babylonian inheritance divisions, see Van Wyk 2013b *Fundamina* 424 and Claassens *Family Deceased Estate Division Agreements* vol 1 224-231.

53 Voet *Commentarius ad Pandectas* para 10.2.32.

54 In Roman-Dutch law the consensual basis of an inheritance division was emphasised by Voet *Commentarius ad Pandectas* para 10.2.32. See the *Klerck* case 630-631 regarding the South African counterpart. In Old Babylonia all the recorded texts concerning the division of inheritances consistently state that the parties involved must "mutually agree to the division". Claassens *Family Deceased Estate Division Agreements* vol 1, 345, 356-357.

55 See Claassens *Family Deceased Estate Division Agreements* vol 1 107-50 comparison of the inheritance divisions in the city-states of Old Babylonian Larsa, Sippar and Nippur. See the *Klerck* case regarding the South African counterpart. Other options in common are that the heirs could sell the inheritance property and divide the proceeds, retain ownership and lease the property for rental income.

Mechanisms to reshuffle: Heirs have the option of transferring their inheritances through various mechanisms, including sale, donation or exchange.[56] In a South African law case, *Klerck v Registrar of Deeds* (hereafter the "*Klerck*-case"),[57] Judge Dowling referred to these mechanisms as "vehicles of redistribution".[58]

Dealing with estate or movable property: All division agreements require heirs to deal with the properties of the deceased estate or property outside the estate that may be introduced by a party to the agreement to equalise the allocation of inheritance properties.[59]

4 Comparing the recording of inheritance division in Old Babylonia with its South African counterpart

4.1 Old Babylonian recording: abridged version of oral arrangements

In Old Babylonia parties orally agreed on legal practices that were unique to each agreement, time and city-state.[60] In some cases a scribe was hired to create a recording based on the agreed-upon oral arrangements, using a scribal school template.[61] These recordings were done on clay tablets, which have been excavated, transcribed and translated by contemporary scholars.[62] An example of an Old Babylonian inheritance division record can be found in Addendum A to this article.

It is important to clarify that the term "recording" is preferred over "text" when referring to the Old Babylonia inheritance division, as the Old Babylonian society relied heavily on oral traditions and did not view recordings as the

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56 According to Roman-Dutch law, family heirs who inherited together had the option to redistribute their shared inheritance. Huber *Heedensdaegse Rechtsgeleertheyt* para 3.29.16; Maasdorp *Introduction to Dutch Jurisprudence* 297-298. In an analysis of the forty-six division recordings from Old Babylonian Nippur, Larsa, and Sippar, Claassens *Family Deceased Estate Division Agreements* vol 1 107-150 reflect on the use of various mechanisms, such as sale, donation or exchange, depending on the specific circumstances of each family.

57 *Klerck v Registrar of Deeds* 1950 1 SA 626 (T) (the "*Klerck* case").

58 *Klerck* case 630-631.

59 The Roman-Dutch law recognised the option to bring-in property as a redistribution mechanism. See Huber *Heedensdaegse Rechtsgeleertheyt* para 3.29.16; Maasdorp *Introduction to Dutch Jurisprudence* 297-298. Regarding the South African counterpart, see *Klerck* case 630-631; *Cradock's Estate v Cradock* 1951 3 SA 51 (N) 59C; Meyerowitz *Law and Practice of Administration of Estates* para 13.17. See examples from Old Babylonian recordings in Claassens *Family Deceased Estate Division Agreements* vol 1 125-126, 356 and my further discussion in para 7.1.

60 See Westbrook and Jasnow "Old Babylonian Period" 361-340.

61 See Westbrook and Jasnow "Old Babylonian Period" 362, 399-401 regarding the Old Babylonian contract and its recording. Compare Van Wyk 2013a *Fundamina* 156; 146-171.

62 See Oppenheim *Mesopotamia* 283 re-evaluation of the origins of cuneiform script.

final and binding agreement.[63] This stands in contrast to contemporary societies, which rely on written documentation to create fixed, unchanging agreements.[64]

The work of Old Babylonian scribal schools and their trained scribes have provided invaluable assistance in our understanding of the recordings of inheritance divisions, as well as a vast corpus of other types of literature.[65] However, it should be noted that Old Babylonia was still predominantly a preliterate society.[66]

The recording of an inheritance division was considered a significant achievement in a scribe's education, and training in drafting contracts was given only in the final stage of a scribe's education.[67] The recorded inheritance division was typically part of the tablets identified as "Type II-" or "Teacher-Student tablets"[68] and several hundred exercises have survived based on model contract templates.[69] The Old Babylonian city-state of Nippur was particularly renowned for its excellence in crafting a precise recording of an inheritance division, which had a fixed structure and larger vocabulary than other recordings, such as an adoption recording. However, the details of the assets of the estate recorded on the clay tablet varied depending on the scribe's style.[70]

Westbrook[71] notes that the purpose of recording an inheritance division was not to conclude the content but rather to establish the various transactions that accompanied it. This indicates that family members participated in various ceremonies to secure the agreed-upon arrangements.[72] The

63 Renteln and Dundes "What is Folk Law?" 1-4. See Hibbits 1992 *Emory LJ* 873-960, esp 874.

64 See Van Wyk 2019a *JSem* 1-7.

65 Westbrook "Character of Ancient Near Eastern Law" 5-6; Veenhof "Before Ḫammu-rāpi of Babylon" 137-161.

66 Pearce "Scribes" 2265-2278.

67 Veldhuis *Elementary Education* 63; Robson 2001 *RA* 39; Pearce "Scribes" 2265-2278.

68 The obverse and reverse of a medium size tablet were approximately 13 x 8 x 3.5 cm. Veldhuis *Elementary Education* 31.

69 Spada *Model Contracts*; Veldhuis *Elementary Education* 40-41. Different exercises were written on a tablet. In the left column the teacher wrote an extract from a model contract and the student re-copied it on the right side, until the exercise was mastered. Veldhuis 1996 *Dutch Studies-Nell* 16, 31; Veldhuis *Elementary Education* 30-31; Robson 2001 *RA* 45; Spada *Model Contracts* 60. See Spada *Model Contracts* 78-79 regarding an inheritance division school exercise tablet that was partly preserved.

70 Veldhuis 1996 *Dutch Studies-Nell* 24 refers to the Nippur Old Babylonian scribal schools as following the tradition of an "overdose of highbrow Sumerian", which was similar to Latin for us. See Robson 2001 *RA* 39, 60; Claassens-van Wyk 2013 *JSem* 62; Claassens *Family Deceased Estate Division Agreements* vol 1 93,104 and Van Wyk 2019b *JSem* 1-34.

71 Westbrook *Old Babylonian Marriage Law* 16.

72 Westbrook *Property and Family* 118-141.

inheritance division was recorded in an abbreviated form that reflected the agreed-upon oral arrangements[73] made through verbal[74] and symbolic communication.[75] The recordings contained special legal terms that reflected the symbolic gestures used.[76] Distinct phrases present in all the recordings such as the "division is finished" and "they agree to the division" conveyed the finality of the division.[77] Occasionally this mutual consent clause is reinforced by the statement that their "hearts were satisfied with the division",[78] indicating a sense of contentment and consensus regarding the terms of the division. Sometimes the recording refers to "as much as there is", implying the division of the entire estate, or "everything was divided from straw to gold", which signifies the comprehensive distribution of the inheritance from the least valuable items to the most precious estate assets.[79]

The so-called "no-claim" clause was widely used in various legal documents, including most of the recorded inheritance divisions. This clause typically stated that the parties involved would not make claims against each other, raise claims, or speak against one another.[80] Generally the oath clause occupied a special position, after the provisions and no-claim clause but before the date and the names of the witnesses. Each city-state's scribal school used its own formula or specific wording, usually invoking the names of the gods of the city-state and/or the king.[81]

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73 Hibbits 1992 *Emory LJ* 874; Renteln and Dundes "What is Folk Law?" 2-4; Westbrook "Adoption Laws of Codex Hammurabi" 195-204; Malul *Studies in Mesopotamian Legal Symbolism* 449-450. Compare Claassens *Family Deceased Estate Division Agreements* vol 1 216-225; Van Wyk 2013b *Fundamina* 423-427; Claassens-van Wyk 2013 *JSem* 72-77.

74 Malul *Studies in Mesopotamian Legal Symbolism* 449-450 and Malul *Knowledge, Control and Sex* 38. In these studies Malul explores Old Babylonian recordings as a medium of communication. See the discussion on "multi-sensory communication" by Hibbits 1992 *Emory LJ* 873-960.

75 Charpin *Reading and Writing* 42 has offered different perspectives on the analysis of the performance of legal acts and agreements through symbolism.

76 Malul *Studies in Mesopotamian Legal Symbolism* 449-450; Hibbits 1992 *Emory LJ* 874; Greengus "Legal and Social Institutions" 475.

77 Oppenheim *Assyrian Dictionary* 245 and Sjöberg *Sumerian Dictionary* 276. See case studies in Schorr *Urkunden des Altbabylonische Zivil-und Prozessrechts* 224-278 and compare Claassens *Family Deceased Estate Division Agreements* vol 1 179, 360.

78 Westbrook 1991 *JAOS* 219-224.

79 Westbrook *Property and Family* 223. See Oppenheim *Assyrian Dictionary* 245 and Sjöberg *Sumerian Dictionary* 358. See case studies in Claassens *Family Deceased Estate Division Agreements* vol 1 125-126, 356.

80 See the analysis of case studies in Claassens *Family Deceased Estate Division Agreements* vol 1 129-130, 182-183.

81 Schorr *Urkunden des Altbabylonische Zivil-und Prozessrechts* 258-260, 269-273.

Generally, witnesses testified to the details of an agreement in addition to the parties[82] and the way the seals were placed on the recorded tablet served as an additional measure to protect the interests of the family members involved, indicating whose rights were protected.[83]

Such a recorded inheritance division was an abridged version of the oral arrangements and did not require the notarisation of every detail due to the involvement of witnesses, the recording of the oath taken, and the no-claim clause.[84] The parties and witnesses would have been familiar with the circumstances and supported the parties' commitment to not raise claims and to abide by their oath.[85] The recording appeared to reflect that a final settlement had been agreed upon, and all of the parties involved would have been aware of the nature of the agreement.[86]

4.2 Redistribution agreement as a final binding contract

Contrary to the Old Babylonian inheritance division, the South African redistribution agreement is considered a legal contract[87] that must comply with various legal requirements related to contracts, including its being in writing.[88] The formalities required may vary depending on the type of assets involved and the applicable statutory provisions.[89] Typically the redistribution agreement is drafted by the executor's attorney or conveyancer, who must register any immovable property involved in the Deeds Office.[90]

In contrast, with the Old Babylonian inheritance division the scribes adhered to the customs and practices of their learned scribal school, using different

82 Veenhof "Before Ḫammu-rāpi of Babylon" 147; Greengus "Legal and Social Institutions" 469-484; Tanret and Suurmeijer 2011 *ZA* 78-112; Charpin *Reading and Writing* 42-52.

83 Suurmeijer 2010 *RA* 21; Stone 1982 *JESHO* 61-62; Tanret *Seal of the Sanga* 234-236. Compare Malul *Studies in Mesopotamian Legal Symbolism* 291-309.

84 Malul Studies in Mesopotamian Legal Symbolism 449-450; Hibbits 1992 Emory LJ 874.

85 Veenhof "Before Ḫammu-rāpi of Babylon" 147.

86 Tanret and Suurmeijer 2011 *ZA* 78-112; Greengus "Legal and Social Institutions" 475; Claassens *Family Deceased Estate Division Agreements* vol 1 131.

87 See *Bydawell* case 523H.

88 If the redistribution agreement involves immovable property, s 2(1) of the *Alienation of Land Act* 68 of 1981 requires it to be in writing. Additionally, reg 5(1)(e)(iii) to the *Estates Act* (GN R473 in GG 3425 of 24 March 1972 (Regulations to the *Administration of Estates Act* 66 of 1965, as amended) stipulates that the redistribution agreement must be attached to the Liquidation and Distribution Account. See my discussion in para 6.1.

89 See my discussion in para 6.1.

90 See my discussion in para 6.1.

techniques and styles to capture the oral agreement in written format, reflecting their individual idiosyncratic styles to a greater degree.[91]

5 Features of the Old Babylonian inheritance division

The upcoming section will delve into a discussion on the proposed key features of the Old Babylonian division that differentiate it from its South African counterpart. These features include: (1) the absence of a time limit for the inheritance division in an informal administration process in the Old Babylonian system, (2) the emphasis on maintaining harmonious family relationships, and (3) the use of flexible and practical solutions that are tailored to the unique circumstances of each case.

5.1 Informal administration process

In the Old Babylonian inheritance division heirs may divide their shared inheritances at any time whilst with a South African redistribution agreement the heirs may agree to a division only during the formal administration process.[92] To illustrate this, the Old Babylonian inheritance division, which was an agreement between family members, can be understood as a process consisting of three stages. The process starts with the owner of the estate, who is typically the father, or is sometimes the mother,[93] or is sometimes both parents, and the heirs, who are usually family members related by kinship or adoption.[94] Co-ownership of the inheritance was common among family members who were connected to each other through family ties either by the instructions of the deceased during their lifetime or by custom.[95] In most cases the co-owners were brothers, but sisters,[96] nephews, or uncles were occasionally included in the division.[97] However the South African redistribution agreement is not limited to family members and the deceased owner can direct in his/her Will who will inherit, which may include non-family members.[98] During the second stage of the Old Babylonia inheritance division the family heirs acted as co-owners and shared in the management, use, profits and liabilities of their shared

91 Pearce "Scribes" 2265-2278. Compare Van Wyk 2013b *Fundamina* 432-439; Van Wyk 2014b *JSem* 443-483; Van Wyk 2014a *JSem* 195-236.

92 See my discussion in para 6.

93 In exceptional cases and only under specific circumstances a sister or a mother would be allowed to act as a contractual party. This was typically observed when the woman in question held the role of a priestess. See my discussion in para 5.2.

94 *Claassens Family Deceased Estate Division Agreements* vol 1 125, 355-356.

95 See the analysis of case studies in Claassens *Family Deceased Estate Division Agreements* vol 1 124-125, 83-84; See Van Wyk 2013b *Fundamina* 432-439; Van Wyk 2013a *Fundamina* 146-147; Van Wyk 2014a *JSem* 195-236; Van Wyk 2014b *JSem* 443-483.

96 See my discussion in paras 5.2 and 7.3.

97 *Claassens Family Deceased Estate Division Agreements* vol 1 125, 354-355.

98 *Bydawell* case 520H; *Klerck* case 630-631; ss 14(1)(b)(iii) and (iv) of the *Deeds Act.*

inheritance property. In the final stage the co-owners could decide to divide certain or all of their shared inheritance into portions of sole ownership.[99]

Although both the Old Babylonian and South African common law (Roman-Dutch law) inheritance divisions shared the goal of preserving family relationships, a notable difference arises in the South African context when the heirs involved are not family members. In such cases, their motivations for dividing the inheritance may be driven by factors like exclusion, financial gain or control.[100] Nevertheless, reaching a consensus remains a crucial requirement for any inheritance division. Therefore, in South Africa it can be assumed that in instances where the heirs are indeed family members the negotiated provisions are influenced by their efforts to maintain family relationships.[101]

5.2 Family relationship orientation

A complex system of family relationships existed in Old Babylonian society, including the nuclear family, extended families and interconnected family groups.[102] The nuclear family comprised of a married couple and their children living together,[103] while the extended family consisted of several nuclear families linked through a common ancestor.[104] Interconnected family groups referred to multiple families connected through marriage and/or adoption.[105] For example, the Ur-Pabilsaĝa Archive from Old Babylonian Nippur documented transactions, including several inheritance divisions, involving three interconnected patrilineal lineages over a period of 45 years.[106] Divisions of inheritances and other transactions provide insights into how they impacted on the status and financial positions of the family

99 Westbrook *Property and Family* 141 and the analysis of case studies in Claassens *Family Deceased Estate Division Agreements* vol 1 107-150.

100 According to Claassens *Family Deceased Estate Division Agreements* vol 1 154, 127, non-family contractual parties in some contemporary societies may prioritise competition and favourable deals due to their capitalistic mindset. In contrast, family contractual parties in Old Babylonian agreements placed importance on establishing and maintaining family relationships.

101 Paragraph 5.2 highlights a few similarities among the Old Babylonian family customs and practices and those observed in South Africa.

102 See Roth "Gender and Law" 173-184 and Roth 1987 *Comp Stud Soc Hist* 715-747; Stone 1982 *JESHO* 50-70, esp. 18, 50, 52, 55 and Stone and Stone 1981 *Iraq* 19-33 regarding different social roles in Old Babylonian society.

103 Leemans 1986 *Oikumene* 15; Frymer-Kensky 1981 *BA* 211.

104 Leemans 1986 *Oikumene* 1-16.

105 Van Wyk 2019a *JSem* 1-24; Van Wyk *JSem* 2019b 1-34; Frymer-Kensky 1981 *BA* 210-214; Fleishman 2001 *JAOS* 93-97; Frymer-Kensky "Gender and Law" 1-31. According to Roth 1987 *Comp Stud Soc Hist* 717 an individual's life progresses through various stages, and this progression directly affects the individual's social and familial status and position.

106 See different interpretations on the Archive in Van Wyk 2018b *JSem* 1-27; Stone "Adoption in Nippur" 1-33; Goddeeris *Old Babylonian Legal and Administrative Texts* 355-368.

members involved.[107] They also reveal the social and financial networks that existed among these family groups.[108] While there were no strict rules governing inheritance division practices, a person's position in his/her adoptive or biological family in Old Babylonian society was influenced by reciprocal rights, duties and obligations.[109] The system was built on the principles of reconciliation and the preservation of positive relationships between family members.[110]

Certain priestess groups, especially the nadiātu,[111] were intertwined with family groups and benefactors in inheritance divisions.[112] The cloistered nadiātu groups consisted of unmarried priestesses who were prohibited from having children. On the other hand the uncloistered nadiātu were allowed to marry but were still not permitted to have children.[113] While the nadītu had more contractual capabilities than the typical mother-wife role, which was bound by patriarchal control, her contractual capacity was still limited. Her rights were determined by her group, societal rules and her family's choices.[114]

It was common for the uncloistered nadītu to provide her husband with a second wife, whose children would be considered the children of the nadītu. The second wife could be a younger sister, a free woman or a slave girl.[115] This practice bears some similarities to the South African customary law of the seed-bearer. The most distinct difference is that South African law recognised the seed-bearer as an intestate heir in the instance there is no Will left.[116]

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107 Suurmeijer 2010 *RA* 9-40; Frymer-Kensky 1981 *BA* 211; Obermark *Adoption* 1, 29-30; Westbrook *Property and Family* 48-60; Westbrook "Adoption Laws of Codex Hammurabi" 195-204. Compare Van Wyk 2019a *JSem* 1-24; Van Wyk 2019b *JSem* 1-34; "analysis of case studies".

108 Leemans 1986 *Oikumene* 1-16; Frymer-Kensky 1981 *BA* 209-214.

109 Suurmeijer 2010 *RA* 19-21, 27. Compare Van Wyk 2019a *JSem* 1-24; Van Wyk 2019b *JSem* 1-34.

110 Leemans 1986 *Oikumene* 1-16; Van Wyk 2019a *JSem* 1-24; Van Wyk 2019b *JSem* 1-34. Frymer-Kensky 1981 *BA* emphasises the significance of kinship relations and explores the social functions of each person's juridical position in the family, viewing it as an essential aspect of family life. Fleishman 2001 *JAOS* delves into the concept of kinship beyond biological connections and includes the idea of adoptive status as a kinship relation.

111 "Nadiātu" is a plural noun meaning priestesses, while "nadītu" is the singular form. See Stone and Stone 1981 *Iraq* 19.

112 Harris *Sippar* 10-14, Stone 1982 *JESHO* 69; Tanret *Seal of the Sanga* 227; Van Wyk 2015 *JNSL* 116-117.

113 Harris *Sippar* 315, 317. Stone 1982 *JESHO* 55.

114 Harris *Sippar* 317-322; Stone 1982 *JESHO* 55, 62-63. Compare with Van Wyk 2015 *JNSL* 95-122.

115 Harris Sippar 315, 317; Goddeeris *Old Babylonian Legal and Administrative Texts* 362-363.

116 Section 3(1) of the *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009.

In Old Babylonia the principle of the first-born share prevailed in some cases, and the continuation of family patronage through inheritance was an important institution.[117] In some inheritance divisions a privileged portion or preference portion is granted to the eldest son. This is a larger portion or percentage of the assets of the estate before the division of the deceased paternal estate occurs.[118] This practice is based on the idea that the "father's house" is a household unit where the head is the sole owner of the assets of the household, and the sons inherit the estate.[119] In South Africa a customary rule of succession also known as the primogeniture rule was based on similar principles, which excluded women and younger siblings from inheriting estates. However, the Constitutional Court in *Bhe v Khayelitsha Magistrate*[120] found that the primogeniture principle violated the right to equality and human dignity. The *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009 was subsequently enacted to give effect to the court's ruling, operating on 20 September 2012.[121] On the other hand the Green Paper on Marriages in South Africa[122] (hereafter the "Green Paper") recommends reforms in the country's marriage systems, acknowledging the significance of recognising the diverse legal systems and belief systems of the various population groups in the country. This includes acknowledging practices such as polygamy and family structures which seem to be similar to those in existence during the Old Babylonian period.[123]

5.3 Finding practical solutions to divide ownership

The Old Babylonian and South African common law (Roman-Dutch law) inheritance divisions share a common objective of avoiding co-ownership and seeking practical solutions for sole ownership.[124] In Old Babylonia negotiations were lengthy, taking into account factors such as agriculture, architecture and social structures. Mechanisms and legal practices were chosen based on their sustainability and the unique situation of the family.[125] For instance, in situations where a house was too small to divide, it was often deemed a "practical consequence" for family members to continue

117 Westbrook *Property and Family* 14, 23; Kitz 2000 *JBL* 618; Frymer-Kensky 1981 *BA* 241; Frymer-Kensky "Gender and Law" 1-31.

118 Westbrook *Property and Family* 14; Frymer-Kensky 1981 *BA* 241; Postgate *Mesopotamia* 98; Claassens *Family Deceased Estate Division Agreements* vol 1 186-187, 190, 267-268. Compare the case study done by Claassens-van Wyk 2013 *JSem* 56-89, esp. 74-75 and O'Callaghan 1954 *JCS* 137-139.

119 Westbrook *Property and Family* 18; Frymer-Kensky 1981 *BA* 210-214.

120 *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 221.

121 See my discussion in para 6.3.

122 GN R398 in GG 44529 of 4 May 2021 (hereafter the "Green Paper").

123 See my discussion in para 6.3.

124 Van Wyk 2013a *Fundamina* 155.

125 Claassens *Family Deceased Estate Division Agreements* vol 1 52-77, 389; Claassens-van Wyk 2013 *JSem* 69-71.

living in the same household.[126] Old Babylonian society had it to their advantage that negotiations may have been facilitated by the malleability of structures and materials, allowing for adjustments to be included in inheritance agreements and the negotiation of additional compensation to ensure a fair division of inheritance.[127] The building materials used were adaptable and easily constructed, enabling secondary changes to be made. Simple structures and materials did not require specific skills, but the drying process required ample sunshine, and mixing plaster necessitated significant quantities of water and straw, which could have presented difficulties depending on their availability.[128] However, unlike the Old Babylonian house structures, South African house structures are not easily adaptable. Also, the parties involved in the South African redistribution agreement are legally obliged to follow municipal ordinances and other legislation due to the fact that mandatory statutory compliance is one of the significant features of South African redistribution agreements.[129] This will be further discussed in the next section of this paper.

6 The features of the South African redistribution agreement

In this section we will explore three key features that differentiate the South African redistribution agreement from its Old Babylonian counterpart. The first feature focusses on the importance of adhering to statutory requirements. The second feature addresses the formal administrative process in the redistribution of an inheritance as overseen by the executor. The last feature highlights the significance of concluding the agreement with a commitment to fairness and equality, taking into consideration South Africa's mixed law system and the underlying values of South Africa's *Constitution*.

6.1 Statutory compliance

Redistribution agreements have been recognised in South African court cases since 1897, with the application of Roman-Dutch law as the common source of law.[130] Despite the country's mixed legal system, which incorporates elements of English common law and the customary law of indigenous peoples, the courts have not actively developed either the

126 Postgate *Mesopotamia* 98.

127 See Stone and Stone 1981 *Iraq* 19-21 analysis of recordings in relation to the agricultural and architectural elements that would have played a role in the negotiations. Compare with Claassens *Family Deceased Estate Division Agreements* vol 1 59-77.

128 Oats 1990 *WA* 389.

129 For example, s 3 of the *Subdivision of Agricultural Land Act* 70 of 1970 and s 5(2) of the *Agricultural Holdings (Transvaal) Act* 22 of 1919. See Nel Jones Conveyancing 171-173 and Meyerowitz Law and Practice of Administration of Estates para 12.31.

130 *McDonald* case.

English common law or the South African customary law in relation to redistribution agreements.[131]

The *Deeds Act*, which commenced on the 11th of September 1937, was the first legislative recognition of the South African inheritance division as a redistribution agreement. Sections 14(1)(b)(iii) and (iv) of the *Deeds Act* allow for the redistribution of immovable inheritance property and/or rights, and the bringing-in of non-estate movable property to equalise the division of an inheritance.[132]

In 1972 regulation 5(1)(e)(iii) of the *Estate Administration Act* 66 of 1965 (hereafter the "*Estates Act*") was introduced,[133] that required the executor to submit the signed redistribution agreement along with the Liquidation and Distribution Account (hereinafter "L&D Account") to the Master of the High Court when accounting for the winding-up of the deceased estate.[134]

The Master of the High Court of the Department of Justice holds jurisdiction over the estates of deceased individuals in South Africa in terms of section 4 of the *Estates Act*.[135] It assumed a supervisory role over the legality of redistribution agreements. However, Van Wyk[136] argues that the Master's role in relation to the redistribution agreement is administrative. The Master's responsibility does not extend to ensuring the legality or validity of the redistribution agreement in terms of its form or content. Rather the executor is responsible for ensuring that the agreed awards are both lawful and feasible based on the informed consent of the heirs[137] and complies with specific format requirements.[138] The focus of the Master's examination is to verify that the distribution details in the L&D Account align with the attached redistribution agreement.[139]

131 There are commonalities between customary law and the characteristics of ancient Near Eastern legal thought, including non-specialisation, the religious impact, group or social orientation, the concrete nature of legal acts, and openness. See Claassens *Family Deceased Estate Division Agreements* vol 1 23-50. Compare Van Niekerk 2001 *Codicillus* 5-13 for a similar comparison between customary law and South African law.

132 The Deeds Office of the Department of Rural Development and Land Reform oversees the registration of immovable properties and/or rights.

133 GN R473 in GG 3425 of 24 March 1972.

134 Section 35(1)(a) read with reg 5(1)(e)(iii) of the *Administration of Estates Act* 66 of 1965 (the "*Estates Act*").

135 In terms of ss 7 and 8 of the *Estates Act*.

136 Van Wyk 2021 *PELJ* 1-46, esp. 36-39.

137 See *Bydawell* case 523G-H, 515E-H, 516; Van Wyk 2021 *PELJ* 22-23, 35-37. See my discussion in para 4.2.

138 Regulation 5(1) read with 5(1)(i), 5(1)(e)(i), (ii) and (iii) of the *Estates Act.*

139 Section 35(1)(a) read with the second proviso to reg 5(1)(e)(iii) of the *Estates Act*.

Other legal requirements for the South African redistribution agreement for instance prohibit the registration of farmland to more than one person.[140] Additionally, when a party to the contract is married in community of property[141] or when the party is a minor, an additional party is required to ratify the agreement.[142]

Additionally, the conveyancer is obliged to review all submitted documentation, including the certified copy of the redistribution agreement, for accuracy and correctness. This assessment is crucial for the registration process of inherited immovable property at the Deeds Office.[143]

In contrast with Old Babylonia, section 195 of the *Constitution* outlines basic values and principles that must govern public administration. This entails that since 1994 public officials in South Africa are required to act transparently, responsibly, openly and accountably in their administrative acts, as promoted by laws such as the *Promotion of Access to Information Act* 2 of 2000 (hereafter "*PAIA*") and the *Promotion of Administrative Justice Act* 3 of 2000 (hereafter "*AJA*"). For instance, in the case of the Master evaluating a redistribution agreement, the Master is obliged to provide information if requested under section 3 of *PAIA*. Similarly, if the Master is deciding on an objection submitted against the executor's report of the Master's administration, the Master's actions are subject to review under the *AJA*.[144]

6.2 Formal administration process

In South African law when a person dies a deceased estate is formed, which must be administered and distributed according to the Will[145] or the *Intestate Succession Act* 81 of 1987 (hereafter the "*Intestate Act*") if there is no valid Will. The *Estates Act* prescribes the procedure for administering a deceased estate. This is in contrast to Old Babylonian society, where there was no

140 Section 3 of the *Subdivision of Agricultural Land Act* 70 of 1970 applies, unless the Minister of Agriculture, Forestry, and Fisheries grants such registration. A similar prohibition can be found in s 5(2) of the *Agricultural Holdings (Transvaal) Act* 22 of 1919. This provision relates to the transfer of any holding or a portion thereof that is smaller in size than one morgen, or a holding held jointly by two or more persons. See Nel *Jones Conveyancing* 84, 171-173.

141 Section 15(2) of the *Matrimonial Property Act* 88 of 1984 requires that any agreement involving a party married in community of property disposing of a right in immovable property must be signed by two witnesses.

142 Section 18(3)(c) read with s 18(5) of the *Children's Act* 38 of 2005 dictates that both parents must provide permission for transactions involving immovable property, while only one parent's permission is required for transactions involving movables.

143 Section 42(1) of the *Estates Act* and s 15(A) read with reg 44A of the regulations of the *Deeds Act* (GN R474 in GG 466 of 29 March 1963 (Regulations to the *Deeds Registries Act* 47 of 1937, as amended).

144 See *Nedbank Ltd v Mendelow* 2013 6 SA 130 (SCA) paras 11, 28.

145 A Will must comply with the formal requirements of the *Wills Act* 7 of 1953.

formal estate administration process and the heirs appointed an administrator to manage the shared inheritance or transfer the estate properties to the family heirs entitled by succession.[146]

In South African law the executor must follow a strict process prescribed by the *Estates Act* and is obliged to account to the Master of the High Court for proper compliance with the process.[147] The formal administration process begins with reporting the deceased estate to the Master of the High Court, who appoints an executor to administer the estate on behalf of the heirs and creditors.[148] Under sections 18 and 19 of the *Estates Act* the Master holds the discretion to appoint an executor. However, this discretion is subject to the provisions of the *Estates Act* and the Master's decisions can be appealed or be subjected to review in the High Court, as outlined in section 95(3) of the *Estates Act*.

The executor is required to submit an L&D Account report to the Master within a specified timeframe,[149] which details the inheritance properties collected, administration costs, creditor claims accepted, and heir awards.[150] This process requires the heirs to finalise the redistribution of assets during the prescribed administration process, while with the Roman-Dutch and Old Babylonian inheritance division the family heirs can divide their inheritance at a later stage.[151]

In South African law, the estate debts must be settled first from the proceeds of the estate properties before the remaining balance can be transferred to the heirs.[152] However, the Old Babylonian[153] and Roman-Dutch[154] inheritance division practices allow family heirs as co-owners to assume all the rights and liabilities of their paternal deceased family member.

146 The Old Babylonian administrator (an informal type of executor) was usually the oldest brother. Kitz 2000 *JBL* 607, 618; Westbrook *Property and Family* 140-141.

147 Section 35(1)(a) read with the reg 5(1) of the *Estates Act.* See Meyerowitz *Law and Practice of Administration of Estates* paras 1.3-1.8 regarding the Master and paras 12.1-12.12 regarding the executor.

148 Relating to the Master's jurisdiction, see ss 4, 7-8 of the *Estates Act*. Many of the procedures and executor's obligations to manage a deceased estate are outlined in the *Estates Act*. These include taking control of the estate's properties (s 26), advertising for claims (s 29), opening a late banking account (s 28), assessing the solvency of the estate (s 34), submitting an inventory to the Master (s 27), lodging the L&D Account (s 35), and responding to requests/enquiries from the Master.

149 Section 35(1)(a) read with the reg 5(1) of the *Estates Act.*

150 The Master ensures that the L&D account meets the format requirements of reg 5(1) of the *Estates Act*. Reg 5(5) limits the Master's discretion to waive non-compliance if such non-compliance is "not material".

151 Claassens *Family Deceased Estate Division Agreements* vol 1 83-84.

152 Section 34 of the *Estates Act*. See Meyerowitz *Law and Practice of Administration of Estates* paras 12.31, 13.7.

153 See case studies discussed in Van Wyk 2013a *JSem* 158 and O'Callaghan 1954 *JCS* 141.

154 *Maasdorp Introduction to Dutch Jurisprudence* 297-298.

Moreover, in South African law, the transfer of the common law half share in a marriage in community of property is subject to the payment of joint estate debts. If there are sufficient funds available to pay the estate debts, the common law half share of a surviving spouse can be included in a redistribution agreement.[155]

In South Africa, the redistribution agreement is an agreement that the heirs and/or the surviving spouse enter into.[156] Similar to other divisions, the heirs may negotiate the reallocation of assets and trade them to some extent through mechanisms like sale, donation, or exchange.[157]

Because the redistribution agreement is defined as a contract, parties are bound to abide by its terms and conditions according to the common law principle of *pacta sunt servanda*.[158] The signed redistribution agreement is part of the winding up of the estate and cannot be altered without the parties' agreement.[159] In contrast, in the Roman-Dutch Law a co-owner could dissolve the co-ownership independently initially, but the later mutual consent of all co-owners was required.[160]

In South African law the heirs' vested rights and the enforceability of the redistribution agreement come into effect only when the advertised L&D Account and its attached redistribution agreement are free from any objections.[161] In addition, sections 35(12) and (13) of the *Estates Act* require the executor to finalise payments and transfers of claims and inheritance awards within two months from the end of the inspection period.[162]

6.3 Constitutional values and principles

South Africa is a multicultural and legal pluralistic society divided by language, religion, culture, sexual orientation and race. Historically and even today the norms of the customary law in African communities, Hindu,[163] Muslim and Jewish legal systems,[164] as well as the legal position

155 Section 14(1)(b)(iii) of the *Deeds Act*.

156 Section 14(1)(b)(iii) of the *Deeds Act* and reg 5(1)(e)(iii), as per s 35(1) read with reg 5(1) of the *Estates Act*.

157 See my discussion in para 3.3.

158 See Meyerowitz *Law and Practice of Administration of Estates* para 12.3; Klerck case 630-631; Bydawell case 523G-H.

159 *Bydawell* case 523B; *Klerck* case 630-631.

160 Kaser 1984 *Römisches Privatrecht* 123, 225; Van Warmelo 1950 *THRHR* 217, 223-227, 232.

161 Regulation 5(1)(iii) read with s 35(12) of the *Estates Act.* Reg 5(1)(e)(iii) of the *Estates Act* assigns the responsibility of enforcing the redistribution agreement to the executor.

162 The Master ensures that the executor complies with the *Estates Act*, including registering any inherited immovable property in the heir's name under s 39(1) and submitting a "certificate" under s 42(1) as proof.

163 Regarding Hindu marriages, see Green Paper 48.

164 Regarding Islamic marriages when ended due to death or divorce see Green Paper

of LGBTQIA+ persons and communities,[165] as guaranteed in South Africa's *Constitution*,[166] are complex and sensitive issues of which larger parts are still not recognised in our statutory enactments.[167]

Also, prior to the entrance of South Africa into a new democratic dispensation in 1994 the only marriage regime officially recognised and its religious marriage rituals were commonly referred to as the "white wedding".[168] Some ancient Near Eastern scholars influenced by preconceived notions rooted in Calvinist Christian and Western traditions, particularly the practices of Christian and Western marriages ("white weddings") would have found the Old Babylonian customs of polygamy culturally challenging. However, the Old Babylonian concept of polygamy cannot be dismissed as culturally distinct due to its similarities with polygamy in South African customary marriages.

In South Africa the *Constitution* and the Bill of Rights have introduced a new legal framework that presents both challenges and opportunities for the ongoing development of the redistribution agreement. These challenges highlight the need for a renewed constitutional examination of family and succession laws. These laws directly affect the succession rights of women and permanent life partners as well as the freedom of individuals to express their sexual orientation. This also applies to those engaged in customary marriage structures.[169] All of this must take into account the fact that polygamous marriages in South Africa can present challenges with the division of inheritances. This is especially true in cases where a maintenance claim is involved based on the complex system of a man's being able to have multiple spouses.

Today there are three pieces of legislation that regulate marriages in South Africa: the *Marriage Act* 25 of 1961 (hereafter the "*Marriage Act*"), the *Recognition of Customary Marriages Act* 120 of 1998 (hereafter "*RCMA*") and the *Civil Union Act* 17 of 2006. The *Marriage Ac*t applies to monogamous marriages between opposite-sex couples. The *RCMA* applies to polygamous marriages involving opposite-sex couples who are black South Africans. *The Civil Union Act* covers both monogamous partnerships for same-sex and opposite-sex couples. Additionally, monogamous marriages between heterosexual black individuals were historically, governed by the partially repealed *Black Administration Act* 38 of 1927

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165 The term "LGBTQIA+" refers to individuals and groups who identify as lesbian, gay, bisexual, transgender, queer, intersex, asexual, and other related categories. Green Paper 45, 48.

166 *Constitution of the Republic of South Africa*, 1996.

167 See Green Paper 6-7, 45.

168 Green Paper 10.

169 Green Paper 6-7.

(hereafter the "*BBA*").[170] Also, South Africa's democratic system inherited the marriage systems of the former homeland states, that were Transkei, Venda, Bophuthatswana and Ciskei, as well as Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa and Qwaqwa.[171]

These pieces of legislation are not aligned with South Africa's Constitution and are exclusive instead of being inclusive for all South Africans, as per the values of the *Constitution*.[172] For example, the *RCMA* does not cover other types of polygamous marriages, such as those practised in Islamic, Jewish, Shembe, KhoiSan and customary marriages involving non-citizens.[173] Also, the *RCMA* currently fails to acknowledge customary marriages in royal families that are specifically intended to produce a future king or heir. Additionally, South African law does not currently recognise a woman's right to have multiple husbands (polyandry).[174] The current legislation lacks a transitional mechanism for LGBTQIA+ who originally married under the *Marriage Act* but later underwent a sex change.[175]

Also, discriminatory provisions and shortcomings that are unconstitutional and thus invalid have been highlighted in various South African court cases. For example, in the case of *Sithole v Sithole*[176] the court ruled that certain provisions of section 21(2)(a) of the *Matrimonial Property Act* 88 of 1984 are unconstitutional and invalid. These provisions were deemed to perpetuate the discriminatory effects of section 22(6) of the *BBA*. Prior to 1988 marriages of black individuals under the *BBA* were automatically classified as being out of community of property, depriving many black women of the protections afforded by a marriage in community of property. This provision exacerbated their vulnerability, leaving them entirely dependent on their husbands' goodwill, and the husband often had control over most of the family's wealth and assets. Consequently, the wives faced adverse consequences on the death of their husbands.[177] In *Gumede v President of the Republic of South Africa* (hereafter the "*Gumede* case")[178] and *Ramuhovhi v President of the Republic of South Africa* (hereafter the "*Ramuhovhi* case"),[179] sections 7(1) and (2) of the *RCMA* were criticised for only changing the proprietary position of post-Act customary marriages, overlooking women already in customary marriages. The *Gumede* case focussed on pre-Act monogamous customary marriages, while the

170 Green Paper 6.
171 Green Paper 6.
172 See esp. Green Paper 6-7.
173 Green Paper 48.
174 Green Paper 6, 48.
175 Green Paper 45, 48.
176 *Sithole v Sithole* 2021 5 SA 34 (CC) (the "*Sithole* case").
177 *Sithole* case paras 2, 31-33.
178 *Gumede v President of the Republic of South Africa* 2009 3 BCLR 243 (CC).
179 *Ramuhovhi v President of the Republic of South Africa* 2018 2 BCLR 217 (CC).

Ramuhovhi case dealt with pre-Act polygamous customary marriages. The court ruled the differential treatment established by sections 7(1)[180] and 7(2)[181] as unconstitutional. Consequently, the *Recognition of Customary Marriages Amendment Act* 1 of 2021[182] amended section 7(1) of the *RCMA*, granting parties joint and equal ownership, rights of management, and control over marital property. However, certain issues remain unresolved and unclear, such as the establishment of a community of property regime with multiple spouses and the specific share each spouse holds in the joint estate.

In the case of *Bwanya v Master of the High Court, Cape Town*,[183] the Constitutional Court ruled that it is unconstitutional to deny surviving partners in a permanent partnership the status of a surviving spouse, thus prohibiting them from inheriting or being eligible to submit a maintenance claim against the estate of their deceased partners. The *Judicial Matters Amendment Bill* of 2023[184] (hereinafter the "*Amendment Bill*") was introduced to address this issue. Clause 14 of the *Amendment Bill* expands the definition of "spouse" in the *Intestate Act*, allowing a spouse to inherit from the deceased partner's intestate estate. Clause 15 broadens the definition of "survivor" and "marriage" in the *Maintenance of Surviving Spouses Act* 27 of 1990 (hereafter the "*MSSA*") to include a surviving partner in a permanent life partnership where "reciprocal duties of support" were undertaken, and who did not receive an "equitable share" of the deceased partner's estate.[185]

The recent appraisal of South African family and succession law, as outlined in the Green Paper, suggests the establishment of a new legal framework to regulate all monogamous and heterosexual religious marriages, regardless of race, religion, culture, sex, gender or nationality. The goal of this proposal is to align the legislation with sections 9, 10, 15 and 31 of the *Constitution*.[186] The roadmap for implementing the marriage policy involves submitting the *Marriage Bill* to Parliament for approval by 31 March 2024.[187] It is hoped that the new legal framework will genuinely align with South

180 Section 7(1) of the *Recognition of Customary Marriages Act* 120 of 1998 (the "*RCMA*") maintained that the proprietary consequences of customary marriages before the Act's commencement would continue to be governed by customary law.

181 Section 7(2) of the *RCMA* stated that marriages entered into after the Act's commencement would be marriages in community of property.

182 Commenced on 1 June 2021.

183 Bwanya v Master of the High Court, Cape Town 2022 3 SA 250 (CC).

184 *Judicial Matters Amendment Bill* B7-2023 (Explanatory summary published in Gen N 1678 in GG 48217 of 16 March 2023). No provision for the public to comment was made as the authorities deemed the amendments to be of a technical nature.

185 However, the legislature did not provide definitions for either "reciprocal duties of support" or "equitable share".

186 Green Paper 6-7, 45.

187 Green Paper 7.

Africa's constitutional values and principles, as this alignment is crucial for effectively addressing challenges and opportunities in the further development of redistribution agreements.

7 Proposed application of legal practices of Old Babylonian inheritance division in relation to their South African counterparts

This section will examine how certain legal practices employed in the Old Babylonian inheritance division can be potentially utilised in the South African redistribution agreement. These practices aim to facilitate a fair redistribution of inheritances that considers the specific circumstances of each case and ultimately achieves agreement among all parties involved.[188]

7.1 Division by lots (lot-casting)

The practice of lot-casting, also known as division by lots, is a common feature found in both the Old Babylonian inheritance division[189] and South African Common Law. In Old Babylonia, lot-casting was used to ensure a fair and equal distribution of assets among the heirs. Different assets were divided into portions during the negotiations and lots were drawn to allocate each portion to the respective party. In some cases the parties might agree that one brother received a preferential share, after which the rest of the assets were allocated in portions.[190]

It appears from the available records that the methods utilised in Old Babylonia to effect a division by lot were similar to the recommendations put forward by Roman-Dutch legal scholars.[191] According to Roman-Dutch legal scholar Voet,[192] lot-casting was considered a convenient practice for dividing an estate. Voet listed several options for implementing this method, such as allowing the elder to divide the property and the younger to choose, or distributing the property and settling through lot-casting, or valuing the properties and engaging in mutual bidding, or having one person retain the inheritance while providing a fixed amount of money to the others. Another Roman-Dutch legal scholar, Maasdorp,[193] observes that the practice of the elder fixing the shares and the younger choosing has been in existence for

188 Due to this article's length and scope, a detailed comparison between Old Babylonian and South African legal practices on family division is unfeasible. Rather, the article focusses on lessons that can be learned from Old Babylonian legal practices and their potential relevance to South African redistribution agreements.

189 Kitz 2000 *JBL* 618; Westbrook *Property and Family* 23; Kitz 2000 *CBQ* 207-214.

190 Westbrook *Property and Family* 14, 23; Kitz 2000 *JBL* 618; Claassens *Family Deceased Estate Division Agreements* vol 1 130, 363.

191 See Kitz 2000 *JBL* 618; Westbrook *Property and Family* 23; Kitz 2000 *CBQ* 207-214.

192 Voet *Commentarius ad Pandectas* para 10.2.32.

193 Maasdorp *Introduction to Dutch Jurisprudence* 297-298.

a long time, whilst the Roman Dutch legal scholar Huber[194] suggests that if the property cannot be divided and the shares are almost equal, the co-owners may take turns in using it, or the co-owner with the least share may take money for his/her portion at the appraisal of arbitrators.

In South African law the practical procedures followed by heirs to redistribute estate assets are not rigidly defined. Executors in South Africa may draw inspiration from the methods utilised in the Old Babylonian period and recommended by Roman-Dutch legal scholars, particularly in the redistribution of movable estate assets. These methods encompass various approaches, such as appointing an appraiser selected by the Master to evaluate the assets of the estate and then for one party to receive the movables as they are, while the other party is compensated on the basis of the appraised value. Alternatively, one party may divide the assets and the other party could make a choice. Another option is employing lot-drawing to allocate assets and achieve individual ownership.

7.2 Bringing-in practice of any type of non-estate asset

The Old Babylonian inheritance division implemented the bringing-in principle, which involved one or more parties contributing assets or money to attain an equitable division based on value.[195] Through this practice movable non-estate assets like silver, slaves, household goods and immovable non-estate assets such as houses or fields could be included in the division.[196] In contrast, in South Africa the redistribution agreement may also pertain to the entire estate or any portion of its assets, with the exception that only non-estate movable property can be included in terms of section 14(1)(b)(iv) of the *Deeds Act*.[197]

To provide some background understanding for the following discussion on the exclusion of non-estate immovable property, the following points need to be considered. Denoon[198] suggests that the initial inclusion of section 14(1)(b)(iii) of the *Deeds Act* in 1937 was to ensure the proper registration of a redistribution agreement involving immovable property and to collect transfer duty on immovable property due to the State's fiscus. In most of the earlier court cases[199] the issue was whether transfer duty should be paid. It

194 Huber *Heedensdaegse Rechtsgeleertheyt* paras 1, 3.29.16.

195 Stone and Stone 1981 *Iraq* 23; Claassens *Family Deceased Estate Division Agreements* vol 1 128, 175 264-265; Claassens-van Wyk 2013 *JSem* 72-73.

196 Claassens *Family Deceased Estate Division Agreements* vol 1 128. In Sjöberg *Sumerian Dictionary* 191, 193-194, the term "búr" in the recordings denotes "to pay in exchange, to compensate". Claassens *Family Deceased Estate Division Agreements* vol 1 125-126, 356.

197 The non-estate movable property is not considered a deemed asset under s 3(3) of the *Estate Duty Act* 45 of 1955. Consequently, it does not attract estate duty.

198 Denoon 1945 *SALJ* 319.

199 For example, the *Esterhuizen* case.

was only after a 1962 court case[200] and introduction of section 9(1)(e)(i) of the *Transfer Duty Act* 40 of 1949[201] (hereafter "*Transfer Duty Act*") that transfer duty payment was exempted if a redistribution of immovable property in a deceased estate occurred.

In South Africa, the exclusion of non-estate immovable property has consequences as it may limit the pool of assets available for division and options to achieve fairness among the heirs, particularly in cases where the heirs need to address hardships and impractical situations. This exclusion appears to aim at preventing exemption claims from transfer duty under section 9(1)(e) of the *Transfer Duty Act*. However, there is an argument to be made for including non-estate immovable property subject to transfer duty, as it could contribute to a fair redistribution of the inheritance. Also, the immovable property would potentially qualify for the threshold exemption when transfer duty is to be paid.[202] Thus, the inclusion of such property could still be beneficial in achieving a fair redistribution of the inheritance, based on the need to develop innovative solutions that preserve family relations for the larger South African population of lower income, who may qualify for such threshold exemption. Even the payment of transfer duty may call for the need to equalise the division of the inheritance to ensure that inheritances are fairly and justly allocated. This calls for a reconsideration of including non-estate immovable property for the redistribution of a South African inheritance.

7.3 Maintenance provision

Contemporary scholars in ancient Near Eastern studies find it convenient to use today's legal term the "usufruct" to denote a maintenance clause in an inheritance division.[203] However, during the Old Babylonian period the term itself was unfamiliar. The term "usufruct", originating from Roman law, refers to a person's right to use and enjoy movable and immovable property owned by another person.[204] This concept has been incorporated into legal agreements in the civil law system for nearly 2000 years.[205] However, in the

200 *Lubbe v Kommissaris van Binnelandse Inkomste* 1962 2 SA 503 SA (O).

201 The exemption in s 9(1)(e)(i) of the *Transfer Duty Act* 40 of 1949 reads "an heir or legatee in respect of—(i) property of the deceased acquired by *ab intestato* or testamentary succession or as a result of a re-distribution of the assets of a deceased estate in the process of liquidation."

202 In accordance with the schedule of Fees of Office as prescribed by reg 84 and 86 of the *Deeds Act*, as amended. The transfer duty threshold was raised by R100 000 from R1 000 000 to R1 100 000 on the 1st of March 2023. GN R3095 in GG 48150 of 28 February 2023.

203 Van Wyk 2014b *JSem* 478-479, esp. 457.

204 Verbeke, Verdickt and Maasland "Usufruct" 36; Kaser 1984 *Römisches Privatrecht* 148-152; Meyerowitz *Law and Practice of Administration of Estates* paras 24.14-24.15, 24.20.

205 See McClean 1963 *ICLQ* 650-651, 649-667, who suggests that "usufruct" initially denoted land ownership in Roman law but evolved into the idea of absolute

Old Babylonian period the maintenance provision encompassed various potential obligations based on the specific needs of the family, as well as the prevailing economic and social circumstances of each case. These obligations could include receiving income or predominantly goods, benefiting from certain advantages associated with another person's property, or even holding property with restrictions on its transferability.[206]

The Old Babylonian inheritance divisions commonly involved the sons of the deceased family head that would undertake the responsibility of providing for their priestess sister throughout her lifetime,[207] whilst South African law recognises the importance of providing for the surviving spouse[208] and dependent children[209] of a deceased spouse or parent. If the deceased person disinherits his/her surviving spouse or dependent child, South African law allows them to submit a maintenance claim against the estate.[210] This ensures that they are not left destitute. Section 2(3)(d) of the *MSSA* grants the executor the authority to enter into agreements, such as a redistribution agreement with the surviving spouse and heirs in settling the maintenance claim.[211]

In Old Babylonian society the position, status, and property ownership of the priestess' sister[212] played a crucial role in understanding the application of the maintenance provision in an inheritance division, particularly in a specific group known as the nadiātu.[213] One of the primary functions of this priestess institution was to ensure continued support and patronage.[214] As

ownership in civil law. Additionally, Graef 2002 *JESHO* 143, 147 uses the term usufruct in reference to sources from the ancient Near East. See Van Wyk 2014b *JSem* 444-447, 451-456 regarding Old Babylonian legal practices that are similar to a usufruct construction.

206 Harris *Sippar* 317-322; Stone 1982 *JESHO* 55, 62-63, 69. Compare Van Wyk 2015 *JNSL* 95-122 and Van Wyk 2014b *JSem* 468, esp. 472-474.

207 Stone 1982 *JESHO* 57-59.

208 Section 1 and 2(1) of the *Maintenance of Surviving Spouses Act* 27 of 1990 (the "*MSSA*").

209 According to South African common law and section 18(2) of the *Children's Act* 38 of 2005, parents have a legal obligation to provide support to their children as primary caregivers. This duty of child support continues even after the parents' death and is transferred to their deceased estate. *Carelse v Estate de Vries* [1906] 25 SC 532; *Glazer v Glazer* 1963 4 SA 694 (A) 706 H-707A.

210 Section 2(1) of the *MSSA*.

211 Sonnekus 1990 *TSAR* 499, 502, 505, 511-513 conceives that such an agreement is similar to that of a redistribution agreement. See Meyerowitz *Law and Practice of Administration of Estates* para 15.79A.

212 Harris *Sippar* 317-322; Stone 1982 *JESHO* 55, 62-63. Compare Van Wyk 2015 *JNSL* 95-122.

213 See the analysis of inheritance divisions in Harris *Sippar* 358-365; Van Wyk 2014a *JSem* 195-236; Van Wyk 2014b *JSem* 443-483. Compare Van Wyk 2015 *JNSL* 95-122; Van Wyk 2015 *JSem* 109-145. See my discussion in para 5.2.

214 Stone and Stone 1981 *Iraq* 18, 24; Stone 1982 *JESHO* 59-60; Harris *Sippar* 307, 309, 316-318; Obermark *Adoption* 67-70. Compare with Van Wyk 2015 *JNSL* 116-117.

part of the accepted practice, when a nadītu joined the priestess group affiliated with a particular deity, she would receive her dowry and ring-money from her father.[215] However, in most instances the ownership of the property remained in the patrilineal group, while the income generated from the property served as the priestess sister's lifelong support.[216] In Nippur a similar maintenance practice was used but with an additional obligation on the brothers to support their priestess sister.[217] This placed an extra financial burden on them, as they had to provide for their priestess sister's lifetime maintenance, usually in specific amounts of commodities such as wool and oil, in addition to their other duties.[218]

In some cases the nadītu, through her intelligence and labour, could accumulate property for her own financial independence.[219] However, if circumstances left her destitute the nadītu had to resort to adopting someone as a daughter or son in order to secure her financial well-being.[220] When the nadītu bequeathed her estate to the adopted child this would cause tension in her family due to the violation of her brothers' inheritance rights.[221] Also, in the event that the priestess outlived her brothers and required ongoing support, she may have been forced to sell the family properties to sustain herself, despite this being technically prohibited.[222] As an illustration, a court case recorded in Old Babylonian Sippar ruled that the remaining male members, being the bare-dominium owners, were obliged to support their priestess sister or else risk forfeiting their ownership rights.[223] Still, in many case the nadītu was dependent on maintenance, and her ability to attain independence from the patriarchal household was limited to specific circumstances.[224]

In South Africa the *MSSA* governs the provision of reasonable maintenance for claimant spouses until their death or remarriage.[225] This maintenance claim is paid from the inheritances.[226] If the maintenance claim of a surviving

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215 Harris *Sippar* 7; Tanret *Seal of the Sanga* 234-236. Stone 1982 *JESHO* 62, 58-59.

216 Stone 1982 *JESHO* 55; Harris *Sippar* 155, 358-365. Compare Claassens *Family Deceased Estate Division Agreements* vol 1 384-385; Van Wyk 2014a *JSem* 195-236, esp. 206; Van Wyk 2014b *JSem* 474.

217 Stone 1982 *JESHO* 58-60. Compare Van Wyk 2014b *JSem* 471-474.

218 Harris *Sippar* 334-350. Compare Van Wyk 2014b *JSem* 471-474; 467-480.

219 Harris *Sippar* 307, 337.

220 Harris *Sippar* 335-357; Harris 1963 *JESHO* 152-156.

221 Harris *Sippar* 309. Compare Van Wyk 2015 *JNSL* 116-117.

222 Charpin Reading and Writing 156-157; Claassens Family Deceased Estate Division Agreements vol 1 385.

223 Dekiere *MHET* 2, 4, 459. But taking into account that the jurisdiction of Old Babylonian courts was limited to each case and no precedent rule existed. Greengus "Legal and Social Institutions" 264; Charpin *Reading and Writing* 156-157; Claassens *Family Deceased Estate Division Agreements* vol 1 385.

224 Harris *Sippar* 309; Van Wyk 2015 *JNSL* 116-117.

225 Section 2(1) read with 3(a) of the *MSSA*.

226 Section 2(3)(b) of the *MSSA*.

spouse and a dependent child conflict, the claims will be proportionately reduced if necessary.[227] The surviving spouse must provide evidence that s/he is unable to meet her/his own reasonable maintenance needs.[228] When evaluating a surviving spouse's claim, the executor considers various factors outlined in section 3(b) and 3(c) of the *MSSA*.[229] The executor ensures that the amount granted for the maintenance claim is fair and appropriate based on the specific circumstances of the surviving spouse.[230]

Furthermore, the executor has a duty to protect the interests of minors, as mandated by section 28(2) of the *Constitution*. This duty is reinforced by section 9 of the *Children's Act* 38 of 2005, which prioritises the best interests of the dependent children in all matters related to their care, protection, and overall well-being. In the case of *Du Toit v Thomas*[231] the Appellate Division determined that it would be beneficial for the dependent child if the executor chose to utilise the faster remedy provided by the *Maintenance Act* 99 of 1998 rather than relying solely on the *Estates Act.*

In terms of section 2(3)(d) of the *MSSA*, the executor can enter into agreements to facilitate the transfer of the assets of an estate, establish rights in those assets, create trusts, or even impose obligations on heirs to settle a maintenance claim. As previously mentioned, this includes the option of introducing a redistribution agreement.[232]

In South Africa, when it comes to settling maintenance claims, a common approach is to provide a lump sum payment to expedite the winding up of the estate.[233] However, in *Feldman v Oshry*[234] (hereafter the "*Feldman* case"), the court highlighted potential concerns with this approach. If the surviving spouse and/or dependent child were to pass away shortly after receiving the payment, the funds intended for the maintenance would be inherited by his/her heirs rather than serving their original purpose. On the

227 Section 2(3)(c) of the *MSSA*.

228 Section 2(1) read with 3(a) of the *MSSA*.

229 These factors include the claimant's current and anticipated financial means, earning capacity, financial obligations, and needs. The executor also considers the standard of living enjoyed during the marriage and the age of the surviving spouse at the time of the deceased spouse's death.

230 Section 2(1) of the *MSSA*. *Seidel v Lipschitz* (24960/11) [2013] ZAWCHC 158 (24 October 2013) outlined the extent to which an executor must go to assess a claim. Also see Meyerowitz *Law and Practice of Administration of Estates* paras 15.79A, 15.45; Sonnekus 1990 *TSAR* 512.

231 *Du Toit v Thomas* (635/15) [2016] ZASCA 94 (1 June 2016).

232 Meyerowitz *Law and Practice of Administration of Estates* paras 15.79A, 15.45; Sonnekus 1990 *TSAR* 512.

233 If there is insufficient cash available in the estate to settle the claim, it may be necessary to sell estate assets to generate the required funds. Meyerowitz *Law and Practice of Administration of Estates* paras 13.7, 15.79A. See *Feldman v Oshry* 2009 6 SA 454 (KZD) paras 36-37 (the "*Feldman* case").

234 *Feldman* case para 34-37.

other hand, the claimant dependent may also encounter a disadvantage if unforeseen circumstances arise and the initially agreed-upon maintenance amount becomes insufficient to meet his/her ongoing maintenance needs.[235]

As a solution, as in some of the Old Babylonian maintenance provisions,[236] periodic payments as part of a settlement agreement may ensure that the dependent's maintenance claim is fulfilled without the need to transfer cash or assets directly.[237] This addresses the dependent's changing circumstances, such as increased needs or reduced means and earnings, on an ongoing basis. Also, the heirs benefit from the knowledge that the claim can be reassessed if there are changes in the survivors' circumstances, including in their means or earnings.[238] However, in South Africa the executor is obliged to finalise the estate as promptly as possible and cannot keep it open indefinitely until the dependent's death, remarriage, or the termination of his/her need for maintenance.[239]

One potential solution to this problem is to establish an *inter vivos* trust in accordance with the provisions of the *Trust Property Control Act* 57 of 1988 (herewith "*TPCA*").[240] This involves the executor of the estate's acting as the founder of the trust with the dependent named as an income beneficiary and the heirs designated as capital beneficiaries.[241] This approach is similar to certain Old Babylonian maintenance provisions.[242] It is worth noting that both South African law and Old Babylonian customs hold trustees or male family members accountable for their actions.[243] In both systems these

235 See *Feldman* case paras 34-35.

236 Harris *Sippar* 334-350. Compare Van Wyk 2014b *JSem* 471-474; 467-480.

237 See Williams *Maintenance* 385-386.

238 *Feldman* case paras 34-37; Williams *Maintenance* 385.

239 Section 2(2) of the *MSSA* read with ss 35(1), (5)-(12) of the *Estates Act* does not allow for a reassessment of the maintenance claim if the survivor's circumstances change, impacting on the amount of the claim. Once the claim is accepted and distributed accordingly, the survivor cannot take legal action against a creditor or heir of the estate if the amount received is insufficient due to a change in his/her circumstances. See Meyerowitz *Law and Practice of Administration of Estates* para 15.79; *Feldman* case paras 36-37.

240 Williams *Maintenance* 386, 393-401 outlined the advantages and disadvantages of a trust structure.

241 See Williams *Maintenance* 386-387, 393-394 and definition of a trust in s 1 of the *Trust Property Control Act* 57 of 1988 (the "*TPCA*").

242 Stone and Stone 1981 *Iraq* 18. An example of this can be seen in the Old Babylonian clay tablet ARN 120, which illustrates a brother's authority over his sister's property transactions. Stone 1982 *JESHO* 60; Harris 1964 *Studies Oppenheim* 119.

243 Sections 9(1) and (2) of the *TPCA*. In *Wiid v Wiid* (1571/2006) [2012] ZANCHC 62 (13 January 2012), Judge Lacock made several observations regarding the actions to be taken by the trustees.

individuals can be held personally liable if they mismanage the property or fail to adequately meet the needs of the trust beneficiary or dependent.[244]

However, the option of establishing an *inter vivos* trust under the *TPCA* is viable only if the executor actively enters into such an arrangement.[245] The executor is not permitted to implement a trust in a redistribution agreement due to the specific restriction that only heirs are allowed to be contractual parties in the reshuffling of their inheritances. This limitation is highlighted in the *Bydawell* case,[246] where the redistribution agreement is referred to as a "case of schichten en delen" *between heirs of full legal capacity* (my emphasis).

An alternative option is then to create a company structure in a redistribution agreement, with the heirs and/or the surviving spouse holding all the shares in the company. As the only shareholders of the company, whose shares form part of each heir's estate, it can be argued that they are still acting as heirs in their participation to redistribute their inheritances.[247] The executor provides an estate cash amount or transfers an estate asset, or both, equivalent to the capital value of the maintenance claim to the company. The directors then invest the funds and manage the assets to generate income that can be used to meet the shareholders' ongoing needs. If the asset involved is immovable property, the directors may allow the shareholders to reside in it or enter into a lease agreement with a tenant, utilising the rental income to fulfil the shareholders' needs. Implementing a company structure allows for a more structured and manageable redistribution of the estate's assets while ensuring compliance with legal requirements.[248]

Also, another way to address the maintenance needs of a surviving spouse and/or dependent child in South Africa is through the introduction of a usufruct construction.[249] This involves burdening the inherited immovable property with a usufruct in favour of the claiming spouse and/or dependent child.[250] In the past the Master's position was not to accept a redistribution agreement that reserved a real right, like a usufruct. However, it seems that

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244 Sections 9(1) and (2) of the *TPCA* (South African trust) and Stone 1982 *JESHO* 60; Harris 1964 *Studies Oppenheim* 119; Greengus "Legal and Social Institutions" 264 (Old Babylonian counterpart).

245 In accordance with s 2(3)(d) of the *MSSA*.

246 *Bydawell* case 523B.

247 This meets the requirement that only eligible heirs of full legal capacity are allowed to be parties to a redistribution agreement. *Bydawell* case 523B. Acceptance of this solution as a valid option may vary among the branches of the Master offices.

248 Compare Williams *Maintenance* 145-150.

249 Williams *Maintenance* 383.

250 Meyerowitz *Law and Practice of Administration of Estates* paras 24.13-24.23; Sonnekus 1990 *TSAR* 499, 502, 511-513. See the advantages and disadvantages outlined by Williams *Maintenance* 383-385.

this stance has changed[251] on the condition that servitudes need to be registered to establish limited real rights, and the transfer of land ownership can be accomplished only through a deed of transfer.[252] This concept of a usufruct bears some resemblance to certain Old Babylonian maintenance provisions where the family members held the property as the bare dominium owners.[253] The dependent (priestess sister) in turn possessed the right to receive income as granted by the family.[254]

Also the Old Babylonian and South African approaches to addressing maintenance needs by means of a usufruct construction share similar advantages and disadvantages, as highlighted by Williams' comments on the South African solution.[255] Instead of transferring the ownership of the assets of the estate, creating a limited right such as a usufruct ensures that the dependent's maintenance needs are met while safeguarding the inheritance rights of the heirs. This solution aims to provide a tailored limited interest to the survivor, benefiting all parties involved.[256] However, as pointed out by Williams,[257] there is a notable disadvantage to this solution, because continued engagement between the dependent and the heirs is necessary.[258] From the dependent's perspective, this solution may not be ideal if s/he prefers a lump sum payment for greater independence from the heirs. Similarly, this solution may not be ideal if the relationship with the dependent is strained or problematic; for instance, if there are shared responsibilities such as property maintenance and insurance.[259] All of these concerns can be addressed in a redistribution agreement by outlining the rights and obligations of all the involved parties, the consequences of transgression, and the procedures required in the re-evaluation of the maintenance arrangement.[260] The tailor-made arrangements may restrict the dependent's ability to alienate his/her rights and if the family members responsible mismanaged the property or failed to provide proper sustenance, they could be held personally liable. On the other hand, the

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251 *Ex Parte Jooste* 1968 4 SA 437 (O). Section 67 of the *Deeds Act* provisions can be invoked to directly refer to the usufruct in the Transfer Deed without the need for notarisation. See Meyerowitz *Law and Practice of Administration of Estates* paras 12.31, 13.7.

252 Sections 75 and 76, as provided for in s 3(1)(o) of the *Deeds Act*. Compare Nel *Jones Conveyancing* 279.

253 In some instances the property of the nadītu was at least partly controlled by her brothers. Stone and Stone 1981 *Iraq* 19; Stone 1982 *JESHO* 60.

254 See Van Wyk 2014a *JSem* 195-236 analysis of three case studies concerning this structure.

255 Williams *Maintenance* 383-386

256 See Meyerowitz *Law and Practice of Administration of Estates* paras 24.13-24.23.

257 Williams *Maintenance* 383, 385.

258 Regarding Old Babylonian records see Leemans 1986 *Oikumene* 1-16. Compare Van Wyk 2019a *JSem* 1-24; Van Wyk 2019b *JSem* 1-34.

259 Williams *Maintenance* 385.

260 Section 2(3)(d) of the *MSSA*. Compare Williams *Maintenance* 145-150.

parties may agree that the responsible family members stood to gain full ownership after the dependent passed away or no longer required financial support.[261]

7.4 Payment-clause

The Old Babylonians had a systematic approach to dividing an inheritance that incorporated a payment clause.[262] This clause required individuals who were in transgression with the initial division to then compensate other family members with a specific amount of silver.[263]

Like the payment clause in Old Babylonian practices, some modern commonwealth law systems, including those in England, Wales and Australia, have established mechanisms for addressing breaches of contract. These mechanisms, such as rescission, alternative contracts and the compensation principle for liquidated damages enable contracts to be modified or terminated if necessary. They prevent excessive compensation and aim to ensure fairness for both parties involved.[264]

In South Africa a penalty clause can be incorporated into the redistribution agreement division, especially when limited rights were created, ensuring that an obligation and/or limitations regarding the burdened inheritance property is/are met. This is to anticipate possible disputes and ensure certainty in following the terms of the contract and the initial inheritance awards where the obligations were agreed upon.

8 Conclusion

The Old Babylonian inheritance division and the South Africa redistribution agreement share common elements. These include the necessity of engaging in negotiations to reallocate inheritances based on prevailing circumstances. Mechanisms such as exchange, sale, or donation are employed in reaching an agreement. Furthermore, estate properties can be managed in a manner that enables the introduction of assets to equalise the division.

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261 Suurmeijer 2010 *RA* 19-21, 27. Compare Van Wyk 2019a *JSem* 1-24; Van Wyk 2019b *JSem* 1-34.

262 Two inheritance divisions excavated from the Old Babylonian Tell Harmal site included a payment clause that required any family member who transgressed with a claim to pay an agreed monetary reward in units of silver. Tell Harmal represents the ancient city Shaduppum and is today part of the expanding city of Baghdad, in Iraq. Ellis 1974 *JCS* 133-153. Compare Van Wyk's 2018 *Fundamina* 170-197 study of the payment clause in these recordings.

263 Van Wyk 2018 *Fundamina* 170-197.

264 See O'Sullivan, Elliott and Zakrzewski *Law of Rescission*; Goetz and Scott 1977 *Colum L Rev* 576-578.

In South African law the executor follows a statutory process prescribed by the *Estates Act* to enforce a redistribution agreement agreed upon by the eligible heirs of a deceased estate. In contrast, the Old Babylonian approach involved an informal administration process where family members divided the family inheritance with no time limitations, aiming to sustain family relationships and address the parties' needs. We can learn valuable lessons from the Old Babylonians about adaptive approaches tailored to the circumstances of each case, introducing flexible solutions to ensure fairness and equality, especially when considering the needs of vulnerable family members. This consideration becomes even more significant in South Africa's mixed law system, as it strives to adhere to the underlying values of the country's *Constitution*.

When comparing inheritance divisions in the contexts of the Old Babylonian and South African traditions, the following adaptable legal practices of the Old Babylonians offer valuable insights for interpreting South African law concerning redistribution agreements. These practices involve a division by lots, the bringing-in principle, maintenance clauses and payment clauses.

In South African law the practical procedures that heirs undertake to reshuffle the assets of an estate are not fixed. South African executors may draw inspiration from the methods employed during the Old Babylonian period, which are similar to the recommendations made by Roman-Dutch legal scholars, especially for movable estate assets. These methods provide options such as appointing an appraiser to evaluate the assets, with one party receiving the assets as they are while the other receives compensation based on the appraised value. Alternatively, assets can be divided with one party dividing the assets and the other making a choice, or lot-drawing can be used to allocate the assets and establish individual ownership.

The Old Babylonian inheritance division included the possibility of implementing the bringing-in principle, where parties could contribute non-estate immovable or movable properties, including money, to the estate, to achieve an equal division. In South Africa the bringing-in principle is currently limited to non-estate movable property in redistribution agreements. However, the exclusion of non-estate immovable property in South Africa's redistribution system has implications that limit flexibility in addressing hardships and impractical situations in a diverse society. This exclusion appears to be aimed at preventing claims of exemption from transfer duty. However, there is an argument to be made for including non-estate immovable property subject to transfer duty, as it could contribute to a fair redistribution of the inheritance. Also, by potentially qualifying for the transfer duty threshold exemption, the inclusion of such property might

benefit the larger low-income South African population by promoting equity and balancing the division of inheritances.

The Old Babylonian inheritance division involved brothers taking responsibility for providing for their priestess sister, while South African law recognises the need to provide for surviving spouses and dependent children. Both divisions employed methods such as usufruct or company construction to address maintenance needs. The Old Babylonian records demonstrate the importance of adequately meeting the dependent's needs through a mechanism for handling maintenance claims. Like the Old Babylonian practice, it is recommended that maintenance provisions should extend throughout the dependent's lifetime, considering potential changes for both the dependent and the obligated family members (the heirs). The redistribution agreement could address these concerns by outlining the rights and obligations of the heirs, the consequences of transgression, and the procedures for re-evaluating the maintenance arrangement.

Another Old Babylonian legal practice known as the payment clause stipulated that anyone failing to honour the agreed-upon obligations in the inheritance division would be required to pay a specific amount to the other parties involved. A penalty clause could be included in a South African redistribution agreement to anticipate potential disputes and ensure compliance with the terms of the contract and initial inheritance awards, particularly when the obligations have been agreed upon. This would serve to provide certainty and enforce adherence to the terms agreed upon.

In conclusion, the narrow approach of South African law towards redistribution agreements may not always be the best solution for today's challenges. This article argues for a more flexible and innovative approach in the South African context, drawing lessons from the practices of the Babylonians. By embracing a more flexible and innovative approach, it may be possible to achieve a fair and equitable redistribution agreement that aligns with the underlying values of the South African *Constitution*.

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List of Abbreviations

ARCHIBAB	Archives Babyloniennes
AJA	Promotion of Administrative Justice Act 3 of 2000
Am J Comp L	The American Journal of Comparative Law
BA	Biblical Archaeologist
BBA	Black Administration Act 38 of 1927
BCE	Before the Common Era
CBQ	Catholic Biblical Quarterly
CILSA	Comparative and International Law Journal of Southern Africa
Colum L Rev	Columbia Law Review
Comp Stud Soc Hist	Comparative Studies in Society and History
Emory LJ	Emory Law Journal
ICLQ	The International and Comparative Law Quarterly
JAOS	Journal of the American Oriental Society
JBL	Journal of Biblical Literature
JCS	Journal of Cuneiform Studies
JESHO	Journal of the Economic and Social History of the Orient
JNSL	Journal of Northwest Semitic Languages

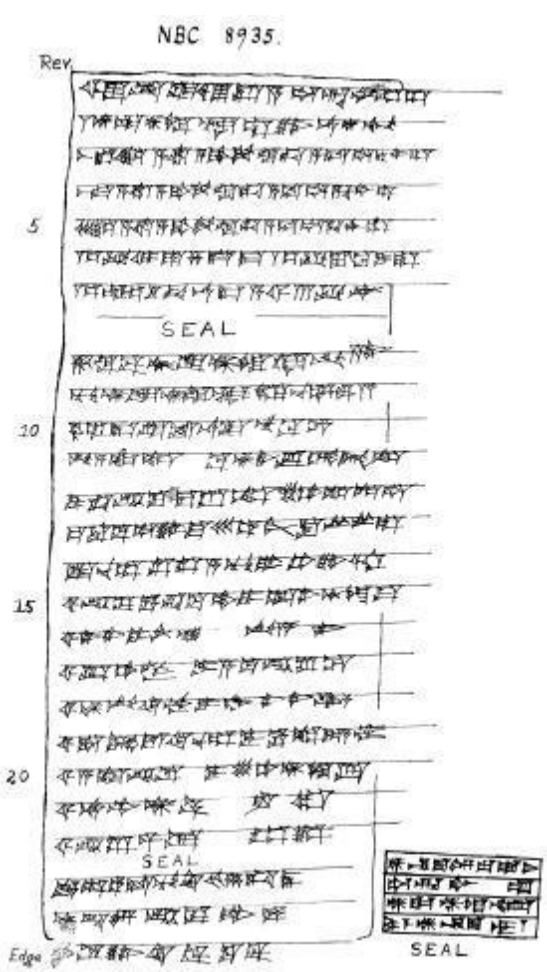
JSem	Journal for Semitics
Jur Rev	The Juridical Review
LGBTQIA+	Individuals and groups who identify as lesbian, gay, bisexual, transgender, queer, intersex, asexual, and other related categories
L&D Account	Liquidation and Distribution Account
MSSA	Maintenance of Surviving Spouses Act 27 of 1990
PAIA	Promotion of Access to Information Act 2 of 2000
PELJ	Potchefstroom Electronic Journal
RA	Revue d'assyriologie et ´d'archeologie orientale
RCMA	Recognition of Customary Marriages Act 120 of 1998
SALJ	South African Law Journal
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg / Journal for Contemporary Roman-Dutch Law
TPCA	Trust Property Control Act 57 of 1988
TSAR	Journal of South African Law / Tydskrif vir die Suid-Afrikaanse Reg
WA	World Archaeology, London, 1969-
ZA	Zeitschrift für Assyriologie und vorderasiatische Archäologie

Addendum A

The tablet, which is part of the JB Nies Collection (NBC 8935), is currently owned by Yale University. O'Callaghan 1954 *JCS* transcribed and translated the tablet and named it "A new inheritance contract from Nippur", where he also provided some commentary on the tablet.

Obverse plate (O'Callaghan 1954 *JCS* 142)

Reverse plate (O'Callaghan 1954 *JCS* 143)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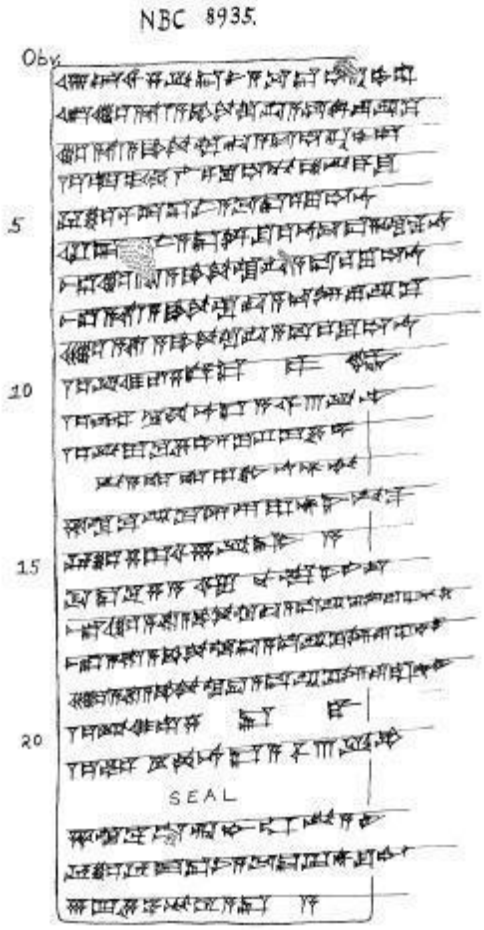
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