Name & Surname: Tracey Makhubele

Student Number: 10975888

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QUESTION 1

a) Yes Mrs. Xitsonga's customary marriage to Mr. Xitsonga is legally recognized. They got married on the 13th of March 1999 before the Recognition of Customary Marriages Act 120 of 1996 came into operation on the 15th of November 2020. The Act recognizes customary marriages that were validly entered into under customary law before it came into operation.

   The fact that their marriage was not registered does not mean that it is invalid. Registration is mainly important as proof of the marriage is recognized and is regulated by the Recognition of Customary Marriages Act 120 of 1998.

b) Mr. Xitsonga's second customary marriage to Ms Ntswaki is more complicated because he was already married to Mrs. Xitsonga.

   Under the Recognition of Customary Marriages Act, a man who is already married under customary law may enter into another customary marriage. However there are certain requirements that must be followed. In terms of section 7(6) he must approach the court for approval of a written contract that regulates the matrimonial property system of his existing and future customary marriage.

   The facts also shows that Mr. Xitsonga and Ms Ntswaki are Tsonga, this is important because the constitutional court dealt with Tsonga customary law in Mayelane v Ngwenyama and Another 2013 (4) SA 415 (CC). The court recognized that according to the relevant Xitsonga customary law, the existing wife's consent is required before her husband can enter into another marriage.

   In this case Mrs. Xitsonga only found out about the second marriage after Mr. Xitsonga had already paid lobola and held a traditional wedding with Ms Ntswaki. There is no indication that Mrs. Xitsonga gave her consent to Mr. Xitsonga.

   Therefore the second customary marriage between Mr. Xitsonga and Ms Ntswaki would not be valid under the applicable Xitsonga customary law because Mrs.Xitsonga did not consent to it. The fact that lobola was paid and that a traditional wedding took place does not remove the requirement for the existing wife's consent.

c) No the civil marriage between Mr. Xitsonga and Ms Ntswaki is not legally recognized.

   Mr. Xitsonga was already married to Mrs. Xitsonga under customary law and that marriage had not been dissolved. Under the Recognition of Customary Marriages

Act, a person who is already married under customary law generally cannot enter into a civil marriage with another person while that customary marriage still exists.

Therefore Mr. Xitsonga was not legally free to enter into a civil marriage with Ms Ntswaki in January 2023. The civil marriage is consequently invalid even though they went to the department of Home Affairs and went through the civil marriage process.

In conclusion, Mrs. Xitsonga's customary marriage to M. Xitsonga is legally recognized under the **Recognition of Customary Marriages Act 120 of 1998**, even though the marriage was not registered. Mr. Xitsonga could potentially enter into another customary marriage, but because he and Ms Ntswaki are Tsonga, the requirements of Xitsonga customary law are important. Since Mrs. Xitsonga did not give her consent to the second customary marriage, the marriage between Mr. Xitsonga and Ms Ntswaki would not be valid. In addition, Mr. Xitsonga could not legally enter into a civil marriage with Ms Ntswaki while his customary marriage to Mrs. Xitsonga was still in existence. Therefore, Mrs. Xitsonga remains legally protected as Mr. Xitsonga's first customary wife.

QUESTION 2

The main issues in this question is whether Mrs. Simpson can claim anything from her late husband's estate even though they were married out of community of property without the accrual system. Mr. Simpson does not want to ask the court for redistribution of the assets but she has no income or assets for her own.

The question is therefore whether there is another legal remedy available to her as a surviving space.

The maintenance of surviving spouses Act 27 of 1990 protects a surviving spouse who does not have enough financial resources to support themselves after the death of their spouse.

According to the Act a surviving spouse can claim reasonable maintenance from the deceased estate if they do not have sufficient means to support themselves. The purpose of the Act is to make sure that surviving spouse is not left without financial support simply because their deceased spouse has left their property to other beneficiaries.

When deciding whether maintenance should be awarded, the court looks at the circumstances of both the surviving spouse and the deceased estate. Factors such as the surviving spouse's financial position, their needs, the standard of living they enjoyed during the marriage, their age, and the length of the marriage and the value of the deceased estate may be considered.

Importantly being married out of community of property without accrual does not prevent Mrs. Simpson from making a maintenance claim. A maintenance claim is different from asking for a share of the matrimonial property.

In this case, Mrs. Simpson and Mr. Simpson were married for 15 years during the course of their marriage Mrs. Simpson did not work because Mr. Simpson believed that a woman's place was in the kitchen (home). As a result she has no assets or income of her own.

This puts Mrs. Simpson in a financially vulnerable position following the death of her husband. She also cannot simply claim half of Mr. Simpson's estate because the couple were not married out of community of property without accrual. However this does not mean that she has no right against the estate.

Mrs. Simpson can make a claim for maintenance under the maintenance of surviving spouse Act. Her lack of income and assets would be important factors for the court to consider. The fact that she was financially dependent on Mr. Simpson throughout their 15 year marriage would also be relevant.

The court would also consider the fact that Mr. Simpson left his estate to his three children, their interest would have to be considered together with Mrs. Simpson's needs and the value of the estate. Mrs. Simpson would therefore not automatically receive the entire estate but she may be awarded an amount that is considered reasonable for her maintenance.

The constitutional court case of Bwanya v Master of the high court, Cape Town and others 2022 (3) SA 350 (CC) also demonstrates the importance of protecting vulnerable surviving partners and ensuring that the law relating to deceased estate is applied fairly.

In conclusion, Mrs. Simpson does not automatically receive a share of Mr. Simpson's estate because the couple were married **out of community of property without accrual**. However, this does not mean that she has no rights against the deceased estate. Since she has no assets or income of her own and was financially dependent on Mr. Simpson during their 15-year marriage, she may claim **reasonable maintenance under the Maintenance of Surviving Spouses Act 27 of 1990**. The court will consider her financial needs and circumstances, as well as the value of the estate and the interests of the other beneficiaries. Therefore, even though Mr. Simpson left his estate to his children, Mrs. Simpson may still have a valid claim for maintenance from the estate.

Reference list

1. Republic of South Africa (1990) *Maintenance of Surviving Spouses Act 27 of 1990*. Pretoria: Government Printer.
2. *Bwanya v Master of the High Court, Cape Town and Others* 2022 (3) SA 305 (CC).
3. Republic of South Africa (1990) *Maintenance of Surviving Spouses Act 27 of 1990*. Pretoria: Government Printer.
4. *Bwanya v Master of the High Court, Cape Town and Others* 2022 (3) SA 305 (CC).