



Between law and custom: The dissolution of unregistered customary marriages by death in South Africa

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ABSTRACT

The dissolution of marriage by death is settled in South African law, yet death within an unregistered customary marriage produces uncertainty and unequal outcomes. Despite the Recognition of Customary Marriages Act 120 of 1998, many unions remain unregistered because of socio-cultural and administrative barriers. This article therefore analysed the legal consequences of death, incapacity, and disappearance for spouses in such unions, focusing on inheritance, burial decision-making, guardianship and medical consent. Drawing on jurisprudence, including *Bhe v Magistrate, Khayelitsha*, *Gumede v President of the Republic of South Africa*, *Hassam v Jacobs NO*, and High Court decisions on burial rights, the article revealed that courts have advanced equality, yet procedural gaps persist, especially in polygynous households and in instances where marriages are valid but undocumented. The argument is twofold. First, legislative reform should introduce presumptive recognition of unregistered customary marriages, clarify status-update procedures at the Department of Home Affairs, and codify hierarchies for medical decision-making consistent with living customary law and section 39(2) values. Second, culturally responsive mediation anchored in traditional leadership and court oversight should be institutionalised for disputes about status, burial, and child care. The article proposes a constitutionally compliant hybrid framework to secure dignity, equality, and legal certainty and fairness for surviving spouses and children.

Keywords: Customary Marriages, Presumption of Death, Medical Consent, Burial Rights.

INTRODUCTION

The dissolution of marriage by death is a long-standing principle in South African law, signifying the automatic termination of the marital bond and the extinction of reciprocal rights and duties between spouses.¹ However, when death occurs within an unregistered customary marriage, the legal consequences become uncertain and contested. Although the *Recognition of Customary Marriages Act 120 of 1998* (“Recognition Act”) was enacted to provide customary marriages with the same status and legal protection as civil marriages,² the persistence of unregistered unions has created significant interpretive and procedural challenges. A substantial number of customary marriages in South Africa

¹ Hahlo HR *The South African Law of Husband and Wife* 5 ed (Juta 1985) 321.

² Section 2(1) of the *Recognition of Customary Marriages Act 120 of 1998*.

remain unregistered due to a range of social, cultural, and administrative barriers, including limited access to registration facilities, lack of awareness, and adherence to traditional practices that prioritise communal recognition over formal documentation.³

This reality generates deep legal uncertainty when a spouse in such a union dies, particularly with respect to inheritance, guardianship, burial rights, and the legal status of the surviving spouse.⁴ The state's administrative systems—especially the Department of Home Affairs—often rely exclusively on formal registration to confer legal status, thereby excluding surviving spouses in unregistered unions from essential legal protections and benefits.⁵ The resulting exclusion disproportionately affects women, reflecting both gendered power dynamics and the historical marginalisation of customary law within South Africa's plural legal order. The *Constitution of the Republic of South Africa, 1996*, provides a normative foundation for reconciling this tension. Section 15(3)(a)(ii) explicitly recognises marriages concluded under any tradition or system of religious, personal, or family law, thereby affirming the constitutional legitimacy of customary unions.⁶ Moreover, section 9 guarantees equality before the law, while section 10 affirms the inherent dignity of every person. However, the persistence of statutory and administrative frameworks that condition recognition on formal registration undermines these constitutional guarantees and perpetuates structural inequality.⁷

Judicial interpretation has attempted to bridge this gap. Landmark cases such as *Bhe v Magistrate, Khayelitsha*,⁸ *Gumede v President of the Republic of South Africa*,⁹ and *Hassam v Jacobs NO*¹⁰ have collectively advanced the constitutionalisation of family law by invalidating discriminatory rules of succession and recognising the equal status of women in customary and religious marriages. Nonetheless, significant doctrinal and procedural lacunae remain. These include the absence of statutory clarity on the legal implications of death in unregistered customary marriages, the lack of administrative procedures for posthumous recognition, and the inconsistent application of living customary law principles by the courts.

Accordingly, this article examines the dissolution of unregistered customary marriages by death and the attendant legal implications. It interrogates how the current legal framework—comprising common law, customary law, and constitutional jurisprudence—addresses the rights of surviving spouses and dependants. The article argues that the existing regime inadequately protects such individuals, failing to reconcile South Africa's constitutional commitment to equality and human dignity with the lived realities of customary unions. It proposes a hybrid reform model that integrates statutory precision, community-based dispute resolution, and recognition of living customary law to achieve a more inclusive and constitutionally compliant framework for managing marital dissolution by death.

METHODOLOGY

This research adopted a doctrinal legal methodology, which was the most suitable approach for analysing the normative, interpretive, and constitutional dimensions of the dissolution of unregistered customary marriages by death within South Africa's plural legal system. The study conducted a comprehensive examination of primary legal authorities, including the *Constitution of the Republic of South Africa, 1996*, the *Recognition of Customary Marriages Act 120 of 1998*, the *Presumption of Death Act 13 of 2013*, and the *Children's Act 38 of 2005*, as well as relevant jurisprudence from the Constitutional Court, the Supreme Court of Appeal and the High Courts. Through this analysis, the research sought to elucidate how these instruments regulated spousal rights, inheritance, guardianship, and marital dissolution upon death, incapacity, or disappearance in unregistered customary unions.

The selection of cases was guided by their constitutional significance, precedential value, and relevance to issues of marital status, inheritance, guardianship, and the legal consequences of death,

³ M. Mamashela, "The Legal Recognition of Customary Marriages in South Africa," *South African Journal on Human Rights* 622., 2004.

⁴ T. W. Bennett, *Customary Law in South Africa* (Cape Town: Juta and Company Ltd, 2008).215

⁵ I. M. Rautenbach, "Registration and Legal Recognition of Customary Marriages," *127 South African Law Journal* 136, 2010.141.

⁶ Section 15(3)(a)(ii) of the *Constitution of the Republic of South Africa, 1996*.

⁷ Iain Currie and Johan De Waal, *The Bill of Rights Handbook* (Juta and Company Ltd, 2013). 242–243

⁸ *Bhe v Magistrate, Khayelitsha and Others* 2005 (1) SA 580 (CC).

⁹ *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC).

incapacity, and disappearance. Priority was given to landmark decisions that contributed to the development of customary law and its interaction with constitutional principles, particularly equality, dignity, and non-discrimination.

The study also engaged with secondary legal literature, including academic commentary and scholarly works, which provided critical insights into the intersection of living customary law and constitutionalism.¹⁰ The research followed a normative interpretive design, which not only interrogated the internal coherence of the existing legal framework but also evaluated its consistency with constitutional imperatives such as equality, human dignity, and substantive justice. This framework enabled a critical assessment of whether the existing legal regime adequately protects spouses in unregistered customary marriages. Although the study was limited to textual and jurisprudential analysis and did not incorporate empirical or socio-legal fieldwork, its reliance on authoritative sources ensured doctrinal precision, analytical rigour, and theoretical depth. Thus, this methodology enabled a critical assessment of whether South Africa's legal regime adequately reconciled customary norms with constitutional values in the regulation of marital dissolution by death.

DISCUSSION

The legal rights of a spouse regarding an incapacitated/missing partner

In South Africa, the registration of a marriage plays a pivotal role in conferring legal recognition and securing the rights of spouses, particularly in circumstances involving medical decision-making, presumed death, or the actual death of a partner.¹¹ Where a marriage, especially one concluded under customary law, remains unregistered, serious legal uncertainties arise regarding the authority to act on behalf of an incapacitated spouse.¹² This section explores the legal complexities that arise when one spouse becomes unable to make decisions due to illness, incapacity, or absence, and how the absence of formal registration complicates such determinations.

Spouse on life support

Life support refers to medical interventions that maintain artificial essential bodily functions, such as breathing and circulation, in individuals whose vital organ systems have failed or are insufficient.¹³ These interventions include mechanical ventilation, artificial nutrition and hydration, dialysis, or other advanced technologies.¹⁴ In South Africa, individuals on life support are legally considered alive, retaining all associated rights and legal protections.¹⁵ If the patient is married, the marriage remains valid.¹⁶ However, this legal status raises significant questions about decision-making on behalf of the

¹⁰ Bennett *Customary Law in South Africa*; Rautenbach "Registration and Legal Recognition of Customary Marriages"; C. Himonga and T. Nhlapo, *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (Oxford University Press, 2014).

¹¹ In South African law, the right to make medical decisions on behalf of an incapacitated partner is generally reserved for legally recognized spouses. See the case of *In Hardie v Jansen and Others* 2015ZAWCHC 104 (HC), the court considered the validity of a customary marriage where the husband, diagnosed with schizophrenia, was alleged to lack mental capacity to consent. The husband's sisters challenged the marriage's validity, arguing he was mentally incapacitated when the marriage was contracted. The court emphasized that valid consent is essential for a lawful marriage. Due to the husband's mental incapacity affecting his ability to understand and consent, the marriage was found invalid, impacting the legal recognition of the union and spousal rights.

¹² Institutions like government departments, the Master's Office and other private institutions require a marriage certificate for these benefits to be conferred. See also the case of *SJM v LIM* 2020 ZAMPMHC 46 (HC) at para 23 it is stated that in the case of registration, for example, the courts regarded registration as prima facie evidence of the existence of a marriage rather than as a requirement for the marriage.

¹³ Sarah Higgins et al., "Views and Perceptions of Advanced Life Support Practitioners on Initiating, Withholding and Terminating Resuscitation in out-of-Hospital Cardiac Arrest in the Emergency Medical Services of South Africa," *Resuscitation Plus* 19 (2024): 100709; Aline Bouwes et al., "Prognosis of Coma after Therapeutic Hypothermia: A Prospective Cohort Study," *Annals of Neurology* 71, no. 2 (2012): 206–12.

¹⁴ Archer S Gordon, David C Fainer, and A C Ivy, "Artificial Respiration: A New Method and a Comparative Study of Different Methods in Adults," *Journal of the American Medical Association* 144, no. 17 (1950): 1455–64.

¹⁵ The Constitution of the Republic of South Africa, 1996, sec 11 states that "Everyone has the right to life"; South African Law Commission Report *Euthanasia and The Artificial Preservation of Life*: 1998, and J Govender 'Pulling the plug' (2019) at 1.

¹⁶ In South Africa, a marriage can only be dissolved through a formal court-issued divorce. This means that even in circumstances such as illness, a marriage does not automatically end; the couple must go through the legal divorce process to terminate the union. Russel Viljoen, "'Till Murder Do Us Part': The Story of Griet and Hendrik Eksteen," *South African Historical Journal* 33, no. 1 (1995): 13–32.

incapacitated individual. Critical issues include determining the legal authority to make decisions on behalf of an unconscious patient, assessing the influence and applicability of a living will in guiding such decisions, and examining whether a spouse, particularly in cases of polygamous or unregistered customary marriages, is granted automatic decision-making authority. To answer these questions, the discussion will first deal with the issue of a living will.

A living will allows a person to outline their preferences for medical treatment, including the refusal of life-sustaining interventions, should they become incapacitated.¹⁷ However, the legal enforceability of such documents remains uncertain.¹⁸ In *Clarke v Hurst NO and Others*,¹⁹ the court addressed the withdrawal of life-sustaining treatment for a patient in a persistent vegetative state, setting a significant legal precedent in South African law regarding end-of-life decisions. In that case, Bryan Clarke suffered severe brain damage, leaving him in a persistent vegetative state with no prospect of recovery, and he was being kept alive through artificial feeding and hydration.²⁰ Before his condition, he had explicitly expressed his desire not to be kept alive through artificial means under such circumstances. Based on this, his wife petitioned the court for an order to withdraw life-sustaining treatment, asserting that its continuation was neither in his best interests nor consistent with his wishes.²¹

The court held that the withdrawal of artificial feeding and hydration would not constitute an unlawful act.²² The judgment emphasised that continuing life-sustaining treatment did not serve a therapeutic purpose and merely prolonged suffering. Importantly, the court considered the patient's prior expressed wishes, despite the absence of formal legal recognition of living wills in South Africa at the time.²³ The court determined that continuing life-sustaining measures against the patient's expressed wishes, especially in the absence of any prospect of recovery, would not be consistent with his best interests.²⁴ This case not only reinforced the importance of honouring patient autonomy but also demonstrated how South African courts are willing to respect living wills, even in the absence of explicit statutory recognition, marking a progressive step in medical and legal ethics.

In the absence of a living will, the legal authority to make decisions for an incapacitated individual on life support in South Africa is governed by the National Health Act 61 of 2003. Section 7 of the Act establishes a hierarchy of individuals authorised to consent to medical treatment or the withdrawal of life-sustaining measures. The order is as follows:

1. A person authorised in writing by the patient to act on their behalf, such as through an advance directive or power of attorney.
2. A spouse or life partner.
3. A parent, grandparent, adult child, or sibling.²⁵

Where no advance directive exists, a legally recognised spouse generally holds primary decision-making authority.²⁶ However, the spouse's decisions must align with the best interests of the incapacitated individual, as interpreted by medical professionals and, where necessary, the courts. For legally registered marriages, this decision-making framework is straightforward. However, challenges

¹⁷ David McQuoid-Mason, "Pacemakers and 'living Wills': Does Turning down a Pacemaker to Allow Death with Dignity Constitute Murder?," *South African Journal of Criminal Justice* 18, no. 1 (2005): 24–40; Alastair Bull and Bob Mash, "Advance Directives or Living Wills: Reflections of General Practitioners and Frail Care Coordinators in a Small Town in KwaZulu-Natal," *South African Family Practice* 54, no. 6 (2012): 507–12; James Faber, "A Conceptual View of the Act of Testation to Elucidate a Testator's Intention in the South African Law of Succession: A Proposed 'Actbased Model' as Opposed to the Traditional 'Requirements Model' (Part 1)," *Journal of South African Law* 3 (2021): 504–20; Johann Jacobs, "Last Rights: Human Rights Law," *Without Prejudice* 12, no. 6 (2012): 61–64.

¹⁸ *Clarke v Hurst* 1992 (4) SA 630 (D).

¹⁹ *Clarke v Hurst* 1992 (4) SA 630 (D).

²⁰ Theodore Fleischer, "End-of-Life Decisions and the Law: A New Law for South Africa?," *Continuing Medical Education* 21, no. 1 (2003).1.

²¹ Fleischer, "End-of-Life Decisions and the Law,1.

²² *Clarke v Hurst* 1992 (4) SA 630 (D). para 10.

²³ Fleischer, "End-of-Life Decisions and the Law, 1.

²⁴ *Clarke v Hurst* 1992 (4) SA 630 (D). (n 451) para 11.

²⁵ National Health Act 61 Of 2003.

²⁶ National Health Act 61 Of 2003.

arise in the context of polygamous customary marriages, particularly when determining which spouse holds the decision-making authority.

Under the *Recognition Act*, customary marriages are granted the same legal status as civil marriages, provided they comply with the Act's requirements. Section 6 of the *Recognition Act* affirms the equal status and capacity of spouses in customary marriages, allowing them to manage assets, enter into contracts, and litigate independently. In polygamous customary marriages, determining which spouse holds authority for medical decisions is not explicitly addressed in the *Recognition Act*. Customary traditions often prioritise the first wife as the senior spouse, potentially granting her precedence in family matters. However, this is not codified in statutory law, leading to potential ambiguity and conflict in decision-making.

South African jurisprudence has engaged with various dimensions of customary marriage but has not definitively addressed the issue of medical decision-making authority within polygynous unions. In *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC), the Constitutional Court affirmed the equal legal status and capacity of spouses in customary marriages,²⁷ reinforcing the constitutional imperative of substantive gender equality in the application of the *Recognition of Customary Marriages Act 120 of 1998*. Although the case did not explicitly consider questions of medical consent or decision-making on behalf of an incapacitated spouse, it affirmed the overarching principle that customary law must be interpreted in a manner that promotes dignity and equality.

In contexts where living customary law governs marital relationships, unregistered customary marriages may nonetheless be recognised as legally valid, provided that they conform to the substantive requirements of customary law.²⁸ In such instances, the surviving or present spouse may, in principle, exercise decision-making authority on behalf of an incapacitated partner. However, in the context of polygynous unions, where multiple spouses may assert competing claims of authority, the absence of statutory clarity on medical decision-making hierarchies creates a normative vacuum. Disputes are likely to arise when the legitimacy or seniority of a particular spouse is contested by other co-spouses or family members, particularly in the absence of formal registration.

To address this legal lacuna, two key interventions are recommended. First, there is a pressing need for legislative reform to introduce explicit statutory provisions governing the delegation of medical decision-making authority in customary marriages, with specific attention to the complexities posed by polygynous unions. Such provisions should affirm the legal standing of spouses in unregistered yet substantively valid customary marriages and establish a clear hierarchy or process for resolving competing claims to authority. Second, a structured community-based mediation framework should be institutionalised to provide culturally appropriate dispute resolution mechanisms. This framework should integrate the role of traditional leaders, legal professionals, and family representatives to mediate conflicts related to spousal authority in cases of medical incapacity. Such a model would not only offer a practical solution in the absence of immediate legislative reform but also reflect the hybrid normative order that characterises the South African legal system, wherein customary and statutory law are required to coexist in harmony with constitutional values.

Missing Spouse

Presumption of death refers to a legal declaration by a court that a person is presumed to have died after an extended period of unexplained absence, during which there is no evidence indicating that the person is still alive.²⁹ Under common law, the presumption of death procedure allows a court to legally declare

²⁷ *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC) at para 32 it stated that "Beyond the Constitution, the Recognition Act is the starting point of this equality analysis. It must be understood within the context of its legislative design. Its avowed purpose, as I have earlier remarked, is to transform spousal relations in customary marriages. The legislation not only confers formal recognition on the marriages but also entrenches the equal status and capacity of spouses and sets itself the task of regulating the proprietary consequences of these marriages. In doing so, the Recognition Act abolishes the marital power of the husband over the wife and pronounces them to have equal dignity and capacity in the marriage enterprise."

²⁸ According to Section 3(1) of the RCMA, for a customary marriage to be valid: Section 3 of the Act sets out the requirements for the validity of customary marriages as follows: "3(1) For a customary marriage entered into after the commencement of this Act to be valid – (a) the prospective spouses: (i) must be above the age of 18 years; and (ii) must both consent to be married to each other under customary law; and (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law."

²⁹ Edward W. Hinton, "Presumption of Death," *Illinois Law Review* 19 (925): 681.

a missing person as deceased when they have been absent for a prolonged period, typically seven years, without any contact or evidence of life.³⁰ An interested party, such as the person's heirs or surviving spouse, may petition the court, presenting evidence that reasonable efforts were made to locate the person.³¹ The court then assesses the case based on a "balance of probabilities," determining if it is likely that the individual has died.³² This evaluative framework raises critical questions regarding the legal status of a surviving spouse during such proceedings, particularly concerning their legal capacity to apply for a presumption of death certificate. Addressing this question requires an exploration of common law, statutory law, and customary law.

Under common law, the surviving spouse is recognised as an interested party, which remains the same regardless of their marital status at the time of the application.³³ Specifically, section 1 of the Presumption of Death Act 2013 empowers any individual with sufficient interest to petition the High Court for an order declaring someone deceased, provided that the individual has been absent for an extended period without evidence of being alive.³⁴ This statutory recognition underscores the importance of ensuring that survivors have the opportunity to seek legal redress in the face of uncertainty.

However, the situation diverges under customary law, highlighted by the *Recognition Act*, which fails to delineate specific rights or responsibilities for spouses in cases of disappearance. Consequently, this gap in legal protection places women married under customary regimes at a significant disadvantage. Certain customary practices hold implications for the dissolution of marriages when a presumption of death is declared, thereby disadvantaging the rights and status of surviving spouses. For instance, in the Xhosa culture, the disappearance of a person is often addressed with both communal and spiritual practices. The family and community actively search for the missing individual, involving traditional healers (*igqirha*) or diviners (*ixhwele*)³⁵ to seek guidance from the ancestors.³⁶ Ancestors (*amadlozi*) are believed to play a central role in such situations, and their intervention is sought through rituals, prayers, and offerings.³⁷ If the person is not found, rituals may be performed to provide spiritual closure and ensure that the person's spirit does not disturb the family. This process often includes cleansing ceremonies to protect the family from bad luck or lingering spiritual unrest.

When a spouse goes missing, the marriage enters a culturally ambiguous state. If the missing spouse is a man, the wife may continue to live in her marital home, but her ability to remarry or engage in new relationships is culturally restricted. Elders may decide after a significant period, typically a year or more, whether the missing person is presumed deceased. A cleansing ritual may be performed to release the surviving spouse from the marital bond. If the missing spouse is a woman, the husband may

³⁰ D. Stone, "The Presumption of Death: A Redundant Concept?," *The Modern Law Review* 44, no. 5 (1981): 516–25; G. H. Treitel, "The Presumption of Death," *The Modern Law Review* 17, no. 6 (1954): 530–46. Modern Law Review 530-531 averred that, the effect of the decision of the House of Lords in *Prudential Assurance Co. v. Edmonds* (1877) 2 App. Cas. 487 seems to be that a person is not "heard of" if no reliable information concerning him is received. Conversely, it is clear that the mere fact that a person has not been heard of is not sufficient if news of him could have been obtained by the exercise of reasonable diligence. Just as the person who seeks to set up the presumption is not bound to listen to idle gossip, so also, he must not shut his eyes to possible sources of reliable information. Also see *Re Kannemeyer* 1890 (7) 322 (SC), *Re Kanneyer* 1899 (16) 407 (SC), *Re Beaglehole* 1908 TS 49, *Ex parte Alexander* 1956(2) SA 608 (AD), *Ex parte Rungasamy* 1958(4) SA 688(D), *Ex parte Graham* 1963 (4) SA 145 (D) and *Berger v Aiken* 1964 (2) SA 396 (W).

³¹ D. S. P. Cronje and Jacqueline Heaton, *The South African Law of Persons* (Butterworths, 1999). 66-67.

³² Cronje and Heaton, *The South African Law of Persons*, 66-67. See also *Ex Parte Viking Fishing A Division of Sea Harvest Corporation (Pty) Ltd and Others* 2024 83 (HC) para 10 state that the Court requested to presume the death of a person will not do so unless it is satisfied that such can rightly and should, therefore, be inferred on a preponderance of probabilities from the evidence adduced in the proceedings. Whether the inference can rightly be drawn in any given case is always a question of fact, the answer to which depends on its own particular circumstances. The applicant must prove on a balance of probabilities that the missing person is dead.

³³ Rudolph De Bruin, "Presumption of Death-Its Legal Consequences," *S. African LJ* 95 (1978): 577.

³⁴ T. Boezaart, "Law of Persons," *Journal of South African Law* 159, 2010. Sometimes a person disappears and his or her family does not know whether he or she is alive or dead. Any person who has an interest in the missing person, for example a spouse or an heir, can apply to the court for an order declaring that the missing person is presumed dead.

³⁵ B. E. Van Wyk, B. Van Oudtshoorn, and Nigel Gericke, *Medicinal Plants of South Africa*, 1997. *Igqirha* means traditional healer and diviner. *Ixhwele* means an herbalist. See also Traditional Health Practitioners Act of 2007.

³⁶ The sangoma provides specific information about the problems of the patient.

³⁷ Steve Edwards et al., "The Role of the Ancestors in Healing: Indigenous African Healing Practices," *Indilinga African Journal of Indigenous Knowledge Systems* 8, no. 1 (2009): 1–11. The spirits of deceased ancestors are concerned with the lives of the living and either protect or discipline them. According to healers the ancestors are seen to do God's work.

consult the elders to determine the appropriate actions. Traditionally, a man may take another wife after rituals are performed to honour the missing spouse and seek ancestral approval. This highlights the advantage of being a man in a patriarchal society: whether or not the marriage is valid, the male spouse enjoys many rights.

A coherent academic response should therefore comprise two interrelated proposals: legislative intervention to clarify the legal standing of spouses in unregistered customary marriages, and the development of a hybrid legal framework that incorporates culturally informed procedures into the statutory system, while ensuring constitutional consistency. The first and most urgent reform is the amendment of the *Recognition Act* to explicitly provide for the rights and duties of spouses, whether in registered or unregistered customary marriages, in cases of disappearance and presumed death. The *Presumption of Death Act 2013* grants “any person with sufficient interest” the right to petition the court,³⁸ but in practice, women in unregistered customary marriages may struggle to prove legal standing due to the absence of a marriage certificate or formal recognition. A statutory amendment should affirm that any spouse in a de facto customary marriage that satisfies the substantive requirements of section 3(1) of the *Recognition Act* is deemed to have legal capacity for the purposes of applications under the *Presumption of Death Act*. This would help harmonise statutory law with constitutional imperatives, as articulated in cases such as *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC), which emphasised substantive equality in the application of family law.

Secondly, South African law must move toward a hybrid legal framework that meaningfully integrates living customary law into the statutory process for presumption of death, without compromising constitutional rights, particularly gender equality and access to justice. Courts should be empowered to take judicial notice of customary practices related to disappearance and spiritual closure, provided these practices do not violate constitutional principles. For example, judicial officers could be trained to understand the role of rituals such as *ukubuyisa* or *cleansing ceremonies* when evaluating claims made by surviving spouses from customary unions. This approach would enhance legal pluralism while ensuring that deeply rooted cultural processes are not ignored in legal determinations.

To guard against patriarchal bias in customary norms such as the asymmetrical treatment of men and women in spiritual dissolution and remarriage, legislation and judicial interpretation must be guided by section 39(2) of the Constitution, which mandates the promotion of the spirit, purport, and objects of the Bill of Rights. The Constitutional Court in *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) has already endorsed the evolutionary capacity of customary law, affirming that it must develop in accordance with constitutional values, particularly those of dignity, equality, and non-discrimination. The current legal lacuna surrounding presumed death in the context of unregistered customary marriages not only undermines the rights of surviving spouses—especially women but also perpetuates uncertainty and inequality. A responsive legal solution must combine statutory reform with judicial sensitivity to living customary law, ensuring that surviving spouses are not excluded from legal processes due to cultural and administrative marginalisation. Such an approach would uphold the constitutional vision of a pluralistic and inclusive legal system, in which all forms of marriage are given equal dignity and protection.

Natural death

The death of a spouse in a customary marriage is widely acknowledged as an automatic legal termination of the marital bond.³⁹ The National Health Act defines death as “brain death”.⁴⁰ Brain death is defined as an irreversible and irreparable cessation of all the brainstem functions including complete cessation of the heartbeat, respiration, blood circulation and digestive functions.⁴¹ The main legal consequences

³⁸ Section 1(1) of the *Presumption of Death Act 18 of 2013* states “Any person who has sufficient interest in the matter may apply to the High Court for an order declaring that a person is presumed to be dead.”

³⁹ Van Heerden B. V. et al., “Family Law in South Africa 133,” 2021, 2021. It is averred that the dissolution of a marriage due to the death of one spouse results in the cessation of any divorce or ancillary proceedings between the parties. As a result, the surviving spouse is precluded from pursuing claims, such as the redistribution of assets under sections 7(3)-6 of the *Divorce Act 70 of 1979*, that were initiated prior to the death of the deceased spouse.

⁴⁰ National Health Act 61 of 2003 sec 1.

⁴¹ Jenny Govender, “Pulling the Plug,” *Without Prejudice* 19, no. 4 (2019): 15–16.

of death are that it marks the end of legal personality, and the cessation of legal personality upon death means that a dead body, no longer being a person, has no rights and is treated as a thing.⁴² In South Africa, the Department of Home Affairs (DHA) is responsible for maintaining the National Population Register, which includes records of individuals' marital statuses.⁴³ The death of a spouse requires that the surviving spouse's marital status be updated in official records to reflect this change. However, this process is not automatic and requires the completion of specific administrative steps to ensure that the change is properly recorded. Below is the process of updating marital status after a spouse's death.

- Reporting the Death: The death must be reported to the DHA, typically by submitting a death notice and the deceased's identity document. This initiates the process of updating official records.⁴⁴
- Application for Status Amendment: The surviving spouse or a representative must apply for an amendment of personal information to reflect the change in marital status. This involves completing the necessary forms and providing supporting documents, such as the death certificate, marriage certificate and identity document.⁴⁵

However, legal challenges can arise in cases involving polygamous customary marriages, as the death of a husband results in the automatic termination of each marriage.⁴⁶ First, in customary law, marriage is recognised as a union between two individuals and their families, and its existence is dependent on the presence of both spouses. Customary law systems generally do not require any formal legal action to confirm the dissolution of the marriage upon death,⁴⁷ meaning that it is not necessary for a surviving spouse to approach the court for dissolution of marriage by death. Marriage is recognised as a contract between living persons. Common law marriage is dissolved by death. After death, the widow is no longer bound by marital obligations and is free to remarry if she chooses.

According to African customs, death is a natural transition from the visible to the invisible or spiritual ontology, where the spirit, the essence of the person, is not destroyed but moves to live in the spirit ancestors' realm.⁴⁸ In traditional African beliefs, the deceased are believed to exist in the realm of unseen, intangible beings, actively participating in a continuously evolving state of existence within the world of animated spirits.⁴⁹ Upon the death of a spouse, customary law prescribes specific rites that may affect the surviving spouse's rights and obligations.⁵⁰ In customary law, the marriage continues after the death of the husband. The principle of widow levirate marriage⁵¹ allows the widow to marry a male relative of the deceased husband to ensure family continuity and support. In certain cultures, the widower may be expected to marry a relative of the late wife to preserve familial bonds and responsibilities.

There is a significant legal and administrative gap in the regulation of marital status updates for surviving spouses in polygynous customary marriages after the death of a husband.⁵² Although South African law, particularly the *Recognition Act*, formally acknowledges the validity of polygynous customary unions,⁵³ it remains silent on the procedures for updating the marital status of multiple surviving spouses. This lack of statutory and administrative clarity results in inconsistencies in practice, particularly at the

⁴² Cronje and Heaton, *The South African Law of Persons*. It states that a person's legal personality is terminated by death.

⁴³ White Paper On Home Affairs (2019) 11.

⁴⁴ Department of Home Affairs. (2023). Updating marital status after the death of a spouse. Retrieved from <https://www.dha.gov.za>

⁴⁵ Fastdocs, "Procedure for Marital Status Changes Following Death," 2022, <https://fastdocs.co.za>.

⁴⁶ Papa I P Maithufi, "The Requirements for Validity and Proprietary Consequences of Monogamous and Polygynous Customary Marriages in South Africa: Some Observations," *De Jure Law Journal* 48, no. 2 (2015): 261–79.

⁴⁷ The death of the husband does not dissolve it, for the widow continues to be considered as a 'wife' in the deceased husband's family.

⁴⁸ Lesiba Baloyi and Molebogeng Makobe-Rabothata, "The African Conception of Death: A Cultural Implication," 2014. 235.

⁴⁹ Baloyi and Makobe-Rabothata, "The African Conception of Death, 235.

⁵⁰ Cronje and Heaton, *The South African Law of Persons*; Himonga and Nhlapo, *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives*.

⁵¹ Yuya Kudo, "Why Is the Practice of Levirate Marriage Disappearing in Africa? HIV/AIDS as an Agent of Institutional Change," 2018. Levirate marriage, whereby a widow is inherited by male relatives of her deceased husband, has anecdotally been viewed as informal insurance for widows who have limited property rights.

⁵² *M M v M N and Another* 2010 ZAGPPHC 24 (HC) at paras 11–15, 16–18

⁵³ Section 7(6) of the Recognition Act.

Department of Home Affairs (DHA), which is responsible for maintaining the National Population Register.⁵⁴

The challenge becomes particularly acute in circumstances where customary marriages were not formally registered. Although such marriages may be substantively valid under customary law, the absence of official documentation often makes it difficult for surviving spouses to prove their status as lawful wives. As a result, these women may be denied the ability to update their marital status to “widowed” in the national register, which in turn hinders access to related legal benefits, such as inheritance, pension claims, and remarriage rights. The situation is further complicated when the deceased husband had contracted both a civil and one or more customary marriages. The hierarchical recognition accorded to civil marriages in administrative practice can obscure or displace the status of customary spouses, leading to inequitable treatment and the potential erosion of customary marriage rights.

To address this deficiency, a twofold legal and policy solution is proposed. First, the *Recognition of Customary Marriages Act* should be amended to include explicit provisions on the procedures for updating marital status in the event of the death of a husband in a polygynous marriage. These provisions should require the DHA to recognise all substantively valid customary marriages, whether registered or not, upon the presentation of sufficient corroborating evidence, such as affidavits from traditional leaders or family members, and documentation of lobolo negotiations or communal recognition. Such an approach would align with the constitutional obligation to treat customary marriages with equal dignity and status, as mandated by section 15(3)(a)(ii) of the Constitution. Secondly, the DHA should establish a dedicated administrative protocol or guideline for managing status amendments in polygynous unions. This protocol should provide for the registration or posthumous recognition of multiple spouses and outline the evidentiary requirements for surviving spouses seeking to update their marital status. Importantly, the process must be accessible and culturally responsive, especially in rural areas where formal documentation is often lacking. By codifying clear and inclusive procedures, the state would give practical effect to the constitutional principles of equality, dignity, and access to justice, ensuring that widows in customary marriages, whether monogamous or polygynous, are not excluded from the benefits and protections of legal recognition.

RECOMMENDATIONS

This study recommends that South Africa’s legal framework be reformed to provide explicit statutory recognition and procedural clarity regarding the dissolution of unregistered customary marriages by death. The *Recognition of Customary Marriages Act 120 of 1998* should be amended to incorporate a presumptive recognition mechanism, allowing unregistered unions that meet the substantive customary requirements—such as lobolo payment, cohabitation, and community acknowledgement—to be legally recognised for purposes of inheritance, guardianship, and marital status. Furthermore, the *Department of Home Affairs* should establish a posthumous registration procedure enabling surviving spouses to regularise their marital status upon providing sufficient proof of a valid customary marriage. In addition, specialised mediation frameworks led by traditional leaders, family representatives, and judicial officers should be institutionalised to resolve disputes concerning burial rights, inheritance, and guardianship in culturally sensitive yet constitutionally compliant ways. Finally, sustained public education and awareness campaigns are essential to encourage marriage registration, particularly in rural communities, while continuous judicial training on customary law and gender equality should be undertaken to ensure that courts interpret and apply the law consistently with the constitutional values of dignity, equality, and access to justice.

CONCLUSION

In conclusion, the dissolution of unregistered customary marriages by death reveals deep structural gaps within South Africa’s plural legal system, where statutory formalism and customary practices continue

⁵⁴ For instance in the case of *M M v M N and Another* 2010 ZAGPPHC 24 (HC) at para 15 it was stipulated that “In the light of the competing claims by the applicant and the first respondent, the second respondent's offices refused to register the applicant's marriage to the deceased”

to coexist unfavourably. Although the Constitution guarantees equality, dignity, and access to justice, the current legal framework does not fully protect surviving spouses in unregistered customary unions. The absence of explicit statutory mechanisms to regulate matters such as inheritance, burial rights, guardianship, and marital status leaves many individuals—particularly women—vulnerable to legal and social marginalisation. The *Recognition of Customary Marriages Act 120 of 1998* was intended to bridge the divide between customary and civil marriage systems, yet its emphasis on formal registration has inadvertently excluded a large portion of couples whose unions are valid under customary law but lack administrative recognition. This study has demonstrated that reconciling living customary law with constitutional imperatives requires deliberate legislative and institutional reform. A hybrid regulatory framework that combines statutory clarity, administrative accessibility, and culturally responsive dispute-resolution mechanisms is essential. This approach would promote inclusivity, uphold gender equality, and ensure that the dissolution of unregistered customary marriages by death is governed in a way consistent with South Africa's constitutional values and its commitment to human dignity and social justice.

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