2008 Journal for Juridical Science Special Issue: 24-33

MA du Plessis

Divorce: Achieving social justice through clinical legal education*

Summary

In achieving social justice, a law clinic has to strike a balance between teaching of students and service to its clients. Divorce, as a simple service case, proves to be a good learning vehicle for students, whilst affording their clients social justice. The different systems of marriage and divorce, both in the past and present, the different divorce courts and litigation methodology are discussed. Bearing this is mind, the question of whether universities are failing in educating students to become lawyers, is analysed and solutions are sought through clinical legal education, using the model of divorce proceedings.

Egskeiding: Die haalbaarheid van sosiale geregtigheid deur middel van kliniese regsopleiding

Ten einde sosiale geregtigheid te bewerkstelling, moet 'n regskliniek 'n balans handhaaf tussen die opleiding van studente en dienslewering aan die kliente. Egskeiding, as 'n eenvoudige dienslewering, blyk 'n goeie leermiddel vir studente te wees, terwyl dit aan die kliente sosiale geregtigheid verseker. Die verskillende huweliksbedelings en egskeidingsprosedures, beide in die verlede en tans, die verskillende egskeidingshowe en litigasiemetodes word bespreek. Gedagtig hieraan, word die vraag of universiteite faal in die opleiding van studente as juriste geanaliseer en oplossings word deur middel van kliniese regsopleiding gesoek, aan die hand van egskeidingsprosedures as model.

* This article emanated from a paper delivered at the Fifth International *Journal of Clinical Legal Education* Conference, held at the University of the Witwatersrand, Johannesburg on 9 and 10 July 2007.

MA du Plessis, BA LLB (Stell) LLM (Wits), Attorney, University of the Witwatersrand, Johannesburg, Law Clinic.

1. Introduction

In achieving social justice, a law clinic has to strike a balance between teaching of students and service to its clients, the indigent in the community the clinic serves. A clinical programme must consider distinguishable types of cases that will serve as good learning vehicles for their students. It has been suggested that simple service cases, which students can see from initial interview to resolution, make for the best learning tools.[1] Divorce, which is a social problem in society demanding clinical assistance,[2] present as such "simple service cases", not only because it is generally possible to complete a divorce matter during students' period of service in a clinic, but also because the law pertaining to divorce and the practice tools applied are diverse and sometimes complicated, both for attaining social justice and as a teaching tool to students. This article serves to illustrate how divorce practice can be utilised as a learning tool in shaping students into young lawyers.

2. Social justice

The South African legal system has its roots in the Western legal tradition, influenced by Judeo-Christian values and the policy of apartheid further ensured that the law, in the past, served the interests of a minority racial group.[3] This is illustrated in the different application of the law of marriage and divorce in the past, depending on race. A marriage, entered into between two white people, without an antenuptial contract, was and still is, automatically regarded as being entered into in community of property. Before 2 December 1988 black people who entered into a marriage could request such marriage to be in community of property,[4] and could enter into antenuptial contracts to that effect.[5] If they did neither, they were automatically married out of community of property and of profit and loss, with the husband retaining the marital power.[6] In practice, the majority of black people were unaware of their choices and therefore unaware of the consequences of their marriages, due mainly to the lack of (legal) education and access to legal services. To date, these misconceptions prove to be problematic upon divorce or death of either of the parties.[7] All South Africans now have the same choices on entering into marriages.[8]

1 Tarr 1993:33-34.
2 In the context of law students serving at a university law clinic under supervision of an attorney.
3 Ogunronbi 1998:499.
4 The *Black Administration Act* 38/1927: section 22(6).
5 *Ex parte Minister of Native Affairs in re Molefe v Molefe* 1946 AD 315, 318-320 and the references to antenuptial contracts in Reg 2(c) GN R200 of 6 February 1987.
6 The marital power was abolished on 1 December 1993 by section 29 of *General Law Fourth Amendment Act* 132/1993.
7 An understanding of law development pertaining to divorce matters are an essential part of student training, as students are required to apply specific marital regimes to their matters.
8 The *Marriage and Matrimonial Property Law Amendment Act* 3/1988.

In satisfying the "needs" rather than the "wants" of society, social justice was referred to as "the fair distribution of health, housing, welfare, education and legal resources in society, including, where necessary, the distribution of such resources on an affirmative action basis to disadvantaged members of the community".[9] University law clinics are well placed in satisfying indigent clients in need of legal services, access to the divorce courts, whilst affording students the required skills.

2.1 Divorce courts

Divorce proceedings are traditionally heard in the High Court which is open to all South Africans. Problematic for the typical (indigent) clinic client, is the costs associated with the bifurcated attorney-advocate system. To approach the High Court for a divorce, the client has to contract the services of an attorney, who will in turn brief an advocate to appear in the High Court. Professional services for divorce proceedings were therefore placed well outside their financial abilities.

In the past Divorce courts,[10] having the same jurisdiction as High Courts, and where attorneys had the right to appear,[11] were established for divorce proceedings of black people. This however, still did not accommodate indigent white people who still had to litigate through the High Courts. During the mid-1990's a pilot project was launched introducing Family Courts into the justice system.[12] In 1997 Family Courts were established,[13] having the same jurisdiction as High Courts, allowing for attorneys to appear on behalf of their clients. This proved to be a welcome relief, not only for ordinary South Africans, but also for law clinics that no longer had to carry advocates' fees on behalf of their clients. However, understaffed clinics identified the need to allow candidate attorneys to appear in such courts.[14] In 1997, the law clinic at the University of the Witwatersrand, Johannesburg, applied successfully to the High Court,[15] to afford candidate attorneys who already served a year of articles of clerkship, the right of appearance in such courts.[16]

9 McQuoid-Mason 1999:89.

10 In terms of section 10(1) of the *Black Administration Act 1927 Amendment Act* 9/1929.

11 Rule 3 GN R2726 of 24 December 1982.

12 The Family Courts are open to all members of society, which effectively addressed the differences in accessibility to divorce courts for people of different races.

13 *Divorce Courts Amendment Act* 65/1997. The rules of these courts, called Divorce Court Rules, 1998 were published in Government Gazette No. 19458, 9 November 1998, and came into operation on 15 November 1998.

14 The *Attorney's Act* 53/1979 was amended in 1993 to allow candidate attorneys to obtain practical experience by undertaking community service, rather than serving articles of clerkship in attorneys' offices. This service may be done at university law clinics accredited by provincial law societies, where an attorney(ies) with sufficient practical experience supervises law graduates in the community service programme. See Mcquoid-Mason 2001:212.

15 Case No. 97/17286 (WLD).

16 This right also affords the candidate attorneys much needed court appearance experience.

What may arguably be seen as further relief in terms of access to divorce courts is found in the *Jurisdiction of Regional Courts Amendment Bill* 2007, currently before a parliamentary committee. This Bill seeks to extend the jurisdiction of the regional courts from hearing criminal matters only, to civil divorce matters.[17] This jurisdictional extension may very well provide relief to clients and law clinic in areas remote from the Family Courts. Caution should however be exercised with intricacies typically associated with divorce matters, such as division of matrimonial property, allocation of pensions and most importantly, the custody of and access to minor children.[18] How the involvement of the office of the family advocate and other social services will be incorporated on a practical level, remains to be seen and it is submitted that special caution be taken to ensure that all services applicable to divorce matters be made available.[19]

2.2 Students and social justice

Two important aspects of students' work in a law clinic have been identified, namely the opportunity to help indigent clients, and the theoretical and practical exposure to the social justice issues of the day, which is not possible in a regular 'black letter' law course. This serves to sensitise students to both the theory and practice of social justice.[20] This experience of the use of law and procedure, which make social justice attainable to their clients, allows students to measure the success of the social and economic promises enshrined in the South African Constitution.[21] The law clinic supervisors share the responsibility to strive to democratise the legal culture. Students should be trained to see themselves as "trustees of justice with a fiduciary responsibility to ensure that the legal system provides justice for all citizens, not only for the rich and powerful".[22]

2.3 Are we failing in educating students to become lawyers?

Kate O'Regan, Judge of the Constitutional Court, indicated that South Africa's own peculiar racist and authoritarian past,[23] where educational institutions were structured in ways that furthered apartheid policies, added many of the increased pressures on universities to produce law graduates who will perform their role well.[24] A significant number of students enrolled at law schools in South Africa are from disadvantaged backgrounds where families struggle to provide them with an opportunity to study law. These families are also seen as a primary social responsibility for law schools, as they are "holding out the promise of a competent

17 http://www.polity.org.za/page.php?rep_id=608%20-%2035k%20-.
18 It is submitted that regional magistrates be specifically trained in the hearing of divorce matters.
19 There is currently also no clarity on whether the Bill will extend to (separate) applications for custody of and access to minor children after finalisation of a divorce.
20 McQuoid-Mason 1999:90, 93.
21 The *Constitution of the Republic of South Africa* 108/1996, as amended by the *Thirteenth Amendment Act of 2007*, 23/2007.
22 Wizner 2002:1933.
23 O'Regan 2002:243.
24 O'Regan 2002:243.

legal education to these students that will equip them for employment".[25] O'Regan suggested that the primary responsibility of law schools is to provide competent legal education to students, which responsibility is also owed to the broader community, prospective clients and in general to the administration of justice.[26] The universities must assist these students in overcoming the disadvantages of their primary and secondary education.[27]

During March 2007, at a Provincial workshop on the Legal Services Charter, concerns regarding poor quality of law graduates and their inability to draw affidavits and pleadings were raised.[28] These concerns included the poor quality of essays, where it was indicated that "writing is an essential professional skill in almost every branch of legal practice".[29] It is submitted that these concerns may be addressed through clinical legal education, where skills based education includes writing and drafting of legal documents, such as court pleadings, settlements and associated correspondence, as will be indicated later.

2.4 Clinical legal education at university law clinics

Justice O'Regan indicated that the competency of a lawyer is measured against the application of skills, rather than knowledge of the content of a matter.[30] Practical legal skills are being taught at law clinics, and relate to the old adage by Confucius: "I am told, I forget; I see, I remember; I do, I understand".[31]

The intellectual roots of clinical legal education in the United States can be traced back to the 1930's, when the legal realist movement began.[32] Clinical methods of law teaching were defended in reaction to "legal formalism", the traditional methods of legal study. A realist, Jerome Frank, as early as in 1933, promoted clinical approaches, saying about the relationship between theory and practice, that good theory is practical and that good practice is informed by theory.[33] He saw clinics as environments to develop teaching methods based in students practising real cases, instead of mere book studies. It was suggested that modern clinics in Argentina, functioning like laboratories of training and reflection on legal practice, on the model proposed by Frank, assist in forming different lawyers, ones well coached in professional practice skills and in analytical and critical interpretive abilities.[34] When the historical development of legal education in the United States was examined in 1986, it was said that South African clinicians need to set standards for clinics in light of their own customs, needs and resources.[35] This is echoed by McQuiod-Mason who states that

25 O'Regan 2002:244.
26 O'Regan 2002:244.
27 O'Regan 2002:246.
28 Van der Merwe 2007:2.
29 Van der Merwe 2007:2.
30 O'Regan 2002:247.
31 Grimes 2002:1516.
32 Wizner 2002:1933.
33 Wizner 2002:1932.
34 Puga 2003:243.
35 Franklin 1986:89.

clinic work has implications for the teaching of law, because "poverty law" is very often neglected in formal law curricula which tend to focus on "rich people law".[36] He suggests that a successful clinic programme requires students to be trained in the relevant substantive law subjects which reflect the needs of their clients.[37] Matrimonial law, which includes divorce, provides for a perfect "tool" to meet clients' needs, whilst gaining practical experience in the law clinic.

Sound clinical training at universities provides for a solid foundation from which law graduates can proceed with their practical training as candidate attorneys. The system by which candidate attorneys are trained was criticised as not being uniform,[38] as much of the experience gained by young lawyers during this period, depends upon the nature of the practice of the attorney by whom practical training is given. This was illustrated recently by reports that about fifty percent of the Legal Aid Board's candidate attorneys, serving at their legal aid clinics, known as justice centres, are failing their board examinations.[39] The subjects they failed are crucial to the interests of the poor and unsophisticated people they represent in court, i.e. examinations in court procedure, ethics and accounting.[40] Legal Aid Board justice centres focus on the practice of criminal law. Whilst affording candidate attorneys valuable experience in this field of law, they are deprived of the practice of civil litigation. It is submitted that these candidate attorneys would have been better placed in succeeding in their board examinations, if they had been properly trained during clinical legal education at university law clinics in "simple service cases" such as divorce litigation.

2.5 Training of students by the model of divorce proceedings

The vehicle whereby the substantive law is implemented into litigation practice is civil procedure, for which the rules were defined as "devices to ensure the orderly adjudication of legal disputes between opposing parties".[41] Civil procedure should therefore be seen as a "core" course in the law school curriculum, preferably to be taught prior to the course in clinical legal education, as students will be required to apply their knowledge of civil procedure during their clinical experience.

A distinguished law teacher, scholar and author, Professor J C Wet, used to say that he 'could produce a great lawyer by teaching only the Liquor Act', his message being that "the necessary skills can be imparted through a minimum of content, if the focus on skills is sufficiently rigorous".[42] Training students in the practical skills of divorce and incidental proceedings,[43] will expose them to the

36 McQuoid-Mason 1999:92.
37 McQuoid-Mason 1999:92.
38 Phukubye 2002:40.
39 http://www.news24.com/City_Press/News/0,,186-187_2127389,00.html (Accessed on 11 June 2007).
40 http://www.news24.com/City_Press/News/0,,186-187_2127389,00.html (Accessed on 11 June 2007).
41 McQuoid-Mason 1982:160.
42 O'Regan 2002:248.
43 For example: access to and of custody of minor children, maintenance, domestic violence and the appointment of a receiver and liquidator.

drafting of a broad spectrum of pleadings in action and application procedures, covering the entire scope of pleadings required to bring a case to litis contestatio, in both the High Court and the Family Court.

Students will, apart from learning consultation and negotiation skills, also be trained in the drafting of affidavits, deeds of settlement and reports to the family advocate. Matrimonial actions that are pertinent to the dissolution of marriage include the actions for divorce by means of a combined summons, which is a combination of a summons and a declaration.[44] Incidental proceedings for interim relief, to regulate the position between the parties until the court finally determines all the issues between them include leave to sue for maintenance *pendente lite*, for a contribution to costs, for the custody of children *pendente lite* or for access to children *pendente lite*.[45] These will afford students skills training in the drafting of motion procedures that include the drafting of affidavits. Students may also be required to draft interdicts that may be brought against the other party to the divorce.[46] When parties, after the divorce, fail to distribute the assets of their estate in terms of the divorce order, students will be trained to draft an application for the appointment of a receiver and liquidator, to attend to the division of the estate.[47]

Students have the opportunity to acquire negotiation skills in leading the parties to agree upon for example, the division of their property and the payment of maintenance. Their drafting skills can be refined in drafting a settlement agreement which, in terms of section 7(1) of the *Divorce Act*,[48] the court granting the divorce, may incorporate in the divorce order.

Many divorce matters involve taking care of the well-being of minor children. The *Mediation in Certain Divorce Matters Act*,[49] created the office of the family advocate whose main function is to safeguard the interests of the minor or dependent children of divorce. Students are now typically involved in consultation with such office, and completing the forms for which it is required to disclose the kind of information one would reasonably expect a judge or family advocate to have,[50] in order to decide whether an enquiry in terms of section 4 of the *Mediation in Certain Divorce Matters Act* is desirable or not.[51]

44 Form 10 of First Schedule of *Uniform Rules of Court*.

45 Rule 43 of the *Uniform Rules of Court* (for the High Court) and rule 32 of the *Divorce Courts Rules*, 1998, for the Central Divorce Court.

46 For example: family violence or the prevention of squandering of assets.

47 Rule 6 of the *Uniform Rules of Court* (for the High Court) and rule 33 of the *Divorce Courts Rules*, 1998, for the Central Divorce Court.

48 76/1979.

49 24/1987.

50 Apart from biographical details, full particulars regarding the arrangements made, or proposed, relating to the custody of, access to, and guardianship of any of the children in the marriage. Any details regarding the children's learning problems or physical or mental disabilities also have to be disclosed. Convictions of any criminal offences, or whether the parties to the application are subject to any order in terms of the *Child Care Act* 74/1983, need to be disclosed.

51 24/1987.

3. Conclusion

Through using the model of divorce,[52] being a social problem, it becomes clear that when striking a balance between teaching of students and service to the community, social justice can be achieved. South African law schools, through clinical legal education at their law clinics, may indeed succeed in eradicating past injustices for both students and the communities they serve, by focusing on skills training, breeding not only skilled future lawyers, but also ones with ingrained passion for social justice. This will support William Rowe's 1917 vision of the benefits of clinical legal education:[53]

> [E]very law school shall make earnest clinical work, through legal aid societies or other agencies, a part of its curriculum for its full course ... this instinct for right and the consciousness of wrong, which constitute the true spirit of the profession, and lead, regardless of rewards, to that necessary self-sacrificing devotion to the vindication of the good and the true and the punishment of the evil and the false, upon which, with us, must largely rest the welfare of our profession and much of our advancement in social development and organized government ... Knowledge of practice cannot be acquired by any other method.[54]

Indeed, such lawyers may, as they experience practice through the years, agree with Oliver Wendell Holmes (1880) that: "The life of the Law has not been logic: it has been experience".[55]

52 Divorce matters being regarded as "simple service cases", covering a broad spectrum of civil court pleadings in action and application proceedings.
53 Jessup 2002:1.
54 Row 1917:591.
55 Brayne 2000:34.

Bibliography

BRAYNE H
2000. A case for getting law students engaged in the real thing — the challenge to the Sabre-tooth curriculum. *The Law Teacher* 34:17-39.

FRANKLIN N
1986. The clinical movement in American legal education. *Natal University Law and Society Review* 1(2):55-64.

GRIMES R
2002. The (book)case of learning by doing. *New Law Journal* 152(7051): 1516.

JESSUP G
2002. Symbiotic relations: Clinical methodology — fostering new paradigms in African legal education. *Clinical Law Review* 8(2):377-404.

MCQUOID-MASON DJ
1999. Teaching social justice to law students through community service: The South African experience. *Transforming South African Universities*, Chapter 6. Africa Institute of South Africa and Fort Hare University.

2001. Legal aid development: Lessons from South Africa and some thoughts for Nigeria. *Law and Development: Facing complexity in the 21st century*, Chapter 14. Cavendish Publishing Limited.

1982. Methods of teaching civil procedure. *Journal for Juridical Science* 7:160-171.

OGUNRONBI S
1998. The challenges to legal studies in an era of transformation. *South African Law Journal* 115(3):493-510.

O'REGAN K
2002. Producing competent graduates: The primary social responsibility of law schools. *South African Law Journal* 119(2):223-242.

PHUKUBYE N
2002. Do we really need schools for practical legal training in South Africa? *Codicillus* 2:39.

PUGA M
2003. Challenges for legal clinics in Argentina. *The Law Teacher — The International Journal of Legal Education* 37(3):239-259.

ROWE WV
1917. Legal clinics and better trained lawyers — a necessity. 11 *Ill.Rev.*:591-599.

TARR N W
1993. Current Issues in clinical legal education. *Howard Law Journal* 37(1):31-48.

VAN DER MERWE P
2007. The trouble with LLB graduates ... *De Rebus* April:2.

WIZNER S
2002. The law school clinic: Legal education in the interests of justice. *Fordham Law Review* 70(5):1929-1938.

Legislation

The Attorney's Act, No. 53 of 1979.

The Black Administration Act, No. 38 of 1927.

The Black Administration Act 1927 Amendment Act, No. 9 of 1929.

The Child Care Act, 74 of 1983.

The Constitution of the Republic of South Africa, Act No. 108 of 1996.

The Divorce Act, No. 70 of 1979.

Divorce Courts Amendment Act, No. 65 of 1997.

General Law Fourth Amendment Act, No. 132 of 1993.

The Marriage and Matrimonial Property Law Amendment Act, No. 3 of 1988.

The Mediation in Certain Divorce Matters Act, No. 24 of 1987.

Ex parte Minister of Native Affairs in re Molefe v Molefe 1946 AD 315.

http://www.polity.org.za/page.php?rep_id=608%20-%2035k%20-

http://www.news24.com/City_Press/News/0,,186-187_2127389,00.html