

The nature of financial protection of an individual in the event of the death of a spouse or life partner with regard to succession, maintenance and pension funds

**Angélique Visser
24534048**

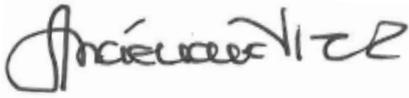
Submitted in accordance with the requirements for the degree *Magister Legum* in Estate Law at the Potchefstroom Campus of the North-West University, South Africa

Supervisor: Prof HJ Kloppers

November 2015

DECLARATION

I, Angélique Visser, declare that this study is my own work and all the sources have been indicated and acknowledged by means of complete references.



20 November 2015

.....
Angélique Visser

.....
Date

ACKNOWLEDGEMENT

I wish to express my gratitude to the following people:

- Prof Henk Kloppers for his guidance, patience and support.
- My children, Martin and Kyla Visser, for their love, understanding and encouragement.
- My mother, Gertie Krügel, for keeping me in her prayers and for always making sure that I have a cup of coffee to keep me going.
- My colleague, Ilse Opperman, for her support at the practice.
- Uno Tarwa, a fellow-student and friend, for the late night calls and laughter sessions.
- Christien Terblanche for editing the dissertation and her sense of humour when the pressure was high.
- Amelia Redelinghuys and Doepie de Jongh for their assistance with the formatting in the late hours of the night.
- I thank God for giving me strength and opportunities to grow.

TABLE OF CONTENTS

DECLARATION	ii
ACKNOWLEDGEMENT	iii
LIST OF ABBREVIATIONS	vii
ABSTRACT	viii
KEY WORDS	ix
<i>OPSOMMING</i>	x
<i>SLEUTELWOORDE</i>	xi
CHAPTER 1	1
INTRODUCTION	1
<i>1.1 Background</i>	<i>1</i>
<i>1.2 Problem statement</i>	<i>2</i>
<i>1.3 Research question</i>	<i>3</i>
<i>1.4 Research aims</i>	<i>4</i>
<i>1.5 Research outlines</i>	<i>4</i>
CHAPTER 2	5
THE MOST PROMINENT RELATIONSHIPS IN SOUTH AFRICA	5
<i>2.1 Introduction</i>	<i>5</i>
<i>2.2 Marriages</i>	<i>5</i>
<i>2.2.1 Civil marriages</i>	<i>7</i>
<i>2.2.1.1 In community of property marriages</i>	<i>9</i>
<i>2.2.1.2 Marriages out of community of property</i>	<i>12</i>
<i>2.2.2 Customary marriages</i>	<i>14</i>
<i>2.2.2.1 Patrimonial consequences</i>	<i>16</i>
<i>2.2.3 Marriage and civil partnership under the Civil Union Act</i>	<i>18</i>
<i>2.2.3.1 Patrimonial consequences</i>	<i>20</i>

2.3	<i>Religious marriages</i>	21
2.3.1	<i>Property consequences</i>	22
2.4	<i>Life partnerships (domestic partnerships)</i>	23
2.4.1	<i>Property</i>	24
2.5	<i>Foreign marriages</i>	25
2.5.1	<i>Patrimonial consequences</i>	25
2.6	<i>Summary</i>	26
CHAPTER 3		28
INTESTATE AND TESTATE SUCCESSION		28
3.1	<i>Introduction</i>	28
3.2	<i>Testate succession</i>	28
3.2.1	<i>Limitations on the freedom of testation</i>	30
3.2.1.1	Sub-division of Agricultural Land	30
3.2.1.2	Pension fund	31
3.2.1.3	Contrary to public policy or too vague	31
3.3	<i>Intestate succession</i>	34
3.3.1	<i>Black people</i>	35
3.3.2	<i>Same-sex life partners</i>	37
3.3.3	<i>Religious marriages</i>	38
3.3.4	<i>Opposite sex life partners (domestic partnership)</i>	40
3.4	<i>Summary</i>	41
CHAPTER 4		42
MAINTENANCE		42
4.1	<i>Introduction</i>	42
4.2	<i>Marriages</i>	42
4.3	<i>Religious marriages</i>	47

4.4	<i>Life partnerships (domestic partnerships)</i>	49
4.5	<i>Summary</i>	52
	CHAPTER 5	53
	PENSION FUNDS	53
5.1	<i>Introduction</i>	53
5.2	<i>Summary</i>	56
	CHAPTER 6	57
	CONCLUSION	57
	BIBLIOGRAPHY	60
	<i>Literature</i>	60
	<i>Case law</i>	64
	<i>Legislation</i>	67
	<i>Government publications</i>	69
	<i>Internet sources</i>	69

LIST OF ABBREVIATIONS

GG	Government Gazette
J Comp L	Journal of Comparative Law
McGill LR	McGill Law Review
PELJ	Potchefstroom Electronic Law Journal
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
SARS	South African Revenue Services
SSA	Statistics South Africa
STELL LR	Stellenbosch Law Review
<i>TSAR</i>	<i>Tydskrif vir die Suid-Afrikaanse Reg</i>

ABSTRACT

One of the consequences of South Africa's diverse society is, *inter alia*, that individuals are party to many forms of intimate relationships. The *Constitution of the Republic of South Africa*, 1996 also supports diversity by confirming in section 9(1) that everyone is equal before the law and has the right to equal protection by and benefit from the law. Based on the strong provisions on legal and social equality, every surviving spouse and life partner should, therefore, enjoy equal protection from a financial perspective when the relationship ends with one partner passing away.

The aim of the research was firstly to establish what the most prominent intimate relationships are and what the financial consequences of each type of relationship in the event of the death of a partner are. Secondly, the research examined whether the law does protect an individual from a financial perspective with regard to succession, maintenance and pension fund benefits when a spouse or life partner dies.

The conclusion drawn after analysing the different relationships is that there is no consistency when it comes to legal protection as far as the financial affairs of survivors are concerned. Individuals do not all receive the same legal protection when faced with the same life event. For example, opposite sex life partners cannot inherit intestate from one another in terms of the *Intestate Succession Act* whilst same-sex life partners can. It is also possible for Muslim and Hindu individuals in monogamous as well as Muslim individuals in polygynous religious marriages to inherit intestate, but not for Hindu individuals in polygynous religious marriages. A surviving spouse in a recognised customary marriage can inherit intestate, but the definitions of *spouse* and descendant are not clear, resulting in uncertainty as to how to calculate the portion that the surviving spouse is entitled to in terms of the *Customary Law of Succession Act*.

Although same-sex life partners can inherit intestate from one another, they are not allowed to claim maintenance in terms of the *Maintenance of Surviving Spouse Act*. Only Muslim individuals in monogamous religious marriages can rely on the protection of this Act, whilst Muslim individuals in polygynous and Hindu individuals in both monogamous and polygynous religious marriages cannot.

The legal journey for South Africans in this area has been eventful over the last few years, but there is nonetheless room for further development to ensure that individuals in the same type of relationship are equally protected by the law in terms of our Constitution.

KEY WORDS

Death; Financial support; Life partner; Maintenance; Marriage; Pension; Relationship; Spouse; Succession; Survivor

OPSOMMING

Een van die gevolge van Suid-Afrika se diverse samelewing is, *inter alia*, dat individue deel vorm van baie verskillende soorte intieme verhoudinge. Die *Grondwet van die Republiek van Suid-Afrika*, 1996 ondersteun die beginsel van diversiteit deur in artikel 9(1) te bepaal dat elkeen gelyk is in die reg en geregtig is op dieselfde beskerming en voordele van die reg. Gebaseer op hierdie sterk bepaling op regs- en sosiale gelykheid, behoort elke langsliewende gade en lewensmaat dieselfde beskerming te geniet met betrekking tot finansiële gevolge wanneer 'n lewensmaat sterf.

Die doel van die navorsing was eerstens om vas te stel wat die mees prominente intieme verhoudinge is, asook wat die finansiële implikasies is in geval van die ontbinding van die verhouding deur dood. In die tweede plek het die navorsing ondersoek of die reg voorsiening maak vir die finansiële beskerming van die oorblywende lewensmaat by wyse van vererwing, onderhoud en pensioenfondsvoordele wanneer 'n gade of lewensmaat sterf.

Die gevolgtrekking nadat die verskillende intieme verhoudinge geanaliseer is, is dat die beskerming van die reg met betrekking tot die finansiële sake van 'n langsliewende nie konsekwent toegepas word op elke verhouding nie. Individue ontvang nie almal gelyke beskerming van die reg wanneer hulle in dieselfde situasies is nie. Teenoorgestelde geslag lewensmaats kan byvoorbeeld nie intestaat van mekaar erf volgens die *Wet op Intestate Erfopvolging* nie terwyl dieselfde geslag lewensmaats kan. Dit is ook moontlik vir Moslem en Hindoe-individue in monogame godsdienstige huwelike sowel as Moslem individue in poligame godsdienstige huwelike om intestaat van mekaar te erf. 'n Langsliewende gade in 'n erkende gewoontereg-huwelik kan intestaat erf, maar die definisie van 'gade' en 'afstammeling' in die *Wet op Intestate Erfopvolging* is baie vaag en veroorsaak dat daar onsekerheid is oor hoe om die deel te bereken waarop die oorblywende lewensmaat geregtig is.

Ten spyte van die feit dat dieselfde geslag lewensmaats intestaat van mekaar kan erf, word hulle nie toegelaat om onderhoud ingevolge die *Wet op Onderhoud van Langsliewende Gades* te eis nie. Slegs Moslem individue in monogame godsdienstige huwelike kan staat maak op die beskerming van die reg om onderhoud te eis, terwyl Moslem individue in huwelike met

meer as een gade sowel as Hindoe individue in beide monogame en poligame huwelike nie daarop kan staat maak nie.

Alhoewel die reis vir Suid-Afrikaners op regsgebied positiewe verwikkelinge teweeg gebring het oor die afgelope jare, is daar nog baie ruimte vir verdere ontwikkeling ten einde te verseker dat individue in ooreenstemmende verhoudinge dieselfde beskerming deur die reg geniet soos deur ons grondwet bepaal word.

SLEUTELWOORDE

Dood; Finansiële ondersteuning; Gade; Huwelik; Langslewende; Lewensmaat; Onderhoud; Pensioen; Vererwing; Verhouding

CHAPTER 1

INTRODUCTION

1.1 Background

South Africa is a culturally diverse country. The nation consists of many people who speak various languages, of which eleven are official in terms of the *Constitution of the Republic of South Africa*¹ (hereafter referred to as the Constitution). People have a wealth of traditions and skin tones range from ebony to sunburned pink. Archbishop Desmond Tutu² was definitely right when he referred to South Africans as the rainbow nation of Africa.

One of the consequences of such a diverse society is *inter alia* that there are many forms of intimate relationships between people. Individuals from different cultures, religions, races, social statuses and sexual orientations live together as couples. According to the Women's Legal Centre³ individuals can currently enter into civil marriages, customary marriages, same-sex marriages, religious relationships or domestic partnerships. Whilst civil marriages have always been recognised by law, this was not the position for all types of relationships. The *Bill of Rights*⁴ contained in the Constitution, however, paved the way for many legal changes in this regard. It was formulated to guarantee fundamental rights and to regulate the granting and limitation of rights for the people of South Africa. One can only support Rautenbach's⁵ statement that the legal development in South Africa's mixed⁶ legal system since 1994 has been revolutionary.

¹ *Constitution of the Republic of South Africa*, 1996 which came into operation on 4 February 1997.

² Desmond Mpilo Tutu, born on 7 October 1931 received the Nobel Peace Prize not only as a gesture of support to him and to the South African Council of Churches of which he is a leader, but also to all individuals and groups in South Africa who, with their concern for human dignity, fraternity and democracy, incite the admiration of the world.

³ Ndashe and Johnstone *Know your rights* 4.

⁴ Bill of Rights Chapter 2 of the Constitution.

⁵ Rautenbach and Du Plessis 2011 *McGill LJ* 749-780.

⁶ Rautenbach explains that the legal system comprises of Roman-Dutch law, which was influenced by English common law and indigenous laws, referred to as customary laws.

Due to all the legal changes during the last few years it is now possible for all individuals to choose whether they wish to formalise their relationship in some way or to keep it informal, regardless of the type of relationship that they are in.

1.2 Problem statement

Section 9(1) of the Constitution clearly states that everyone is equal before the law and has the right to equal protection by and benefit from the law. It is, however, a different situation for many individuals as they may not be on the same level as their partners when it comes to making decisions about the kind of relationships that they are in. The problem is therefore, that although it appears that individuals legally have the freedom to choose by which legal rules their relationship will be governed, many individuals may be restricted because of their religion, culture or in some instances because they are just uneducated or even dominated by their partners when it comes to making these relationship decisions. The result is that they may end up being in a relationship with legal consequences that are not in their best interest from a financial perspective. Whilst formal equality can be witnessed, formative equality is lacking.

In most relationships one partner is financially dependent on the other partner. The reasons for and degree of financial dependence on a partner will vary from relationship to relationship. In some instances it may be due to a personal or joint decision that one partner attends to domestic matters, such as raising children and looking after the joint home, whilst the other one provides financially. In *Kroon v Kroon*⁷ the court held that it was common cause that the plaintiff required maintenance as she was not self-sufficient. She cared for the children and looked after the home for many years without the assistance of her husband as his work required him to be away from home from time to time. For these reasons she was not able participate in the open workforce. It often happens that one partner sacrifices career opportunities to allow the other one to advance his or her career. In the rural areas many women still stay at home and raise children while the men work in the cities and send money home every month to support their families. Therefore, regardless of a couple's culture, religion or marital status, one

⁷ 1986 1 All SA 423 (E) at 429.

partner often relies on the other one for financial support. There is no doubt that despite having legal freedom, the majority of individuals today are in relationships, with or without choice or knowledge, that could result in hardship for the survivors if the partners who are responsible for the main source of income die without providing financially for the dependent spouses or life partners. Due to circumstances it may be very difficult, and in some instances almost impossible, for the survivors to generate an income to sustain the household. Survivors may have responsibilities to raise minor children, may have health problems, be too old, have been away from the employment environment for too long or just not have the skills⁸ to be trained to earn an income to be self-sufficient.

It is therefore evident that despite the fact that South Africa has one of the most progressive constitutions in the world that provides for equality and protection for all, some individuals could still be financially destitute when a spouse or life partner dies.

1.3 Research question

As a result of the poor financial position in which surviving spouses or life partners can find themselves in, as explained above, it is necessary to determine what protection the law, from a financial perspective, provides in these situations. It should be established whether surviving spouses or life partners will be entitled to share in the deceased partners' assets by way of inheritance, maintenance or pension fund benefits to survive financially if they are not able to provide for themselves.

The research question posed is therefore:

What is the nature of the financial protection provided to an individual in the event of the death of a spouse or life partner with regard to succession, maintenance and retirement funds?

⁸ In *Kroon v Kroon* 1986 4 SA 616 (EC) the Court acknowledged the fact that it is possible that a spouse does not have the skills to be trained to provide for herself.

1.4 Research aims

This dissertation endeavours to analyse the most prominent statutes that could benefit and protect an individual financially in the event of the death of a spouse or life partner. It furthermore attempts to establish what the effect of the various statutes are on the surviving spouse or life partner's financial position and it highlights any gaps. Throughout this research the focus is on areas to determine whether a surviving spouse or life partner has a right to inherit, testate or intestate, from the deceased's estate, claim maintenance or benefit from the deceased's retirement funds in order to make up for the financial loss due to the death of the spouse or life partner on whom he or she was financially dependent. The study also endeavours to establish whether the patrimonial consequences of a specific relationship contribute to the financial protection of the survivor in any way.

1.5 Research outlines

As it is possible to be a surviving spouse or life partner in many different relationships in South Africa, Chapter 2 examines what the most prominent intimate relationships are and determines what the financial consequences of each type of relationship are.

In Chapter 3 the succession laws are examined to establish whether an individual in each relationship has a legal right to inherit, testate or intestate, from the estate of a deceased spouse or life partner.

Maintenance claims are researched in Chapter 4 to determine whether a surviving spouse or life partner in a given relationship can rely on financial support through maintenance from the deceased's estate to provide for his or her needs.

In Chapter 5 pension funds are investigated with the aim to find out whether individuals in a given relationship are entitled to share in the deceased partner's pension fund in the event of death.

Chapter 6 provides a summary of the financial protection granted to a surviving spouse or life partner in the most prominent relationships in terms of South Africa's current legal framework.

CHAPTER 2

THE MOST PROMINENT RELATIONSHIPS IN SOUTH AFRICA

2.1 Introduction

As mentioned in the introduction, South Africa is a diverse country and as a result individuals could potentially find themselves in different forms of intimate relationships. It could be a relationship between a male and a female, a customary relationship between one male and one or many females, a male and female in a relationship because of their religion or a relationship between two individuals of the same sex. In order to determine the legal position of the individuals in each relationship, the different relationships and the matrimonial property systems applicable to each are discussed below. It is important to understand what the financial status of individuals is as a result of the relationships they are in. This is especially important if one of the individuals is financially dependent on the other and the one who is responsible for the upkeep of the joint household passes away first. The aim of this chapter is therefore to establish what the most prominent intimate relationships are and what the financial consequences of each type of relationship in the event of the death of a partner are.

2.2 Marriages

One of the types of intimate relationships an individual can be party to is a marriage. According to Heaton⁹ South African law recognises three types of marriages, namely civil marriages, customary marriages and marriages that are civil unions. Civil unions are also referred to as civil partnerships.¹⁰ The parties to the union may, however, decide whether they wish to call the union a marriage or a civil partnership.¹¹

⁹ Heaton 2008 *STELL LR* 452.

¹⁰ Sections 1 and 2(a) of the *Civil Union Act* 17 of 2006.

¹¹ Section 11(1) of the *Civil Union Act* 17 of 2006.

Although all *compos mentis*¹² majors¹³ and minors¹⁴ with the necessary consent may enter into a legal marriage, their personal circumstance may dictate which one of the three marriage systems will govern their marriage as each act has specific requirements that have to be met. These requirements are discussed in detail below.

A marriage between individuals, regardless which type of marriage is chosen, results in rights and responsibilities for each party and for this reason the important role that a marriage plays in society has been stressed in the courts on many occasions. Langa J in *Volks v Robinson*¹⁵ said:

The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children.

Cameron J also explains the significance of a marriage and the creation of rights and responsibilities of marriage partners in *Minister of Home Affairs v Fourie*:¹⁶

The capacity to choose to get married enhances the liberty, the autonomy and the dignity of a couple committed for life to each other. It offers them the option of entering an honourable and profound estate that is adorned with legal and social recognition, rewarded with many privileges and secured by many automatic obligations.

The rights conferred on an individual due to one of the three marriages entered into are examined below to establish what the financial consequences are in the event of the dissolution of the marriage when one of the spouses dies. As there were many changes since the incorporation of the Constitution, a brief summary of the different marriages are also provided.

¹² *Compos mentis* is a Latin term which means 'of sound mind'.

¹³ In terms of s17 of the *Children's Act* 38 of 2005 an individual is a major at the age of 18 years.

¹⁴ Boys between the ages of 15 and 18 years and girls between the ages of 12 and 15 years may in terms of ss 24 and 26 of the *Marriage Act* enter into marriage provided that they have the consent of their legal guardians and of the Minister of Home Affairs or an officer in public service authorised by him. Girls between the ages of 15 and 18 years only need the consent of their legal guardians.

¹⁵ 2005 5 BCLR 446 (CC) 462.

¹⁶ 2006 1 SA 524 (CC) par [63], [64] and [70] 41-44.

2.2.1 Civil marriages

Civil marriages were initially regulated by the common law and since 1 January 1962 by the principles of the *Marriage Act*.¹⁷ Hahlo¹⁸ explains that a marriage is a contract due to the fact that it is based on the consent of the parties, but he also makes it clear that it is not an ordinary contract. The consent of the parties, for instance, is not sufficient to create a legal marriage. In terms of section 29 of the *Marriage Act*, for the marriage to be valid, other requirements have to be met as well. Section 29(2) stipulates that the marriage has to be solemnised by a duly appointed marriage officer, which can be done at any place¹⁹ as long as the doors are open if held in a private or public building. Section 29(4) requires that both parties have to be present and section 12 requires that each party has to furnish a certified copy of their identity documents or a prescribed affidavit. It is further required by section 29(2) that the ceremony has to be witnessed by two competent witnesses. A marriage cannot be dissolved by consent either. It can only be dissolved by the death of a spouse, the decree of a competent court or by the annulment of a voidable marriage.²⁰ It is therefore evident that although there are some consequences of marriage that the parties may vary or exclude by way of an antenuptial or postnuptial contract, there are others that they cannot exclude or vary as it forms the essence of the marriage. In *Frankel's Estate v The Master*,²¹ Van den Heever J describes a marriage as not an ordinary private contract, but a juristic act *sui generis*²² and the relationship that it creates is not an ordinary contractual relationship, but one of a public nature.

In *Zulu v Zulu*,²³ Hugo J also confirms that one of the requirements for a civil marriage is for it to be monogamous.²⁴ Robinson²⁵ explains that it is even possible for individuals

¹⁷ 25 of 1961.

¹⁸ Hahlo *SA Law of Husband and Wife* 21-22.

¹⁹ *Ex parte Dow* 1987 3 SA 829 (D).

²⁰ Cronjé and Heaton *South African Family Law* 109.

²¹ 1950 1 SA 220 (A) 249.

²² The term means the only one of its kind according to the legal dictionary – Anon date unknown <http://thelawdictionary.org/sui-generis/>.

²³ 2008 4 SA 12 (D).

²⁴ Marriage between two individuals.

²⁵ Robinson, Human and Boshoff *Introduction to SA Family Law* 128.

who are married in terms of customary law to convert their marriage to a civil marriage under the *Marriage Act*, provided that neither party is married to someone else in terms of customary law. If the monogamous requirement is not met, the marriage will be void.

A marriage in terms of the common law was also defined in *Ismael v Ismael*²⁶ as:

The legally recognised voluntary union for life of one man and one woman to the exclusion of all others while it lasts...

Govender²⁷ is therefore correct when she states that civil marriages can also only be concluded between a man and a woman. Religion and race are therefore not relevant, but sex is as a civil marriage can only be entered into between one man and one woman.

Once a civil marriage has been solemnised, there are invariable and variable consequences for the individuals.²⁸ The variable consequences deal mainly with the property or estates of the couple and can be regulated by the individuals to some extent. For the purpose of this research, the focus is on the patrimonial property consequences only.

Until the promulgation of the *Matrimonial Property Act*²⁹ there were only two marital dispensations in South Africa. In terms of common law individuals could get married in community of property and profit and loss. Individuals who got married without entering into a contract prior to their marriage to regulate the property consequences of their marriage, were married in community of property and profit and loss³⁰ by default and the wives were subject to the marital power of their husbands.³¹ However, if the individuals concluded a contract before their marriage to regulate the property

²⁶ 1983 1 SA 1006 (A) 1019 (H).

²⁷ Govender *Formalities in respect of marriage* meumannwhite.co.za/family-law/.

²⁸ Heaton *South African Family Law* 43.

²⁹ 88 of 1984.

³⁰ The term 'community of property' will refer to 'community of property and profit and loss' throughout this dissertation.

³¹ Hahlo *South African Law of Husband and Wife* 153.

consequences, the marriage was out of community of property and excluded the marital power. Postnuptial agreements were not allowed either.

Section 11 of the *Matrimonial Property Act*, however, abolished the marital power that the husband had over the person and property of his wife in all marriages entered into after inception on 1 November 1984. Later the *General Law Fourth Amendment Act*³² abolished the marital power that husbands had over their wives retrospectively. Section 2 of the *Matrimonial Property Act* also introduced a further option for couples to consider, namely out of community of property with the accrual system. Some writers are of the view that there are now three³³ marriage regimes and others are of the opinion that there are only two³⁴ systems, of which one has two options. Kleingeld³⁵ agrees with the last group and explains that marriages in South Africa are governed by the *Marriage Act* and the *Matrimonial Property Act* and can either be in community of property and profit and loss, or out of community of property with or without the accrual system as is discussed below.

2.2.1.1 In community of property marriages

In *Brummund v Brummund's Estate*,³⁶ Levy J confirms that a marriage is in community of property and profit and loss in the absence of an antenuptial contract and every marriage is presumed to be in community until the contrary is proven. One of the consequences of the marriage is that the individuals' separate estates amalgamate into one joint estate for as long as they are married. Clarity in this regard is also given by Rabie AJ in *De Wet v Jurgens*.³⁷

As to this, it seems to me that there can be no doubt in our law. The Dutch writers whom I have consulted seem to be unanimous in the view that in Holland such property was owned by the spouses in common, in equal undivided shares. This view has also been accepted without question in several decisions in our Courts.

³² 132 of 1993.

³³ Jacobs 2012 *I do – but how?* www.cliffedekkerhofmeyr.com/.../en/.../TE_Alert_11_July_2012.pdf.

³⁴ Robinson *PELJ* 2007 3.

³⁵ Kleingeld 2014 *Marriages in South Africa* <http://www.webberslaw.com/recent-articles/marriage-in-south-africa/>.

³⁶ 1993 1 All SA 298 (NM) 301.

³⁷ 1970 3 All SA 143 (A) 145.

Meyer³⁸ explains that all liabilities and debts entered into by the individuals prior to the marriage, as well as liabilities and debts incurred after the marriage form part of the joint estate and the individuals are co-debtors of all the liabilities. Section 14 of the *Matrimonial Property Act* further provides that each individual has equal authority to administer the joint estate.

The joint estate can only be divided when the marriage dissolves, either in the event of divorce or the death of one of the spouses. If there is no massing of the joint estate and aviation by the survivor of the two spouses when one of them dies, the survivor is entitled to a half-share of the net estate, which is the difference between the assets and liabilities before the deduction of funeral expenses and estate duty³⁹ in terms of the marriage regime.

It should be noted, however, that the default marriage system before 2 December 1988 for black persons who entered into a civil marriage in South Africa was not automatically in community of property. They were required to make a joint written declaration before a magistrate, commissioner or marriage officer within one month prior to the marriage that they intended to marry in order for their marriage system to be in community of property and profit and loss.⁴⁰ They therefore did not need to enter into an antenuptial agreement. It is only after section 1(e) of the *Marriage and Matrimonial Property Law Amendment Act*⁴¹ repealed section 22(6) of the *Black Administration Act*⁴² that the default marriage regime became in community of property and profit and loss in the absence of a declaration.

It was confirmed in *Van der Merwe v Road Accident Fund*⁴³ that it is possible for individuals to conclude an antenuptial contract in terms of which they exclude certain assets from the joint estate when they enter into marriage in community of property. Various statutes also exclude assets from the joint estate as detailed below:

³⁸ Meyer 2012 *Marriages and Matrimonial Property Systems* 5.

³⁹ Meyerowitch *Administration of Estates and their Taxation* 15-51.

⁴⁰ Section 22(6) of the *Black Administration Act* 38 of 1927.

⁴¹ 3 of 1988.

⁴² 38 of 1927.

⁴³ 2006 6 BCLR 682 (CC).

- i) Property may be bequeathed in terms of a will or donated to one of the spouses with the condition that the property, with or without the fruit thereof, has to be excluded from the joint estate.⁴⁴
- ii) A *fideicommissum* or usufruct cannot form part of the joint estate because it is the beneficiary's personal right, which cannot be alienated.⁴⁵
- iii) All engagement gifts fall outside the joint estate.⁴⁶
- iv) In terms of section 17 benefits due to a married woman under the *Friendly Societies Act*⁴⁷ are excluded from the joint estate.
- v) Section 18(a) of the *Matrimonial Property Act* stipulates that an amount received by a spouse due to non-patrimonial damages forms part of that spouse's separate property.
- vi) Further provision is made in section 18(b) of the *Matrimonial Property Act* to exclude patrimonial and non-patrimonial damages awarded to the injured spouse due to bodily injuries caused by the other spouse.
- vii) When costs are awarded to a spouse who is married in community of property and involved in a patrimonial action, the costs will not fall into the joint estate provided the marriage is not dissolved.⁴⁸
- viii) Sections 50(1) and 48(1) of the *Prevention of Organised Crime Act*⁴⁹ provide that property that is acquired through unlawful activities will not form part of the joint estate.

It is very important for an executor to establish whether any of these exclusions apply to ensure that the surviving spouse does not part with a portion of the estate that never

⁴⁴ Heaton *South African Family Law* 68; *Ex parte Lelie* 1945 WLD 168.

⁴⁵ Hahlo *South African Law of Husband and Wife* 167.

⁴⁶ *Levin v Levin* 1960 4 SA 469 (W) 232.

⁴⁷ 25 of 1956.

⁴⁸ Heaton *South African Family Law* 70; *Comerma v Comerma* 1938 TPD 220 224.

⁴⁹ 121 of 1998.

formed part of the joint estate. The exclusion of these assets from the joint estate by statutes increases the value of the surviving spouse's estate, if awarded to the surviving spouse during the marriage. The result of the exclusions is that the surviving spouse should be in a better financial position in the event of the death of a spouse as would have been the case if these assets formed part of the joint estate when paid to him or her.

2.2.1.2 Marriages out of community of property

The default matrimonial property system in South Africa is in community of property and profit and loss⁵⁰ and if individuals wish to deviate from the normal consequences of universal community of property, they have to enter into an antenuptial contract prior to their marriage which has to be registered in terms of section 86 of the *Deeds Registries Act*.⁵¹ Before the introduction of the *Matrimonial Property Act*, White, Asian and Coloured individuals who entered into an antenuptial agreement, had complete separation of property and profit and loss and the marital power⁵² was excluded. The default marriage system for Black individuals who married in terms of the civil law was out of community of property in terms of section 22(2) of the *Black Administration Act*⁵³ until 2 December 1988 when this section was repealed by section 1(e) of the *Marriage and Matrimonial Property Law Amendment Act*.⁵⁴

Since 1 November 1984 section 2 of the *Matrimonial Property Act* provides that a marriage is now automatically subject to the accrual system when an antenuptial contract is entered into, unless it is expressly excluded in the antenuptial contract. White, Indian and Coloured individuals who were married with an antenuptial contract before this date were given an opportunity to make the accrual system applicable to their marriage by entering into a notarial contract within a period of four years. Black

⁵⁰ Sections 1 and 2 of the *Matrimonial Property Act* 88 of 1984.

⁵¹ 47 of 1937; also refer to *Ex parte Spinazze* 1983 (4) SA 751 (T), confirmed on appeal 1985 (3) SA 650 (A); *Lagesse v Lagesse* 1992 1 SA 173 (D) 176-177; *Honey v Honey* 1992 3 SA 609 (W) 612 BC.

⁵² See Hahlo *South African Law of Husband and Wife* 189 where it is explained that the husband was regarded as the head of the family and had power of over the person and property of his wife.

⁵³ 38 of 1927.

⁵⁴ 3 of 1988.

individuals were only given this choice since the law was amended on 2 December 1988.⁵⁵ Blacks were also granted a period of two years in terms of section 2(a) after the promulgation of the *Marriage and Matrimonial Property Law Amendment Act* to change their marital regime.

The financial effect of the accrual system is that the net assets accumulated by each individual during the marriage are shared equally between the individuals in the event of death. According to section 3(1)⁵⁶ of the Act this is achieved by the spouse with the smallest accrual claiming from the estate of the spouse with the larger estate when one spouse dies. It is, however, important to keep track of inflation and it is therefore necessary to adjust the commencement value by the consumer price index when the marriage is dissolved.⁵⁷ Each individual will therefore retain the assets that were excluded by the antenuptial contract and share equally in the net assets acquired during the marriage in the event of the death of a spouse. This is not the same as the marriage in community of property and profit and loss as individuals do not share in joint debts or assets that were acquired before the marriage and which were excluded from the marriage in terms of the antenuptial contract. In terms of the *Matrimonial Property Act* the following are also excluded from the accrual calculation:

- i) amounts that accrue to a spouse due to non-patrimonial damages;⁵⁸
- ii) assets defined in the antenuptial contract by the spouses together with the proceeds thereof or replacement assets;⁵⁹
- iii) an inheritance, legacy or donation received from third parties, the proceeds thereof or replacement assets;⁶⁰ and
- iv) donations between spouses.⁶¹

⁵⁵ *Marriage and Matrimonial Property Law Amendment Act* 3 of 1988, ss 3 and 4.

⁵⁶ 88 of 1984.

⁵⁷ Section 4(1)(b)(iii) of the *Matrimonial Property Act* 88 of 1984.

⁵⁸ Section 4(1)(b)(i).

⁵⁹ Section 4(1)(b)(ii).

⁶⁰ Section 5(1).

⁶¹ Section 5(2).

If individuals do not want the accrual system to apply to their marriage, they have to specifically exclude it in their antenuptial agreement.⁶² The result is that they will each retain assets acquired before and after their marriage and will only be liable for their own debts. Any gifts, bequests or donations received during the marriage will fall into the recipient's estate.

It is also possible for individuals to make other arrangements concerning their matrimonial property in an antenuptial agreement to cater for their personal situations. Section 23(4) of the *Matrimonial Property Act* provides if one individual contributes more to the joint household than the other, that individual does not have recourse against the other spouse if the marriage was concluded after the promulgation of the *Matrimonial Property Act*, unless they have made provision for it in an antenuptial agreement. Before the *Matrimonial Property Act* came into operation, individuals could claim if they contributed more than their *pro rata* share to the joint household in terms of section 23(3). In this regard individuals are therefore less protected by the law in the event of the dissolution of the marriage since 1 November 1984.

2.2.2 Customary marriages

Section 1 of the *Recognition of Customary Marriages Act*⁶³ (herein after referred to the *Recognition Act*) defines a customary marriage as a marriage concluded in accordance with customary law whilst customary law is defined as the customs and usages traditionally observed among indigenous African people of South Africa that form part of the culture of those people.

Despite the country's diversity and the fact that most of the population⁶⁴ in South Africa are Africans, customary marriages were not treated on an equal status compared to civil marriages. The result was therefore as Robinson⁶⁵ confirms, that customary marriages were not regarded as valid marriages in most areas of the law. This view,

⁶² Section 2 of the *Matrimonial Property Act* 88 of 1988.

⁶³ 120 of 1998.

⁶⁴ According to Census 2011, South Africa's population stands at 51.77 million. Africans are in the majority, making up 79.2% of the population.

⁶⁵ Robinson, Human and Boshoff *Introduction to South African Family Law* 38.

however, changed after the introduction of the *Bill of Rights*, as contained in the Constitution, when the *Recognition Act* and the regulations were introduced and came into operation on 15 November 2000.

Sub-sections 2(1) and (3) of the *Recognition Act* provide that all monogamous and polygamous marriages are recognised for all purposes provided they were valid according to customary law. These sections apply to marriages entered into before the commencement of the act. The requirements for recognition are set out clearly in sections 3 and 7(6)⁶⁶ for all monogamous and polygamous customary marriages entered into before the commencement of the act, as well as for marriages entered into after the 15th of November 2000. West,⁶⁷ however, warns that the registration of a customary marriage is not a requirement if the marriage was concluded before or after 15 November 2000 and a marriage is therefore not invalid if a spouse does not produce documentation to prove the existence of the marriage. It was also held in *Kambule v The Master*⁶⁸ that a customary marriage concluded in terms of customary law as defined in section 1 of the *Recognition Act* prior to the commencement of the act was valid despite the fact that it had not been registered. This fact is important as it determines whether the spouse may rely on legal protection from a financial perspective, if any, in the event of death.

Dhever⁶⁹ highlights the risks of the proposed changes to the *Recognition Act*. Currently either one of the spouses is allowed to register the customary marriage after the marriage was concluded in order to comply with the requirements of the *Recognition Act*. The Registry Officer is allowed to register the marriage even after the death of one of the spouses, which results in the surviving spouse being able to provide a document as proof of the marriage in order to receive the full legal benefits of such a marriage. If the proposed changes are adopted, an individual will no longer be able to register the marriage after the death of a spouse, even if it is within the period of three months as

⁶⁶ 120 of 1998.

⁶⁷ West 2002 *De Rebus* 47; also refer to Bhengu "Money Marketing" 2.

⁶⁸ 2007 3 SA 403 (E).

⁶⁹ Dhever 2012 *Giving with one law and taking away with another* www.withoutprejudice.co.za.

prescribed by section 4(3)(b) of the *Recognition Act*. This will make it more difficult for the survivor to provide proof of the marriage in order to claim any benefits, if any.

The introduction of this act resulted in a positive change, especially for women as they suffered unequal status and rights to men prior to this act coming into operation. Previously all women were treated as minors regardless of their age or marital status in terms of section 11(3)(b),⁷⁰ which meant that they could not own property. The matrimonial property consequences of customary marriages after the introduction of the act are discussed below.

2.2.2.1 Patrimonial consequences

To determine what the patrimonial consequences of customary marriages entered into before the *Recognition Act* are, a distinction should be made between monogamous and polygamous marriages.⁷¹

The patrimonial consequences, as explained by Stassen⁷² remain the same for polygamous marriages concluded before 15 November 2000 in terms of section 7(1) of the *Recognition Act*, which are explained by Herbst⁷³ as follows:

In terms of customary law, a single household is an undivided economic unit under control of the head of the family if a man is married to one wife. In the case of a polygamous marriage, a distinction is made between family property controlled by the family head and house property controlled by the members of a specific household. According to the KwaZulu-Natal Codes of Zulu Law, house property belongs to the specific house but is still under the control of the family head. The house property must, however, be utilised for the benefit of the members of the specific household. The family head must maintain the daily needs of his wife (wives) and children. Family property includes all the property in the family excluding house property and personal property. Personal property includes, for example, clothes and other smaller items of personal nature or gifts that were received. Women had control over their personal property only.

⁷⁰ *Black Administration Act* 38 of 1927.

⁷¹ Section 7 of the *Recognition of Customary Marriages Act* 120 of 1998.

⁷² Stassen and Stassen 2001 *De Rebus* 48-49.

⁷³ Herbst and Du Plessis 2008 *J Comp L* 10.

As explained above, customary law subscribes to a family-oriented property system and not a specific matrimonial property system. Such marriages have therefore always been regarded to be out of community of property.

The position for monogamous marriages entered into prior to the *Recognition Act* changed after the Constitutional Court decision of *Gumede*,⁷⁴ which was handed down on 8 December 2008. It was found that section 1 of the *Recognition Act* was inconsistent with the Constitution as far as monogamous marriages are concerned and therefore invalid. The result is that monogamous customary marriages entered into before the *Recognition Act* are now regarded as being in community of property and profit and loss.

Section 7(2) of the *Recognition Act* determines that customary marriages concluded after this date are in community of property and profit and loss unless such consequences are specifically excluded by the spouses in an antenuptial contract that regulates their matrimonial property system. If the marriage was entered into after the commencement of the act and the husband only has one wife, section 21 of the *Matrimonial Property Act*⁷⁵ applies, which means that they can apply to court to change their matrimonial property system. When a husband wants to enter into further customary marriages, he has to approach the court in terms of section 7(4)(b) of the act to approve a written contract that regulates the future matrimonial property system of the marriages to protect the interests of all parties. The existing and future spouse or spouses also have to be part of the proceedings and each will be provided with a copy of the order and a certified copy of the contract that regulates the matrimonial property.⁷⁶ These documents are very important as they assist in determining whether an individual was married to the deceased partner, and if married, which matrimonial property regime applied and this will determine whether the surviving spouse has a claim to assets due to the marriage when a spouse passes away.

⁷⁴ *Gumede v President of the Republic of South Africa* CCT 50/80 2008 ZACC 23.

⁷⁵ 88 of 1984.

⁷⁶ Section 7(4)(b) of the *Recognition of Customary Marriages Act* 120 of 1998.

It should, however, be noted that non-compliance with section 7(6) of the *Recognition Act* does not make the subsequent customary marriage invalid, as it was held in *Ngwenyama v Mayelane*⁷⁷ that this marriage is regarded as being out of community of property.

The matrimonial consequences of marriages in community of property and profit and loss or out of community of property are the same as in civil marriages as explained above.

2.2.3 Marriage and civil partnership under the Civil Union Act

Until 2005 it was only possible for opposite sex couples to enter into marriage. As mentioned above, the Constitution, which came into operation on the 4th of February 1997, paved the way for many changes. It was argued in *Lesbian and Gay Equality Project v Minister of Home Affairs*⁷⁸ that the prohibition of marriages between same sex partners was in violation of the *Bill of Rights* and therefore unconstitutional as section 9 of the Constitution provides that:

Everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination may be taken. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex pregnancy, marital status, ethnic or social origin, colour sexual orientation, age, disability, religion, conscience, belief, culture and birth. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection.

Same-sex couples were not entitled to enjoy the status, benefits and protection of marriage as they were not allowed to enter into marriage. The Court was approached by Marié Fourie and Cecilia Bonthuys in 2002 to remedy this situation. They were a lesbian couple who wanted to register their marriage in terms of the *Marriage Act* and after many legal battles, eventually turned to the Constitutional Court in 2005 to provide direction. On 1 December that year the landmark decision of the Constitutional Court in

⁷⁷ (474/11) 2012 ZASCA 94.

⁷⁸ 2006 1 SA 524 (CC).

*Minister of Home Affairs v Fourie*⁷⁹ declared the lack of the legal recognition of same-sex relationships unconstitutional as far as the common law and *Marriage Act* are concerned. Sachs J explained the significance of marriage and the impact of the exclusion from it in *Minister of Home Affairs v Fourie*.⁸⁰

It is true that marriage, as presently constructed under common law, constitutes a highly personal and private contract between a man and a woman in which parties undertake to live together, and support one another. Yet the words 'I do' bring the most intense private and voluntary commitment into the public, law governed and state-regulated domain.

The result was that Parliament was given a period of one year in which to develop a remedy that would allow same-sex partners to formalise their relationships. Parliament opted to develop a separate institution of marriage, apart from existing forms of marriage such as civil or customary marriages and introduced the *Civil Union Act*,⁸¹ which has allowed same sex partners to enter into marriage from 1 December 2006.

The *Civil Union Act* defines a civil union in section 1 as follows:

The voluntary union of two persons who are both 18 years or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all the others.

The interpretation of the section is that any individual, male or female, who is eighteen years or older, may choose to either enter into a marriage or civil partnership. The latter may be the preferred option for individuals who do not wish to get married or who are restricted in terms of religious reasons, but still wish to regulate their relationship and want legal protection, as section 13 of the *Civil Union Act* confers all legal consequences of a civil marriage in terms of the *Marriage Act*⁸² to a civil partnership. This position was echoed by Gamble J in *AS v CS*⁸³ when two individuals who had entered into a civil union in England approached the court for a divorce when they returned to South Africa.

⁷⁹ 2006 1 SA 524 (CC).

⁸⁰ 2006 1 SA 524 (CC) [63].

⁸¹ 17 of 2006.

⁸² 25 of 1961.

⁸³ 2011 2 SA 360 (WCC) par [23].

The requirements and legal consequences for a marriage and a civil partnership in terms of sections 8 and 13 the *Civil Union Act* are exactly the same. It is merely a matter of preference by the parties as to what it should be registered as and referred to.

Ntlama,⁸⁴ however, warns that the categorisation of marriages into opposite sex and homosexual marriages or civil unions has created legal uncertainty about the essence of the notion of equal rights for all without distinction, as envisaged in the Constitution. The right to a marriage is not equal to the right to a union as the *Civil Union Act* deals with solemnisation of civil unions and consequences of a civil union, which is not a marriage. Allocating people into different categories rather than allowing them to be just normal human beings could defeat the purpose of establishing a just society based on democratic values, social justice and fundamental human rights. The lack of the definition of the word marriage in the *Civil Union Act* creates uncertainty about the establishment of legal rules relating to the enforcement of equal rights within the context of couples in same-sex relationships versus those in opposite sex relationships.

Whether the *Civil Union Act* meets everyone's expectations is debatable, but it does, however, succeed in protecting the rights of people in same-sex relationships who are most vulnerable to discrimination and persecution.

2.2.3.1 Patrimonial consequences

Section 13 of the *Civil Union Act* provides that:

- (1) The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union.
- (2) With the exception of the Marriage Act and the Customary Marriages Act, any reference to-
 - (a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and
 - (b) husband, wife or spouse in any other law, including the common law, includes a civil union partner.

⁸⁴ Ntlama 2010 *PELJ* 191.

The result is therefore that the different marriage regimes in terms of the *Matrimonial Property Act*⁸⁵ will be available to an individual who enters into a civil union in terms of the *Civil Union Act* and that the same patrimonial consequences will apply as discussed under civil marriages above.

2.3 Religious marriages

A religious marriage is a marriage concluded in accordance with the tenets of a specific religion. As South Africa has large Muslim and Hindu communities, the dissertation focuses on Muslim and Hindu religious marriages only.

Robinson⁸⁶ explains that a religious marriage is entered into between individuals in terms of their religion, but the individuals do not comply with any of the solemnization and registration requirements as set out in the *Marriage Act*⁸⁷ or the *Civil Union Act* and therefore the marriage is not recognised in terms of South African law. Many religious marriages are furthermore polygamous,⁸⁸ which is not currently recognised in South Africa despite the fact that section 15(3) of the Constitution reads:

- (a) This section does not prevent legislation recognising
 - (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
 - (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

The result is that a spouse cannot rely on the protection of the laws of South Africa when it comes to the dissolution of a religious marriage, but will have to rely on the protection of their religion in this regard, which is not always perceived to be fair by the community. An example of how easy and quickly a husband can divorce a spouse can be witnessed in *Faro v Bingham*,⁸⁹ where a husband divorced his seven month pregnant wife. According to the applicant she cared for her ill husband, Moosa, who was diagnosed with lung cancer in 2009. One morning the applicant and her husband had

⁸⁵ 88 of 1984.

⁸⁶ Robinson, Human and Boshoff *Introduction to South African Family Law* 40.

⁸⁷ Sections 10 and 29 of the *Marriage Act* 25 of 1961.

⁸⁸ Hindu and Islamic law allows one man to be married to more than one wife at the same time.

⁸⁹ (446/2013) 2013 ZAWCHC 159 [3].

an argument about his alleged failure to give her money for food and on their way back from his chemotherapy he stopped at the home of the Imam and requested a divorce. In accordance with Islamic rites, the marriage was dissolved immediately after the Talāq certificate was issued.

As religious marriages are not recognised as legal marriages in terms of South African law and the religion's tenets do not protect women either, as can be testified in the example above, women are very vulnerable and exposed to abuse. Due to the need for full recognition of religious marriages to ensure that individuals are duly protected, the Commission for Gender Equality compiled a draft Bill called the *Recognition of Religious Marriages Bill*, but this document has not yet been submitted to Parliament.⁹⁰ Therefore, until legally recognised, parties to a religious marriage do not receive most of the benefits associated with legal marriages.

2.3.1 Property consequences

Provided for a few exceptions⁹¹ that are discussed later in this dissertation, individuals married in terms of religious rites are regarded as unmarried in South Africa. Property owned before and acquired during the existence of the religious marriage by an individual remains the property of that individual.⁹² The same applies to debts incurred by an individual before and during the existence of the religious marriage.⁹³ The result is therefore that an individual that is party to such a relationship is not able to rely on the matrimonial property benefits that a legally recognised marriage offers, such as sharing in the joint owned assets when married in community of property or being able

⁹⁰ Cronjé and Heaton *SA family law* 231; the Women's Legal Centre also brought an unsuccessful application for direct access to the Constitutional Court to seek an order compelling the President and Parliament to enact legislation recognising Muslim marriages: *Women's Legal Centre Trust v President of the Republic of South Africa* 2009 6 SA 94 (C). The Constitutional Court rejected the application *inter alia* on the grounds that the obligation to enact legislation to fulfil constitutional rights fall on the State and not the President and Parliament alone, and that direct access to the Constitutional Court was not justified. The court did not consider whether an obligation to enact legislation to recognise Muslim marriages exists or whether such legislation is required by the Constitution. Nor did it consider whether such legislation would be consistent with the Constitution.

⁹¹ See ss 1 and 4q of the *Estate Duty Act* 45 of 1955, definitions of 'spouse' in terms of *Intestate Succession Act* 81 of 1987 and *Maintenance of Surviving Spouse Act* 27 of 1990.

⁹² Breslaw 2013 *Muslim Spouses Are they 'equally' married?* De Rebus 246.

⁹³ Breslaw 2013 *Muslim Spouses Are they 'equally' married?* De Rebus 246.

to lodge an accrual claim in terms of an antenuptial contract when the marriage dissolves as discussed under marriages above.

2.4 Life partnerships (domestic partnerships)

In this section, life partnerships, also known as domestic partnerships, which are less formal arrangements between individuals, are discussed. In 2007 it was confirmed by the Statistics South Africa⁹⁴ reports that despite the fact that the South African legal framework now provides equal rights to all individuals to get legally married, many couples, opposite sex and same-sex, prefer to live together without getting married. Individuals are therefore regarded as life partners if they live together and have an intimate relationship and have not formalised their relationship by meeting the requirements of any one of the following acts:

- i) Marriage in terms of the *Marriage Act, Recognition of Customary Marriages Act* or *Civil Union Act*;
- ii) Civil Partnership in terms of the *Civil Union Act*; or
- iii) Religious marriage in terms of religious rites.

Couples, regardless of their sex, often do not realise what the legal consequences of their relationships are. They sometimes live together for years, during which time they buy various kinds of assets and contribute to joint household expenses. In some events they even pay off assets that are registered in the name of the other partner. It is only once the relationship ends, for instance at death, that the questions about financial rights are raised.

In 2008 the *Domestic Partnership Bill* was drafted to afford all parties equally before the law, the right to equal protection and benefit of the law. Once the *Domestic Partnership Bill*⁹⁵ is promulgated, it will recognise and protect partners in domestic

⁹⁴ SSA Report 2007 *Marriages and divorces* confirm a further decline in civil and customary marriages. SSA Report 2014.

⁹⁵ *Domestic Partnership Bill* 2008.

partnerships and allow partners the opportunity to share in some of the rights and responsibilities that emanate from a marriage. One of the important points that is addressed in the *Domestic Partnership Bill* is the division of property in the event of the dissolution of domestic partnerships that are not registered. Volgepach⁹⁶ explains that an individual will be able to approach the court for a court order regarding the allocation of assets. In order to make a decision, the court will take into account factors such as the duration and the nature of the relationship, the degree of financial assistance, dependence or interdependence, arrangements regarding financial support, performance of household duties, ownership and use of as well as acquisition of the property, the principles of justice, fairness and equality, and the interest of both parties and their individual needs depending on the facts of each individual case. Such an application will also have to be lodged within two years of the separation.

Although the *Domestic Partner Bill* deals with domestic relationships of both opposite and same sex partnerships, it is important to distinguish between them currently as far as some acts are concerned. Before the *Civil Union Act* came into effect, same-sex partners were not allowed to marry one another and the courts were approached on a few occasions for relief. Under certain conditions, same-sex partners therefore now have legal protection where opposite-sex partners who were able to get married and chose not to, do not. This is discussed in detail in the chapters dealing with intestate succession and maintenance in this dissertation.

2.4.1 Property

Opposite sex and same-sex life partnerships do not generally confer the consequences of legally recognised marriages and individuals are regarded as unmarried.⁹⁷ Consequently, these relationships have no patrimonial consequences when they terminate. It is, however, possible for individuals to make use of ordinary legal rules and remedies to regulate the property consequences of their relationship to protect

⁹⁶ Volgepach date unknown <http://www.polity.org.za/article/what-are-the-consequences-of-living-together-2011-02-01>.

⁹⁷ See Cronjé and Heaton *South African Family Law* 243.

them financially.⁹⁸ An agreement between the individuals will therefore determine what the financial consequences will be for the surviving life partner when the relationship ends and will be different in each case.

2.5 Foreign marriages

As South Africa participates on many levels globally, individuals also get into intimate relationships with foreigners. Although this dissertation does not focus on offshore legislation, it is important to understand what the legal effect of marriages between South Africans and foreigners are. Van Schalkwyk⁹⁹ explains that a marriage entered into in a foreign country is deemed to be valid in South Africa if the following two requirements are met:

- i) the marriage has to be valid in terms of the law and formalities of the country where the marriage was concluded; and
- ii) no rule in South Africa law renders the marriage null and void.

The above requirements have to be met not only when a foreigner and a South African conclude a marriage in a foreign country, but also when two South Africans enter into marriage in another country. In order to determine whether an individual will be able to benefit from legal protection in South Africa, it will therefore also be necessary to determine what the foreign country's laws and formalities are and whether they were met when the marriage was concluded.

2.5.1 Patrimonial consequences

A foreign marriage, like any other marriage, has patrimonial consequences. When foreign marriages are concluded, the *lex domicilii matrimonii*¹⁰⁰ rule applies. This means that the patrimonial consequences of the marriage will be governed by the law of the country where the husband was domiciled at the time of the marriage. In order to establish whether a couple is married in community of property or out of community of

⁹⁸ Cronjé and Heaton *South African Family Law* 243.

⁹⁹ Van Schalkwyk *General Principles* 149.

¹⁰⁰ *Frankel's Estate v The Master* 1950 1 SA 220 (A); *Sadiku v Sadiku* 2007 JOL 19342 (T) 2; Heaton and Schoeman 2000 *THRHR* 146.

property, with or without the accrual system, will therefore be determined by the legal system of the husband's country of domicile at the date that the marriage was concluded.

In *AS v CS*¹⁰¹ Gamble J had to consider the position of two South African domicilliarities who registered a civil partnership in England when they filed for divorce on their return to South Africa. It was concluded that their marriage was valid under the *lex loci celebrationis*¹⁰² and that it did not offend public policy. Sadly the *Civil Union Act* does not cater for all situations. The legal question that has *inter alia* not been tested in the South African courts as yet, is which country's laws will apply in the event of a marriage between two males with different domiciles or in the event of a marriage between two females where there is no husband. The patrimonial consequences in these relationships are therefore currently uncertain.

2.6 Summary

After researching the most familiar intimate relationships in South Africa, it is evident that an individual could be party to one of the following relationships:

- i) a spouse in a marriage that is legally recognised, namely a civil marriage, customary marriage or a civil union, or
- ii) married in terms of a religious rite which, except for a few exceptions that are discussed later in the dissertation, is not currently recognised as a legal marriage; or
- iii) a life partner in a same-sex or opposite sex relationship in which instance the individual is treated as being unmarried except for a few exceptions in the case of same-sex relationships, which are also discussed later in the dissertation.

¹⁰¹ Matlala 2011 2 SA 360 (WCC) para 26; *De Rebus* 2011 46.

¹⁰² *The law of the place of celebration of a marriage*. In private international law this law governs questions around the formalities required for marriage, whether the marriage is monogamous or polygamous, what law governs impotence or wilful refusal to consummate a marriage.

In the event of civil marriages, customary marriages and civil unions, the patrimonial consequences of these recognised marriages are determined by the individuals in the relationships as they can select which marriage system has to apply to their marriage before they enter into marriage. Religious marriages and life partnerships, also known as domestic partnerships, on the other hand, are not legally recognised as marriages and therefore have no patrimonial consequence unless a contract was entered into to regulate the distribution of assets when the relationship ends. The type of relationships and the marriage regime in the event of a recognised marriage, are most probably the most important decisions that individuals can take to ensure some financial security when the relationships dissolve at death as it determines whether the survivors are entitled to some of the deceased partners' assets based on their relationships.

Financial arrangements contained in an antenuptial contract when legally married, or in terms of a contract entered into between the individuals when not legally married, will also have an effect on the financial consequences at the dissolution of the relationship.

The effect that a relationship has on the financial position of a surviving spouse or life partner varies drastically between the different types of relationships. Life partners are least protected, whilst married individuals enjoy more protection, although the extent thereof depends on the marital regime selected.

The remainder of this dissertation aims to critically examine whether individuals are protected by other statutes in the event of the death of a partner as the relationships *per se* cannot be relied on for financial security in most instances.

The next chapter focuses on the laws of succession to establish to what extent an individual will be allowed to benefit from the deceased estate of a spouse or life partner.

CHAPTER 3

INTESTATE AND TESTATE SUCCESSION

3.1 Introduction

The aim of this chapter is to determine whether a surviving spouse or life partner can inherit when a partner passes away. The death of a spouse or life partner can have a severe impact on an individual's financial position if the survivor was financially dependent on the deceased. If the surviving spouse or life partner, however, is entitled to a financial benefit in the form of an inheritance, it will alleviate the survivor's financial burden if he or she has no other means. The position with regard to a spouse or life partner's right to claim inheritance is researched in the rest of this chapter.

As an individual can die testate, which means leaving a valid will,¹⁰³ or intestate, in which event there is no will or the will was invalid due to it not meeting the requirements¹⁰⁴ as set out in the *Wills Act*,¹⁰⁵ it is important to differentiate between the two situations to ascertain what the differences or similarities are in the two different situations.

3.2 Testate succession

The position with regard to wills is firstly reviewed, starting with a brief history of events that contributed to our legal position today. In terms of the Roman law as well as the Roman-Dutch law, a surviving spouse, descendants, ascendants and siblings were entitled to benefits that were transferred from a deceased estate as legitimate

¹⁰³ Pace and Van der Westhuizen *Wills and Trusts* 1 describe a will as a declaration of what a person wishes to happen to his assets after his death.

¹⁰⁴ Section 2(1)(a)(i) requires that the will has to be signed at the end thereof by the testator or by some other person in his presence and by his direction. Such signature has to be made in the presence of two or more competent witnesses who are present at the same time in terms of s 2(1)(a)(ii). The witnesses must attest and sign the will in the presence of the testator and each other according to s 2(1)(a)(iii). If the will consists of more than one page, each page other than the one that it ends on, must also be signed by the testator or such other person anywhere on the page in terms of s 2(1)(a)(iv).

¹⁰⁵ 7 of 1953.

portions.¹⁰⁶ This benefit was based on the *querella inofficiosi testamenti*¹⁰⁷ principle that members of the family had a right to a supposed due portion of the deceased's estate when they were excluded from the deceased's will.¹⁰⁸ During the 19th century, whilst under the influence of the English who favoured freedom of testation, the legitimate portions were abolished, which resulted in the principle of freedom of testation being upheld in the South African common law today.

This principle of freedom of testation was confirmed by the Supreme Court of Appeal in *BoE Trust Limited*.¹⁰⁹

Freedom of testation is considered one of the founding principles of the South African law of testate succession: a South African testator enjoys the freedom to dispose of the assets which form part of his or her estate upon death in any manner (s)he deems fit.

This means that one therefore has an almost unrestricted freedom to leave one's entire estate to whomever one wish. Erasmus AJA further confirmed in *Curators, Emma Smith Educational Fund v University of KwaZulu-Natal*¹¹⁰ that freedom of testation is an integral part of the right to own property in terms of section 25 of the Constitution and the right to dignity. Although it is possible to disinherit anyone on the basis of freedom of testation, a legacy or inheritance that has discriminatory conditions under section 9 of the Constitution is invalid and unenforceable. As Van der Westhuizen¹¹¹ explains, except for a few limitations, the freedom of testation is unfettered and the wishes of the testator as contained in the will must be carried out. As stated, this rule is not absolute and may sometimes be restricted by legislation as was confirmed in the *Robertson v Robertson's Executors*¹¹² by Innes ACJ:

¹⁰⁶ Du Toit *Roman-Dutch Law in Modern South African Succession Law* 280.

¹⁰⁷ A complaint when a testament was contrary to the testator's duties. If, according to Roman Law, a next-of-kin of a testator was effectively disinherited or less than one quarter of his legal share of the inheritance was made to him and he did not receive this share by way of a bequest or donation due to death, he could follow the required steps to demand the annulment of the testament against the testator's beneficiaries.

¹⁰⁸ Du Toit *Roman-Dutch Law in Modern South African Succession Law* 280.

¹⁰⁹ 2013 3 SA 236 (SCA) at 243.

¹¹⁰ 2010 6 SA 518 (SCA).

¹¹¹ Pace and Van der Westhuizen *Wills and Trusts* 6(1).

¹¹² *Robertson v Robertson's Executors* 1914 AD 503.

The golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained, the court is bound to give effect to them, unless it is prevented by some rule of law from doing so. *There is therefore no doubt that a partner is, subject to the limitations set by some statutes, free to bequeath his or her estate to whomever he or she wishes to.*

3.2.1 Limitations on the freedom of testation

Statutes that limit an individual's freedom to bequeath assets in terms of a will may also have an effect on a surviving spouse or life partner's financial position and are briefly examined below.

3.2.1.1 Sub-division of Agricultural Land

Section 3 of the *Sub-division of Agricultural Land Act*¹¹³ *inter alia* limits the number of owners of agricultural land¹¹⁴ and prohibits the sub-division of agricultural land unless the consent of the Minister of Agriculture was obtained under specific conditions. The intention of the legislator with this act was confirmed *inter alia* by the Constitutional Court in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd*¹¹⁵ to ensure the continued existence of agricultural land and the Minister's control over it. Although one can understand the reason for this limitation, it could have a negative effect on a survivor's financial position as a testator will for instance not be able to bequeath a portion of a fixed property to a partner to provide for him or her and the balance to another person, for instance a son who farms on the property, if it falls within the definition of agricultural land. This restriction limits the chances of a surviving spouse or life partner being provided for financially by a partner; especially if it is the only asset and the heir is not a blood relation of the survivor.

¹¹³ 70 of 1970.

¹¹⁴ The definition of agricultural land according to Section 1 of the *Sub-division of Agricultural Land Act* is any land except "land situated in the area of jurisdiction of certain local authorities". To comply with the government's policy of land distribution on a more equitable basis this Act has been repealed by the *Sub-division of Agricultural Land Repeal Act* 64 of 1998 but it has not yet been promulgated.

¹¹⁵ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC).

3.2.1.2 Pension fund

In terms of section 37C of the *Pension Funds Act*¹¹⁶ the trustees of a pension fund are allowed to decide to which dependant of the pension fund member they will pay the pension fund benefits and also in which proportion they will make payment regardless of the fact that the testator may have bequeathed the pension fund benefits in a will to other individuals. The trustees may, however, take into account any benefit that a dependant will receive in terms of the will when deciding on the allocation of pension fund benefits. It was found by the Pension Fund Adjudicator in *Hlathi v University of Fort Hare Retirement Fund*¹¹⁷ that section 37C of the *Pension Funds Act* overrides the freedom of testation of the deceased.

The effect of this section of the *Pension Funds Act* is that even though the testator may have provided adequately for a spouse or life partner in a will by bequeathing the pension fund benefits to the surviving spouse or life partner, the trustees of the pension fund have the right to distribute the entire fund to the dependants, which may or may not include the surviving spouse or life partner. Therefore, if a surviving spouse or life partner is not dependent on the deceased and there are other dependants, it is possible that the surviving spouse or life partner will not benefit from the pension fund benefits at all, despite being the sole heir to these funds in a will. The result of the restriction in terms of the *Pension Funds Act* is that it limits the protection that a surviving spouse or life partner may enjoy by means of a partner's will.

3.2.1.3 Contrary to public policy or too vague

The freedom of testation is not only limited by statutes,¹¹⁸ as the Court may also intervene when a bequest is illegal, contrary to public policy, too vague to be

¹¹⁶ *Pension Funds Act* 24 of 1956.

¹¹⁷ 2009 1BPLR 37 (PFA).

¹¹⁸ Section 29 of the *Close Corporations Act* 69 of 1984, s6 of the *Immovable Property Act* 94 of 1965, s3 of *Minerals and Petroleum Resources and Development Act* 28 of 2002, *Mining Titles Registration Amendment Act* 24 of 2003, s37C of the *Pension Funds Act* 24 of 1956, s3 of the *Sub-division of Agricultural Land Act* 70 of 1970 and s13 of the *Trust Property Control Act* 57 of 1988.

interpreted, or too uncertain to enforce.¹¹⁹ Grove¹²⁰ explains that the matter of public policy has been dealt with in case law as early as 1945.

An example where the court ruled that the testator's wishes were *contra bonos mores* is in *Oosthuizen v Bank Windhoek Ltd*¹²¹ where the deceased bequeathed half of his estate to his daughter on the condition that it will be held in trust until her marriage is dissolved if she is still married to her current husband at the date of her father's death. The intention of this condition was to break up the daughter's marriage and the court was of the opinion that it could not be imposed on the deceased's daughter.

Schoeman¹²² explains that it can also be problematic if clauses relating to bequests to certain classes of people are made. In *Minister of Education v Syfrets Trust Limited*¹²³ the will was worded to provide that the income of a trust has to be used to fund bursaries for students of European descent and on the condition that the students may not be Jewish or female. The court held that these clauses were discriminatory based on race and gender and that the trustees of the trust had to delete the offending provisions of the trust created in the will. The court first examined the *Promotion of Equality and Prevention of Unfair Discrimination Act*,¹²⁴ the *National Education Policy Act*¹²⁵ and various other sources and found that the clauses were unfair in terms of section 9(3) of the Constitution and therefore contrary to public policy.

Similarly, in 2002 in *BoE Trust Limited*¹²⁶ a testatrix bequeathed an amount to a testamentary trust to be established in the event of her death to assist white South African students who have completed a MSc degree in organic chemistry at the University of Cape Town, University of the Free State, University of Pretoria, University of Stellenbosch and who are planning to complete their studies with a doctorate degree at a university in Europe or Britain. One of the conditions was that the students had to

¹¹⁹ Jamneck *et al The Law of Succession* 116-117.

¹²⁰ www.fpi.co.za.

¹²¹ 1991 (1) SA 849 (NHC).

¹²² Anon 2013 www.schoemanlaw.co.za/wp-content/uploads/2013/07/Freedom-of-Testation-July-2013.

¹²³ 2006 4 SA 205 (C).

¹²⁴ *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000.

¹²⁵ *National Education Policy Act* 27 of 1996.

¹²⁶ 2009 6 SA (WCC).

return to South Africa for a specified period. She further stipulated that the income generated by the trust may be used to annually provide equally sized donations to ten charitable organisations if the trustees were unable to carry out the terms of the will.

Relying on the decision of the court in the *Minister of Education v Syfrets*,¹²⁷ the trustees approached the Western Cape High Court to delete the word 'white' from the will clause as it directly or indirectly discriminated against beneficiaries of the bursaries on the basis of race and, therefore, infringed on the right to equality contained in section 9(1) of the Constitution, and was contrary to public policy, section 7 of the *Promotion of Equality and Prevention of Discrimination Act* as well as the principles of sections 3 and 4 of the *National Education Policy Act*.

Mitchell AJ, however, stated that the provisions concerned were not clearly contrary to public policy and that section 9(3) of the Constitution prescribes discrimination that is unfair. The High Court noted that the right to freedom of testation is protected by section 25(1) of the Constitution, which provides:

No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

It was, however, added that this right is not without restriction. The decision in *BoE Trust Limited*¹²⁸ was appealed in the Supreme Court of Appeal in *BoE Trust Limited*¹²⁹ where section 25 of the Constitution was examined and it was held that recognition must be given to the freedom of testation and failure to do so flies in the face of the founding constitutional principle of human dignity. The court held that the right to dignity allows people the peace of mind of knowing that their last wishes would be respected after they have passed away.

After examining the relevant statutes and case law, it is evident that an individual has almost absolute freedom of testation. It consequently allows a testator to completely disinherit a spouse or life partner. It is also clear that the Courts will also not easily

¹²⁷ 2006 4 SA 205 (C).

¹²⁸ 2009 6 SA 470 (WCC).

¹²⁹ 2012 ZA SCA 147.

interfere with a testator's wishes regardless of the fact that it may be unfair, unreasonable or even a strange bequest. Because the *Wills Act*¹³⁰ does not force an individual to bequeath a share of the individual's estate to a surviving spouse or life partner, it consequently provides no protection to a surviving spouse or life partner in the event of the death of the testator. This could be detrimental if the survivor was financially dependent on the deceased and has no other means to survive financially.

3.3 Intestate succession

In this part of the succession chapter, the aim is to determine what the protection of a surviving spouse or life partner is when a partner dies without a will. According to the statistics received from the Chief Master's office,¹³¹ more than seventy five percent of deceased estates reported every year, are of people who died intestate. In South Africa intestate succession is governed by the *Intestate Succession Act*,¹³² which came into operation on 18 March 1988 and replaced the *Succession Act*.¹³³ This act not only applies when people die without a will, but also applies if the entire will or a part thereof is invalid. Meyer¹³⁴ describes that the law of intestate succession determines the heirs to a deceased estate in the following circumstances:

- i) When the deceased has failed to determine how and to whom his or her property must be awarded by will or antenuptial contract; or
- ii) Where it is impossible to carry out the wishes of the deceased because the beneficiaries are, for example, unable to inherit, or do not wish to inherit or are predeceased.

If a deceased is survived by a spouse and there are no children or descendants, the surviving spouse inherits the entire estate in terms of section 1(1)(a) of the *Intestate Succession Act*. Section 1(1)(c) further provides that where the deceased leaves a surviving spouse and children, the surviving spouse is entitled to the greater of a child's

¹³⁰ 7 of 1953.

¹³¹ Adv. Lester Basson provides the Fiduciary Institute of Southern Africa ("FISA") with annual reports which are generated from the deceased estate system that all the Masters Offices use and reflect information that is captured when deceased estates are reported.

¹³² 81 of 1987.

¹³³ 13 of 1934.

¹³⁴ Meyer 2011 http://www.justice.gov.za/juscol/news/201106_intestate-and-testate-succession.pdf.

share or an amount that is determined by the Minister of Justice from time to time and published in the *Government Gazette*. The mentioned amount was increased from R125 000 to R250 000 with effect from 24 November 2014.¹³⁵

According to Pace,¹³⁶ although a spouse is not defined in the *Intestate Succession Act*,¹³⁷ the act made provision for a surviving spouse in a traditional marriage. It therefore means that a surviving spouse who is not married in terms of a civil marriage or a surviving life partner could not benefit in terms of this act if a spouse or life partner died. This position has however been challenged in our courts the last few years by many distressed surviving partners,¹³⁸ which lead to positive changes in our law. The outcome of the legal battles in each relationship and the effect that it has on surviving partners today are discussed below.

3.3.1 Black people

Section 23 of the *Black Administration Act*¹³⁹ regulated the rules around succession in South Africa for many years. Africans were forbidden to bequeath house property and quitrent land as these assets had to devolve in terms of the customary laws of succession, which endorsed the customary rule of male primogeniture.¹⁴⁰ During an on-going investigation into the customary law of succession as part of project 90¹⁴¹ by the SALRC, the Constitutional Court ruled in *Bhe v Magistrate Khayelitsha*¹⁴² that section 1(4)(b) of the *Black Administration Act* was unconstitutional as it excluded respectively the two daughters and wife of the two deceased men from inheriting based on the rule of primogeniture as applied in the African customary law of succession. As the court held that section 23 of the *Black Administration Act*, together with the regulations pertaining thereto, were discriminatory and in breach of the rights to equality and dignity laid down in the Constitution and were invalid, it was ordered that all estates

¹³⁵ GG 38238 dated 24 November 2014.

¹³⁶ Pace and Van der Westhuizen *Wills and Trusts* 2.

¹³⁷ 81 of 1987.

¹³⁸ *Gory v Kolver* 2007 4 SA 97 (CC); *Volks v Robinson* 2005 5 BCLR 446 (CC).

¹³⁹ 38 of 1927.

¹⁴⁰ Rautenbach and Meyer 2012 *TSAR* 149.

¹⁴¹ *Harmonisation of the Common Law and the Indigenous Law* Project 90 1998 3.

¹⁴² 2005 1 SA 580 (CC).

previously devolving according to the rules of the *Black Administration Act* and customary rules of male primogeniture, must devolve in terms of the *Intestate Succession Act*.¹⁴³ In cases of polygynous marriages, modifications to the *Intestate Succession Act* had to be applied. Although the importance of customary laws in South Africa was stressed by Langa DCJ in *Bhe v Magistrate Khayelitsha*,¹⁴⁴ this ruling was ground-breaking for black women in South Africa who were not able to benefit from a deceased husband's estate prior to this ruling, as the eldest male relative of the deceased was to benefit from the estate with the obligation to care for the deceased's spouse and children.

The *Reform of Customary Law of Succession and Regulation of Related Matters Act*¹⁴⁵ was promulgated years after the Constitutional Court ruling and has to be read in conjunction with the *Intestate of Succession Act*.¹⁴⁶ Section 2(1) of this act provides that the estate or part of the estate of any person who is subject to customary law who dies after the commencement of the act and whose estate does not devolve in terms of that person's will, must devolve in accordance with the law of intestate succession as regulated by the *Intestate Succession Act*. In order to cater for customary law, section 1 of the act includes every spouse of the deceased and women¹⁴⁷ who provided children for the deceased's house. Section 3(1), which caters for descendants, also provides for the same women who bear children for the house who are provided for under spouses in clause 1. This creates confusion as it could not have been the intention of the legislators to allow seed-raising women and women involved in women-to-women marriages to receive a double portion of what the spouses are allowed to receive. Rautenbach and Meyer,¹⁴⁸ however, advise that the Masters of the High Court took a decision to include these women only as spouses and not as descendants as well when the intestate portion of the deceased's estate is calculated. As it is not the function of

¹⁴³ 81 of 1987.

¹⁴⁴ 2005 1 SA 580 (CC).

¹⁴⁵ 11 of 2009.

¹⁴⁶ Rautenbach and Meyer 2012 *TSAR* 149.

¹⁴⁷ Section 2(2)(b) refers to women, other than a spouse of the deceased, with whom he had entered into a union in accordance with customary law for the purpose of providing children for his spouse's house and s2(2)(c) refers to a woman who was married to another woman under customary law for the purpose of providing children for the deceased's house.

¹⁴⁸ Rautenbach and Meyer 2012 *TSAR* 158.

the Master's offices to interpret legislation, this practice can be challenged in court in the future.

The financial benefits that this act brought about for women, outweighs the uncertainty about the interpretation of the spouse and descendant clauses.

3.3.2 Same-sex life partners

Prior to 1 December 2006 section 1(1) of the *Intestate Succession Act* only catered for the surviving spouse of a deceased who was married in terms of a civil marriage that was governed by the *Marriage Act*.¹⁴⁹ As same-sex life partners were prohibited to enter into a civil marriage, they could not qualify as a spouse in terms of the civil law, which resulted in them not being able to receive any rights to inherit in terms of the laws of intestate succession. This was felt to be unfair by surviving life partners such as Mark Gory¹⁵⁰ as the act discriminated against same-sex couples on the basis of their sexual orientation, which was in their view unconstitutional as section 9 of the *Bill of Rights* sets out the fundamental rights of all South Africans, including the right of dignity and the right of equality.

According to this section everyone is equal before the law and has the right to equal protection and benefit of the law. It further provides that equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken.

The result was that this situation was challenged in *Gory v Kolver*.¹⁵¹ Mark Gory, the applicant, was a partner in a permanent same-sex life partnership in which reciprocal duties of support were undertaken by the partners. When his partner, Henry Harrison Brooks, died intestate on 30 April 2005, the parents of his

¹⁴⁹ 25 of 1961.

¹⁵⁰ *Gory v Kolver* 2007 4 SA 97 (CC).

¹⁵¹ 2007 4 SA 97 (CC).

deceased partner appointed Daniel Gerhardus Kolver as executor and claimed to be the intestate heirs and entitled to the estate.

On 31 March 2006, Hartzenburg J declared that the omission of the words 'or partner in a permanent same-sex partnership in which the partners have undertaken reciprocal duties of support' after the word 'spouse' wherever it appears in section 1 of the *Intestate Succession Act*, is inconsistent with the *Constitution of the Republic of South Africa* and that the act should be amended. It was ordered that the amendments to the act shall have no effect on the validity of any act performed in respect of the administration of an intestate estate that has been finally wound up before the date of the order.

The consequence of this Constitutional Court ruling is that same-sex life partners will inherit intestate from each other provided that they can prove that there was a reciprocal duty to support one another. The Master of the High Court is normally satisfied with an affidavit by the surviving partner confirming that there was a reciprocal duty of support. It should be noted that this judgement was handed down before the *Civil Union Act* came into operation, which allows same-sex partners to formalise their relationships by marriage or a civil partnership. The fact that same-sex life partners can inherit intestate from one another provided that there was a reciprocal duty of support and opposite sex partners cannot, contravenes the equality clause of the Constitution and will most probably be challenged in future.¹⁵²

3.3.3 Religious marriages

Although religious marriages are not recognised as legal marriages in South Africa, the courts have extended some private law principles to religious spouses, specifically to Islamic and Hindu spouses. This was mainly brought about due to the implementation of the Constitution as section 15 in the *Bill of Rights* recognises

¹⁵² Wood-Bodley 2008 *SALJ*259; also see *Volks v Robinson* 2005 5 BCLR 446 (CC) where a heterosexual life partner was unsuccessful to claim maintenance from her deceased life partner's estate as the court was of the opinion that there was nothing standing in their way to formalise their relationship in order to enjoy the benefits of a marriage.

cultural and religious diversity. The 2010 *Muslim Marriage Bill* will address some of the shortcomings once promulgated into law.

One area where legal consequences have been allocated to religious marriages, is where a spouse passes away intestate, regardless whether the marriage was monogamous or polygynous. In *Daniels v Campbell*¹⁵³ the surviving spouse, who lived with her husband for 30 years and contributed to the household expenses during this time and was married in terms of a monogamous Islamic marriage, was not able to inherit in terms of the *Intestate Succession Act*¹⁵⁴ as she did not qualify as a spouse in terms of this act. She sought relief from the court by requesting that the word 'spouse' be inclusive of spouses from Islamic marriages and failing the latter, she requested that the act should be declared unconstitutional as it discriminated unfairly against Muslim marriages.

In a majority judgement Sachs J explained in *Daniels v Campbell*¹⁵⁵ that the word 'spouse' in its ordinary meaning includes parties to a Muslim marriage. He was of the opinion that the exclusion in the past emanated from a linguistically strained use of the word spouse due to the culturally and racially hegemonic appropriation of it. It was also said that the constitutional values of equality, tolerance and respect for diversity point strongly in favour of a broad and inclusive interpretation of the word spouse. The court ruled that the question was not whether Mrs Daniels was lawfully married to the deceased, but whether she was entitled to be protected in terms of the *Intestate Succession Act*¹⁵⁶ and the *Maintenance of Surviving Spouse Act*.¹⁵⁷ The court held that parties to a monogamous Muslim marriage are also spouses in terms of these two acts, which resulted in the protection of a spouse in the event of the dissolution of the marriage by death when a spouse dies intestate.

¹⁵³ 2004 7 BCLR 735 (CC).

¹⁵⁴ 81 of 1987.

¹⁵⁵ 2004 7 BCLR 735 (CC).

¹⁵⁶ 81 of 1987.

¹⁵⁷ 27 of 1990.

A few years later the court was again approached in *Hassam v Jacobs*¹⁵⁸ on the basis that section 1 of the *Intestate Succession Act*¹⁵⁹ was unconstitutional as it excluded spouses of polygynous Muslim marriages. Robinson¹⁶⁰ rightly points out that it would be unjust to grant a widow in a monogamous Muslim marriage the protection offered by the act and to deny the same protection to a widow or widows of a polygynous Muslim marriage.

The court found section 1 of the *Intestate Succession Act*¹⁶¹ unconstitutional and ordered the act to be amended to allow each spouse a portion of the inheritance. Consequently, both monogamous and polygynous spouses are now protected by section 1 of the *Intestate Succession Act* when a spouse dies intestate.

3.3.4 Opposite sex life partners (domestic partnership)

Matshe¹⁶² is of the opinion that, despite the fact that the South African legal framework now provides equal rights to all individuals to enter into marriage in order to enjoy the same status, rights and obligations, an increasing number of couples are still choosing to live together. This statement is supported by the latest statistics that were released by Statistics South Africa.¹⁶³

Same-sex life partners or cohabitees are protected if a life partner dies intestate if there was a reciprocal duty of support since the Constitutional Court ruling, but opposite-sex life partners or cohabitees are not. Pace¹⁶⁴ explains the importance of cohabitees entering into a universal partnership agreement to protect their assets on the termination of the relationship as well as the division of assets jointly acquired by the cohabitees during the cohabitation. If there is not such an agreement, the surviving

¹⁵⁸ *Hassam v Jacobs* 2009 5 SA 572 (CC).

¹⁵⁹ 81 of 1987.

¹⁶⁰ Robinson, Human and Boshoff *Introduction to South African Family Law* 342.

¹⁶¹ 81 of 1987.

¹⁶² Matshe date unknown *Living Together* www.legalcity.net.

¹⁶³ SSA Statistical Release P0307 Marriages and Divorces 2011.

¹⁶⁴ Pace and Van der Westhuizen *Wills and Trusts* 6.

partner or cohabitee will have no right to claim a portion of the deceased's estate or be able to rely on the *Intestate Succession Act*.

3.4 Summary

Due to the almost absolute freedom of testation that individuals have and the courts' reluctance to interfere, all survivors, regardless of what type of relationships they are, only have a *spes* to benefit testate. The *Wills Act* only protects testators and grants no protection to a surviving spouse or life partner. Except for opposite sex life partners, all partners receive a degree of protection by the *Intestate Succession Act* and *Reform of Customary Law of Succession and Related Matters Act* as they are entitled to a share of the deceased partners' estates. The result is that it may be financially more beneficial for a couple to die intestate than having a partner or spouse leaving a will appointing third parties as heirs.

Surviving spouses and life partners could therefore find themselves in very unfavourable positions from a financial perspective when a partner dies. To alleviate the financial burden and the possible dependence on the state, the legislators could consider forcing testators to bequeath a percentage of their estates to a spouse or life partner.

CHAPTER 4

MAINTENANCE

4.1 Introduction

When a relationship terminates in the event of the death of a partner, it can leave the surviving partner in an adverse position if he or she was financially dependent on the deceased. As discussed in detail in the previous chapters, the type of relationship will determine whether the survivor will be entitled to property when the relationship dissolves, which will have an effect on the financial position of the survivor. The fact that the principle of freedom of testation, as explained in the previous chapter, is one of the cornerstones of the law of succession in South Africa, means that there is no obligation on a testator or testatrix to provide in a will for a spouse or life partner who is or may become financially dependent, and this will further have an effect on the financial position of the survivor. If the deceased died intestate, as discussed in the previous chapter, it will further contribute to the survivor's ultimate financial position. It is therefore necessary to determine whether the law provides some protection to a surviving life partner or spouse by allowing the survivor to claim for maintenance from the estate of the deceased partner. The effect of any benefit received due to the relationship or succession laws on the amount of the maintenance that can be claimed is also researched. The legal position of each relationship is assessed below to determine whether the surviving spouse or life partner is given protection in this regard.

4.2 Marriages

One of the personal consequences of a marriage is the reciprocal duty of support that spouses have from the moment that they are married until the dissolution of the marriage.¹⁶⁵ In *Hodges v Coubrough*¹⁶⁶ Didcott J stated as follows:

The duty of support which each spouse owed to the other, and consequently the liability for maintenance that depended on and gave effect to the duty, were incidents

¹⁶⁵ Hahlo *South African Law of Husband and Wife* 352; *Oberholzer v Oberholzer* 1947 3 SA 294 (O); *Eidelstein v Eidelstein* 1952 3 SA 1 (SA) 1 (A) 15.

¹⁶⁶ 1991 3 SA 58 (D) para 62(J)-58(D).

of their matrimonial relationship. The termination of the relationship by either death or divorce left the duty with no remaining basis and brought it in turn to an end.

It was later recommended by the South African Law Commission in the *Report on the introduction of a legitimate portion or the granting of a right to maintenance to the surviving spouse*,¹⁶⁷ that a claim for maintenance against the estate of the deceased spouse be given to the surviving spouse by operation in law. Effect was given to this recommendation on 1 July 1990 when the *Maintenance of Surviving Spouse Act*¹⁶⁸ came into operation. Section 2(1)¹⁶⁹ of this act provides as follows:

If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide, therefore, from his own means and earnings.

The duty of support does therefore definitely not cease in the event of the death of a spouse as the surviving spouse will be able to claim maintenance from the estate of the deceased spouse in terms of the *Surviving Spouse Act*.¹⁷⁰ According to Meyerowitz,¹⁷¹ a surviving spouse who was married in terms of the civil law, civil union or *Recognition Act* will be allowed to claim maintenance. The result is that if a surviving spouse is unable to support him or herself from his or her own means and income, he or she can claim for maintenance against the deceased spouse's estate. In *Slabbert v Harmse*,¹⁷² Watermeyer J explained that 'means' includes some available property or right, by the use of which support can be procured. Means of support therefore includes not only income, but property that can produce income.

In terms of section 3 of the *Maintenance of Surviving Spouse Act*,¹⁷³ the proof and disposal of a claim for maintenance of the survivor shall be dealt with in accordance with the provisions of the *Administration of Estates Act*¹⁷⁴ A survivor's maintenance

¹⁶⁷ Project 22: *Review of the Law of Succession*.

¹⁶⁸ 27 of 1990.

¹⁶⁹ *Maintenance of Surviving Spouse Act* 27 of 1990.

¹⁷⁰ 27 of 1990.

¹⁷¹ Meyerowitz *Administration of Estates and their Taxation* 48.

¹⁷² 1923 CPD 187 at 190.

¹⁷³ 27 of 1990.

¹⁷⁴ 66 of 1965.

claim shall have the same order of preference in respect of other claims against the estate of the deceased spouse. It will therefore have the same order as a claim for maintenance of a dependent child. If the claim of the survivor and that of a dependent child compete with each other, it will be reduced proportionately.¹⁷⁵ The Master of the High Court may defer a claim for maintenance until the court has decided on the claim if there is a conflict between the interests of the survivor in his or her capacity as claimant against the estate of the deceased spouse and the interests in his or her capacity as guardian of a minor dependent child of the deceased spouse for maintenance.¹⁷⁶ The executor of the deceased's estate has the power to enter into an agreement with the survivor and the heirs and legatees who have an interest in the agreement to transfer assets from the estate, or a right in the assets, to the survivor to impose an obligation on an heir or legatee, in settlement of the claim of the survivor or part thereof.¹⁷⁷ The result is that the executor cannot be forced to pay the surviving spouse a lump sum from the deceased's estate to provide for maintenance. An asset, for instance a fixed property to live in, can be transferred to the surviving spouse or a monthly amount can be paid to him or her until remarriage or death. Section 2(d) further allows the executor to set up an *inter vivos* trust and to transfer assets from the estate into the trust for the benefit of the surviving spouse.¹⁷⁸ In practice this section often assists executors to resolve conflict situations between a surviving spouse who lodges a maintenance claim against the estate and heirs who are children from a previous relationship of the deceased. When an *inter vivos* trust is set up, the survivor will have to ensure that the tax consequences of the structure are also taken into account when the value of the claim is calculated as the survivor may receive less income from the trust due to the trust being taxed at a higher income tax rate.¹⁷⁹ The Davis Tax Committee¹⁸⁰ is proposing that the attribution principles in terms of sections 7 and 25B of the *Income Tax Act*¹⁸¹ which apply in the event of trusts should be

¹⁷⁵ Section 3(b).

¹⁷⁶ Section 3(c).

¹⁷⁷ Section 2(d).

¹⁷⁸ 27 of 1990.

¹⁷⁹ The effective tax rate for trusts is much higher than for most individuals according to the tax tables as set out in the *SARS Tax Guide 2015*.

¹⁸⁰ *First Interim Report on Estate Duty* 37.

¹⁸¹ 58 of 1962.

abolished. This will result in all income earned in the trust to be taxed at a much higher marginal rate, currently 41% percent,¹⁸² opposed to in the hands of the beneficiary, who most probably will have a much lower marginal rate. When assets are sold, the effective rate¹⁸³ for trusts will also be 27.31% opposed to 13.65% for individuals. It will therefore be critical to take the tax consequences into account when a trust is set up for maintenance for a surviving spouse to ensure that sufficient provision is made for the survivor's maintenance needs.

Section 3 of the *Maintenance of Surviving Spouse Act*¹⁸⁴ stipulates that the amount of the claim will be limited to cater for reasonable maintenance needs only and provides some guidance to determine what reasonable is. Section 3(a) explains that the amount in the estate of the deceased available for distribution to heirs and legatees should be taken into account when the amount of the maintenance is calculated. It is further required that the existing and expected means, earning capacity, financial needs and obligations of the survivor and the subsistence of the marriage are taken into account in terms of section 3(b) of the act. Baker J confirmed the position regarding earning capacity in *Kroon v Kroon*¹⁸⁵ by explaining that if there is a possibility that the claimant can be trained or re-trained to earn an income, it should be taken into account when determining maintenance claims.

Another requirement in terms of section 3(c) is that the standard of living of the survivor during the substance of the marriage and his or her age at the death of the deceased spouse should be considered. Jones J in *Pommerel v Pommerel*¹⁸⁶ was of the opinion that one should be able to expect the same standard of living that one had when one was married. He said, however, in most cases it will most likely not be possible to achieve this goal.

Section 3 of the *Maintenance of Surviving Spouse Act* does, however, make provision for any other factor that should be taken into account to determine the reasonable

¹⁸² *SARS Tax Guide* 2015 1.

¹⁸³ *SARS Tax Guide* 2015 9.

¹⁸⁴ 27 of 1990.

¹⁸⁵ 1986 All SA 423 (E) at 441.

¹⁸⁶ 1990 1 SA 110 (A) at 613.

maintenance needs of a surviving spouse. In *Feldman v Oshry*¹⁸⁷ it was argued by the deceased's daughter that the voluntary contributions made by the surviving spouse's sons should be taken into account when determining the maintenance. Van Zyl J was, however, not persuaded that these contributions should be included in the plaintiff's 'own means' for purposes of determining her entitlement to maintenance from the estate of the deceased.

It was not only held in *Feldman v Oshry*¹⁸⁸ that the duty of support continues after death, but the court also ruled that a conservative approach should be taken when the amount of the maintenance claim is calculated. Another important aspect that was confirmed is that the court cannot make an order for a lump-sum maintenance in terms of the *Maintenance of Surviving Spouse Act* in the absence of an agreement providing for the payment of a lump sum as it would put both the estate and the survivor at risk.¹⁸⁹ The reasons were *inter alia* that the surviving spouse may live longer than anticipated and then the lump-sum payment will not be enough to last the survivor until death, or if the survivor lives for a shorter period or re-marry, the heirs of the estate will be prejudiced. The Supreme Court of Appeal, however, found in *Oshry v Feldman*¹⁹⁰ that the High Court erred and that maintenance can take the form of a lump sum under the *Maintenance of Surviving Spouse Act*. Section 2(2) of the *Maintenance of Surviving Spouse Act* further provides that a survivor will not have a right of recourse against anyone to whom money or property was validly distributed in terms of the *Administration of Estates Act*. This could be detrimental if the survivor is not aware of the fact that he or she may claim maintenance from the deceased's estate when no provision was made for him or her in the deceased's will. Many people do not know what their legal rights are and there is no legal obligation on an executor to inform the surviving spouse that he or she may lodge a claim for maintenance against the estate of the deceased. It often in practice happens that the children of a previous marriage

¹⁸⁷ 2009 6 SA 454 (KZD) at 27.

¹⁸⁸ 2009 6 SA 454 (KZD) at 26.

¹⁸⁹ 2009 6 SA 454 (KZD) at 33; Cronjé and Heaton *South African Family Law* 114.

¹⁹⁰ 2011 1 All SA 124 (SCA) at 137.

of the deceased are the beneficiaries and that the executor never even meets the surviving spouse.

It is also important to note that the appeal court ordered in *Kruger v Gross*¹⁹¹ that a divorced spouse does not have a claim for maintenance against a deceased estate of the divorced spouse unless the divorce order specifically states that the maintenance order is binding on the deceased's estate. Once again, this could have severe financial consequences for the divorced spouse if he or she does not ensure that provision is made for maintenance in the divorce order.

4.3 Religious marriages

As explained in the chapter dealing with relationships, Muslim and Hindu marriages do not meet all the legal requirements to be recognised as marriages in South Africa. Consequently, an individual who was married in terms of Muslim or Hindu rites, was not recognised as a survivor for the purposes of the *Maintenance of Surviving Spouse Act*. This position was challenged in the Constitutional Court in *Daniels v Campbell*¹⁹² by the survivor, whose maintenance claim was rejected on the basis that she was not recognised as a survivor in terms of this act. The Constitutional Court held that the question was not whether it was open for the survivor to solemnise her marriage in terms of section 29(2) of the *Marriage Act*¹⁹³ as stated in the High Court, but whether, in terms of common sense and justice and the values of the Constitution and the objectives of the acts, it would best be furthered by including in or excluding her from the protection that it provided. The Constitutional Court came to the conclusion that the word 'survivor' in the *Maintenance of Surviving Spouse Act* had to be interpreted to include partners in monogamous Muslim marriages.

Individuals in polygynous Muslim marriages were, however, still not protected by the provisions of the *Maintenance of Surviving Spouse Act* which resulted in the Cape Provincial Division of the High Court being approached again for relief in *Hassam v*

¹⁹¹ 2010 1 All SA 422 (SCA) at 424.

¹⁹² 2009 5 SA 572 (CC) at 1.

¹⁹³ 25 of 1961.

Jacobs.¹⁹⁴ Van Reenen J held that the word 'survivor' in the *Maintenance of Surviving Spouse Act* can be applied to more than one surviving spouse without unduly straining the language of the act. It was further held that the act applies to *de facto* monogamous and polygynous Muslim marriages. Van Reenen J also declared section 1(4)(f) of the *Intestate Succession Act* unconstitutional. As only the Constitutional Court¹⁹⁵ has the power to declare acts or sections of an act unconstitutional, it had to be confirmed in the Constitutional Court in *Hassam v Jacobs*.¹⁹⁶ Unfortunately the Constitutional Court did not deal with maintenance claims of survivors in the event of polygynous Muslim marriages in this judgement. In *Khan v Khan*,¹⁹⁷ the Transvaal Provincial Division of the High Court, now the North Gauteng High Court, also recognised the duty of support in a *de facto* polygynous Muslim marriage. As *de facto* polygynous Muslim marriages are being recognised by the courts¹⁹⁸ in some areas of the law and customary marriages are fully recognised, it is very likely that survivors in *de facto* polygynous marriages will also be recognised by the *Maintenance of Surviving Spouse Act* in future.

The courts have not extended the meaning of survivor in the *Maintenance of Surviving Spouse Act* to Hindu marriages¹⁹⁹ as yet. Based on the *Daniels v Campbell*²⁰⁰ ruling, it can however be argued that a survivor in a monogamous Hindu marriage should be in the same legal position as a survivor in a monogamous Muslim marriage. Therefore, until the law changes, only a survivor of a monogamous Muslim marriage can be certain that he or she will be able to rely on the *Maintenance of Surviving Spouse Act* for financial protection in the event of the death of a partner.

¹⁹⁴ 2008 4 All SA 350 (C); Cronjé and Heaton *South African Family Law* 233.

¹⁹⁵ Section 172(2)(a) of the Constitution.

¹⁹⁶ 2009 5 SA 572 (CC) at 2.

¹⁹⁷ 2005 2 SA 272 (T).

¹⁹⁸ In *Ismail v Ismail* 2007 (4) SA 557 E the court gave effect to a contract of lease concluded by parties to a Muslim marriage despite the fact that the husband was already a party to a civil marriage with another woman.

¹⁹⁹ Cordier and Rautenbach 2009 *Obiter* 601.

²⁰⁰ 2009 5 SA 572 (CC).

4.4 Life partnerships (domestic partnerships)

For different reasons many couples, same-sex and opposite-sex, prefer to live together without formalising their relationship. These partnerships are referred to as life partnerships, domestic partnerships, cohabitation, living together, concubinage, *de facto* marriage and common-law marriages.²⁰¹ The number of life partnerships is increasing and it is therefore necessary to determine to what extent these individuals are protected when a life partner dies.²⁰² Over time the legislators and courts have been very accommodating to include couples in relationships that are not recognised as marriages for some spousal benefits.²⁰³

In *Volks v Robinson*²⁰⁴ the Constitutional Court had to decide whether a decision of the then Cape Provincial Division of the High Court to exclude opposite sex life partners from the ambit of the *Maintenance of Surviving Spouse Act* was unconstitutional on the grounds that it constituted unjustifiable unfair discrimination and unjustifiably violated the right to dignity.²⁰⁵ Mokgoro and O'Regan JJ concluded that the cohabitation relationship was a relationship that constituted a permanent life partnership in which the parties had undertaken mutually to support one another, both financially and otherwise, and their relationship was, therefore, socially and functionally similar to a marriage.²⁰⁶ It was also held that the law will be *prima facie* discriminatory to the extent that the law regulates its consequences differently to that of a marriage, but the question is whether the discrimination is unfair. In the court's view the law discriminates against surviving partners of cohabitation relationships who are in financial need as

²⁰¹ Cronjé and Heaton *South African Family Law* 243; South African Law Reform Commission *Project 118 Report Domestic Partnerships* para 1.4.5.

²⁰² According to Statistics South Africa 2011 approximately 40% of African and Coloured women indicated that they are in some kind of relationship which indicates that a large number of South Africans live with an intimate partner without marrying. In the 2001 Census, 2.3 million people described themselves as "living together" like married partners although they were not married. This constituted about eight percent of the adult population at the time.

²⁰³ Section 1(1)(a) of the *Estate Duty Act* includes a partner in a same-sex or opposite sex union which the Commissioner is satisfied is intended to be permanent; s1 of the *Pension Funds Act* recognises a permanent life partner in the definition of "spouse"; s1 of the *Income Tax Act* accepts donations between life partners from *donations* tax.

²⁰⁴ 2005 5 BCLR 446 (CC) at 2.

²⁰⁵ Sections 9(3), 10 and 36 of the Constitution.

²⁰⁶ 2005 JOL 13723 (CC) at 55.

section 2(1) of the Act and other legal provisions extensively regulate the rights of spouses in the event of the termination of a marriage by death, but there are no statutory provisions at all to regulate the rights of cohabitants upon termination of their relationships by death.²⁰⁷ The court held that the discrimination is reasonable and justifiable within the contemplation of section 38 of the Constitution as it was not unfair for the law to distinguish between surviving spouses and surviving cohabitants as far as maintenance was concerned.²⁰⁸

It was, however, highlighted by the court that it is quite likely that after a long period of cohabitation in which parties lived together and even raised children jointly, the person in the relationship, often but not necessarily the woman, who has been responsible for the maintenance of the household and caring for children, will be more vulnerable in relation to material and financial matters than the other partner.²⁰⁹ Also, it was acknowledgement that the termination of the cohabitation relationship, whether by death or separation, will often prejudice that person in the absence of any equitable regulation of the property affairs of the partners upon termination.²¹⁰ The court agreed that it becomes plain that cohabiting partners are a vulnerable group and that, in the absence of any other forms of legal regulation, the fact that they are excluded from the provisions of section 2(1) of the act can have a grave impact on the interests of cohabiting partners.²¹¹ The impact will be particularly grave, whether the partnership is a permanent life partnership in which partners have undertaken reciprocal duties of support, where the surviving partner is in need, and there has been no equitable distribution to the surviving partner from the estate of the deceased partner.²¹²

The common-law rules governing universal partnership may in some circumstances, however, assist the partners at termination.²¹³ A universal partnership is a contract in which the parties agree to put in common all their property, both that which they

²⁰⁷ 2005 JOL 13723 (CC) at 211.

²⁰⁸ 2005 JOL 13723 (CC) at 60; Smith 2010 *PELJ* 243.

²⁰⁹ 2005 JOL 13723 (CC) at 64.

²¹⁰ 2005 JOL 13723 (CC) at 121.

²¹¹ 2005 JOL 13723 (CC) at 64.

²¹² 2005 JOL 13723 (CC) at 71.

²¹³ 2005 JOL 13723 (CC) at 126.

presently own and that which they are to acquire in the future.²¹⁴ In *Ally v Dinath*²¹⁵ it was found that if a clear contract of partnership is proven, such a partnership is valid and can be treated expressly or tacitly. The requirements for a universal partnership were confirmed in the judgement as follows:

- i) the aim of the partnership must be to make a profit;
- ii) both parties must contribute to the enterprise;
- iii) the partnership must operate for the benefit of both parties; and
- iv) the contract between the parties must be legitimate.

The court was also of the view that another remedy that may be available to assist a cohabiting partner on the termination of the relationship arises from the law governing unjustified enrichment.²¹⁶ If one partner can show that the other partner was enriched during the existence of the relationship by tangible improvements made to the property of the other partner, the partner who contributed to the other partner will be able to claim from the estate of the partner who was enriched.²¹⁷

Whilst the South African Law Commission²¹⁸ found that acknowledgement is given to the fact that some women have made much progress towards establishing social and economic independence, it is unfortunately true that in the South African heterogenic society the majority of women are still socially and economically disadvantaged and need legal protection. This legal protection is particularly visible at the time of the dissolution of the relationship and these women should be allowed to benefit from legislative intervention.

Despite the fact that the need for maintenance is recognised by the courts and the South African Law Reform Commission, a life partner cannot legally claim maintenance from the estate of a deceased life partner if he or she was financially dependent on him or her. It is only possible for a life partner to claim from the deceased partner's estate

²¹⁴ 2005 JOL 13723 (CC) at 66.

²¹⁵ 1984 2 SA 451 (T) at 524 to 526.

²¹⁶ 2005 JOL 13723 (CC) at 126.

²¹⁷ 2005 JOL 13723 (CC) at 67.

²¹⁸ *Project 118 Report Domestic Partnerships* para 2.4.174.

based on a universal partner's agreement, if one existed and it caters for it. The majority of life partners are, therefore, not protected by the law when a partner dies.

4.5 Summary

The analysis revealed that individuals who are not protected by the *Maintenance of Surviving Spouse Act* are life partners, both opposite sex and same-sex partners, couples in Hindu marriages, as well as individuals in polygamous Muslim marriages. Although it can be argued that, based on the judgements as discussed above, individuals in Hindu and polygamous Muslim marriages may also be successful in maintenance claims, the position remains uncertain and does not provide protection. The protection granted by law to the remaining individuals can also be criticised for the following reasons:

- i) the majority of South Africans do not know the law and may never realise that they are entitled to claim for maintenance;²¹⁹
- ii) the Master of the High Court only has an obligation to look after the interests of minor children and therefore only enquires from the executor if no maintenance claim was lodged in favour of a minor; not a surviving spouse or life partner;
- iii) most executors are not legally equipped to deal with maintenance claims; and
- iv) if a maintenance claim is challenged by the heirs of the estate, the legal battle can take years to settle and become a very expensive exercise for the survivor.

Taking into account all of the above, the *Maintenance of Surviving Spouse Act* clearly does not serve the purpose that it intended by the legislators.

²¹⁹ In *Volks v Robinson* 2005 JOL 13723 (CC) at 66 it was confirmed that the effects of vulnerability are more pronounced in the case of the very poor and illiterate.

CHAPTER 5

PENSION FUNDS

5.1 Introduction

Due to the tax advantages granted by the Government to incentivise people to save for their retirement to alleviate the burden on them to provide for aged citizens, many people contribute to retirement funds over a period of years while earning an income. Sections 11(k) and 11(n) of the *Income Tax Act*²²⁰ allow tax payers to deduct up to fifteen percent of their non-retirement income as contributions to retirement funds per annum and section 11(l) allows employers to deduct up to ten percent of an employee's approved remuneration contributed to a pension, provident or benefit fund by them per annum for income tax purposes.²²¹ The result is that tax payers often contribute up to a quarter of their non-retirement income into retirement funds through personal contributions and their employers to take advantage of the income tax benefits. The *Taxation Laws Amendment Act*²²² also passed some of the Government's retirement reform proposal into law. According to the new rules,²²³ which have not yet been implemented, the deduction limit for retirement fund contributions will increase to 27.5% of the greater of remuneration or taxable income.²²⁴ The rate will also apply to the aggregate of contributions made to an individual's pension, provident and retirement funds and not different limits and deductions depending on the type of retirement fund contributed to as being done presently. The proposal is, however, to limit the contribution to R350 000 per annum. Once implemented, it will result in an even larger percentage of an individual's assets being locked up in retirement funds.

²²⁰ Section 11 of the *Income Tax Act* 58 of 1962 allows individuals to deduct 15% of their taxable income.

²²¹ Section 11 of the *Income Tax Act* 58 of 1962 has various provisions that provides for a specific formula to calculate the allowable deductions by employers and tax payers for income tax purposes. 31 of 2013.

²²² *Tax Administration Laws Amendment Act* 23 of 2015.

²²⁴ See Haupt *Notes on South African Income Tax* 8 where it is explained that taxable income is the amount on which normal tax, at the applicable rate, is calculated.

The fact that members of retirement funds are also restricted from withdrawing before and at retirement from these funds in terms of section 1 of the *Income Tax Act*²²⁵ and that section 2 of the *Tax on Retirement Funds Act*²²⁶ allows for retirement funds to be taxed more favourably than other investments, further contribute to the compound growth of individuals' wealth held in the form of retirement funds. Substantial portions of an individuals' wealth can therefore be locked up in retirement funds in the event of death. As section 37C(1) of the *Pension Funds Act*²²⁷ specifically excludes retirement funds from an individual's personal estate, it is important to determine whether a surviving spouse or life partner will be entitled to any benefit from these funds in the event of death.

The wording of section 37C(1) also provides that regardless of the provisions of any other law, including the common law²²⁸ and notwithstanding the rules of a registered fund, any benefit upon the death of a member must be dealt with in terms of the scheme outlined in the said section. As this section is not subject to any law, which includes marriage laws, pension fund benefits also do not form part of a joint estate if individuals were married in community of property. This position was confirmed in *Makume v Cape Joint Retirement Fund*:²²⁹

The wording leaves no room for an interpretation that there are two half benefits contemplated – one half benefit accruing to the deceased and the other half benefit to the Applicant by virtue of their marriage in community of property. In fact, the benefit has nothing to do with whether the deceased was married in or out of community of property – it is simply one benefit that becomes payable upon death and that single benefit has to be distributed in accordance with Section 37C. The Applicant is, therefore, not entitled to 50% of the proceeds of the pension benefits of the deceased as a priority entitlement as claimed.

²²⁵ At retirement not more than one-third of the total value of the pension fund interest may be commuted for a single payment and the remainder must be paid in the form of an annuity, including a living annuity, except where two-thirds of the total value does not exceed R100 000 or where the employee is deceased.

²²⁶ 38 of 1996.

²²⁷ 24 of 1956.

²²⁸ *Kaplan v Professional and Executive Retirement Fund* 2001 10 BPLR 2541 (W) at 2544A-B.

²²⁹ 2007 2 BPLR 174 (C).

Although the pension fund does not form part of an individual's personal estate, an individual is allowed in terms of section 1 of the *Pension Funds Amendment Act*²³⁰ to nominate a beneficiary to receive the benefit in the event of the pension fund member's death. However, the intention of the legislators when they inserted section 37C into the *Pension Funds Act* in 1976 was to regulate the payment of any lump sum benefit payable upon the death of a member of a pension fund as defined in the act.²³¹ The High Court also confirmed in *Mashadi v African Products Retirement Benefit Provident Fund*²³² that the purpose of section 37C is to ensure that the dependants of retirement fund members are left with adequate support. It is therefore necessary to establish to what extent a surviving spouse or life partner will benefit from a partner's pension fund in the event of the member's death, especially if the member nominated someone other than a spouse or life partner as the beneficiary of the fund.

In terms of the definition of a dependant in relation to a member as set out in section 1 of the *Pension Funds Amendment Act*,²³³ a dependant includes

- a) a person in respect of whom the member is legally liable for maintenance;
- b) a person in respect of whom the member is not legally liable of maintenance, if such person –
 - i) was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;
 - ii) is the spouse of the member, including a party to a customary union according to Black law and custom or to a union recognised as a marriage under the tenets of any Asiatic religion;
- c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died.

Section 1 further defines a spouse as a person who is the permanent life partner or spouse or civil union of a member in accordance of the *Marriage Act*,²³⁴ the *Recognition of Customary Marriages Act*,²³⁵ or the *Civil Union Act*,²³⁶ or the tenets of a religion. From these sections it is clear that the definitions of dependants and a spouse are very wide

²³⁰ 11 of 2007.

²³¹ Section 37(1).

²³² 2002 8 BPLR 3703-3705.

²³³ 11 of 2007.

²³⁴ 25 of 1961.

²³⁵ 120 of 1998.

²³⁶ 17 of 2006.

and therefore cater for a surviving spouse or life partner of a deceased member. There is consequently no doubt that both a surviving spouse and life partner will be able to claim as a dependant from the deceased partner's retirement fund for financial assistance. If the deceased, however, nominated third parties as beneficiaries of his or her retirement funds, the trustees will have to adhere to section 37I(i)(b)(A), which reads as follows:

If a member has a dependant, and the member has also designated in writing to the fund a nominee to receive the benefit, or such portion of the benefit as is specified by the member in writing to the fund, the fund shall within 12 months of the death of such member pay the benefit, or such portion thereof to such dependant or nominee, in such proportions as the board may deem equitable.

In terms of this section duties are imposed on the board of trustees to identify dependants and the nominees of a deceased member, to distribute the pension funds and to determine an appropriate means of payment. The trustees have to ensure that they pay the funds to individuals who were legally and financially dependent on the deceased before his or her death and have a period of twelve months to determine who these dependants are.

5.2 Summary

The *Pension Funds Act* contains a very comprehensive definition of 'dependant' as it includes the spouse of a member, a person in respect of whom the member is legally liable for maintenance, as well as an individual who, in the opinion of the Board, was in fact dependent on the member at death. Based on this definition, all surviving spouses and life partners are therefore included and consequently protected by the *Pension Fund Act*. This act is also the only statute that treats all survivors equally with regard to financial support in the event of the death of a partner. Regrettably most South Africans do not have a retirement fund, which means that although the act does grant protection, surviving spouses and life partners will not receive any financial benefit to support them.

CHAPTER 6

CONCLUSION

The purpose of the research in Chapter 2 was, *inter alia*, to determine what the most prominent relationships in South Africa's diverse society are and what the financial implications in the event of death are. The outcome of the research revealed that there are nine²³⁷ types of prominent relationships. It was also found that the financial consequences when the relationship terminates in the event of death will depend on the type of relationship and the marital regime²³⁸ selected if the couple's marriage was recognised in terms of the law. The only relationships that provide financial benefits at termination are legally recognised marriages, provided the individuals selected to marry in community of property and profit and loss or concluded an antenuptial agreement that includes the accrual system. As the research revealed that the relationship *per se* does not provide financial protection in most intimate relationships, the research focussed in the subsequent chapters on prominent statutes that could serve as a financial lifeline when a partner dies.

After analysing the laws of succession in Chapter 3 to determine whether a spouse or life partner will benefit financially when a partner dies, it was found that individuals have freedom of testation and that a surviving spouse or life partner, therefore, only has a *spes* to benefit from a partner's estate if he or she drafted a will to specify how the estate assets should be distributed in the event of death. The *Wills Act* therefore provides no security to any individual who relies on a partner for financial support after death. If a partner, however, dies intestate, the *Intestate Succession Act* does provide protection to some individuals. The type of relationship will determine if the survivor can inherit. An individual married in terms of the *Marriage Act* and *Civil Union Act* will

²³⁷ Individuals can be legally married in terms of the *Marriage Act* 25 of 1961, *Recognition of Customary Marriages Act* 120 of 1998 or *Civil Union Act* 17 of 2006. They can also be married in terms of a monogamous or polygynous Muslim or Hindu marriage. It is also possible to be a party to an opposite sex or same-sex life partnership.

²³⁸ Individuals can select between a marriage in community of property and profit and loss or a marriage out of community of property which can be subject to the accrual system or not.

inherit the deceased partner's entire estate when the deceased did not have any children. If there are children, the spouse will inherit R250 000 or a child's share, whichever is the greater. A child's share is calculated by dividing the estate amongst the total number of children and spouse of the deceased.

To cater for customary law, the *Reform of Customary Law of Succession Act* was introduced and has to be read with the *Intestate Succession Act*. The result is that all spouses are protected by the law as each one will be able to inherit R250 000 or a child's share, whichever is the greater.

Unfortunately the Act does not protect individuals equally in the different relationships. Opposite sex life partners for instance cannot inherit intestate from one another in terms of the *Intestate Succession Act*, whilst same-sex life partners can. It is also possible for Muslim and Hindu individuals in monogamous as well as Muslim individuals in polygynous religious marriages to inherit intestate, but not for Hindu individuals in polygynous religious marriages. As the courts have been extending the meaning of 'spouse', it can be argued that all individuals in religious marriages will be able to rely on the protection of the *Intestate Succession Act*, but until this position has either been confirmed in a statute or by the Constitutional Court, they are not protected by law.

In Chapter 4 the position around maintenance claims was investigated to establish if a spouse or life partner could claim maintenance from the deceased's estate to provide financial support. From the research it is evident that individuals in all relationships do not enjoy equal protection by the law in this area either. A surviving spouse who was married in terms of the *Marriage Act*, *Recognition of Customary Marriages Act*²³⁹ and *Civil Union Act* will be entitled to claim maintenance from the deceased spouse's estate if he or she was financially dependent on the deceased. A spouse in a monogamous Muslim marriage will also be able to rely on the protection of this Act, while none of the individuals in any of the other religious marriages or life partners, same-sex and

²³⁹ 120 of 1998.

opposite sex, will be able to. The *Maintenance of Surviving Spouse Act* therefore only provides financial comfort to a limited group of individuals.

Pension funds were also critically reviewed in Chapter 5 in order to determine whether an individual would be able to seek financial support from retirement funds when a partner or spouse dies. As the definition of a spouse in terms of section 1 of the *Pension Fund Act* is defined as a person who is the permanent life partner or spouse or civil union of a member in accordance of the *Marriage Act*, the *Recognition of Customary Marriages Act*, or the *Civil Union Act*, or the tenets of a religion, individuals in all relationships will qualify to benefit from the deceased's retirement fund. The *Pension Fund Act* consequently provides the most comprehensive protection and treats all spouses and life partners equally.

Based on the outcome of the research, it can be concluded that the current legal framework does not treat individuals in the respective relationships equally, nor does it protect surviving spouses and life partners adequately. Therefore, despite all the changes in the legal arena after the introduction of the Constitution, there is still a need for legal intervention to ensure that surviving spouses and life partners do not become a financial burden on the government if they cannot provide for themselves financially.

BIBLIOGRAPHY

Literature

B

Bhengu *Money Marketing*

Bhengu M *Money Marketing: Customary marriage – registration is important* 31
March 2013

Breslaw 2013 *De Rebus*

Breslaw S Muslim Marriages *Are they 'equally' married? De Rebus* 246

C

Cordier and Rautenbach 2009 *Obiter*

Cordier SIJ and Rautenbach C *Hindoe-eggenote, weet jy wat jou regsposisie in die Suid-Afrikaanse Reg is?* 2009 *Obiter* 584-606

Cronjé and Heaton *SA Family Law*

Cronjé DSP and Heaton J *South African Family Law* 3rd ed (LexisNexis Durban 2010)

D

Davis Tax Committee 2015 *De Jure*

Davis Tax Committee First Interim Report on Estate Duty 2015 *De Jure* 38

De Waal and Schoeman-Malan *Law of Succession*

De Waal MJ and Schoeman-Malan MC *Law of Succession* 4th ed (Juta Cape Town 2008)

Du Toit 2014 *Verdieping*

Du Toit F Roman-Dutch law of in modern South African succession law 2014
Verdieping 278-285

Hahlo *SA Law of Husband and Wife*

Hahlo HR *The South African Law of Husband and Wife* 5th ed (Juta Cape Town 1985)

Heaton 2008 *STELL LR*

Heaton J The Marriage Act 25 of 1961, the Divorce Act 70 of 1979, and the dissolution of a Hindu marriage [discussion of *Singh v Ramparsad* 2007 3 SA 445 (D)] 2008 *STELL LR* 452-465

Heaton *South African Family Law*

Heaton J *South African Family Law* 3rd ed (LexisNexis Durban 2010)

Heaton and Schoeman 2000 *THRHR*

Heaton J and Schoeman E 'Foreign Marriages and Section 7(3) of the Divorce Act 70 of 1979 (2000) 63 *THRHR* 141

Herbst and Du Plessis 2008 *J Comp L*

Herbst M and Du Plessis W Customary Law v Common Law Marriages: A hybrid approach in South Africa 2008 *J Comp L* 105

J

Jamneck *et al The Law of Succession in South Africa*

Jamneck J, Rautenbach C, Paleker M, Van der Linde A and Wood-Bodley M *The Law of Succession in South Africa* 2nd ed (Oxford University Press Cape Town 2012)

M

Meyer *Marriages and Matrimonial Property Systems*

Meyer M *Marriages and Matrimonial Property Systems for Purposes of succession* (Justice College MT 2012)

Meyerowitz *Administration of Estates and their Taxation*

Meyerowitz D *Administration of Estates and their Taxation* (Maytax Publishers CC Cape Town 2010)

N

Ndashe and Johnstone *Know your Rights*

Ndashe S and S Johnstone *Know your Rights* (Digital Printing and Promotional Items 2007)

Ntlama A Brief Overview of the Civil Union Act

Ntlama N A Brief Overview of the Civil Union Act 2010 *PELJ* 191 – 234

P

Pace and Van der Westhuizen *Wills and Trusts*

Pace RP and Van der Westhuizen WM *Wills and Trusts* (LexisNexis Durban 2012)

R

Rautenbach and Du Plessis 2011 *McGill LJ*

Rautenbach C and Du Plessis W African Customary Marriages in South Africa and the Intricacies of a Mixed Legal System: Judicial (In) Novatio or Confusio? 2011 *McGill LJ* 749-780

Rautenbach and Meyer 2012 *TSAR*

Rautenbach C and Meyer MM Lost in Translation: Is a spouse a spouse or a descendant (or both) in terms of the Reform of Customary Law of Succession and Regulation of Related Matters Act? 2012 *TSAR* 149-160

Robinson 2007 *PELJ*

Robinson JA Matrimonial Property Regimes and Damages: the far reaches of the South African Constitution 2007 *PELJ* 2-20

Robinson, Human and Boshoff *Introduction to SA Family Law*

Robinson J, Human S and Boshoff A *Introduction to South African Family Law* 5th ed (Printing Things Potchefstroom 2012)

S

SARS Tax Guide 2015

SARS Tax Guide 2015

Smith 2010 *PELJ*

Smith B Rethinking *Volks v Robinson*: The Implications of Applying a 'contextualised choice model' to prospective South African Domestic Partnerships Legislation 2010 *PELJ* 238-300

South African Law Reform Commission *Project 22 Intestate Succession* 1983

South African Law Reform Commission *Project 22 Intestate Succession* 1983

South African Law Reform Commission *Project 90 Harmonisation of the Common Law and the Indigenous Law* 1998

South African Law Reform Commission *Project 20 Harmonisation of the Common Law and Indigenous Law* 1998

South African Law Reform Commission *Project 118 Report Domestic Partnerships*

South African Law Reform Commission *Project 118 Report Domestic Partnerships*

SSA Statistical Release PO307 Marriage and Divorce 2011

SSA Statistical Release PO307 Marriage and Divorce 2011

Stassen and Stassen 2001 *De Rebus*

Stassen K and Stassen P New Legislation: Recognition of Customary Marriages 2001 *De Rebus* 48-49

V

Van Schalkwyk *General Principles*

Van Schalkwyk LN *General Principles of the Family Law* 4th ed (University of Pretoria 2011)

W

West 2002 *De Rebus*

West A Customary Marriages: Registration involving customary marriages entered into before implementation of the Recognition of Customary Marriages Act 2002
De Rebus 47

Wood-Bodley 2008 *SALJ*

Wood-Bodley MC Establish the Existence of a same-sex life partnership for the purposes of Intestate Succession" 2008 *SALJ* 259-273

Case law

Ally v Dinath 1984 2 SA 451 (T)

AS v CS 2011 2 SA 360 (WCC)

Bank Windhoek Ltd 1991 1 SA 849 (NHC)

Bhe v Magistrate Khayelitsha 2005 1 SA 580 (CC)

BOE Trust Limited 2009 6 SA (WCC)

BOE Trust Limited 2012 ZASCA 147

BoE Trust Limited 2013 3 SA 236 (SCA)

Brummund v Brummund's Estate 1993 1 All SA 298 (NM)

Comerma v Comerma 1938 TPD 220

Curators, Emma Smith Educational Fund v University of KwaZulu-Natal 2010 6 SA 518 (SCA)

Daniels v Campbell 2004 7 BCLR 735 (CC)

Daniels v Campbell 2009 5 SA 572 (CC)

De Wet v Jurgens 1970 3 All SA 143 (A)

Edelstein v Edelstein 1952 3 SA 1 (SA)

Emma Smith Education Fund v University of KZN 2010 6 SA 518 (SCA)

Estate Breedt v Peri-Urban Areas Health Board 1955 3 SA (A)

Ex Parte BOE Trust Limited 2009 6 SA 470 (WCC)

Ex Parte Dow 1987 3 SA 829 (D)

Ex Parte Lelie 1945 WLD

Ex parte Spinazze 1983 4 SA 751 (T)

Faro v Bingham (446/2013) 2013 ZAWCHC 159

Feldman v Oshry 2009 (6) SA 454 (KZD)

Fourie v Minister of Home Affairs 2009 JOL 24266 (SCA)

Frankel's Estate v The Master 1950 1 SA 220 (A)

Gory v Kolver 2007 4 SA 97 (CC)

Gumede v President of the Republic of South Africa CCT 50/80 2008 ZACC 23

Hassam v Jacobs 2008 4 ALL SA 350 (C)

Hassam v Jacobs 2009 5 SA 572 (CC)

Hlathi v University of Fort Hare Retirement Fund 2009 1BPLR 37 (PFA)

Hodges v Coubrough 1991 3 58 (D)

Honey v Honey 1992 3 SA 609 (W)

Ismael v Ismael 1983 1 SA 1006 (A)

Ismael v Ismael 2007 4 SA 557 (E)

Kambule v The Master 2007 3 SA 403 (E)

Kaplan v Professional and Executive Retirement Fund 2001 10 BPLR 2541 (W)

Khan v Khan 2005 2 SA 272 (T)

Kroon v Kroon 1986 All SA 423 (E)

Kroon v Kroon 1986 4 SA 616 (EC)

Kruger v Gross 2010 1 All SA 422 (SCA)

Lagesse v Lagesse 1992 1 SA 173 (D)

Lesbian and Gay Equality Project and Eighteen others v Minister of Home Affairs 2006 1 SA 524 (CC)

Levin v Levin 1960 4 SA 469 (W)

Makume v Cape Joint Retirement Fund 2007 2 BPLR 174 (C)

Mashadi v African Products Retirement Benefit Provident Fund 2002 8 BPLR

Minister of Education v Syfrets Trust Ltd 2006 4 SA 205 (C)

Minister of Home Affairs v Fourie 2006 1 SA 524 (CC)

Ngwenyama v Mayelane (474/11) 2012 ZASCA

Oberholzer v Oberholzer 1947 3 SA 294 (O)

Oosthuizen v Bank Windhoek Ltd NO 1991 (1) SA 849 (NHC)

Oshry v Feldman 2011 1 All SA 124 (SCA)

Pommerel v Pommerel 1990 1 SA 110 (A)

Robertson v Robertson's Executors 1914 AD

Sadiku v Sadiku 2007 JOL 19342 (T)

Slabbert v Harmse 1923 CPD 187

Van der Merwe v Road Accident Fund 2006 6 BCLR 682 (CC)

Volks v Robinson 2005 5 BCLR 446 (CC)

Volks v Robinson 2005 JOL 13723 (CC)

Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd 2009 1 SA 337 (CC)

Woman's Legal Centre Trust v President of the Republic of SA 2009 6 SA 94 (C)

Zulu v Zulu 2008 4 SA 12 D

Legislation

Administration of Estates Act 66 of 1965

Black Administration Act 38 of 1927

Children's Act 38 of 2005

Civil Union Act 17 of 2006

Close Corporations Act 69 of 1984

Constitution of the Republic of South Africa, 1996 [came into operation 4 Feb 1997]

Deeds Registries Act 47 of 1937

Divorce Act 70 of 1979

Estate Duty Act 45 of 1955

Friendly Societies Act 25 of 1956

General Law 4th Amendment Act 132 of 1933

Immovable Property Act 94 of 1965

Income Tax Act 58 of 1962

Intestate Succession Act 81 of 1987

Maintenance of Surviving Spouse Act 27 of 1990

Marriage Act 25 of 1961

Marriage and Matrimonial Property Law Amendment Act 3 of 1988

Matrimonial Property Act 88 of 1984

Minerals and Petroleum Resources and Development Act 28 of 2002

Mining Titles Registration Amendment Act 24 of 2003

National Education Policy Act 27 of 1996

Pension Funds Act 24 of 1956

Pension Funds Amendment Act 11 of 2007

Prevention of Organised Crime Act 121 of 1998

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Recognition of Customary Marriages Act 120 of 1998 [came into operation 15 November 2000]

Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009

Sub-division of Agricultural Land Act 70 of 1970

Succession Act 13 of 1934

Succession Act 81 of 1987

Tax Administration Laws Amendment Act 23 of 2015

Taxation Laws Amendment Act 31 of 2013

Tax on Retirement Funds Act 38 of 1996

Trust Property Control Act 57 of 1988

Wills Act 7 of 1953

Government publications

Government Gazette 30663 14 January 2008

Government Gazette 38238 24 November 2014

Internet sources

Anon date unknown <http://www.southafrica.info/about/people/population.htm#.VODN2S4u9U8>

Anonymous date unknown *South Africa's population* <http://www.southafrica.info/about/people/population.htm#.VODN2S4u9U8> [Accessed 15 February 2015]

Anon date unknown <http://thelawdictionary.org/sui-generis/>

Anonymous date unknown <http://thelawdictionary.org/sui-generis/> [Accessed 14 February 2015]

Anon 2013 <http://www.schoemanlaw.co.za/wp-content/uploads/2013/07/Freedom-of-Testation-July-2013.pdf>

Anonymous 2013 <http://www.schoemanlaw.co.za/wp-content/uploads/2013/07/Freedom-of-Testation-July-2013.pdf> [Accessed 21 March 2015]

Dhever 2012 <http://www.withoutprejudice.co.za>

Dhever S 2012 *Giving with one law and taking away with another* <http://www.withoutprejudice.co.za> [Accessed 4 March 2015]

Govender date unknown <http://www.meumannwhite.co.za/family-law/>

Govender V date unknown *Formalities in respect of marriage* <http://www.meumannwhite.co.za/family-law/> [Accessed 16 January 2015]

Grove 2012 <http://www.fpi.co.za/AboutFPI/MediaCentre/LatestNews/tabid/3300/ctl/ArticleView/mid/4829/articleId/61/language/en-ZA/Freedom-of-Testation-Bequest-contra-bones-mores.aspx>

Grove J 2012 <http://www.fpi.co.za/AboutFPI/MediaCentre/LatestNews/tabid/3300/ctl/ArticleView/mid/4829/articleId/61/language/en-ZA/Freedom-of-Testation-Bequest-contra-bones-mores.aspx> [Accessed 24 March 2015]

Jacobs 2012 http://www.cliffedekkerhofmeyr.com/.../en/.../TE_Alert_11_July_2012.pdf

Jacobs J 2012 *"I do" – but how?* http://www.cliffedekkerhofmeyr.com/.../en/.../TE_Alert_-_11_July_2012.pdf [Accessed 29 March 2015]

Kleingeld 2014 <http://www.webberslaw.com/recent-articles/marriage-in-south-africa/>

Kleingeld A 2014 *Marriages in South Africa* <http://www.webberslaw.com/recent-articles/marriage-in-south-africa/> [Accessed 27 February 2015]

Matlala 2011 http://www.myvirtualpaper.com/doc/derebus/de_rebus_june_2011_opt/2011052602/48.html#44

Matlala D June 2011 *De Rebus Digital* http://www.myvirtualpaper.com/doc/derebus/de_rebus_june_2011_opt/2011052602/48.html#44 [Accessed 3 November 2014]

Matshe date unknown *Living Together* www.legalcity.net

Matshe L date unknown *Living Together* www.legalcity.net [Accessed 4 March 2015]

Meyer 2011 http://www.justice.gov.za/juscol/news/201106_intestate-and-testate-succession.pdf

Meyer M 2011 http://www.justice.gov.za/juscol/news/201106_intestate-and-testate-succession.pdf [Accessed 24 March 2015]

South Africa's population <http://www.southafrica.info/about/people/population.htm#.VODN2S4u9U8>

South Africa's population <http://www.southafrica.info/about/people/population.htm#.VODN2S4u9U8>

Volgopach date unknown <http://www.polity.org.za/article/what-are-the-consequences-of-living-together-2011-02-01>

Volgopach C date unknown *What are the consequences of living together* <http://www.polity.org.za/article/what-are-the-consequences-of-living-together-2011-02-01> [Accessed 22 February 2014]