



## Domestic partners – The changing legal environment

There is a generally held misconception that two people who live together (or co-habit) in South Africa will, after the passage of time, attain a legal status often referred to as a 'common law marriage'. This article seeks, by way of question and answer, to clarify the current legal position and explore the Domestic Partnership Bill promulgated in 2008, which at the time of writing in August 2011, is not yet law.

### What is the current position?

While unmarried domestic partners can claim pension benefits if they can prove they were dependent on the deceased, this principle has not been extended to other situations. There is, for example, no claim by the survivor of a heterosexual life partnership for a share of the estate of the partner who dies without a will. (*Gory v Kolver*, 2006). There is also no claim by a surviving life partner for maintenance payments (*McDonald v Young*, March 2011) or Road Accident Fund benefits (*Paixao v RAF*, July 2011). There is no separate Act of Parliament which recognises a domestic partnership. There is no automatic accrual of rights after the couple have lived together for a period of time, as is the case in some other countries.

### What Acts presently cover marriages, unions or partnerships?

The classic marriage is provided for under the Marriage Act of 1961. The Customary Marriages Act, amended in 1998, was designed to recognise the traditions of indigenous persons. The Civil Union Act of 2006 allowed both heterosexual and same-sex couples to enter into a 'civil partnership' or a 'marriage' provided certain formalities were completed in the presence of an official recognised by the State. Originally the Civil Union Bill contained clauses which covered domestic partnerships, but before the bill became law, these clauses were omitted with a view to housing them in a separate Act.

### What are the rights of children?

The rights of children are contained in the Children's Act of 2005. Any parent of a child has a duty to maintain that child, irrespective of any marriage or living arrangement between the parents. Such duty extends to the deceased estate of that parent, and may translate into a claim by the child against the estate if sufficient provision has not been made in the deceased's last will and testament.

### Why is the Domestic Partnership Act necessary?

While parties wishing to establish rights flowing from co-habitation may attempt to prove that they had a universal partnership, it is both difficult and expensive to try to prove this in court, and thus the Domestic Partnership Bill seeks to establish legally recognised procedures to protect the rights and establish the obligations of the parties who are living together.

### What are the requirements?

Couples may be married under only one Act at any point in time, and if so married cannot register a domestic partnership. At least one domestic partner must be a South African citizen. The Minister must appoint a registration officer who must operate from official premises and sign the prescribed documents as evidence that the declaration of the parties was made voluntarily in his/her presence. The officer must complete a register and issue the partners with a registration certificate. In addition, if the parties have drafted and signed a domestic partnership agreement and wish to register it formally, such fact must be noted in the register, and a certified copy of the signed agreement attached to the certificate issued to the partners. The registration officer must transmit the register to the

State official in charge of the Population Register for inclusion in that register in accordance with the provisions of the Identification Act.

**What is the effect on one's property?**

Partners who enter into a registered domestic partnership do not enter into an *automatic* community of property regime. If they do not enter into a separate agreement regarding ownership and use of the property each one brings to the partnership, then each one will retain full ownership of his or her assets. However, they may agree to contribute property to a jointly owned 'pool' in which case it will become joint property. Likewise they may agree to contribute in different amounts or percentages towards daily expenses out of their respective incomes. If the partners have entered into an oral or written agreement, but have not formally registered it with the registration officer, such agreement binds only the partners, not third parties. Even if it is registered formally, a court may make a ruling on any clause in such agreement, even if the agreement says that it excludes the court's jurisdiction.

**What are the legal consequences of the registration of a domestic partnership?**

The partners owe each other a duty of support. A partner may not without the other's consent dispose of or burden joint property. Both partners are entitled to occupy the family home. For purposes of a delictual claim, partners are deemed to be spouses in a legally valid marriage. A partner can launch a claim based on the wrongful death of the other partner and is regarded as a dependant under the Compensation for Occupational Injuries and Diseases Act, and one may assume, although it is not stated, the Road Accident Fund Act.

**When does the partnership terminate?**

On the death of one of the partners or by agreement or by a court order. A registration officer must conduct the termination procedure which is similar in format to the registration procedure. Any termination agreement must be noted in the register and on the termination certificate to be issued to the ex-partners. The partners (or, as the case may be, their executors) must give written notice of the termination to interested parties.

**What are the financial consequences?**

A termination agreement may provide for the division of joint and separate property, the payment of maintenance, arrangements regarding the family home and any financial consequences of the termination. If the partners cannot agree how to divide property or maintenance payments following termination, either partner may approach the court for relief. On the death of a partner, the survivor has a claim in terms of the Maintenance of Surviving Spouse's Act and, if no will was left, a claim in terms of the Intestate Succession Act.

**How are minor children protected?**

Registered domestic partners who have minor children from the partnership and who wish to terminate it, must apply to court for a termination order. The court may order an investigation similar to that envisaged by the Mediation in Certain Divorce Matters Act, appoint a legal practitioner to represent the children and order the partners to pay costs. The court may ratify any provisions made in a termination agreement regarding the welfare of any minor or dependent children or make any order it deems fit.

**What happens if the partners simply live together but do not register the domestic partnership?**

After termination of the partnership through death or separation, either or both partners may apply to court for a property division order, a maintenance order and an intestate succession order. However, if the applicant is already a spouse in a *civil marriage*, a partner in a *civil union* or in a *registered domestic partnership* with a third party, the court cannot make an order concerning the applicant's relationship with another partner. However, if the applicant is a spouse in a *customary marriage* or an *unregistered domestic partnership*, the court may make an order.

The court must have regard to all the circumstances of the partnership, e.g. duration and nature of the relationship, the degree of financial dependence or independence, future financial needs, and the care and support of children and the performance of household duties.

**Are unregistered domestic partners liable to maintain each other during the relationship?**

No.

**Are they liable for maintenance payments to each other after they separate?**

A court may make a maintenance order in favour of one of the unregistered domestic partners for a specified period. Before making any order, the court must consider a wide range of circumstantial factors and may consider the relevant circumstances of another *unregistered domestic partnership*, or *customary marriage* insofar as they are connected to the situation under review. Likewise after the death of an unregistered domestic partner, the court must consider competing claims from other parties before making an order.

**Are there time limits?**

Yes, an application to court for an order after the termination of both a registered and an unregistered domestic partnership through death or separation must be made within two years of the event.

**When will the Bill become law?**

As soon as it is gazetted. The delay in gazetting the date is probably due to the need to set up the registration infrastructure and appoint registration officers.

**Will prospective domestic partners be able to attend to all the formalities themselves?**

The actual registration process for the partnership itself is not complicated. However, the drafting of an agreement to suit the needs of both partners, as well as the drafting of a Will to provide for the survivor and children, and a testamentary trust to provide for minor children, could well necessitate legal and fiduciary assistance. It is far better to pay modest consultation fees in advance of entering into such a partnership, than to pay high litigation fees to resolve difficulties in court later on.

**Conclusion**

The benefits to both partners in attending to the registration of both the domestic partnership and a written agreement will be a much greater degree of certainty in law about their relationship.

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