

Money Matters

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Cohabitees and "Universal partnerships"

Estate planning

As fiduciary specialists we are often asked about 'common law marriages'. There is a prevailing (mis) perception that one can acquire rights (such as to maintenance) simply by virtue of co-habiting with a romantic partner. This (mis) perception probably stems from anecdotal knowledge of the current debates internationally about this issue.

For example, the Law Commission of the United Kingdom has proposed amendments to the law of intestacy in England & Wales, in particular to allow someone who had cohabited with a partner who dies without a will, to inherit from his or her estate under the intestacy rules. The rule would be that the cohabitation lasted for five years or – if the couple had a child who was living in the same household at the date of death – for two years. However, in our law, no duty of support arises by operation of law in the case of unmarried cohabitants. Thus in the case of the death of one partner or on the break-up of a relationship, a cohabitee does not have any automatic claim to any part of the other partner's estate or to maintenance. It is only if partners choose to marry or enter into a contract to that effect, that a mutual obligation of support arises.

Ponelat v Schrepfer

In certain circumstances, some cohabitees have managed to establish contractual claims for a share of a former partner's estate, on the basis of what is known as a 'universal partnership' or a 'joint venture

agreement'. The recent Supreme Court of Appeal case, *Ponelat v Schrepfer*, illustrates the impact of the existence of a contract of universal partnership.

Erica Schrepfer successfully led evidence of facts that proved the existence of such a contract for a period of some 16 years. As a result, she was awarded a 35% share of the 'partnership' estate, and her former partner (Hans Ponelat) was awarded a 65% share. Ms Schrepfer's evidence was that Mr. Ponelat invited her to live with him permanently as his life partner and support her and look after her 16 year old son. His deceased's wife's will stipulated that he would forfeit a share of his inheritance to his sons if he married within 10 years of her death.

Therefore he promised to marry Ms Schrepfer after the 10 year period had lapsed. They lived together and shared a joint household, he told her repeatedly "what is mine is yours". She made all her assets and income available to the joint household. In relation to his electrical business, she assisted with administration after hours, helped when Mr. Ponelat's secretary was absent, entertained guests and business associates and acted as his confidant and advisor. The court found that certain decisions that Mr. Ponelat made on her advice, contributed to the generation of income and or capital for the benefit of the partnership. Also, she was actively involved in improving a farm that Mr. Ponelat purchased (for example in the construction of two self-contained apartments

which she then managed as tourist accommodation to generate additional income for the joint household). Furthermore she assisted in rearing and feeding cows and calves and the felling of trees which netted approximately R70 0000. She also performed administrative, book-keeping and clerical tasks, supervised employees, negotiated agreements and oversaw disputes. When Mr. Ponelat sold the farm, he invested R1,2 million in an Old Mutual insurance policy which provided for one lump sum payment to be payable to the survivor on the death of one of them.

Requirements for a Universal Partnership

The court summarized the essentials of a universal partnership as follows and confirmed that they can apply between spouses or cohabitees where they agree to pool their resources:

- (1) each of the partners bring something into the partnership, whether it be money, labour or skill;
- (2) the business should be carried on for the joint benefit of the parties; and
- (3) the object should be to make a profit
- (4) the contract should be legitimate

Where a tacit agreement is alleged, the claimant must prove that it was more probable than not that it had been concluded. In another recent SCA case (*McDonald v Young*, (24 March 2011), Mr McDonald cohabited with Ms Young for eight

years and tried to claim a 50% share of her property on the basis of an alleged joint venture agreement. The Court found that the evidence and conduct of the parties in that case did not justify the inference that there was consensus between them.

Summary

In South African law, certain family relationships, such as parent and child, husband and wife, create a duty of support. In line with the Constitution, contractual rights of support are also supported by the common law. For example, the courts have recognized a contractual right of support arising out of a marriage in terms of Islamic law, and have found that a common law duty of support could, in certain circumstances, be extended to person in a same-sex relationship. However whether such a contractual duty of support exists or not, depends on the circumstances of each case.

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¹ *Volks NO v Robinson & others* (2005), para 56

² (802/10) [2011] ZASCA 167, 29 September 2011

³ *Amod v Multilateral Motor Vehicle Accidents Fund*

⁴ *Satchwell v President of the Republic of South Africa*