Eric Juan Spiridion Duplan v Rasmus Elardus Erasmus Loubser NO and Others

(24589/2015) [2015] ZAGPPHC 849 (23 November 2015)

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The proprietary consequences of the relationships of unmarried couples have been tested in South African courts for many years. In the Constitutional Court decision in *Gory v Kolver NO and Others* (2007 (4) SA 97 CC) one issue appeared to have been settled as the court decided the exclusion of persons in same sex relationships from the provisions of the Intestate Succession Act, 1987 was unconstitutional. The inclusion of such persons was brought about by the court ordering the "reading-in" after the word "*spouse*", wherever it appears in the relevant section of the Act, of the words "*or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support*".

The Civil Union Act 17 of 2006 became law only seven days after judgment in the *Gory* case was handed down. The Civil Union Act provided the mechanism for persons in same sex and heterosexual relationships to enter into a lawful marriage or civil union and regulated the proprietary consequences of such unions. However, the Act does not regulate the estates of those who, for whatever reason, choose not to enter into a marriage or civil union. The Domestic Partnerships Bill, the provisions of which had been included in earlier drafts of the Civil Union Act, was drafted for this purpose. However, until the Domestic Partnership Bill comes into law, the issue of what happens to the property of those cohabitees who decide not to enter into marriage or a civil union remains to be decided by the courts as seen in the recent case of **Duplan v Loubser NO and Others (24589/2015) [2015] ZAGPPHC 849 (23 November 2015)**.

The facts of the case were that the applicant, Eric Juan Spiridion Duplan, had been in a permanent same sex life partnership with Cornelius Daniel Loubser from 2003 until Loubser died intestate in 2015. The applicant lodged a claim with the Executor of the deceased's estate to inherit the deceased's entire intestate estate as a consequence of their same sex life partnership. The Executor, the brother of the deceased and the only surviving child of the deceased's parents, maintained that the applicant was not a spouse within the meaning of the Intestate Succession Act and that only a spouse in a partnership which is solemnised and registered as a civil union is entitled to inherit in terms of the Intestate Succession Act. The crisp issue, as Muller AJ put it in his decision, was whether the applicant could inherit intestate from the deceased.

In his judgement, the Judge first reviewed the history in South Africa of the recognition of same sex marriages, the Civil Union Act, the *Gory* case and the specific provisions to be read into the Intestate Succession Act. The Judge then discussed the distinction between same sex partnerships which are solemnised and registered and those which are not. He noted that the former is recognised by the law and the latter, together with the relationships of heterosexuals who have elected not to marry, are not. Although Parliament had removed the impediment against same sex marriages by the introduction of the Civil Union Act which declared partners in a civil union to be spouses, this only cured the unconstitutionality of the non-recognition of same sex marriages. The Civil Union Act does not include those whose partnerships are not formally recognised and solemnised and the Judge therefore decided that the reading-in order of the *Gory* case had not yet run its course. Following the *stare decisis* doctrine, the lower courts are required to follow the decision of the Constitutional Court in

the *Gory* case. The definition of the word "spouse" in the Intestate Succession Act was therefore still to include the words *"or partner in a same-sex life partnership in which the partners have undertaken reciprocal duties of support*".

The Judge mentioned that it was not open to him to decide why the applicant and the deceased had elected not to solemnise the relationship between them in terms of the Civil Union Act. The Judge would also not find that the Civil Union "cured" the constitutional defect found in the Intestate Succession Act. The Judge did state in passing that, in his personal view, he believed the "reading-in" leads to discrimination against unmarried heterosexual couples whose relationships are still excluded from the ambit of the Intestate Succession Act.

While this case confirms that the "reading-in" to the definition of "spouse" in the Intestate Succession Act brought about by the *Gory* case is to continue, it perhaps also serves as a reminder to those heterosexual couples who have not solemnised their union that they should, during their lifetime, properly arrange the devolution of their estates in their Wills.