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A Critical Appraisal of the Extension of the Meaning of "Spouse" and its Effect on the Law of Intestate Succession: With Specific Focus on the *Bwanya* Case

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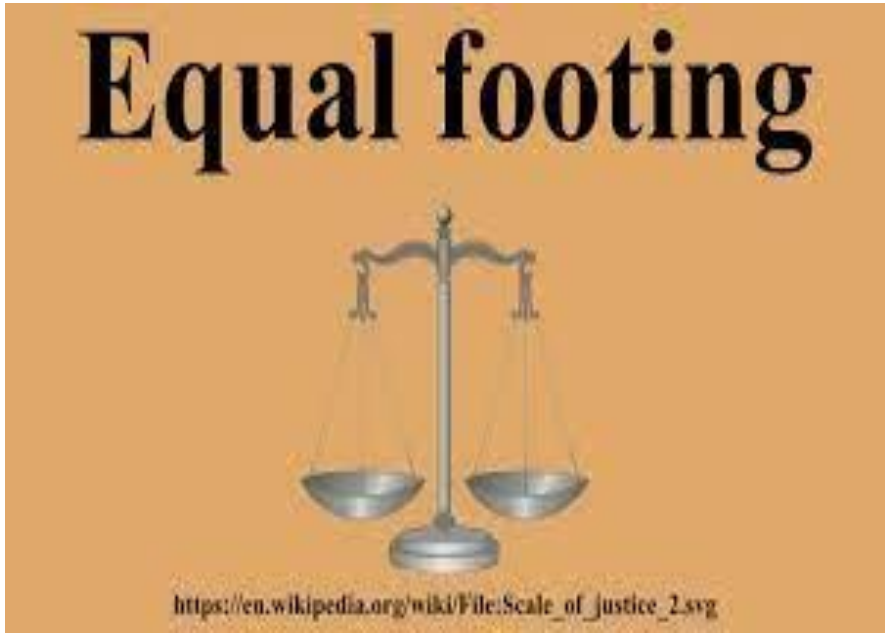
1. Introduction

- 2021 case = the ambit of intestate heirs was extended to include all permanent life partners who have undertaken reciprocal duties of support during the subsistence of the relationship
- S1 of ISA = Spouse = Primary heir
- No explicit definition of spouse in the ISA. The Act explicitly provides as follows:
  - S1(1)(a) = Survived by a spouse/s = inherit the intestate estate to the exclusion of all other relatives of the deceased.
  - S1(1)(c) = Survived by a spouse/s and descendant = the spouse/s will inherit whichever is greater between the child share, and the amount fixed by the Minister of Justice in the Government Gazette = **R 250 000**.
    Descendant = residue if any
- Deduce from the above = spouses enjoy priority in relation to inheriting from their deceased spouse's intestate estate over all other relatives.
- Although the definition evolved: monogamous & polygamous customary spouses, spouses married ito religious law & spouses in monogamous civil unions or partnerships.

1. Introduction

- Even with this progression towards inclusivity, permanent life partners have neither been legislatively recognised nor included as spouses to this day.
- Interestingly, however, they have been allowed to inherit from their deceased partners' intestate estates on the same level as spouses.



Aim: This paper therefore analyses the effect of such elevation of status for the purpose of intestate succession thereof

Argument of paper:

- CC decision = unfair & creates legal uncertainty
  = failed to seize the opportunity to redress the law of intestate succession by correcting its decision in *Laubscher v Duplan.*

2. The genesis of including life partners as intestate heirs: same-sex permanent life partners

- Emergence = *Gory v Kolver* case (2006) wherein the CC held that the ISA unfairly discriminated against same-sex couples on the grounds of sexual orientation and marital status in that it only granted the right to intestate succession to spouses and not to the former.
- Resultantly, sec 1 of ISA was to be read as though the words "or partner in a permanent same-sex life partnership in which partners have undertaken reciprocal duties of support" appear after the word spouse

∴ The extension was limited to same-sex couples to the exclusion of opposite-sex partners

- Decision premised primarily on the reasoning that same-sex partners were neither legally entitled to marry nor to formalise their relationships in any state-sanctioned manner.

2. The genesis of including life partners as intestate heirs: same-sex permanent life partners

- A week following the Gory decision, the Civil Union Act was passed.
- The Act regulates the solemnisation of civil unions, by way of either a marriage or civil partnership.
- Thus heterosexual and same-sex couples have the capacity to marry in terms of either:
  - Marriage Act,
  - Civil Union Act, or
  - Recognition of Customary Marriages Act, or
  - Religious law.

- Permanent life partnerships are not included in any of the existing marriage Acts or separate legislation
- Even with the above legislative developments, the ISA has not explicitly amended to include permanent life partners and the decision in Gory has not been overturned to remove same-sex partners from inheriting as intestate heirs.
- 10 years later (2016) - CC further reaffirmed its stance in the *Laubscher v Duplan*.

2. The genesis of including life partners as intestate heirs: same-sex permanent life partners

- The Court grappled with the question of whether its previous *ratio* from the *Gory v Kolver* judgment was still applicable in view of the enactment of the Civil Union Act.
- Decision: enactment of the CUA did not have the effect of amending section 1(1) of the ISA but it rather established a new category of beneficiaries, namely, same-sex partners who had entered into registered civil unions.
- Court passed the baton to Parliament by making it clear that its reading-in order was of an indefinite duration *albeit* subject to amendment or repeal by Parliament.

- Although the majority noted that an inequality existed between heterosexual and same-sex partners iro intestate succession rights – it was for the Legislature to decide whether to afford heterosexual partners the same rights or to limit the rights of same-sex permanent partners under the Intestate Succession Act.
- Foretelling that an eventual application will be made on the unconstitutionality of excluding opposite-sex life partners from the ambit of intestate heirs

3. Facts of Bwanya – High Court

- 2014 – Marriage-like relationship
- 2015 – engaged to get married = fiancé
- April 2016 – Deceased died testate – mom (sole heir) predeceased him – (2 months before payment of lobolo)
- Duration of the relationship = approx. 2 years
- Claims lodged: Inheritance – ISA,

  Maintenance – MSSA
- The executor of the deceased's estate rejected both claims on the basis that these Acts conferred benefits only on married couples, not partners in permanent life partnerships.

High Court (HC):

- contended that section 1(1) of the ISA discriminates against her and women similarly placed on the grounds of gender, sexual orientation and marital status.

- Unfair discrimination and violated their rights to dignity and equality.
- Act treats surviving opposite-sex life partners differently from surviving same-sex life partners and affords them greater rights than opposite-sex life partners, despite both having the ability to marry.
- The wording in Ms. Bwanya's plea was deliberately modelled on the wording used in the *Gory v Kolver* and *Laubscher v Duplan* cases where the CC had already been extended to incl. partners in permanent same-sex life partnerships in which the partners have undertaken reciprocal duties of support.
- The HC declared section 1(1) unconstitutional but rejected the challenge to the constitutionality of section 1 of the Maintenance of Surviving Spouses Act.

4.1 Constitutional Court Ruling – Bwanya Majority - Madlanga J

- Acknowledged that cohabiting families constituted another category of families and are deserving of legal protection
- Question from *Volks NO v Robinson*: "Should a person who has shared her home and life with her deceased partner, born and raised children with him, cared for him in health and sickness, and dedicated her life to supporting the family they created together, be treated as a legal stranger to his estate, with no claim for subsistence because they were never married?
- **Majority judgment confirmed the HC's declaration of invalidity of section 1(1).**
- **Held:** the rationale in previous court decisions for extending the ambit of s1 of the ISA to include permanent same-sex life partners was that they were unable legally to marry.
- Therefore, since this impediment is removed, there is no good reason for distinguishing between unmarried heterosexual couples and unmarried same-sex couples in respect of intestate succession".

- **Concluding order:** section 1(1) of the ISA be read as though the following words appear after the word "spouse", wherever it appears in the section: "or partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support".
- Thus, extending the section to apply to both same-sex and opposite-sex permanent life partners.
- 18 months from the date of the decision to affect the reading in.
- Judicial Matters Amendment Bill; section 4 of which was to affect the amendment to the Intestate Succession Act in light of Bwanya.
- Failure to meet deadline = Bill not passed
- CC in the event of failure of the above provided that, estates that are wound up in a manner that gives effect to the Bwanya case after the 18-month period will not be invalid even by virtue of Parliament's failure to affect the advised change.
- The Bwanya decision is binding

4.2 Bwanya Dissenting – Mogoeng Mogoeng CJ

- Parted ways with the majority judgment and third judgment penned on the reasoning and outcome.
- He accepted that the differential treatment = discrimination.
- Agrees with *Volks*, that the fundamental differences between marriage and permanent life partnerships necessitate the existence of different regimes for each with regard to maintenance and inheritance.
- Further noted: the examples cited in the main judgment as support for the equal treatment of marriage and permanent life partnerships are not drawn from cases relating to permanent life partnerships of heterosexuals as they are all about people who actually wanted to and were planning to get married soon when tragedy struck.

- Argues: no permanent life partnerships of heterosexuals to draw from in support of what is being pursued on their behalf.
- Further holds: the majority should not depart from the *Volks* judgment that the differentiation between unmarried and married couples is not unfair, since there is no other legal basis to do so. (same as Jafta J)
- Concludes: that the HC's decision should be set aside since there is a reasonable justification for the limitation of the right to equality, in an open and democratic society based on freedom, equality and dignity.
- Discrimination is fair, and the impugned provisions are therefore constitutionally valid.

4.3 Bwanya Dissenting - Jafta J

- Agreed with the majority judgment that the declaration of invalidity of section 1 of the ISA made by the HC should be confirmed
- Concur with the third judgment's suggestion that the real problem did not lie in how the impugned section itself regulated its subject matter, but in Parliament's failure to pass legislation that regulated the affairs of millions of people in permanent life partnerships.
- I submit that the same argument should be presented for the impugned section 1 of the Intestate Succession Act, although his focus was on the maintenance claim.
- Therefore, the collective focus should be directed to once more nudge Parliament to pass the necessary legislation, and such a recommendation cannot constitute a breach of the principle of separation of powers.

5. Implications for intestate succession – critical analysis

1. Permanency or a permanent life partner?

   = unclear

- Although the CC in the *National Coalition for Gay and Lesbian Equality* *established several factors to determine (age, years, how partners view the relationship),* it remains unclear how one significantly distinguishes mere cohabitation from a permanent life partnership.
- Permanency is treated differently on a case-to-case basis, at the discretion of the judges.
- The lack of clarity is problematic as it creates the possibility of subjecting couples who merely cohabit as permanent life partners.

- Inevitably leads to the unfortunate result of some deceased person's intestate estate devolving to their cohabiting partner who, through abusing this uncertainty, claims upon the death of one that they were a permanent life partner who should inherit as a primary heir.
- *In re BOE Trust Ltd* case, the court held that the right to dignity allows the living and the dying the peace of mind of knowing that their last wishes could be respected after they have passed away.
- What makes one sure that the deceased would have intended to have their partner inherit from them, especially if the couple never intended to legally formalise their union?

5. Implications for intestate succession – critical analysis

2. Although I also agree with the sentiments that it would be unfair to completely disregard the permanent life partner as though they did not share the most intimate part of their lives with the deceased, I also submit that placing them on the same footing as a spouse only for the purposes of intestate succession can be unfair to those spouses who have all the consequences of marriage applied to their union.

- As such, the non-recognition through legislative measures by the legislature of permanent life partnerships warrants urgent attention.

- The Domestic Partners Bill was published for public comments to the Department of Home Affairs on or before 15 February 2008.
- Almost fifteen years later the Bill has still not been passed as legislation yet.
- Permanent life partnerships are also not included in the recently published Draft Marriage Bill, 2022.
- Legislature's intention?

5. Implications for intestate succession – critical analysis

3. Reciprocal duty of support? = unclear

- Problem: adds extra burdens on executors of estates to determine its meaning on a case-to-case basis and as such creates more legal uncertainty.
- E.g. is reciprocal duty of support determined by financial contribution?
- How do we distinguish between contributing to the smooth running of a shared home & reciprocal duty of support? Does reciprocal contribution amount to obligationary reciprocal duty of support?
- This may sometimes be difficult to establish, especially where there lies no obligation for such duty of support by operation of law.

- Submit that the CC in *Bwanya* missed the opportunity to correct the law in so far as it relates to the choice argument and clearly defining the scope of permanency and reciprocal duty of support.
- By employing the principle of *Stare decisis,* it could have used the opportunity to correct its decision in *Gory v Kolver and Laubscher v Duplan* that the decision to extend the ambit of intestate heirs to permanent life partners was an indefinite one.

5. Implications for intestate succession – critical analysis

5. Argue: Indubitably, respect for human autonomy implies that the law must honour the choices that people make, including the decision of whether or not to marry.

- Unmarried couples should not unreasonably demand only those consequences of marriage that are convenient for them upon the death of their deceased partner.
- Argue: legislature and judiciary alike should guard against eventually creating legal uncertainties in their pursuit of inclusivity and perhaps liberalism.

- Decision = oversight of the best interest of the children of the deceased.
- Fairness to children where an estate is not sufficient?
- The children may claim for maintenance
- More beneficial if the children were prioritised over the permanent life partner.
- Such prioritisation = best interest of the children as per section 28(2) of the Constitution.

5. Implications for intestate succession – critical analysis

6. How will courts decide whether the marriage contract outweighs the life partnership?

Lindeni v Master of the High Court, Johannesburg and Others (2022/23635) [2023] ZAGPJHC 800

- Duration of relationship: approx. 3 years from 2017
- Cohabited from 2018 – initiated the lobolo process by his family sending a letter to the applicant's home.
- Deceased and his sister travelled to East London and paid lobolo in the amount of R19 000, with an outstanding amount of R11 000.
- The applicant was handed over to the deceased's family (ceremony the daughters did not attend) = husband & wife (2018).
- Deceased married in 1994 and only got a decree of divorce in 2020
- Died in 2021
- Initial application to be declared spouse ito RCLSA withdrawn by Court
- Subsequently applied to be declared perm. Life partner in which reciprocal duties of support were undertaken
- Court asked: competence?
- Claim dismissed = Deceased was incompetent to enter another marriage and/or permanent life partnership
- Applicant ≠ Permanent life partner
- Deduce: Civil Marriage = cannot have more than one spouse or a spouse & life partner

5. Implications for customary law of succession – critical analysis - Future developments

- Due to *Bhe v Magistrate Khayelitsha* = ISA extended to apply to customary law ►S2(1) of RCLSA

∴ S1 of ISA applies to customary law

Issues to consider:

- Can a deceased have a spouse/s and permanent life partner? Do they inherit equally?
- *Mayelane v Ngwenyama and another 2013 (4) SA 415 (CC)* – Is consent from a spouse/s necessary for the establishment of a valid permanent life partnership?

Are there future prospects for:

- ➢ Polygamous life partnerships?
- ➢ Open Marriage? Spouse/s & permanent life partner?

Before the calculation of child share, for the matrimonial property regime share: Does this even apply?

- ➢ Default? Deemed ICoP or OCoP?
  - ➢ If OCoP – Chances of instituting redistribution order? *EB (born S) v ER (born B) and others; KG v Min. of Home Affairs and others [2023] ZACC 32*

6. Conclusion

- Submission: while the Bwanya judgment underlines the paramount urgency of legislative reform to regulate permanent life partnerships, it also equally submits that this should have not been done through the extension of the ambit of intestate heirs to permanent life partners as this is unfair to those that choose to have their relationships regulated and formalised in legally binding ways.
- It as such underscores that wherein the Courts have extended the definition of spouse to include spouses married in terms of the Recognition of Customary Marriages Act, Civil Union Act and religious rites, they were justified because all the spouses in these relationships intentionally and proactively legally bound themselves to the institution of marriage.
- Hence, this contribution opines that there is no better way to affirm one's intention to be permanently attached to the other than through formalisation of the relationship, especially where no legal impediments make such impossible.
- Courts should, in their pursuit of inclusivity take caution not to limit people's right to choose by imposing marital consequences onto them upon death.
- i.e. Courts should be careful not to assume that a deceased would have wanted their life partner to inherit to the exclusion of their other surviving relatives, especially where the deceased is survived by children and his/her estate is insufficient to provide for both.
- Therefore, while the CC may have successfully afforded all permanent life partners the same and equal treatment wrt. intestate succession, it has inevitably almost rendered the marriage institution redundant, especially if unmarried people can benefit like married people but do not bear the same legal obligations as married couples.
- Does this not place married couples in a prejudiced position? Differently put, does this not unjustly enrich non-married permanent life partners at the death of one partner?