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**Non-Formalised Cohabitation: Does the Swedish Model of Statutory  
Regulation Provide a Solution for South Africa?**

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## Plagiarism Declaration

I declare that '*Non-formalised Cohabitation: Does the Swedish Model of Statutory Regulation Provide a Solution for South Africa?*' is my work and has not been submitted for any degree or examination in any other university or academic institution. All sources and materials used are duly acknowledged and are properly referenced.

Signature: N. Damons

Signature: Prof J. Sloth-Nielsen

Date: 08 May 2015



## ABSTRACT

# NON-FORMALISED COHABITATION: DOES THE SWEDISH MODEL OF STATUTORY REGULATION PROVIDE A SOLUTION FOR SOUTH AFRICA?

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South Africa has come a long way from the rigid family structures which existed in the past. This is demonstrated by the recognition afforded to couples in same-sex relationships as well as those in customary marriages. Proposals have also been set forth regarding law reform to protect the rights and interests of those involved in domestic partnerships. The Domestic Partnership Bill was promulgated in 2008 but to date has not been passed into law. The ensuing consequence is that cohabitation relationships are therefore self-regulated. This relationship has no legal status as a union in South Africa. The court have, however, recognised that a universal partnership could be established if certain criteria are met. Furthermore, heterosexual couples are now also recognised as a “dependant” in actions against the Road Accident Fund for loss of support as a result of death of the breadwinner.

Unlike South Africa, cohabitation in Sweden is regulated by a dedicated law called the Cohabitees Act 2003. The Act provides comprehensive protection than that afforded to cohabitants in South Africa. It offers a clear definition of cohabitation and criteria in order to qualify as a cohabitee. The Act, further, regulates the proprietary consequences of entering into such a relationship and the effects of termination. Cohabitation has status as a legal union in Sweden.

My research will deal with non-formalised cohabitation and a comparison shall be made between the current systems in South Africa and Sweden. My work will suggest that the statutory model of regulation in Sweden may provide a solution for South Africa. In South Africa, cohabiting couples are not afforded the same rights as married couples. In contrast,

married couples are afforded rights automatically as a result of the institution. Unmarried partners have no automatic duty of support, to acquire an interest each other's separate property and a cohabitee may not inherit intestate from the estate in the event of death of one of the partners. In Sweden, intimate relationships are treated similarly to married relationships, with the law applying the principle of "neutrality" with regard to its family laws. Several cases have emerged recently in South Africa which will provide a clearer understanding of the current state of the law.

The reason for undertaking this study is to illustrate the changing mores of society and the necessity of the law to keep up with these values. As South Africa has not yet passed its domestic partnership law it may be useful to compare it to Sweden in order provide South Africa with a possibly better approach. Sweden has passed laws on cohabitation and these have been in place for years. Thus we might still learn from them prior to our law being passed. Legislative and judicial activity have soared recently and it may be beneficial to look at another jurisdiction more carefully. These observations will be undertaken more comprehensively in the body of the thesis.



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## ACRONYMS AND ABBREVIATIONS

- Cohabitees Act Cohabitation Act 1 July 2003, SFS 2003:376.
- Domestic Partnerships Non-Formalised Cohabitation, Life Partnerships.
- Law Commission South African Law Reform Commission.
- RCMA Recognition of Customary Marriages Act 120 of 1998.
- The Bill Domestic Partnerships Bill in Government Gazette 14 January 2008.
- The Constitution Constitution of the Republic of South Africa, 1996.



## KEY WORDS

- Non-formalised cohabitation
- Domestic Partnership Recognition
- Comparison
- Law Reform
- Legislation
- Benefits
- Consequences
- Duty of support
- Marriage
- Introduction/amendment of legislation



CHAPTER 1 AN INTRODUCTION TO THE PROBLEM QUESTION AND THE  
DEFINITION AND SCOPE OF NON-FORMALISED COHABITATION IN SOUTH  
AFRICA AND SWEDEN

1. INTRODUCTION

The rights of cohabitantes were traditionally not recognised. The approach adopted by the law at the time with regard to the acknowledgement of cohabitation relationships can be explained with reference to a quotation by Napoléon, ‘Les concubins ignorent la loi, la loi ignore donc les concubins.’<sup>1</sup> This expression essentially meant ‘[c]ohabitants ignore the law, so the law ignores them.’<sup>2</sup> The quotation above was equally true in the case of South Africa as cohabitation relationships had no legal recognition and cohabitantes had no recourse after dissolution of the relationship. The status quo ante has however changed in many jurisdictions, such as South Africa and Sweden. Cohabitation, still regarded as ‘sinful’ not too long ago, is increasingly becoming a conventional fact of life if not the norm.<sup>3</sup> Many jurisdictions recognised the pressing need for accommodation of these relationships.

In light of the above, this chapter will provide the framework from which the problem question and introduction to South African and Swedish law will be developed. The main focus of this chapter is to provide a background on cohabitation in South Africa and Sweden by examining the definition and nature of cohabitation in these jurisdictions. What will follow is a discussion of cohabitation in Sweden.

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<sup>1</sup> Scherpe J ‘The Nordic countries in the vanguard of European Family Law’ 2010 *Stockholm Institution for Scandinavian Law* 274.

<sup>2</sup> Barlow A ‘Regulation of cohabitation, changing family policies and social attitudes: A discussion of Britain within Europe’ (2004) 26 (1) *Journal of Law and Policy* 58.

<sup>3</sup> Scherpe J 2010 274.

## 2. AN EXPLANATION OF COHABITATION IN SWEDEN

Marriages in Sweden take place either in a civil or religious ceremony. Same-sex couples are also allowed to marry in Sweden.<sup>4</sup> One of the first countries to recognise the rights of cohabitants was Sweden. Sweden's cohabitation laws developed as early as 1973 and have a long history of implementation of rights for cohabitants.<sup>5</sup> It speaks volumes of the effectiveness, practicality and applicability of such laws, for them to have been implemented over such an extensive period of time. The nature of cohabitation in Sweden will be discussed next.

There are many arguments as to the nature of cohabitation in Sweden. The most common are those arguments held by Scherpe, who suggests that there is no single reason for the prevalence of cohabitation. According to Scherpe, '[o]ne of the great social trends in Western countries is that more and more couples live together without being married.'<sup>6</sup> The author goes on to say that '... [t]he reasons for cohabiting are manifold, ranging from informed decisions against the legal consequences to indifference to or ignorance of these consequences. Some couples see cohabitation as an alternative to marriage (or registered partnerships), some as 'trial period' that will eventually lead up to a more formalised family union, and for some cohabitation just 'happens' without any serious consideration of legal consequences.'<sup>7</sup>

I agree with Scherpe, that we live in a diverse and ever changing society, where new trends occur daily, cohabitation being just one of them. It is up to legislatures to stay abreast of current developments and ensure their laws adequately protect those in such circumstances.

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<sup>4</sup> Amendments to the Sweden Marriage Code (1987) which came into effect on 15 May 2009, allowed same-sex couples to get married.

<sup>5</sup> Cohabitees Mutual Residence (Lag) 1973:651.

<sup>6</sup> Scherpe J 2010 note 1 above at 274.

<sup>7</sup> Scherpe J 2010 note 1 above at 274.

Sweden acknowledges non-formalised cohabitation in terms of the Cohabitation Act.<sup>8</sup> The Act defines cohabitation as ‘two persons living permanently together as a couple and having a joint household.’<sup>9</sup> When the law or regulation refers to cohabiting couples, people living together in a marriage-like relationship or whenever similar expressions are used, it is used to denote cohabitants referred to above.<sup>10</sup> The law applies only to cohabiting couples where neither of the partners are married, and it regulates the cohabitants’ joint dwelling and household goods.<sup>11</sup> It can be concluded that the law protects couples living in situations reminiscent of marriage and the scope of the protection is confined to the cohabitants’ property interests.

The Act validates the significance of cohabitation as a family form and its relevance in society.<sup>12</sup> The Act clearly stipulates the consequences of entering into such a relationship and the effects of termination on cohabitee property and household goods. Cohabitants are in a position to be more aware of the legal status of their relationship as well as their rights and responsibilities when involved in such a relationship. Couples in non-formalised cohabitation relationships are recognised as being partners to a legal union in Sweden. In addition to having a dedicated Act regulating cohabitation, Sweden adheres to the principles of neutrality and gender equality in its laws and policies. These concepts will briefly be considered below.

The Swedish legislature has adopted a neutral stance with regard to its Family Laws. Agell states that Swedish family law has long had the objective of reaching out to all families regardless of whether the parties had formalised their relationship through a wedding

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<sup>8</sup> Cohabitation Act 1 July 2003, SFS 2003: 376.

<sup>9</sup> Cohabitation Act, s 1.

<sup>10</sup> Cohabitation Act, s 1, para 2.

<sup>11</sup> Cohabitation Act, s 1, para 3.

<sup>12</sup> Agell A ‘The Swedish legislation on marriage and cohabitation: A journey without a destination’ in Schmidt F (ed) *Scandinavian Studies in Law* (1980) 21-The Swedish Legislation has gone furthest in applying a definite ‘legal-political’ approach to non-marital cohabitation.

ceremony.<sup>13</sup> This principle suggests that one form of intimate relationship is not regarded as more significant than the other. Neutrality goes hand in hand with gender equality.

Gender equality has also been diligently promoted by family laws in Sweden. Sweden is characterised by a transformation of family patterns towards a more flexible approach to family formations, including both opposite-sex and same-sex relationships within the protection of the law. These concepts will be extensively covered in Chapter 5. A discussion of cohabitation within South Africa will be explored next.

### 3. AN EXPLANATION OF COHABITATION IN SOUTH AFRICA

The same appreciation of cohabitation displayed in Sweden is not the case for South Africa. South Africa has, however, come a long way from the rigid family structures which existed in the past. In South Africa, there is no legal definition of 'living together'. 'Cohabitation...lacks a precise definition and clear terminology.'<sup>14</sup> It generally means to live together as a couple without being married. Mashau states that defining cohabitation is complex and its definition takes on two forms, firstly where 'cohabitation is more of a testing ground for marriage, or a step on the way to marriage, much like dating and engagement.'<sup>15</sup> Secondly, it can also be defined as two people living together in a family framework analogous to marriage, without having gone through a ceremony of marriage.<sup>16</sup> This research paper examines the Domestic Partnerships Bill<sup>17</sup> to provide a clearer understanding of the planned regulation of cohabitation in South Africa.

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<sup>13</sup> Agell A (1980) 9, 30.

<sup>14</sup> Himonga C and du Bois F 'Life Partnerships' in du Bois F (ed) *Wille's Principles of South African Law* (9ed) (2009) 363.

<sup>15</sup> Mashau T 'Cohabitation and pre-marital sex amongst Christian youth in South Africa today: A missional reflection' 2011 *HTS: Theological Studies* 2.

<sup>16</sup> Mashau T 'Cohabitation and pre-marital sex amongst Christian youth in South Africa today: A missional reflection' 2011 *HTS: Theological Studies* 2.

<sup>17</sup> Draft Domestic Partnership Bill No 30663 in Government Gazette 14 January 2008.

However, there is case law in South Africa which provides guidance on domestic partnerships. Protections have been afforded financially where the courts have recognised universal partnerships, provided certain requirements are satisfied. The requirements will be discussed in greater detail in the substantive part of the thesis. The courts, too, have upheld express contracts which may take the form of a written partnership agreement between cohabitees. More recently, contracts which are implied from the conduct of the parties have also been upheld. The current state of affairs dictates that same-sex domestic partnerships enjoy significantly greater legal recognition and protection than their heterosexual counterparts.<sup>18</sup> My study will address these judicial decisions by the courts. My research paper examines some of the older judgments but also analyses later judgements to highlight the current state of the law in South Africa. This research paper will also explore the Constitution's strong incentive towards equality.

South Africa adheres to the concept of equality before the law and equal protection and benefit of the law.<sup>19</sup> The question to be answered is whether the discrimination against heterosexual cohabitees is unfair. Although marriage is an important social institution constitutionally and internationally, it does not mean domestic partnerships cannot co-exist with marriage, thus still upholding the sanctity of marriage and providing protection to unmarried cohabiting couples. Arguments for and against this statement with reference to case law will be argued in the substantive parts of the thesis. The courts have recognised broadened family formations and this could be step in the right direction as far as future recognition of domestic partnerships is concerned.

#### 4. PURPOSE OF RESEARCH

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<sup>18</sup> De Vos P and Barnard J 'Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections of an ongoing saga' 2007 *South African Law Journal* 462.

<sup>19</sup> Constitution of the Republic of South Africa, 1996, s 9 (1).



This paper will explore how non-formalised cohabitation relationships are protected in South Africa and whether the Swedish model of statutory regulation could provide a solution for South Africa. In light of the above, this paper will examine the existing measures in place to regulate non-formalised cohabitation in South Africa and Sweden and whether the model followed in Sweden could be adopted in South Africa.

There is no dedicated statute regulating non-formalised cohabitation in South Africa, although a Bill was prepared some years ago. The law as it stands today in South Africa is unsatisfactory, because it does not place cohabitation on the same footing as partners in a marriage or civil union, thus reducing it to a second-class institution. Therefore it may be useful to compare the South Africa position to another jurisdiction for guidance. Sweden has a statute regulating cohabitation, thus South Africa may learn from Sweden prior to its domestic laws being passed.

The reason for undertaking this research is to illustrate the changing mores of society and the necessity of the law to keep up with these values. There has been a rise in the number of people cohabiting and cases being heard in courts upon dissolution. Furthermore, it is an area of contemporary legislative activity in a number of jurisdictions and other options may be available for South Africa to fill the lacuna in the law.

My hypothesis is that the approach in Sweden may provide South Africa with options before a decision is made with regard to cohabitation legislation. I will argue that South Africa should adopt an approach similar to that utilised in Sweden.

## 5. RESEARCH QUESTION

My research question is whether the Swedish model of statutory regulation of non-formalised cohabitation could provide a solution for South Africa as there is no statutory law in place

regulating this aspect of our law. In order to answer the question, this paper will explore and provide preferred options based on analysis regarding the regulation of non-formalised cohabitation in South Africa and Sweden. How the current law in these jurisdictions deals with non-formalised cohabitation will be examined. A comparison will be made between the two systems with regard to the consequences stemming from this relationship. The South African legislature could look at the approach adopted in Sweden more closely and elect whether to adopt a similar approach.

## 6. LITERATURE REVIEW/ METHODOLOGY

In accounting for the published works on cohabitation, this literature review will categorise the writings of other authors on this subject under the headings South Africa and Sweden.

### 6.1 SWEDEN

Various writers have commented on the position of cohabitants in Sweden. Björnberg states that cohabitation is a less stable relationship than marriage, as cohabitation is more likely to end in dissolution than marriage is.<sup>20</sup> However, this article is limited to a discussion upholding marriage as a stable and sacred union. There is inadequate comprehensive insight into what other forms of family may undertake functions analogous to those performed in a marriage. Sobotka and Toulemon noted that Sweden is the only society where cohabitation as a family-building institution evolved to be indistinguishable from marriage.<sup>21</sup> By extending protections to these broadened family formations, Sweden recognised cohabitation as a stable family unit.

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<sup>20</sup> Björnberg U 'Cohabitation and marriage in Sweden-Does family form matter?' (2001) 15 (3) *International Journal of Law Policy and the Family* 351.

<sup>21</sup> Sobotka T and Toulemon L 'Changing family and partnership behaviour: Common trends and persistent diversity in Europe' in Freijka T, Sobotka T and Hoem J (eds) *Childbearing Trends and Policies in Europe* (2008) 101.

A common argument that also arises is one held by Aeschlimann, where he states that the Cohabitation Act forces certain rules on unmarried couples. Considering the basic differences between marriage and cohabitation, the legal effects of a cohabitation relationship cannot be far-reaching.<sup>22</sup> The author goes on to say that cohabitees have chosen not to marry and that their freedom to choose their form of family life should be respected.<sup>23</sup> The writer does not extend his research to the realities faced by many unmarried couples and the gendered-power relations present in many cohabitation relationships. Women are often the most vulnerable partners and may not have the ability to decide whether to get married or determine the financial circumstances applicable to the relationship; thus extending the scope of protection to non-formalised cohabitation relationships may alleviate the vulnerable position of many partners.

Finally, arguments also exist around gender neutral marriage in Sweden. Sorgjerd argues that marriage has been reduced to a secular contractual agreement without any remaining ethical value.<sup>24</sup> However, the article is limited to discussing the significance of marriage in society and does not take cognisance of the fact that gender neutral marriage finally reinforces equality between opposite-sex and same-sex cohabitants. Nordstrom notes that gender neutral marriage was a defining moment for Sweden as true gender equality had been a goal of Sweden for a long time.<sup>25</sup> The gains made are significant and ensure that Sweden is regarded as a world leader when it comes to gender equality.

## 6.2 SOUTH AFRICA

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<sup>22</sup> Aeschlimann S 'Financial compensation upon the ending of informal relationships- A comparison of different approaches to ensure the protection of the weaker partner' in Boele-Woelki K (ed) *Common Core and Better Law in European Family Law* (2005) 344.

<sup>23</sup> Aeschlimann S (2005) 344.

<sup>24</sup> Sorgjerd C 'Neutrality: The death or the revival of the traditional family?' in Boele-Woelki K, Braat B and Curry-Summer I (eds) *Common Core and Better Law in European Family Law* (2005) 350-351.

<sup>25</sup> Nordstrom BJ *Culture and Customs of Sweden* (2010) 49.

In assessing non-formalised cohabitation in South Africa, arguments exist which allege that supportive and protective measures of family law are not available to couples in domestic partnerships. Schafer notes that domestic partnerships do not enjoy any distinct legal status.<sup>26</sup> The views of the author at the time predate the Civil Union Act which provides for same-sex and opposite sex couples to get married. The author relied primarily on the position of cohabitants pre-Civil Union Act, this limitation excludes the consideration as to how the legislative and judicial system has developed within the domestic partnership framework. However, Bakker finds that piecemeal recognition has been provided to domestic partnerships in legislation and by way of court decisions.<sup>27</sup>

Another most commonly utilised argument in denying cohabitants legal protection is one put forth by Didishe. The author supports the ‘choice’ argument and states that partners in a heterosexual life partnership can marry, but choose not to, and therefore it cannot be regarded as discriminatory to distinguish between spouses in a marriage and partners in a heterosexual life partnership.<sup>28</sup> However, the author failed to address the issue of vulnerable partners in a cohabitation relationship who may not have this ‘freedom of choice’. Goldblatt finds the ‘choice’ argument flawed. Thus, she concludes that gender inequality and patriarchy result in women lacking the choice freely and equally to set the terms of their relationships. It is precisely because weaker parties (usually women) are unable to compel the other partner to enter into a marriage or contract or register their relationship that they need protection<sup>29</sup> De

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<sup>26</sup>Schafer L ‘Marriage and marriage- like relationships: Constructing a new hierarchy of life partnerships’ 2006 *South African Law Journal* 626.

<sup>27</sup> Bakker P ‘Chaos in Family Law: A model for the recognition of intimate relationships in South Africa’ (2013) 16(3) *Potchefstroom Electronic Law Journal* 119.

<sup>28</sup> Didishe V ‘Legal recognition for non-nuclear families: Support for unmarried heterosexual partners’ (2012) *De Rebus* 26.

<sup>29</sup> Goldblatt B ‘Regulating domestic partnerships: A necessary step in the development of South African family law’ 2003 *South African Law Journal* 610, 616.

Vos<sup>30</sup> also addressed the plight of vulnerable women involved in domestic partnerships. My study too addresses this issue but goes further than De Vos in examining current case law which has to some extent ameliorated the position of vulnerable partners in domestic partnerships.

Arguments also exist as to the difference in treatment between heterosexual and same-sex couples. De Vos and Barnard write that same-sex life partners currently enjoy more comprehensive legal protection than heterosexual life partners.<sup>31</sup> Others, such as, Wood-Bodley are of the opinion that no anomaly exists when adopting a substantive approach to equality.<sup>32</sup> He puts forth the theory that the continued differentiation between same-sex and opposite-sex life partners as far as the law of intestate succession is concerned could be permitted if it is borne in mind that, despite the enactment of the Civil Union Act, ongoing homophobia implies that marriage (or civil partnership) is simply not an option for many same-sex couples.<sup>33</sup> This distinction, according to Smith, would be eliminated by applying a contextualised choice model. Smith notes that the fact that parties had not specifically elected to marry one another could not deprive one of them of a right to support and that this applies equally to same-sex and opposite-sex couples.<sup>34</sup> The author states that a request for support must always be based on the particular needs of the applicant and the respondent and their capacity to provide for themselves and each other, and that such an objective approach would remove the need for differentiating between same-sex and opposite-sex relationships.<sup>35</sup>

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<sup>30</sup> De Vos P 'Still out in the cold? The Domestic Partnership Bill and the (non) protection of marginalised women' in Sloth-Nielsen J and Du Toit Z (ed) *Trials and Tribulations, Trends and Triumphs. Developments in International, African and South African Child and Family Law* (2008) 140.

<sup>31</sup> De Vos P, Barnard J 'Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections of an ongoing saga' 2007 *South African Law Journal* 823.

<sup>32</sup> Wood-Bodley MC 'Establishing the existence of a same-sex life partnership for the purposes of the Intestate Succession Act' 2008 *South African Law Journal* 259, 260 (259–273)

<sup>33</sup> Wood-Bodley MC 'Same-sex couple discrimination in employment benefits: Where to now?' 2008 *South African Law Journal* 483.

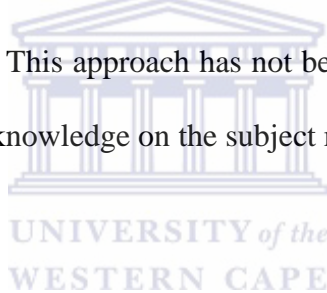
<sup>34</sup> Smith BS 'Rethinking Volks v Robinson: The implications of applying a 'contextualised choice model' to prospective South African Domestic Partnership legislation' (2010) 13 (3) *Potchefstroom Electronic Law Journal* 244.

<sup>35</sup> Smith BS (2010) 273.

However, neither of these writers have a broad scope in discussing how the domestic partnership situation in South Africa could be improved by looking at the treatment of same-sex and heterosexual cohabitants in another jurisdiction which could provide guidance.

Consideration as to how legislation, policies, and strategies were used to provide comprehensive protection to cohabitants in another jurisdiction and its relevance in contemporary South Africa is research not yet thoroughly conducted within the context of South African jurisprudence.

This research is unique in that instead of having a limited view on one jurisdiction; it embarks on a broader study which considers the nature of cohabitation in South Africa and Sweden. It encompasses a study into how these models of cohabitation have evolved and how the laws have responded to these changes. This approach has not been explored before and the author submits that this constitutes new knowledge on the subject matter.



## CHAPTER OUTLINE

A brief overview of the structure of this work is presented below.

Chapter 2 will involve the consideration of the current legal status and regulation of non-formalised cohabitation as a union in Sweden. The Cohabitation Act<sup>36</sup> which regulates cohabitation relationships will be considered. Aspects relating to property, reciprocal duty of support, ex post facto maintenance, and succession will be analysed. In understanding how this system works, further investigation will also be made into journal articles, books, statutes, websites and other sources relevant to support my study.

In Chapter 3 the main focus will be the examination of judicial decisions and constitutional issues prior to national legislation in South Africa. This chapter will also look at judicial

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<sup>36</sup> Cohabitation Act 1 July 2003, SFS 2003:376.

decisions surrounding universal partnerships and protections extended to opposite-sex partners. Particular attention will be paid to case law with the view of emphasising the difference in treatment between same-sex and opposite sex relationships.

Chapter 4 will focus on the current legal status and regulation of non-formalised cohabitation by national legislation in South Africa. This chapter will examine the Civil Union Act<sup>37</sup> and the Domestic Partnerships Bill<sup>38</sup> and conclude that there is a need for comprehensive legislation to regulate domestic partnerships in order to protect these relationships. Aspects relating to property, reciprocal duty of support, maintenance, and succession will be analysed. Recent and relevant authority will be considered.

Chapter 5 will contain arguments establishing the statutory model of cohabitation in Sweden as a good example and reasons it should be a yardstick for South Africa. Emphasis will be paid to the principles of neutrality and gender equality applicable in Sweden. Reference will be made to the writings of authors and relevant scholarly articles.

Finally, chapter 6 contains recommendations for introduction/ amendment of legislation in South Africa to provide for cohabitation and its consequences.

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<sup>37</sup> Civil Union Act 17 of 2006.

<sup>38</sup> Draft Domestic Partnership Bill No 30663 in Government Gazette 14 January 2008.

## CHAPTER 2: THE CURRENT LEGAL STATUS AND REGULATION OF NON-FORMALISED COHABITATION IN SWEDEN

### 1. INTRODUCTION

The purpose of this chapter is the detailed examination of the Cohabitation Act and its regulation of non-formalised cohabitation relationships. The current regulation of both opposite-sex and same-sex relationships will be discussed. An exploration of aspects relating to cohabitee property, reciprocal duty of support, maintenance and succession will be analysed. A brief explanation of the arguments against and in favour of the regulation of non-formalised cohabitation will be discussed at the outset.

#### 1.1 ARGUMENTS AGAINST THE LEGAL RECOGNITION OF COHABITATION RELATIONSHIPS

Arguments supporting the contention that cohabitation relationships should not be granted legal recognition will be discussed. One of the main arguments against the regulation of cohabitation is that people living in a free union should not have support obligations towards each other. This argument is plausible; however, it can also be argued that the motivation for the support claim is the interdependence cohabitees have on one another as a result of the cohabitation. Although Sweden has a dedicated statute in place regulating cohabitation, there are still arguments against the regulation of cohabitation. These arguments are considered below.

The traditional concept of the family was composed of a man and a woman married in terms of civil law and their children. This notion of the family is still applicable and considered common in Sweden today.<sup>39</sup> Sweden has regulated cohabitation more comprehensively than

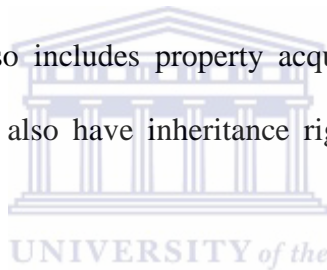
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<sup>39</sup> Beinaroviča O 'The historical development of regulation of non-marital cohabitation of heterosexual couples and its effect on the creation of modern Family law in Europe' 2010 *University of Latvia* 28 (unpublished article) available online at



other countries. Many contend that the regulation of cohabitation weakens marriage as many couples opt to enter into cohabitation relationships. However, the regulation of cohabitation cannot be regarded as a threat to the institution of marriage as it has its own peculiar rules by which it is regulated.

This argument is untenable if one takes into account that cohabitees have to establish that their relationship is similar to marriage in order to obtain rights and obligations associated with marriage. It would be incorrect to suggest that the same rules apply to cohabitees as for spouses. Married couples still have more rights and enjoy more protection than those cohabiting. The matrimonial property system in Sweden that applies to spouses provides that all property is shared equally. This is not limited to the residence and household goods as in the case of cohabitation, but also includes property acquired before marriage or through inheritance or gift. The spouses also have inheritance rights and maintenance obligations towards each other.



In light of the above, it can be understood that marriage retains its privileged status. Scherpe contends that marriage in Sweden survived law reforms to the institution. She states that ‘...the legal framework of marriage has changed significantly over the centuries. Each and every reform of that legal framework has been accompanied by fears that the new law would change (or even destroy) the ‘nature’ of marriage forever, whatever that is deemed to be. But the institution of marriage has survived all these changes.’<sup>40</sup> Married couples still enjoy benefits superior to those in cohabitation relationships. The ‘rights gap’ between marriage and cohabitation is much narrower in Sweden than in other jurisdictions. It can be seen that despite changes to the traditional concept of the family, marriage in Sweden still has a place

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[http://www.tf.vu.lt/dokumentai/Admin/Doktorant%C5%B3\\_konferencija/Beinarovica.pdf](http://www.tf.vu.lt/dokumentai/Admin/Doktorant%C5%B3_konferencija/Beinarovica.pdf) (accessed on 23 April 2015)

<sup>40</sup> Scherpe J ‘The legal recognition of same-sex couples in Europe and the role of the European Court of Human Rights’ (2013) 10 *The Equal Rights Review* 86.

within family law and the rights accompanying marriage are more advantageous to spouses than those rights associated with cohabitation relationships. The argument that cohabitants are free to marry will now be discussed.

The focus of this section is to examine the ‘choice’ argument and establish whether this argument is established or is completely unfounded. It is held that marriage is an option available to cohabiting couples, thereby justifying the limited protection afforded to non-formalised cohabitation relationships. It is further held that cohabitants are independent individuals and are responsible for their own financial future even when living with someone else.<sup>41</sup> These arguments are flawed because many cohabitees may not have the ‘choice’ to get married. Sverdrup states that it takes two people to marry and the reluctant party has the right to veto.<sup>42</sup> A cohabitee may not want to get married in order to escape the obligations marriage would impose. The resultant consequence of this lack of ‘choice’ therefore is that the vulnerable partner loses the protection marriage affords. It can be observed that marriage is not an option readily available to everyone, often leaving one cohabitee in a financially weaker position. What will follow is a discussion highlighting arguments in favour of regulating non-formalised cohabitation relationships.

## 1.2 ARGUMENTS IN FAVOUR OF THE LEGAL RECOGNITION OF COHABITATION RELATIONSHIPS

There are arguments supporting the regulation of cohabitation. One of the founding arguments in favour of the regulation of cohabitation is that cohabitation is a normal fact of life and its prevalence requires regulation and protection from the law which embraces diverse family compositions. A second commonly employed argument is that cohabitants

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<sup>41</sup> Sverdrup T ‘Statutory regulation of cohabiting relationships in the Nordic countries: Recent developments and future challenges’ in Boele-Woelki K, Dethloff N and Gephart W (eds) *Family Law And Culture In Europe: Developments, Challenges And Opportunities* (2014) 68.

<sup>42</sup> Sverdrup T (2014) above note 5 at 67.

become interdependent on one another and the financial situation of the cohabitantes is undoubtedly affected during the subsistence of cohabitation and after the relationship. Arguments in favour of the regulation of cohabitation relationships will now be discussed in further detail.

Emphasis was shifted from the creation of a family only through marriage. The main priority in family relations was given to the fulfilment of emotional needs.<sup>43</sup> The development and rise of cohabitation reflects the changed political, economic and social position of women. This has strongly challenged the appropriateness of the traditional patriarchal nature of marriage.<sup>44</sup> Women are also more financially independent now and voluntarily enter into cohabitation relationships. Scherpe<sup>45</sup> states that any regulation of cohabitation finds itself between two extremes, on the one hand, the need to protect the weaker partner and respect for private autonomy. There is a negative choice, where couples choose not to marry and a positive choice, where couples choose to cohabit. This positive choice to cohabit can and should also have consequences. Couples who voluntarily cohabit should be encompassed in the protection provided to other formal family compositions. The regulation of cohabitation in order to protect vulnerable partners will be considered next.

The argument that individuals who enter into relationships outside the institution of marriage should be responsible for their own relationships does not stand the criticism, especially if children are involved.<sup>46</sup> The main argument in favour of regulation relates mainly to women

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<sup>43</sup> Beinaroviča O 'The historical development of regulation of non-marital cohabitation of heterosexual couples and its effect on the creation of modern Family law in Europe' 2010 *University of Latvia* 32 (unpublished article).

<sup>44</sup> Barlow A 'Regulation of cohabitation, changing family policies and social attitudes: a discussion of Britain within Europe' (2004) 26 (1) *Journal of Law and Policy* 59.

<sup>45</sup> Scherpe J 'Protection of partners in informal long-term relationships' 2005 *International Law Forum Du Droit International* 210.

<sup>46</sup> Beinaroviča O 'The historical development of regulation of non-marital cohabitation of heterosexual couples and its effect on the creation of modern Family law In Europe' *University of Latvia* note 30 above..

who become financially dependent on the other cohabitee, especially if the relationship lasted for a long period.

Many women are homemakers or work less to assume responsibility for childcare, often earning less than their partners. Sverdrup states that cohabitation forms a ‘work unit, consumption and investment unit’ and that the financial position of one party cannot be unaffected by that of the other.<sup>47</sup> The author goes on to say that the most typical example of this is when one partner undertakes more ‘unprofitable’ tasks than the other, leaving him or her with no appreciable assets after the end of the relationship.<sup>48</sup> In addition to the protection needed upon separation, cohabitees also require protection in the event of death of one of the cohabitees. With a longer cohabitation relationship that terminates through death comes more responsibility to protect the surviving partner, as cohabitees are likely to have been reliant on one another for an extensive period of time thus necessitating protection. Scherpe states that ‘... [p]artners of informal long-term relationships are not strangers, yet the law often treats them as such, ignoring the interdependencies that are particularly strong when the couple has children. These interdependencies and vulnerabilities are often of the same character as in marriage and it seems justifiable to treat them alike...’<sup>49</sup> There needs to be a reorganisation and more importance placed on the functions cohabitants perform. The law currently regulating cohabitation relationships will be addressed in the following section.

## 2. THE CURRENT REGULATION OF OPPOSITE-SEX AND SAME-SEX NON-FORMALISED COHABITATION RELATIONSHIPS

### 2.1 BACKGROUND ON OPPOSITE-SEX AND SAME-SEX LEGISLATION

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<sup>47</sup> Sverdrup T ‘Statutory regulation of cohabiting relationships in the Nordic countries: Recent developments and future challenges’ in Boele-Woelki K, Dethloff N and Gephart W (eds) *Family Law And Culture In Europe: Developments, Challenges And Opportunities* (2014) 66.

<sup>48</sup> Sverdrup T (2014) 66.

<sup>49</sup> Scherpe J ‘Protection of partners in informal long-term relationships’ 2005 *International Law Forum Du Droit International* 211-212.

The default position in Sweden was regulated by the Sweden Marriage Code<sup>50</sup> which restricted marriage to a man and a woman who were of the marriageable age of eighteen. Section 1 of the Code initially read; '[m]arriage is concluded between a woman and a man. The two who have married one another become spouses.'<sup>51</sup> The Swedish legislature recognised that both opposite and same-sex cohabitants were faced with the same problems as married couples upon relationship breakdown. As early as 1973, a proposal was brought to the attention of the Swedish Parliament (Riksdag) to abolish the institution of marriage in favour of registered cohabitation for all couples.<sup>52</sup> This proposal did not come to fruition. However, more extensive statutory rules were to be implemented not too long after. The progression of regulation of opposite-sex and same-sex cohabitation relationships will now be dealt with respectively.

There has been some statutory minimum protection for the financially more vulnerable party for opposite-sex couples in terms of the Cohabitees Mutual Residence Act (Lag).<sup>53</sup> This Act made it possible for the courts to transfer tenancy or tenant-owner rights of a property to a partner who was most in need of the residence. The justification for the Act was to provide protection for the financially weaker partner, which were typically women who would take up homemaker roles whilst men would be the sole breadwinner.

In 1987 greater legal recognition was provided for cohabitants in terms of the Cohabitation (Joint Homes) Act.<sup>54</sup> The purpose of this Act was to afford the weaker party minimum protection upon termination of the relationship between the parties or in the event of death.<sup>55</sup>

This Act gave rights to cohabitants in relationships which resembled marriage. Parliament

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<sup>50</sup> Sweden Marriage Code (Aktenskapsbalken) 1987:230.

<sup>51</sup> Sweden Marriage Code (Aktenskapsbalken) 1987: 230, s 1.

<sup>52</sup> Motion to Parliament 1973: 1793.

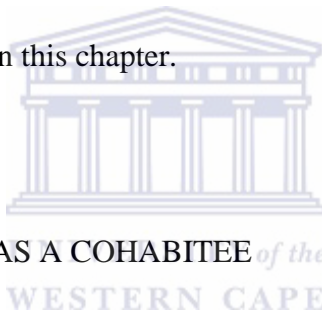
<sup>53</sup> Cohabitees Mutual Residence Act (Lag) 1973:651.

<sup>54</sup> Cohabitation (Joint Homes) Act 1987:232.

<sup>55</sup> Saldeen A 'Joint custody, special representative for children and cohabitees' property' in Bainham A (ed) *The International Survey of Family Law* (2001) 408.

acknowledged that same- sex relationships were also worthy of protection and that this protection should not be limited to opposite-sex cohabitants.

Same-sex relationships had come to be regarded as an acceptable form of family in Sweden.<sup>56</sup> The result was the enactment of the Homosexual Cohabitation Act.<sup>57</sup> With this Act, Sweden was one of the first countries in the world to regulate same-sex relationships. This Act ensured the equal treatment of same-sex couples on the same basis as heterosexual cohabitants. Subsequent to this Act, Sweden introduced same-sex partnerships in terms of the Registered Partnership Act.<sup>58</sup> All the legal effects of marriage were made applicable to registered partners. The Cohabitation (Joint Homes) Act and the Homosexual Cohabitation Act were repealed in 2003 and replaced with the Cohabitation Act of 2003, which will be discussed in further detail below in this chapter.



## 2.2 COHABITATION ACT<sup>59</sup>

### 2.2.1 CRITERIA TO QUALIFY AS A COHABITEE *of the* WESTERN CAPE

There are set criteria in order to qualify as a cohabitee. The Cohabitation Act serves as a tool for the regulation of cohabitation relationships and the most pertinent aspects are addressed below. Three criteria must be present in order to qualify as a cohabitee namely; ‘[t]he cohabitee must live with his or her partner on a permanent basis. The cohabitee and his partner must live together as a couple, which means that the parties live together in a relationship normally including a sexual relation. The cohabitants must share the household with his or her partner, which means shared chores and expenses.’<sup>60</sup> Registration and similar formalities are not required for the Act to apply. There is also no required time lapse for

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<sup>56</sup> Report of the Parliamentary Legislative Committee [Lagutskottets betakände] LU 1973: 20.

<sup>57</sup> Homosexual Cohabitation Act 1987: 813.

<sup>58</sup> Registered Partnership Act of 1993.

<sup>59</sup> Cohabitation Act 1 July 2003, SFS 2003:376.

<sup>60</sup> Scherpe J ‘The Nordic countries in the vanguard of European Family law’ 2010 *Stockholm Institute for Scandinavian Law* 274.

application of the Act to the respective opposite-sex and same-sex relationship. The rules of the Act merely begin to apply to the cohabitants. The Cohabitation Act eliminated many negative attitudes towards cohabitation.

The Act applies to both opposite-sex and same-sex cohabitants. This is confirmed by the choice of words in the definition section. Section 1 reads that ‘cohabitants mean two people who live together in a relationship as a couple and have a joint household.’<sup>61</sup> The implication of this section is therefore the elimination of any difference in the treatment of same-sex and opposite-sex cohabitants. Swedish legislation ‘...has responded to family restructuring by taking a deliberately functional approach based on social needs to both same and different sex cohabitation.’<sup>62</sup> While ensuring equality between opposite and same-sex couples, the Act intends to grant cohabitants’ rights analogous to those enjoyed by married couples.

The aim of the Act is to narrow the differences between married and unmarried couples. Spouses who are married in community of property establish an economic partnership. The same cannot be assumed for unmarried cohabitants. Therefore, the goal of the Act is to establish a property regime for unmarried cohabitants to limit the inequality between partners. The law in Sweden makes it clear what non-formalised cohabitation entails, who it involves and the nature thereof. The Cohabitants Act provides significantly greater protection and regulation to cohabiting couples than in South Africa.

Unlike in a civil marriage or civil partnership, it is important to note that the rules in the Act are not based on need, but instead apply a minimum protection for a partner on death or relationship breakdown.<sup>63</sup> ‘Such a scheme based principally on equality is of course appropriate where any inequalities suffered as a consequence of the cohabiting relationship

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<sup>61</sup> Cohabitation Act, s 1.

<sup>62</sup> Barlow A ‘Regulation of cohabitation, changing family policies and social attitudes: A Discussion of Britain within Europe’ (2004) 26 (1) *Journal of Law and Policy* 59.

<sup>63</sup> Barlow A ‘Regulation of cohabitation, changing family policies and social attitudes: a discussion of Britain within Europe’ (2004) 26 (1) *Journal of Law and Policy* 62.

are minimized and addressed by the welfare regime operated by the Swedish state....<sup>64</sup> Although the protection provided by the Act is limited, partners are not left impoverished due in part to the strong social welfare system in place. The protection provided to cohabitants in Sweden is much more extensive than that provided for couples in domestic partnerships in South Africa.

Special provision in law is made for non-formalised cohabitation relationships. The legal reaction to the spreading phenomenon of cohabitation in Sweden has been to increase the legal effects of cohabitation and to eliminate many of the features that distinguish legal marriage from cohabitation so as to not favour one above the other.<sup>65</sup>

This section demonstrated the positive law reforms made in Sweden with regard to the rights of cohabitants and the conscious choice made by the legislature to recognise and protect these family forms. What will follow is a discussion of how the law has responded to the consequences stemming from a non-formalised cohabitation relationship.

### 3. ASPECTS RELATING TO PROPERTY, RECIPROCAL DUTY OF SUPPORT, EX POST FACTO MAINTENANCE AND SUCCESSION

Against the background provided with regard to the Cohabitation Act, this section serves to illustrate the most important consequences which arise during the subsistence of cohabitation and after termination of the relationship. The property consequences of cohabitation relationships are covered extensively in the Cohabitation Act. It should be noted that the Act does not intend to create a second-class marriage which would compete with marriage in the

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<sup>64</sup> Barlow A (2004) 62.

<sup>65</sup> Merin Y *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States* (2010) 38.



traditional sense.<sup>66</sup> The scope of the Act is limited compared to marriage regulation, only providing rules on the division of the joint dwelling<sup>67</sup> and household goods.<sup>68</sup>

### 3.1.1 RESTRICTIONS ON THE RIGHT TO DISPOSE OF THE COMMON HOME

There are limitations placed on cohabitees who enter into cohabitation relationships. These restrictions on the right to dispose of the common home mirror those found in the Swedish Marriage Code.<sup>69</sup> A partner may not, without the other partner's consent, divest, lease or otherwise grant rights to a dwelling that constitutes cohabitation property or a dwelling that the other cohabitee may be entitled to take over; let, mortgage real property or leasehold where there is a residence that constitutes cohabitation property; pledge other property that includes a residence that constitutes cohabitation property or a dwelling that the other cohabitee may be entitled to take over; or divest or pledge household effects representing cohabitation property.<sup>70</sup> Consent to mortgage on real property or leasehold must be submitted in writing.<sup>71</sup> Consent is not required if the other cohabitee cannot give valid consent or if the consent cannot be obtained within a reasonable time.<sup>72</sup> The court may grant consent where the necessary consent is missing.<sup>73</sup>

If the property has been transferred without the consent or authorisation required, the party to whose detriment it is may approach the court for an order that the act is invalid and it shall revert back. The same rules apply where a partner, without consent, has transferred or pledged household goods. However, this shall not be invalidated if the new owner received

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<sup>66</sup> Sörgjerd C ‘‘Neutrality: The death or the revival of the traditional family?’ in Boele-Woelki K, Braat B and Curry-Summer I (eds) *Common Core and Better Law in European Family Law* (2005).

<sup>67</sup> Cohabitation Act, s 5 ‘Cohabitees joint home’ means, real property that the cohabitees or one of them owns or possesses under a leasehold agreement that is intended to be used as the joint home and is possessed primarily for that purpose.

<sup>68</sup> Cohabitation Act, s 6 ‘Household goods’ means furniture, domestic appliances and other internal chattels that are intended for the joint home

<sup>69</sup> Sweden Marriage Code (Aktenskapsbalken) 1987:230.

<sup>70</sup> Cohabitation Act 1 July 2003, s 23, para 1.

<sup>71</sup> Cohabitation Act, s 23, para 3.

<sup>72</sup> Cohabitation Act, s 23, par 4.

<sup>73</sup> Cohabitation Act, s 24.

the property in his/her possession in good faith.<sup>74</sup> Proceedings shall be brought before the court within three months of the other cohabitee learning of the disposition of the home or delivery of the household goods.<sup>75</sup> The application of abovementioned rules depend on the duration of the cohabitation relationship. The justification for the restrictions imposed is to protect partners in a relationship in circumstances where one acts to the detriment of the other. It provides a safety net in the event of unforeseen state of affairs in the relationship. The Swedish legislature accepted the pressing need to protect the economic interests of parties in cohabitation relationships and agreed that problems faced by cohabitees are not limited to spouses alone, thus justifying protection in terms of the Act. The division of property upon dissolution of the relationship will be addressed next.

### 3.1.2 DIVISION OF PROPERTY UPON SEPARATION

The principle of equal sharing is adhered to in Sweden in the event of termination of the relationship. Sweden is the only country where assets can be divided equally upon dissolution of the relationship.<sup>76</sup> The basis for legislation regulating property of cohabitees lies in the notion that cohabitees are independent individuals to begin with. Once the relationship has lasted for a period of time, the cohabitees become interdependent in relation to property and finances, amongst other aspects. It can be argued that the equal sharing of cohabitee property and household goods is prejudicial to the cohabitee who is in a stronger financial position than the other. However, one can understand the basis for the legislature's intention when drafting the Cohabitation Act in that manner in order to protect the weaker partner.

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<sup>74</sup> Cohabitation Act, s 25, para 1.

<sup>75</sup> Cohabitation Act, s 25 para 2.

<sup>76</sup> Sverdrup T 'Statutory regulation of cohabiting relationships in the Nordic countries: Recent developments and future challenges' in Boele-Woelki K, Dethloff N and Gephart W (eds) *Family Law And Culture In Europe: Developments, Challenges And Opportunities* (2014) 65.

Sweden has a fixed rule for the division of property and it has proved to be the most effective way of regulating cohabitation relationships.<sup>77</sup> The Act gives limited protection to unmarried couples where property was acquired by either party for mutual use during the subsistence of the cohabitation relationship. The rules on division of property do not apply where one partner moved in with the other, regardless of whether they shared debts and other costs. The rules would however apply if such property was sold for the purpose of purchasing a joint household or goods.<sup>78</sup> ‘Seen in the light of the cohabitants’ contributions, the requirement that the family home must be ‘acquired for joint use’, aims both too low and too high. Substantial discrepancies may arise between the cohabitants’ contributions, on the one hand, and what they are left with upon termination, on the other.’<sup>79</sup> This could be because a partner in a cohabitee relationship may view his or her contribution as being more substantial than the other and vice versa, resulting in disagreements with regard to the division of property. The procedures regarding division of property are dealt with next.

The procedure for the division of property is also provided for in the Act. When cohabitation ceases for any other reason than if cohabitees marry the other, at the request of the cohabitees the cohabiting property is divided between them by the division of property. The net value of the cohabitee property is divided. The partner who owns the most property may choose whether equalisation takes place by payment of a lump sum or transfer of assets of equivalent value. If no payment is made, the other cohabitant is entitled as far as possible, to any property that is not manifestly inappropriate for the cohabitant.<sup>80</sup> The cohabitee with the greatest need of the home can be granted the right to take over the dwelling when the cohabitation ends, even if it is owned by the other cohabitee alone, on the condition that the

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<sup>77</sup> Sverdrup T ‘Statutory regulation of cohabiting relationships in the Nordic countries: Recent developments and future challenges’ in Boele-Woelki K, Dethloff N and Gephart W (eds) *Family Law And Culture In Europe: Developments, Challenges And Opportunities* (2014) 72.

<sup>78</sup> South African Law Reform Commission (Project 118) *Report on Domestic Partnerships* (2006) 202.

<sup>79</sup> Sverdrup T (2014) at 69.

<sup>80</sup> Cohabitation Act, s 17 para 1.

property is held by lease or tenant ownership. If the spouses do not have children, this applies only if there are strong reasons for it.<sup>81</sup> Cohabitation property is equally shared regardless of who purchased it. This is held by some to be one of the shortcomings of the Act as the non-owner has a right to share in the value of the property when the relationship ends. Division of property must be based on property relations on the date the relationship ended.<sup>82</sup> The request for division of property shall be made no later than one year after the relationship ended.<sup>83</sup> Division of property rules are based on those found in the Marriage Code.<sup>84</sup>

In addition to the division of property rules, there are also exceptions to equal sharing of cohabitee property. A possible derogation from the equal division rule was introduced, where the application of the rule appeared to be unreasonable. In addition, the rules of the Act can be excluded by contract.<sup>85</sup> Prospective cohabitants may agree that a division of property should not be made or that certain property be excluded from the property division.<sup>86</sup> The agreement must be in writing and signed by prospective cohabitants.<sup>87</sup> Cohabitation contracts may cover various issues and be concluded at various times (before, during or after cohabitation relationship). Parties' financial affairs may be regulated during the relationship and make provision for the parties' financial affairs on separation.<sup>88</sup> Another exception usually relates to the short duration of the relationship. If an equal division of assets would lead to an unreasonable result for the cohabitant who owns most of the divisible assets, the settlement can be adjusted so that a smaller portion or no assets at all are divided.<sup>89</sup> In some

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<sup>81</sup> Cohabitation Act, s 22 para 1.

<sup>82</sup> Cohabitation Act, s2, para 1.

<sup>83</sup> Cohabitation Act, s22.

<sup>84</sup> Sweden Marriage Code of 1987 (Äktenskapsbalken).

<sup>85</sup> Saldeen A 'Cohabitation outside marriage or partnership' in Bainham A (ed) *The International Survey of Family Law* (2005) 504.

<sup>86</sup> Cohabitation Act, s 9 para 1.

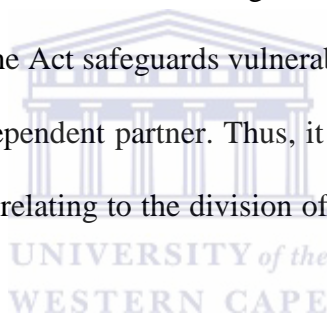
<sup>87</sup> Cohabitation Act, s 9 para 2.

<sup>88</sup> Great Britain Law Commission *Cohabitation: The Financial Consequences of Relationship Breakdown; a Consultation Paper* The Stationery Office (2006) 46

<sup>89</sup> Cohabitation Act, s 15.

special cases, adjustments can be made where partners retain their own property.<sup>90</sup> The property excluded in the division of property is addressed below.

Property acquired by one cohabitee through inheritance, will or gift does not form part of the division of property.<sup>91</sup> Property used primarily for recreational purposes and property acquired before the cohabitation began are excluded.<sup>92</sup> The Act does not cover other property, such as bank assets, shares, cars, etcetera. Assets like that fall outside the division of property. ‘The main rule therefore is that the cohabitee owns and manages his or her property himself and is responsible for his/her own debts.’<sup>93</sup> This section displays the limited scope of protection provided by the Act as assets subject to the division of property are much more extensive for married couples than cohabitees. The goal is for cohabitees to maintain some independence from each other. The Act safeguards vulnerable partners and in addition, it also protects the financially more independent partner. Thus, it allows both to survive financially after the relationship ends. Rules relating to the division of property in the event of death are addressed in the next section.



### 3.1.3 DIVISION OF PROPERTY UPON DEATH OF ONE OF THE PARTNERS

With a longer cohabitation relationship, division of property may extend beyond cohabitee property thus heightening protection needed by cohabitees. The same rules for division of property applicable upon separation apply in the event of death. The rule of sharing equally applies in this instance. The lengthier the cohabitation, the more likely the shared economy

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<sup>90</sup> South African Law Reform Commission (Project 118) *Report on Domestic Partnerships* (2006) 201.

<sup>91</sup> Saldeen A ‘Cohabitation outside marriage or partnership’ in Bainham A (ed) *The International Survey of Family Law* (2005) 506.

<sup>92</sup> Couples in Europe ‘What does the law provide for the property of registered and non-registered partners’ available at <http://www.coupleseurope.eu/en/sweden/topics/8-what-does-the-law-provide-for-the-property-of-registered-and-non-registered-partners/> (accessed on 27 August 2014) 1.

<sup>93</sup> Reich-Sjögren M ‘Dealing with Cohabitation in Sweden’ available at [http://www.ccbe.eu/fileadmin/user\\_upload/document/Family\\_law\\_Conferencebxl\\_2008/Speeches/EN\\_Reich\\_Sjoergen.pdf](http://www.ccbe.eu/fileadmin/user_upload/document/Family_law_Conferencebxl_2008/Speeches/EN_Reich_Sjoergen.pdf) (accessed on 20 April 2014) 3.

extends beyond joint dwelling and household goods.<sup>94</sup> ‘...cohabitees might, for example, purchase a car or a holiday residence together, without really considering the ownership conditions or how much each of them has to pay for the assets....’<sup>95</sup> Therefore along with a lengthier cohabitation relationship, the need for economic protection increases. This section illustrated the rules regarding division of property and the need to ensure equality upon dissolution of the relationship. A longer period of cohabitation has an effect on the amount of assets divided. This section further presented exceptions to the principle of equal sharing in certain circumstances. The next section relates to reciprocal duty of support and ex-post facto maintenance.

### 3.2 RECIPROCAL DUTY OF SUPPORT AND EX-POST FACTO MAINTENANCE

Unlike married couples and civil partners there is no duty during or after the relationship on cohabitees to support each other financially. Cohabitees can however enter into an agreement to regulate this aspect of their relationship. ‘...unmarried couples (both different-sex and same-sex) can regulate individual aspects of their cohabitation within the framework of contracts e.g. concerning maintenance or inheritance rights.’<sup>96</sup> Therefore, it is necessary for cohabitants to regulate their affairs through a cohabitation agreement to ensure protection for them where the law has not provided such security.

The justification for non-protection is that parties are free to marry and if they desired legal obligations to flow from their relationship it should have been solemnised by marriage. ‘In Sweden, the argument professed has been that it would not correspond to public opinion if

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<sup>94</sup> Walleng K ‘The Swedish Cohabitees Act in today’s society’ in Boele-Woelki K, Dethloff N and Gephart W (eds) *Family Law And Culture In Europe: Developments, Challenges And Opportunities* (2014) 100.

<sup>95</sup> Walleng K (2014) 100.

<sup>96</sup> Wintemute R and Tennesson Andenaes M *Legal Recognition of Same-Sex Relationships: A Study of National, European and International Law* (2001) 535.

persons living in a free union would have support obligations to one another....<sup>97</sup> However, it could be argued that the reason for having a support claim is the dependency created by the cohabitation itself.<sup>98</sup> Cohabitees also have no maintenance obligation towards each other, even after a very long relationship. Continuing support of a former partner is very rare in Sweden, even in the event of divorce, given the underlying assumptions that individuals are responsible for their own support.<sup>99</sup> Individuals are seen as being capable of supporting themselves and being economically independent after dissolution of the relationship or death of the partner.

This line of reasoning can be challenged as cohabitation creates interdependencies during the relationship and interdependencies which extend after termination of the relationship. The argument that supports the continuation of maintenance for ex-spouses is equally true for cohabitants. The argument suggests that the economic importance of the family is not abolished after marriage, thus maintenance obligations between former spouses should continue to exist.<sup>100</sup> Sufficient safeguards should be provided by the law to extend maintenance obligations to cohabitants. What will follow is a discussion of succession concerning cohabitation relationships.

### 3.3 SUCCESSION

Married couples are considered spouses and are allowed to inherit from one another testate or intestate. Cohabitees have no automatic right to inherit from one another. If they are to inherit from one another in the event of death, they must make a will. In the event of death of one of

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<sup>97</sup> Agell A 'Family forms and legal policies a comparative view from a Swedish observer' 1999 *Stockholm Institute for Scandinavian Law* 200.

<sup>98</sup> Agell A 1999 200.

<sup>99</sup> Carlson AC *The Swedish Experiment in Family Politics* (1989)228.

<sup>100</sup> Paskalia V *Free movement, social security and gender in the EU* (2007) 291.

the partners, the surviving partner may request application of the Act as a cohabitee may not inherit intestate.<sup>101</sup> The Act, however, provides some protection for a surviving cohabitee.

The surviving partner has the right to demand division of property covered by the Act in the same way as if a voluntary breakup had taken place. The surviving partner always has the right to a minimum value share of the joint home and household goods.<sup>102</sup> The Act gives the surviving partner up to ten thousand dollars and more than half of the value of the dwelling and household goods before being distributed amongst the deceased's heirs.<sup>103</sup> It should be noted that cohabitees do not have the same rights as married couples with regard to succession. The Act provides limited protection to the surviving partner. It is imperative that if cohabitees wishing to regulate the consequences of their relationship conclude a cohabitation agreement or make a will. This section explained the provision made in the Act for the surviving partner, thus alleviating the position of the left behind partner in the event where no provision was for him/her were made. The grounds for termination of a cohabitation relationship will now be discussed.

#### 4. TERMINATION OF A COHABITATION RELATIONSHIP

A cohabitation relationship ceases if the cohabitees or either of them marries, if they separate or if one of them dies.<sup>104</sup> The grounds for termination are developed from the rules for termination found in the Sweden Marriage Code. The South African Law Reform Commission did a comparative study with Sweden and stated in its report that in Sweden a cohabitee relationship ends if 'one or both cohabitees enter into matrimony or a registered partnership, one of the cohabitees dies, one of the cohabitees applies to the District Court for

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<sup>101</sup> Agell A 'Family forms and legal policies a comparative view from a Swedish observer' 1999 Stockholm Institute for Scandianvian Law 200.

<sup>102</sup> Cohabitation Act, s 18, para 1-3.

<sup>103</sup> Agell A 'Family forms and legal policies: A comparative view from a Swedish Observer' 1999 *Stockholm Institute for Scandianvian Law* 200.

<sup>104</sup> Cohabitation Act 1 July 2003, s 2.



the appointment of an executor to divide the property or for the right to remain in a joint home included in the division of property or one of the cohabitants institutes an action to be allowed to take over a joint home not included in the division of property.’<sup>105</sup> Legal rules demonstrate that termination surrounding cohabitation poses the same legal issues as does the dissolution of a marriage. This section has ascertained the reasons for termination of the cohabitation relationship and it is similar to those found in the Sweden Marriage Code.<sup>106</sup> The Swedish legislature undertook the most important task to ensure equality between heterosexual and homosexual couples by rendering marriage and its dissolution gender-neutral in 2009.

## 5. GENDER- NEUTRAL MARRIAGE

In 2005 a special commission was appointed to determine whether same-sex couples should be allowed to marry. A recommendation was made that couples of the same-sex could enter into marriage.<sup>107</sup> The law on registered partnerships was repealed in 2009, when the Swedish Marriage Code<sup>108</sup> became gender neutral. Same-sex couples have the option of continuing a legal partnership or applying for marital status. Although a functionally equivalent legal regime was already available to same –sex couples in the form of a registered partnership, the view was taken that there was no longer any legally relevant reason for having two separate legal regimes. Thus opening marriage up to same-sex couples was the final logical step.<sup>109</sup> This development has significantly equalised the position of same-sex and opposite-sex

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<sup>105</sup> South African Law Commission (Project 118) *Report on Domestic Partnerships* (2006) 202-203.

<sup>106</sup> Sweden Marriage Code (Aktenskapsbalken) 1987:230.

<sup>107</sup> Government Committee Report SOU 2007: 17 Marriage for couples of the same sex [Äktenskap för med samma kön].

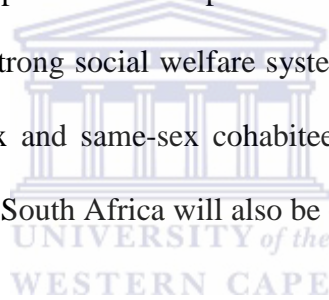
<sup>108</sup> Sweden Marriage Code (Aktenskapsbalken) 1987:230. The amendments to section 1 of the Code now reads that ‘this Code contains provisions regarding life together in marriage. Two persons who enter into marriage with one another become spouses.’

<sup>109</sup> Scherpe J ‘The legal recognition of same-sex couples in Europe and the role of the European Court of Human Rights’ (2013) 10 *The Equal Rights Review* 86.

cohabitants by opening up traditional heterosexual marriage to same-sex couples who were remitted to a separate Act.

## 6. CONCLUSION

This chapter has shown that Sweden has taken a deliberately functional approach to cohabitation. While still maintaining marriage as the ideal family form, Sweden has accommodated other family formations without any preferences between them. Recognition of cohabitation relationships places cohabitantes in a position to be more cognisant of the legal system governing the relationship and the consequences which stem therefrom. The legal reforms in Sweden provide a reference point for other jurisdictions. Sweden's Cohabitation Act has mechanisms in place to protect weaker partners and this is reinforced by a society based on gender equality and a strong social welfare system. The next chapter will examine case law relating to opposite-sex and same-sex cohabitantes in South Africa. Constitutional issues which led to law reform in South Africa will also be exemplified.



CHAPTER 3: JUDICIAL DECISIONS RELATING TO NON-FORMALISED  
COHABITATION RELATIONSHIPS IN SOUTH AFRICA

1. INTRODUCTION

Couples who do not solemnise their relationship in terms of the Marriage Act,<sup>110</sup> Recognition of Customary Marriages Act<sup>111</sup> (RCMA) or the Civil Union Act,<sup>112</sup> are often left to regulate their own affairs. The current legal position dictates that none of the invariable consequences flowing from marriage or civil partnerships attach to cohabitants in a non-formalised domestic partnership.<sup>113</sup> Such partnerships have no legal recognition save for the piecemeal judicial extensions of the consequences of marriage that have occurred.

This chapter will therefore deal with judicial decisions and constitutional issues relating to opposite-sex and same-sex non-formalised cohabitation relationships. The main focus of this chapter is the review of judicial decisions preceding national legislation such as the Civil Union Act and the Domestic Partnerships Bill which is discussed in the forthcoming chapter as well as judicial decisions surrounding universal partnerships. The purpose is to show the development of our law through the courts and how the legislature has responded to such decisions. A short summary of the default position with regard to marriage will be considered first.

Civil marriages are concluded in terms of the Marriage Act which applies exclusively to the solemnisation of a monogamous marriage between heterosexual partners. Comprehensive consideration of the default position (one man, one woman) will be made in the following

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<sup>110</sup> Marriage Act 25 of 1961. Muslim couples have also received greater recognition since 2014 when Muslim officials (Imams) were appointed as Marriage officers in terms of the Marriage Act. Although the Muslim Marriages Draft Bill general notice 37 in Government Gazette No 33946 21 January 2011, has not been passed, Muslim marriages conducted under the Marriage Act will now have legal status as a union.

<sup>111</sup> Recognition of Customary Marriages Act 12 of 1998.

<sup>112</sup> Civil Union Act 17 of 2006.

<sup>113</sup> Smith BS 'The statutory domestic partnership cometh' in Atkin B (ed) *The International Survey of Family Law* (2010) 300.

chapter. As judicial recognition was extended to same-sex cohabiting couples before heterosexual couples, this aspect will be considered in the first part of this chapter.

## 2. JUDICIAL DECISIONS REGARDING SAME-SEX RELATIONSHIPS

This section seeks to demonstrate the courts' willingness to provide legal recognition to same-sex relationships. The major rationale underlying these extensions was the fact that the laws in question were found to discriminate unfairly against same-sex couples on the basis of sexual orientation, as the law did not permit to them marry.<sup>114</sup> The case of *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*<sup>115</sup> marked the beginning of extending legal protection to same-sex life partnerships. In this case, benefits in terms of section 25 of the Aliens Control Act<sup>116</sup> were accorded to same-sex couples which were reserved for spouses of a particular category. The court acknowledged that an intimate relationship between two persons of the same sex could attract at least some of the rights and duties previously reserved for spouses.<sup>117</sup> The position of unmarried partners in permanent heterosexual partnerships was never an issue and the matter was left completely open by the court.

Judgments that followed *National Coalition* extended a variety of rights to partners in same-sex life partnerships. These included parental rights in relation to adoption,<sup>118</sup> guardianship,<sup>119</sup> the status of a legitimate parent,<sup>120</sup> rights to share in a partner's pension benefits<sup>121</sup> and the right to prosecute a dependant's action in the event of a partner's wrongful

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<sup>114</sup> Sinclair J 'South Africa: A new definition of marriage: gay and lesbian couples may marry' in Atkin B (ed) *The International Survey of Family Law* (2008) 398.

<sup>115</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC).

<sup>116</sup> Aliens Control Act 96 of 1991. The legislation extended the right of spouses of permanent residents to immigrate to South Africa to same-sex couples.

<sup>117</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at para 38.

<sup>118</sup> *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA (CC).

<sup>119</sup> *J v Director General, Department of Home Affairs* 2003 5 SA 621 (CC).

<sup>120</sup> *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC).

<sup>121</sup> *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA).

death.<sup>122</sup> These extensions of rights to same-sex couples have contributed to the unequal treatment of same-sex and heterosexual cohabitants, which will be emphasized further in the chapter.

In the landmark decision of *Minister of Home Affairs and Another v Fourie and Another*,<sup>123</sup> a same-sex couple approached the court to challenge the constitutionality of the prohibition against them marrying each other. Neither the common law definition nor the definition of marriage in the Marriage Act provided for same-sex couples to marry. The court stated that the common-law definition of marriage and section 30(1) of the Marriage Act were ‘under-inclusive and unconstitutional to the extent that they [made] no appropriate provision for gay and lesbian people to celebrate their unions in the same way that they [enabled] heterosexual couples to do.’<sup>124</sup> The court went on extensively about the need to develop common law.

The court stated that ‘[t]he common law prohibition of same-sex marriages was unfair because it prevented same-sex couples from entering into a legally protected relationship from which substantial benefits conferred and recognised by the law flowed.’<sup>125</sup> The court suspended the declaration of invalidity of the common law to enable Parliament to amend the law so as to provide an alternative statutory mechanism to enable same-sex couples to enjoy their constitutional rights as outlined in the judgment. The Civil Union Act subsequently enacted is meant to give effect to this.<sup>126</sup> It can be observed that the court’s approach to same-sex relationships has been a functional one, recognising that same-sex partners perform the same functions similar to those performed in marriage and should accordingly be granted benefits available to married couples.

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<sup>122</sup> *Gory v Kolver* 2007 (4) SA 97 (CC) in which the common law dependant’s action for loss of support was extended to same-sex life partners.

<sup>123</sup> *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC).

<sup>124</sup> *Minister of Home Affairs v Fourie and Another* 2006 (1) SA 524 (CC) at para 54.

<sup>125</sup> *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC) at para 93.

<sup>126</sup> See the Memorandum of the Objects of the Civil Union Bill, 2006 Government Gazette No 29237 of 21 September 2006; and The Civil Union Act 17 of 2006, preamble.

## 2.1 RECIPROCAL DUTY OF SUPPORT

This section highlights the protection afforded to same-sex life partnerships with regards to the dependant's action for loss of support. In *Du Plessis v Road Accident Fund*,<sup>127</sup> the dependant's action was extended to a partner in a same-sex permanent life relationship. The court held that '[t]o extend the action for loss of support to partners in a same-sex permanent life relationship similar in other respects to marriage, who had a contractual duty to support one another, would be an incremental step to ensure that the common law accords with the dynamic and evolving fabric of our society as reflected in the Constitution, recent legislation and judicial pronouncements.'<sup>128</sup> The court made reference to the case of *Satchwell v President of the Republic of South Africa*<sup>129</sup> in which it held that the law attaches a duty of support to various family relationships. Family formations have been widened in our society and such a duty of support may be inferred as a matter of fact in certain cases of persons involved in same-sex life partnerships.<sup>130</sup> Smith states that it is important to note that the *Du Plessis* judgment was decided prior to the legalisation of same-sex marriage by the Civil Union Act. This meant that benefits were accorded to same-sex life partners, to which heterosexual life partners were not entitled.<sup>131</sup> The gap left in the law as far as the dependant's action for reciprocal duty of support was concerned was addressed by the court in the *Paixão* case, which is discussed under Universal Partnerships below.<sup>132</sup>

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<sup>127</sup> *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA).

<sup>128</sup> *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) at para 37.

<sup>129</sup> *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC).

<sup>130</sup> *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) at para 25.

<sup>131</sup> Smith BS 'Extension of the dependant's action to heterosexual life partnerships after *Volks v Robinson* and the coming into operation of the Civil Union Act-Thus far and no further?' (2012) 75 *Tydskrif Vir Hedendaagse Romeins-Hollandse Reg* 473.

<sup>132</sup> As discussed in section 3.

## 2.2 SUCCESSION

This section further showcases the court's failure to extend rights to heterosexual cohabitants by limiting protection to same-sex couples. Before *Gory v Kolver*<sup>133</sup> same-sex life partners were not allowed to automatically inherit if the partner died without a will, as was the case for a 'spouse'. The court declared section 1 (1) of the Intestate Succession Act unconstitutional and there would be a reading-in of the words 'or a partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support' after the word 'spouse'. The court noted that it would amount to unfair discrimination on the grounds of sexual orientation and marital status if this was not done.

Despite the fact that the court extended rights to same-sex couples, this case clearly distinguishes between couples of the same and different sex. Unmarried heterosexual partners were not considered spouses in terms of the Intestate Succession Act.<sup>134</sup> Heterosexual couples did not enjoy the same rights and benefits afforded to same-sex cohabitants. The court held that '[a]ny change in the law pursuant to *Fourie* will not necessarily amend those statutes into which words have already been read by this Court so as to give effect to the constitutional rights of gay and lesbian people to equality and dignity. In the absence of legislation amending the relevant statutes, the effect on these statutes of decisions of this Court in cases like *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, *Satchwell*, *Du Toit* and *J v Director-General, Department of Home Affairs* will not change. The same applies to the numerous other statutory provisions that expressly afford recognition to permanent same-sex life partnerships....'<sup>135</sup>

The court had predicted that an anomaly would exist when it stated that if Parliament failed to respond before the *Fourie* deadline or if it did enact legislation permitting same-sex couples

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<sup>133</sup> *Gory v Kolver* 2007 (4) SA 97 (CC).

<sup>134</sup> Intestate Succession Act 81 of 1987.

<sup>135</sup> *Gory v Kolver* 2007 (4) SA 97 (CC) at para 28.

to marry, section 1(1) was specifically amended, it would also apply to permanent same-sex life partners who have undertaken reciprocal duties of support but who do not 'marry' under any new dispensation, thus still excluding heterosexual couples from the ambit of section 1(1) of the Act.<sup>136</sup>

The court reiterated the dictum in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*<sup>137</sup> which stated that '[i]t should also be borne in mind that whether the remedy a Court grants is one striking down, wholly or in part; or reading into or extending the text, its choice is not final. Legislatures are able, within constitutional limits, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them, 'fine-tuning' them or abolishing them. Thus they can exercise final control over the nature and extent of the benefits.'<sup>138</sup> Same-sex couples are allowed to marry and it will not affect their pre-existing rights which had been accorded to them through judicial decisions and amendments to legislation.<sup>139</sup> The legislation held to be unconstitutional will continue to stand unless those statutes are expressly amended.<sup>140</sup> There will continue to be unevenness in the application of the law with regard to same-sex and heterosexual couples until the legislature intervenes. The legislature has the final authority and should have amended the remedies to benefit both same-sex and heterosexual couples. The result is thus that heterosexual couples who live together now have to marry or register a civil union, in order to acquire rights already afforded to same-sex couples without them having to be married. Judicial decisions regarding opposite-sex couples will be considered

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<sup>136</sup> *Gory v Kolver NO 2007 (4) SA 97 (CC)* at para 29.

<sup>137</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC).

<sup>138</sup> *Gory v Kolver* 2007 (4) SA 97 (CC) at para 30.

<sup>139</sup> De Vos P, Barnard J 'Same-Sex Marriage, Civil Unions And Domestic Partnerships In South Africa: Critical Reflections Of An Ongoing Saga' 2007 *South African Law Journal* 795, 823, Bilchitz D and Judge M 'For whom does the bell toll? The challenges and possibilities of the Civil Union Act for family law in South Africa' 2007 *South African Journal on Human Rights* 496, Picarra L 'Notes and comments: *Gory v Kolver NO 2007 (4) SA 97 (CC)*' 2007 *South African Journal on Human Rights* 563 565.

<sup>140</sup> *Gory v Kolver NO 2007 (4) SA 97 (CC)* at para 28-30.



below. Arguments against and in favour of the legal recognition of cohabitation relationships will be set out initially.

### 3. JUDICIAL DECISIONS REGARDING OPPOSITE-SEX RELATIONSHIPS

#### 3.1 ARGUMENTS AGAINST THE LEGAL RECOGNITION OF COHABITATION RELATIONSHIPS

The starting point for this discussion is the case of *Volks No v Robinson and Others*.<sup>141</sup> It is the leading case which fails to recognise the claims of heterosexual cohabitants to rights. The court had to establish whether the exclusion of survivors of permanent life partnerships from benefitting under the Maintenance of Surviving Spouses Act<sup>142</sup> constituted unfair discrimination. The court made reference to the case of *Dawood and another v Minister of Home Affairs and others*<sup>143</sup> in which it held that '[m]arriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another.'<sup>144</sup> The court went on to say that the couple were free to continue with the relationship and get married or withdraw from it completely, having no obligations. The Constitutional Court was of the view that it could legitimately distinguish between married and unmarried people and that it may accord benefits to married people which it does not accord to those who are unmarried.<sup>145</sup>

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<sup>141</sup> *Volks No v Robinson and others* 2005 (5) BCLR 446 (CC)

<sup>142</sup> Maintenance of Surviving Spouses Act 27 of 1990.

<sup>143</sup> *Dawood and another v Minister of Home Affairs and others* 2000 (3) SA 936 (CC).

<sup>144</sup> *Volks No v Robinson and Others* 2005 (5) BCLR 446 (CC) at para 23.

<sup>145</sup> *Volks No v Robinson and Others* 2005 (5) BCLR 446 (CC) at para 54.

The court held that it was not appropriate to impose a duty upon the estate when none arose by operation of law during the deceased's lifetime. This would violate the private autonomy of parties. '[T]here are many ways in which these relationships can be regulated. It is not for the [court] to decide how this is done. It is up to the legislature to make provision for this.'<sup>146</sup> No duty of support arises by operation of law in the case of unmarried cohabitants.<sup>147</sup> This is the present state of the law in South Africa. This case was a step backwards as the courts had in previous cases recognised broadened family formations for the purpose of acquiring rights and benefits otherwise limited to married spouses. The court failed to recognise that the very hardships suffered by married persons are also attributed to unmarried couples. It was imperative that the court extend these protections to cohabitants and it failed to do so.

In light of the above decision, three main arguments against the legal recognition of cohabitation came to the fore. The first deals with upholding the sanctity of marriage. It is argued that the legal recognition of cohabitation relationships threatens marriage as a sacred and stable institution.<sup>148</sup> Marriage is recognised as a fundamental part of society and also has great social and legal importance. Marriage is also regarded as a consensual union and the rights stemming from that union are restricted and sacred to the institution.<sup>149</sup> Thus, extending rights and obligations inherent to this distinct relationship to cohabitation relationships may result in marriage being eradicated. Respect for autonomy of the parties will be discussed next.

The second argument which may be derived from the case is that legal recognition might violate the autonomy of the parties involved. As was stated above, marriage is a consensual

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<sup>146</sup> *Volks No v Robinson and Others* 2005 (5) BCLR 446 (CC) at para 67.

<sup>147</sup> *Volks No v Robinson and Others* 2005 (5) BCLR 446 (CC) at para 56.

<sup>148</sup> *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) at par 25.

<sup>149</sup> Schafer L 'Marriage and marriage- like relationships: constructing a new hierarchy of life partnerships' 2006 *South African Law Journal* 627.

union from which rights are derived, whereas rights flowing from cohabitation apply without an explicit declaration of will. Scherpe argues that the regulation of cohabitation may result in rules being applied against the wishes of the couple or one of the cohabitants.<sup>150</sup> The crux of the argument is essentially that regulation would involve the state extending rights and duties to couples, when this may not have been what they intended for the relationship. This section ties in with the next argument which relates to ‘choice’ of the partners.

The third argument utilised against the legal recognition of cohabitation relates to the notion that cohabitants are free to enter into marriage but choose not to do so. This reasoning was employed in *National Coalition* and by the majority judgment in *Volks*. The choice argument was premised on the fact that opposite-sex couples, as a class, enjoy the freedom to marry and same-sex couples (prior to the Civil Union Act) did not.<sup>151</sup> Schafer states that ‘[t]his model of freedom of choice would appear not to be defeated by the operation of a relative impediment affecting some members of a class, provided it promotes a legitimate and reasonable objective.’<sup>152</sup> If cohabitantes desire the rights and obligations linked with marriage then a valid marriage should be concluded. The choice argument resigns itself to the notion that the absence of legal recognition of cohabitation relationships is justified given the fact that cohabitantes may freely enter into a marriage but choose to cohabit instead. The subsequent section relates to arguments disproving those made above.

### 3.2 ARGUMENTS IN FAVOUR OF THE LEGAL RECOGNITION OF COHABITATION RELATIONSHIPS

By focusing on the need to accommodate these relationships, this section will aim to refute the arguments against the legal recognition of cohabitation relationships. Consideration of the

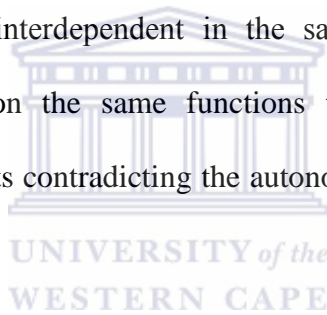
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<sup>150</sup> Scherpe J ‘The Nordic countries in the vanguard of European Family law’ 2010 *Stockholm Institution for Scandinavian Law* 276.

<sup>151</sup> Schafer L ‘Marriage and marriage- like relationships: Constructing a new hierarchy of life partnerships’ 2006 *South African Law Journal* 640.

<sup>152</sup> Schafer L 2006 640.

credibility of the three arguments against the legal recognition of cohabitation will be addressed. The first section deals with the establishment of broadened family formations and the need for extension of the rights characteristic of marriage. The traditional definition of ‘family’ in the narrow sense refers to heterosexual spouses in a valid civil marriage and their children.<sup>153</sup> The notion of the ‘constitutional family’ is an important feature in the post 1994 era. There have been numerous judgments redefining the concept of ‘family’ to include broadened family formations.<sup>154</sup> These broadened family formations include cohabitation relationships. Many unmarried couples take on rights and responsibilities akin to marriage. ‘It is recognised, in particular, that a variety of non-marital relationships can play the same social role as marriage and that the parties to them may provide the same kind of support to each other and be financially interdependent in the same way as married couples.’<sup>155</sup> Unmarried couples may take on the same functions traditionally associated with the institution of marriage. Arguments contradicting the autonomy of the partners are considered below.



With regards to autonomy of the partners, couples in cohabitation relationships become interdependent on one another for emotional and financial support amongst other things. Sloth-Nielsen and Van Heerden criticise the argument of autonomy of the partners by stating that ‘[t]here is a fiction that individuals have autonomy to decide for themselves how to regulate their affairs and that they would have the knowledge necessary to engage with the courts in order to seek a just decision in order to protect themselves.’<sup>156</sup> After termination of the relationship through separation or death, relief may be sought by one of the partners and

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<sup>153</sup> Cronjé D and Heaton J *South African Family Law* (2ed) (2004) 3.

<sup>154</sup> Sloth-Nielsen J and Van Heerden B ‘The Constitutional family: Developments in South African Family law jurisprudence under the 1996 Constitution’ (2003) 17 *International Journal of Law, Policy and the Family* 121. And Sloth-Nielsen J and Van Heerden B ‘The Constitutional family: Developments in South African child and Family law 2003-2013’ (2014) 28 *International Journal of Law, Policy and the Family* 1.

<sup>155</sup> Meyerson D ‘Who’s in and who’s out? Inclusion and exclusion in the Family law jurisprudence of the Constitutional Court of South Africa’ (2010) 3 *Constitutional Court Review* 295.

<sup>156</sup> Sloth-Nielsen J, Van Heerden B ‘The ‘Constitutional family’: Developments in South African child and Family law 2003-2013’ (2014) 28 *International Journal of Law, Policy and the Family* 1.

the argument that rules would undermine the autonomy of individuals in making family choices is not sustained. Having rules in place will provide protection and security not only during the relationship but also in the event of termination.

The credibility of the choice argument will be outlined. It is a reality that gendered power relations plays out in the lives of individuals. Individuals may not feel empowered themselves and therefore the law should intervene to redress structural inequality. Smith criticizes the ‘choice’ argument and emphasises that ‘...the rationale...clearly underscores the need for domestic partnership legislation that provides a legal institution that co-exists with marriage and that accommodates the lived reality faced by life partners for whom the choice of formalisation exists merely in theory.’<sup>157</sup> De Vos argues that ‘[t]his libertarian presumption of the existence of pure free choice is incorrect. For many women especially poor women - this freedom is a complete fiction. Men and women often approach intimate relationships from different positions of power. In a generalised and patriarchal society like our own, women will often lack the real choices to enter into an intimate relationship or not, or to formalise that intimate relationship by getting married (or by registering a domestic partnership).’<sup>158</sup> The ‘choice’ argument incorrectly assumes that cohabittees are aware of the repercussions of not formalising their union.

Arguments against the legal recognition of cohabitation were set out in *Volks No v Robinson and Others*<sup>159</sup> and these arguments have been found to be unsupported given the function cohabitation relationships performs in society and the lived realities faced by many

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<sup>157</sup> Smith BS ‘Rethinking *Volks v Robinson*: The implications of applying a ‘contextualised choice model’ to prospective South African Domestic Partnership legislation’ (2010) 13 (3) *Potchefstroom Electronic Law Journal* 238.

<sup>158</sup> De Vos P ‘Still out in the cold? The Domestic Partnerships Bill and the (non) protection of marginalised woman in Sloth-Nielsen and Du Toit (eds) *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law* (2008) 131-132.

<sup>159</sup> *Volks NO v Robinson and others* 2005 (5) BCLR 446 (CC)

cohabitees. The following section relates to the constitutional implications of the failure to provide legal recognition to cohabitants.

#### 4. THE RIGHT TO EQUALITY

The right to equality is provided in terms of section 9 of the Constitution Equality.<sup>160</sup> It states that ‘[e]veryone is equal before the law and has the right to equal protection and benefit of the law.’<sup>161</sup> This means that all people should be treated equally with respect to their human dignity and that the law should not differentiate in its treatment of persons in a way that impact negatively on their human dignity. Furthermore, ‘[t]he 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, language and birth.’<sup>162</sup> In terms of the Promotion of Equality and Prevention of Unfair Discrimination Act<sup>163</sup>, discrimination on the grounds of marital status include ‘...the status or condition of being single, married, divorced, widowed or in a relationship, whether with a person of the same or the opposite sex, involving a commitment to reciprocal support in the relationship.’<sup>164</sup> This definition therefore encompasses discrimination against cohabitants.

The right to equality is a foundational value of the Constitution.<sup>165</sup> The significance of the right to equality was endorsed by the court in *Minister of Finance v Van Heerden*<sup>166</sup> where it held that ‘the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and

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<sup>160</sup> Constitution of the Republic of South Africa, 1996, s 9.

<sup>161</sup> Constitution, s 9 (1).

<sup>162</sup> Constitution, s 9 (3).

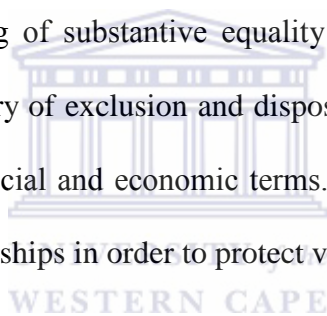
<sup>163</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 as amended by Act 52 of 2002.

<sup>164</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 as amended by Act 52 of 2002, section 1 definition section.

<sup>165</sup> Constitution of the Republic of South Africa, 1996.

<sup>166</sup> *Minister of Finance v Van Heerden* 2004 11 BCLT 1125 (CC).

against which all law must be tested for constitutional consonance.’<sup>167</sup> This right plays a critical role in the interpretation and limitation of other fundamental rights. The right to equality creates a framework for the equal enjoyment of all fundamental rights in the Bill of Rights. Two forms of equality can be distinguished; namely formal equality and substantive equality. Formal equality is based on the premise that inequality is irrational and arbitrary. Formal equality presumes that all persons are equal and differential treatment on arbitrary grounds such as race or gender is irrational.<sup>168</sup> Subjective equality is remedial in nature seeking to redress past disadvantage and has been incorporated into the Constitution. Many cases of gender discrimination have considered women as a disadvantaged group and the remedial and anti-disadvantage aspects of equality jurisprudence are thus related to feminist thinking. ‘Such an understanding of substantive equality is consistent with the history of inequality in our country, a history of exclusion and dispossession where black women have been the most marginalised in social and economic terms.’<sup>169</sup> This necessitates the need for the regulation of domestic partnerships in order to protect vulnerable partners.



Albertyn<sup>170</sup> argues that at the centre of the equality right is unfair discrimination. Discrimination impairs fundamental human dignity.<sup>171</sup> The word ‘unfair’ does not simply distinguish between different kinds of differentiation, but separates permissible from impermissible discrimination, where the discrimination bears a pejorative meaning. The Constitutional Court has confirmed that unfair discrimination must be determined by establishing whether the difference in treatment is on a listed ground in section 9 (3) of the Constitution; if this has been affirmed, the next step is to establish whether the impact of the

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<sup>167</sup> *Minister of Finance v Van Heerden* 2004 11 BCLT 1125 (CC) at para 22.

<sup>168</sup> Albertyn C ‘Equality’ in Bonthuys E and Albertyn C (eds) *Gender, Law and Justice* (2007) 87.

<sup>169</sup> Albertyn C ‘Equality’ in Bonthuys E and Albertyn C (eds) *Gender, Law and Justice* (2007) 95.

<sup>170</sup> Albertyn C ‘Equality’ in Bonthuys E and Albertyn C (eds) *Gender, Law and Justice* (2007) 107.

<sup>171</sup> Constitution, s 10.

different treatment is such that impugns the human dignity of those affected. The final step applies the limitations enquiry in section 36.<sup>172</sup> The rights in the Bill of Rights may also be limited as is provided for in section 36 of the Constitution. When an infringement can be justified in accordance with section 36, it will be constitutionally valid, however, there needs to be an exceptionally strong reason for limiting a right.<sup>173</sup> The limitation needs to be justifiable.

Given the present state of the law with regard to the absence of legal recognition of cohabitation relationships, cohabitees' right to equality is undoubtedly impaired. This section will examine cohabitees' right to equality. At the time of the decision of *Volks*, opposite-sex marriage was the only family form regulated in terms of the law.<sup>174</sup> Same-sex couples were not permitted to marry. This notion explains on face value why the courts were prepared to extend rights and obligations characteristic of marriage more readily to same-sex couples than opposite-sex couples.<sup>175</sup> Subsequent to the decision in *Volks*, same-sex couples were allowed to marry in terms of the Civil Union Act.<sup>176</sup> The Act will be considered more comprehensively in the following chapter. The impediment to marriage for same-sex couples has been removed; therefore the justification of the refusal to extend rights and obligations to heterosexual life partners is longer sustained. Currie and De Waal state that with the introduction of same-sex marriage, the same reasoning of 'choice' held by the majority judgment in *Volks* would apply to same-sex couples who opted to cohabit.<sup>177</sup> This means that

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<sup>172</sup> Constitution, s 36.

<sup>173</sup> The case of *Harksen v Lane NO* 1998 1 SA 300 (CC) provided the first expanded interpretation of the right. It essentially involved test for the determination of the existence of discrimination.

<sup>174</sup> Marriage Act 25 of 1961: The default position was that only heterosexual couples could formalise their relationship.

<sup>175</sup> Smith BS 'Rethinking *Volks v Robinson*: The implications of applying a 'contextualised choice model' to prospective South African Domestic Partnership legislation' (2010) 13 (3) *Potchefstroom Electronic Law Journal* 238.

<sup>176</sup> Civil Union Act 17 of 2006

<sup>177</sup> Currie I and De Waal J *The Bill of Rights Handbook* (2005) 256. See also section on 'Exclusion of persons in same-sex relationships from the institution of marriage' in Currie I and De Waal J *The Bill of Rights Handbook* 6ed (2013) 230.



same-sex couples who do not get married in terms of the Civil Union Act would be in the same predicament as opposite-sex cohabitants. Smith states that the ‘choice argument’ that informed the majority judgment in *Volks* should *strictu sensu* also apply to same-sex couples who choose not to marry despite there being no legal impediment to such a marriage.<sup>178</sup>

In judgments preceding and subsequent to the *Volks* decision, statutory extensions have been made to protect same-sex partners who are not married. Same-sex cohabiting couples are allowed to inherit intestate while heterosexual cohabiting couples cannot do so. These statutory extensions by the courts were discussed when the chapter dealt with judicial decisions regarding same-sex couples.<sup>179</sup> The position of heterosexual and same-sex partners who have not formalised their relationship in terms of the Civil Union Act appears to be unequal and therefore potentially unconstitutional.<sup>180</sup> This is incompatible with the constitutional values of respect for diversity and pluralism. The implications of this inequality on cohabitants’ rights will be discussed next.

The decision in *Volks* was a failure on the part of the courts as it contributed to the anomaly in the law with regard to the legal recognition of opposite-sex and same-sex relationships. Didishe argues that ‘...[i]t is up to the courts to decide whether a deviation from the *Volks No* is necessary, however it is acknowledged that parliamentary intervention is required to remove uncertainty on how domestic partnerships ought to be treated.’<sup>181</sup> Kruuse suggests a departure from precedent where injustice would result. A softening of the doctrine of stare

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<sup>178</sup> Smith BS ‘Extension of the dependant’s action to heterosexual life partnerships after *Volks v Robinson* and the coming into operation of the Civil Union Act-Thus far and no further?’ (2012) 75 *Tydskrif Vir Hedendaagse Romeins-Hollandse Reg.* See also Carnelley M and Mamashela M ‘Cohabitation and the same-sex marriage. A complex jigsaw puzzle’ 2006 *Obiter* 379 388, Robson R ‘Sexual democracy’ 2007 *South African Journal on Human Rights* 409 426.

<sup>179</sup> In section 2 above.

<sup>180</sup> Sloth-Nielsen J and Van Heerden B ‘The ‘Constitutional family’: Developments in South African child and Family law 2003-2013’ (2014) 28 *International Journal of Law, Policy and the Family* 1.

<sup>181</sup> Didishe V ‘Legal recognition for non-nuclear families: Support for unmarried heterosexual partners’ 2012 *De Rebus* 26.

decisis is the approach to follow, she suggests.<sup>182</sup> There is a clear contest between the right to equality on the one hand and the entrenched value of marriage on the other. The issue of constitutionality of the failure to regulate non-formalised cohabitation is one of paramount importance which should be addressed.

Despite the lack of legal recognition for cohabitation relationships, the courts have upheld the existence of a universal partnership. This aspect will be dealt with below.

## 5. UNIVERSAL PARTNERSHIPS

This section will consider how the courts have dealt with universal partnerships between cohabitants relating to property, reciprocal duty of support, ex post facto maintenance and succession. Although there is no dedicated legislation regulating domestic partnerships, the courts have established that universal partnerships can exist between unmarried individuals. The concept of a universal partnership has from time to time been employed in South African law in order to ameliorate the adverse consequences that ensued due to the erstwhile complete lack of recognition accorded to relationships other than civil marriage.<sup>183</sup> The definition of a universal partnership should be outlined first. The South African Law Reform Commission (SALRC)<sup>184</sup> states that a universal partnership is a contract in which the parties agree to bring into the community of property, all of their property. This includes property currently owned and property that is still to be acquired for their joint benefit. The partner relying on the universal partnership bears the onus of proving the existence of the agreement as well as the terms of the agreement proving that a universal partnership had been established. Two types of universal partnerships can be observed. These are highlighted below.

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<sup>182</sup> Kruuse H 'Here's To You, Mrs Robinson': Peculiarities and Paragraph 29 in Determining the Treatment of Domestic Partnerships' (2009) 25 *South African Journal on Human Rights* 380.

<sup>183</sup> Smith BS *The Development Of South African Matrimonial Law With Specific Reference To The Need For And Application Of A Domestic Partnership Rubric* (LLD thesis, University of the Free State, 2010) 367.

<sup>184</sup> South African Law Commission (Project 118) *Report on Domestic Partnerships* (2006) 111.

Two types of universal partnerships that can be distinguished are *societas universorum bonorum*. This is where the parties agree to put in common all their property present and future.<sup>185</sup> The second type is *societas universorum quae ex quaestu veniunt* and this involves the parties agreeing that all they may acquire during the existence of the partnership from every kind of commercial undertaking shall be considered partnership property.<sup>186</sup> The universal partnerships above require an express or tacit agreement between the parties. An express contract is an agreement where the terms are explicitly stated by the parties. 'Express contracts can be oral or written. An example of the latter is a written cohabitation agreement.'<sup>187</sup> Those who enter into express cohabitation agreements are usually the minority, but such an agreement will determine what will happen to property and assets of the couple if they should separate. The express contract will eliminate uncertainty as to the nature of the relationship and the terms which governed the partnership. A tacit contract on the other hand is not created by an express agreement between the parties but may be inferred from the conduct of the parties. This contract is established when it can reasonably be concluded that the parties had a tacit understanding.<sup>188</sup> In addition to the requirement of an express or tacit agreement between the parties, criteria in order to qualify the relationship as a life partnership should also be satisfied and these criteria are discussed below.

The criteria for a life partnership is that the union should have some measure of permanence, which is usually determined on the facts of each case. Monogamy between the partners as well as interdependence of the partners on one another is essential for the establishment of a life partnership. Smith states that this interdependence involves the parties being dependent on one another for the improvement of their lives by cooperating in the meeting of

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<sup>185</sup> *Butters v Mncora* 2012 (4) SA 1 (SCA) at para 14.

<sup>186</sup> *Butters v Mncora* 2012 (4) SA 1 (SCA) at para 14.

<sup>187</sup> Statsky WP *Family Law: The Essentials* 3 ed (2014) 46.

<sup>188</sup> Statsky WP *Family Law: The Essentials* 3 ed (2014) 46.

expenses.<sup>189</sup> Smith concludes that the real test is whether the parties' intention suggests that they regard their relationship as permanent.<sup>190</sup> I agree with this contention as the focus should be in the intention of the parties rather than the form of the relationship. A consideration of judicial decisions regarding universal partnerships will now be discussed.

The objective of this section is to explicate the courts' approach in extending rights and obligations associated with marriage to cohabitants through the recognition of universal partnerships. The requirements for a universal partnership were set out in *Ponelat v Schrepfer*.<sup>191</sup> In this case, the respondent instituted an action against the appellant declaring that a universal partnership existed between them. The plaintiff and the defendant had formed a romantic relationship. The defendant promised to support her and also look after her 16 year old son. He expressed a desire to marry her. The plaintiff was actively involved in improving and running their farm. The relationship came to an end and the plaintiff had very little to show in the form of assets upon termination of the relationship. The essentials of a universal partnership were set out by the court. The first is that each of the partners should bring something into the partnership, whether it is money, labour or skill. The second requirement is that the business should be carried on for the joint benefit of the parties and the third requirement is that the object should be to make a profit.<sup>192</sup> The court held that '[i]t does not follow then that a universal partnership cannot exist between parties who are engaged to be married. A universal partnership exists if the necessary requirements for its existence are met, and this is regardless of whether the parties are married, engaged or cohabiting.'<sup>193</sup> The court held that the essentials for a contract of universal partnership were established. It is clear from the court's reasoning that the court is not concerned with the

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<sup>189</sup> Smith BS *The Development Of South African Matrimonial Law With Specific Reference To The Need For And Application Of A Domestic Partnership Rubric* (LLD thesis, University of the Free State, 2010) 153.

<sup>190</sup> Smith BS *The Development Of South African Matrimonial Law With Specific Reference To The Need For And Application Of A Domestic Partnership Rubric* (LLD thesis, University of the Free State, 2010) 153.

<sup>191</sup> *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA).

<sup>192</sup> *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) at para 19.

<sup>193</sup> *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) at para 22.

marital status of parties. Thus marriage is not a requirement for the establishment of rights and obligations between individuals. The court's main focus is on whether the requisite criteria have been established in order to find that a universal partnership exists.

In a more recent case of *Lilly v Berry*<sup>194</sup> the plaintiff sought an order declaring that a partnership existed between himself and the defendant in equal shares in respect of certain immovable property, previously occupied by the parties. The plaintiff's claim was based on an oral agreement. The defendant excepted to the claim stating that the partnership lacked the essential requirement that the object of the partnership was to make a profit. The court referred to *Butters v Mncora* in which Brand JA noted that 'once it is accepted that a partnership enterprise may extend beyond commercial undertakings, logic dictates, in my view, that the contribution of both parties need not be confined to a profit making entity.'<sup>195</sup> This case differs from the case mentioned above as an oral agreement was relied upon. The court concluded based on *Volks* that the relationship did not constitute a universal partnership but rather domestic property which constituted the sole basis of a partnership between the parties. The plaintiff did not show that a tacit universal partnership existed. The plaintiff's claim did not disclose a cause of action and the court upheld the defendant's exception.

*Steyn v Hasse and Another*<sup>196</sup> dealt with whether a universal partnership existed between the parties. The parties had entered into an oral agreement of lease for residential purposes. The appellant took occupation of the property. The respondent informed the appellant that he wished to sell the property. The first respondent stated that the appellant made no financial contribution towards the property and lives rent free. He is suffering financially and could no longer afford to allow the appellant to continue living rent free at his property. The appellant opposed the eviction application and denied that the parties ever concluded a written or oral

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<sup>194</sup> *Lilly v Berry* ZAWCHC 153 (7 October 2014).

<sup>195</sup> *Butters v Mncora* 2012 (4) SA 1 (SCA) at para 19.

<sup>196</sup> *Steyn v Hasse and Another* ZAWCHC 120 (15 August 2014).

agreement of lease as contended by the first respondent. The court a quo found that there were no reciprocal rights and duties of support between the appellant and first respondent. The court concluded that the appellant's occupancy was motivated by the love relationship, based on the consent of the first respondent. The issue regarding the existence of a universal partnership was never explicitly raised by appellant in the pleadings. Appellant therefore did not allege that there was an express or implied universal partnership as a result of their cohabitation. It was therefore not in dispute that the relationship did not comply with the essential requirements of a universal partnership.

In *V v V*,<sup>197</sup> the plaintiff alleged in her particulars of claim that a universal partnership came into existence between the parties in respect of their business. The court stated that plaintiff had failed to prove an express oral agreement of a universal partnership. The plaintiff wanted the court to believe that such an agreement was in place and in this regard she relied on the contents of certain discussions between her and the plaintiff, which the latter denied. The discussions relied upon by the plaintiff were typical of discussions between husband and wife regarding their future and nothing more.<sup>198</sup> The next question was whether the evidence justified a finding of a silent agreement of partnership. The conduct of the plaintiff did not translate into a partnership agreement as alleged by her. The fact that she never mentioned a partnership agreement, or at least her right to share in the profits of the business is a clear indication that such an agreement never existed.<sup>199</sup>

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<sup>197</sup> *V v V* ZAGPPHC 530 (17 April 2013).

<sup>198</sup> *V v V* ZAGPPHC 530 (17 April 2013) at para 45.

<sup>199</sup> *V v V* ZAGPPHC 530 (17 April 2013) at para 47.

## 5.1 ASPECTS RELATING TO PROPERTY, RECIPROCAL DUTY OF SUPPORT, EX POST FACTO MAINTENANCE AND SUCCESSION

Against the background regarding the courts understanding of a universal partnership, the courts' approach to aspects such as property, reciprocal duty of support, ex-post facto maintenance and succession will now be explored.

### 5.1.1 PROPERTY

There is no law in South Africa which regulates the proprietary consequences of domestic partners; this includes no law on how the property should be divided once the relationship ends.<sup>200</sup> The general rule of South African law is that even longstanding cohabitation partnerships do not have any legal consequences unless the partners have formed a universal partnership, as described above. Cohabitants do not automatically have property rights and the ordinary rules of contract have to be invoked to enforce rights.<sup>201</sup> These ordinary rules are discussed in the latter part of this chapter and in the subsequent chapter. This section will therefore demonstrate how the courts have regulated this aspect as it relates to cohabitation relationships.

The starting point for this discussion is *McDonald v Young*.<sup>202</sup> It shows the progression of the courts from a strict approach to being more flexible in protecting cohabiting couples. In *McDonald v Young* the appellant instituted an action against the respondent for an order declaring that a joint venture agreement existed between the parties in respect of certain

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<sup>200</sup> In *Fink v Fink* 1945 WLD 226 at para 241 it was held that, when the universal partnership is terminated, the parties' assets are divided between them. In terms of the common law there is no presumption of equality of shares in the partnership, but the shares are divided in proportion to what each party has contributed, whether in capital, stock, labour or services. If it is impossible to say that one party has contributed more than the other, then they are entitled to share equally.

<sup>201</sup> Clark B 'Family law' in Van Der Merwe CG and Du Plessis JE (eds) *Introduction to the law of South Africa* (2004) 159.

<sup>202</sup> *McDonald v Young* 2012 (3) SA 1 (SCA).

immovable property. The High Court refused both orders and the appellant appealed to the Supreme Court of Appeal. The appellant did not possess any meaningful assets and had very limited income. The respondent, on the other hand, was a person of considerable means. The court held that the appellant had not discharged the onus resting on him and that the appellant was not entitled to the relief sought in respect of the main claim.<sup>203</sup> With regards to the maintenance claim, the court stated that under South African law certain family relationships create a duty of support. This duty of support has also been extended to contractual rights of support. Whether such a duty exists depends on the circumstances of each case. The court relied on *Volks No v Robinson and others*<sup>204</sup> in which the court found that ‘the law may distinguish between married people and unmarried people and may, in appropriate circumstances, accord benefits to married people which it does not accord to unmarried people’<sup>205</sup> Furthermore whilst there was a reciprocal duty of support between married persons, ‘no duty of support arises by operation of law in the case of unmarried cohabitants’<sup>206</sup> The appeal was dismissed with costs as the court found that no legal duty of support could be established between the parties.

The court’s reasoning was based on conferring rights and obligations to those protected under the law. The court failed to consider the realities of modern family formations prevalent in South Africa and adopted a strict approach to the protection of cohabitation relationships.

Some courts have, however adopted a more flexible approach to the protection of cohabitation relationships and the present state of the law is found in *Butters v Mncora*.<sup>207</sup> In this case, the parties had lived together as husband and wife for twenty years. The plaintiff instituted an action against the defendant for half of his assets. The plaintiff sought to rely on

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<sup>203</sup> *McDonald v Young* 2012 (3) SA 1 (SCA) at para14.

<sup>204</sup> *Volks No v Robinson and others* 2005 (5) BCLR 446 (CC).

<sup>205</sup> *Volks No v Robinson and others* 2005 (5) BCLR 446 (CC) at para 54.

<sup>206</sup> *Volks No v Robinson and others* 2005 (5) BCLR 446 (CC) at para 56.

<sup>207</sup> *Butters v Mncora* 2012 (4) SA 1 (SCA).



a remedy derived from the law of partnership. The general rule of our law is that cohabitation does not give rise to special legal consequences. The court reiterated the essentials of a universal partnership held in *Ponelat v Schrepfer*.<sup>208</sup> Chetty J found that there need not be an express agreement between the partners and that a universal partnership can come into existence by a tacit agreement, derived from the conduct of the parties. The requirements of universal partnerships seem to communicate an undertaking of a purely commercial nature, but the recent judgement has made it clear that universal partnerships of all property ‘extend beyond commercial undertakings and still form part of our law....’<sup>209</sup> The court expanded on a tacit agreement and stated that ‘[w]here the conduct of the parties is capable of more than one inference, the test for when a tacit universal partnership can be held to exist is whether it is more probable than not that a tacit agreement had been reached.’<sup>210</sup> The plaintiff was awarded 30 percent of the assets as they stood when the partnership came to an end. The significance of the decision was that commercial objectives do not have to be paramount, opening the door for intimate relationships to be considered too.

The *Butters* case is an example of a case which significantly broadens the application of a universal partnership, particularly in the case of cohabitantes, by taking non-financial contributions into account. Smith states that *Butters* constitutes a broadening of the very notion of a universal partnership that encapsulates both family life as well as commercial undertakings.<sup>211</sup> Prior to the *Butters* case, vulnerable parties in cohabitation relationships, especially women, were left destitute and in a financially weaker position. The *Butters* case has alleviated the position of the weaker partner in cohabitation relationships. The discarded cohabitee does not have an automatic right to patrimonial relief, but will still have to approach the court to obtain relief or redress. The Supreme Court of Appeal (SCA) has now

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<sup>208</sup> *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) at para 19.

<sup>209</sup> Nielsen J ‘Cohabitants’ rights recognised at last’ 2012 *Without Prejudice* 82.

<sup>210</sup> *Butters v Mncora* 2012 (4) SA 1 (SCA) at para 18.

<sup>211</sup> Smith BS ‘The Dissolution of a life or Domestic Partnership’ in Heaton J (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 438.

offered protection to those parties who would have previously been left without a legal remedy, by offering them protection using a private law remedy through the recognition of a tacit universal partnership. Given the latest development in law of universal partnerships, it is advisable nevertheless that parties enter into a written agreement to regulate their cohabitation relationship.

*Cloete v Maritz*<sup>212</sup> is another case that was heard in which an order was made highlighting the position of vulnerable women and recognising the existence of a tacit universal partnership. The plaintiff instituted a claim against the defendant for breach of promise to marry. The plaintiff amended her particulars of claim and alleged that a tacit universal partnership existed between the parties. The court made reference to *Butters v Mncora*<sup>213</sup> which set out the essential requirements for establishing the existence of a universal partnership. The court was in favour of the plaintiff's version and satisfied that she not only helped establish businesses but also sustained them. Her role could not be regarded as insignificant.

Due to the nature of the relationship and the plaintiff's involvement in the businesses, the court concluded that a universal partnership existed. This case, as well as those preceding, recognised the significant role played by women in intimate relationships. Their role extended far beyond that of homemaker and often includes being competent partners in various business endeavours.

As the law stands today, cohabiting couples have to prove the existence of a universal partnership when seeking redress after the dissolution of the relationship. The biggest problem that is occasioned by the universal partnership is proof of its existence.<sup>214</sup> If the existence of a universal partnership cannot be proven, it may have serious consequences for the vulnerable partner who may end up with very little after termination of the universal

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<sup>212</sup> *Cloete v Maritz* 2013 (5) SA 448 (WCC).

<sup>213</sup> *Butters v Mncora* 2012 (4) SA 1 (SCA) at para 11.

<sup>214</sup> See for example *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at par 125.

partnership. The current system does not guarantee partners legal protection, thus strengthening the need for more thorough protection to ensure protection of unmarried partners. Smith notes that prospective domestic partnership legislation should regulate the patrimonial consequences of termination of life partnerships comprehensively in order to guarantee equitable distribution of the proprietary interests involved.<sup>215</sup> The courts approach to the aspect of reciprocal duty of support and ex post facto maintenance will be covered next.

### 5.1.2 RECIPROCAL DUTY OF SUPPORT AND EX-POST FACTO MAINTENANCE

This section aims to demonstrate the progression from the default position confirmed in *Volks* to the court recognising a claim of support between unmarried partners. A partner is also not automatically regarded as an heir or dependant. *Volks No v Robinson and Others*<sup>216</sup> was the status quo for a long time. The Constitutional Court expressly confirmed the common law position that there is no claim for reciprocal maintenance between parties living together in a permanent heterosexual life partnership during the existence of the cohabitation and furthermore, that there is also no possible claim for maintenance after the death of one of the parties. Smith<sup>217</sup> holds strongly that the *Volks* case is irreconcilable with earlier judgements in which the courts have readily found that the existence of such a duty could be inferred from the facts of the matter at hand. The fact that earlier judgments dealt with homosexual couples is irrelevant as gender has no bearing on the capacity of two persons to enter into an agreement to support one another. The *Volks* judgment must be criticized for the fragmented and inconsistent legal position that it has created.

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<sup>215</sup> Smith BS *The Development Of South African Matrimonial Law With Specific Reference To The Need For And Application Of A Domestic Partnership Rubric* (LLD thesis, University of the Free State, 2010) 379-380.

<sup>216</sup> *Volks No v Robinson and others* 2005 (5) BCLR 446 (CC).

<sup>217</sup> Smith BS 'Rethinking *Volks v Robinson*: The implications of applying a 'contextualised choice model' to prospective South African Domestic Partnership legislation' (2010) 13 (3) *Potchefstroom Electronic Law Journal* 257.

Judgments subsequent to *Volks* varied with regards to the reasoning utilised to exclude cohabitation relationships from being granted legal recognition. One of these cases is *Verheem v Road Accident Fund*.<sup>218</sup> The case involved a woman who claimed loss of support as a result of the death of her partner. The plaintiff alleged that she should be put in the same position as a widow who was married to the deceased. The court stated that the previous partners' behaviour confirms that the agreement between the parties as to their duties (the deceased working and the plaintiff looking after the household and children) had been established.<sup>219</sup> This case closed the gap in the law left by the *Du Plessis* judgement by extending the dependant's action for loss of support to heterosexual couples.

This judgment was discussed in relation to same-sex relationships earlier in this chapter. The court in the *Du Plessis* case extended the dependant's action for loss of support to same-sex partners only. The *Verheem* judgment addressed the position of unmarried heterosexual couples by recognising the existence of an agreement between the parties. The case ameliorated the vulnerable position of cohabitants. Smith puts forth the theory that the *Verheem* case does not convey the true legal position of life partners as reflected in the *Volks* case. The court did not engage whether the *Volks* decision was a binding precedent that precluded the plaintiff's claim.<sup>220</sup> Goodey AJ proceeded no further than to quote the summary of the finding of the trial court in *Volks*. He made no reference whatsoever to the fact that the judgment of the trial court had not found favour with the Constitutional Court.<sup>221</sup> This case makes it clear that the *Volks* case is binding and it is up to the courts to decide whether a

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<sup>218</sup> *Verheem v Road Accident Fund* 2012 (2) SA 409 (GNP).

<sup>219</sup> *Verheem v Road Accident Fund* 2012 (2) SA 409 (GNP) at para 38.

<sup>220</sup> Smith BS 'Extension of the dependant's action to heterosexual life partnerships after *Volks v Robinson* and the coming into operation of the Civil Union Act-Thus far and no further?' (2012) 75 *Tydskrif Vir Hedendaagse Romeins-Hollandse Reg* 478-480.

<sup>221</sup> Smith BS 'Extension of the dependant's action to heterosexual life partnerships after *Volks v Robinson* and the coming into operation of the Civil Union Act-Thus far and no further?' (2012) 75 *Tydskrif Vir Hedendaagse Romeins-Hollandse Reg* 479.

departure from the precedent is necessary. Another case in which the courts extended benefits to unmarried couples is discussed next.

*Paixão v Road Accident Fund*<sup>222</sup> concerned the common law dependant's action and whether it should be extended to permanent heterosexual life partners. The appellant and her daughter sued the Road Accident Fund for maintenance and loss of support as a result of the death of her partner. The deceased took care of the appellant and the children financially. The court stated that a duty of support only arises by operation of law. The court held that 'the dependents' action has always had the flexibility to adapt to social changes and modern conditions.'<sup>223</sup> Although, there was no reciprocal duty of support by operation of law, it did not exclude a duty arising out of agreement between the partners. The court held that there was a binding and legal obligation between the appellant, her daughter and the deceased. The agreement between the parties created a reciprocal duty of support and the common law should provide for this duty of support also in relation to unmarried heterosexual life partners. Now, the courts generally appear to be more sympathetic to the cohabitee-applicant. The *Volks* case examined whether spousal benefits upon death should be available to the surviving heterosexual life partner. The *Paixão* case went further than the *Volks* case, by considering the common law in light of constitutional imperatives and by placing the applicants in the position they would have been in had the father who owed them a legal duty of support had not been killed.

The *Paixão* case has proved to be instrumental in the judiciary being attentive to the needs of heterosexual cohabitants. 'The *Paixão* case has managed to readdress the preferential treatment afforded to same-sex life partners, despite the 'choice' argument *strictu sensu* also

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<sup>222</sup> *Päixio v Road Accident Fund* 2012 (4) ALL SA 262 (SCA).

<sup>223</sup> *Päixio v Road Accident Fund* 2012 (4) ALL SA 262 (SCA) at para 25.

now (post-Civil Union act) applying to same-sex life partners that choose not to marry. The *Paixão* case, in the absence of the legislator providing a legal framework for life partnerships, has at least managed to smooth out the difference in position between same-sex and heterosexual life partners as far as a dependant's action is concerned.<sup>224</sup> The *Paixão* case provides a distinct approach from earlier decisions such as *Du Plessis* where the courts have refrained from providing solutions faced by heterosexual life partners. The next section relates to the courts approach to the issue of succession regarding cohabitation relationships.

### 5.1.3 SUCCESSION

This section will aim to highlight the discrepancy in the law between heterosexual and same-sex couples as far as succession is concerned. Our law does not give automatic rights to partners in a cohabitation relationship to inherit. If one of the partners dies without leaving a will, the domestic partner is not legally entitled to inherit from the deceased's estate. *Gory v Kolver No* <sup>225</sup> was discussed comprehensively in this Chapter under same-sex relationships. While alleviating the position of same-sex couples the judgment left the door open on the position of heterosexual permanent life-partners. After the *Gory* decision there was an anomaly in the law which allowed spousal benefits relating to succession to unmarried as well as married same-sex life partners, while restricting such benefits to married opposite-sex couples only. The grounds for termination of a universal partnership are outlined next.

A universal partnership terminates if one of the parties predeceases the other, or by agreement or by insolvency of one of the partners.<sup>226</sup> By contrast to marriage or a civil union, a life partnership is terminated by the mere separation of the parties and does not involve the

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<sup>224</sup> Calvino LR 'Advancing the rights of heterosexual life partners in respect of loss of support' (2014) 35 *Obiter* 167.

<sup>225</sup> *Gory v Kolver No* 2007 4 SA 97 (CC).

<sup>226</sup> Leslie Smith J 'Universal partnerships' *Legal Articles* available at <http://www.jlesliesmith.com/articles/legal-articles/Universal-Partnerships/default.aspx> (accessed on 14 August 2014).

courts as it occurs extra-judicially.<sup>227</sup> Should the parties be unable to reach an agreement, the parties may resort to the courts for relief.

## 6. CONCLUSION

The *Fourie* decision was based on the discrimination faced by same-sex couples who were prevented from getting married. There have not been any judgements on unmarried same sex couples post the Civil Union Act so we cannot say how a court will treat unmarried same sex cohabitees now. It is contended however that there was therefore no justification for the inequality between the two. By enacting same-sex legislation, the state recognised the inequality of denying same-sex couples rights akin to marriage. The limited domestic partnership protection is different to the protection afforded to same-sex couples. The courts felt it was the prerogative of the legislature to extend marital type benefits to heterosexual cohabitees and that this should not occur through judicial interpretation. Against the background provided with regard to judicial decisions and constitutional issues surrounding cohabitation, the following chapter will examine the legislation currently in place to regulate opposite-sex and same sex cohabitation relationships.

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<sup>227</sup> Smith BS 'The Dissolution of a life or Domestic Partnership' in Heaton J (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 428.

## CHAPTER 4: CURRENT LEGISLATION REGULATING OPPOSITE-SEX AND SAME-SEX RELATIONSHIPS

### 1. INTRODUCTION

Married couples have for a long time exclusively enjoyed advantages denied to unmarried couples. The status quo has changed and the legislature has opted for a model where different intimate relationships are regulated by different Acts. Bakker states that the consequence of various laws regulating intimate relationships is a myriad of problems associated with inconsistent legal drafting, oversights and complexity and that it is a system in chaos.<sup>228</sup> Non-formalised cohabitation relationships are not protected under a dedicated statute, thus regulation of these intimate relationships in our diverse society proves to be problematic. It can be observed that the absence of legislation regulating cohabitation has adverse consequences for those involved in these relationships and particularly on our family law system which can be characterised as ‘disorderly’, according to Bakker.<sup>229</sup>

The purpose of this chapter is to briefly outline legislation currently in place to regulate opposite-sex and same-sex relationships. The main focus of this chapter is the detailed examination of the Civil Union Act and the Domestic Partnerships Bill. A discussion of the default position in terms of the Marriage Act will be provided at the outset.

### 2. MARRIAGE ACT<sup>230</sup>

The common law definition of marriage stated that a marriage in South Africa is ‘a union of one man with one woman, to the exclusion, while it lasts, of all others.’<sup>231</sup> This definition restricted marriage to a civil or religious marriage between monogamous heterosexual

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<sup>228</sup> Bakker P ‘Chaos in Family law: A model for the recognition of intimate relationships in South Africa’ (2013) 16 (3) *Potchefstroom Electronic Law Journal* 128.

<sup>229</sup> Bakker (2013) 128.

<sup>230</sup> Marriage Act 25 of 1961.

<sup>231</sup> As articulated by Innes CJ in *Mashia Ebrahim v Mahomed Essop* 1905 TS 59 at 61.



couples.<sup>232</sup> The traditional definition of marriage was unsuitable given the diverse family formations in South Africa who perform functions analogous to those performed by spouses in a marriage.

### 3. RECOGNITION OF CUSTOMARY MARRIAGES ACT <sup>233</sup>

The Act places couples who conclude a customary marriage on the same footing as couples married in terms of the Marriage Act. For a customary marriage to be valid, the prospective spouses must be over the age of 18 years and must both consent to be married to each other under customary law and the marriage must be negotiated and entered into or celebrated in accordance with customary law.<sup>234</sup> Therefore, couples who do not conclude a customary marriage will be in the same position as same-sex and opposite sex couples find themselves in our law with regard to cohabitation.

### 4. THE CIVIL UNION ACT<sup>235</sup>

The Civil Union Act was prompted by the ruling of the Constitutional Court in which the exclusion of lesbian and gay couples from the protection afforded to spouses was declared unconstitutional.<sup>236</sup> The Civil Union Act provided a vehicle for the recognition of a plurality of family forms previously denied legal recognition. The enactment of the Civil Union Act enabled same-sex or heterosexual couples to enter into marriages or civil unions. A civil union is defined as ‘the voluntary union of two persons who are both 18 years of age 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

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<sup>232</sup> Marriage Act, s 30 (1).

<sup>233</sup> Recognition of Customary Marriages Act 120 of 1998.

<sup>234</sup> Recognition of Customary Marriages Act, s 3 (1) (a), (i), (ii) and (b).

<sup>235</sup> Civil Union Act 17 of 2006.

<sup>236</sup> *Minister of Home Affairs and Another v Fourie and Another 2006 (1) SA 524 (CC)*.

others.<sup>237</sup> Along with marriage, the Act also allows individuals to enter into civil partnerships. This term is not defined in the Act but it has been suggested that it is a mechanism for two persons to formalise their relationship in instances where they do not wish to marry but still wish to obtain legal recognition.<sup>238</sup> The Act gives due recognition to the fact that the elimination of systematic discrimination against people in same-sex relationships cannot be achieved without positive action being taken by the state. The Civil Union Act serves as a direct and accessible legal instrument in laying the foundation for the equal rights of people in same-sex relationships.<sup>239</sup>

## 5. AD HOC LEGISLATIVE DEVELOPMENTS AND PRIVATE LAW REMEDIES

Some ad hoc legislative developments have created some rights and duties for domestic partners. Some of these Acts include, the Medical Schemes Act,<sup>240</sup> the Pension Funds Act,<sup>241</sup> And the Domestic Violence Act.<sup>242</sup> In the absence of legislation regulating non-formalised cohabitation relationships, these partners can only rely on private law remedies to seek redress. These remedies include express or implied agreement where the partner contends that a universal partnership has been established as discussed in the preceding chapter. A disadvantaged partner may have to rely on the doctrine of proprietary estoppel as a defence. Proprietary estoppel is an equitable cause of action that enables a claimant to claim an

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<sup>237</sup> Civil Union Act 17 of 2006, definition section.

<sup>238</sup> Smith BS and Robinson JA 'An embarrassment of riches or a profusion of confusion? An evaluation of the continued existence of the Civil Union Act 17 of 2006 in the light of prospective Domestic Partnerships legislation in South Africa' (2010) (13) 2 *Potchefstroom Electronic Law Journal* 37.

<sup>239</sup> Ntlama N 'A brief overview of the Civil Union Act' (2010) 13 (1) *Potchefstroom Electronic Law Journal* 197. It could also be argued that having a separate institution regulating same-sex marriage is submitting same-sex couples to the same level of discrimination and subordinate position they experienced prior to the Civil Union Act. By not accommodating same-sex marriage in the common law definition of marriage creates the impression that a civil marriage is still the preferred form of intimate relationship.

<sup>240</sup> Medical Schemes Act 131 of 1998, s1: a 'dependant' includes a 'spouse' or 'partner.'

<sup>241</sup> Pension Funds Act 25 of 1956, s 1: a 'spouse' includes a 'permanent life partner or spouse or civil union partner in accordance with the Marriage Act, the Recognition of Customary Marriages Act, the Civil Union Act or the tenants of a religion.'

<sup>242</sup> Domestic Violence Act 116 of 1998, s1: cohabitation is defined under the Act as a 'domestic relationship'.

interest in property.<sup>243</sup> Smith states that it can be used ‘...where a life partner was, to his or her detriment, encouraged or, by way of omission, led to believe that he or she had acquired a legal right to property while this was in reality not true.’<sup>244</sup> A disadvantaged partner bears the onus of proving that the legal titleholder created a situation in terms of which it could be reasonably inferred that some right or legal interest in or over the property had been accorded to the non-owner.<sup>245</sup> Smith, however, challenges the appropriateness of this remedy by stating that estoppel only operates as a defence and that it cannot be used to acquire ownership.<sup>246</sup> Another remedy is unjustified enrichment. The basic function of the law of unjustified enrichment is to restore economic benefits to the plaintiff, at whose expense they were obtained, and for the retention of which by the defendant there is no legal justification.<sup>247</sup> An example is where the non-owner contributed to the purchase of the property the partners shared together where the property is only owned by one of the partners. When the relationship terminates, the consequence would be that the legal title holder will claim ownership of the property to the detriment of the other. Unjustified enrichment can therefore be invoked to remedy the discrepancy. It can be deduced that cohabitants are in need of more comprehensive legal protection.

## 6. DOMESTIC PARTNERSHIPS BILL<sup>248</sup>

A step towards recognising relationships outside marriage was taken in 2003 when the South African Law Reform Commission (SALRC) presented a Discussion Paper on domestic partnerships to Parliament in which the SALRC suggested a two-tier domestic partnership

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<sup>243</sup> Atkins S *Equity and Trusts* (2013) 473.

<sup>244</sup> Smith BS ‘The Dissolution of a life or Domestic Partnership’ in Heaton J (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 444.

<sup>245</sup> The South African Law Reform Commission Discussion Paper 104 (Project 118) *Domestic Partnerships* (2003) 40.

<sup>246</sup> Smith BS ‘The statutory Domestic Partnership cometh’ in Atkin B (ed) *The International Survey of Family Law* (2010) 301.

<sup>247</sup> Visser D *Unjustified Enrichment* (2008) 4.

<sup>248</sup> Draft Domestic Partnerships Bill, Government Gazette No 30663, 14 January 2008.

system, namely registered and unregistered.<sup>249</sup> This process was followed by a Report containing draft legislation in which the Commission recommended that registered and unregistered partnerships be regulated by a Domestic Partnerships Act.<sup>250</sup> The proposed Domestic Partnerships Act was tabled in 2008 but never debated by Parliament. It remains dormant. The substantive content of this draft legislation will be considered below.

This section seeks to explore the features of the Domestic Partnerships Bill. The preamble of the Bill states that it seeks '[t]o provide for the legal recognition of domestic partnerships; the enforcement of the legal consequences of domestic partnerships; and to provide for matters incidental thereto.'<sup>251</sup> The provisions of the Bill create the impression that it caters for both opposite-sex and same-sex couples.<sup>252</sup> 'Domestic partnership' is defined in the Bill as 'a registered domestic partnership or unregistered domestic partnership between two persons who are both 18 years of age or older and includes a former domestic partnership.'<sup>253</sup> The Bill was drafted for the very purpose of defining domestic partnerships and affording such relationships legal recognition. Smith suggests that the Bill is intended to provide the legislative substructure of domestic partnerships in South African law and would provide a realistic alternative to marriage through comprehensive and effective regulation of those partnerships.<sup>254</sup> The Bill provides for two types of domestic partnerships, registered domestic partnerships and unregistered domestic partnerships. Since the consequences differ, each will be separately discussed below.

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<sup>249</sup> The South African Law Reform Commission Discussion Paper 104 (Project 118) *Domestic Partnerships* 2003.

<sup>250</sup> The South African Law Reform Commission (Project 118) *Report on Domestic Partnerships* (2006) 110, 111.

<sup>251</sup> Draft Domestic Partnerships Bill, preamble.

<sup>252</sup> Smith BS *The Development Of South African Matrimonial Law With Specific Reference To The Need For And Application Of A Domestic Partnership Rubric* (LLD thesis, University of the Free State, 2010).466.

<sup>253</sup> Draft Domestic Partnerships Bill, definition of 'domestic partnership'.

<sup>254</sup> Smith BS 'Rethinking *Volks v Robinson*: The implications of applying a 'contextualised choice model' to prospective South African domestic partnership legislation' (2010) 13 (3) *Potchefstroom Electronic Law Journal* 275.

## 6.1 REGISTERED DOMESTIC PARTNERSHIPS

The first form of domestic partnership proposed by the SALRC is a registered domestic partnership. It involves a public commitment in the form of a formal registration process that is undertaken by two persons (irrespective of their gender).<sup>255</sup> These two persons must be at least 18 years of age and at least one of them must be a South African citizen.<sup>256</sup> ‘A person may only be a partner in one registered domestic partnership at any given time.’<sup>257</sup> A person who is (a) married under the Marriage Act, (b) married under the Recognition of Customary Marriages Act, or (c) who is a spouse or partner in a civil union, may not register a domestic partnership.<sup>258</sup> Registration has the virtue of certainty. This approach avoids a subjective inquiry into the quality of the relationship with partners having to prove their rights with regard to inheritance, maintenance etcetera. It provides an evidentiary advantage. The consequence of registration is that many of the legal consequences that attach to marriage are extended to registered domestic partners. These consequences will be separately outlined below.

Registered domestic partnerships are out of community of property.<sup>259</sup> However, partners are able to deviate from the default system by concluding a registered partnership agreement.<sup>260</sup> Partners are thus able to regulate the proprietary consequences of their relationship themselves.

Partners may by way of a registered partnership agreement agree that the relationship is one in community of property, thus partners have to take positive action to ensure protection of this matrimonial property system. However it should also be noted that the goal of the

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<sup>255</sup> Draft Domestic Partnerships Bill, preamble.

<sup>256</sup> Draft Domestic Partnerships Bill, definition of ‘domestic partnership’ read with clause 4 (6).

<sup>257</sup> Draft Domestic Partnerships Bill, clause 4 (1).

<sup>258</sup> Draft Domestic Partnerships Bill, clause 4 (2).

<sup>259</sup> Draft Domestic Partnerships Bill, clause 7 (1).

<sup>260</sup> Draft Domestic Partnerships Bill, definition of ‘registered partnership agreement’.

registered domestic partnership is not to mirror marriage. In the event of registration, both partners are thus entitled to occupy the family home regardless of which partner purchased the property. The non-owning partner may also not be evicted from the family home.<sup>261</sup> Partners require each other's consent when disposing of any property. The Bill makes provision for division of property when the relationship terminates. A claim for the division of joint property or redistribution of separate property may be brought to the court by the partners.<sup>262</sup> It can be concluded that the registered domestic partnership retains many of protections which marriage affords spouses as regards the matrimonial property regime. The effects of registering a domestic partnership on reciprocal duty of support and ex-post facto maintenance will be considered next.

Registered domestic partners owe each other a duty of support in accordance with their respective financial means and needs.<sup>263</sup> After the termination of a registered partnership, the court may make an order requiring one partner to pay maintenance to another.<sup>264</sup> A partner in a registered domestic partnership is also considered a 'spouse' for the purpose of any action brought in terms of the Maintenance of Surviving Spouses Act.<sup>265</sup> Smith states that registration alleviates the burden of a partner having to prove the existence of a reciprocal duty of support.<sup>266</sup> The position of registered partners with regard to succession will be discussed next.

Registered domestic partners are recognised as legal heirs of a deceased in terms of a valid will where the partner was named as a beneficiary. If a partner dies intestate, the surviving

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<sup>261</sup> Draft Domestic Partnerships Bill, clause 11.

<sup>262</sup> Draft Domestic Partnerships Bill, clause 22.

<sup>263</sup> Draft Domestic Partnership Bill, clause 9.

<sup>264</sup> Draft Domestic Partnership Bill, clause 18 (a)-(e). This order for the payment of maintenance could be for any specified period or until the registered partner in whose favour the order is given dies, marries under the Marriage Act, marries under the Recognition of Customary Marriages Act, enters into a civil union, or enters into a registered domestic partnership.

<sup>265</sup> Maintenance of Surviving Spouses Act 27 of 1990, Draft Domestic Partnership Bill, clause 19.

<sup>266</sup> Smith BS 'Rethinking *Volks v Robinson*: The implications of applying a 'contextualised choice model' to Prospective South African domestic partnership legislation' (2010) 13 (3) *Potchefstroom Electronic Law Journal* 275.

partner is also regarded as a 'spouse' in terms of the Intestate Succession Act.<sup>267</sup> A registered domestic partner is treated in the same way as a 'spouse' to a marriage. Inheritance rights would be provided to a surviving non-marital partner if they had registered their partnership as prescribed in the Bill. The above sections illustrate the legal certainty that accompanies registration. Couples who register a domestic partnership will be placed in the same position as same-sex couples whether or not they undergo a civil union. This was clearly the intention of the legislature when drafting the Bill.

The Bill also provides for the dissolution of a registered domestic partnership. It can be terminated upon the death of one or both registered domestic partners, through the conclusion of a termination agreement or by application to the court for a termination order.<sup>268</sup> These legal consequences aims to eliminate the prevailing inconsistent legal position between same-sex and opposite-sex domestic partners.<sup>269</sup>

## 6.2 UNREGISTERED DOMESTIC PARTNERSHIPS

Registered domestic partnerships have shortfalls in their under-inclusiveness if partners choose not to register their domestic partnership or neglect to do so. The Bill provides very little protection for unregistered domestic partners. These partnerships would not be registered in terms of the Bill. Unregistered domestic partnerships do not require a formal act of any kind to establish cohabitation or, more precisely, to attach legal consequences to cohabitation. The Bill does not explicitly define what an unregistered domestic partnership entails. However, in order for an unregistered partnership to be recognised a threshold criterion must be satisfied. The Bill prescribes no formalities for the recognition of an unregistered domestic partnership. Smith states that the Bill ostensibly envisions the situation

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<sup>267</sup> Intestate Succession Act 81 of 1987. Draft Domestic Partnerships Bill, clause 20.

<sup>268</sup> Draft Domestic Partnerships Bill, clause 12 (1) (a), (b) and (c).

<sup>269</sup> Smith BS 'The statutory domestic partnership cometh' in Atkin B (ed) *The International Survey of Family Law* (2010) 305.

whereby one or both of the partners can apply to a competent court at the termination of the relationship for recognition, which, on the basis of a list of factors, will determine whether the relationship qualifies for the protection provided by the Bill.<sup>270</sup>

The criteria for recognition of a relationship as a domestic partnership can be criticised as the Bill provides a list of factors<sup>271</sup> that the court must take into consideration instead of providing a clear list of criteria expressly stating the requirements for the recognition of an unregistered domestic partnership. Unregistered domestic partners may 'opt-in' to the protection provided by chapter 4 of the Bill, by approaching a competent court for an order related to property division, intestate succession or maintenance.<sup>272</sup> This suggests that the court is endowed with wide discretion to make an order pertaining to property division, maintenance or intestate succession. The consequences of an unregistered domestic partnership are considered below.

After the termination of an unregistered domestic partnership through death or separation, one or both of the partners may apply to the court for an order to divide their joint or separate property, or part of the separate property of the other unregistered domestic partner.<sup>273</sup> Smith states that the protection provided to unregistered domestic partnerships in relation to property is adequate. The author suggests that where the facts of an application lead a court to

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<sup>270</sup> Smith BS 'Rethinking *Volks v Robinson*: The implications of applying a 'contextualised choice model' to prospective South African domestic partnership legislation' (2010) 13 (3) *Potchefstroom Electronic Law Journal* 287.

<sup>271</sup> Draft Domestic Partnerships Bill, clause 26 (2) (a) - (i). When deciding on an application for an order under section 26 of this Act, a court must have regard to all the circumstances of the relationship, including; (a) the duration and nature of the relationship; (b) the nature and extent of common residence; (c) the degree of financial dependence or interdependence, and any arrangements for financial support, between the unregistered domestic partners; (d) the ownership, use and acquisition of property; (e) the degree of mutual commitment to a shared life; (f) the care and support of children of the unregistered domestic partnership; (g) the performance of household duties; (h) the reputation and public aspects of the relationship; and (i) the relationship status of the unregistered domestic partners with third parties.

<sup>272</sup> Smith BS 'The interplay between registered and unregistered domestic partnerships under the Draft Domestic Partnerships Bill, 2008 and the potential role of the putative marriage doctrine' 2011 *The South African Law Journal* 565.

<sup>273</sup> Draft Domestic Partnerships Bill, clause 32 (1).



conclude that a vulnerable applicant was unable to convince his/her partner to formalise their relationship, an extension of principle of matrimonial (or registered domestic partnership) property law may conceivably be justifiable due to the lack of any real choice.<sup>274</sup> The legislature opted for a judicial discretion model instead of attaching comprehensive consequences to unregistered domestic partnerships until the partnership has been proved to be established. The consequences with regard to reciprocal duty of support and maintenance are considered next.

Unregistered domestic partners are not liable to maintain one another and are not entitled to claim maintenance from the other, except as provided for in the Bill which provides for this as follows: In the event of separation, a court may, upon application of one or both partners make an order for the payment of maintenance by one unregistered domestic partner to the other for a specified period.<sup>275</sup> Smith criticises this clause as unregistered partners have no ex lege duty to maintain one another during the subsistence of the relationship and in the event partners have not created a contractual duty to maintain each other, it would be impossible to lodge a claim that is based on this duty after termination of the relationship.<sup>276</sup> Such partners would have to undertake contractual mutual support obligations in order to institute a need-based claim after termination of the relationship. The Bill also makes provision for the surviving partner of an unregistered domestic partnership to apply for maintenance from the deceased's estate.<sup>277</sup> Smith suggests that the justification of not affording unregistered domestic partners an ex lege duty of support on the same basis as marriage and registered domestic partners lies in the SALRC's decision to opt for a judicial discretion model as

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<sup>274</sup> Smith BS (2010) 294.

<sup>275</sup> Draft Domestic Partnership Bill, clause 28(1).

<sup>276</sup> Smith BS 'Rethinking *Volks v Robinson*: The implications of applying a 'contextualised choice model' to prospective South African domestic partnership legislation' (2010) 13 (3) *Potchefstroom Electronic Law Journal* 290.

<sup>277</sup> Domestic Partnership Bill, clause 29. The order for the duration of the maintenance payment may be made until his or her death, remarriage or registration of another registered domestic partnership, insofar as he or she is not able to provide therefore from his or her own means and earnings.

opposed to one in which de facto recognition was provided.<sup>278</sup> The decision of the SALRC is therefore justified given the nature of the unregistered domestic partnership envisioned by the SALRC as a relationship which has to be established before recognition is granted.

Unregistered domestic partners are regarded as legal heirs of a deceased where he/she concluded a valid will and the unregistered domestic partner was named as a beneficiary. Where an unregistered domestic partner dies intestate, the surviving partner may bring an application to court for an order that he or she may inherit the intestate estate or where the deceased partner is survived by one or more descendants, to inherit either child's share of the intestate estate or an amount determined by the relevant Minister responsible for the administration of justice, whichever amount is the greater.<sup>279</sup> The absence of criteria in the Bill for the court to consider when determining this application leads to the conclusion that such an application will operate solely based on the court's discretion.<sup>280</sup>

The Bill provides that this partnership terminates through death or separation and that either or both parties may approach the court for a maintenance order, intestate succession order or a property division order.<sup>281</sup>

Smith notes that the enactment of the Bill would supersede earlier case law in which words were read into statutes by the Constitutional Court to acknowledge the rights of equality and dignity of same-sex couples.<sup>282</sup> The Bill is a notable attempt at extending legal protection to vulnerable and powerless individuals; it is however, still caught up in the fiction that individuals have the autonomy to decide themselves how to regulate their affairs. It also

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<sup>278</sup> Smith BS (2010) 288.

<sup>279</sup> Domestic Partnerships Bill, clause 31(1) and (2).

<sup>280</sup> Smith BS 'Rethinking Volks v Robinson: The implications of applying a 'contextualised choice model' to prospective South African domestic partnership legislation' (2010) 13 (3) *Potchefstroom Electronic Law Journal* 291.

<sup>281</sup> Draft Domestic Partnerships Bill, clause 26 (1).

<sup>282</sup> Smith BS 'The interplay between registered and unregistered domestic partnerships under the Draft Domestic Partnerships Bill, 2008 and the potential role of the putative marriage doctrine' 2011 *The South African Law Journal* 565.

wrongfully presumes that upon termination of the relationship individuals will have the knowledge and resources to engage with the courts to seek protection.<sup>283</sup> Partners in unregistered domestic partnerships are unlikely to rush for registration. Parties that are favoured by the skewed power relations in such partnership are not likely to give up their advantage and register a relationship if they can take advantage of the uncertainties that go with lack of registration. Notwithstanding the circulation of the Domestic Partnerships Bill in 2008, the position remains that unmarried heterosexual cohabitantes are not embraced in present-day family law.<sup>284</sup>

## 7. CONCLUSION

A Domestic Partnerships Act is necessary as it will establish legally recognised procedures to protect the rights and establish the obligations for the parties who are living together. The provisions in relation to registered and unregistered domestic partnerships have to be clarified and corrected prior to the Bill being enacted into law insofar as there are uncertainties and inconsistencies. The enactment of the Bill into law will place domestic partnerships on par with same-sex relationships that already enjoy protection in terms of the law. The following chapter will engage with the contention that the statutory model in Sweden provides a good standard for the regulation of domestic partnerships in South Africa as there is not yet any statutory regulation in this area.

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<sup>283</sup> De Vos P 'Still out in the Cold? The Domestic Partnerships Bill and the (non) protection of marginalised woman' in Sloth-Nielsen J and Du Toit Z (ed) *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law* (2008)136.

<sup>284</sup> Sloth-Nielsen J and Van Heerden B 'The Constitutional Family: Developments in South African child and Family law 2003-2013' (2014) 28 *International Journal of Law, Policy and The Family* 4.

## CHAPTER 5: WHY THE SWEDISH MODEL PROVIDES AN EXPEDIENT PARADIGM FOR SOUTH AFRICA

### 1. INTRODUCTION

In the 1950's and 1960's marriage was the custom in Sweden. An increasing number of families in Europe had replaced marriage with cohabitation as the partnership model of choice. Cohabitation came to fore in the 1970's where young people would live together as a prelude to or as an alternative to marriage. Social and legal acceptance of cohabitation in Scandinavian society paved the way for the recognition of same-sex unions as well.<sup>285</sup> The growing acceptance of cohabitation relationships as a social reality within society led to a continuous reduction in the disparity between the legal status of married couples and cohabiting couples. Nordstrom<sup>286</sup> argues that these developments demonstrate how Sweden is a pioneer in the ongoing process of freeing individuals to live their lives as they choose. At the core of Swedish laws was a massive 'gender turn' that required the radical transformation of marriage.

Against the background, this chapter will explore the strong cornerstones of neutrality and gender equality upon which the Swedish legislature founded its laws. Arguments to strengthen the notion that the Swedish model of statutory regulation should be followed will also be analysed. Finally, this discussion will also include criticisms of the Swedish model.

### 2. THE PRINCIPLE OF NEUTRALITY

This principle essentially required all legislation to be neutral regardless of gender or family formations people chose for their lives. The object was to reinforce the principle that people should be given the freedom to determine the path of their own lives, without the state having

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<sup>285</sup> Eskridge W and Spendale N *Gay Marriage: For Better or for Worse? : What We've Learned From the Evidence* (2006) 179.

<sup>286</sup> Nordstrom BJ *Culture and Customs of Sweden* (2010) 3.

any influence on how this ought to be achieved. The Ministry of Justice in the abstract of the Protocol on Justice Department Matters<sup>287</sup> elaborated on this principle by stating that '[n]ew legislation ought (so far) as possible to be neutral in relation to the different forms of living together and different moral views. Marriage has and ought to have a central position in the family law, but one should try to see that the family law legislation does not create any provisions which create unnecessary hardship or inconveniences for those who have children and build families without marrying.'<sup>288</sup> This principle was interpreted to mean that there would be mechanisms regulating marriage as well as mechanisms regulating cohabitation, with cohabitants having the option of either concluding a marriage or entering a cohabitation relationship. This principle introduced many changes to both marriage and cohabitation to encourage uniformity.

Uniform treatment has been the guideline in Sweden for many years. Agell supports this argument by stating that the intention of the legislature was that state should remain neutral to whether a couple chose to marry or cohabit. Marriage should maintain its important place in society but that the law should not create difficulties for couples who preferred not to marry.<sup>289</sup> This principle was heightened with the passage of the Cohabitation (Joint Homes) Act and the Homosexual Cohabitation Act<sup>290</sup> and was further given effect to with the introduction of the Cohabitation Act in 2003<sup>291</sup> as discussed in Chapter 2. Cohabitation legislation was enacted to meet the practical needs of individuals while striving to treat marriage and cohabitation equally. The final step taken by the legislature to ensure neutrality was when marriage in Sweden became gender neutral. This was extensively covered in Chapter 2. This pinnacle confirmed the Swedish legislature's long-established campaign to

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<sup>287</sup> Ministry of Justice, Abstract of Protocol on Justice Department Matters (1969).

<sup>288</sup> Ministry of Justice, Abstract of Protocol on Justice Department Matters (1969) 4.

<sup>289</sup> Agell A (1999) 'Family forms and legal policies: A comparative view from a Swedish observer' 1999 Stockholm Institute for Scandinavian Law 206.

<sup>290</sup> Cohabitation (Joint Homes) Act 1987:232 Homosexual Cohabitation Act 1988:942.

<sup>291</sup> Cohabitation Act 1 July 2003, SFS 2003:376.

promote a society of inclusion and uniform treatment of all individuals regardless of sex, marital status and family construction. The strong cornerstone of neutrality led to the enactment of legislation regulating cohabitation as well as amendment of already established legislation. Along with the principle of neutrality, another founding principle of the Swedish legislation is gender equality and it will be considered next.

### 3. GENDER EQUALITY

At the forefront of all Swedish laws is the concept of gender equality and it is the cornerstone upon which Swedish law is constructed. Sweden in particular is unparalleled in its advances towards gender equality.<sup>292</sup> ‘The principle of gender equality demonstrates that the norms and values in society can penetrate already established legislation. The aspiration to achieve gender equality is often obvious in preparatory work, and occurs plainly in legal terms in the form of gender-neutral legislation.’<sup>293</sup> In contrast, South Africa has not elected to make marriage gender-neutral, but instead created a parallel institution, namely, a civil union. The development of gender equality in the private and public sphere will be discussed respectively.

In the private sphere, there has been a change in social conceptions regarding gender and family relations. It is the form rather than the function of families that is the basis for legal differentiation in most jurisdictions. Barlow and James are of the opinion that the law’s focus on the form has resulted in a neglect of family relationships fulfilling the same functions.<sup>294</sup> Sweden, however, has adopted a functional approach to the regulation of various non-

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<sup>292</sup> Merin Y *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States* (2010) 47.

<sup>293</sup> Mannelqvist R ‘Social Insurance law- The core of Swedish welfare law’ in Davies M, Gunnarsson A and Svensson E (eds) *Exploiting the Limits of Law: Swedish Feminism and the Challenge to Pessimism* (2013) 158.

<sup>294</sup> Barlow A, James G ‘Regulating marriage and cohabitation in 21<sup>st</sup> Century Britain’ (2004) 67 *Modern Law Review* 152, 166.

traditional relations. These laws integrate modern family patterns such as same-sex and opposite-sex cohabitation with traditional family forms.

With regard to the public sphere, Sweden has many national gender equality policies.<sup>295</sup> These policies reflect a strong commitment based on ‘...ideals of women and men equally sharing paid work and family responsibilities.’<sup>296</sup> This commitment has ensured that Sweden has one of the most equal male to female ratio employment rates in Europe. This also establishes equal partnership between cohabitants.

This section displayed the Swedish society’s strong commitment towards gender equality and that policy makers have undertaken to implement this principle in policies affecting the private and public spheres. The next section will provide arguments supporting the adoption of the Swedish model of statutory regulation in South Africa.

#### 4. ARGUMENTS JUSTIFYING THE ADOPTION OF THE SWEDISH MODEL IN SOUTH AFRICA

South Africa is on the brink of legislative reform. A careful analysis of the statutory model in Sweden may provide South Africa with options when legislators debate impending domestic partnership legislation. The Swedish model of statutory regulation provides a noteworthy illustration for South Africa, both positive and negative. These positive and negative aspects will be contemplated below.

The positive aspects of adopting the Swedish model will be explored first. The Swedish laws have proved to be practical and resourceful. They have been in place and tested for a long period of time, thus it may be useful to consider them. Sweden’s same-sex and opposite-sex couples are treated the same in Sweden. Unlike in South Africa, Swedish cohabitants do not experience the same inequality in treatment. The lifestyles of many opposite-sex couples in

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<sup>295</sup> Ministry of Integration and Gender Equality ‘The Swedish government’s gender equality policy’ 2009.

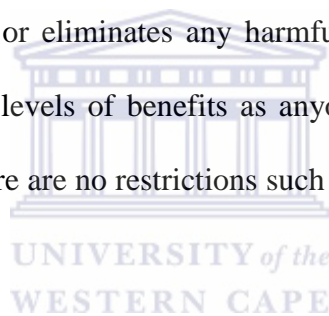
<sup>296</sup> Oláh L and Bernhardt E ‘Combining childbearing and gender equality’ in Frejka T, Hoem J and Touleman L *Childbearing Trends and Policies in Europe, Book 3* (2008) 1106.

Sweden is much closer to that of same-sex couples.<sup>297</sup> The degree of legal recognition and social acceptance of non-marital cohabitation also account for the higher degree of social acceptance of gay couples and more comprehensive legal recognition of their relationships.<sup>298</sup>

Kohm notes that cohabitation has been regulated to such an extent that, in many statutory circumstances, it looks much like marriage. Reforms in Sweden provide a reference point for development elsewhere.<sup>299</sup>

The state provides pension schemes, worker's compensation, housing assistance, universal free health care and child care.<sup>300</sup> This philosophy assumes full employment, but the Swedish state also provides a basic minimum safety net for all individuals in need.<sup>301</sup> Although there continue to be distinctions between the legal treatment of married and unmarried couples, the Swedish social contract reduces or eliminates any harmful effects of those differences.<sup>302</sup>

Sweden is generous in terms of levels of benefits as anyone who lives in Sweden may be eligible for social assistance. There are no restrictions such as household type or time spent in Sweden.



The 2003 Employment guidelines<sup>303</sup> seek to achieve full employment, quality and productivity at work and social cohesion and inclusion. This is the government's main priority. A high employment level is crucial to maintain the social welfare system. Sweden seeks to develop and modernise the European social model into one of an active welfare state that is conducive to activation, mobility and individual security, and encourages employment and growth. This paves the way for increasing prosperity, for the individual and society alike.

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<sup>297</sup> Merin Y *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States* (2010) 38.

<sup>298</sup> Merin Y (2010) 38.

<sup>299</sup> Kohm L 'Cohabitation and the future of Marriage' 2005 *Regent University Law Review* 262.

<sup>300</sup> Bowman *Unmarried Couples, Law and Public Policy* (2010) 218.

<sup>301</sup> Bowman 218.

<sup>302</sup> Bowman 218.

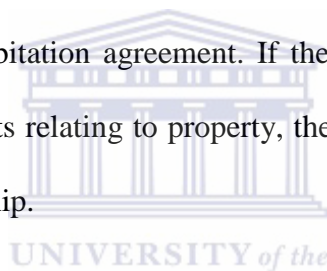
<sup>303</sup> Sweden's Action Plan for Employment 2003 9. Available online at [http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CC8QFjAD&url=http%3A%2F%2Fec.europa.eu%2Fsocial%2FblobServlet%3FdocId%3D6043%26langId%3Den&ei=kN8vVdK\\_AabA7Aa49IEO&usg=AFQjCNH4vh\\_J82N6adPIBwdd3gHd2DVEGg](http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CC8QFjAD&url=http%3A%2F%2Fec.europa.eu%2Fsocial%2FblobServlet%3FdocId%3D6043%26langId%3Den&ei=kN8vVdK_AabA7Aa49IEO&usg=AFQjCNH4vh_J82N6adPIBwdd3gHd2DVEGg) (accessed on 16 April 2015).



Swedish welfare policy is based on an economic policy of full employment for men and women, a general system of universal social insurance and access to childcare for every child.<sup>304</sup>

It can be observed that there is uniformity in the treatment of both opposite-sex and same-sex couples and there is no anomaly in the law differentiating these forms of cohabitation.

Despite the fact that the Act only regulates cohabitee property and household goods, the Act provides for equal sharing upon division of property<sup>305</sup> ensuring equality between cohabitees' and also provides that the non-owner may take over the dwelling if so required thus safeguarding vulnerable partners.<sup>306</sup> The Act also gives partners the freedom to regulate their own affairs by means of a cohabitation agreement. If there is a cohabitation agreement in place and parties regulated aspects relating to property, there would be protection for parties upon termination of the relationship.



Fixed rules like the Swedish Cohabitation Act, have the potential to equalise economic differences in many cohabiting relationships.<sup>307</sup> As a last resort, if the partners did not acquire joint property, they may rely on other private law remedies at their disposal. This model will provide domestic partners in South Africa with many remedies. Not only will the Swedish model give legal status to domestic partnerships, it will also allow partners to regulate their own affairs.

This guaranteed legal recognition provided to cohabitants in Sweden as discussed above, is not enjoyed by cohabitants in South Africa. However, through the introduction of the

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<sup>304</sup> Sweden's Action Plan for Employment 2003 11.

<sup>305</sup> Cohabitation Act 1 July 2003, s 14.

<sup>306</sup> Cohabitation Act 1 July 2003, s 22, para 1.

<sup>307</sup> Sverdrup T 'Statutory regulation of cohabiting relationships in the Nordic countries recent developments and future challenges' in Boele-Woelki K, Dethloff N and Gephart W (eds) *Family Law And Culture In Europe: Developments, Challenges And Opportunities* (2014) 72.

Swedish model, such legal protection may be able to be achieved for these various thriving family forms in South Africa. Barlow suggests that Sweden has provided adequate family law-style regulation for other functionally identified informal families in line with the protective aims of family law.<sup>308</sup> Diversity of family forms and regulation of these divergent family forms in Sweden has progressed farther than any other jurisdiction. The South African Law Reform Commission did a comparative study with Sweden and stated in its report<sup>309</sup> that Sweden has a liberal approach to the regulation of cohabitation. The Commission concluded that the Swedish Cohabitation Act of 2003 is limited when compared to the protection provided to married couples as it only regulates the couple's joint home and property.<sup>310</sup> Therefore any legislation enacted in the context of South Africa should extend beyond property rights of the couple. The committee further concludes that the recognition of cohabitation in statutory law eliminated many of the negative attitudes associated with unmarried couples.<sup>311</sup> The SALRC partially accepted the Swedish model, this is justified by South Africa's strong emphasis on the sacred institution of marriage. The Commission did accept that statutory regulation was the best choice to ensure equality and eliminate many negative stereotypes linked with cohabitation.

The Swedish law's strong emphasis on diversity may provide a framework within which South Africa can develop its laws on cohabitation. Atkin holds that legislative reforms will create a new status, the incidence of which are very similar to the status of marriage.<sup>312</sup> Special benefits and obligations provided to married persons are embedded in the economic dependence and emotional interdependence in the relationship, not the title of the marriage itself. An extension of these rights as well as obligations is also required by unmarried

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<sup>308</sup> Barlow A 'Regulation of cohabitation, changing family policies and social attitudes: A discussion of Britain within Europe' (2004) 26 (1) *Journal of Law and Policy* 63.

<sup>309</sup> South African Law Commission (Project 118) *Report on Domestic Partnerships* 2006 192.

<sup>310</sup> South African Law Commission 2006 197.

<sup>311</sup> South African Law Commission 2006 197.

<sup>312</sup> Atkin B 'The challenge of unmarried cohabitation: The New Zealand response' (2003) 37 *Family Law Quarterly* 303-304.

couples. Therefore an adoption of the Swedish model in South Africa will ensure protection for unmarried couples and create a new legal status on par with marriage and civil unions.

Should the Swedish model be used as guidance before South Africa enacts its domestic partnership legislation, it will have to be adapted to the specific needs of South African people. ‘The development of legislation must be able to respond to the challenges of social reality and requirements of modern life and society.’<sup>313</sup> If the Swedish model of cohabitation were to be adopted in South Africa, it would alleviate the burden of a partner having to prove his or her contribution to the property or intent regarding sharing of the property between partners (joint and separate property). There will be no need to rely on private law remedies to obtain redress, as there would be a dedicated statute dealing with the consequences of domestic partnerships. There will also not be such an encumbrance on the court to tirelessly interpret the facts of each case. It will have an Act at its disposal which would serve as guidance on reaching a just and equitable outcome. Despite these arguments in favour of the Swedish model of statutory regulation, it is not without discrepancies.

The Swedish model does not provide a perfect model for South Africa to follow in reforming its law on the treatment of cohabitants. The Cohabitation Act is mainly focused on property of cohabitants, while failing to address relevant issues to cohabitation relationships such as post separation maintenance and succession.

Another pitfall of the Act is the absence of a remedy for the weaker partner, where no property or household goods have been acquired for joint use. Property acquired before the cohabitation is excluded. The Cohabitation Act only covers joint property of the cohabitants and household goods. It does not regulate other important aspects such as reciprocal duty of support, ex-post facto maintenance and succession; although the Act does provide that the

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<sup>313</sup> Beinaroviča O ‘The historical development of regulation of non-marital cohabitation of heterosexual couples and its effect on the creation of modern Family Law in Europe’ 2010 *University of Latvia* (unpublished article).

surviving partner has the right to a minimum value share of the joint home and household goods.<sup>314</sup>

A criticism of this is that the surviving partner may end up with more than half the assets leaving the legal heirs of the deceased with less than half.<sup>315</sup> Sweden is often mentioned as a pioneer in assimilating cohabitation to marriage. However, it is a country that specifically regulates cohabitation but only provides minimal protection for cohabitants.<sup>316</sup> Although many do not distinguish between marriage and cohabitation in Sweden, the consequences of these two relationships differ considerably as highlighted in Chapter 2. Despite the fact that the Swedish model is not without deficiencies, it illustrates an innovative way in which domestic partners can be protected in South Africa if some aspects are borrowed from it. It can be observed that the history behind the implementation of legislation regulating cohabitation was Sweden's strong commitment to neutrality in its law as well as equality for every individual. The Swedish model of cohabitation may be an option for the South African legislature to consider by weighing both positive and negative implications of this model. It would be appropriate to transplant Sweden's version of equality to South Africa given the fact that women were one of the most vulnerable and disadvantaged groups in our society. Sweden has not had the same history as South Africa with regard to equality and provides an excellent example of how a nation can flourish when ensuring equality across the public and private sectors.

Singer states that 'there is no reason to refrain from using legislation regarding marriage and family as one of several instruments in seeking reform toward a society in which every individual can take responsibility for himself, without being economically dependent on those

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<sup>314</sup> Cohabitation Act 1 July 2003, s 18 para 1-3.

<sup>315</sup> Ytterberg H 'From society's point of view, cohabitation between two persons of the same sex is a perfectly acceptable form of family life: A Swedish story of love and legislation' in Wintermute R and Andenaes M (eds) *Legal Recognition of Same-Sex Partnerships* (2001) 431.

<sup>316</sup> Garrison M and Scott E *Marriage at the Crossroads: Law, Policy, and the Brave New World of Twenty-First-Century Families* (2012) 69.

close to him, and a society where equality between men and women is a reality.<sup>317</sup> This statement by Singer constitutes my main argument throughout this chapter, that legislation is the most expedient way to ensure protection for cohabitants and equality for all individuals, thus the Swedish model is the most suitable vehicle by which to achieve this. It could be argued that the Swedish model will not be applicable as we do not have a welfare state. As was argued in previous sections of this Chapter, the model will have to be tailored to the needs, rules and laws of our society. It is up to the legislature to ensure deviation from the laws applicable if it is appropriate.

## 5. CONCLUSION

The principles of neutrality and gender equality which Sweden upholds provided the perfect backdrop for legislation regulating non-formalised cohabitation. Sweden's family law policies are aimed at promoting inclusiveness in its society. It sends a message to South Africa and other jurisdictions that a society of gender equality, neutrality of legislation and inclusion should not only be sought after but may also be achieved. Against the background of the Swedish model of statutory regulation, the subsequent chapter will deal with recommendations for the introduction of legislation to regulate non-formalised cohabitation relationships in South Africa.

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<sup>317</sup> Singer A 'Swedish Family law: The law on marriage and cohabitation in Sweden' Uppsala University, Sweden available at <https://studentportalen.uu.se/uusp-filearea-tool/download.action%3FnodeId%3D552077%26toolAttachmentId%3D117612+%&cd=1&hl=en&ct=clnk&gl=zq> (accessed on 28 August 2014) 1.

## CHAPTER 6 CONCLUSIONS AND RECOMMENDATIONS

### 1. INTRODUCTION

This chapter will emphasise the most important conclusions reached in the previous chapters. Drawing on those conclusions, this chapter will endeavour to make certain recommendations to ensure that domestic partnerships are adequately protected in terms of South African Family Law.

### 2. CONCLUDING REMARKS

The object of chapter 1 was to set out the problem question and establish what the research sought to achieve. The chapter aimed to provide the framework to forthcoming chapters. It was concluded that South Africa does not have a precise definition of domestic partnerships and that no statute currently regulates this form of intimate relationship. In the case of Sweden, it was concluded that the Cohabitation Act contains a clear definition of cohabitation and cohabitation has legal status as a union in Sweden.

In chapter 2 the aim was to examine the current system of regulation of cohabitation in Sweden. Sweden passed the Cohabitation Act<sup>318</sup> which regulates the proprietary consequences of cohabitation. The main features of the Cohabitation Act were examined. It was identified that the Act only regulates cohabitee property and household goods. The Act does however, provide for the possibility of agreements to allow parties to decide the consequences that apply to their relationship. This chapter also emphasised that although there is a dedicated Act in place, the Act is also not without shortcomings.

The aim of chapter 3 was to explore judicial decisions relevant to same-sex and opposite-sex relationships in South Africa. The main conclusions drawn in this chapter was that judicial recognition had been limited to same-sex life couples although recent judicial developments

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<sup>318</sup> Cohabitation Act 1 July 2003, SFS 2003:376.

have taken place where the courts have recognised the existence of a universal partnership for the purposes of a more equitable distribution of property obtained during the subsistence of the union. It was concluded that now, same-sex couples are in a superior position compared to opposite-sex couples. This distinction has created an anomaly in the law between the two categories of intimate relationships and the current position appears to be on the face of it, unconstitutional as opposite-sex couples do not enjoy the same benefits applicable to same-sex couples.

In chapter 4 the goal was to look at the current systems of marriage and cohabitation as provided for legislatively in terms of South Africa. The Marriage Act, the RMCA, Civil Union Act<sup>319</sup> and the Domestic Partnerships Bill<sup>320</sup> were discussed with the view of establishing how opposite-sex and same-sex relationships were provided legal recognition through legislation. It was highlighted that the domestic partnership legislative process was stalled in South Africa, with only the Draft Domestic Partnerships Bill being tabled and not debated (after 8 years).

The aim of chapter 5 was demonstrate the superiority of the legal position of cohabitants in Sweden by comparison to South Africa. It was concluded that Sweden's laws are based on the principle of neutrality and gender equality, thus favouring neither marriage nor cohabitation. Laws were passed based on societal changes and the emergence of various family formations. It was suggested that the statutory model in Sweden may provide an expedient paradigm for South Africa to consider prior to its domestic partnership legislation being passed.

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<sup>319</sup> Civil Union Act 17 of 2006.

<sup>320</sup> Draft Domestic Partnership Bill in Government Gazette No 30663, 14 January 2008.

### 3. RECOMMENDATIONS

I have analysed the position in which domestic partners currently find themselves in South Africa, with Sweden as a point of reference for necessary amendments in South Africa. This section will highlight the significance of regulating cohabitation relationships as well as provide recommendations in this regard. The Domestic Partnerships Bill has already laid the foundation for a debate on domestic partnership legislation. Current family policies and laws do not correspond with social realities and the changing nature of relationships. The significance of regulation of cohabitation relationships will be addressed next.

The argument throughout this paper has been that domestic partners are interdependent and rely on one another for support. They perform the same role and functions as married couples, thereby necessitating protection from the law. Schoeman echoes this point and states that '[c]ohabitation relationships can exist between heterosexual or same-sex couples and often involve the same core sentimental ideas and reciprocal duties of support that a marriage does, but without having the marriage certificate to prove the existence thereof and without having the automatic legal protection marriages do.'<sup>321</sup> Furthermore, recent developments in the area of law regarding cohabitation and universal partnerships suggest that it is an opportune time to advocate for law reform. These developments have proven that the provisions in the Constitution regarding equality, dignity and non-discrimination can offer protections to many intimate relationships. Thus regulation of domestic partnerships will formalise the affiliation between individuals and will better serve non-marital families. Moreover, it will provide necessary structure to society and family laws in South Africa. Regulation of domestic partnerships will remove moralistic restrictions on access to the

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<sup>321</sup> Schoeman N 'Marriage versus cohabitation (life partnerships)' Schoeman Attorney's available at <http://www.schoemanlaw.co.za/wp-content/uploads/2010/03/Short-notes-life-partnerships.pdf> (accessed on 15 June 2014) 1.



institution of marriage. The section below deals with recommendations for the introduction and amendment of domestic partnership legislation.

Intimate relationship legislation needs to be re-evaluated. It therefore recommended that, laws which discriminate against opposite-sex domestic partners need to be abolished or amended to include these relationships. Section 1 (1) of the Intestate Succession Act<sup>322</sup> was extended to partners in permanent same-sex life partnerships in which the partners have undertaken reciprocal duties of support.<sup>323</sup> The position of heterosexual partners was not addressed and this lacuna in the law has to be remedied. Meyerson suggests that instead of extending the rights conferred by the Court on same-sex life partners so as to protect opposite-sex life partners, Parliament might take away the rights of same-sex life partners, should they not take advantage of the opportunity to enter into a marriage or civil union.<sup>324</sup> Smith, however, states that ‘...pending the enactment of life partnerships legislation, an approach which extends similar protection to heterosexual couples is preferable to one which abolishes the recognition currently enjoyed by same-sex partners.’<sup>325</sup> It is therefore recommended that an extension of the benefits enjoyed by same-sex couples to opposite-sex couples is more conducive to one which abolishes the recognition currently enjoyed by same-sex partners.

In the dictum of Van Heerden in *Gory v Kolver*<sup>326</sup> as discussed in Chapter 3 above, any change in the law after the *Fourie* deadline of 1 December 2006, will not necessarily amend those statutes into which words have been ‘read in’ by the court. The result is that unmarried

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<sup>322</sup> Intestate Succession Act 81 of 1987.

<sup>323</sup> There was a reading in of the words “or a partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support” after the word “spouse”.

<sup>324</sup> Meyerson D ‘Who’s in and who’s out? Inclusion and exclusion in the Family law jurisprudence of the Constitutional Court of South Africa’ (2010) 3 *Constitutional Court Review* 307.

<sup>325</sup> Smith B ‘Extension of the dependant’s action to heterosexual life partnerships after *Volks v Robinson* and the coming into operation of the Civil Union Act-Thus far and no further? (2012) 75 *Tydskrif Vir Hedendaagse Romeins-Hollandse Reg* 481.

<sup>326</sup> *Gory v Kolver* 2007 (4) SA 97 (CC).

heterosexual couples are still excluded from the ambit of section 1 (1) of the Intestate Succession Act, unless specifically amended.<sup>327</sup>

Moreover, the enactment of domestic partnership legislation which provides protection to domestic partners to the same extent as protection afforded to same-sex couples is desirable. The Bill should cater for both opposite-sex and same-sex relationships thereby eliminating the need for the continued existence of the Civil Union Act. Once again this depends on what the domestic partnership legislation does; for example whether it goes for ceremony/registration or not, it might eliminate the need for the Civil Unions Act. It will further encourage legal acceptance of other family forms and create legal status for domestic partnerships. There is no reason for having different acts regulating various intimate relationships.

Once protection for opposite-sex cohabitation relationships has been secured through domestic partnership legislation, a gender-neutral marriage option which is implemented in Sweden could be followed in South Africa. This option was also sought in the case of *Minister of Home Affairs and Another v Fourie and Another*.<sup>328</sup> The Marriage Act would be rendered gender neutral and eliminate the second-class institution created in terms of the Civil Union Act. This could involve inclusion of words or 'spouse' after 'husband and wife' or a complete substitution of the aforementioned words. Smith suggests that the 'status equality' of same-sex marriage would be enhanced by compelling them to marry in terms of the Act which was previously reserved for heterosexual marriages.<sup>329</sup> It would be irrational to have to pieces of legislation forcing same-sex couples to marry in terms of one of them.<sup>330</sup>

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<sup>327</sup> *Gory v Kolver* 2007 (4) SA 97 (CC) at para 28 and 29.

<sup>328</sup> *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC).

<sup>329</sup> Smith BS *The Development Of South African Matrimonial Law With Specific Reference To The Need For And Application Of A Domestic Partnership Rubric* (LLD thesis, University of the Free State, 2010) 775.

<sup>330</sup> Smith BS 2010 775.

In view of the above, legal protections similar to those afforded to same-sex couples is the most advantageous approach for South Africa to follow. The chosen approach should be guided by the principles of neutrality, gender equality and constitutional imperatives of equality and respect for human dignity.

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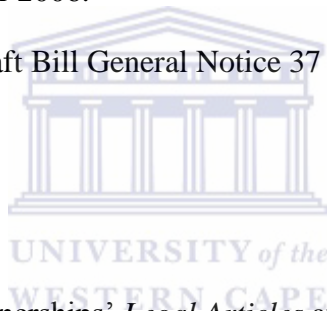
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