THE DEVELOPMENT OF SOUTH AFRICAN MATRIMONIAL LAW WITH SPECIFIC REFERENCE TO THE NEED FOR AND APPLICATION OF A DOMESTIC PARTNERSHIP RUBRIC

submitted in partial fulfilment of the requirements for the degree

DOCTOR LEGUM

at the

Faculty of Law
Department of Private Law
University of the Free State
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NOVEMBER 2009

For my grandfather,
William Godfrey Holt Meintjes (1919 – 1985)
who stimulated my interest in all things academic

ACKNOWLEDGEMENTS

- To my promoters, Mr Justice Fritz Brand and Professor Robbie Robinson—thank you for your invaluable guidance and support: It was truly a privilege to be able to undertake this study under your supervision.

- To my colleagues at the Faculty of Law at the University of the Free State, thank you for your encouragement and advice. Thanks especially to Professors Rita-Marie Jansen, Johan Henning, Loot Pretorius, Neels Swanepoel, Elizabeth Snyman-van Deventer and Shaun de Freitas, and also to Messrs Brand Claassen, Kenneth Mould and Jaco de Bruin. A particular word of gratitude to Ms Hesma van Tonder, Information Officer at the UFS SASOL Library, for her sterling efforts.

- To my parents, André and Althia, my sisters Tarryn and Nicole, and the Coldman family: Thank you for your love and support.

- To my fiancée, Soekie: Thank you for your patience and faith in me—without you this would never have been possible!

- A final word to a number of my teachers at Christian Brothers' College in Welkom and Grey College Bloemfontein: To Mesdames Laura James, and Heather Rudolph; Messrs Gary Cimma, Tony White, Pierre Hugo and Tommie Cronjé; and Brothers Terry Dowling and JC O'Neill: Thank you for being a source of inspiration over the years. I hope that this work in some way bears testimony to your individual influences on my life.

In Deo Sapientiae Lux

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PART 1

BACKGROUND

CHAPTER 1:

INTRODUCTION

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1. CONTEXT

The scale and scope of the complexities surrounding the issue of recognising and regulating relationships in South Africa between people who live together "as husband and wife"[1] without concluding a State-sanctioned marriage have only fairly recently become prominent features of legislative and judicial developments and academic discourse.[2] Although many terms are used in order to categorise these relationships,[3] for the purposes of this introductory paragraph the parties involved in such relationships will be referred to as "domestic partners" and the resulting phenomenon as a "domestic partnership."

The uneasy relationship between law and family life beyond the confines of marriage in the traditional sense has at times vacillated between moralistic disapproval of[4] and later

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1 See *Drummond v Drummond* 1979 (1) SA 161 (A) at 167 (A) – (B) where the phrase "living together as man and wife" was explained as denoting "the basic components of a marital relationship except for the formality of marriage." This phrase should be interpreted broadly to include same-sex couples—see Schwellnus 1995: 134.

2 See for example Hahlo 1972: 321 *et seq*; Thomas 1984: 456, 457; Goldblatt 2003: 610 *et seq*; Schwellnus 1994 (in general) and 1995: 133 *et seq*; Singh 1996: 317, 318; Lind 2005: 108 *et seq*; Labuschagne 1989: 649 *et seq*.

3 See 2 in Chapter 4 below.

4 *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at par [124] and [167]. In the early seventies Hahlo (1972: 321) remarked that: "No doubt because South Africans are a moral people, there are not many cases on concubinage in our law." In 1995 Schwellnus (1995: 134) made the telling statement that "[i]n South Africa cohabitation is not as common as in Europe, as a consequence of South Africa's conservative and

plain disregard for heterosexual cohabitation and its legal consequences,[5] while same-sex relationships in particular were for the most part subjected to unadulterated hostility.[6] It is therefore patent that the provision of an effective and suitable framework within which all permanent domestic partnerships could be accommodated has traditionally[7] constituted one of the most challenging issues with which family law has had to contend.

Towards the latter half of the previous century, a more accommodating yet marginalising attitude towards heterosexual unions was adopted, with the ostensible approach towards persons living together out of wedlock apparently being to tolerate the phenomenon while neither proscribing nor promoting it.[8] The gateway to full legal recognition of an intimate relationship was however limited to civil marriage.[9] Indeed, in

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Calvinistic background [see 3.4.7.3 in Chapter 2 for a discussion of the influence of Calvinism and Christian Nationalism in South Africa], although the numbers of cohabitees have been increasing in South Africa since 1980 at the rate of 100% per year. It is likely that the South African figures will be comparable to the current figures in England in 10-20 years." For an example of the earlier disapproval of such relationships in English case law (*per* Louw J in *Farr v Mutual & Federal Insurance Co Ltd* 2000 (3) SA 684 (C) at 687 (J) – 688 (B)), see *Gammans v Ekins* [1950] 2 All ER 140 (CA), where Asquith LJ, in referring to heterosexual cohabitants, said: "To say of two people masquerading, as these two were, as husband and wife—there being no children to complicate the picture—that they were members of the same family, seems to me an abuse of the English language. . . " (at 142).

5 Thomas 1984: 456. Van der Vyver and Joubert 1991: 449, 450 concede that while relationships between unmarried persons could potentially be as strong or even stronger than those between spouses, the lack of formal recognition of and obligations resulting from such relationships meant that it was quite understandable why South African law dissuaded parties from living together without being married.

6 South African law has for the most part been far more tolerant of heterosexual relationships—see *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [42]. A good example of a judgmental approach adopted to homosexuality occurs in the pre-Bill of Rights decision of *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W) at 329 (I) – 330 (A) where, in the context of divorce and the possibility of the mother of the children who was involved in a lesbian relationship being granted rights of access to her children, Flemming DJP stated that "[t]he signals are given by the fact that the children know that, *contrary to what they should be taught as normal or what they should be guided to as to be correct (that it is male and female who share a bed)*, one finds two females doing this and not obviously for reasons of lack of space on a particular night but as a matter of preference and a matter of mutual emotional attachment. That signal comes from the fact that they know the bedroom is shared. *It is detrimental to the child because it is the wrong signal*." (emphasis added). As far as gay men were concerned, pre-1994 South African law criminalised sodomy between such persons even if this took place in private between consenting adults—see *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at par [11].

7 See Thomas 1984: 456, 457 for examples of conflicting considerations in pre-democratic South Africa.

8 While the law did not proscribe heterosexual cohabitation, it certainly did not encourage it either—see Van der Vyver and Joubert 1991: 450; *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at par [160].

9 See for example Visser and Potgieter 1998: 5; De Vos 2004: 189.

the three intervening centuries between the first Dutch settlement at the Cape of Good Hope in 1652 and the advent of the democratic constitutional era in 1994,[10] the monogamous marriage between a man and a woman was the only form of marriage that was fully recognised by South African law.[11] It is therefore not surprising that in the early seventies Hahlo described the legal position in South Africa as follows:

> There is no 'law of concubinage' in the same sense as there is a 'law of husband and wife', for while marriage is a recognized legal relationship, concubinage is not. [The legal position at the time therefore needed to be analysed with reference to] the application of general rules of law to the factual situation known as concubinage.[12]

It goes without saying that the exclusive position enjoyed by monogamous civil marriage did not take cognisance of the multifarious nature of South African society and without doubt reflected the collective legal viewpoint of the minority of South African citizens.[13] Gay and lesbian couples were also left out in the cold: As far as male homosexual unions were concerned, such relationships were not only severely stigmatised, but the act of sodomy remained a crime well into the 1990's.[14] Although lesbian sexual conduct was not criminalised, this did little to alleviate the stigmatisation to which the parties to such relationships were also subjected. Gay and lesbian couples were obviously also prevented from marrying one another.

The advent of a democratic constitutional era in South Africa in 1994 began to place increasing pressure not only on the paramountcy enjoyed by civil marriage, but also on

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10 These developments will be discussed in Chapters 2 and 3 that follow.

11 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at par [36]; *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) at par [12]; *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at par [2] and SALRC 2006: 3 and 108. As De Vos (2004: 188) explains, although some form of recognition of customary law was provided by the *Black Administration Act* 38 of 1927, customary law was not readily applied as it had to be proven by expert evidence in Court.

12 Hahlo 1972: 321.

13 Pre-democratic South African law blatantly disregarded the marriages of the majority of South Africans—see Chapters 2 and 3 as well as the minority judgment of Sachs J in *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) (at par [160]) where this fact is emphasised.

14 See in general *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC).

the denial of automatic legal consequences for heterosexual or homosexual non-formalised permanent domestic partnerships.[15] Furthermore, by weight of sheer statistics, if it is borne in mind that the incidence of such relationships involving persons over the age of 14 almost doubled between the Census periods of 1996 and 2001,[16] that a more than significant number of adult women in all race groups in South Africa are unmarried,[17] and that marriage is no longer perceived as an automatic or essential option for intimate couples or family formation,[18] the lack of legal recognition of domestic partnerships is simply untenable.

Against this backdrop, the Bill of Rights in post-1994 South Africa has sparked a flurry of judicial and legislative activity which, in the words of Sachs J in *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae); Lesbian & Gay Equality Project v Minister of Home Affairs*[19] "led to a patchwork of laws that did not express a coherent set of family law rules." This study attempts, with specific reference to permanent domestic partnerships, to provide a more consistent, coherent and less-complex legal framework by virtue of the application of a robust domestic partnership rubric.

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15 See Chapter 3 where the developments in this regard are discussed.

16 See SALRC 2006: 21. These statistics prompt Lind (2005: 108) to describe cohabitation as an "endemic social phenomenon."

17 According to the SALRC (2006: 22 (and note 18)) only 40% of African and Coloured women are married, while approximately 60% of White and Indian women are married. Although it is certainly true that the fact that they are unmarried does not imply that they cohabit, it is safe to assume (particularly on the basis of the Census statistics) that a significant number of these unmarried women do. In addition, the SALRC (2006: 21 (note 16)) mentions that the incidence of cohabitation where one of the cohabitants is married to someone else is also difficult to determine due to the fact that societal attitudes may discourage such persons from revealing the true state of affairs.

18 See SALRC 2006: 24 *et seq*; and Schwellnus 1994: 2 who refers to Glendon's findings that "geographic mobility, the declining influence of formal religion, the transformation of socio-economic roles of women, greater longevity and the increased control over the reproductive processes are just some of the factors that have had an influence on the changing institution of marriage and family formation."

19 2006 (1) SA 524 (CC) at par [125].

2. STRUCTURE OF THIS STUDY

This study is divided into four Parts. In Part 1, the development of South African matrimonial law is analysed with a view to ascertaining the need for legislation to govern formalised and non-formalised permanent domestic partnerships and, if such legislation is indeed found to be necessary, establishing a rubric according to which the same should be crafted. The second part of the study attempts—on the basis of an in-depth analysis of case law, common law and existing legislation—to identify certain fundamental principles which should be embodied in South African domestic partnership legislation. In Part 3 the rubric is put into action, in accordance with which (i) the conclusions reached and principles formulated in Part 2 will be transposed onto prototypical legislation in the form of the draft *Domestic Partnerships Bill* of 2008, and (ii) the newly-modified Bill will be calibrated with attendant legislation. The final Part of the study (Part 4) attempts—in the light of the domestic partnerships legislation developed in Part 3—to evaluate the case for retaining the *Civil Union Act* 17 of 2006 in the interests of a less complex and more effective body of South African family law. The study will conclude with a consideration of the way forward for South African family law and the significance of this study in this regard.

3. METHOD AND SCOPE OF THIS STUDY

While this study focuses on the need for legislation to govern formalised and non-formalised domestic partnerships, it is important to note that such legislation cannot function effectively unless it co-exists with marriage in a broader interpersonal relationships framework. To this end, a detailed historical and comparative analysis of the development and current legal position pertaining to marriage and analogous relationships and their potential impact on and interrelationship with domestic partnership legislation is required. The focus, however, remains on the legal position of *non-marital* unions. The result is that, while the current legal position pertaining to marriages that are not currently recognised as valid civil or customary marriages

according to South African law (such as religious marriages) must of necessity be *considered*, the *further development* of the legal position pertaining to such marriages falls beyond the scope of this study.

In closing, cognisance must be taken of the fact that the comprehensive and effective regulation of formalised and non-formalised domestic partnerships involves a wide range of policy and legal considerations and embodies the application not only of virtually every aspect of private law (contract, delict and succession to name but a few) but also of many aspects of public law such as constitutional and criminal law. For this reason, while it must be conceded from the outset that this study is voluminous, a comprehensive analysis of the multitudinous and interrelated issues at hand makes this unavoidable.

CHAPTER 2:

LAYING THE FOUNDATION: THE DEVELOPMENT OF MATRIMONIAL LAW AND A JUXTAPOSITION OF MARRIAGE IN PRE-1994 SOUTH AFRICA WITH DEVELOPMENTS IN THE WESTERN LEGAL TRADITION

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1. INTRODUCTION

This Chapter will attempt to analyse the historical development of the law of marriage as from Roman times until immediately before the advent of the democratic constitutional era in South Africa. Throughout the course of this Chapter the development of the major theological models of marriage in the Western legal tradition will simultaneously be traced with a view towards both illustrating the dynamic and ever-changing theological and legal nature of marriage and ascertaining the basic denominator that is common to marriage irrespective of the (theological) model encapsulating it or of the legal nature ascribed to it. In so doing the role played by State and Church in governing and regulating marriage will be examined, and the potential inter-relationship between legislation based on a robust domestic partnership rubric that co-exists with and complements the contemporary contractarian model of marriage that prevails in Western jurisdictions will be considered.

2. MARRIAGE IN EARLY TIMES

2.1 The Roman law marriage (*iustum matrimonium*): Marriage as a matter of social significance

Marriage in Roman law was a venerated institution,[1] the significance of which can largely be attributed to the central role played by the family unit in Roman society.[2] The central figure in the Roman *familia* was the *paterfamilias* or "father of the family", who exercised lifelong paternal authority (*patria potestas*) over a considerable number of persons,[3] including his *cum manu* wife and his children.[4] The relevance and importance of marriage is illustrated by the fact that the wife acquired the *honor matrimonii* by virtue thereof, and that the existence of a valid Roman marriage was the major vehicle by which the *patria potestas* was established thereby enabling the children so born to continue their father's family.[5] Prior to the Christian influence marriage enjoyed societal rather than legal or religious significance, with the existence or otherwise of a marriage being determined on a *de facto* rather than *de iure* basis.[6]

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1 The revered nature of marriage as an institution is illustrated by Modestinus (D 23.2.1) where he describes marriage as "*[n]uptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio*" (marriage is a joining of man and woman, a partnership in the whole of life, a sharing of rights both sacred and secular)—as *per* Farlam JA in *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at par [84]. Also see *Campher v Campher* 1978 (3) SA 797 (O) at 798 (E) and *Ex parte Inkley and Inkley* 1995 (3) SA 528 (C). In the latter case, the definition quoted from *Fourie* is translated as "[m]arriage is the joining of a man and a woman in a *consortium* of every aspect of their lives, together with a communication of divine and human law" at 535 (H).

2 Van Warmelo 1957: 52; Van Zyl 1983: 9.

3 Sandars 1905: xxxviii, xxxix; Spiller 1986: 60; Van Warmelo 1957: 52; Van Zyl 1983: 87.

4 See G 1.55: "*In potestate nostra sunt liberi nostri, quos ex justus nuptiis procreaverimus*—Our children, begotten in lawful marriage, are in our power" *per* Sandars 1905: 20. The extent to which the *paterfamilias* exercised power over his son is illustrated in *Inst*. 1.9.3 and 1.12.4.

5 *Campher v Campher* 1978 (3) SA 797 (O) at 798 (G); Van Zyl 1983: 97.

6 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at par [69]; Van Zyl 1983: 97. It is interesting to note the parallels in this regard with modern-day South Africa, where, although compliance with any one of the three marriage statutes (i.e. the *Marriage Act* 25 of 1961; the *Recognition of Customary Marriages Act* 120 of 1998 and the *Civil Union Act* 17 of 2006) is required in order for any union to be recognised as a legal marriage for the purposes of South African law, there appears to be a tendency to recognise and apply certain consequences of marriage (such as the reciprocal duty of support) to non-formalised life partnerships or what may for the sake of convenience be termed "purely religious 'marriages'" on a *de facto* basis—see

As is generally[7] the case in present-day South Africa, marriage in Roman law was preceded by a contract of engagement (*sponsalia*). Originally regarded as a formal agreement, the agreement was usually concluded by the parents of the couple by way of oral promises that were enforceable. In later years the engagement came to be regarded as an informal one which was concluded by the parties themselves who presented one another with gifts (*arrhae sponsalicia*) as a pledge of engagement.[8] The agreement to marry could not be enforced in the event of the marriage not taking place and, similarly, no claim for compensation in the form of damages could be instituted against a party who breached the betrothal.[9] This did not however mean that the termination of an engagement was entirely without legal consequences, as liability for *infamia* could ensue, for example, where a person purported to enter into two simultaneous betrothals.[10] It was also understood that the gifts proffered as pledge of the engagement would be forfeited by a party who terminated the engagement in a wrongful manner and that such a party would repay double the value of any such *arrhae* received by him or her to the "innocent" party.[11]

Both parties had to have the right to conclude a Roman marriage (the *ius conubii*); a right reserved for persons who were Roman citizens (*cives Romani*).[12] Over and above the aspect of citizenship, *conubium* also comprised an age requirement, namely that both parties must at least have attained the age of

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Satchwell v President of the Republic of South Africa and Another 2002 (6) SA 1 (CC) at par [25]; *Khan v Khan* 2005 (2) SA 272 (T) at par [10]; *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) at par [11] – [16].

7 The existence of a valid engagement is not regarded as an absolute prerequisite for a valid civil or customary marriage to take place—see (within the context of civil and customary marriages respectively) Cronjé and Heaton 2004: 2 and Jansen 2006: 31.

8 Van der Vyver and Joubert 1991: 458; Van Zyl 1983: 98.

9 Hahlo 1985: 1; Van Zyl 1983: 98.

10 D 3.2.1; Hahlo 1985: 1 (note 4); Van Zyl 1983: 98.

11 Van Zyl 1983: 98, 99; Spiller 1986: 61.

12 G 1.56 *et seq;* Van Zyl 1983: 99; Spiller 1986: 63. Only privileged *peregrini* had the *ius connubium,* but Ulpianus (5.4) mentions that others (such as *Latini*) could be granted the same—see Spiller 1986: 63 and De Zulueta 1953: 30.

puberty which was regarded as 12 years for girls and 14 years for boys.[13] In addition, Roman marriages were required to be monogamous, and the parties could be precluded from marrying one another by virtue of the prohibited degrees of affinity or by social or moral constraints.[14]

In earlier times the wife (*uxor*) to a Roman marriage was placed under the authority or *potestas* of her husband or his *paterfamilias* (in the event of her husband himself being in *potestas*). Such a marriage *cum manu* consequently entailed that, although she was regarded as being the *materfamilias*, a wife *in manum viri* found herself in the same position as if she were her husband's (or, where apposite his *paterfamilias*'s) daughter and her children's sister.[15] It is interesting to note that the husband acquired this position over his wife not in his capacity as husband, but as her father.[16] As such, marriage implied drastic changes to the wife's status, while the same did not occur in the husband's case.[17]

Marriages *cum manu* took place in three forms, namely by *confarreatio* (the ritualistic religious marriage);[18] or secularly by either *coemptio* (the fictitious agreement of sale by which the wife was "purchased" by her husband by way of *mancipatio*)[19] or *usus* (in terms of which *manus* was in effect established by way of prescription by virtue of the wife having lived with her husband for one full

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13 *Inst.*1.10 pr; and 1.10.22 pr.; C 5.4.24; Hahlo 1985: 1. Although invalid, a marriage involving an *impubes* was later validated once the appropriate age had been reached, provided that the parties lived together with the intention of being married—see D 23.2.4 and Sandars 1905: 33. The distinction between the sexes regarding the age of puberty still obtains in present-day South Africa—see *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA) at par [16]. In the latter case, Scott JA remarked that "[i]n passing, it is worthy of note that this gender-based distinction between girls and boys may well be unjustifiable. The more appropriate cut-off point would seem to be 14 years for children of both sexes…"

14 *Inst.* 1.10.1-3, 5-7, 9 and 12; G 1.58, 59; Van Zyl 1983: 100, 101. Consummation of the marriage was not required—see D 35.1.15.

15 Maine 1901: 155; Van Zyl 1983: 103; Spiller 1986: 68; De Zulueta 1953: 34.

16 Maine 1901: 155.

17 Hahlo 1985: 1; Spiller 1986: 67, 68.

18 Maine 1901: 154; Sohm (translated by Ledlie) 1907: 453.

19 Spiller 1986: 66; Van Zyl 1983: 102 (note 109); De Zulueta 1953: 35.

year).[20] In each of these forms of marriage any property brought into the marriage by the wife or acquired during the existence of the marriage became that of the husband (or his *paterfamilias*).[21] On the husband's death, the Roman law of succession allowed a husband to appoint a tutor for his wife, and it regarded her as having a status similar to that of one of his daughters.[22]

A less formalistic view of marriage coupled with societal changes that led to the increased independence of women implied that the need for marriage with *manus* began to dissipate,[23] and Spiller[24] mentions that by the second century AD it had been superseded by the marriage without *manu* (*sine manu*).[25] This form of marriage was not an institution that was governed or regulated by the State, but instead was a private act that was brought about by the consent of the spouses coupled with an intention to marry.[26] No public records of the marriage were required, and the marriage did not affect the status of the wife in any way.[27] Despite the lack of formal legal requirements, marital ceremonies were often held, specifically as a way of evincing the parties' unequivocal intention to marry one another.[28]

An obvious consequence of the marriage *sine manu* was that the wife (*matrona*)[29] did not become part of her husband's *familia* and was also not

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20 G 1.109-114; Spiller 1986: 67; Van Zyl 1983: 102 (note 109). The law of the Twelve Tables permitted her to prevent the *manus* by living apart from her husband for three successive nights during that year (*absentia trinoctium*) see G 1.111; Spiller 1986: 67; Van Zyl 1983: 102 (note 109).

21 *Campher v Campher* 1978 (3) SA 797 (O) at 798 (H).

22 G 1.148; Spiller 1986: 68.

23 Van Zyl 1983: 103.

24 1986: 68.

25 This appears to have been facilitated by the fact that in the case of a marriage with *manus* established by *usus*, the wife prevented falling under the *manus* of her husband by ensuring that she vacated the matrimonial home for three consecutive nights each year. As a result of this marriage *cum manu* fell into desuetude and the *absentia trinoctium* fell away—see Van Zyl 1983: 103; Sohm (translated by Ledlie) 1907: 457.

26 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) par [69].

27 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) par [69]; Hahlo 1985: 2.

28 Spiller 1986: 67; Van Zyl 1983: 104.

29 Originally used to distinguish between a wife *in manum* ("*uxor*") and one without, this term was later used for all married women—see Sandars 1905: 31.

subject to the *potestas* of her husband or his *paterfamilias*.[30] Despite the existence of a rebuttable presumption that all property in the matrimonial home belonged to her husband,[31] no community of property ensued in the marriage.[32] The fact that marriage did not alter the status of the parties therefore permitted a wife to own her own property provided that she was *sui iuris*.[33] If, on the other hand, she was under the *potestas* of her own *paterfamilias*, all property acquired during the marriage accrued to him.[34] Donations between spouses (*donatio inter virum et uxorem*) were as a rule prohibited and, at least initially, no right of intestate succession was recognised in civil law.[35]

It is interesting to note a number of parallels that can be drawn between the Roman marriage in the classical period and modern-day South African family law: For instance, although this was not a requirement for the validity of a Roman marriage, the parties could enter into an agreement known as an *instrumentum dotale* to govern the patrimonial consequences of their marriage.[36] This agreement is comparable with the antenuptial contract encountered today.[37] Secondly, Roman law dictated that, as an outflow of husband and wife's duty to respect and revere one another (the duty of *reverentia*),[38] it was not permissible to institute defaming actions against one another.[39] This is still to some extent

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30 Van Zyl 1983: 105; Spiller 1986: 68, 69.

31 Van Zyl 1983: 105.

32 *Campher v Campher* 1978 (3) SA 797 (O) at 798 (G).

33 A Roman citizen was *sui iuris* if he or she was not under the *patria potestas* or *manus* of anyone else—see *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) at 403 (D).

34 *Campher v Campher* 1978 (3) SA 797 (O) at 798 (H); Hahlo 1985: 2; Van Zyl 1983: 105.

35 See Spiller 1986: 69, 70. As far as spouses were concerned, the following applied (see Van Zyl 1983: 205 *et seq*): The Twelve Tables confined the right to inherit intestate to a wife married *cum manu*. This state of affairs was systematically refined by the *praetor*, who, by virtue of praetorian *edicta* granted the husband or wife of the deceased the right to inherit intestate. Finally, the Roman law of intestate succession received a complete overhaul by Justinian in his *Novellae*. Although the *Novellae* did not categorically provide for this, a surviving spouse could, by virtue of the earlier developments, inherit intestate in the event of no blood relatives being able to inherit (*cf* Spiller 1986: 164, 165).

36 Hahlo 1985: 2; Van Zyl 1983: 104.

37 Van Zyl 1983: 104.

38 Spiller 1986: 69.

39 *Campher v Campher* 1978 (3) SA 797 (O) at 799 (F) – (G); Van Zyl 1983: 105; Spiller 1986: 69.

the position in South Africa today, where spouses are, as a matter of policy, not allowed to institute actions based on defamation against one another.[40]

It was customary for the *paterfamilias* (or another relative) of a woman who entered into marriage to provide a dowry (*dos*) for her husband in order for his wife to maintain a similar standard of living to that enjoyed by him and to contribute to the upbringing of the children and the maintenance of the joint household.[41] By the time of Justinian's reign this custom had evolved into a legal duty.[42] Initially, the husband was entitled to the *dos* and its fruits, and could, in principle, dispose freely of movables forming part thereof,[43] but an increasing divorce rate with the resulting greater prospect of remarriage required a curtailment of the husband's powers. In this way the wife came to have a preferential tacit hypothec over her husband's property so that the *dos* had to be returned to her unless the marriage had been dissolved by divorce due to her fault (in which case the *dos* or a part thereof was forfeited to the children while the husband retained the use thereof).[44]

In addition to the *dos*, it later became common for the husband to give a gratuitous marriage settlement to his wife as a type of "counter *dos,*" known as a *donatio propter* (or *ante*) *nuptias.* A tacit condition of this *donatio* was that it would only take effect when the marriage which constituted its *causa* followed,[45] and it was given with the main aim of providing for the wife's maintenance needs after the death of her spouse or after divorce.[46] Although sometimes viewed as a *donatio* for the benefit of the children subject to the usufruct of the wife rather than a benefit for the wife *per se*, by the time of Justinian the *dos* and the *donatio*

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40 See for example *C v C* 1958 (3) SA 547 (SR) at 548 (A) – 552 (F).

41 *Campher v Campher* 1978 (3) SA 797 (O) at 799 (A); Hahlo 1985: 2; Van Zyl 1983: 106, 107.

42 Van Zyl 1983: 106; Spiller 1986: 61.

43 *Inst*. 2.8 pr.

44 Hahlo 1985: 3; Van Zyl 1983: 108, 109.

45 *Inst*. 2.7.3.

46 *Campher v Campher* 1978 (3) SA 797 (O) at 799 (D); Hahlo 1985: 3.

were virtually equated with one another with the result that the rules governing the *donatio* were substantially similar to those governing the *dos*.[47]

Roman marriages were terminated by death (subject, initially, to a one-year period of mourning [*annus luctus*] by the wife),[48] by divorce (effected by way of an act that reversed the act by which the marriage came into being),[49] by loss of citizenship or as a result of a criminal sentence.[50]

As seen earlier, although no formal requirements were posed for the conclusion of a marriage, the intention of the parties was paramount. Mere cohabitation without the requisite intention to be married was neither essential nor sufficient to constitute a valid marriage.[51] According to Sohm,[52] parties who lived together in such unions (*concubinatus*) were nevertheless acknowledged by the law after the time of Augustus[53] "as constituting likewise a mode of lawful union between a man and a woman for the purpose of permanent mutual companionship." By the

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47 Van Zyl 1983: 109.

48 See Hahlo (1985: 4) who mentions that this rule was aimed at preventing doubts as to the paternity of children born of the wife. Penalties were imposed in the event of a wife disregarding this rule and marrying another prior to the expiration of the one year period: She or her father could be rendered infamous with drastic social consequences—see Spiller 1986: 70, 71.

49 So, for example, Hahlo (1985: 3, 4) mentions that if the marriage had been concluded *cum manu* by way of *confarreatio*, it was terminated by *disfarreatio*; and if it was concluded by way of *coemptio* or *usus*, it was terminated by *remancipatio* (resale). If the marriage was without *manus*, it was terminated either by mutual consent or by way of a unilateral repudiation by either spouse or his or her *paterfamilias*—see Spiller 1986: 71. Divorce by mutual consent was eventually abolished by Justinian in 542 AD, only to be reinstated by his successor two decades later. Unilateral repudiation was initially permitted on rather feeble grounds, but later subjected to certain limitations in order to prevent abuse and to stem the tide of a high divorce rate—see Van Zyl 1983: 112.

50 Van der Vyver and Joubert 1991: 459; Spiller 1986: 71.

51 Sandars 1905: 31; *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at par [69].

52 Sohm (translated by Ledlie) 1907: 457. Also see Labuschagne 1989: 651 who states that although the laws passed by Augustus did not prohibit cohabitation, the law neither recognised nor regulated such relationships. She mentions further (at 655) that the emperors who succeeded Augustus not only recognised cohabitation, but in fact encouraged the same.

53 "Augustus" was the title assumed by Gaius Octavius Thurinus (the adopted son of Julius Caesar) who became the first Roman emperor in 27 BC and reigned until his death on 19 August AD—see Van Zyl 1983: 6; Hayes *et al* 1967: 34, 35; http://www.roman-empire.net/emperors/augustus.html (accessed on 15 July 2009).

time of Justinian[54] the legal position was that, in order for it be worthy of recognition, the union had to be consensual (whether the union constituted a marriage or a *concubinatus* was determined solely by the parties' intention in this regard), monogamous and entered into between persons who would otherwise be permitted to enter into a valid marriage.[55] As a result, the parties had to be of marriageable age and not related in the prohibited degrees.[56] Such a *concubinatus* was regarded as being an inferior marriage (*inaequale coniugium*),[57] with the result (*inter alia*) that the female cohabitant did not enjoy the status of a married woman and that the children of such a union did not fall under the *potestas* of the male cohabitant but were known as natural children (*liberi naturales*).[58] Already as from the time of Constantine's reign,[59] the children born of a man and his concubine could be legitimated by subsequent marriage.[60] A union that did not qualify as an *inaequale coniugium* enjoyed no legal recognition.[61]

As an outflow of the requirement of monogamy, a married man was not permitted to have a concubine.[62] According to Van Zyl[63] the institution of *concubinatus* fell into disrepute as a result of the Christian influence during the fourth century AD, and attempts were made to discourage such unions; particularly by restricting the rights of the offspring thereof. The *concubinatus* was however finally abolished

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54 The Byzantine emperor Flavius Petrus Sabbatius Iustinianus reigned from 527 – 565 AD—see http://en.wikipedia.org/wiki/Justinian_I (accessed on 22 October 2009) and Hayes *et al* 1967: 905.

55 Labuschagne 1989: 658.

56 Spiller 1986: 74.

57 Labuschagne 1989: 651.

58 Sohm (translated by Ledlie) 1907: 457, 458; Van Zyl 1983: 90; Labuschagne 1989: 660.

59 Constantine reigned from 306 – 337 AD—see Spiller 1986: 20.

60 Spiller 1986: 74.

61 Labuschagne 1989: 659.

62 Sohm (translated by Ledlie) 1907: 458.

63 1983: 90; *cf* Labuschagne 1989: 661: "Volgens Jonkers [in his 1938 thesis entitled "*Invloed van het Christendom op de Romeinsche Wetgeving Betreffende het Concubinaat en de Echtscheiding*" at 103 *et seq*] wil dit voorkom asof daar nie gesê kan word dat die Christendom 'n baie groot invloed op die konkubinaatsverhouding uitgeoefen het nie, hetsy ten aansien van die negering daarvan, hetsy ten aansien van die juridiese erkenning daarvan. Trouens die kerk het sekere konkubinaatsverhoudings erken."

by the Byzantine emperor Leo VI ("the Wise")[64] in his 91st *Novellae* which states that

> It shall not be lawful to keep Concubines. The law which authorized men who do not blush at such a connection to keep concubines was conducive to neither modesty nor virtue. Hence We do not permit the error of former legislators to disgrace Our government, and We hereby repeal this law forever. For, in accordance with the precepts which We have received from God, and which are becoming to Christians, We prohibit such a practice as being injurious not only to religion but also to nature. And, indeed, if you have a spring and the Divine Law invites you to drink from it, do you prefer to resort to a muddy pool, when you can obtain pure water? And even though you have no such a spring, you still should not make use of what is forbidden. It is not difficult to find a consort for life.[65]

2.2 Germanic law (from that which is recorded until the 5th century AD)[66]

Due to the dearth of reliable sources on the subject, primitive Germanic law cannot be conveyed with pinpoint clarity. The reason for this is that it was governed by tribal customary law which was handed down from generation to generation by word of mouth.[67]

Marriage in Germanic law was largely viewed as an agreement or transaction between families rather than the spouses themselves.[68] Once a suitable suitor had been found, the marriage was preceded by negotiations between the

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64 AD 19 September 866 – 11 May 912—see http://en.wikipedia.org/wiki/Leo_VI_the_Wise (accessed on 22 October 2009).

65 *Per* Labuschagne 1989: 661 (note 110).

66 Most of the available information regarding the early Germanic peoples is to be found in Julius Caesar's *De Bello Gallico* and the writer Tacitus's *Germania* (see in general Smith (ed) 1855), a work which appeared approximately 150 years after Caesar's, and, interestingly, appears to have been written with a view towards highlighting the contrasts between the debased Roman society and the "virtuous" Germanic one—see Hahlo and Kahn 1968: 332 (note 1); Hayes *et al* 1967: 63.

67 Hayes *et al* 1967: 63; Hahlo and Kahn 1968: 342. As Hahlo and Kahn (1968: 342) state, this implies that "[a]ll statements about the laws of the early Germanic peoples are therefore of necessity generalizations."

68 Van der Vyver and Joubert 1991: 457.

families involved. These negotiations centered on the determination of a bride-price (*pretium nuptiale*), delivery of which preceded the handing over of the bride to her husband.[69]

Much like Roman law with its concept of paternal power (*patria potestas*), the Germanic tribes recognised similar paternal powers known as the *munt*.[70] Therefore, once the bride had been handed over to her husband, a token symbolising the transferal of the *munt* from her father to the bridegroom was presented to the latter.[71] The wedding was celebrated in the form of a feast during which a number of rituals were performed, and this was followed by the home-bringing of the wife. The marriage formally came into existence after consummation thereof had taken place.[72]

Marriage entitled the husband not only to the *munt* over his wife, but also to the *munt* over any children born to her, regardless of the identity of their biological father.[73] A wife was not permitted to participate in legal traffic and was not generally entitled to own any property of her own save for the wedding gifts and clothes received from her family at the wedding, the *morgengawe* (a gift which was customarily given to her following the consummation of the wedding in exchange for giving herself to her husband),[74] and, at times, for any donation given to her by her husband.[75] The latter was, much like the *donatio propter*

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69 Hahlo and Kahn 1968: 345; Hahlo 1985: 4.

70 Hahlo and Kahn 1968: 344.

71 Hahlo and Kahn 1968: 342, 343 and 345.

72 Van der Vyver and Joubert 1991: 457; Hahlo and Kahn 1968: 346; Hahlo 1985: 4. Parallels between indigenous customary marriages and the Germanic marriages are immediately apparent in terms of the family unions involved, the bride-price custom (referred to in African customary marriages as "lobolo") and in the fact that polygamous unions (although uncommon) were permitted according to Germanic law—see Hahlo 1985: 4; Hahlo and Kahn 1968: 345.

73 Hahlo and Kahn 1968: 344.

74 This was in accordance with the *widergift* principle in terms of which every transaction required a counter-transaction—see Wessels 1908: 463; Hahlo 1985: 4; Hahlo and Kahn 1968: 342, 343.

75 Van der Vyver and Joubert 1991: 458; Hahlo and Kahn 1968: 346; Hahlo 1985: 4.

nuptiae of Roman law, intended to make provision for the wife's needs in the event of her husband predeceasing her.[76]

The marriage could be terminated by divorce, but only the husband had the right to do so unilaterally.[77] Divorce could be effected by mutual familial consent or by simply returning the wife to her family.[78] If the reason for divorce was material he was entitled to demand a full or partial reimbursement of the bride-price paid for her.[79]

3. THE CHANGING FACE OF MARRIAGE: A GLOBAL PHENOMENON CATEGORISED BY A VACILLATION BETWEEN STATE AND RELIGIOUS CONTROL

> There has been a tension throughout history between two interlocking aspects of marriage: marriage as a publicly policed institution and marriage as an individual experience.[80]

3.1 The Roman Empire

As seen above, the State played a minimal role in the Roman law of marriage, and it had jurisdiction over the consequences of marriage rather than the formation thereof.[81]

After many attempts to suppress it, Christianity became an official religion of the Roman Empire in AD 313.[82] Despite further attempts to derail the religion

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76 Van der Vyver and Joubert 1991: 458.
77 Olivier 1974: 164; Hahlo and Kahn 1968: 346.
78 Hahlo and Kahn 1968: 346; Van der Vyver and Joubert 1991: 458; Hahlo 1985: 4, 5.
79 Van der Vyver and Joubert 1991: 458.
80 Merin 2002: 9, 10.
81 Merin 2002: 10.

(notably by the pagans under Julian "the apostate" AD 361 – 363), Christianity flourished and spread throughout the Roman Empire.[83] Roman law—hitherto regarded as a divine law presided over by a divine emperor—became infused with Christian laws and beliefs and was now presided over by an emperor who was simultaneously "pope and king, [and] who reigned supreme in spiritual and temporal matters."[84]

As from AD 325 the Empire enjoyed a brief century or so of political calm which allowed the Church to establish itself in hitherto pagan regions, and by the time of the fall of the Western Empire in AD 476 the Church was ideally poised to supply the political and social stability that had become so sorely absent during the preceding decades of decay.[85] As Hayes *et al* [86] state:

> When the Roman political structure disintegrated in the fifth century, the organized church already possessed sufficient stability to survive and to exert a growing influence over society. In a sense, it replaced the Roman Empire as the principal civilizing agent of Europe.

Despite the Christianisation of the Western Empire, marriage did not immediately come under the control of the Church, and the Roman law of marriage remained largely a formless institution based on the consent of the parties and thus free from rigid State or ecclesiastical control.[87]

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82 This occurred by the *Edict of Milan* which was issued by Constantine in that year. According to Witte (2004: 3) Constantine himself converted to Christianity in 312 AD, but Christianity only became the official religion in the Empire in 380 AD. Hayes *et al* (1967: 46) do not share this view—they state that Constantine only became a Christian many years after the issuing of the Edict.

83 Hayes *et al* 1967: 46.

84 Witte 2004: 3.

85 Hayes *et al* 1967: 87.

86 1967: 87.

87 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) par [70].

As the first "watershed period" in the Western religious tradition, Witte[88] opines that the conversion of the Roman Empire to Christianity triggered the first of four "massive transformations" in the Western legal tradition, the others being the Papal Revolution, the Protestant Reformation and the Enlightenment. As will be seen throughout this Chapter, these transformations would all later play a prominent role in the development of South African (family) law in general and the civil marriage in particular.

3.2 The advent of the Frankish empire (5th to the 9th century AD)

By the end of the fourth century AD, a large number of Germanic tribes had settled along the northern frontier of the Roman Empire.[89] The fall of the Roman Empire in Western Europe led to large-scale migrations and the merging of tribes throughout the erstwhile Roman territories. One of the most important of these was the Franks (a term first used in the third century)[90] who had originally settled on the lower Rhine.[91] The Franks were initially divided into two main groups, namely the Salian and the Ripuarian,[92] but under Clovis (481 – 511 AD) these groups were united.[93] A period of immensely successful expansion followed, in consequence of which most of Gaul was conquered after the Romans, Visigoths and Alamans had been defeated.[94] Convinced that his success over the latter tribe was due to the intervention of the Christian God, Clovis and his followers embraced Catholicism in 496 AD.[95] This development endeared him to the Christianised Gallo-Romans; a fact which, coupled with the respect that the

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88 2004: 2.

89 Hayes *et al* 1967: 63. These groups mainly comprised the Franks (on the lower Rhine), the Alamans (the upper Rhine), the Burgundians, the Vandals and Suevi in the interior, the Saxons and Angles along the North Sea, the Lombards (in Italy) and the Goths (on the Danube river and north of the Black Sea)—see Hayes *et al* 1967: 63, 64.

90 Hahlo and Kahn 1968: 359.

91 Hayes *et al* 1967: 63.

92 Hayes *et al* (1967: 63) mention that the names "Salian" and "Ripuarian" derive from *sal* (denoting "salt" as in "sea") and *ripa* (or "riverbank") respectively.

93 Hahlo and Kahn 1968: 359.

94 Hayes *et al* 1967: 69, 70; Hahlo and Kahn 1968: 359.

95 Hayes *et al* 1967: 70.

Frankish Empire maintained for Roman traditions and customs, resulted in a true fusion of the Germanic and Roman cultures.[96]

The simultaneous spread of Christianity in Britain also had a substantial influence on developments in the Frankish Empire. This process had largely begun under St Patrick who, upon his return to Ireland years after being held captive there, succeeded in converting much of the land to Christianity. This influence later spread to Scotland and to the pagan areas of the Frankish Empire.[97] In the meanwhile, Southern Britain was being evangelised by St Augustine who had been sent for this purpose by Pope Gregory.[98] Although the newly-converted Northern and Southern Christian groups initially failed to agree on certain dogmatic issues, the synod of Whitby effectively facilitated the unification of these two groups with the result that the English and Irish Christians ineluctably merged with the Roman Catholic Church.[99] These developments played an instrumental role in the Frankish Empire, where Saxon missionaries such as Willibrord (later bishop of Utrecht) and Winfrid (later St Boniface) converted many of the remaining pagan areas to Christianity and in so doing furthered the influence of the Catholic Church and the notion of papal supremacy.[100] The Frankish Empire continued to expand throughout this period, and reached its pinnacle under the reign of Charlemagne (768 – 814),[101] who, significantly, was proclaimed Emperor of Rome by Pope Leo III on Christmas Day, 800.[102]

The early Church based its principles of marriage on the teachings of Christ—who often used the image of marriage to illustrate the kingdom of God and spoke out against divorce and adultery[103]—and the letters of Paul,[104] who used the

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96 Hayes *et al* 1967: 70.

97 Hayes *et al* 1967: 87.

98 Hayes *et al* 1967: 87.

99 Hayes *et al* 1967: 88, 89.

100 Hayes *et al* 1967: 87.

101 Hahlo and Kahn 1968: 359.

102 Hayes *et al* 1967: 121.

103 See the texts cited by Witte 1997: 16 – 17; particularly the Gospel according to Matthew 5: 27-28 and 31- 32; 19: 6 and 8 – 9; 22: 1 – 14 and 25: 1 - 13.

concept of marriage to illustrate the role and function of the Christian Church by likening its relationship with Christ to that between bride and bridegroom respectively.[105] Drawing on these teachings, the Church originally (c 325 AD) demanded the clergy to practice monogamous sexual restraint, but within a century the influence of the later Church Fathers had not only escalated the requirement to celibacy—with marriage often being viewed "as the least virtuous Christian estate" and sexual intercourse restricted to procreative purposes—but had also begun to reform the Roman law of marriage and divorce.[106]

In this regard, Hahlo[107] mentions that some of the most notable effects of the growing influence of Christianity as from the fifth century onwards were that polygamy and marriage within the prohibited degrees of affinity were outlawed and that, over and above the consent of her father, the consent of the wife-to-be also came to be required.[108] It is also interesting to note that even the nature of the bride-price evolved into a settlement akin to the *dos* with the aim of providing for the wife should she survive her husband.[109] In this way Hahlo[110] mentions that it came to resemble a modern-day life insurance policy. The power which a husband had previously exercised over his wife was also substantially reduced, an effect of which was that, although they were still subjected to the guardianship of their husbands, wives became entitled to have estates of their own.[111] As far as religious rites were concerned, it became customary for marriages to be blessed in a church on the morning after the wedding. This was not, however, a legal requirement for the validity of the marriage.[112]

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104 See texts cited by Witte 1997: 17 – 19.

105 Witte 1997: 16 – 18.

106 Witte 1997: 19, 20.

107 1985: 5.

108 Hahlo and Kahn 1968: 384.

109 Hahlo 1985: 5. In accordance with the reciprocity principle the groom was however still required to present something to the bride's father as a counter-present—see Hahlo and Kahn 1968: 384.

110 1985: 5 (note 34).

111 Hahlo and Kahn 1968: 385.

112 Van der Vyver and Joubert 1991: 459; Hahlo 1985: 5; Hahlo and Kahn 1968: 384.

The developments sketched above leave no room for doubt that by the end of the 8th century AD the entire Frankish Empire was Christian.[113] The Frankish king was regarded as the head of the Church, and there was no separation between Church and State.[114] However, during the tempestuous reign of Charlemagne's son Louis the Pious (814 – 840) the Frankish Empire had begun to decline, and after his death the Empire was divided in terms of the *Treaty of Verdun* (843) amongst Louis's three sons, Lothair (Lothair I), Louis (the German), and Charles (the Bald).[115]

By the time of the demise of the Frankish Empire the divide between Church and State had become more prominent,[116] and, moreover, the Pope had by that time become the head of the Frankish Church.[117]

3.3 The Middle Ages: The Roman Catholic Church transforms marriage into a sacrament

The Church began to exercise jurisdiction over matrimonial law in Europe as from the tenth century AD.[118] According to Witte,[119] the catalyst for this new-found jurisdiction was the Papal Revolution in 1075 when, under Pope Gregory VII (originally known as Hildebrand), the Church began to overthrow the civil rulers of Western Europe. What followed was the "second watershed period of the Western legal tradition",[120] namely the transformation of the Roman Catholic Church into "an autonomous legal and political corporation", which literally acquired the power to "speak the law."[121] This revolutionary conflation of law and

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113 Hahlo and Kahn 1968: 367.
114 Hahlo and Kahn 1968: 367.
115 Hayes *et al* 1967: 122; Hahlo and Kahn 1968: 360.
116 Hahlo and Kahn 1968: 360.
117 Hahlo and Kahn 1968: 368.
118 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at par [70].
119 1997: 22 and 2004.
120 Witte 2004: 4.
121 Witte 1997: 31 and 2004:4. Also see Reid and Witte 1999: 647.

theology would contribute to the enduring legacy that the Church's influence has left on the institution of marriage to this very day.[122] As Witte[123] mentions:

> In the Western world of 1200-1500, the church was not merely a voluntary association of like-minded believers gathered for worship. Its canon law was not simply an internal code of spiritual discipline to guide the faithful. The church was the one universal sovereign of the West that governed all of Christendom. The canon law was the one universal law of the West that was common to jurisdictions and peoples throughout Europe. The great nation-states of Western Europe were not yet born. The Holy Roman Empire was not yet real. In that interim, the Catholic Church with its canon law held preeminent authority.

The development of the sacramental model of marriage was occasioned by the refinement and structuring of the Catholic Church's marriage doctrines along with the systematisation of Canon law.[124] This process led to marriage being viewed from a three-tiered perspective comprising (i) the consensual contractual undertaking that (ii) was bound by the laws of nature and (iii) was elevated to one of the seven sacraments of faith.[125] As a sacrament, marriage not only resorted under the jurisdiction of the Church,[126] but moreover occasioned a spiritual transformation of the parties so that sexual intercourse between them was no longer regarded as sinful and divine intervention could be relied upon in fulfilling the spouse's marital and parental obligations.[127]

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122 Witte 1997: 23; 30.

123 1997: 30.

124 See Witte (1997: 23) who mentions that the most fundamental developments in the former regard were occasioned by works such as Hugh of St Victor's "On the sacraments of the Christian Faith" (c 1143), Lombard's "Book of sentences" (1150) and Thomas Aquinas's "*Summa Theologica*" (c 1265 – 1273), while Gratian's *Decretum* (c 1140) was the first attempt at systematising Canon law, and as such constituted the "anchor text of medieval canon law" (Witte 2004: 4).

125 Witte 1997: 23; *Dalrymple v Dalrymple* 2 Hag. Con. 65; 161 Eng. Rep. 1752 – 1865 (16 July 1811) at 669. The six other sacraments were baptism, confirmation, confession and penance, the Eucharist, extreme unction for the sick and dying and holy orders—see Hayes *et al* 1967: 351.

126 Witte 2004: 4; 1997: 26.

127 Witte 1997: 27.

Thus was born the first of the five theological models of marriage that Witte identifies as having arisen in the Western legal tradition.[128] As such, the so-called "Catholic sacramental model" was based on the idea that marriage is a unit comprised of three elements, namely the natural, the contractual and the sacramental. The natural element was based on the idea that marriage is a union between two natural persons with a view to procreation and providing an acceptable (albeit not perfect) means of satisfying lustfulness.[129] The contractual element comprised the mutual consent of the parties in terms of which they undertook to be faithful to one another and dutiful as parents. Thirdly, as one of the seven sacraments, marriage was viewed as a perceptible symbol of the everlasting spiritual and physical union between God and His Church.[130]

It is important however to note that the Catholic model always preferred celibacy over marriage, with the former being regarded as a condition for ecclesiastical office and the ultimate proof of spiritual maturity.[131] Therefore, although marriage was elevated to sacramental status, celibacy was regarded as being the true path to righteousness, while marriage was simply an alternative "second-best" for those who required a more acceptable channel for their natural sexual urges.[132]

Canon law developed from this basic concept of marriage as a composite unit embodying the three facets mentioned above. As a result, unnatural sexual relations such as incest and buggery were prohibited (in accordance with the natural perspective), while monogamous marriages that were based on consensus that had properly been reached were sanctioned (in accordance with

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128 The others are the "Lutheran social model", the "Calvinist covenantal model", and the "Anglican commonwealth model" (which, together, can be classified as Protestant models) and the "Enlightenment contractarian model." All of these models will be discussed in this Chapter.

129 Witte 1997: 3.

130 Witte 1997: 26.

131 Witte 1997: 4.

132 See Westermarck 1903: 155 and Witte 1997: 4 who observes that "[t]hose who could not forgo marriage were not worthy of the church's holy orders and offices. Celibacy was something of a litmus test of spiritual discipline and social superiority."

the contractual perspective), and, furthermore, were regarded as indissoluble once concluded (in accordance with the sacramental nature of marriage).[133]

The formation of marriage in Canon law followed three stages.[134] The first stage was the espousal, which, although binding on the parties, could be terminated by mutual agreement or by unilateral withdrawal provided that there was a good reason for doing so.[135] The second stage was the contracting of the marriage in the presence of the parties, and the third stage was the consummation of the marriage by consensual sexual intercourse.[136]

Under Canon law the Roman law pertaining to the incapability of persons below puberty (*impubes*) to marry was applied.[137]

Originally, the marriage ceremony itself took place after the parties had by virtue of the so-called "consent-talks" between the parties' relatives, friends or the priest consented to marry one another.[138] In later times these talks were held outside the church, followed by a blessing inside the church.[139] By the sixteenth century the entire ceremony had been formalised and a ceremony before a priest in the church became mandatory.[140] It is however, important to remember that it was the consent of the parties and not the blessing of the marriage that brought the marriage into existence.[141]

Under the influence of the Catholic Church it came to be required that consummation of the marriage (*copula carnalis*) was a requirement for the

133 Rheinstein 2007: 6; Reid and Witte 1999: 686.
134 Witte 1997: 32.
135 Hahlo 1985: 7.
136 Witte 1997: 32.
137 Hahlo and Kahn 1968: 448.
138 Hahlo 1985: 7;
139 Hahlo and Kahn 1968: 448.
140 Merin 2002: 11; Hahlo and Kahn 1968: 448.
141 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at par [70] - [71]; Hahlo 1985: 7.

validity thereof,[142] and there were those who were of the view that consummation rendered the marriage sacramental.[143] However, by the close of the thirteenth century the prevailing viewpoint appears to have been that the exchange of promises between the parties was the means by which marriage attained its sacramental nature, with the result that human intervention could no longer terminate it.[144] This implied that divorce was not permitted in a consummated marriage, but canon law did provide for the ecclesiastical courts to grant a decree authorising the parties to live apart by way of a decree of separation of board and bed (*separatio a mensa et thoro*) if continued cohabitation became impossible due to the conduct of the other spouse.[145] If the marriage had not been consummated, it could be dissolved by the Pope or by either of the spouses entering a monastery or a convent.[146]

As from 1215 the publication of the banns was required in order for the parties to conclude a "regular" marriage (that is to say a marriage sanctioned by the Church).[147] The purpose of this requirement was to allow family members of the prospective spouses to prevent marriages of which they did not approve.[148] Nevertheless, an espousal concluded by mutual consent expressed in the presence of the parties (*sponsalia per verba de praesenti*) implied that an "actual and legal"[149] marriage came into existence simultaneously with the espousal (so that Pollock and Maitland[150] term the espousal an "initiate marriage").[151]

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142 Hahlo and Kahn 1968: 448.

143 Witte 1997: 27.

144 Witte 1997: 36.

145 Hahlo and Sinclair 1980: 2; Hahlo and Kahn 1968: 449; Hahlo 1985: 8. Grounds for obtaining such a decree would include adultery or heresy—see Hahlo 1985: 8.

146 Hahlo and Kahn 1968: 449.

147 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at par [70]; Pollock and Maitland 1898(b): 370, 371.

148 Van der Vyver and Joubert 1991: 460.

149 *Per* Sir William Scott in *Dalrymple v Dalrymple* 2 Hag. Con. 65; 161 Eng. Rep. 1752 – 1865 (16 July 1811) at 669.

150 1898(b): 368.

151 *Dalrymple v Dalrymple* 2 Hag. Con. 65; 161 Eng. Rep. 1752 – 1865 (16 July 1811) at 669. In his judgment in the *Dalrymple* case, Sir William Scott criticised the use of the term "*sponsalia per verba dc (sic) praesenti*" due to the fact that "*sponsalia*" refers to that which precedes marriage, and not the marriage itself.

Although a marriage without ecclesiastical blessing or publication of banns was not invalid, a number of disadvantages followed in that the validity and existence of such an informal or "irregular" marriage had to be proved and that a number of other penalties ensued.[152]

By the sixteenth century canon law governed marriage as an institution in the entire Western Europe.[153] Clandestine marriages, however, remained problematic, and attempts were made by lawmakers to circumvent their conclusion.[154] For example, Article 17 of the *Perpetual Edict* of 1540 (issued by Charles V on 4 October of that year) noted that "inconveniences are caused in consequence of secret marriages"[155] and prescribed penalties for the conclusion thereof.[156] Such marriages were nevertheless valid.[157] Despite this attempt, the instance of clandestine marriages appears to have increased.[158]

Eventually, in order to reform the law of marriage and to thwart the conclusion of marriages concluded in secret, the Council of Trent issued the *Decretum Tametsi (De Reformatione Matrimonii)* in 1563, in terms of which the sacramental nature of marriage was reaffirmed, the publication of banns was made compulsory and all marriages were required to be solemnised before a priest and at least two

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152 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at par [71]; *Ex parte Dow* 1987 (3) SA 829 (D) at 831 (G); *Dalrymple v Dalrymple* 2 Hag. Con. 65; 161 Eng. Rep. 1752 – 1865 (16 July 1811) at 669; Hahlo and Kahn 1968: 448; Hahlo 1985: 8; Pollock and Maitland 1898(b): 371. The doctrine of the putative marriage (*matrimonium putativum*) came to be recognised in terms of which the harsh consequences of nullity of marriage could be avoided in certain instances, provided that one or both of the parties were *bona fide* and that the marriage had been solemnised in Church—see Hahlo 1985: 8.

153 Merin 2002: 11.

154 Reid and Witte 1999: 678.

155 *Ex Parte Dineen and Another* 1955 (4) SA 49 (O) at 52 (C). According to Article 17 these inconveniences could be attributed to the lack of "advice[,] counsel and consent of friends and relatives of both sides" and that such marriages were not "in accordance with honour and due obedience, and generally come to a bitter end" (Lee 1931: 56).

156 See the discussion of section 17 in 3.4.6 below. Other penalties also applied—see notes 400 and 401 below.

157 *Ex Parte Dineen and Another* 1955 (4) SA 49 (O) at 52 (C) – (E).

158 Wessels 1908: 443.

witnesses.[159] Contraception and abortion were declared to be contrary to the primary goal of marriage, namely procreation[160] and the marriage of a minor without the consent of his or her parents became punishable.[161]

It is interesting to note that Canon law did not concern itself with matrimonial property law. Instead, this aspect of the law of marriage was viewed as a civil matter and was therefore left to the secular authorities to regulate.[162] No uniform system of matrimonial property law applied, with the result that the legal principles took on a cosmopolitan nature and differed from jurisdiction to jurisdiction, based largely on the particular legal heritage concerned.[163]

3.4 The Reformation and one of its consequences: Roman-Dutch law

The influence of the Catholic Church appears to have reached its zenith during the thirteenth century,[164] but in the centuries that followed the Church began to slump into a period of general decline characterised (and exacerbated) by growing uncertainty regarding the position of the papacy, an increase in the incidence of heresy and ever-increasing administrative problems.[165] By the sixteenth century serious cracks were beginning to appear in the Catholic Church's monopoly over life in Western Europe, and it was only a question of time before the growing Protestant movement, set in motion by Martin Luther's nailing of the *Ninety-Five Theses* to the doors of the church in Wittenburg in 1517,[166] began to question tenets fundamental to the Catholic faith.[167] In

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159 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at par [71]; *Ex parte Dow* 1987 (3) SA 829 (D) at 831 (G) – (H); Witte 1997: 38. Due to the rift that developed between Henry VIII and the Catholic Church (discussed in 3.4.2.3 below) these requirements were not entrenched in England, where informal marriages were still recognised well into the 18th century—see Merin 2002: 11; Coester-Waltjen and Coester 2007: 72.

160 Merin 2002: 11.

161 Hahlo and Kahn 1968: 450.

162 Hahlo 1985: 9.

163 Hahlo 1985: 10.

164 Hayes *et al* 1967: 325.

165 Hayes *et al* 1967: 325.

166 See 3.4.2.1 below.

particular, Protestantism began to revolt against the Catholic Church's conception of marriage as a sacrament that was under its uncontested and exclusive jurisdiction.[168]

In time, the three main Protestant traditions, namely Lutheranism, Calvinism and Anglicanism each began to develop their own schools of thought regarding, *inter alia*, the theological basis of marriage. Although each tradition propagated a specific "theological formula"[169] pertaining to marriage, the common thrust of the Protestant tradition was the rejection of the Catholic perception of marriage as one of the seven sacraments,[170] coupled with greater (but varying) recognition of the role played by the State in the institution of marriage.

For the purposes of this study, it is of cardinal importance to understand the impact of the Reformation. This is so because of the fact that the Reformation led to a radical reassessment of the concept of marriage; a development that occurred both parallel to and (somewhat paradoxically) as a result of, the development of Roman-Dutch law.

3.4.1 The birth of Roman-Dutch law

The Netherlands formed part of the Frankish Empire and was divided into provinces and cantons.[171] The Northern provinces included Gelderland, Utrecht, Friesland and Holland, while Brabant and Flanders were in the South. Holland (comprising North and South Holland as well as West Friesland) was a countship which had been conferred on Dirk I by Charles the Simple in 922 AD, thus establishing the House of Holland.[172] The counts were powerful overlords, and

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167 Hayes *et al* 1967: 351.
168 Witte 1997: 42
169 Witte 1997: 2.
170 See 3.3 above.
171 Wessels 1908: 58.
172 Wessels 1908: 58.

together with the nobles and the clergy held the balance of power.[173] Even centuries after the Frankish Empire had ceased to exist there was no legislation of general application in the Netherlands,[174] which only appears to have become a prominent feature of the legal system during Spanish rule (intermittently as from the mid-fifteenth century until 1648).[175] One of the privileges (*handvesten*) granted to the so-called "fourth estate" (constituted by the towns)[176] was the power to make their own binding regulations, which were later assimilated into *keur-* or *stadboeken.*[177] According to Sir John Kotzé:[178]

> If we bear in mind that the provinces and towns in the Netherlands had each their own laws and customs, and that the development of the law in almost each province was separate and independent, we can readily understand what necessity there was for uniformity and how hopeless it seemed to bring about such uniformity of local law and custom and to transfer them into national common law.

The resultant body of law, rules and customs was not only incoherent and illogical, but moreover was based on a Medieval legal system that was rapidly becoming obsolete. The necessity for the introduction of a structured, complete and reliable system of law was obvious, and Roman law clearly fitted this bill.[179]

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173 Wessels 1908: 57.

174 Lee 1931: 4.

175 Lee 1931: 7.

176 Wessels 1908: 57.

177 Kotzé 1909: 387; Lee 1931: 4.

178 1909: 407, 408. Sir Johannes Gysbert (John Gilbert) Kotzé (1849 – 1940) had a legal career that was extraordinary in terms both of variation and longevity: He was a Judge of the High Court of the South African Republic (Transvaal) as from 1877 and later Chief Justice as from 1881 until his dismissal in 1898 (reputedly "for renouncing his undertaking not to test the validity of legislation against the Constitution"), after which he returned to the Pretoria Bar. He was appointed as a Judge of the Eastern Districts Court in 1903, and was Judge President of this Court until 1913. From here he was appointed as a judge of the Cape Provincial Division in 1913, until his appointment as Judge President in 1920. In 1922 he was appointed as a Judge of Appeal in 1922 until his retirement in 1927. This information was obtained in Kahn 1999: 167.

179 Kotzé 1909: 408; Lee 1931: 4.

The House of Holland established by Dirk I was succeeded by the House of Henegouwen in 1299, and later by the House of Bavaria in 1345.[180] It is around this period that the first references to codified Roman law as a supplement to local custom began to appear in judgments of the High Court in Holland.[181] This process gained momentum under the House of Burgundy (commenced by Philip the Good in 1428) which not only "favoured every means calculated to bring about uniformity in the law"[182] but also set in motion the process of steadily unifying the various provinces into one State.[183]

Lee[184] describes the origin of Roman-Dutch law in the following terms:

> Derived from two sources, Germanic Custom and Roman Law, the Roman-Dutch law may be said to have existed so soon as the former of these incorporated elements derived from the latter.

An "accelerated infiltration"[185] of Roman law into the law of Germany and Holland took place in the fifteenth and sixteenth centuries, with the first official statutory recognition thereof being mentioned in Holland in 1462 and in Germany in 1495.[186] As such, Roman law was applied in the event of indigenous laws and customs being silent and it therefore enjoyed subsidiary common law status in both of these territories.[187] However, as these non-codified indigenous laws and customs were sometimes difficult to access, the codified Roman law occasionally came to be applied as primary law as a matter of practicality.[188]

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180 Wessels 1908: 59.
181 Hahlo and Kahn 1968: 515.
182 Kotzé 1909: 390.
183 Wessels 1908: 59.
184 Lee 1931: 3.
185 Hahlo and Kahn 1968: 515.
186 Hahlo and Kahn 1968: 503 and 516; Lee 1931: 3; Kotzé 1909: 408. In this year a supreme court of appeal in the form of the *Reichskammergericht* was established in Germany and was enjoined to decide matters on the basis of the existing law of the empire and Roman law—see Kotzé 1909: 408.
187 Hahlo and Kahn 1968: 516
188 Van Zyl 1983(a): 315.

3.4.2 Religious upheavals intervene: The influence of Protestantism and the resultant Lutheran and Calvinist models of marriage

The House of Burgundy came to an end when Philip the Fair succeeded his mother Maria (the granddaughter of Philip the Good, who, by marrying Maximilian I of Hapsburg in 1477 had become the Archduchess of Austria) in 1482 after her unexpected death in a horse-riding accident. Philip the Fair's father, Maximilian I, had become Holy Roman Emperor-elect in 1508, by which time Philip had predeceased him. Philip's son—Charles V—succeeded his father as Duke of Burgundy in 1506. On 28 June 1519 he was elected as successor to his grandfather (Maximilian) as ruler of the Holy Roman Empire, and was crowned as such by Pope Clement VII in 1530.[189]

By the time of Charles V's reign, anti-Catholic religious sentiment in the form of Lutheranism was beginning to gain support in Germany, and Charles—a Netherlander by birth—was determined not to allow the same to happen in the Netherlands.[190] Attempts to thwart all forms of heresy would culminate in Witte's "third watershed period in the Western legal tradition" in the form of the Protestant revolution.

The term "Protestant" is self-explanatory in that it was first used to describe those who protested against Charles V's 1529 order that the canon law be enforced against those who dissented against it.[191] Although these initial protesters were of the Lutheran faith, the term later came to be used as a collective description of all traditions of Western Christendom who distanced themselves from Catholicism in consequence of the Reformation.[192]

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189 http://en.wikipedia.org/wiki/Charles_V,_Holy_Roman_Emperor accessed on 17 July 2009.

190 http://en.wikipedia.org/wiki/Charles_V,_Holy_Roman_Emperor accessed on 17 July 2009.

191 Hayes *et al* 1967: 354.

192 Sinclair (ed) 2001: 1204; Hayes *et al* 1967: 354.

Generally speaking, the Protestant models developed from the Catholic sacramental model[193] and as such retained the notion of marriage as embodying the natural and contractual elements, but rejected the notion of marriage as a sacrament and as a lesser alternative to celibacy.[194] The major branches of Protestantism include the Lutheran, Calvinist, Anglican and Free Church branches.[195]

3.4.2.1 The Lutheran social model

Although at one time an Augustinian friar, Martin Luther (1483 – 1546) became convinced that man, as a sinful and corrupt being, could be saved only through faith in God's grace and not, as the Catholic tradition would have it, by faith, good works and sacraments.[196] As a consequence, Luther came to view certain Catholic practices, such as the granting of indulgences, with particular suspicion. In terms of this practice, the punishment for sins could be remitted wholly or partially if certain prescribed religious tasks were performed. Although these tasks were originally particularly demanding in nature,[197] it appears that, in time, they had become watered-down to such an extent that a simpler act such as a monetary contribution to a specified religious cause would suffice.[198] After a series of flagrant abuses by the Catholic clergy and their representatives involving the issuance of indulgences came to light in Wittenberg in 1517, Luther took the bold step of openly questioning the Catholic faith by posting the well-known *Ninety-Five Theses* on the doors of the Church in that city—a move that was to set the Reformation in full motion.[199] Amongst others, Luther argued that a repentant sinner was pardoned by God and therefore did not require an

193 Coester-Waltjen and Coester 2007: 5.
194 Witte 1997: 4, 5.
195 Witte 2004: 6.
196 Hayes *et al* 1967: 352.
197 According to Hayes *et al* 1967: 352 examples of such tasks included pilgrimages and crusades.
198 Hayes *et al* 1967: 351, 352.
199 Witte 2004: 5.

indulgence by the Church.[200] Indeed, over the next few years Luther questioned the status of the Pope and the nature of the Church as mediator between God and His creation; instead professing that the Scriptures were the supreme authority and that only baptism and the Eucharist were to be retained as sacraments.[201] Unsurprisingly, this did not endear him to the Pope and the Catholic Church, and Luther was excommunicated at the *Diet of Worms* in 1521.[202]

Luther's message of reform spread throughout Germany and the movement against the Roman Catholic Church intensified (particularly after the German Peasants' War of 1524),[203] so much so that two distinct parties, Catholic and Lutheran, subsequently emerged in what only a decade or so earlier had been the almost exclusive domain of the Roman Catholic Church.[204] Although an uneasy peace accord was struck between these two factions in 1555,[205] Lutheranism continued to spread beyond German borders and throughout Europe.[206]

In particular, Luther launched a fierce assault on the canon law perception of marriage and the total dominance wielded over this institution by the Roman Catholic Church.[207] Much of this criticism appears to have been fuelled by the prevailing social ills and the apparent inability of the Roman Catholic model to address, counter or explain them. As Luther argued, the institution of marriage "ha[d] fallen into awful disrepute" by instances of immorality, rape and incest; and the premium placed on celibacy by the Catholic Church and its "accursed papal

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200 Hayes *et al* 1967: 353.
201 Hayes *et al* 1967: 353.
202 Hayes *et al* 1967: 353.
203 The so-called "*Deutcsher Bauernkrieg.*"
204 Hayes *et al* 1967: 354.
205 Amongst others, the Peace of Augsburg of 1555 permitted each ruler to determine the religion of his people—see Hayes *et al* 1967: 354.
206 Hayes *et al* 1967: 354.
207 Witte 1997: 42.

law" often dissuaded people from marrying, or prompted parents to coerce their children into becoming priests or nuns instead of opting for marriage.[208]

The Lutheran model of marriage proceeded from the basis that a distinction had to be drawn between the kingdoms of heaven and earth; and that it was fundamental to realise that the institution of marriage formed part of the latter.[209] For the Lutherans, the Roman Catholic Church had usurped marriage as an institution and had incorrectly bestowed upon it a sacramental character instead of recognising it for the "social estate of the earthly kingdom of creation" which it really was; an institution that, although divinely ordained, was not sacramental in nature and was aimed at the fulfilment of social needs and therefore subject to the jurisdiction of the State as opposed to that of the Church.[210] For this reason, marriage was placed under the legal authority of the State and its formation and termination were brought into the public sphere.[211] Nevertheless, the Church still had a valuable role to play in counselling both prospective spouses and the secular authorities and, at the same time, complementing the latter by "publicizing and disciplining"[212] marriage.[213] As Westermarck[214] observes "[m]arriage certainly ceased to be thought of as a sacrament, but continued to be regarded by the Protestants as a Divine institution; hence sacerdotal nuptials remained as indispensable as ever." The major difference was, however, that God's law was to be administered by the State, as marriage was deemed to form part of the earthly kingdom. Divorce was therefore allowed, as marriage was not a sacramental union that formed part of the heavenly realm.[215] Moreover, the

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208 *Per* Witte 1997: 47.

209 Witte 1997: 5; Raath 2009: 14.

210 Witte 1997: 5; Westermarck 1903: 428.

211 Witte 1997: 6.

212 Witte 1997: 6.

213 Witte 1997: 6. See Raath (2009: 6): "Marriage is the lawful and divine union of one man and one woman. It has been ordained for the purpose of calling upon God, for the preservation and education of offspring, and for the administration of the church and the state. Marriage is the first and chief thing; for it is the beginning and origin of the whole life." (LW 5: LG [Luther's Works (volume 5), Lectures on Genesis] (Genesis 28: 2)).

214 1903: 428.

215 Witte 1997: 6.

premium placed on celibacy by the Catholic tradition was removed, with the result that clerics were free to marry. Nonetheless, many important principles of canon law such as those pertaining to morality were retained.[216]

3.4.2.2 The Calvinist covenantal model

The third model proposed by Witte stems from the Calvinist tradition—the second chief sub-division of Protestantism. John Calvin (1509 – 1564) was born in Noyon, France and trained as both a priest and later as a jurist.[217] In his early twenties he experienced a religious conversion which led him to renounce Catholic teachings in an attempt to regain, as Hayes *et al* describe it,[218] the "purer Christianity" as he believed it once to have existed prior to the influence of Catholicism.[219] Published in 1536, Calvin's seminal work, *The Institutes of the Christian Religion*, professed a faith that was based purely on the Scriptures and was almost completely devoid of the Catholic sacraments.[220] As the French monarch was a staunch supporter of Catholicism, Calvin elected to leave his native France and to settle permanently in Switzerland.[221]

As mentioned above, Calvin's teachings were based on an attempt to return to a purer and simpler Christianity. As such, church services were remodelled so as only to include practices expressly sanctioned by the Bible, and a puritanical way of living—which promoted moral rectitude, sobriety and clean living—came to be encouraged.[222] Calvin's motto—*cor mactatum in sacrificium offero* (I bring my heart as an offering)—reflected his view that those who acknowledged God's

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216 Witte 1997: 6.

217 Hayes *et al* 1967: 355.

218 Hayes *et al* 1967: 355.

219 Hayes *et al* 1967: 355.

220 Hayes *et al* 1967: 355, 356.

221 Interestingly, Calvin's work was dedicated to the French monarch (Francis I), who was a staunch supporter of Catholicism, in an ostensible (but unsuccessful) effort to convert him—see Hayes *et al* 1967: 355

222 Hayes *et al* 1967: 356.

authority understood that every aspect of life was based on Biblical principles and that all of Creation was to seek to honour God.[223]

As far as marriage was concerned, the Catholic notion of marriage as a sacrament was, as had been the case in the Lutheran tradition, once again rejected. Instead, Witte states,[224] the Calvinists viewed marriage as a "covenantal association" involving not only God and the spouses in a tripartite agreement, but also the entire community including their parents (the consent givers), the witnesses to the marriage (the spouses' spiritual peers), the minister (who blessed the union) and the magistrate (the registrar and legal protector). For Calvin and his followers the institution of matrimony therefore involved each of these parties forming part of the covenant and portraying varying but essential divinely-determined roles; all of which were governed by God's over-arching moral law.[225] This law comprised complementary civil and Christian spiritual norms, enforced by the State and the Church respectively and therefore not, as the Lutherans would have it, solely by the State.[226] This implies that the covenantal view of marriage bridged the strict divide between the earthly and heavenly kingdoms observed by the Lutherans, "by [adding] a spiritual dimension to marriage life in the earthly kingdom, a marital obligation to spiritual life in the heavenly kingdom, and complementary marital roles for both church and state."[227] Witte[228] illustrates this two-way process as follows:

> In marriage cases, the consistory [ecclesiastical court] was the court of first instance; it would call the parties to their higher spiritual duties, backing their recommendations with (threats of) spiritual discipline. If such spiritual counsel failed, the parties were referred to the city council to compel them, using civil and criminal sanctions, to honor at least their basic civil duties for marriage.

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223 Gaum 2009.
224 Witte 1997: 7.
225 Witte 1997: 7.
226 Witte 1997: 7.
227 Witte 1997: 8.
228 1997: 8.

The Calvinistic model of marriage placed considerable emphasis on the voluntary consent of the parties thereto, and on ensuring that parties were fit for marriage, with the result that the process was communal and transparent from the outset and that disputed betrothals were more common than divorces.[229] Once entered into, betrothals were binding.[230] A formal church ceremony had to follow the betrothal and civil registration of the marriage.[231] A properly contracted marriage was presumed permanent, and annulments or divorces—while not easily granted to begin with—involved the public and were granted in open Courts. An annulment was possible in the event of the marriage being void *ab initio* without the knowledge of either or both the parties (i.e. a putative marriage) or on grounds such as incurable disease, impotence or the discovery by a husband that his wife had not been a virgin at the time of the marriage.[232] Divorce was only granted in limited circumstances, and pre-eminence was always placed on reconciliation where possible (Watt[233] recounts a letter written by Calvin in which he instructs a Protestant woman to continue to live with her abusive Catholic husband unless her life was endangered). The only grounds of divorce were adultery or desertion, and only a completely innocent spouse could sue for divorce.[234]

Civil administration was dominated by the Consistory and under Calvin's influence Geneva became a theocracy; a fact that attests to the profundity of Calvin's influence as a reformer.[235] Calvinism later spread throughout Europe, where churches established by adherents thereto became known as "Reformed Churches"; notably in Germany and the northern Netherlands.[236] In France—Calvin's homeland and a Catholic stronghold under Francis I—religious wars raged for years until the *Edict of Nantes* of 1598 granted Protestants the right to

229 Watt 2006: 326.
230 Watt 2006: 327.
231 Witte 1997: 84, 85.
232 Witte 1997: 85, 86.
233 2006: 327.
234 Witte 1997: 85, 86.
235 Hayes *et al* 1967: 356.
236 Hayes *et al* 1967: 357.

practice their religion and to participate in private and (albeit limited) public worship.[237] Calvin's theological doctrines and views on authority were later to play a particularly important role in the political scene in South Africa in the Boer Republics and the later influence of Afrikaner Christian-Nationalism.[238] This aspect will be embroidered upon later.

3.4.2.3 The Anglican commonwealth tradition

3.4.2.3.1 Introduction

In as far as matrimonial matters are concerned, the Catholic Church began to make its influence felt on English soil as from the 7th century onwards, particularly with regard to aspects such as incest and prohibited degrees of relationship.[239] According to Pollock and Maitland[240] ecclesiastical rules pertaining to marriage and its dissolution appear to have been enforced by Archbishop Theodore from these times but, interestingly, the notion of marriage as an indissoluble union was not applied *strictu sensu*; a fact that is probably partially due to certain allowances made for the Germanic customs regarding divorce. A few centuries later, during the reign of Canute the Great (King of England from 1016 – 1035), Christian marriage legislation was enacted in terms of which the bishop adjudicated on matters such as adulterous conduct.[241] Moreover, after William the Conqueror defeated the last Anglo-Saxon King of England (Harold Godwinson or Harold II) in the Battle of Hastings in 1066, the Norman influence began to permeate the law of marriage,[242] and within two decades William placed the law of marriage under the jurisdiction of the Ecclesiastical Courts.[243] The Church's influence in this regard increased, and by

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237 Hayes *et al* 1967: 357 – 359.
238 Sachs 1973: 70 *et seq*; Robinson 2005: 489 (note 3).
239 Pollock and Maitland 1898(b): 366.
240 1898(b): 366.
241 Pollock and Maitland 1898(b): 367.
242 For example, see Pollock and Maitland 1898(b): 367, 370.
243 Coester-Waltjen and Coester 2007: 72.

the twelfth century English law firmly reflected the view that marriage "appertained to the spiritual forum" and was thus governed by canon law.[244]

Nevertheless, marriage was based on consensus (*consensus facit nuptias*), with no ecclesiastical blessing being essential for the validity thereof.[245] This much is substantiated by the case of Richard of Anesty that was preceded by a matrimonial dispute (c 1143) in which a second marriage that had been ecclesiastically blessed and which had produced offspring was annulled in favour of a prior marriage concluded solely on the basis of verbal consent.[246]

By the time that Henry VIII (1509 – 1547) acceded to the throne of England, Catholicism was firmly entrenched as the dominant religion. Indeed, the English monarch was among the first vehemently to defend Catholicism against Martin Luther's teachings, an effort for which Pope Leo X bestowed the title of "Defender of the Faith" upon him in 1521. However, when Henry conspired to have his marriage to his wife, Catherine of Aragon, annulled, he ran into difficulty due to the fact that his marriage had received papal authorisation years before, and the incumbent Pope (Clement VII) was, for political and other reasons, hesitant to attempt to grant the annulment sought.[247] After years passed with no decision being taken, Henry became incensed by what he regarded as an abuse of power by the Pope, so much so that he set about forcing a split between the Catholic Church and the English monarchy by formally declaring himself the supreme earthly head of the Church of England in 1534.[248] It is to be noted that this schism did not imply that Protestant doctrines were embraced in totality by Tudor England. Indeed, with the exception of papal supremacy, fundamental Catholic doctrine was adhered to despite Henry's feud with the Church; a fact that was reaffirmed by the "six articles" promulgated by the English Parliament in

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244 Pollock and Maitland 1898(b): 367.
245 Coester-Waltjen and Coester 2007: 72; Pollock and Maitland 1898(b): 370, 371.
246 Pollock and Maitland 1898(b): 367.
247 Hayes *et al* 1967: 361, 362.
248 Hayes *et al* 1967: 362.

1539.[249] Moreover, severe penalties were meted out to anyone who disputed Henry's revised Catholic doctrines.[250]

Importantly, the rift between England and the Catholic Church which had developed as a result of Henry VIII's marital shenanigans meant that the reformative measures occasioned by the Council of Trent in 1563 were not applied on English soil.[251] As a result, the formal ecclesiastical blessing of marriages, while serving as a means of publicising the marriage, appears only to have been required in the event of property disputes; a position that obtained for the most part until 1753.[252]

Henry's nine year old son Edward VI succeeded to the throne in 1547 and under the new King Protestantism gained a greater foothold in England, with the result that a number of practices and doctrines fundamental to the Catholic faith were adapted in such a way as to reflect Protestant beliefs.[253] This period of Protestant pre-eminence was, however, short-lived, and when Edward VI's half-sister Mary succeeded him as the English Monarch after his death in 1553 the re-establishment of the breached ties with the Catholic Church was foremost on the agenda; a task that, accompanied by much bloodshed, led to the restoration of Papal supremacy coupled with the repeal of the legislation which her father had caused to be enacted two decades earlier and the re-instatement of laws against heresy.[254]

However, Mary died only five years later and, as she was heirless, she was succeeded by her half-sister Elizabeth, a pro-Protestant Monarch who was to re-establish the Anglican faith and to mould it into much of what it remains to this

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249 Hayes *et al* 1967: 362.

250 Hayes *et al* 1967: 362, 363.

251 Coester-Waltjen and Coester 2007: 72.

252 See Coester-Waltjen and Coester 2007: 72 who mention that this state of affairs was interrupted by the republican revolution (1649 – 1660).

253 Hayes *et al* 1967: 363.

254 Hayes *et al* 1967: 364.

day.[255] Although pro-Protestant in the main, Elizabeth retained many icons of the Catholic faith, with the result that the Church of England "while embracing a modified Protestant theology, retained all the outward form of Catholic organization, save only the pope."[256] As such, Elizabeth remained the supreme ruler of the Church of England; a fact that was reinforced in that, for a time, any attempt to promote Catholicism (and hence Papal supremacy) was regarded as an act of high treason justifying capital punishment. In time, however, recusant Catholics and dissident Protestants were permitted to practice their faith more freely.[257]

The entrenchment of Anglicanism in England can however be attributed to more than just Elizabethan politics and religious views. Coinciding with the resuscitation of Anglicanism, Elizabethan England entered into a period of resurgence that encompassed enormous economic, social, political and intellectual prosperity—aspects that created immense pride in all things English. Set against this backdrop, it is easy to understand why Elizabeth's modified Anglicanism came to be viewed as an element of this national pride; a factor that undeniably contributed to its acceptance and sustainability.[258]

The developments outlined above provide the background to the fourth model of marriage identified by Witte, namely the Anglican commonwealth tradition. The reforms to matrimonial law as initially occasioned by Henry VIII's schism "triggered an explosion of new Protestant literature in England both on marriage and its dissolution and on the canon law of marriage and its reformation" in turn prompting a series of legal reforms.[259] However, the tug-of-war between

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255 Hayes *et al* 1967: 365.

256 *Per* Hayes *et al* 1967: 365. Also see Witte 1997: 131.

257 Hayes *et al* 1967: 365, 366. Despite Elizabeth's return to Protestantism, not all Protestants were convinced that Elizabeth's modified Anglicanism was sufficiently removed from Catholicism, and, by establishing movements of their own, these dissidents, including the English Calvinists (or "Puritans") and the Brownists (or "Congregationalists") later played no small role in political and other developments both in England and abroad—see Hayes *et al* 1967: 366.

258 Hayes *et al* 1967: 366, 367.

259 Witte 1997: 131; 140.

Catholicism and Protestantism in the years following Henry's death had displaced many of the ecclesiastical reforms so occasioned, and by the time of Queen Elizabeth's reign "much of the marriage law of the medieval Catholic tradition" had been reintroduced.[260] Nevertheless, during her reign both a revised *Book of Common Prayer* of 1559 and the *Thirty-Nine Articles of Religion* (1571) were promulgated; the combined effects of which were that only Baptism and the Eucharist were recognised as sacraments, that Parliament (albeit indirectly) approved clerical marriages, that the publication of banns was required, and that marriages were required to be solemnised as a public event in a parish church.[261] Nevertheless, the Catholic canon law as it had existed prior to Henry VIII's schism—and, as a result of which unaffected by the *Decretum Tamesti* of 1563—continued to govern the institution of matrimony in England, with the result that compliance with the banns requirement or participation in a religious ceremony were not essential in order to constitute a valid marriage, but rather facilitated proof thereof.[262]

The canon law of marriage was adapted by the *Canons and Constitutions Ecclesiastical* in 1604. To begin with, the *Canons* of 1604 tried to prevent the conclusion of secret marriages by reaffirming the requirements of banns, church solemnisation and parental consent for persons under the age of 21.[263] However, the *Canons* made provision for prospective spouses to be absolved from these requirements by obtaining a licence to this effect from an authorised cleric. This procedure was soon abused so that the legislation's intended purpose was easily frustrated by the creation of an "underground marital industry."[264] As far as dissolution was concerned, the *Canons* tightened up the procedure regarding divorces and annulments, and maintained the position in terms of which divorced spouses were permitted to separate from bed and board

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260 Witte 1997: 131.
261 Witte 1997: 155; 159.
262 Coester-Waltjen and Coester 2007: 72; Witte 1997: 159, 160.
263 Glendon 1977: 33; Witte 1997: 161.
264 *Per* Witte 1997: 161, 162.

but were prevented from remarrying.[265] On the other hand, an annulment entitled the erstwhile spouses to remarry, but disentitled a woman from insisting on her dower (claim from the marital estate).[266] Faced with these unfavourable alternatives, Witte[267] mentions that women were often discouraged from attempting to extricate themselves from marriages where abuse or adultery was rife, but the eventual practice of awarding alimony to a woman who found herself in such a position did much to improve this unfortunate state of affairs.

3.4.2.3.2 The commonwealth tradition

By the seventeenth century it appears that theologians were generally *ad idem* that marriage, although ordained by God, was not a sacrament.[268] However, the statutory acknowledgment of this conception of marriage as far back as 1571[269] and reaffirmation thereof in 1604[270] led to increased pressure for a definitive explanation as to why complete or absolute divorce (as opposed to mere separation from bed and board) could not be countenanced in the light of this fact. Witte[271] opines that the commonwealth tradition as propagated by theologians such as Perkins, Cleaver and Gouge, aimed to point the way forward.

The Commonwealth tradition, which was spawned by the process of theological reform that had begun with Henry VIII's schism and later gained momentum during the turbulent reign of the Stuarts, proceeds from, acknowledges and encompasses the three models explained above while viewing marriage as serving as the divinely-ordained bed-rock and seminary of the commonwealth.[272]

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265 Witte 1997: 162.
266 Witte 1997: 163.
267 1997: 163, 164.
268 Witte 1997: 165.
269 The *Thirty-Nine Articles of Religion* of 1571.
270 The *Canons and Constitutions Ecclesiastical* of 1604.
271 1997: 167.
272 Witte 1997: 131.

As such, Witte[273] states that the main purpose of marriage was to constitute a "little church, and a little commonwealth" (consisting of the family) which was divinely tasked with instructing the "broader commonwealth" (consisting of Church, society and State) regarding core "Christian and political norms and habits." Therefore, marriage was also initially used as a means of explaining the hierarchical structure to which society ascribed: The "little commonwealth," with its hierarchy of husband over wife and parent over child, could fit into (and indeed be mirrored by)[274] the "broader commonwealth" where the Church exercised authority over the family, while the State was superior to the Church.[275] According to Cleaver, the interdependence between these commonwealths is borne out by the fact that the *paterfamilias*, in carrying out his responsibility to instruct and discipline his family, not only played an instrumental role in assisting State and Church officials in their tasks and therefore maintaining civil order, but also demonstrated that he possessed the necessary understanding, knowledge and skill required to govern the broader commonwealth, for "[i]t is impossible for a man to vunderstand to gouerne the common-wealth, that doth not knowe to rule his owne house…"[276]

In this way, the commonwealth tradition aimed to rationalise the prohibition on absolute divorce: To tamper with the very nature of things by permitting a marriage to be broken for any reason other than expressly provided for in God's divine law was, in effect, to break the "little commonwealth" which constituted the very foundation of the broader English commonwealth.[277]

The ecclesiastical Courts continued to exercise jurisdiction over the institution of marriage well into the mid seventeenth century. However, the English

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273 1997: 8, 9.

274 See Witte 1997: 171 who cites Sir Robert Filmer's (1588 –1653) statement that "[i]f we compare the natural duties of a father with those of a King, we find them to be all one, without any difference at all but only in the latitude or extent of them."

275 Witte 1997: 131.

276 *Per* Witte 1997: 170.

277 Witte 1997: 175.

Revolutions that occurred during the tempestuous reign of the Stuarts due to the perceived abuse of power by the monarchy[278] would have a drastic impact on English society in general and its perceptions of marriage in particular. In order to understand the reasons for this change, it first necessary to consider the historical developments that occurred after the demise of the Tudor reign.

3.4.2.3.3 The Stuart dynasty: Volatility and absolutism

The reign of the Stuarts commenced when James VI of Scotland succeeded Queen Elizabeth as James I of England in 1603. Although the new King of England was intent on entrenching the supremacy of the monarchy, he faced a number of difficulties, including the fact that he was perceived as a foreigner, that he was considered to be a spendthrift in a time of financial difficulty and that the absolute power for which he strove was curtailed by a combination of the parliamentary and legal systems of the time.[279] Indeed, throughout his reign, King James had an uneasy relationship with Parliament.[280]

As far as his religious views were concerned, James I supported the Anglican reforms that had been occasioned by his predecessors, and, as such, was a staunch adherent of monarchical supremacy in religious matters.[281] However, although Anglicanism had firmly been established and embraced by the time of Queen Elizabeth's demise, its fundamental doctrines were being met with increasing opposition from within its ranks by those who advocated Calvinist beliefs.[282] These opponents were categorised chiefly as Puritans and fundamental Calvinists. While the former group was so named due to its

278 Witte 1997: 176.
279 Hayes *et al* 1967: 501.
280 See Hayes *et al* 1967: 503 for a complete description.
281 Hayes *et al* 1967: 501.
282 Hayes *et al* 1967: 502, 503.

attempts to "purify" the Anglican faith,[283] the latter group championed Presbyterianism or Congregationalism as the preferred faith of England. Nevertheless, despite these differences in theological doctrine, both of these groups advocated religious beliefs that were "purged" of all things Catholic.[284] At the request of the Puritans, King James sanctioned a new English translation of the Bible which appeared in 1611. Despite this, the King continued to be viewed as a supporter of Catholicism; a belief that was intensified by his perceived attempts to remain on friendly terms with the Spanish at all costs. Matters did not improve under the reign of Charles I, King James's son who succeeded him in 1625. From the outset, the new King incensed the Puritans by marrying a French Catholic princess and by adhering to Anglican beliefs that were intensely formalistic and reminiscent of Catholicism.[285] Furthermore, by 1629 his relationship with Parliament had reached such a state of disintegration that he resolved to rule England on his own; a state of affairs that persisted for more than a decade. Undoubtedly fuelled by this new-found *carte blanche*, Charles gained firm control of the judiciary and initiated a number of almost draconian[286] —and at times fanciful[287]—financial policies that did little to endear him to his subjects. In addition, religious conflict was fuelled by the ever-growing Catholic influence on Anglican practices; and was inflamed when Charles attempted to impose Anglicanism on Presbyterian Scotland.[288]

By 1640 England had, for all intense and purposes, virtually become an absolute monarchy. However Charles's Scottish policies proved to be the beginning of the end for this process when his failed attempts to quell the rebellion in Scotland

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283 As an example of this, Hayes *et al* (1967: 503) mention the fact that the Puritans viewed the custom of exchanging rings at marriage ceremonies as a Catholic practice that was not in keeping with their beliefs.

284 Hayes *et al* 1967: 503.

285 Hayes *et al* 1967: 504.

286 Charles I reinstated feudal laws and began to monopolise trading practices—see Hayes *et al* 1967: 504.

287 In this regard, the example of "ship money" is cited by Hayes *et al* (1967: 505). Although entitled to revenue and ships from seaside towns, Charles determined to collect contributions from inland towns as well.

288 Hayes *et al* 1967: 505.

eventually forced him to attempt to convene an English Parliament.[289] This failed to resolve the problem posed by the Scottish rebellion and the newly-established Parliament was disbanded less than a month after it had been formed.[290] Under the guidance of a number of Puritan leaders this second Parliament gradually began to curtail the King's powers and to assume greater powers for itself.[291] Matters came to a head two years later when the King attempted to reassert his authority by personally appearing in Parliament and demanding the arrest of certain of his opponents. A rebellion ensued that pitted Parliament against the Crown; and thus the radical anti-Anglican "Roundheads" against the royalist "Cavaliers", eventually leading to full-scale civil war.[292] Despite initial royal victories, the Parliamentary army's conquest of 1644 led to the abolition of many Anglican traditions and practices and a shift towards Presbyterianism. Although the religious and political landscape in England had been drastically altered, the Presbyterians appear to have been content to permit Charles to continue to occupy the throne. This moderate approach does not appear to have sat well with the more radical Congregationalists (or Independents) who not only were staunchly Anti-Anglican but also approved neither of Presbyterianism nor of the latter group's intention to restore Charles to power. Under Oliver Cromwell (1599 O.S. – 1658 O.S.) the Congregationalists formed the so-called "New Model" army that defeated Charles the following year. Presbyterians were ousted from Parliament and the new exclusively Congregationalist government had Charles executed in early 1649.[293] England was now without a Monarch and was declared to be a republican "commonwealth and free state",[294] and after his appointment as supreme commander of the Parliamentary army in 1650, Cromwell embarked upon a virtual dictatorship that was cemented by 1651 in the wake of successful conquests over the Irish and Scottish rebels.[295] Indeed,

289 Hayes *et al* 1967: 505.
290 Hayes *et al* 1967: 505.
291 Hayes *et al* 1967: 505.
292 Witte 1997: 176; Hayes *et al* 1967: 505, 506.
293 Hayes *et al* 1967: 507.
294 Witte 1997: 176.
295 Witte 1997: 176; Hayes *et al* 1967: 507, 508.

Cromwell's dictatorial style coupled with developments such as that he had himself declared "Lord Protector" of England for life, implied that "although it started out to 'withstand the fierce licentiousness of kings,' [Puritanism's] leader, Oliver Cromwell, himself became an absolute monarch in everything but name."[296] This notwithstanding, Cromwell was an astute leader under whom commerce, trade and industry in England flourished.[297] Furthermore, one of the most important results of the Puritan influence was that, ever since the early 1640's, England was placed on a steady road towards embracing Parliamentary supremacy.[298]

Cromwell's death in 1658 paved the way for a re-constituted and freely-elected Parliament and, equally significantly, the return of the exiled Stuart family—in the person of Charles II—to the English throne in 1660.[299] Anglicanism was restored to power and Charles II promised to steer clear of the royal despotism that had categorised his father's reign.[300] Although his twenty-five year reign was an uneasy one typified by excesses and a complete deviation from the moral severity of Cromwell's government, the English people continued to favour the monarchy, most likely in fear of the alternative of another civil war.[301] However, under the pro-Catholic James II—who succeeded his brother Charles II—abuse of royal power intensified.[302] Indeed, James's attempt to revert to the practices of pre-1640 England led to him being forced, in the wake of such despotic abuses coupled with the fear of the possibility of a Catholic successor to the throne,[303] to flee to France as a result of the "Glorious Revolution" of 1688.[304]

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296 Berman 1983: 28. Also see Hayes *et al* 1967: 508: "Cromwell's power was more absolute than that of Charles I had ever been."

297 Hayes *et al* 1967: 508.

298 Berman 1983: 27.

299 Hayes *et al* 1967: 508.

300 Hayes *et al* 1967: 508.

301 Hayes *et al* 1967: 511.

302 See for example Bryson 1984: 645.

303 Although James II had two Protestant daughters, his second marriage to Mary of Modena—who was a Roman Catholic—had produced a son, who it was feared would be reared in the faith of his mother—see Hayes *et al* 1967: 511.

304 Witte 1997: 177; Hayes *et al* 1967: 511.

His daughter Mary and her Dutch husband William III succeeded to the throne as joint sovereigns in 1689.[305] This development, brought about by an increasingly robust Parliament, finally broke the back of the absolute rule of the monarchy in England and ensured that Parliamentary supremacy would henceforth be the order of the day.[306] Moreover, although Parliament consisted largely of the aristocracy, this new system did much to protect the rights of all English citizens by the enactment in 1689 of both the *Bill of Rights* (which, amongst others, required respect for freedom of speech and demanded the free election of Parliament) and the *Act of Toleration* which permitted non-Anglican Protestants to associate and to worship freely, although, it must be emphasised, did not permit Catholics to do the same.[307] By the *Act of Settlement,* 1700 the independence of the judiciary—subjected only to Parliament—was confirmed.[308] The lasting impact of the Glorious Revolution is nicely summarised by Berman[309] who states that this revolution "ended almost fifty years of acute civil strife, and established a system of government which survived into the twentieth century."

3.4.2.3.4 A remodelling of the commonwealth model

The increasing recognition of the principles of equality and liberty in the decades following the Revolution of the 1640's demanded that the traditional hierarchy that was previously viewed as being determined by natural order make way for a democratised hierarchy that instead was created by individuals freely contracting with one another of their own volition thereby leading to the creation of reciprocal obligations within this hierarchy and corresponding mechanisms to counter

305 Witte 1997: 177; Hayes *et al* 1967: 511.

306 Berman 1984: 591. It must however be remembered that the curtailment of royal power was not utterly new. In this regard, Bryson (1984: 647) points out that such measures had already been introduced by the *Magna Carta* of 1215, the *Statute of Marlborough* of 1267 and the *Confirmatio Cartarum* of 1297.

307 Berman 1984: 592; Hayes *et al* 1967: 512; Glendon *et al* 1982: 155.

308 Glendon *et al* 1982: 155.

309 1984: 591.

abuses of power within them.[310] As such, the Biblical duties which earlier had represented the basis of the interlocking commonwealth relationships were remodelled as contractual relationships between the parties thereto.[311] This newly-conceived commonwealth model, with its revolutionised hierarchy of marriage, society and State, eventually also led to reforms in the marriage laws of England.[312] Furthermore, although the statute that originally embodied some of these changes was repealed less than a decade after the resumption of the Stuart dynasty in 1660, a number of important changes that it had occasioned pertaining specifically to marriage and divorce were retained and in this way continued to permeate English culture.[313] More importantly, this revised model of marriage with its emphasis on equality and contractual freedom was instrumental in providing a platform upon which the fifth model identified by Witte could be established.

3.4.3 Moving ahead: Marriage as a contract in consequence of the Age of Enlightenment

> The Enlightenment is held to be the source of critical ideas, such as the centrality of freedom, democracy, and reason as primary values of society. This view argues that the establishment of a contractual basis of rights would lead to the market mechanism and capitalism, the scientific method, religious tolerance, and the organization of states into self-governing republics through democratic means. In this view, the tendency of the *philosophes* in particular to apply rationality to every problem is considered the essential change.[314]

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310 See Witte 1997: 132: "Just as the English commonwealth could be rent asunder by force of arms when it abused the rights of the people, so the family commonwealth could be put asunder by suits of law when it abused the marital rights of either spouse. Just as the King could be relieved of his head for abuses in the English Commonwealth, so the *paterfamilias* could be removed from his headship for abuses in the domestic commonwealth" (italics added).

311 Witte 1997: 9; 132.

312 Witte 1997: 132.

313 Witte 1997: 132.

314 http://en.wikipedia.org/wiki/Age_of_Enlightenment#Influence (accessed on 28 September 2009). Also see Mautner (ed) 2000: 167 – 169 for a general discussion.

The foremost *philosophe* of his day was the Frenchman Françios Arouet (also known as Voltaire 1694 – 1778) who advocated rationalism over what he and his followers believed to be the exploitative, tyrannical and superstitious beliefs enforced upon mankind by the Catholic Church, and compounded by a societal structure ruled by the idle aristocracy.[315] The influence of Enlightenment thought was however not restricted to theological debate but also found expression in the propagation of natural law so that

> [t]he whole universe could now be regarded as a Newtonian machine, perhaps originally created by God, but left by Him to function according to the rules He had established … Nature, as man saw it, was the outer aspect of this world machine. What was natural was good. Everything worked out for the best if left alone. Man must not interfere. He must not try to go against nature. His laws should be merely explanations and declarations of what was natural … Man could find out about natural law, and the workings of nature could be discovered and understood by *human reason*, as Newton had found out about gravitation. Man should trust his reason. What was *rational* was good. What was irrational or merely traditional was bad … Man should treat man in a *humanitarian* fashion.[316]

A focus on the individual and equality of man ensued, so that, under the influence of the humanists, the celebration of humankind and its capacities—as a direct outflow of God's endowment on humankind of creative capability—was viewed as a more "appropriate" form of worshipping the Almighty.[317] The increased focus on the individual coupled with the growing influence of the increasingly affluent merchant class meant that "individualism, freedom and change replaced community, authority and tradition as core European values."[318] As Brians[319] mentions, although religion survived, the transformation which both religion itself, the aristocracy and monarchial supremacy experienced due to

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315 Brians 1998: 1; Hayes *et al* 1968: 486.
316 Hayes *et al* 1968: 489.
317 Brians 1998: 2.
318 Brians 1998: 5.
319 1998: 5, 6.

Enlightenment thinking was undeniable. As monarchical supremacy in England had already been severely dented in the wake of the developments in the 1600's explained above, the effects of this revolution had irrevocably placed England on the road to democracy so that the volatile consequences of the manifestation of these new views in France a century later could be avoided.[320] Nevertheless the developments in England were to play a vital role in the changes that were to take place in American society[321] which, as will be seen below, will for the purposes of this study be used as an example of the influence of the Age of Enlightenment on marriage. It is against this backdrop that the continued development of the four major Catholic and Protestant models of marriage—dispersed and applied throughout the territories in which Western law[322]—must be understood.

The effects of the Enlightenment of the eighteenth century notwithstanding, it is interesting to note that—admittedly with variations—the Catholic and Protestant models as they had existed in the sixteenth century still featured strongly in both English and American marriage legislation of the early twentieth century, with the crux of these models implying that marriage was perceived as a stable and enduring monogamous union between two heterosexual adults "designed for mutual love and support, and for mutual procreation and protection" that was required to comply with formal and religious precepts that were similar to those inherited from these traditions.[323] (As will be seen below this description could

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320 Brians 1998: 8. In France the ideas of the English political thinker and writer John Locke (1632 – 1704) were of particular importance for French Enlightenment political (albeit not revolutionary) thought—see Quinton (1994: 323 and at 327 where he describes this very effectively as "[t]he effect of the importation of Locke's doctrines into France was much like that of alcohol on an empty stomach").

321 Brians 1998: 8.

322 See Witte 1997: 10: "The Catholic sacramental model flourished in southern Europe, Iberia, and France, and their colonies in Latin America, Quebec, Louisiana, and other outposts. The Lutheran social model dominated portions of Germany, Austria, Switzerland, and Scandinavia, together with their colonies. The Calvinist covenantal model came to strong expression in Calvinist Geneva and in dispersed Huguenot, Pietist, Presbyterian, and Puritan communities in Western Europe and North America. The Anglican commonwealth model prevailed in much of Great Britain and its many colonies across the Atlantic."

323 Witte 1997: 194.

apply equally to the framework within which the South African civil marriage was accommodated until the final decade of the pre-1994 *Apartheid* regime.)[324] However, Witte[325] states that in the last one hundred years this perception has changed radically in the West, where, particularly in the United States of America, Enlightenment thinking has resulted in marriage increasingly being viewed as a contractual undertaking devoid of the religious, social and natural functions ascribed thereto by the four religious models so that these theological models have been "slowly eclipsed."[326] As examples of this phenomenon, Witte[327] mentions a number of developments that have taken place in America, including:

- The premium placed on prenuptial and nuptial agreements, and deeds of settlement that allow spouses to regulate contractually the formation, operation and termination of their unions;
- The extension of the reciprocal duties of support to cohabitants on the basis that a tacit "marital contract" exists between them;
- The recognition of agreements sanctioning surrogacy, artificial fertilisation and abortion;
- The relaxation of the formal requirements pertaining to the formation of marriage, such as parental consent and witnesses;
- The removal of the fault requirement as a prerequisite for obtaining a decree of divorce, leading to divorce becoming no more than "an expensive formality";
- The increasing recognition of the clean-break principle in divorce matters, with the result that dependency for maintenance is reduced;
- The increasingly nominal role played by the Courts as far as scrutinising and supervising property settlements in divorce matters is concerned;

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324 See 3.4.7.3 below.
325 Witte 1997: 195.
326 Witte 1997: 196.
327 1997: 195, 196.

- The blurring of the distinctions between the rights attaching to marriage and cohabitation, to heterosexual and homosexual relationships, and to children born in or out of wedlock;
- The fact that "deference to the constitutional principles of sexual autonomy and separation of church and state" has curtailed the influence of Church, State and community on marriage;
- The abolition of many sexual offences;
- The removal of the erstwhile prohibitions of contraception and abortion on the basis of their perceived violation of constitutional rights; and
- The fact that the actions based on the "interference with one's spouse and children" have largely become redundant.

In fairness, Witte[328] mentions, many of these changes have led to the furtherance of human rights such as equality, and have been expedited by the dramatic progress of science and technology, increasing globalisation and in the furtherance of human rights such as equality. However, these factors, combined with the theories propagated by the political thinker John Locke (1632 – 1704) and subsequently developed by other Enlightenment thinkers, have resulted in the emergence of a new model of marriage. According to Witte, the foundation of this model is rooted in the "impious hypothesis" advocated by Locke in terms of which marriage could be accommodated and understood on a purely contractual basis without recourse to religious or social purposes or perspectives. In short, Locke proposed therefore that the institution of marriage could, as it were, be divorced from the realm of the religious and accommodated and understood within a secular framework.[329] In further expounding on Locke's perspectives, the Enlightenment theorists averred that, on the basis of their foundational theology[330] comprising deism, individualism and rationalism, marriage was a secular contractual undertaking entered into between the

328 1997: 196.
329 Witte 1997: 196.
330 See Witte 1997: 197 for a discussion.

spouses in accordance with the contractual prescripts and civil norms of the society in which they lived.[331] As such, the function of marriage and the roles played by the parties thereto were not derived from or comprised of the elements traditionally ascribed thereto by the Catholic and Protestant models, but instead were secular aspects left to be contractually structured by the spouses themselves.[332] As a result, a new model of marriage, the so-called "Enlightenment contractarian model" had emerged.

3.4.3.1 Reforms occasioned by the Enlightenment contractarian model

3.4.3.1.1 The "first wave": Gender equality and the focus on the family

The Enlightenment contractarian model of marriage led to a drastic reform of many concepts most fundamental to the Catholic and Protestant models of marriage. Returning to English law (which was eventually to influence developments in the United States), one of the first important developments was the expansion of religious marriage in the mid 1830's so as to permit non-Anglican parties to marry in accordance with their religious traditions followed by registration of their marriage. Equally significantly, English law also introduced the dual system of permitting both civil and religious marriages.[333] Furthermore, by the *Matrimonial Causes Act* marriage and divorce were placed under the jurisdiction of the common law Courts in 1857, and, by the same statute private divorce suits were introduced coupled with a right of remarriage for the faultless party.[334]

Although the Enlightenment model generally retained the requirements pertaining to the formation of marriage, it deviated from the other models in that it placed a greater focus on the content of marriage and family, eventually leading to greater

331 Witte 1997: 196, 197.
332 Witte 1997: 197.
333 Witte 1997: 203.
334 Witte 1997: 204.

equality and to the improvement of the position of women and children both in the family and in society in general.[335] To begin with, the invidious position in which children born out of wedlock had previously found themselves was greatly improved,[336] and the *Matrimonial Causes Act* recognised the custody rights of mothers in consequence of divorce or annulment, thereby paving the way for the eventual recognition of the "tender years" doctrine.[337] In the wake of this Act, the property rights of female spouses were dramatically developed as from the 1870's, thereby promoting gender equality; a process that would eventually culminate in 1918 when women were granted the franchise and the right to hold public office.[338] These developments in England evince a gradual swing from the marriage controlled and regulated by a dominant religion towards one in which the State prescribed certain boundaries within which the parties to the marriage were free to move unrestricted by constraints such as "excessive paternalism, patriarchy and prudishness"[339] and premised instead on the welfare of all of the parties concerned. For this reason, Witte welcomes this "first wave" of reforms as an overall improvement of marriage in the Western tradition.[340]

3.4.3.1.2 The Enlightenment model pressed further

As an outflow of the developments in England, Witte acknowledges that the first phase of the Enlightenment model was instrumental in realising the ideals of equality and freedom and in the overall improvement of the position of women and children in society and, as such, was commendable. However, he opines that in the wake of these developments, marriage in the Western tradition now finds itself in a new phase in terms of which the ideals encapsulated in the Enlightenment model are being utilised to "reject traditional marriage laws

335 Witte 1997: 202; 207.
336 See Witte 1997: 203.
337 Witte 1997: 204, 205. In South Africa this doctrine is commonly referred to as the "maternal preference" principle—see *P v P* 2007 (5) SA 94 (SCA) at par [26].
338 Witte 1997: 206.
339 Witte 1997: 208.
340 Witte 1997: 207, 208.

altogether"[341] and he cites the recognition of certain fundamental rights in the United States as the key to this new paradigm. These include:

(a) The recognition of a fundamental civil right to marry

According to Witte the recognition of this right is embodied in the *Uniform Marriage and Divorce Act* (1973), which reflects the increasing judicial recognition by the Supreme Court of the right to marry that has taken place since the 1960's.[342] The Act defines marriage as a "civil contract" that is predicated on the consent of both husband and wife. In addition, the Act has relaxed the formal and substantive[343] requirements for valid marriages and provides that non-compliance with the few formalities that are indeed prescribed will not invalidate such a marriage unless the parties themselves (or the parents of a minor) apply for annulment within prescribed time limits. Although it protects the right to have a marriage annulled on the basis of a lack of consensus, the option to elect to have a marriage set aside on any other grounds is left to the sole discretion of the parties.[344]

(b) The recognition of the right to privacy and greater freedom of contract

In this regard, Witte[345] *inter alia* cites the recognition of the right of spouses to choose whether or not to bear children,[346] and the erstwhile recognition of the husband as head of the household as examples of the recognition of these rights. Further examples mentioned by Witte include the fact that antenuptial and marital contracts allow parties to determine the personal and patrimonial consequences of the dissolution and termination of their marriages as they see

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341 Witte 1997: 209.

342 Witte 1997: 210.

343 Such as prohibitions pertaining to consanguinity, bigamy and adoption—see Witte 1997: 209.

344 Witte 1997: 209.

345 1997: 210.

346 *Griswold v Connecticut* 381 U.S. 479 (1965) (the right to use contraceptives) and *Roe v Wade* 410 U.S. 113 (1973) (the right to an abortion within the first 12 weeks of pregnancy).

fit, subject, of course, to the requirement of legality. In addition, the introduction of no-fault divorce and divorce at the instance of one party has resulted in the effective granting of a "right to divorce."[347] As far as property is concerned, "one-time divisions" made on the basis of what the Courts' find to be an equitable apportionment are now being ordered in the event of the spouses being unable to reach a settlement. Interestingly, the *Uniform Marriage and Divorce Act* does not permit blameworthy conduct on behalf of the spouses to be considered in determining the *quantum* of the apportionment.[348] Provided that it can be proved, fault is however still relevant in custody disputes, where the best interests of the child remain the paramount consideration. Regarding the increasingly contractarian nature of marriage, Witte[349] cites a number of other examples that attest to the fact that minor children play a major role in mitigating the contractual freedom which otherwise categorises marriage in the United States.[350]

In conclusion, it is important to note that Witte stresses that although marriage obligations are not necessarily enforced as rigidly as commercial contractual undertakings, "the strong presumption in America today is that adult parties have free entrance into marital contracts, free exercise of marital relationships, and free exit from marriages once their contractual obligations are discharged"; consequences which also have spilled over into non-marital relationships.[351] As a result, a number of other authors[352] point out that the contractualisation of marriage poses the serious (and paradoxical) threat of in fact undermining the protection enjoyed by women and children that was occasioned by the "first wave" of Enlightenment reforms due to the inferior bargaining positions in which they often find themselves in a system that increasingly reflects a state of nature

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347 Witte 1997: 212.

348 Witte 1997: 212.

349 1997: 213.

350 Examples in this regard include better enforcement of maintenance and other obligations or duties towards minor children—see Witte 1997: 213.

351 Witte 1997: 214.

352 See for example Witte 1997: 214.

in which Church, State and society play no significant roles and in which married life has become "brutish, nasty and short." As a consequence, it can be argued that the contractarian model promotes equality in form rather than substance.

In the final analysis Witte expresses the rather dismal opinion that the second phase of the Enlightenment contractarian model has resulted in a legal revolution that, due to the fact that it has attempted to deconstruct a "millennium-long tradition of marriage" by way of "rudimentary disquisitions on equality, privacy and freedom", is devoid of tangible future benefits and instead will result in the ultimate deconstruction of the family into a "random collection of individuals"[353] and the dismissal of the roles traditionally portrayed by Church, State and society.

3.4.4 *Quaere*: Same-sex marriage—a 21st century phenomenon?

Bearing the global developments pertaining to marriage in mind, it is at this point apposite to consider whether a phenomenon that is often viewed as being alien, unheard of and sacrilegious is rightly classified as such. In the paragraphs that follow the law's (in)tolerance of homosexuality and same-sex marriage will briefly be explored.

Uncertainty persists as to whether or not homosexual activity was penalised in early Roman times,[354] but according to Eskridge[355] contemporary research suggests that same-sex unions appear to have been tolerated in the Republican period and that they may even have enjoyed some status in law akin to marriage. By the time of the emperors there appears to be no doubt that such unions were permitted and that legally-valid male same-sex marriages involving public ceremonies were common among the aristocracy.[356] It is certain that Nero was

353 Witte quoting Nietzsche.
354 *S v K* 1997 (9) BCLR 1283 (C) at par [12].
355 1993: 1445 (also see note 87). Also see Church 2003: 47.
356 Eskridge 1993: 1446.

involved in at least two homosexual unions, while it has been widely suggested that the relationship between Hadrian and the youth Antinous (whom Hadrian had deified after his death) was undoubtedly also of a romantic nature.[357] It is in fact interesting to note that Claudius was the only emperor not to have been involved in a homosexual relationship.[358] Female same-sex unions were also permissible but less common due to the prevailing social and political climate.[359] The Christianisation of Rome led to the criminalisation of homosexual activity in 342 AD and by the time of Justinian it was regarded as a capital crime in the Eastern Empire.[360] After the fall of the Western Roman Empire homosexual practices were prohibited in territories such as Visigoth Spain while they were tolerated amongst the Frankish tribes.[361] The spread of Christianity and the early notion that sexual intercourse was intended only for procreation led the Church to discourage such practices, but nevertheless to remain relatively ambivalent towards homosexual relationships.[362] Eskridge[363] mentions that during the early and high Middle Ages the Church became "spiritually critical" of homosexual relations, but "[p]aradoxically … was in some respects tolerant of same-sex unions in practice, especially those within its own clergy." In this regard

> [e]xisting scholarship documents the existence of Roman Catholic and Greek Orthodox rituals of "brother-making," "enfraternization," and "spiritual brotherhoods." Ceremonies creating these brotherhoods were sometimes performed for male missionaries before they embarked on their missions, as well as for other males who wished to formalize their friendships.[364]

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357 Eskridge 1993: 1446, 1447; Church 2003: 47.

358 http://en.wikipedia.org/wiki/Homosexuality#Europe (accessed on 25 July 2009).

359 Eskridge 1993: 1446.

360 *S v K* 1997 (9) BCLR 1283 (C) at par [14]; Eskridge 1993: 1447, 1448.

361 Eskridge 1993: 1449.

362 Church 2003: 48; Eskridge 1993: 1448.

363 1993: 1450.

364 Eskridge 1993: 1450.

Eskridge[365] mentions that the ceremonies formalising these unions differed from those followed for heterosexual marriage in the sense that the latter emphasised the procreative aspect of marriage while the former was based on its companionate nature. Nevertheless, he concedes that it is probable that these ceremonies were "little more than send-offs for missionaries" and that they did not envision or sanction sexual unions as such. Over and above these "brother-making" liturgies it has been suggested that the Church permitted the solemnisation of genuine same-sex marriages, but whether this is so has never been confirmed.[366]

As from the thirteenth and fourteenth centuries the Church's initially accommodating attitude towards same-sex unions began to change and, on the basis of theological constructions by theologians such as Thomas Aquinas, homosexual relations came to be viewed as heretical.[367] Ecclesiastical law proscribing homosexual conduct was taken up by the secular authorities of the day and punished as crimes "contrary to the order of nature."[368] In this manner Roman-Dutch law criminalised male-to-male sodomy (although some writers were of the opinion that male-to-female or female-to-female sodomy should also be prosecuted) and bestiality.[369] This practice was followed in South African law which criminalised both male-to-male sodomy and other "unnatural sexual offences" between males, irrespective of whether such activity was

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365 1993: 1451.

366 Eskridge 1993: 1452, 1453. Also see Church 2003: 48.

367 *S v K* 1997 (9) BCLR 1283 (C) at par [15]; Church 2003: 49; Eskridge 1993: 1469.

368 Church 2003: 49. Eskridge (1993: 1471) opines that this may also have been related to the medieval thinking of the 1200's that demanded conformism and the criminalisation of non-conforming *conduct* which then transmogrified into the general criminalisation of *categories of persons*. As Eskridge (1993: 1472) states "[d]uring the early modern period (about 1400-1700), society's obsession with bad conduct gave way to an obsession with bad categories of people. Attention shifted from persecuting specific conduct evincing heretical beliefs to identifying and excluding "heretics," from forbidding demonic behavior to identifying and excluding "witches," and from penalizing inverted sexual behavior to identifying and excluding "inverts," or people who engaged in crimes against nature (bestiality, sodomy, and so forth). Eventually, isolated prosecutions of individuals engaging in bad conduct gave way to hysterical persecutorial crazes that swept up throngs of people in popular, ecclesiastical, and official dragnets."

369 *S v K* 1997 (9) BCLR 1283 (C) at par [19].

consensual.[370] As will be seen in the Chapter that follows, sodomy continued to be criminalised until the Constitutional Court's decision in *National Coalition for Gay and Lesbian Equality v Minister of Justice*[371] found this common law crime to be unconstitutional in October 1998.

The preceding paragraphs show that in the Western tradition the concept of marriage as an exclusively heterosexual union cannot necessarily be taken for granted. It is also noteworthy that African customary law also recognises same-sex marriages within the context of so-called "woman-to-woman" marriages.[372] In such a case, the danger of a "house dying out" prompts an older woman who is past child-bearing age to marry another woman.[373] Although usually not involving a sexual relationship,[374] such a marriage is concluded according to the usual customary rituals, and any children born to the wife are regarded as the children of the barren woman (who is now regarded as a husband).[375] In the event of the female bride not having children, a male genitor is found in order for her to conceive. The genitor has no rights to the children so born.[376] In customary law it also sometimes occurs that a woman who has considerable status or power marries another woman instead of marrying a man which would place her in a subordinate position as a wife.[377] The South African Legislature has recently taken cognisance of the existence of such marriages by enacting legislation to give effect to the intestate succession rights of a surviving spouse to such a marriage.[378] Finally, it must also be mentioned that, though uncommon,

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370 *S v K* 1997 (9) BCLR 1283 (C) at par [20].

371 1999 (1) SA 6 (CC).

372 *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC) at par [12]; Church 2003: 50.

373 Oomen 2000: 275.

374 Bonthuys 2007: 533, 534.

375 Oomen 2000: 275.

376 Oomen 2000: 275.

377 Church 2003: 50; Oomen 2000: 276; Bonthuys 2007: 533.

378 The *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009 was assented to on 19 April 2009 but is not yet in operation. This Act is discussed within the context of domestic partnerships in Chapter 7.

marriages between African males have also been reported, particularly between migrant mineworkers.[379]

3.4.5 Preliminary conclusions

The development of the various models of marriage and the manner in which the law has accommodated them since Roman times shows that marriage has never been a static concept and that it has been adapted by Church and State alike. *It therefore appears that there really is no such thing as a traditional and uniform concept of marriage that can be accepted without more as being the "correct" one.* Indeed, it has been shown that even the most basic common assumption regarding marriage—namely that it is of necessity a heterosexual union—cannot simply be accepted at face value in either the West or in African customary law. The preceding analysis shows that each phase of the development of marriage demands a contextualised analysis of the nature of the relevant society and of the epoch in question.[380]

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379 Bonthuys 2007: 534; Church 2003: 51.

380 It is insightful in this regard to compare a recent contribution by Ventrella (2009: 81 – 129) who bases his arguments against the recognition of what he refers to as "same-sex 'marriage'" on the contention that "[s]ame-sex 'marriage' advocates are not seeking to correct a *misapplication of regulatory power* to marriage; rather, these advocates are walking the same analytic aisle with the polygamists because, in each situation, the altar they seek demands *the structural obliteration* of marriage" (at 112, emphasis added). Ventrella essentially contends that marriage is and always has been a monogamous union between a man and a woman ["[m]arriage in Calfornia, for example (*and in all cultures and at all times for that matter*), has always meant a union between a man and a woman" (at 90, emphasis added)]. As a result "[s]ame-sex 'marriage' impugns marriage's *qualitative* essence; plural marriage impugns marriage's *quantitative* essence. In both cases, marriage's structure is transmogrified." (note 27). Ventrella opines that "the true analogue" to gay marriage is not laws based on miscegenation, but rather on polygamy "because in each case the advocates are seeking to alter *the essence of marriage's structure*" (at 94, emphasis added). It is submitted that this "true analogue" is precisely where Ventrella's arguments become vulnerable, especially in a (South) African context, where not only has polygyny always been a part of the culture of the majority of the population (leading to such marriages being legally entrenched by the *Recognition of Customary Marriages Act* 120 of 1998), but where, as seen above, same-sex marriages have indeed been permitted. Therefore it must be reiterated that the argument that the validation of same-sex marriage and the recognition of polygamous marriages will alter the very "structure" of marriage must, as stated above, be viewed against "a contextualised analysis of the nature of the relevant society and of the epoch in question." It is submitted that doing so will show that marriage really has no immutable and

Regarding the shift towards a contractarian model of marriage in the West, Witte and Glendon's[381] point that under the contractarian model marriage has become "short" is undeniable, but whether this model is also the cause of it being "brutish and nasty" is surely debatable. Life in the 21st century—as influenced by factors such as technological and scientific advances, the separation of Church and State and the greater awareness of universal human rights and the concomitant need to cater for increasingly less homogenous societies—dictates that the shift towards a contractarian approach towards marriage is inevitable. Moreover, when the possibility of a "brutish, nasty and short" marriage under the contractarian model is compared with the possibility of the same marriage being "brutish, nasty and *perpetual*" under any other, the latter option is certainly preferable. It is however also undeniable that women and children bear the brunt of the shift towards a contractarian marriage model, and that the increasing incidence of single-mother and child-headed households, abortions and "lost children" could at least partially be attributed towards this shift.[382] Whether, in a first-world society, these problems would be solved by a reversion towards the stringent sacramental or austere pre-Enlightenment Protestant models is possibly debatable; in an essentially third-world society positively untenable. Indeed, such a reversion may in fact compound the problems to which Witte and Glendon refer, as it is a known fact that the stringent requirements and strictures of marriage often constitute one of the main reasons for couples choosing not to marry.[383] A legal system that ignores this fact and fails to provide adequate recognition for such relationships prejudices all of the parties involved—not merely the most vulnerable members of society, but in fact society in general (think, for example, of an outsider to such a relationship who contracts with such a couple). No model of marriage can provide a solution to the problems faced by individuals who—by choice or by force—find themselves in non-formalised relationships that do not enjoy adequate legal recognition and protection.

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universal structure, and that Ventrella's arguments cannot hold water in a pluralistic society such as South Africa's.

381 See Witte 1997: 214.

382 See Witte 1997: 214, 215.

383 See SALRC 2006: 27, 28; Sinclair and Heaton 1996: 272.

It is submitted that the answer to these problems lies not so much in expecting any particular model of *marriage* as such to shoulder the burdens of achieving greater equality and freedom for women and better protection of children, but rather, as will be seen in the Chapters that follow, in the drafting of legislation based on an effective, pluralistic and legally-robust domestic partnership rubric in order to co-exist with marriage in a broader interpersonal relationships model. It is however important to note that the furtherance of equality for women and better protection of children cannot be the sole objective of such a rubric and its resulting legislation, for the incidence of unmarried cohabitation is increasing worldwide[384] (and South Africa is no exception)[385] and it is therefore imperative that the legislation should provide legal protection for the men, women and children involved in such relationships, and for the broader society in which they live. While ensuring contractual autonomy for couples irrespective of gender, race or religion, the broader model must enable them freely to contract regarding the level of commitment and/or religious significance which they wish to attach to their union; and thus to obtain legal recognition thereof irrespective of whether they enter into a marriage or a domestic partnership, and irrespective of whether the domestic partnership is of a conjugal or non-conjugal nature.[386] In order to ensure adequate protection for the partners themselves as well as for their children, the model would have to ensure that its domestic partnership legislation provides a form of "catch-all" protection, so that legal protection would not be contingent on opting-in to the model, but would also be available by default. This should be achieved by providing for both formalised and non-formalised domestic partnerships. The idea behind the interaction between marriage and the domestic partnership legislation drafted according to the rubric (represented by the shaded area) can be illustrated as follows:

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384 See for example SALRC 2006: 20; Sinclair and Heaton 1996: 269 and Schrama 2008: 311 (in a European context).

385 See 1 in Chapter 1.

386 The legislation contained in such a broader model should also provide a means for countering the role played by patriarchy in society—see De Vos and Barnard 2007: 813 and 824.

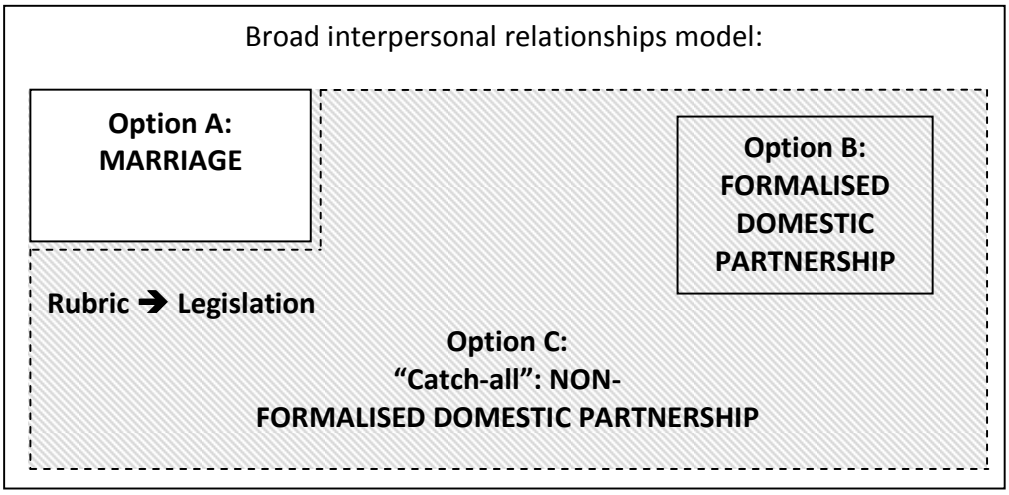

Figure 2.1: The broad interpersonal relationships model

Nevertheless, while being sturdy in law, the broad interpersonal relationships model would have to comprise laws that are flexible enough to accommodate the lived reality and needs of the persons involved by taking cognisance of societal prejudices, cultural differences and religious beliefs. Furthermore, the rules governing the formation and dissolution of all interpersonal relationships would ideally also have to be "comparable in their stringency."[387] These guiding principles notwithstanding, a model that complied with these guidelines would be meaningless if it did not provide adequate protection for the most vulnerable members of society namely its women and children. In this regard the functionality and efficiency of the entire model would depend on the functionality and efficiency of domestic violence, maintenance and child-care legislation.

It is submitted that these principles apply equally to a South African setting so that, in the end result, the litmus test for the broader model and for the domestic partnership legislation contained therein would be whether or not it is able to pass constitutional muster by promoting the overall achievement of human dignity, equality and freedom. A broad interpersonal relationship model that

[387] Witte 1997: 218.

embodies these characteristics by including legislation drafted according to a robust domestic partnership rubric that co-exists with marriage, will serve to allay many of the fears expressed by Witte and Glendon. In the Chapters that follow an attempt will be made to ascertain whether (i) such a rubric is required in South Africa, and (ii) if so, how the rubric should be employed towards drafting the requisite domestic partnerships legislation.

In view of these findings, the development of marriage in Roman-Dutch law and subsequently in South Africa must now be considered.

3.4.6 Roman-Dutch law and marriage

Bearing the developments sketched earlier in this Chapter in mind, it comes as no surprise that after the tenth century the canon law of marriage as administered by the Bishop of Utrecht applied in the northernmost Dutch provinces.[388] This was the case until the end of Spanish rule,[389] after which the Reformation led to the secularisation of the marriage laws in many jurisdictions, including the province of Holland.[390] However, lawmakers of the time appear to have recognised the merits of a number of features of the decree of 1563, notably pertaining to the abolition of clandestine marriages and the publication of banns.[391]

When the law of marriage was reformed and consolidated by the *Political Ordinance of the States of Holland and West Friesland* of 1 April 1580, the

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388 Witte 1997: 127.

389 As from 1566 a number of provinces revolted against Spanish rule under Philip (who had succeeded Charles V in 1555 and had become Philip II of Spain). In terms of the Union of Utrecht of 23 January 1579 (which, incidentally, formed the basis for the later United Republic) a number of northern provinces (namely Holland, a portion of Gelderland, Zeeland, Utrecht and Groningen) formed an alliance aimed at overthrowing their Spanish rulers, and in 1580 William of Orange (1533-1584) was proclaimed Count of Holland and of Zeeland. In 1648 the Treaty of Munster finally terminated Spanish rule throughout the Netherlands—see Hahlo and Kahn 1968: 404; 525; 529.

390 Witte 1997: 127.

391 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at par [71]; Hahlo 1985: 11.

secular authorities did not do away entirely with the marriage laws as they had existed prior to the Reformation: Indeed, as Hahlo[392] mentions, the secular authorities maintained the notion of marriage as a divine institution while distancing themselves from the notion of marriage as a sacrament.

Article 3 of the *Political Ordinance* took the regulation of marriage to a new level: It applied to all marriages regardless of any religion[393] and required marriages to be solemnised by a marriage officer (who was either a magistrate or a minister of religion)[394] in the presence of witnesses. In addition, it retained the *Decretum Tametsi*'s banns requirement,[395] and required the prospective spouses to obtain parental consent in the event of the male being younger than 25 or the female being younger than 20.[396] Failure to comply with the provisions of section 3 led to nullity.[397]

In Roman-Dutch law the nature of the espousal (*sponsalia trouwbeloften*) as a reciprocal obligation—enforceable by an *actio in personam*—was retained, but the enforcement thereof took on a rather unusual format in that the Courts could appoint a person to go through the marriage ceremony on behalf of the defaulting party, so that that person was married *in absentia*.[398]

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392 1985: 11.

393 Wessels 1908: 439. Wessels mentions that although Jewish couples intending to marry initially did so according to their own regulations, they were required as from 1656 to comply with the requirements of the *Political Ordinance*.

394 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at par [71]. In terms of the law of 7 May 1795 all marriages in Holland were required to be solemnised by a magistrate, otherwise they were void *ab initio*—see V.d.K *Th* 84.

395 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at par [71]. Interestingly enough, the *Political Ordinance* was not the first law that secularised marriage in the province of Holland: An ordinance that had been issued four years earlier (in 1576) in Rynland had already required the prospective spouses to appear before the sheriff and to publish banns. The ordinance also proclaimed that all clandestine marriages concluded since 1572 had to be registered and proclaimed as such either in church or in the Court of Rynland—see Wessels 1908: 438; Hahlo and Kahn 1968: 450, 451.

396 Hahlo 1985: 12. A male spouse attained majority by virtue of the marriage—see Hahlo and Kahn 1968: 451.

397 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at par [71].

398 Lee 1931: 52; Hahlo 1985: 12; Van Warmelo 1954: 104.

Forty years before the *Political Ordinance* was adopted, the matrimonial property law of Holland had already been drastically reformed by the *Perpetual Edict* of 1540.[399] In terms of Article 17 of the *Edict*, a man who had married a girl who was younger than 20 years of age without the consent of her parents (or friends and relatives in the event of her not having any parents) or the Courts, was forever barred from taking any benefit or receiving any dowry from her even if such consent was later given.[400] The same applied to a woman who married a man who was younger than 25 years of age without obtaining the requisite consent.[401] The rationale behind the imposition of this perpetual penalty is, according to Voet,[402] to remove the possibility of a profit being gained from a clandestine marriage. As Hahlo[403] mentions, "if deterrence was the object, this was obviously the right way to go about it."

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399 Visser and Potgieter 1998: 20.

400 The first part of this section, translated and accepted as such in *Ex parte Van der Walt et Uxor* 1954 (1) SA 565 (C) at 566 (G) – (H) and *Ex parte Nortje en 'n Ander* 1977 (3) SA 1058 (T) at 1060 (A) – (B), reads as follows: "If any one shall take upon himself to solicit and induce any young girl of not more than twenty years, by means of promises or otherwise, to contract marriage with him, or shall in fact contract marriage with her without the consent of the father or mother of the said girl, or of the majority of the friends and relatives, if she has no father or mother, or of the judicial authorities of the place, such man shall at no time be entitled to take or receive any dowry or other benefit (whether by way of ante-nuptial contract or by the custom of the country, by testament, gift, transfer, cession, or otherwise, in any manner whatever) out of the goods which the said girl may leave behind, even though he may, after the marriage has been completed, have obtained the consent of the father and mother, of the aforesaid friends and guardians or of the Court, of which we do not wish any notice to be taken in this particular."

401 Lee 1931: 57. It is interesting to note Lee's (1931: 57) observation that, in the former case (i.e. where consent on behalf of the woman had not been obtained), the edict refers to the completion of the marriage (*na't houwelijck volbracht sijnde*), whereas in the second case (a woman marrying a man under the age of 25 without consent) the edict refers to the consummation of the marriage (*nae't huwelick gheconsommeert*). Over and above the penalties already mentioned, Article 17 prohibited Charles V's subjects from being present at such marriages or from providing accommodation to the spouses thereto. The punishment prescribed was a fine of 100 Caroli or "other severe punishment" at the discretion of the Court. Similarly, notaries were, on pain of loss of office or other discretionary punishment, prohibited from effecting these marriages—see Lee (1931: 57).

402 Voet 23.2.16.

403 1975: 95 (note 66).

As from the thirteenth century[404] marriages in Roman-Dutch law were presumed to be in community of property and of profit and loss (*gemeenschap van goederen*), unless an impediment to the marriage existed[405] or unless an antenuptial contract stated the contrary.[406] Postnuptial contracts were, however, not permitted.[407]

After the reception of Roman law, donations between spouses *stante matrimonio* were generally prohibited.[408]

Regarding the personal consequences of a marriage concluded in terms of Roman-Dutch law, a man who was a minor before marriage became a major.[409] The same did not, however, apply to his wife: Marital power was applied irrespective of her age at the time of the conclusion of the marriage, with the result that a wife was regarded as a minor who was under the power of her husband,[410] and was bound by any contracts concluded by him during the marriage.[411] In addition the marital power implied that:

(i) The husband became the head of the family. This position could not be varied by antenuptial contract;[412]
(ii) The wife acquired the rank of her husband, and this status was retained if she survived him;[413]

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404 Hahlo 1985: 13. Prior to this date the patrimonial consequences of the marriage was determined by the customs of the particular jurisdiction in which they resided—see Hahlo and Kahn 1968: 451.

405 In this regard, (i) minor parties who married without consent were prohibited from benefiting from the marriage; and (ii) if the parties fell within the prohibited degrees community of property did not occur unless (and for as long as), the marriage was putative—see Lee 1931: 71.

406 Gr 2.11.8; Wessels 1908: 453.

407 Hahlo 1985: 14.

408 Gr 3.2.9: "*Insgelyks een man niet aen zyn huysvrou dog dusdanige gifte, also ook van de huysvrou aen de man, werd door de dood beveftigt, ingevalle niet en blykt van verandering des willes*." Also see Hahlo 1968: 452; Lee 1931: 92; Voet 24.1.1.

409 Gr 1.6.4 and 1.10.2. By virtue of this change a man who was previously a minor could acquire marital power over his wife—see Hahlo 1975: 152.

410 Gr 1.5.19; Lee 1931: 64.

411 Lee 1931: 67.

412 Hahlo 1975: 152, 153.

(iii) The wife had to be represented in Court;[414]

(iv) The husband administered his wife's property freely, regardless of whether it formed part of their community of property,[415] and was placed under no duty to account for his administration thereof.[416] This power could, however, be curtailed by an antenuptial contract[417] or, in the event of maladministration, by an application brought by the wife for division of the joint estate (*boedelscheiding*);[418]

(v) A husband could contract in his wife's name and in so doing could acquire rights or incur responsibilities for her while, generally speaking,[419] she was incapable of entering into binding transactions without her spouse's consent;[420] and

(vi) A husband was permitted to chastise his wife, provided that this was done moderately and reasonably.[421]

The notion of marriage as a union for life was retained,[422] with the result that divorce "continued to be looked upon as a condign punishment for a serious

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413 Lee 1931: 63.

414 Gr 1.5.22, 23; Hahlo 1985: 13.

415 Gr 1.5.22; Lee 1931: 64; Wessels 1908: 452.

416 Lee 1931: 64.

417 Hahlo 1975: 153; Scholtens 1959: 214. To begin with, Roman-Dutch law did not prescribe any formalities for the conclusion of an antenuptial contract. Such contracts could therefore be concluded orally, and the conclusion of the contract in this form was binding on the spouses and third parties (*cf* Lee 1931: 71). As is to be expected, proving the existence of such an agreement could be problematic but this did not influence the validity thereof. The registration of antenuptial contracts involving immovable property appears to have been required in a *plakaat* of 1624, but this stipulation appears to have been disregarded—see *Ex parte Spinazze and Another NNO* 1985 (3) SA 650 (A) at 656 (D) – 657 (B) and Lee 1931: 71; Wessels 1908: 459, 460.

418 Hahlo and Kahn 1968: 452.

419 This power could be regulated by the parties' antenuptial contract (Lee 1931: 67). Other exceptions that applied were contracts (i) which a minor was competent to conclude, unless the husband had deserted his wife, in which case she was fully competent to contract on her own behalf; (ii) contracts involving household necessities; (iii) contracts in the course of her public trade or profession, provided that she practised such with her husband's consent; (iv) unilateral contracts that were solely to her benefit (Lee 1931: 65). Also see Hahlo 1985: 13; Robinson *et al* 2009: 26; Sinclair and Heaton 1996: 192.

420 Gr 1.5.22; Hahlo and Kahn 1968: 451; Hahlo 1985: 13.

421 *S v Ncanywa* 1992 (2) SA 182 (CK) at 187 (F) - 188 (C); Hahlo and Kahn 451; Hahlo 1975: 154.

422 Hahlo and Sinclair 1980: 2.

matrimonial offence."[423] Drawing on the Protestant reforms, Roman-Dutch law permitted divorce *a vinculo* at the instance of either party mainly on the grounds of adultery[424] or, in latter years, malicious desertion.[425] These grounds became the common law grounds of divorce. Certain writers appear to have been of the opinion that adultery could be widely interpreted to include sodomy[426] and that perpetual imprisonment was also a ground of divorce.[427] In line with Protestant reforms, Roman-Dutch divorce law was characterised by a distinctly punitive element; an outflow of which was manifested in the fact that a "guilty" spouse was not permitted to obtain a divorce.[428] In the event of both spouses being "guilty", divorce was impossible.[429] An adulterer was prohibited from marrying his or her lover, and, in some instances, from remarrying at all until the death of the "innocent" spouse.[430] Save for these exceptions, remarriage was not precluded, but a divorcé was not permitted to marry his ex-wife's sister, and, by the same token, a divorcée was not permitted to marry her ex-husband's brother.[431]

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423 Hahlo and Sinclair 1980: 2. An order for judicial separation was, however, obtainable in instances where continued cohabitation was not possible. This would at least relieve the parties from the duty of living together as man and wife—see Van der Vyver and Joubert 1991: 461.

424 Article 18 of the *Political Ordinance* of 1580; Gr 1.5.18 ("*Volgens Chriftus vermaninge werdt in deze Landen geen fcheydinge des Egt-bandts toegelaten, dan door de doodt van een der Egt-genooten, ofte door Overfpel: Alle andere willige ofte regtelyke fcheydinge, konnen van Egt-bandt nogte de regten daar uyt ontftaande niet verbreeken*"). Also see Voet 24.2.5.

425 Voet 24.2.5; Hahlo 1985: 12, 13. The origin of divorce on the ground of malicious desertion appears to be unclear and doubt originally persisted as to whether or not this was the case—see *Allen v Allen* 1951 (3) SA 320 (A) at 326 (H) – 327 (A). Wessels (1908: 470 – 472) states that the earliest authorities appeared to have conflicting views in this regard as De Groot in his *Inleidinge* (1.5.18—see preceding note) appears on the basis of Christian teachings not to have recognised such a ground, while other authorities such as Groenewegen and Brouwer did. On the other hand, Wessels mentions that he had encountered various references to malicious desertion as ground for divorce (for example a Consultation of 1623 that pre-dated De Groot's work). Others viewed malicious desertion as not being a ground of divorce due to the fact that, in itself, the desertion terminated the marriage *ipso iure* leaving the Court merely to declare this fact (see *Allen v Allen* 1951 (3) SA 320 (A) at 327 (B)). In any event, divorce on the ground of malicious desertion has been recognised by Roman-Dutch law since 1650—Wessels 1908: 472.

426 See *McGill v McGill* (1926) 47 NPD 398 at 398 and the authorities cited.

427 See V.d.K *Th* 88 and 89 who states that the "commission of a heinous crime is an equally good, and even stronger ground" than adultery. Also see Lee 1931: 89 (notes 1 and 2).

428 Hahlo and Sinclair 1980: 2.

429 Hahlo and Sinclair 1980: 2.

430 Hahlo and Sinclair 1980: 2; Robinson *et al* 2009: 26.

431 Lee 1931: 89.

Regarding the patrimonial consequences of divorce, the "guilty" spouse could forfeit all of the financial benefits accruing from the marriage, whether by virtue of community of property or otherwise.[432] In certain instances the "guilty" spouse could even be ordered to forfeit the whole or part of his own estate.[433] A further manifestation of the extent to which the fault principle was applied is illustrated by the fact that the "innocent" spouse was generally[434] entitled, as a reward for his or her chastity, to custody of any minor children born of the marriage.[435]

If one of the spouses died leaving minor children born of the marriage, the community of property usually continued to operate between the surviving spouse and the children, and in certain instances a "one sided" community arose in terms of which the latter shared only in the profits while all losses were borne by the former.[436] The joint estate was then dissolved upon the children attaining the age of majority or upon the death or remarriage of the parent concerned. In the event of no minor children surviving a first-dying spouse, the surviving spouse received one half of the joint estate while the other half was inherited by the heirs of the deceased spouse.[437] If a wife survived her husband, she could renounce her entire share of the joint estate in order to avoid liability for joint debts.[438]

The *lex hâc edictali* of AD 472 was received into Roman-Dutch law with the purpose of protecting the children of a person who remarried.[439] In terms of this edict, a person was prohibited from bestowing a gift or inheritance on his or her second spouse that exceeded the smallest amount bequeathed to any of his

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432 Lee 1931: 89;

433 Hahlo 1985: 14; Hahlo and Sinclair 1980: 2.

434 A Court could, in its discretion, decide otherwise if this was in the interests of the children's welfare—Lee 1931: 89.

435 Lee 1931: 89; Hahlo and Sinclair: 1980: 2.

436 Gr 2.13.2, 3; Hahlo and Kahn 1968: 452; Lee 1931: 93.

437 Hahlo and Kahn 1968: 452; Hahlo 1985: 13.

438 Hahlo and Kahn 1968: 452; Hahlo 1985: 13.

439 Lee 1931: 95; Wessels 1908: 467.

children from the previous marriage.[440] In the event of this occurring, the edict provided that the excess was to be distributed between all of the children of the previous marriage in equal shares.[441] In the event of remarriage following the death of a spouse, the survivor was placed under a duty to secure or to disburse that to which the minor children were entitled from the deceased estate.[442]

3.4.7 South African law

3.4.7.1 The Dutch East India Company

Roman-Dutch law was received at the Cape of Good Hope not so much as a product of military expansion, but of mercantile interest instead.[443]

The instrument by which this was accomplished was the Dutch East India Company (*Vereenigde Geoctroyeerde Oost-Indische Compagnie* or "VOC") that had received a charter (*Octrooi*) from the *Staten-Generaal* (the highest body governing territory foreign to the Republic of the United Netherlands, comprising representatives of all seven provinces of the United Netherlands)[444] in 1602 in terms of which the monopoly of trade of all territory to the east of the Cape of Good Hope had been entrusted to it.[445] As such, the VOC remained subject to the sovereignty of the *Staten-Generaal*.[446]

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440 Lee 1931: 95; Wessels 1908: 467.

441 Lee 1931: 95; Wessels 1908: 467.

442 Lee 1931: 95.

443 Hahlo and Kahn 1968: 540: "Throughout the 150-odd years of its existence the V.O.C., with an eye on its shareholders, pursued an unashamedly mercantilistic policy, regarding its possessions first and foremost as sources of profit for shareholders at home."

444 Hahlo and Kahn 1968: 533; De Wet 1958(b): 85.

445 Visagie 1969: 24; Hahlo and Kahn 1968: 534. A point of contention immediately arises as to whether or not the Cape actually fell within the territory governed by the *Octrooi* of 1602—see Visagie 1969: 40, 41 for a discussion.

446 De Wet 1959(b): 84. It does however appear that wide powers were granted to the VOC. This inference can be drawn from the preamble to the *Octrooi* of 1602, as discussed below.

On 25 March 1651 the VOC issued an instruction for the creation of a victualling station at the Cape of Good Hope.[447] The Cape was regarded as *res nullius* since the earlier British occupation by the British in 1620[448] had not been ratified by the British monarch, and the intention was consequently for it to become Dutch property that would be placed under the management of the VOC.[449]

Jan van Riebeeck was the Commander of the Dutch convoy of ships that arrived at the Cape of Good Hope on 6 April 1652. Such a minor settlement was, as Theal states, regarded as being a "single ship in a fleet."[450] As such, Van Riebeeck was the Head of Government and of the Council (*Raad*); a council that consisted of himself and the senior officials who accompanied him.[451] The settlement at the Cape was regarded as an out-station (*buitencomptoir*) subject to the jurisdiction of the Governor-General and Council of India (*Raad van Indie*) that was seated in Batavia, the headquarters of the VOC in the East.[452] In turn, the *Raad van Indie* was under the jurisdiction of the VOC (and, more specifically, its directors, the *Here Sewentien*) which, in the final instance, was subject to the *Staten-Generaal*.[453]

It appears as if the instructions regarding the settlement at the Cape as received by Van Riebeeck from the VOC in 1651 made no mention of the organisation of government at the Cape, either administrative or judicial.[454] This notwithstanding, De Wet[455] mentions that Van Riebeeck, as an experienced official of the VOC, exercised these functions nonetheless, and the fact that he was required to report to his superiors in Batavia and the Netherlands appears to

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447 De Wet 1958(a): 162 (note 1); Van Zyl 1908: 7.

448 On 3 July 1620 Andrew Shillinge and Humphrey Fitzherbert declared that they had "taken quiet and peaceable possession of the Bay of Saldania" on behalf of the King of England—see Visagie 1969: 40.

449 De Wet 1958(a): 163 (note 6).

450 *Per* Hahlo and Kahn 1968: 537 (note 57).

451 Visagie 1969: 41; Hahlo and Kahn 1968: 538; De Wet 1958(a): 164.

452 Visagie 1969: 24; Hahlo and Kahn 1968: 536; De Wet 1957: 237; Roos 1897: 3.

453 Hahlo and Kahn 1968: 537; De Wet 1957: 237.

454 De Wet 1958(a): 164; Visagie 1969: 63.

455 De Wet 1958(a): 164. Also see Van Zyl 1983(a): 429.

indicate that his activities were, at the very least, ratified by them (to the extent that this was possible).[456] However, it is necessary to investigate a fundamental issue before the validity of any such "ratification" could even be contemplated. This is because any possibility of "ratification" by the VOC would be subjected to an important *sine qua non*, namely whether or not the VOC was vested with legislative competence to begin with. On the one hand, a number of authors seem to support the view that the VOC never had the capacity to legislate in any of the territories which it occupied.[457] As De Wet[458] mentions:

> Die State-Genraal het in die Oktrooi geen wetgewende bevoegdheid aan die Here Sewentien verleen nie, en hierdie liggaam kon dus nie die reg voorskryf wat in Oos-Indië toegepas moes word nie.

However, in *Spies v Lombard* [459] the Appellate Division stated that it was "well known" that the *Staten-Generaal* had "conferred legislative powers" on the directors of the VOC. The opinion that the VOC was empowered to legislate is also propagated by authors such as Stock[460] and by the Legislature.[461] Although this debate has raged for many years, it is important for the purposes of understanding the development of family law that this issue is considered in some detail. Moreover, it is submitted that a closer look at a number of provisions of the *Octrooi* of 1602 might yield a fresh perspective on this debate.

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456 De Wet 1958(a): 164. Regarding legislative functions, there are many examples of *plakaten* issued by Van Riebeeck. Indeed one of the first was issued aboard the *Dromedaris* (Van Riebeeck's ship) merely three days after setting foot ashore—see Van Zyl 1908: 8, 9.

457 See De Wet 1958(b): 85, 88, 90, 94; Van Zyl 1907: 132 – 147; 1908: 5, 6; Roos 1897: 1 – 23; Visagie 1969: 38; 63; 78; Van der Merwe 1995: 235.

458 1958(b): 88.

459 1950 (3) SA 469 (A) at 482 (C).

460 1915: 336. That Stock was of the opinion that the VOC indeed was vested with legislative capacity can be deduced from his view that the *Statutes of Batavia* (see main text below) were binding on the Cape as "a settlement dependent on the central Government of Batavia."

461 See for example section 1(1) of the *Cape Statute Law Revision Act* 25 of 1934: "[t]he laws enacted by the *legislative authority established at the Cape of Good Hope* prior to the tenth day of January, 1806 …" (emphasis added).

As a point of departure, it is submitted that De Wet's statement quoted above should be considered against the backdrop of a number of factors:

(i) It is submitted that the preamble to the *Octrooi* may be instructive in determining the ambit of the VOC's powers. The relevant portion of the preamble is the following:[462]

> [I]t having been considered and maturely debated by us [the *Staten-Generaal*] what the value to the United countries and to the good inhabitants of the same would be, if the said navigation trade and commerce were maintained and extended *under good general order*, *policy, correspondence, intercourse and management*, we [the *Staten-Generaal*] have deemed fit to appoint Directors of the aforesaid Company *on our behalf* … which having been well understood by the Deputies of the said Company, and the same having been agreed upon after various communications, deliberations, agreed to and confirmed the said Association, as we do hereby agree to and confirm, for the promotion of the welfare of the United countries, as well as for the benefit of all the inhabitants thereof, *by sovereign power and authority*, likewise with sure knowledge under the stipulations, privileges and advantages hereinafter set forth.

The wording in the preamble is clear and unambiguous—the directors of the VOC were appointed to act *on behalf* of the *Staten-Generaal*, and, furthermore, were entitled to exercise "sovereign power and authority" while doing so. Admittedly, the preamble cannot be read in isolation, but must, as the preamble states, be considered in conjunction with the "stipulations, privileges and advantages" set out in the remainder of the Charter. None of the sources consulted[463] appear fully to have appreciated the value of the preamble in terms of ascertaining the scope of the VOC's authority in the East Indies.

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462 As *per* Van Zyl 1907: 135, 136 (emphasis added).

463 See, for example, De Wet 1958(b): 85, 88, 90, 94 and 1985: 28 – 42; Van Zyl 1907: 132 – 147; Roos 1897: 1 – 23; Van Zyl 1983(a): 425, 433; Swanepoel 1958: 7 – 26; Visagie 1969: 24 – 78.

(ii) Secondly, article 35 of the Charter deals specifically with legal matters pertaining to the VOC's activities.[464] Sir John Wessels[465] (later Chief Justice of the Union of South Africa),[466] accepts the fact that this article made provision for Court structures to be established in the East Indies without any reservation. If one takes a closer look at the article in question, it entitles the VOC to "appoint Governors, soldiers and *officers of justice*, and to establish the necessary services for the preservation of the place, *the maintenance of good order policy and justice, as well as for progress and trade.*"[467]

Although it can be acknowledged that article 35 does not categorically provide for legislative competence, it is difficult to imagine a situation in which an organisation could be vested with the competence to establish Courts and to appoint judicial officers to serve in them without that

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464 Article 35 (*per* Van Zyl 1907: 137) states that: "Also that the aforesaid Company shall be allowed to make contracts with the princes and potentates to the east of the Cape of Good Hope, and beyond the Strait of Maghellan, as also contracts in the name of the States-General of the United Netherlands or the Supreme Authorities of the same; likewise to build there any fortresses and fortifications; to appoint Governors, soldiers and officers of justice, and to establish other necessary services for the preservation of the place, the maintenance of good order policy and justice, as well as for progress and trade; provided that the aforesaid Governors, officers, administrators of justice and soldiers, shall take the oath of allegiance to the States-General, or to the Supreme Authorities aforesaid, and to the Company, as far as industry and trade are concerned, and they shall dismiss the aforesaid Governors and officers of justice in so far as they find that they behave badly or treacherously, upon this understanding that they shall not prevent the aforesaid Governors or officers from coming here to lodge their complaints or grievances, in case they believe that they have such, with us, and that the Company shall at every arrival of ships be obliged to inform the States-General about the Governors and officers whom they have appointed to the aforesaid places, in order that their Commission may then be agreed to and confirmed."

465 1908: 355.

466 According to Kahn 1991: 337 Sir Johannes (John) Wilhelmus Wessels (1862 – 1936) was a member of the Cape Bar (1886) and of the Pretoria Bar as from 1887 – 1899. He served as a judge in the then Transvaal Supreme Court from 1902 – 1920, and was appointed Judge President of that Court in 1920, a position held until his appointment as Judge of Appeal in 1923. He served in this capacity until becoming Chief Justice of the Union of South Africa (1932 – 1936). He was knighted in 1909. When tribute was paid to Mr Justice Wessels after his passing in 1936, his friend and colleague Mr Justice John Stephen Curlewis (Chief Justice of the Union from 1936 – 1938) stated that "[h]is profound knowledge of our common law entitles him, in my view, to rank among the three greatest Roman-Dutch lawyers of our time"—see the "Notes" section of the *South African Law Journal* (1937: 451 – 453).

467 As *per* Van Zyl 1907: 137.

organisation having the power to promulgate legislation. Moreover, could it not be argued that, had the *Staten-Generaal* indeed envisaged the utilisation of a specified body of law in the East Indies (as opposed to legislative powers granted to the VOC), it would have granted judicial competence coupled with a specific reference to the legislation which it required to be applied? To put it differently, bearing in mind that the *Staten-Generaal* specifically granted the (sovereign) power to act on its behalf to the VOC[468] and that it vested the company with the power to establish a Court structure without specifying the legislation to be applied by those Courts, it could be argued that legislative competence was an implied term of the Charter. Indeed, the *Staten-Generaal* might well have envisioned the fact that the establishment of services necessary for the "maintenance of good order policy and justice", and for facilitating "progress and trade" would certainly require the promulgation of legislation that was context-specific for the needs of the specific territory in question.

(iii) Article 35 did not, however, provide the VOC with *carte blanche* to appoint officer-bearers in the East Indies, but clearly required the VOC to report back to the *Staten-Generaal* regarding its affairs as well as all appointments made in order for them to be confirmed.[469] The accounting requirements prescribed by the *Octrooi* dictate that the *Staten-Generaal* could surely not have been oblivious to the (legislative) developments taking place in the East.

If, as De Wet[470] argues, ratification by the *Staten-Generaal* was an absolute prerequisite for the validity of any legislation in the East Indies, an interesting argument presents itself in that the only clear ratification by the *Staten-Generaal* appears to have been in the *Octrooi* of 10 January 1661, in terms of which those articles of the *Political Ordinance* dealing

468 See the preamble to the *Octrooi* of 1602, as discussed above.

469 Article 35 as quoted in note 464 above.

470 1958(b): 95.

with intestate succession were expressly made applicable to the colonies.[471] For the rest, it could therefore be argued that the *Political Ordinance* was never validly applied in the East Indies. Nonetheless, even if, as Van Zyl[472] opines, the VOC was aware of the fact that it had no power to legislate, it is interesting to note that neither the VOC nor the *Staten-Generaal* ever appeared to have made any attempt to *nullify* the actions by the "Legislatures" at the various outposts.[473] Therefore, although they were never ratified, they were also never expressly rejected; this despite the fact that the VOC had in 1660 informed the *Staten-Generaal* that "geen vast recht" obtained in the East Indies.[474] It is therefore not too far-fetched to assume that the legislative and other developments at the Cape acquired force of law by tacit ratification by the *Staten-Generaal.*

(iv) Why would the *Staten-Generaal* specifically grant legislative competence to other companies, but not to the VOC? Van Zyl[475] argues that "[t]he only reason to account for it is this, that the Dutch East India Company was not a colonizing, but essentially only a trading company."

This argument, although not without merit, cannot be supported. It can be conceded that the *Octrooi* contains many references to the VOC as a trading company as opposed to an instrument of colonisation.[476] By the same token, the instructions issued by the VOC to Van Riebeeck also create the impression that colonisation was (at least initially) not intended to take place.[477]

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471 De Wet 1958(b): 95; Swanepoel 1958: 23; Visagie 1969: 34.

472 1907: 147.

473 Indeed, the VOC later permitted the sub-dependencies in the East Indies to deviate from the *Statutes of Batavia* as a result of geographical separation and varying local conditions—see Stock 1915: 329; Roos 1897: 2.

474 See De Wet 1958(b): 94, 95 and 1985: 33.

475 1907: 141.

476 See articles 34 and 35.

477 For example, see Van Zyl 1908: 10.

However, it is submitted that the mere possibility that *colonisation* might not have been an expressly-stated objective of the VOC's activities in the East Indies cannot without more be used as a basis for justifying Van Zyl's conclusion that this (i) was the reason why the *Staten-Generaal* expressly dictated the law and procedures to be followed by other companies[478] but did not do the same for the VOC and (ii) serves as proof that the VOC was never vested with legislative competence.[479] To begin with, a colonisation objective is not a *sine qua non* for the granting of legislative competence. These issues must be treated separately. In this regard, the settlement at the Cape serves as a prime example: The territory in question was *res nullius* that became Dutch property by way of *occupatio*.[480] The fact that it may have been a *trading* as opposed to a *colonising* functionary that exercised the *occupatio* is irrelevant. Moreover, it stands to reason that some or other body of legal rules and norms would have to be applied in the new territories in order to ensure the "maintenance of good order policy and justice."[481] It is therefore submitted that it would be simplifying things too much if it were to be accepted that the *Staten-Generaal* granted the VOC the authority to establish Court structures and to appoint "officers of justice" without either prescribing the legislation to be applied by them, or, in the alternative, intending them to legislate of their own accord.[482]

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478 Other companies include the Dutch West India Company (*West-Indische Compagnie*) which received its *Octrooi* on 3 June 1621 although detailed prescriptions regarding the administration of justice were only issued on 13 October 1629 in which, amongst others, the *Political Ordinance* of 1580 was applied in the West Indies (see the references to and brief comment on *Spies v Lombard* 1950 (3) SA 469 (A) at note 506 below); the Paul de Loando Company (instructions received on 5 July 1642) and the Dutch Brazil Company (instructions received on 23 August 1636). All of these companies received far more comprehensive instructions pertaining to the administration of justice than the VOC did—see Van Zyl 1907: 138 – 141; Visagie 1969 38, 39 (with reference to the Dutch West India Company).

479 See Van Zyl 1907: 138 – 141.

480 De Wet 1958(a): 163.

481 See article 35 of the *Octrooi* of 1602 (*per* Van Zyl 1908: 137).

482 Swanepoel (1958: 14) also does not support Van Zyl's view, and is of the opinion that article 35 implies "die een of ander wetgewing en verhore."

(v) Finally, as Stock[483] mentions, it must be borne in mind that the *Statutes of Batavia* (discussed below) did not comprise only local (that is to say Batavian) laws, but also consisted of the "laws made by the States-General of the Netherlands and the Instructions and Ordinances of the XVII." Indeed, as will be seen below, the *Political Ordinance* of 1580 (which was properly promulgated by the States of Holland) is one of these statutes.[484] Moreover, the *Political Ordinance* was expressly applied to the West Indies by the *Staten-Generaal*, a fact which strengthens the presumption that the latter body had no reservations regarding the worthiness of this piece of legislation.[485] It is consequently submitted that the *Statutes of Batavia* are therefore not entirely comprised of legislation of dubious force and effect.

The preceding factors lead only to two possible conclusions, namely (i) that the *Staten-Generaal* intended the law of the United Netherlands to be applied in the East Indies, or (ii) that the *Octrooi* of 1602 was worded in such a way as to permit an *interpretation* that could, at the very least, provide for the *Staten-Generaal* to approve tacitly any legislative activity undertaken by the VOC in the East Indies. It is suggested that the latter argument, which could for the sake of convenience be termed the "interpretation argument" does not appear to have received due recognition.[486]

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483 1915: 330.

484 De Wet 1958(b): 94.

485 See *Spies v Lombard* 1950 (3) SA 469 (A) at 482 (A) – (C).

486 Also see Van Zyl 1983(a): 433 who is of the opinion that the States of Holland, the VOC, the *Raad van Indie* and the *Politieke Raad* at best had delegated competence in this regard (*cf* Visagie 1969: 39 and 65). Van Zyl does not, however, substantiate this submission. Although Swanepoel (1958: 13, 14) is of the view that article 35 implies "die een of ander wetgewing en verhore", he appears to use this as a basis for arguing that this implication could not be used to justify the argument that a specific *legal system* (in this case the law of the States of Holland) was intended to be applied in the East Indies. Swanepoel therefore stops short of suggesting that article 35 could, especially when considered in conjunction with the factors highlighted above, be taken a step further to imply that *legislative competence* (i.e. the ability to promulgate new and context-specific legislation) was granted, as opposed to a mere indication as to which specific existing body of law was to be applied in the East Indies.

Conclusion (i) is problematic simply because of the fact that, in 1602, there was no such "uniform" law in the Netherlands, and therefore no "default" body of law that could automatically be applied in any of the outside territories.[487] On the other hand, conclusion (ii) is, to a large extent, based on an inferential argument and is therefore not entirely flawless. Nonetheless, it is submitted, on the basis of the inferences drawn above coupled with the practical necessity of having a governmental system that was capable of promulgating context-specific legislation where required, that conclusion (ii) is to be preferred.

In closing it is submitted that the preceding discussion shows that the debate as to whether or not the VOC was authorised to legislate is not as clear-cut as certain authors[488] appear to believe. Nevertheless, there is no doubt that article 35 of the *Octrooi* of 1602 provided, *inter alia*, for the VOC to establish Court structures with judicial officers in its territories.[489] As far as the Cape of Good Hope was concerned, it appears that the government had already begun to distinguish between administrative and judicial functions as early as 1656,[490] and express mention is made of a *Raad van Justitie* at the Cape in 1682.[491] An inferior Court, the *Collegie van Commissarissen van de Cleijne Zaken*, was established in 1682, and the first magistrate (*Landdros*) was appointed three years later.[492] The *Raad van Justitie* however remained the highest Court in the Cape with respect to both criminal and civil matters.[493]

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487 De Wet 1958(b): 84; Visagie 1969: 38.

488 For example, see Van Zyl 1907: 132 *et seq*; De Wet 1958(b): 85, 88, 90, 94; Van Zyl 1983(a): 425. In one instance De Wet (1958(b): 90) does however caution that it would be "safer" to assume that legislative competence was not granted to the VOC.

489 Wessels 1908: 355.

490 De Wet 1958(a): 164; Van Zyl 1983(a): 429; Visagie 1969: 41, 42.

491 De Wet 1958(a): 165. The *Raad van Justitie* was only formally convened and separated from the *Politieke Raad* in 1685—see De Wet 1958(a): 165.

492 De Wet 1958(a): 165; Botha 1921: 408; Visagie 1969: 52.

493 Visagie 1969: 45.

It is at this point that the history of the reception[494] and development of Roman-Dutch law as the common law of South Africa is worthy of special consideration. It is often commonly accepted that the common law of South Africa is that which obtained in the province of Holland during the "sixteenth and seventeenth centuries as received and developed in South Africa during the nineteenth, twentieth and twenty-first centuries."[495] But, as De Wet[496] points out, this statement should not be accepted without due appreciation of the events leading thereto. That this is so is clearly illustrated by historical fact: The *Republiek der Verenigde Nerderlanden* consisted of a number of provinces that each exercised sovereignty with regard to their legal systems, with the result that no uniform system of law applied in the Republic.[497] The province of Holland was merely one of the provinces of the *Republiek der Vereenigde Nederlanden*, and, as such, there is no specific reason why the laws of that particular province (and no other) should of necessity have applied to the territories colonised by the Dutch.[498] As De Wet[499] mentions:

> Suiwer juridies gesien, het die Hollandse reg in die gebiede van die Kompanjie net so min aanspraak gehad op gelding as wat dit in die verowerde "Generaliteitslande", in Nederland self geleë, gehad het.

How this came to happen is, however, quite fascinating. In July 1620 the Governor-General of Batavia, Jan Pietersz Coen, sent a report to the VOC in which he requested the *Here Sewentien* to advise him, *inter alia*, as to the taxes to be levied regarding Jacatra; a territory that he had conquered the previous

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494 Swanepoel (1958: 7) notes that the term "Roman-Dutch law" was used for the first time in 1652, the same year that Van Riebeeck landed at the Cape. It therefore appears that it is probably incorrect to speak of the "reception" of Roman-Dutch law at the Cape as taking place in that year.

495 Thomas 2005: 296.

496 1958(b): 84.

497 De Wet 1958(b): 84; Swanepoel 1958: 12.

498 *Spies v Lombard* 1950 (3) SA 469 (A): 481 (H) – 482 (A); De Wet 1958(b): 84.

499 1957: 237.

year and that was later to be named "Batavia."[500] De Wet[501] mentions that it appears as if the *Here Sewentien* misinterpreted this request as being a request to determine the civil law to be applied in Jacatra, and, in a letter dated 4 March 1621, stated that the *Political Ordinance* of 1580 (as adapted by the *Plakaten* of 13 March 1594 and 18 December 1599) was to be applied to the territory in question[502] (which in the interim had been renamed).[503] This instruction was reinforced by a subsequent letter dated 6 December 1621 in which Coen was instructed to ensure that the requirements of the *Political Ordinance* were strictly complied with regarding the solemnisation of marriages.[504] It is, however, clear that the VOC's letter of 4 March was of little help in solving the problem for which it was originally requested as the issue of taxation is covered by neither the *Ordinance* nor the *Plakaten*.[505] As such, it appears that a mere oversight may have been responsible for the application of the law of Holland in the East Indies.[506]

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500 De Wet 1958(b): 87; Visagie 1969: 28.

501 1957: 237, 238.

502 As De Wet (1957: 242) mentions, if it is true that the *Here Sewentien* misinterpreted Coen's request for advice, he must have been dumbfounded when he received their reply in 1621, as, in dealing (*inter alia*) with the law of marriage and of succession, the *Political Ordinance* of 1580 was absolutely useless as a means of regulating matters of taxation—see De Wet 1957: 242.

503 De Wet 1958(b): 88. Visagie (1969: 29) opines that, although *ultra vires*, this letter provides the first indication of a definite policy regarding the body of law to be applied in the East Indies.

504 De Wet 1957: 244.

505 De Wet 1957: 242.

506 See Visagie 1969: 30; 36. Hahlo and Kahn (1968: 572) appear to adopt a more pragmatic point of view. According to them, "[t]he reason why the law of Holland was adopted in preference to the laws of the other provinces was, simply, that as the wealthiest and most powerful of the provinces Holland exercised the predominant influence in the affairs of the VOC. and supplied most of its directors, officers and servants. Thus it came about that throughout the period of Company rule the law of Holland was the law of the Cape." In *Spies v Lombard* 1950 (3) SA 469 (A), Van den Heever JA was of the view that the *Political Ordinance* of 1580 became applicable in the East Indies by a more circuitous route, namely due to its application in the West Indies, where it had been applied by an *Ordre van Regieringe* of 13 October 1629 (although article 59 of the latter *Ordre* mistakenly refers to the date of the *Ordinance* as being 1582 rather than 1580—see Visagie 1969: 37 (note 17)). According to Van den Heever JA (*cf* Visagie 1969: 37, 38 and 76 and De Wet 1985: 42 (note 101) who reject this view), Dutch law accepted that a federal directive such as the one in question did not only apply to that specific colony, but that it was applicable to other Dutch colonies as well—see 482 (A) – (H). This point of view therefore appears to accept a type of "cross-pollination" between the law applied in the East and West Indies. Nonetheless, irrespective of which route is accepted as being the one leading to the application of the *Political Ordinance* of 1580 in the East Indies, the fact remains that it was applied there and was, as a consequence hereof, later applied at the Cape, leading Visagie (1969:

As seen above, it has been argued that the instructions contained in the letters sent by the VOC (and, indeed, any legislation "promulgated" by the VOC and its officials) were *ultra vires* as the charter granted to the VOC by the *Staten-Generaal* made no express mention of legislative competence to be exercised by the former.[507] Furthermore, there appears to be doubt as to whether or not this competence was ever granted subsequent to the granting of the original charter.[508] Nonetheless, the fact remains that the law of the province of Holland was applied in the East Indies.[509] In so doing, the *Political Ordinance*, amongst others, was incorporated into legislation that was drafted under the instruction of Governor-General De Carpentier in 1625,[510] ostensibly in consequence of the letter of 4 March 1621.[511] When, in 1635, the VOC decided to appoint the first fully-fledged legal practitioner in the East Indies, the task of developing this legislation was taken a step further. To this end, Advocate Jan Maetsuycker[512] compiled and drafted the *Statutes of Batavia* that were enacted in 1642.[513] The *Statutes* included an adaptation of the *Political Ordinance* of 1580 under the title *Commissarissen van Huwelijks Zaken*; a title that was enacted with a view to streamlining the regulation of marriage.[514] This newly-drafted legislation would

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76) to conclude that the entire body of law as applied at the Cape was based on custom. On the other hand, De Wet (1985: 42) submits that only those laws that were expressly made applicable to the East Indies by the *Staten-Generaal* applied *proprio vigore* to the Cape, while the remaineder acquired force of law through custom. It is submitted that the "interpretation argument" proffered earlier can provide a solution to these differing viewpoints.

507 De Wet 1958(b): 88.

508 De Wet (1958(b): 90) mentions that certain authors have attempted to construe the granting of such authority in certain *Instructie* that were later issued by the *Staten-Generaal* to the VOC in 1609 and 1617, but that these attempts are unconvincing.

509 Visagie 1969: 36; 38.

510 In order to supplement the *Plakaten*, it was decided that the common law as applied in the "Vereenigde Nederlanden" was to be applied—see De Wet 1958(b): 89.

511 Visagie 1969: 31.

512 Maetsuycker took office on 7 October 1636, with the main aim of advising the *Raad van Justitie* in Batavia regarding Dutch substantive and procedural law—see Visagie 1969: 32.

513 De Wet 1958(b): 93, 94. It appears that these statutes were originally intended to be of a provisional nature. However, regardless of the intended degree of permanence, the validity of these statutes is also debatable: See Visagie (1969: 33) who reiterates (i) that neither the *Raad van Indie* nor the *Here Sewentien* had the capacity to promulgate this legislation and (ii) that no record of any express approval of these statutes by the *Staten-Generaal* is to be found. Nevertheless, he concedes that the statutes "as gesaghebbend in die Kompanjie-gebied beskou [is]."

514 Botha 1914: 252; De Wet 1958(b): 93, 94.

henceforth apply in the East Indies, and, as a consequence thereof, in the areas falling under its jurisdiction.[515]

As mentioned earlier, the settlement at the Cape of Good Hope was under the jurisdiction of the *Raad van Indie* seated in Batavia.[516] As such, the legal system as it applied in Batavia would of necessity apply to the Cape. Indeed, as early as 1657, a letter was addressed to the free-burghers in which it was intimated that they were subject to the "wetten, ende rechten" (statutes and laws) as they applied in the East Indies.[517] To this end, therefore, the *Statutes of Batavia* (incorporating the *Political Ordinance* of 1580) were also applied in South Africa.[518] For purposes of this analysis it is of critical importance to note De Wet's[519] observation that as far as substantive law was concerned, the *Statutes* at this time regulated little more than the formalities pertaining to marriage and the prohibited degrees of affinity. It can therefore be assumed that the law of marriage as applied in Batavia was applied at the Cape of Good Hope as from the earliest days of Dutch rule,[520] thereby constituting the platform from which the entire South African body of (civil) matrimonial law later developed.[521]

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515 The *Statutes of Batavia* were reviewed and re-drafted in 1766, after which they were submitted to the VOC for ratification. This, however, never occurred (see Visagie 1969: 35). Copies of these new *Statutes* (which were later named after the Governor-General of Batavia at the time and consequently came to be referred to as the "Van der Parra code") were sent to the Cape, but never acquired force of law there—see Stock 1915: 332. Nevertheless, it is interesting to note that the "new" statutes retained the erstwhile provisions regarding the formalities pertaining to marriage and the prohibited degrees of affinity—see De Wet 1958(b): 95.

516 See the introductory paragraph to 3.4.7.1 above.

517 See De Wet 1958(a): 167 who is of the view that Van Riebeeck must therefore have been in possession of a copy of the *Statutes*. This view is not shared by Roos (1897: 6) who opines that the first copy of the *Statutes* was only received at the Cape in 1708. Others, (see the authorities quoted by Stock 1915: 328) are of the opinion that the *Statutes* were only applied at the Cape after a resolution to this effect was adopted on 12 February 1715. Stock (1915: 328) accepts the 1708 viewpoint and consequently considers the 1715 resolution to be of exaggerated importance.

518 As Visagie (1969: 66, 67) states: "Die posisie kom eienaardig voor. Die Goewerneur en sy Raad het geensins die bevoegdheid gehad om te bepaal watter reg, al is dit dan ook die Statute van Batavia, aan die Kaap sou geld nie. Daarbenewens is dié statute in elk geval van toepassing verklaar op die gebiede van die Oos-Indiese Kompanjie en wel deeglik toegepas."

519 1958(a): 168.

520 *Spies v Lombard* 1950 (3) SA 469 (A) at 482 (D) – (E): "From the appendices to the late Mr. Scheeper's unfinished thesis on 'Intestate Succession' it is clear that the *Political Ordinance* of 1580, in so far as it related to these subject matters, was repeatedly applied to the Cape by

The abovementioned state of affairs places an interesting spin on the development of South African family law in particular and common law in general, as it could be argued that the VOC's letters of 1621[522] (coupled with the legislation commissioned by De Carpentier in 1625) in fact constitute the very reason for the application of the (Roman-Dutch) law of Holland in South Africa, and, therefore constitute one of the cornerstones on which the entire South African legal system is founded.[523] Moreover, if one considers the subject matter

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competent authority" (italics added). Van den Heever JA's use of the words "these subject matters" may be confusing. This is so because of the reference to the unfinished treatise on "Intestate Succession" in the first part of the sentence. However, it is submitted that Van den Heever JA was not merely referring to intestate succession when he referred to "these subject matters." Firstly, the paragraph read as a whole makes it clear that he was referring to the *Political Ordinance*'s content regarding matrimonial matters as well as both testate and intestate succession. Secondly, if only matters of intestate succession were being referred to, he might have made use of wording such as "this aspect" instead of "these subject matters." Thirdly, in the sentence immediately following the one cited, Van den Heever JA states that "[t]o remove all possible doubt the Estates-General again applied it with modification by the *Octrooi* of 10 Jan. 1661." It is submitted that the reference to "it" refers to the *Political Ordinance* in a broader context and not merely to the law of intestate succession as such.

521 Many of these principles still apply today. For example, the provisions dealing with the prohibited degrees of affinity are still applied in modern South African family law.

522 4 March and 6 December, see above.

523 Swanepoel (1958: 21 *et seq*) is of the opinion that the view that the letters of 1621 are responsible for the introduction of Roman-Dutch law in the East Indies is incorrect as, firstly, the term "Roman-Dutch law" was only coined by Van Leeuwen in 1652 and that neither the term nor the system was in existence in 1621. Secondly, Swanepoel refers to a statement made by Beyers to the effect that the letter received in March of 1621 established the law of Holland in Batavia and that it provides "die grondslag waarop die Romeins-Hollandse reg berus in die gebiede begrepe in die Oktrooi." According to Swanepoel, this view is incorrect as the Roman-Dutch law was comprised of far more than merely the *Political Ordinance* and the other *plakaten* mentioned in the letters of 1621. Although these views are not without merit, it is submitted that they are somewhat exaggerated. Although it can be conceded (i) that the term "Roman-Dutch law" may only have been coined in 1652, and (ii) that this body of law undoubtedly was comprised of far more than merely the sources referred to in the letter of 1621, the important point to be made is that the letter introduced a cornerstone of the law of Holland (namely the *Political Ordinance* of 1580) which, in turn, constituted a cornerstone of that which was *later to become* Roman-Dutch law which, in turn, was later to be adapted in order eventually *to become* the common law as we understand it and apply it in contemporary South Africa. In addition, Swanepoel (1958: 22) states that the letter of 1621 might be interpreted in such a way as to provide for the possibility of the laws in their original format being adapted in order to suit local conditions; an interpretation which Swanepoel uses in order to strengthen his argument that the sources imported by the letter could be given "'n ander kleur." Even if this were so, it is submitted that this observation does little to support Swanepoel's argument, as the fact remains that the VOC specifically incorporated these sources into the East Indies in their original format. The possibility of modification in order to suit local conditions does little to change the fact that the sources referred to in the letter contributed in no small manner towards laying the foundation for the establishment of the law of Holland in the East Indies. Furthermore, at least

of the *Political Ordinance* of 1580 and the fact that this *Ordinance* provided the basis for the law of marriage throughout the Dutch colonies in the East Indies,[524] it becomes clear that the law of marriage is one of the building blocks of the entire South African legal system as we know it today.[525]

3.4.7.2 The law of marriage in South Africa: 1652 – 1838

To return to the development of the law of marriage in South Africa, it is clear that the common law of Holland formed the common law of the Cape of Good Hope,[526] and, in accordance with the chain of command illustrated in the preceding discussion, a right of appeal from the local Courts of all out-stations in the East lay to the *Raad van Justitie* at Batavia.[527]

As far as the law of marriage is concerned, the *Statutes of Batavia* played an important role in that they regulated the formalities pertaining to marriage and the prohibited grounds of affinity.[528] As such, these regulations were gleaned from the *Political Ordinance* of 1580 which, as seen above, the VOC had already

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in as far as the *Political Ordinance* of 1580 is concerned, the subsequent "adaptations" did not deviate substantially from the original versions—see De Wet 1958(b): 93 – 95. In consequence of these and other arguments, Swanepoel (1958: 26) is of the opinion that the letter of 21 February 1657 (in terms of which the free-burghers were informed that they were subject to the "*wetten, ende rechten*" as they applied in the East Indies) is the true reason for the adoption of Roman-Dutch law in southern Africa, as this body of law only applied to the free-burghers (as opposed to other employees of the VOC). Again, it is submitted that this argument is only partially valid. The law of marriage serves as an example in this regard, as this component of what was later to become known as "Roman-Dutch law" was applied throughout the Cape to free-burghers and company employees alike as from the earliest days of Dutch rule. Swanepoel's argument that "Roman-Dutch law" was only applied to the free-burghers therefore cannot be supported.

524 De Wet 1985: 34 and 42 (note 101).

525 In 1950 the Appellate Division confirmed the fact that the pre-1652 *plakaten* of the States of Holland that had been expressly promulgated in South Africa indeed formed part of our law—see *Spies v Lombard* 1950 (3) SA 469 (A) at 481 (H) – 483 (A); Van Zyl 1983(a): 438.

526 Wessels 1908: 356, 357; Van der Merwe 1995: 236. De Wet 1958(b): 84 *et seq* mentions that this fact should not be accepted as a matter of course as it must be remembered that the law of Holland was merely the law as applied in one of the provinces of the *Republiek der Vereenigde Nederlanden.* Nonetheless, De Wet concludes that, for various reasons, the law of Holland became the common law of the East Indies (1958(b): 96, 97).

527 De Wet 1958(a): 164; Wessels 1908: 356.

528 De Wet 1958(a): 168.

instructed Governor-General Coen to apply in the East Indies in 1620 (albeit that the *Statutes* were actually only applied as from 1625).[529]

Between 1652 and 1665 marriages at the Cape of Good Hope were solemnised by the *Politieke Raad* [530] (from which, it will be remembered, a separate *Raad van Justitie* was only officially constituted in 1685). Banns were called in the Council Chamber, after which the marriage was solemnised by the Secretary of the *Raad* in the presence of all the council members.[531] The position changed in 1665 when the first clergyman was appointed—marriages were henceforth solemnised by him after the *Raad* had granted permission for the marriage to take place and after the banns had been called on three occasions.[532]

In terms of the *Statutes of Batavia* (which as far as marriage was concerned, as seen above, were based on the *Political Ordinance* of 1580),[533] the matrimonial courts were tasked with combating "abuses and irregularities" regarding matrimonial law.[534] To this end, a resolution was taken by the *Politieke Raad* on 28 December 1676 in terms of which the *Collegie van Commissarissen van Huwelijks Zaken*—a special Court dealing with matrimonial matters and modelled on a similar Court in Batavia—was established.[535] This lower Court was subject to the jurisdiction of the *Raad van Justitie* as the superior Court in the Cape.[536] In accordance with the principles elucidated above, a right of appeal lay from the Cape Courts to the *Raad van Justitie* in Batavia.[537]

In consequence of this new development, the prospective spouses were now required to appear before the four commissioners (comprising two officials and

529 See the discussion above.
530 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at par [72].
531 Botha 1914: 251; Visagie 1969: 55.
532 Visagie 1969: 55; Botha 1914: 251.
533 De Wet 1958(b): 94.
534 Botha 1914: 252; De Wet 1958(b): 93, 94.
535 Botha 1914: 251; De Wet 1958(a): 166.
536 Botha 1914: 253.
537 Botha 1914: 253.

two civilians) of the *Collegie van Commissarissen van Huwelijks Zaken*.[538] If satisfied that the couple complied with the statutory requirements, the commissioners granted a certificate permitting the banns to be called by a clergyman.[539] The appearance before the commissioners was generally followed by a celebratory dinner that was attended by friends and relatives of the couple.[540] The Banns were required to be called on three successive Sundays, and any objections raised to the marriage were referred back to the Matrimonial Court for adjudication.[541] If no objection was raised, the marriage was solemnised by the minister of their church.[542]

The *Collegie van Commissarissen van Huwelijks Zaken* existed as a separate entity for approximately 35 years before being merged with the earlier-established *Collegie van Commissarissen van Cleijne Zaken* in 1711, to form the *Collegie van Commissarissen van Cleijne Ziviele en Huwelijks Zaken*. [543]

Initially, all prospective spouses had to appear before the commissioners in Cape Town. As from 1 June 1790, parties living elsewhere were permitted to have their banns called by their local minister or announced by the local magistrate, after which a certificate to this effect was granted and submitted to the commissioners in Cape Town for approval. Once approved, the marriage could be solemnised in the local parish if the parties so wished.[544]

The final decades of the eighteenth century witnessed the steady decline of the VOC, and, on 16 September 1795, a century and a half of Dutch rule came to an end when the Cape of Good Hope was occupied by Britain. While the former development could largely be attributed to corruption and mismanagement, the

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538 De Wet 1958(a): 166; Botha 1914: 252; Visagie 1969: 55.
539 Botha 1914: 252; Visagie 1969: 55.
540 Botha 1914: 252.
541 Botha 1914: 253.
542 Hahlo 1985: 15; Botha 1914: 251; Visagie 1969: 55.
543 De Wet 1958(a): 166; Hahlo 1985: 15; Botha 1921: 421.
544 Visagie 1969: 56; Botha 1914: 255.

latter development had come about as an indirect result of the French Revolution, which had led to the demise of the United Republic of the Netherlands and to the establishment of the Batavian Republic and, as a consequence hereof, a hasty attempt by Britain to occupy the Cape before it fell into French hands.[545] A military government, under General James Henry Craig and Admiral George Keith Elphinstone, initially took control, and all the inhabitants at the Cape were required to undertake an oath of allegiance to their new British masters.[546] Despite this development, the legal system remained largely as before. This much is evident from a proclamation dated 11 October 1795 in which the *Raad van Justitie* was reinstated and ordered to administer justice in the name of the British monarch "in the same manner as has been customary till now, and according to the Laws, Statutes, and Ordinances which have been in force in this Colony…"[547] The first period of English occupation at the Cape therefore did not bring about dramatic changes to the substantive law at the Cape.[548]

Following the *Treaty of Amiens* that was concluded on 28 March 1802, the Cape was returned to Dutch control, although this only came to be known there in March 1803.[549] In anticipation of this development and as a result of the utterly confusing state of affairs regarding the prevailing administration of justice,[550] a commission of enquiry had earlier been convened under Jacob Abraham de Mist in order to make recommendations regarding the governance and management of the Cape. The work done by him in this regard was of such an exceptional standard that he was later appointed as Commissary-General in the Cape; a rank that was superior to that of the governor (J.W. Janssens) serving alongside

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545 Grütter and Van Zyl 1982: 16.

546 Grütter and Van Zyl 1982: 17.

547 *Per* De Wet 1958(a): 172.

548 One significant change was however occasioned in 1797 when the *Raad van Justitie* was reduced in number and the possibility was introduced of an appeal in civil matters to a Court presided over by the Governor, with a further appeal to the King in Council—see De Wet 1958(a): 173.

549 Van Zyl 1907: 135.

550 Wessels 1908: 359.

him.[551] It is noteworthy of mentioning that these recommendations were, from the outset, viewed as being of a transitional nature pending the drafting of a comprehensive charter that would be subjected to the approval of the Dutch Legislature (which charter, incidentally, never materialised). According to De Wet[552] one of the most innovative of the developments occasioned in the wake of De Mist's recommendations was the re-composition of the *Raad van Justitie* so that, for the first time in the history of the Cape colony, the *Raad* was fully comprised of qualified jurists. Moreover, as far as matrimonial law was concerned, De Mist broke new ground in 1804 with the introduction of the civil marriage to the Cape—a development that appears to have been occasioned in consequence of the practical reality of a lack of clergymen in the remote outposts of the Cape rather than an outright rejection of marriage as a religious institution.[553] In rural areas marriages could, as from 1 January of the following year,[554] be concluded before a *landdrost* and two *heemraden*,[555] who, in consequence of De Mist's report, had by now become responsible for all civil administration in their respective districts.[556] By a similar token, the *Collegie van Commissarissen van Cleijne en Huwelijks Zaken* was competent to solemnise marriages in Cape Town itself.[557]

The second period of Dutch rule at the Cape of Good Hope was short-lived: Britain and France again went to war, and on 10 January 1806 the English, under Sir David Baird and Sir Hope Popham, regained control of the Cape.[558] According to Grütter and Van Zyl[559] the brevity of the Dutch rule between 1802 and 1806 "was unfortunate, because this administration promised to be the kind of civil government which might have developed into a model of enlightened

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551 Grütter and Van Zyl 1982: 18.
552 1958(a): 174.
553 Grütter and Van Zyl 1982: 18.
554 Botha 1914: 255 and 1921: 414.
555 Hahlo 1985: 15.
556 Wessels 1908: 361.
557 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at par [76].
558 Wessels 1908: 362.
559 1982: 17.

control." Once again, a military government was initially established, and the *Articles of Capitulation* of 10 and 18 January 1806 again retained Roman-Dutch law as the official substantive law of the Cape.[560] British rule at the Cape was confirmed by the Convention of London in 1814.[561] Nevertheless, the influence of English law could not be ignored, and its eventual infusion with the prevailing law was inevitable, especially after English became the official language of the Cape colony in 1822.[562] As Hahlo and Kahn[563] state:

> Despite the official retention of Roman-Dutch law as the law of South Africa, however, there was a general movement towards English law and institutions. The broad pattern was one that repeated itself in almost every country where as a result of British conquest a civilian system of Continental origin had to face the competition of English law and institutions.

Matrimonial law became one of the first fields to experience the effects of the new order when the concept of civil marriage as introduced barely two years earlier by De Mist, was abolished.[564] According to Sir David Baird, the previous view by which marriage could be regarded as "a mere civil contract" was rejected, and all marriages were now required to be performed by "an ordained clergyman or minister of the gospel."[565] In the country districts, the magistrate's Courts could, however, still be approached in order to establish whether or not a legal impediment to the prospective marriage existed.[566]

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560 See Brand 2009: 71 who states that the Judges were however free to "formulate their own law of procedure." The retention of the Roman-Dutch common law at the Cape was reaffirmed by both the First and Second Charters of Justice (1827 and 1832 respectively)—see Hahlo and Kahn 1968: 576.

561 Grütter and Van Zyl 1982: 18.

562 Hahlo and Kahn 1968: 576.

563 1968: 576.

564 Hahlo 1985: 15, 16.

565 As *per* Farlam JA in *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at par [76]. Also see Botha 1914: 256.

566 Botha 1914: 256.

The extent to which the strict requirements of the religious marriage were enforced appears to be uncertain. For example, in *Ex parte Dow*,[567] a case dealing with the formalities of marriage in contemporary South African law, Broome J referred to an opinion written in 1812 in consequence of a question arising as to the validity of "marriages" solemnised at the Cape by someone professing to be a cleric, while this was not so. The opinion expresses the view that the "marriages" could not be nullified by virtue of the fact that the person in question was not a minister of religion.[568]

The banns requirement was relaxed as from 1818, when it became possible for prospective spouses to obtain a special license (at the cost of 200 rixdollars) that enabled them to acquire the requisite certificate allowing them to marry in church without the banns having to be called.[569]

In 1829 the ages of majority as prescribed in the *Perpetual Edict* of 1540 were, in compliance with English law, reduced from 25 for males and 20 for females to 21 for both sexes.[570]

On 7 September 1838 the *Marriage Order in Council* was passed with the aim of providing for persons of the Christian faith to marry one another.[571] In terms hereof, the Matrimonial Court was abolished, and orders for specific performance regarding espousals could no longer be granted—aggrieved parties would henceforth have to have recourse to claims for damages.[572] The *Order* also regulated the publication of banns[573] and provided for the establishment of a

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567 1987 (3) SA 829 (D).

568 At 832 (D) – (F).

569 Botha 1914: 256; Hahlo 1985: 16.

570 Kelling 1975: 17, 18. This would continue to be the case until 1 July 2007 when the *Children's Act* 38 of 2005 further reduced this age to 18 years for both sexes.

571 See C.T.C. 1886(a): 64.

572 Lee 1931: 52; Van Warmelo 1954: 114.

573 Banns were to be published before the congregation of each spouse (in the event of them being of different denominations of the Christian faith) on three consecutive Sundays prior to the marriage. If this was not possible, a special license could be obtained from the Governor of the Colony—see C.T.C. 1886(a): 64; Hahlo 1985: 16.

marriage register. In addition, the *Order* provided that secular marriage officers could be appointed in instances where Christian ministers were not available.[574] All things considered, Wessels[575] concludes that the *Order in Council* did not depart substantially from the *Political Ordinance* regarding the requirements for a valid marriage.

In 1860 the Cape Legislature made provision for resident magistrates to be appointed as marriage officers and for the Governor of the Colony to appoint marriage officers to solemnise Jewish and Islamic marriages.[576] Marriages could still be solemnised by Christian ministers of religion if the parties so wished.[577]

The banns requirement was retained, but adapted so that the magistrate could perform those tasks previously reserved for the Church.[578] In addition, if the banns had been called and no objection had been raised, a marriage solemnised by a magistrate could no longer be set aside for lack of parental consent.[579]

It is, however, important to note that, although it undoubtedly widened the scope thereof, the Act of 1860 did not reintroduce secular marriage to the Cape. Indeed, one of the most dramatic consequences of the *Order in Council* of two decades earlier was that it permitted secular marriages to be concluded for the

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574 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at par [77]; Hahlo 1985: 16.

575 1908: 439.

576 *Marriage Act* 16 of 1860 (C).

577 See C.T.C. 1886(b): 121 who describes the state of affairs in the following terms: "This law, however, is only permissive, that is, merely allowing the subject the privilege of solemnising marriage in this way. The alternative to those who do not care about being married by a Magistrate, or have a sentimental objection thereto, is, to be united in the bonds of matrimony by a 'Minister of Religion,' that is to say, by the Minister of a particular sect of the Christian faith." It is interesting to note the author's sentiments regarding the fact that the parties may "not care about being married by a Magistrate" or that they might have "a sentimental objection" to doing so—in today's terms these sentiments would probably be expressed in different terms, in the sense that the parties might object to a *religious* marriage, and not the other way around!

578 C.T.C. 1886(a): 65.

579 Schedule A paragraph 28, *per* Hahlo 1985: 92 (note 26).

first time since 1806.[580] The statement by Van der Vyver and Joubert[581] to the effect that

> [d]ie reëling was dat die huwelik bevestig word voor 'n leraar, maar in 1860 is daar weer voorsiening gemaak vir gewoonweg burgerlike huwelike toe resident magistrate as huweliksbevestigers aangestel is ...

should therefore be read with caution, as it could lead to the conclusion that the 1838 *Order* did not make provision for the conclusion of secular marriages, but that such marriages were only permitted in 1860.

The provisions of the 1838 *Order in Council* were systematically adopted by the other colonies in South Africa,[582] and, at the time of the coming into being of the Union of South Africa in 1910, each colony had its own marriage laws. As the *Order* of 1838 differed little from the *Political Ordinance* of 1580 it may be said that the English influence on the law of marriage was minimal,[583] and that, despite the individual legislation "broadly speaking … the marriage ceremony in South Africa [at the time was] identical with that instituted by the *Politique Ordonnantie* of 1580."[584]

3.4.7.3 The influence of Christian Nationalism

At this point it is apposite to digress from the main topic in order briefly to discuss the influence of Calvinism and Christian-Nationalism in pre- and post-Union South Africa.[585] The point of departure can be taken from the revocation of the *Edict of Nantes* by Louis XIV in 1685, as a result of which many French

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580 Cronjé 1990: 164; Cronjé and Heaton 2004: 5.

581 1991: 462.

582 The first colony to do so was Natal, by Ordinance 17 of 1846.

583 See for example Hahlo and Kahn 1968: 578

584 Wessels 1908: 439 (italics added).

585 As Bekink 2008: 483 mentions: "Before the dawn of the democratic dispensation, the former South African state was often perceived to favour Christianity. Such favouritism was specifically attributed to the Calvinistic background of the government."

(Calvinist) Huguenots left France to settle in other European territories and areas as far afield as America and South Africa.[586] Over the next two hundred years the Huguenots who settled in South Africa came to regard themselves as Afrikaners and were bound together in the religious tradition of the Dutch Reformed Church (*Nederduitse Gereformeerde Kerk*) in the Cape Colony, which was in essence a Calvinist Church.[587]

The second British occupation of the Cape as from 1806 provided the catalyst for developments which were to follow. As Sachs explains:

> In order to get away from British government, British taxes and British notions of justice, thousands of white Afrikaner farmers in the eastern Cape in the 1830's packed their belongings into wagons and trekked into the interior of southern Africa. Experience had taught them that it was easier to emigrate en masse than to rebel, and what had already been a slow, unco-ordinated movement of the land-hungry became the accelerated and organised exodus of the discontented. Probably the greatest of all their grievances stemmed from the British doctrine of equality before the law, which enabled missionaries to bring servants and ex-slaves to court to lay charges against their masters… This was not the departure of outlaws, but the migration of a community determined to maintain what it considered to be proper relations between masters and servants.[588]

Upon moving into the interior the Boers encountered little resistance due to the effects of the *difaqane* of the preceding decade by which the Zulu kingdom had forced the migration of the African tribes and had occasioned a substantial depopulation of these areas.[589] The Boers created two republics in the territory beyond the Orange and Vaal rivers (later the Orange Free State) and north of the Vaal (the *Zuid-Afrikaanse Republiek* or ZAR). Patterson states that for the Boers

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586 Hayes *et al* 1968: 428.
587 Hexham 1980: 198.
588 Sachs 1973: 68.
589 Sachs 1973: 68.

> [t]he Old Testament was like a mirror of their own lives. In it they found the deserts and the fountains, the drought and the plagues, the captivity and the exodus. Above all they found a Chosen People guided by a stern but partial Deity through the midst of the heathen to a promised land. And it was the Old Testament and the doctrines of Calvin that moulded the Boer into the Afrikaner of today … The doctrines which the Boers took with them on their trek through the veld and the centuries were those of sixteenth century Calvinism …[590]

Although multiracial, multicultural and independent communities were created as a result of the infusion of the Afrikaner and African peoples, Sachs rightly mentions that "civic inequality and social distance" persisted along the same lines as it had done prior to the abolition of slavery at the Cape.[591] Thus while the Constitutions of the two Boer Republics proclaimed equality for all, such equality was restricted to Europeans, with the ZAR's Constitution categorically stating that "the People will countenance no equality between Black and White in Church or State."[592]

Whether the theological basis of the Dutch Reformed Church was constituted by Calvinism in its true form is debatable, and is questioned by Hexham[593] who states that there is little evidence to support "a continuous Calvinist tradition before 1870" in the sense of one that adhered to the Synod of Dort (1616 – 1618). Instead, Hexham argues that the orthodox Calvinism that formed the backbone of what was later to become Christian-Nationalism was propagated by the Reformed Church (*Gereformeerde Kerk*) that had been formed in 1859 as a breakaway from both the Dutch Reformed Church (prevalent in the Cape and the Orange Free State) and the Dutch Re-formed Church (*Nederduitse Hervormde Kerk*) that had become entrenched in the ZAR. This secession—which occurred

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590 *Per* Hexham 1980: 195. Also see Ritner 1967: 18 (note 2).
591 Sachs 1973: 69.
592 *Per* Sachs 1973: 70.
593 1980: 197.

under a Dutch Minister by the name of Dirk Postma—found great support in the ZAR under President Paul Kruger.[594] As Hexham[595] states:

> The existence of this strict Calvinist Church alongside the Dutch Reformed Church, has led many commentators to attribute Calvinist attitudes to the Dutch Reformed Church which in fact come from the Reformed Church.

The roots of the Christian-Nationalism movement can be traced to developments in the Netherlands, where according to Hexham, a Calvinistic revival occurred under Willem Bilderdijk (1756 – 1831) and later Groen van Prinsterer (1801 – 1876) during the 1800's in reaction to the increasingly liberalising Dutch society in the aftermath of the Enlightenment and the French Revolution. Although based on Calvinism to begin with, the politically-conscious Van Prinsterer created the Anti-Revolutionary Movement which exhorted Christians to refrain from thoughts of revolution which although "they did not appear to pose a threat to Christianity, in fact struck at its core by denying the sovereignty of God in all aspects of life."[596] This movement became known as Christian-Nationalism, and under Van Prinsterer's successor (Abraham Kuyper [1837 – 1920]) the movement gained such momentum in the Netherlands that the entire society was influenced by it. From a South African perspective one of the most influential developments was the establishment of the Free University of Amsterdam at which a number of prominent South African Dutch Reformed theologians received their training, and in this way contributed to the growth of the movement in South Africa.[597] The National Party was established in Bloemfontein in 1914 and later merged with General JC Smuts's South African Party to form the United Party in 1934. Fundamentalist Nationalists under Dr DF Malan however refused to accept the merger, and the breakaway party so formed (later called the Reunited National Party) defeated the United Party and came to power in

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594 Hexham 1980: 201, 202.
595 1980: 202.
596 Hexham 1980: 204, 205.
597 Hexham 1980: 206.

1948.[598] Soon thereafter the policy of *Apartheid* was implemented, which in essence was founded on Afrikaner Christian-Nationalist ideology, which Moodie is reported having described as "a civil religion representing the integration of key symbolic elements. These include major events in Afrikaner history, the Afrikaans language, and Dutch Calvinism."[599] Indeed, the latter beliefs were increasingly used to justify *Apartheid* policies and principles.[600]

The effect of the new order on the South African social order in general and family law in particular was pervasive and immediate, with a country-wide legislative prohibition on marriages between "Europeans and non-Europeans"[601] (so-called "mixed marriages") being enforced as from 1949 in terms of the *Prohibition of Mixed Marriages Act* 55 of 1949.[602] Such "marriages" would henceforth be null and void, although certain "concessions to border-line cases"[603] were made.[604] In addition, the application of matrimonial property law was also differentiated along racial lines: The "default" matrimonial property system for South African marriages was (and still is) is the marriage with

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598 Grütter and Van Zyl 1982: 52.

599 http://science.jrank.org/pages/8334/Apartheid-Rise-Afrikaner-Nationalism.html (accessed on 29 July 2009).

600 Gaum 2009.

601 The prohibition only applied to "marriages" between a "European" and a "non-European" person—marriages between two persons of differing races were therefore valid provided that a "European" was not involved—see Hahlo and Kahn 1960: 398.

602 This type of invasive legislation was however not altogether novel as marriage legislation in the erstwhile colonies had sometimes been restricted in its application to marriages between two white persons (Hahlo and Kahn 1960: 397). So, for example, in the *Zuid-Afrikaanse Republiek*, the *Transvaal Huweliks Ordonnantie* 3 of 1871 applied to marriages between white persons only, and separate legislation provided for marriages between "non-whites" (Law 3 of 1897 and Proclamation 6 of 1900—see Hahlo 1985: 16; Sinclair and Heaton 1996: 195). Similarly, in Natal, Law 46 of 1887 permitted black persons to marry in accordance with the Christian faith, unless they had not been exempted from customary law (in which case special permission to do so was required—Hahlo 1985: 16). These laws were abolished by the *Marriage Amendment Act* 12 of 1973 (Sinclair and Heaton 1996: 197).

603 Hahlo and Kahn 1960: 398.

604 The Act contained a deeming provision (section 3) in terms of which a person whose appearance was either decidedly European or non-European was deemed such until the contrary was proved. An example of such a concession is found in section 1 which provides that, prior to its nullification, the children born of a couple whose "marriage" had in good faith been solemnised by a marriage officer retained their legitimate status.

community of property, and a rebuttable presumption to this effect applies.[605] However, in accordance with section 22(6) of the *Black Administration Act* 38 of 1927, marriages concluded between black persons were automatically regarded as being out of community of property unless an antenuptial contract provided otherwise or unless both of the parties to the marriage had in writing declared a contrary intention to a magistrate, commissioner or marriage officer. This piece of legislation therefore had the marginalising effect of treating marriages between black persons in a diametrically opposite way as those entered into between all other race groups.

On 1 January 1962 the civil marriage laws of the Republic of South Africa were finally consolidated by the coming into operation of the *Marriage Act* 25 of 1961.[606] The requirement that parties to all civil marriages concluded in the Republic were generally[607] required to be at least 16 and 18 years of age in the case of females and males respectively[608] was retained.[609] Based in the main on the principles contained in the *Decretum Tametsi* of 1563 and the *Political Ordinance* of 1580,[610] this Act regulates the formalities pertaining to the conclusion of a valid civil marriage between two persons of the opposite sex[611] and provides for the solemnisation of marriages by both secular and religious marriage officers. Despite the fact that religious marriage officers are permitted to solemnise marriages in terms of this Act, the Act itself "is concerned solely

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605 *Edelstein v Edelstein* 1952 (3) SA 1 (A) at 10 (A) – (B) and 14 (G); *Odendaal v Odendaal* 2002 (1) SA 763 (W) at par [1] - [2].

606 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at par [78]. The Act repealed or amended the majority of the civil marriage laws as applied since the *Order in Council* of 1838 through pre- and post-Union South Africa—see the Schedule to the Act.

607 The Act makes provision for persons younger than the specified ages to marry with the appropriate consent—see sections 24 – 26 of the Act.

608 Section 26 of Act 25 of 1961.

609 These requirements were originally contained in section 1 of the *Marriage Law Amendment Act* 8 of 1935. Persons younger than the prescribed ages could, in terms of the 1935 Act, marry if, over and above the consent of their parents, the permission of the Minister of the Interior was obtained—see Hahlo and Kahn 1960: 399.

610 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at par [78].

611 See the discussion in Chapters 3 and 8.

with marriage as a secular institution"[612] and any religious significance of the marriage is, for all intents and purposes, confined to that which the parties themselves (or their religious denominations) ascribe thereto.

In 1970 the *Marriage Act* [613] was amended so that the requirement of banns was abolished *in toto*,[614] and the age at which girls could marry was decreased from 16 to 15 years of age. In 1984 the Act was again amended by the insertion of section 24A that provides for the dissolution of marriages of persons under the age of majority who have failed to obtain parental consent (or the equivalent thereof)[615] as well as for the consequences of such dissolution.[616] At the same time, the *Matrimonial Property Act* 88 of 1984 also repealed articles 3 and 13 of the *Political Ordinance* of 1580, as well as article 17 of the *Perpetual Edict* of 1540.[617]

As far as marriages between black persons were concerned, the *Black Administration Act* 38 of 1927 distinguished between "marriages" and "customary unions" between such persons, with only the former being recognised by law:

> "**Marriage**" means the union of one man with one woman in accordance with any law for the time being in force in any Province governing marriages, *but does not include any union contracted under Black law and custom or any union recognised as a marriage in Black law* under the provisions of section one hundred and forty-seven of the Code of

612 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at par [78].

613 25 of 1961.

614 Section 6 of the *Marriage Amendment Act* 51 of 1970 repealed sections 13 to 21 of the 1961 Act.

615 Such as the consent of a guardian (in this regard, see section 18 (3) of the *Children's Act* 38 of 2005 in terms of which all guardians of a minor must consent to the minor's marriage) or the commissioner of child welfare (see 4.3 in Chapter 8 for a discussion of a proposed amendment in this regard).

616 Section 24 A was inserted by section 34 of Act 88 of 1984.

617 See the schedule to the Act. The relevant provisions of the *Political Ordinance* of 1580 and the *Perpetual Edict* of 1540 are discussed in 3.4.6 above. The abolition of article 17 finally did away with the penalties prescribed in that section in terms of which the major party to a marriage concluded in secret was permanently precluded from take any financial benefits from the minor's estate. Although these penalties had, *strictu sensu*, been part of South African law since time immemorial, it appears that they were, as Hahlo and Kahn (1960: 401) state "widely ignored" in modern South African law.

> Black Law contained in the Schedule to Law No. 19 of 1891 (Natal) or any amendment thereof or any other law.[618]

This definition, coupled with the Act's definition of "customary union" as "the association of a man and a woman in a conjugal relationship according to Black law and custom, where neither the man nor the woman is party to a subsisting marriage" meant that the South African family law of the day failed to recognise marriages "under Black law and custom", so that black persons only had the option of the monogamous civil marriage open to them, with the result that the principle of polygyny was not recognised. A further differentiation occurred in that even if black spouses indeed chose to enter into a civil marriage, the matrimonial property regime governing their marriage was the exact opposite of that which applied to any other civil marriage in South Africa, in that complete separation of property was presumed.[619]

"Marriages" that were entered into according to the tenets of specific religions without being solemnised as civil marriages were also not countenanced by the law, and no distinction was drawn between such "purely religious 'marriages'" that were potentially as opposed to *de facto* polygynous. In 1983 the Appellate Division (at that time the highest Court in South Africa) summarised the legal position in respect of Islamic marriages in the case of *Ismail v Ismail*:[620]

> This union can obviously not be regarded as a valid civil marriage. Two requirements were lacking. *Firstly, under our law, a marriage is the legally recognized voluntary union for life of one man and one woman to the exclusion of all others while it lasts … Within South Africa the monogamous concept of marriage is fundamental*. In the instant case the union was, *ex facie* the pleadings, a polygamous one even though there may have

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618 Emphasis added.

619 The enactment of the *Marriage and Matrimonial Property Law Amendment Act* 3 of 1988 entailed that as from 2 December 1988 all civil marriages in South Africa were treated equally with the result that the default matrimonial property regime for all civil marriages is today the marriage in community of property.

620 1983 (1) SA 1006 (A).

> been "a tacit consensus between plaintiff and defendant to the effect that their marriage would be monogamous". *Their tacit understanding cannot affect the inherent nature of their relationship*. Under our law a marriage is regarded as polygamous if it is celebrated under tenets which allow the husband to take another wife during its subsistence, whether he does so or not. A potentially polygamous union is equated with a *de facto* polygamous union (see *Seedat's Executors v The Master (Natal)* 1917 AD 302 at 308).[621]

The influence of Christian-Nationalism and the resulting refusal to recognise plural forms of marriage was patent. Therefore, although no reported case law existed regarding the position of other potentially polygynous "purely religious 'marriages'" (such as Hindu marriages) it can be accepted with relative certainty that the legal position in *Ismail* would have been held to apply to such cases.

3.4.7.4 The winds of change prior to 1994

The South African law of marriage's gradual break with centuries of Roman-Dutch law began to become evident in the second half of the twentieth century. An example of this occurs within the context of the South African law of divorce.

Until shortly before the Second World War, the law of divorce was still based squarely on Roman-Dutch law and its reliance on the Reformational grounds of divorce. In 1935 two new grounds of divorce (namely incurable insanity for a period of seven years and the designation of a spouse as a habitual criminal coupled with a five-year period of imprisonment) were added to the common law grounds of divorce.[622] Despite this development, the South African law of divorce would retain the fault principle as its central criterion for another forty years until the coming into operation of the *Divorce Act* [623] on 1 July 1979. In terms of this Act, the fault principle was substituted by irretrievable breakdown of

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621 At 1019 (H) – 1020 (B), emphasis added.

622 Namely adultery and malicious desertion—see 3.4.6 above.

623 Act 70 of 1979.

marriage as the major ground of divorce.[624] The fundamental shift embodied in this new approach is encapsulated by Hahlo[625] who states that:

> In dissolving a marriage by divorce, the court does not kill a live marriage: it certifies that the marriage is dead.

This development not only served to align the law of divorce with international trends, but also constituted somewhat of a departure from the *dictum* of Boshoff J in *Holland v Holland* where it was stated that "[m]arriage is thus of interest to the State and its creation and destruction are regarded as matters which are to be determined by the State alone *and not in any degree by the mere will of the spouses themselves*"[626] in that a shift towards the contractarian model of marriage (as originally precipitated by the Anglican commonwealth model in the United Kingdom and later in the United States of America) became more evident in South Africa.[627]

In another dramatic and much-needed development, South African matrimonial property law was also modernised by the *Matrimonial Property Act* 88 of 1984. Although the marriage in community of property was retained as the default matrimonial property system,[628] the Act introduced the accrual system as a "deferred community of gains"[629] in order to assist spouses (more often than not women)[630] who were married with complete separation of property and who were often left out in the cold despite having "contribute[d] financially and otherwise to the growth of the other spouse's estate."[631] In addition, the Act also provided that

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624 See Hahlo 1985: 330.

625 1985: 331.

626 1973 (1) SA 897 (T) at 899 (H), emphasis added.

627 See Witte 1997: 181, 182 and 211 – 213 respectively.

628 This system originally only applied as the default system for whites, coloureds and Asians, and the default system for civil marriages between black persons was a marriage with complete separation of property. This remained the legal position until 2 December 1988—see note 619 above as well as the main text below.

629 Hahlo 1985: 304.

630 *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA) at par [21].

631 SALC 1982: 17.1.

the system of accrual sharing would apply automatically to all marriages out of community of property and out of community of profit and loss unless expressly excluded by an antenuptial contract.[632]

The *Matrimonial Property Act* [633] also vanquished the common law concept of marital power by abolishing it for all marriages (with the exception, initially, of marriages between black persons)[634] concluded after 1 November 1984. It is, however, worth mentioning that this Act was not the first to bring about substantial reform as far as marital power was concerned. Indeed, three decades prior to the 1984 Act marital power had already to some extent been curtailed by the *Matrimonial Affairs Act* 7 of 1953 leading to greater independence for the female spouse regarding both financial and parental aspects of marriage.[635] The death-knell for marital power was finally sounded on 1 December 1993 when the *General Law Fourth Amendment Act* [636] abolished the same in all marriages in South Africa regardless of when they had been concluded.

On 19 June 1985 the prohibition on so-called "mixed marriages" was removed when the *Prohibition of Mixed Marriages Act* 55 of 1949 was repealed.[637] Sexual intercourse between a "white person" and a "coloured person" was also decriminalised on the same day.[638] "Mixed" marriages concluded after this date

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632 Section 2.

633 88 of 1984.

634 Such marriages were however placed on an equal footing with all other marriages on 2 December 1988 with the coming into operation of the *Marriage and Matrimonial Property Law Amendment Act* 3 of 1988.

635 See Hahlo 1985: 18.

636 132 of 1993.

637 This Act was repealed by the *Immorality and Prohibition of Mixed Marriages Amendment Act* 72 of 1985—see Sinclair and Heaton 1996: 342 *et seq* for a comprehensive discussion.

638 This occurred by virtue of the amendment of the *Immorality Act* 23 of 1957. This Act has since been renamed, and is now referred to as the "*Sexual Offences Act* 23 of 1957."

were permitted, but such marriages concluded prior to this date were not automatically validated.[639]

The unequal application of the principles of matrimonial property law (in terms of which the "default" system that applied to all civil marriages other than those entered into between black persons was the marriage with community of property) was finally removed when the *Marriage and Matrimonial Property Law Amendment Act* [640] came into operation on 2 December 1988. Since that date, the proprietary consequences of all South African marriages are determined without reference to the race of the parties involved.[641]

In 1992, the *Domicile Act* [642] introduced the concept of "domicile of choice" and abolished the common law rule that a wife followed the domicile of her husband in terms of her "domicile of dependence."[643]

The greater recognition that the *Matrimonial Affairs Act* of 1953 provided to female spouses regarding guardianship finally came full circle when the *Guardianship Act* 192 of 1993 came into operation and provided that a woman was the guardian of her minor children and that such guardianship was equal to that exercised by the father of the children at common law.[644] 1993 also saw the abolition of "the one conjugal duty in respect of which a husband could exact compliance and yet escape the ordinary sanction of the criminal law" namely the right to demand sexual intimacy from his wife without the prospect of being prosecuted for rape.[645]

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639 The parties to such marriages could however apply to the Director-General of Home Affairs for a declaration of validity that was issued in terms of section 7 of Act 72 of 1985. If such a declaration was granted, the marriage was deemed to be valid from the date on which it was entered into (section 7(4)).

640 3 of 1988.

641 Section 1 of this Act repealed section 22(6) of the *Black Administration Act* 38 of 1927.

642 3 of 1992.

643 Heaton 2008(a): 45.

644 Section 1(1).

645 Section 5 of the *Prevention of Family Violence Act* 133 of 1993.

3.4.7.5 Preliminary conclusions

The discussion of the development of the law of marriage in South Africa leads to two preliminary conclusions. The first is that a broad parallel can be drawn between the developments in South Africa and what Merin[646] describes as a universal evolution of marriage in the West "from the private to the public sphere, from 'custom to law' and 'from sacrament to contract.'" South African law may however not have been exposed to the full spectrum of this process to the same extent as Western Europe, as the law in South Africa only began to develop at a time when the influence of the Reformation was at its most prominent, with the result that the notion of marriage *as a sacrament* would not have gained the foothold that it did in those jurisdictions. Nevertheless, important developments that were introduced during the epoch of the supremacy of the Catholic sacramental model (particularly those embodied in the *Decretum Tametsi* of 1563 and the *Political Ordinance* of 1580) formed (and continue to form) the backbone of the law of civil marriage in South Africa under the *Marriage Act* of 1961.[647]

Furthermore, it is clear that, beginning with the *Order in Council* of 1838, the institution of marriage has, from a legal point of view, been viewed as a secular institution, and that this position was continued with the promulgation of the *Marriage Act* 25 of 1961.[648] As Farlam JA observed in *Minister of Home Affairs v Fourie*:

> It is true that it is seen by many to have a religious dimension also, but that is something with which the law is not concerned. Even though clerics are appointed marriage officers, when they solemnise marriages they do so in a twofold capacity: first, as clerics, giving the *benedictio ecclesiae* to the couple and affording them the opportunity to take

646 2002: 10.

647 *Minister of Home Affairs v Fourie* 2005 (3) SA 429 (SCA) at par [78].

648 *Minister of Home Affairs v Fourie* 2005 (3) SA 429 (SCA) at par [80].

> their vows at a religious service; and, secondly, as State marriage officers, bringing into existence a secular legal bond recognised by the State.

Consequently, the civil marriage as it existed even prior to 1994 allowed the spouses themselves to attach any form of religious significance to the marriage if they so chose, regardless of whether it was Protestant, Catholic, Islamic or otherwise. The only condition imposed was that such a marriage had to be solemnised according to the requirements of the Act. This relative freedom notwithstanding, no deviation was permitted beyond the boundaries of the civil marriage as it had developed in the Western legal tradition, with the result that no provision was made for (polygynous) customary or "purely religious 'marriages.'" While it is therefore clear that pre-1994 South Africa did not adhere to any particular religious model of marriage (such as the Calvinist model) *per se*, the authoritarian influence of Afrikaner Christian-Nationalism and the draconian enforcement of this ideology on the majority of South Africans is clearly evident. In this regard the evolution from "sacrament to contract" in pre-1994 South Africa was drastically out of kilter with developments in the West, and it is clear that the general model of marriage that dominated the scene at the turn of the twentieth century in America and England (namely that marriage was "a permanent monogamous union between a fit man and a fit woman of the age of consent, designed for mutual love and support, and for mutual procreation and protection" that was required to be formalised "before civil and/or ecclesiastical authorities" and was governed by a male patriarch)[649] continued to prevail in South Africa until the first moves towards greater "contractariansm" and equality between man and wife in the late 1970's.

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649 Quotes taken from Witte 1997: 194, 195.

4. ASCERTAINING THE ESSENCE OF THE PRE-1994 CIVIL MARRIAGE IN SOUTH AFRICA—THE *CONSORTIUM OMNIS VITAE*

The preliminary conclusions drawn from the preceding discussion highlight the fact that, beginning with the Cape Colony in 1838, the South African civil marriage has come to be recognised as a secular institution. Consequently, the evolution of civil marriage in South Africa has followed the same trends as those generally experienced by the Western legal tradition, and it is trite that the South African civil marriage—even prior to 1994 (and in fact at the earliest since 1838)—did not seek to force spouses to conclude a marriage that conformed to any particular religious dogma. This notwithstanding the general *framework* within which civil marriage functioned was shaped by and confined to the boundaries demarcated by Afrikaner Christian-Nationalism as the "civil religion"[650] based on male patriarchy and intolerant of any form of pluralism. As such, until the 1990's the South African civil marriage (apart from a few exceptions that were generally only prospective in nature)[651] resembled the general model of marriage that prevailed in both America and in England at the turn of the twentieth century, in the sense of being a model as yet untouched by many of the reforms occasioned by the Enlightenment which were aimed at "[purging] the traditional household and community of its excessive paternalism, patriarchy and prudishness, and thus to render the ideal structure and purpose of marriage a greater reality for all."[652] The first and second "waves" of reform occasioned by the Enlightenment contractarian model would only begin to reach South African shores during the final decade of *Apartheid* rule.

Accepting, then, that even prior to the era of constitutional democracy "the law [was] concerned only with [an admittedly narrow concept of] marriage as a

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650 See the reference to Moodie in the main text above (at 3.4.7.3).

651 For example, the abolition of marital power initially only applied to marriages concluded after 1984 and was only abolished with retrospective effect in 1993—see 3.4.7.4 above.

652 *Per* Witte 1997: 208.

secular institution"[653] the question arises as to with what, exactly, the law was "concerned." That a portion of the rationale behind the requirements of the formation and dissolution of marriage was (and is) to protect the interests of the State and outsiders is patent.[654] Nevertheless, it is submitted that regardless of the theological model encapsulating it or of the legal nature ascribed to it, the essence of a marriage has always been found in the invariable consequence of marriage known as the *consortium omnis vitae*, which sets the marriage apart as a relationship *sui generis*,[655] for, as Hahlo[656] states "although there are some consequences of marriage which the parties may vary or exclude by antenuptial or postnuptial contract … there are others which, being the essence of matrimony, cannot be varied or excluded. Such are the duty to live together, the duty to observe conjugal fidelity, and the duty to support each other." The distinctive hallmark of marriage, therefore, is that it instantaneously creates "a physical, moral and spiritual community of life"[657] or *consortium omnis vitae*. Due to its abstract nature, this concept is not easy to define.[658] Descriptions which have, however, been met with the approval of the highest Court in South Africa include that it is "an abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage" which include "[c]ompanionship, love, affection, comfort, mutual services, sexual intercourse"

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653 *Per* Farlam JA in *Minister of Home Affairs v Fourie* 2005 (3) SA 429 (SCA) at par [78].

654 "Marriage is not like an ordinary contract which can be terminated by the mere consent of the parties and the reason why this is so is because it is in the interest of the State that the marriage tie, which involves a matter of the status of the parties and the interests of the offspring, should not be lightly dissolved"—*per* Centlivres JA in *Carter v Carter* 1953 (1) SA 202 (A) at 205 (B) – (C); *Holland v Holland* 1973 (1) SA 897 (T) at 899 (H).

655 *Rattigan v Chief Immigration Officer, Zimbabwe* 1995 (2) SA 182 (ZS) at 188 (B).

656 1985: 22.

657 *Per* O'Regan J in *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at par [33].

658 Church 1979: 379; Cronjé and Heaton 2004: 49; Visser and Potgieter 1998: 74; Smith and Grobler 2005: 754.

all of which "belong to the married state."[659] In *Peter v Minister of Law and Order* it was stated that:[660]

> The concept of matrimonial *consortium* has been termed an abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage … These embrace intangibles, such as loyalty and sympathetic care and affection, concern etc; as well as the more material needs of life, such as physical care, financial support, the rendering of services in the running of the common household or in a support-generating business, etc.[661]

In *T v T* [662] *consortium* was eloquently described as comprising three core elements, namely "(i) *eros* (passion), (ii) *philia* (companionship) and (iii) *agape* (self-giving, brotherly love)."[663]

Despite the fact that the move towards the contractarian model of marriage and the introduction—*inter alia*—of no-fault divorce may have led to the duties imposed by *consortium* becoming merely hortative in nature,[664] this does not detract from the fact that *consortium* sets marriage apart from other relationships based on *consensus*. Although the infringement of *consortium* is not actionable in delict against the other spouse, the *consortium* can be protected against outsiders by the institution of actions for adultery,[665] harbouring or enticement.[666] The existence of the *consortium* is also the reason why communications between

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659 *Grobbelaar v Havenga* 1964 (3) SA 522 (N) at 525 (D) – (E) quoting from the English case of *Best v Samuel Fox Co. Ltd*. (1952) 2 All E.R. 394. The *Grobbelaar* case was referred to with approval in *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at par [33].

660 1990 (4) SA 6 (E).

661 At 9 (G) – (H), referred to with approval in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [46] (see note 61 of the judgment) and *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at par [33].

662 1968 (3) SA 554 (R).

663 At 555 (D) – (E), emphasis added.

664 See Sinclair and Heaton 1996: 423.

665 See for example *Biccard v Biccard and Fryer* (1891-1892) 9 SC 473; *Viviers v Kilian* 1927 AD 449; Neethling *et al* 2006: 326.

666 See in general Cronjé and Heaton 2004: 50, 51; Neethling *et al* 2006: 327.

spouses are generally privileged in both criminal and civil proceedings,[667] and why the communication between spouses of defamatory words relating to an outsider does not comply with the publication requirement for the purposes of an action for defamation.[668]

The nub of the position pointed out above is that, regardless of the particular theological or legal model of marriage that applies in any given legal system (whether it be sacramental or contractarian in nature or anything in-between or whether it is controlled by State or Church), the *consortium omnis vitae* between spouses is the objective hallmark of marriage that transcends the prescripts of any obligatory or uniformly-applied religious dogma or legal form. Bearing this in mind, it is apposite to examine the core elements of *consortium* in more detail.

Referring with approval to De Vos Hugo J's conclusion in *Joshua v Joshua*[669] where the learned judge held that

> [m]arriage is rooted in the biotic aspect of life and is based on the difference of sex. It has an unmistakable sexual basis. As an institution it has its foundation in the biotic aspect of reality and finds its fulfilment in the moral sphere where love between the spouses and between the parents and the children is the governing rule

Robinson[670] concludes that marriage is gender-based and morally designated. In dealing with the question as to whether the concept of *consortium* can be used as a yardstick for determining whether a marital relationship is no longer "normal"

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667 Robinson *et al* 2009: 110. See Section 198 of the *Criminal Procedure Act* 51 of 1977 and section 10(1) of the *Civil Proceedings Evidence Act* 25 of 1965.

668 Sinclair and Heaton 1996: 438; Neethling *et al* 2006: 308; *Whittington v Bowles* 1934 EDL 142 at 145.

669 1961 (1) SA 455 (GW) at 459 (B).

670 1991: 509: "Ofskoon daar veel meer te sê is oor die struktuur van die huwelik soos pas uiteengesit, word met die gevolgtrekking volstaan dat die huwelik gelsagtelik gefundeer en eties bestem is."

for the purposes of section 4(1) of the *Divorce Act* 70 of 1979,[671] he reaches an important conclusion: Of the three core elements described in *T v T*, he concludes that only the first, namely *eros*, is capable of precise juridical definition (such as in the case of adultery), due to its connection to the biotic aspect of marriage. However, as for *philia* and *agape*, these elements are not capable of precise juridical definition due to their moral designation. For this reason, while it may be sufficient to rely on the subjective feelings of the plaintiff as far as *eros* is concerned, the further criterion posed in the *Divorce Act*, namely reasonableness, should be used to ascertain whether, *objectively speaking*, the *philia* and *agape* elements of *consortium* are no longer present.[672] Robinson[673] concludes that the concept of *consortium* is too vague to be of assistance in formulating a juridical definition of a "normal marriage relationship."

It is submitted that this line of reasoning is of significance for this study, as the appreciation of the impossibility of formulating juridical definitions for the core aspects of *consortium omnis vitae* can be used as a platform for broadening this concept beyond the confines of civil marriage in post-1994 South Africa. This contention will be dealt with later in this study. Nevertheless, it can be accepted that prior to the democratic era the socio-legal mechanisms were not yet in place for this to be achieved.

To return to the position prior to 1994, two conclusions can be reached, namely (i) that regardless of any particular (constricted) model of marriage that obtained in South Africa prior to 1994, the distinctive hallmark thereof was the *consortium omnis vitae* that existed between the spouses; and (ii) that the recognition of this *consortium omnis vitae* was confined to heterosexual marital unions that complied with the concept of civil marriage as it had developed in the Western

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671 According to section 4(1) "[a] court may grant a decree of divorce on the ground of the irretrievable break-down of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them."

672 Robinson 1991: 510

673 1991: 511.

legal tradition until the turn of the twentieth century that functioned within a framework based on male patriarchy and was bereft of any form of pluralism.

5. CONCLUSION

The conclusions reached in this Chapter can be divided into two categories, namely those that are of a purely historical nature and those that are of a legal nature. Regarding the former category, it has been seen that although the question as to whether or not the *Octrooi* of 1602 indeed provided the VOC with the competence to legislate in the East is somewhat of a moot point today, the answer to this question is not as clear-cut as many historians believe, and that there is some room for arguing that the granting of such a power can be inferred from a broader interpretation of this document. Nevertheless, the fact remains that the VOC's officers in Batavia did legislate, that this legislation was applied at the Cape of Good Hope, and that the Cape government also legislated of its own accord. The *Political Ordinance* of 1580 was applied in the East Indies and, as a consequence, at the Cape as from the earliest days of Dutch rule.[674] As such, it constitutes one of the building blocks of the South African (family) law landscape today. Indeed, as mentioned earlier, it appears that it is not too far-fetched to submit that the *Political Ordinance* of 1580 is the very reason for the adoption of the Roman-Dutch law in the Cape in the first place, later leading to the creation of that to which we today refer to as "the common law of South Africa." To put it differently, had it not been for the incorporation of the *Political Ordinance* of 1580 into the *Statutes of Batavia*, South Africa's legal heritage might have adopted a markedly different guise. As a key component of the *Political Ordinance* of 1580, the law of marriage has played a vital role in the creation and development of the South African legal system as we know it today.

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674 De Wet 1985: 34; *Spies v Lombard* 1950 (3) SA 469 (A) at 482 (D) – (E).

As far as the legal conclusions are concerned, it is clear that although control over the institution of South African marriage originally vacillated between Church and State, the two systems have largely been able to co-exist with one another: In the early days of Dutch rule, the system allowed for a type of symbiotic relationship between the two poles with both the secular component (in the form of verification of compliance with secular law) and the religious component (the blessing) being required in order to constitute a valid marriage. With the return of Dutch rule to the Cape in the early 1800's, the secular marriage was introduced to the Cape, only for the Church to regain control in 1806. As from 1838 the fact that civil marriage was indeed a secular institution pervaded throughout the Cape Colony, Natal and the two Boer republics, and by the time that the various marriage laws were consolidated in 1961, there was no doubt that the new uniform South African *Marriage Act* was "concerned solely with marriage as a secular institution."[675] This notwithstanding, spouses to a civil marriage were free to attach religious significance to their marriage and to have it solemnised by duly appointed clerical marriage officers.

The evolution of civil marriage up until 1994 demonstrated, followed and embodied the same tendencies as those found in the Western legal tradition's shift towards a contractarian model of marriage. Nevertheless, while the rest of the Western world continued to shift closer towards a contractarian model, the shift in South Africa did not—until the final decade of *Apartheid* rule—begin to progress beyond the general model encountered in the United States of America and in the United Kingdom at the turn of the twentieth century. The requirements for the formation of marriage under the 1961 *Marriage Act* remained firmly rooted in the Roman-Dutch law *Political Ordinance* of 1580 and the *Decretum Tametsi* of 1563 that had evolved from the Catholic model. In this regard, Witte and Reid's[676] remark that "[m]odern marriage and family law has been decisively shaped by the medieval conception of marriage as a sacrament, by the creation

675 *Per* Farlam JA in *Minister of Home Affairs v Fourie* 2005 (3) SA 429 (SCA) at par [78].

676 1999: 648.

of an intricate body of marriage law, and by the enforcement of that law in church courts" is particularly appropriate in the South African context.

Despite the evolution of marriage as an institution, this Chapter has shown that the essence and objective hallmark of marriage has always been the *consortium omnis vitae* that existed between the spouses. In South Africa this *consortium* was, however, only recognised in the Westernised model of civil marriage, with the result that customary marriages and "purely religious 'marriages'" were not recognised as such. This state of affairs in effect implied that parties to such "marriages" were forced either to conclude a monogamous civil marriage that complied with the *Marriage Act*, or to resign themselves to the fact that their (potentially polygynous) customary or "purely religious 'marriage'" was null and void according to South African family law.

Consequently, even though the *Marriage Act* of 1961 did not impose a particular theological model on the South African civil marriage, the fact that it did not discriminate on the grounds of religion was not sufficient: By failing to recognise the *consortium omnis vitae* that existed in other marital relationships (such as customary or purely religious marriages) and confining the institution of marriage to the civil marriage in the legacy of the Western legal tradition, it was patent that the law of marriage did not cater for the marital needs of a multifarious South African society. It goes without saying that such an obdurate and marginalising approach to *marriage* entailed that there was little chance of any recognition of *consortium omnis vitae* between the partners to non-formalised life partnerships.

The brief analysis conducted towards the end of the Chapter shows that although it is certainly true that many marital rules that discriminated against women may have been changed in the early 1990's "in a frenetic bid by the National Party to capture the votes of women in the April 1994 election"[677] it must also be remembered that certain salutary developments (such as the introduction of no-

[677] Sinclair and Heaton 1996: 69.

fault divorce, the accrual system and the legislative competence to redistribute assets) occurred even during the *Apartheid* era. When all is said and done it is undoubtedly true that, as Sinclair and Heaton[678] state "[t]he National Party government deserved commendation for its sudden flash of inspiration towards ensuring equality."

Finally, the investigation into the models of marriage in the Western tradition has shown that although the move towards contractarianism originally (that is to say in the so-called "first wave"[679] of reform) accomplished much in terms of furthering the rights to equality and freedom of women and the better protection of children, latter-day developments in this regard may—quite paradoxically—have the effect of undermining these gains. It has however been suggested that the institution of marriage *per se* should not solely be tasked with preventing this phenomenon, but that legislation based on a robust domestic partnership rubric that functions both alongside (and simultaneously as a "catch-all" to) marriage in a broader interpersonal relationships framework is required in order effectively to shoulder not only this burden, but also, in taking the needs of a pluralistic society into account, to recognise the *consortium omnis vitae* that exists between the partners themselves and to provide adequate protection for them and for their children both during the existence of the relationship as well as after the termination thereof.

In the Chapter that follows, the post-1994 developments pertaining to marriage and analogous relationships will be considered with a view towards ascertaining whether or not such a domestic partnership rubric (and its attendant legislation) is required in South Africa.

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678 1996: 435.

679 Witte 1997: 207.

CHAPTER 3:

ASSESSING THE NEED FOR AND FORMAT OF A DOMESTIC PARTNERSHIP RUBRIC AND ATTENDANT LEGISLATION IN SOUTH AFRICA: THE DEMOCRATIC CONSTITUTIONAL DISPENSATION AND ITS BROADENING EFFECT ON MARRIAGE AND THE CONCEPT OF *CONSORTIUM OMNIS VITAE*

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1. INTRODUCTION

At midnight on the 27th of April 1994 the (interim) *Constitution of the Republic of South Africa Act* 200 of 1993 came into operation and South Africa entered into a democratic constitutional era, the cornerstone of which was constituted by chapter 3 of the Act which accorded a number of fundamental rights including a right to equality,[1] human dignity,[2] privacy[3] and freedom of religion, belief and opinion[4] to "every person." Conspicuously absent from both the 1993 *Constitution* and its 1996 successor, was a right to marry. In certifying the 1996 *Constitution*, the Constitutional Court remarked in this regard that:

> The absence of marriage and family rights in many African and Asian countries reflects the multi-cultural and multi-faith character of such societies. *Families are constituted,*

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1 Section 8.

2 Section 10.

3 Section 13.

4 Section 14. The recognition of this fundamental right in 1994 implied that what Bekink (2008: 481) describes as the "intrinsic uneasy triangle between constitutionalism, secularism and the right to freedom of religion" that had become a feature of democracies the world over also became a feature of South African law. This "uneasy triangle" will be referred to in the discussion of the *Civil Union Act* 17 of 2006 in Chapter 8.

> *function and are dissolved in such a variety of ways, and the possible outcomes of constitutionalising family rights are so uncertain, that constitution-makers appear frequently to prefer not to regard the right to marry or to pursue family life as a fundamental right that is appropriate for definition in constitutionalised terms*. They thereby avoid disagreements over whether the family to be protected is a nuclear family or an extended family, or over which ceremonies, rites or practices would constitute a marriage deserving of constitutional protection … On the one hand, the provisions of the [new text of the 1996 *Constitution*] would clearly prohibit any arbitrary State interference with the right to marry or to establish and raise a family. [Section] 7(1) enshrines the values of human dignity, equality and freedom, while [section] 10 states that everyone has the right to have their dignity respected and protected. *However these words may come to be interpreted in future, it is evident that laws or executive action resulting in enforced marriages, or oppressive prohibitions on marriage or the choice of spouses, would not survive constitutional challenge*… On the other hand, *various sections in the [new text] either directly or indirectly support the institution of marriage and family life*. Thus, [section] 35(2)(f)(i) and (ii) guarantee the right of a detained person to communicate with, and be visited by, his or her spouse or partner and next of kin. There are two further respects in which the [new text] deals directly with the issue, and both relate to family questions of special concern. The first deals with the rights of the child, wherein the right to family and parental care or appropriate alternative care is expressly guaranteed ([section] 28(1)(b)). The second responds to the multi-cultural and multi-faith nature of our country. [Section] 15(3)(a) authorises legislation recognising 'marriages concluded under any tradition or a system of religious, personal or family law', *provided that such recognition is consistent with the general provisions of the [new text]*.[5]

The thrust of the decision not to include a specific right to marry or to family life can therefore be summarised by stating that the Court found such rights to be unnecessary in view of the wide array of constitutional guarantees already included in the 1996 *Constitution*. An example of the way in which this could be

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[5] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC) at par [99] – [102].

achieved appeared a few years later in *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs*[6] (hereafter *Dawood v Minister of Home Affairs*) where the Constitutional Court held that "it cannot be said that there is a more specific right that protects individuals who wish to enter into and sustain permanent intimate relationships than the right to dignity in s 10."[7] As a consequence, Cronjé and Heaton[8] correctly conclude that the right to dignity in effect protects the right to family life, and, moreover, that the latter right includes the right to a *consortium omnis vitae*.[9]

2. EXPANDING MARRIAGE TO INCLUDE CUSTOMARY MARRIAGES

One of the first major developments that was necessary for the institution of marriage better to accommodate the needs of a multifarious society was the necessity for it to recognise (potentially polygynous) marriages concluded in accordance with customary law (i.e. the customs and usages traditionally observed by and forming part of the culture of the indigenous African peoples of South Africa),[10] and to this end the *Recognition of Customary Marriages Act* 120 of 1998 came into operation on 15 November 2000. An obvious effect of this development was that customary marriages that complied with the Act would henceforth be recognised alongside monogamous civil marriages concluded in accordance with the *Marriage Act* 25 of 1961. However, in keeping with the notion of marriage as it had developed in the Western legal tradition, the

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6 2000 (3) SA 936 (CC).

7 Par [36].

8 2004: 51.

9 The authors reach this conclusion as a consequence of the Court in *Dawood*'s finding (in par [36]) "Marriage 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."

10 Section 1 definition of "customary law" in the *Recognition of Customary Marriages Act* 120 of 1998.

institution of civil marriage remained an institution reserved for monogamous heterosexual couples.

3. GAY AND LESBIAN LIFE PARTNERS PAVE THE WAY TOWARDS SAME-SEX MARRIAGE

Unmarried life partners have never enjoyed comprehensive legal protection at common law.[11] Male same-sex couples found themselves in an even worse position in that sexual conduct between them was criminalised.[12] In 1994 South Africa however became the first country worldwide to specifically include "sexual orientation" as a listed ground on which unfair discrimination was prohibited,[13] and this provision was retained in the 1996 *Constitution.*[14] Thus, according to De Vos,[15] the first of four main objectives of the National Coalition for Gay and Lesbian Equality—a coalition comprising 43 gay and lesbian organisations that was established in 1994 with the overarching aim of striving for equality for gays and lesbians through legal reform—was realised. This having been achieved, the Coalition's second objective was accomplished on 9 October 1998 when in *National Coalition for Gay and Lesbian Equality v Minister of Justice*[16] (the so-called "sodomy case") the Constitutional Court struck down the common law crime of sodomy (as well as a number of attendant laws that prohibited all-male sexual relations), and held that private consensual intercourse *per anum* between adult males was legally permissible. In a separate but concurring judgment Sachs J expressed the telling sentiment that

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11 Protection at common law is discussed in detail in Chapter 6.

12 See 3.4.4 in Chapter 2.

13 De Vos 2007(a): 435; De Vos and Barnard 2007: 797, 798.

14 According to Robson (2007: 418) "[t]his accomplishment should never be minimized and for queer legal scholars in other nations, including the United States, it is a cause for envy."

15 2007(a): 439 – 443.

16 1999 (1) SA 6 (CC).

> [i]n my view, the decision of this Court should be seen as part of a growing acceptance of difference in an increasingly open and pluralistic South Africa. It leads me to hope that the emancipatory effects of the elimination of institutionalised prejudice against gays and lesbians will encourage amongst the heterosexual population a greater sensitivity to the variability of the human kind.[17]

The first chinks in the armour of the heretofore exclusive recognition of marital unions between persons of the opposite sex were beginning to appear and, as a victory for gay and lesbian equality and dignity,[18] this judgment paved the way for the Coalition to embark on its third objective, namely to challenge discrimination against homosexual couples by way of constitutional litigation.[19] As far as this objective was concerned, the first watershed case involving same-sex life partnerships appeared in the form of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs.*[20] This case will be discussed in detail in Chapter 5, but for now it will suffice to say that in a unanimous judgment the Constitutional Court expressly stated that although heterosexual civil marriage was the only form of conjugal union that was legally recognised at the time (the judgment was delivered prior to the enactment of the *Recognition of Customary Marriages Act*),[21] "there is another form of life partnership which is different from marriage as recognised by law … [that is] represented by a *conjugal relationship between two people of the same sex.*"[22] Thus, a "new legal entity" was born.[23] Moreover, concerning the *consortium omnis vitae* between partners to such a life partnership the Court made the ground-breaking ruling that: [24]

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17 Par [138].

18 Bilchitz and Judge 2007: 469: "The ruling by the Constitutional Court signified a critical shift in the 'status, moral citizenship and sense of self-worth' of lesbian and gay people."

19 De Vos 2007(a): 439. Also see Bonthuys 2007: 528.

20 2000 (2) SA 1 (CC).

21 Act 120 of 1998. The judgment in the *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* case was delivered on 2 December 1999 while Act 120 of 1998 only came into operation on 15 November of the following year.

22 Par [36].

23 De Vos 2007(a): 450.

24 At par [53].

(iv) gays and lesbians in same-sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms, including affection, friendship, eros and charity;

(v) they are likewise as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household;

(vi) they are individually able to adopt children and in the case of lesbians to bear them;

and, most significantly:

(vii) in short, they have the same ability to establish a *consortium omnis vitae*…

The *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* case therefore confirmed that the "essence and objective hallmark" of a marriage as identified in Chapter 2 had the potential of being fully extended to same-sex life partners (it will however be seen in Chapter 5 that full recognition of such *consortium* has not yet taken place).

The *Home Affairs* case was to set the tone for numerous *ad hoc* judicial and legislative[25] extensions of the law of (civil) marriage to same-sex life partners, all of which are considered in detail in Chapters 5 and 6. These extensions included the right to inherit intestate,[26] to adopt children jointly[27] and to claim for loss of support as a result of the death of a breadwinner.[28] Interestingly enough, the extensions permitted by the Courts had the effect that, in less than a decade,

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25 It is interesting to note that the first legislative provision for unmarried heterosexual cohabitants occurred already in 1936—see Chapter 6. It is nevertheless not too far-fetched to assume that the bulk of subsequent recognition was stimulated by cases such as *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*.

26 *Gory v Kolver NO* 2007 (3) SA 97 (CC); 2007 (3) BCLR 294 (CC).

27 *Du Toit v Minister of Welfare & Population Development (Lesbian & Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC); (2002 (10) BCLR 1006).

28 *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA).

South African family law evolved from a position where male same-sex activity was criminalised to a position where same-sex life partners enjoyed better legal protection than their unmarried heterosexual counterparts.[29] Whether or not this created a healthy system of family law is however debatable, as these piecemeal extensions have created a complex patchwork of laws that have largely excluded heterosexual life partners from their ambit.[30] For example, heterosexual life partners currently have no right to adopt a child jointly, to inherit intestate from the first-dying partner or to institute a claim for loss of support in the event of the death of a breadwinner, while same-sex life partners are ostensibly[31] entitled to all of the same.[32] Consequently, while the *ad hoc* extensions were beneficial for same-sex life partners in particular, it could be argued that the anomalies so created had a less wholesome effect on the family law landscape in general. This notwithstanding, the institution of civil marriage remained an institution that was reserved for monogamous heterosexual couples. However, the specific inclusion of the ground of sexual orientation as a listed ground in the equality clause and the equality jurisprudence that had evolved in the wake of the two *National Coalition* cases meant, as Smith and Robinson[33] point out, that "it was only a matter of time before same-sex couples would approach the Courts for an answer to the million dollar question as to whether or not the law could continue to deny them the right to marry one another." This being so

> [i]t is important to remember that the eventual adoption of such legislation was not always as inevitable as it now seems. A combination of luck, wise strategic leadership and fortitude eventually made this achievement possible… the early jurisprudence developed by the Constitutional Court set the stage for later victories because it brought

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29 Smith and Robinson 2008(b): 439; De Vos 2007(a): 462; Bilchitz and Judge 2007: 496; De Vos and Barnard 2007: 823, 824.

30 See for example Smith and Robinson 2008(a) and 2008(b).

31 See 5 below where the effect of the validation of same-sex marriage on the "choice argument" is discussed.

32 See Smith and Robinson 2008(a): 368 *et seq*. These and other inconsistencies are continually referred to throughout this study.

33 2008(b): 423, 424.

> on board judges who might have had some misgivings about the extension of marriage rights to same-sex couples.[34]

The validation of same-sex marriages did eventually occur, but only, as a recent contribution by De Vos[35] describes, after the carefully planned "'conservative' litigation strategy" (involving the *ad hoc* extensions described above) had begun to pay dividends.

The specific process which was eventually to culminate in South Africa becoming the first country on the African continent to recognise same-sex marriages[36] was set in motion when a lesbian couple approached the Transvaal Provincial Division of the High Court[37] for a *mandamus* directing the Minister and the Director-General of Home Affairs (the respondents) to register their "sincere and abiding relationship" of 8 year's duration as a marriage in terms of the 1961 *Marriage Act*.[38] Not surprisingly, this application was unsuccessful on the basis *inter alia* that the *mandamus* sought would "compel the respondents to do what is unlawful" both according to common law and the Act.[39] After being granted leave to appeal against this order to the Supreme Court of Appeal, the couple opted instead to approach the Constitutional Court directly; an application that was refused on the grounds that the interests of justice required the Supreme Court of Appeal first to hear the matter.[40] On 30 November 2004 a majority decision of the latter Court in the case of *Fourie v Minister of Home Affairs*[41] found the common law definition of marriage as a heterosexual union to be invalid and held that it was to be "developed to embrace same-sex partners as follows: 'Marriage

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34 De Vos 2007(a): 434.

35 See in general De Vos 2007(a).

36 http://home-affairs.pwv.gov.za/media_releases.asp?id=370 (accessed on 18 October 2007).

37 Now the North Gauteng High Court in consequence of the *Renaming of High Courts Act* 30 of 2008.

38 25 of 1961.

39 At 5.

40 *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae); Lesbian & Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) at par [8] and [9].

41 2005 (3) SA 429 (SCA).

is the union of two persons to the exclusion of all others for life.'"[42] Furthermore, the Court held that same-sex couples would be capable of marrying one another in terms of the *Marriage Act* of 1961, provided that such a marriage complied with the formalities of this Act.[43] The latter portion of the finding posed a particular problem for the applicant couple (the appellants) as well as for other similarly-situated couples, in that section 30(1) of the *Marriage Act* prescribed a default marriage formula to be used in the absence of an alternative formula that had been approved by the Minister of Home Affairs. By specifically making use of the words "husband" and "wife" this formula was clearly only capable of applying to heterosexual couples.[44] Furthermore, the fact that same-sex marriages had never been legally sanctioned up to that point meant that the Minister was not capable of approving any alternative marriage formula that catered for such couples. However, the development of the common law so as to provide for same-sex marriages would remove this impediment with the result that the Minister could approve such an alternative marriage formula if she so chose, provided, of course, that an application for such approval had been brought to begin with.[45] That this development was unlikely to occur became evident when the State sought leave to appeal against the Supreme Court of Appeal's judgment. The appellants were also not satisfied with the latter judgment as the development of the common law alone was insufficient to permit them to marry. As a result, they sought leave to cross-appeal against the Supreme Court of Appeal's judgment. Both of the applications for leave were granted, and the matter was taken to the Constitutional Court.[46]

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42 Par [49](2)(a).

43 Par [49](2)(b).

44 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at par [26] *et seq*. It is interesting to note that the impediment posed by section 30(1) was overlooked by the appellants' counsel, with the result that the Supreme Court of Appeal could only grant "some portion" of the relief sought—see par [34] and [35].

45 *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae); Lesbian & Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) at par [33].

46 *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae); Lesbian & Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) at par [33].

The correctness of the Constitutional Court's judgment in the landmark case of *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae); Lesbian & Gay Equality Project v Minister of Home Affairs*[47] (hereafter "*Minister of Home Affairs v Fourie*") falls beyond the scope of this study. For this reason the rationale behind the decision to validate same-sex marriages will not be questioned, and the fact that same-sex marriage is permitted in South Africa will be accepted without further comment. Nevertheless, a distinction must be drawn between the *principle* and its *manifestation*, (or to coin a phrase quoted by De Vos, between "product" and "process")[48] and in the latter regard the legislative means by which same-sex marriages have been recognised in South Africa will be investigated in more detail in the concluding chapters of this study.[49] Suffice therefore to say that on 1 November 2005 the Constitutional Court held both the common law definition of marriage as well as section 30(1) of the *Marriage Act* to be unconstitutional to the extent that they did not provide for same-sex couples, and gave the Legislature a period of one year within which to "correct the defects." In the event of Parliament failing to comply with this order within the prescribed one year period, the Court held that the impugned section of the *Marriage Act* would automatically be read as if it provided for same-sex marriages, with the result that same-sex couples would henceforth be permitted to marry under this Act.[50] On 30 November 2006 Parliament met the deadline by enacting the *Civil Union Act* 17 of 2006, which provides for monogamous same- or opposite sexed couples[51] either to marry one another or to enter into a civil partnership, provided that they are at least 18 years of age and not already married to anyone else.[52] Section 13 of the Act (which will be discussed in more detail in Chapter 8) extends, *inter alia*, all the invariable consequences of a civil

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47 2006 (1) SA 524 (CC).

48 2007(a): 446.

49 See Chapter 8.

50 At 585 (A) – 586 (J).

51 Bilchitz and Judge 2007: 483. See Smith and Robinson 2008(a) and (b) for a full discussion of this issue. Bonthuys (2007: 530 (note 20)) presumes that the Act caters only for same-sex couples, but states that "[t]his uncertainty must be clarified."

52 Section 1 definition of "civil union" read with section 8 requirements for solemnisation and registration of a civil union.

marriage under the *Marriage Act* 25 of 1961 to persons who have either married one another or entered into a civil partnership in terms of the *Civil Union Act*.[53] An obvious consequence hereof will be that the *consortium omnis vitae* created by a marriage under the 1961 Act will apply *ipso facto* and *de iure* to spouses or civil partners under the 2006 Act. In so doing, the Act provides homosexual couples—who, up until that point only had the "*ability to establish*"[54] a *consortium omnis vitae*—with the means to do so in a manner that is just as comprehensive as for heterosexual spouses, and, moreover, also binding on third parties. As for the position of homosexual couples who despite the enactment of Act 17 of 2006 have elected not to marry or to enter into a civil partnership, the extent (if any) to which the pre-*Civil Union Act ad hoc* judicial extensions of the invariable consequences of marriage will continue to be recognised is discussed in Chapter 5. The position as far as the extent to which the law recognises a *consortium omnis vitae* between such unmarried life partners will also be examined in that Chapter.

In sum, it is clear that the inclusion of sexual orientation as a listed ground in section 9 of the *Constitution* catapulted South African family law into the forefront of a transformative constitutionalist family law era; a fact that was epitomised by the subsequent validation of same-sex marriages. Nevertheless, a further pressing issue that was touched on in Chapter 2 remains, namely the position of "spouses" in what may be termed "purely religious 'marriages.'"

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53 According to section 13 of this Act (italics added):

"(1) The legal consequences of a marriage contemplated in the *Marriage Act* apply, with such changes as may be required by the context, to a civil union.

(2) With the exception of the *Marriage Act* and the *Customary Marriages Act*, any reference to-

(a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and

(b) husband, wife or spouse in any other law, including the common law, includes a civil union partner."

54 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [53], emphasis added.

4. "PURELY RELIGIOUS 'MARRIAGES'" THAT DO NOT COMPLY WITH SOUTH AFRICAN MARRIAGE LEGISLATION

In this regard, a judgment of the Transvaal Supreme Court in 1905 can be taken as a convenient starting point. In *Mashia Ebrahim v Mahomed Essop* [55] Sir James Rose Innes (later Chief Justice of the Union of South Africa)[56] held that, as the Cape Colony's *Marriage Act* 16 of 1860 permitted the Governor to appoint marriage officers "who profess the Mohamedan religion" such a marriage, provided that it were solemnised in accordance with the Act "would still be a valid marriage, a monogamous marriage, a marriage which both in [the] Cape Colony and here would prevent the parties from marrying again during its existence." An obvious requirement for such a marriage would be that it must be monogamous for

> it is quite certain that if this marriage were a polygamous one it would not be recognised in this country, no matter whether it were recognised as valid in other countries or not. With us marriage is the union of one man with one woman, to the exclusion, while it lasts, of all others; and no union would be regarded as a marriage in this country, even though it were called and might be recognised as a marriage elsewhere, if it was allowable for the parties to legally marry a second time during its existence.[57]

In 1917 the proscription of polygamy in the law of matrimony of the Union of South Africa was reiterated by the highest Court in *Seedat's Executors Appellant*

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55 1905 TS 59.

56 Sir James Rose Innes, who has been described as "the best judge South Africa has known" (Kahn 1991: 98) was born in 1855 and practiced at the Cape Bar from 1878 – 1890. He took silk in 1890 and was knighted in 1901. He was appointed Judge President of the Transvaal High Court in 1902, and when it became a Supreme Court was appointed Chief Justice as from 1902. He held this position until being appointed to the Appellate Division in 1910 and later served as Chief Justice of the Union of South Africa as from 1914 until 1927. He died in 1942. (This information was obtained from Kahn 1991: 96 – 101.)

57 At 61.

v The Master (Natal), Respondent [58] where (now Chief Justice) Innes held that, although some concessions in terms of polygamy were made "in favour of native tribes with whose laws and customs it was at the time undesirable to interfere", a polygamous Islamic marriage duly contracted under a foreign legal system which sanctioned the same, was invalid.[59] As seen in Chapter 2, this legal position was confirmed by the Appellate Division in 1983 in the case of *Ismail v Ismail*.[60]

The dawn of democracy in South Africa has necessitated a re-evaluation of this state of affairs. The first development in this regard occurred in 1996 under the interim *Constitution*, when in *Ryland v Edros*[61] the Cape High Court held that although an Islamic purely religious marriage was not a valid civil marriage, the contractual obligations underlying such a union could no longer be regarded as inimical to public policy and could be enforced.[62] Farlam J (as he then was) was at pains to point out that this judgment did not apply to Islamic "marriages" that were *de facto* ("as opposed to merely potentially") polygynous.[63] The condition of *de facto* monogamy was also set in two subsequent decisions that (i) extended the rights to inherit intestate and to claim maintenance to surviving spouses to Islamic marriages[64] and (ii) allowed the dependants of a deceased spouse to such a marriage to claim loss of support for the death of their breadwinner.[65] Both Courts declined to express themselves on the position regarding *de facto* polygynous Islamic marriages.[66]

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58 1917 AD 302.

59 "Now polygamy is repugnant to the policy and the legal institutions both of Holland and of England. And I know of no case in which the Courts of either country have given effect to a foreign polygamous marriage or recognized the resulting status of either of the parties to it" (at 308).

60 1983 (1) SA 1006 (A).

61 1997 (2) SA 690 (C).

62 At 704 (A) – 711 (C).

63 At 709 (C) – (D).

64 *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at par [36].

65 *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA); [1999] 4 B All SA 421 at par [24].

66 See the paragraphs referred to in the two preceding notes.

Regarding Islamic marriages that are indeed polygynous in nature, the erstwhile Transvaal Provincial Division[67] has held that such spouses fall within the ambit of the *Maintenance Act* 99 of 1998, with the result that this Act could be invoked in order to enforce such claims.[68] In a more recent development the Constitutional Court has further embraced spouses to *de facto* polygynous Islamic marriages by allowing such plural spouses to be regarded as such for the purposes of the *Intestate Succession Act* 81 of 1987. In *Hassam v Jacobs NO and Others*[69] the Court stressed the fact that its judgment was "not concerned with the *validity* of polygynous marriages entered into in accordance with Muslim rites"[70] but held that the position of those persons excluded by the Act had to be evaluated in accordance with the "new ethos of tolerance, pluralism and religious freedom" mandated by the democratic constitutional dispensation.[71] As the word "spouse" as used in the Act was not capable of being interpreted so as to include polygynous spouses,[72] the Court held that the words "or spouses" were henceforth to be read in after the word "spouse" wherever the latter appeared in section 1 of the Act.[73]

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67 Now the North Gauteng High Court in consequence of the *Renaming of High Courts Act* 30 of 2008.

68 *Khan v Khan* 2005 (2) SA 272 (T) *per* Goodey J: "[T]he argument that it is *contra bonos mores* to grant a Muslim wife, married in accordance with Islamic rites, maintenance where the marriage is not monogamous, can no longer hold water. It will be blatant discrimination to grant, in the one instance, a Muslim wife in a monogamous Muslim marriage a right to maintenance, but to deny a Muslim wife married in terms of the same Islamic rites (which are inherently polygamous) and who has the same faith and beliefs as the one in the monogamous marriage, a right to maintenance… In any event, the purpose of the [*Maintenance Act* 99 of 1998] would be frustrated rather than furthered if partners to a polygamous marriage were to be excluded from the protection the Act offers, just because the legal form of their relationship is not consistent with the *Marriage Act*" (italics added).

69 Unreported judgment of the Constitutional Court (Case CCT 83/08) delivered on 15 July 2009.

70 Par [17] (emphasis added).

71 Par [28].

72 Par [44] – [48].

73 Par [57]. It is interesting to note that, despite the fact that the Court in *Hassam* specifically found the provisions of the *Intestate Succession Act* 81 of 1987 to discriminate unfairly against polygynous Muslim marriages (see par [39]; [43] and 3.1 of the order in par [57]), the Court did not restrict the words to be read into the Act to *Muslim* spouses as such—instead by ordering that the words "or spouses" were henceforth to be read into the impugned sections of the Act (par 3.2 of the order in par [57]) it could be argued that the order also extends to other potentially polygynous religious marriages (such as those included in terms of the Hindu faith).

Before moving on to the position of marriages entered into in terms of the tenets of religions other than Islam, it is important to emphasise the fact that the extensions thus far granted to Islamic marriages have not altered the position that such marriages are not valid marriages at common law.[74] Whether this position will change in the foreseeable future is at this stage uncertain. The impasse that persists is summarised by Goolam[75] when he states that

> [j]urists and scholars—both Muslim and non-Muslim—often differ in their interpretation of the sources of Islamic law. These interpretations range from the conservative to the liberal to the radical, the last-mentioned calling for radical changes to certain aspects of the application of the *Shari'ah*. The South African Law [Reform] Commission [has investigated] how Islamic family law could be made consistent with the constitutional Bill of Rights. In this regard, two fundamental issues should be considered. First, it is clear that our Constitution and the present-day concept of human rights is a product of Western ideas. Why, in a case of cross-cultural conflict, should Western culture and notions serve as the yardstick? And, second, why should provisions of the *Qur'an*, which is higher law, be brought in line with a secular legal system?

Although a draft *Muslim Marriages Bill* has recently appeared, attempts to force the enactment of the Bill created a furore in March of 2009. This began with the filing of an application for direct access to the Constitutional Court by the Women's Legal Centre Trust who alleged that the State had failed to meet its constitutional obligations by not enacting legislation granting full validity to Muslim marriages.[76] The applicants sought an order in terms of which the State would be granted a period of 18 months to enact the requisite legislation.[77] This application was met with vehement opposition by 34 traditional Muslim bodies

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This appears to be an oversight by the Constitutional Court, as no analysis of the position of spouses to other religious marriages is conducted anywhere in the judgment.

74 See for example *Ismail v Ismail* 2007 (4) SA 557 (E) at par [7].

75 2002: 20.

76 *Women's Legal Centre Trust v President of the Republic of South Africa and Others* (unreported judgment of the Constitutional Court (Case CCT 13/09) delivered on 22 July 2009) at par [1].

77 *Women's Legal Centre Trust v President of the Republic of South Africa and Others* (unreported judgment of the Constitutional Court (Case CCT 13/09) delivered on 22 July 2009) at par [1].

who opined that such legislation was not sanctioned by their religion and that "Muslims in their overwhelming majority do not engage in civil marriages, in an attempt to avoid the legal consequences arising from them."[78] On 22 July 2009 the Constitutional Court ruled that the application could not succeed as it neither (i) fell under the Constitutional Court's exclusive jurisdiction, nor (ii) warranted direct access to the Court. A finding of particular importance in the latter regard is that the Court found that it would be "inappropriate" for it to attempt to resolve the considerable factual and legal issues that were in dispute as a Court of both first and final instance.[79] One of these issues, presumably, is the issue of patriarchy in terms of which the husband is the head of the family and his wife assumes a subservient position in relation to him.[80] This principle clearly conflicts with clause 3 of the 2009 draft Bill which states that:

> A wife and a husband in a Muslim marriage are equal in human dignity and both have, on the basis of equality, full status, capacity and financial independence, including the capacity to own and acquire assets and to dispose of them, to enter into contracts and to litigate.[81]

The difficulty posed by this conflict underscores the soundness of Cameron J's judgment in the recent *Women's Legal Centre Trust* case as it is undoubtedly so that "ventilation of the difficult issues" surrounding Muslim marriage legislation is urgently required, and that this can only take place if a "multi-stage litigation

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78 Legalbrief Today – 26 March 2009 available at http://www.legalbrief.co.za (accessed on 26 March 2009).

79 Par [28].

80 Cronjé and Heaton 2004: 222. See Currie and De Waal 2005: 355.

81 This provision seems to support Currie and De Waal's submission (2005: 355) when they state that "[t]he drafting of legislation will therefore be a difficult affair because religious-based marriage, personal and family law often discriminates against women. The same was of course true of the common law of marriage, until the legislature intervened to remove the most blatant forms of discrimination. The only alternative seems to be legislation that recognises traditional and religious marriages, and gives effect to them in terms of customary and religious law, *but removes the discriminatory elements of those systems of law*." Recent litigation (see the discussion in the main text) shows that doing so is easier said than done.

process" is followed that allows parties a right of appeal and facilitates the hearing of expert witnesses where necessary.[82]

The position of spouses to Hindu religious marriages has also recently been the subject of judicial scrutiny. In *Singh v Ramparsad* [83] the Durban and Coast Local Division of the High Court[84] dismissed the plaintiff's assertion that the *Marriage Act* 25 of 1961 and the *Divorce Act* 70 of 1979 violated her rights to equality and dignity by not recognising her (*de facto* monogamous) purely religious Hindu marriage.[85] Accordingly, such a "marriage" could only obtain the "*imprimatur* of the State"[86] by being solemnised in terms of the *Marriage Act*. Certain problematic aspects of this case are considered in more detail in Chapter 5.

The position of a spouse to a *de facto* monogamous purely religious Hindu marriage has however to some extent been ameliorated by the judgment in *Govender v Ragavayah NO and Others* [87] in which the same division of the High Court held, on the back of substantial jurisprudence, that the word "spouse" in section 1 of the *Intestate Succession Act* of 1987[88] is capable of including "the surviving partner to a monogamous Hindu marriage."[89]

In closing, it is interesting to note that despite the significant body of case law dealing with the position of purely religious marriages, not one case has expressed itself on the extent to which *consortium omnis vitae* is recognised between the spouses to such marriages. *Prima facie*, it would appear that such

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82 Par [27] and [28].

83 2007 (3) SA 445 (D).

84 Now the KwaZulu-Natal High Court, Durban in consequence of the *Renaming of High Courts Act* 30 of 2008.

85 Par [53].

86 Par [47].

87 2009 (3) SA 178 (D).

88 Act 81 of 1987.

89 Par [44]. The position of polygynous Hindu marriages in relation to intestate succession is uncertain—see note 73 where it is speculated that the Constitutional Court's judgment in *Hassam v Jacobs NO and Others* (unreported judgment of the Constitutional Court (Case CCT 83/08) delivered on 15 July 2009) may (perhaps inadvertently) not necessarily be restricted to polygynous Muslim marriages.

spouses could at a minimum insist that the remarks made by Ackermann J within the context of same-sex life partners in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*[90] applied equally to them. This would imply that the parties would be presumed, *inter alia*, to have "the same ability to establish a *consortium omnis vitae*" *inter partes* as spouses to a valid civil marriage have, but that the full recognition of the same (such as for the purposes of enforcing it on third parties) could only be accomplished by way either of an *ad hoc* judicial extension or by way of legislation that validated such marriages for the purposes of South African law.[91]

5. CONCLUSION

The post-1994 developments in South African family law have been occasioned in accordance with the behests of the *Constitution* and are undoubtedly commendable from that point of view. Nevertheless, there is a downside, namely that, as Sachs J described in *Minister of Home Affairs v Fourie*,[92] "developments since [*National Coalition for Gay and Lesbian Equality v Home Affairs* have] led to a patchwork of laws that [do] not express a coherent set of family law rules."[93] This "patchwork" does not only involve the differentiation between the legal position in which same-sex and opposite-sex life partners find themselves, but also includes the uncertain legal position pertaining to spouses involved in purely religious marriages. Added to this, the fact that three different statutes currently regulate marriage in South Africa does little to "express a coherent set of family law rules." The upshot of all of this is an incoherent family law or interpersonal

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90 2000 (2) SA 1 (CC) at par [53] (quoted earlier in the main text).

91 In the latter regard, this might be accomplished be means of a clause similar to section 13 of the *Civil Union Act* 17 of 2006. Clause 2(5) of the draft *Muslim Marriages Bill* states that "[a] Muslim marriage to which this Act applies and in respect of which all the requirements of this Act have been complied with, *shall for all purposes be recognised as a valid marriage*" (emphasis added). This would obviously imply the full extension and recognition of *consortium omnis vitae* in the case of such a marriage.

92 2006 (1) SA 524 (CC).

93 Par [125].

relationship framework, the complexity of which is perhaps most strikingly illustrated by way of the following diagram:[94]

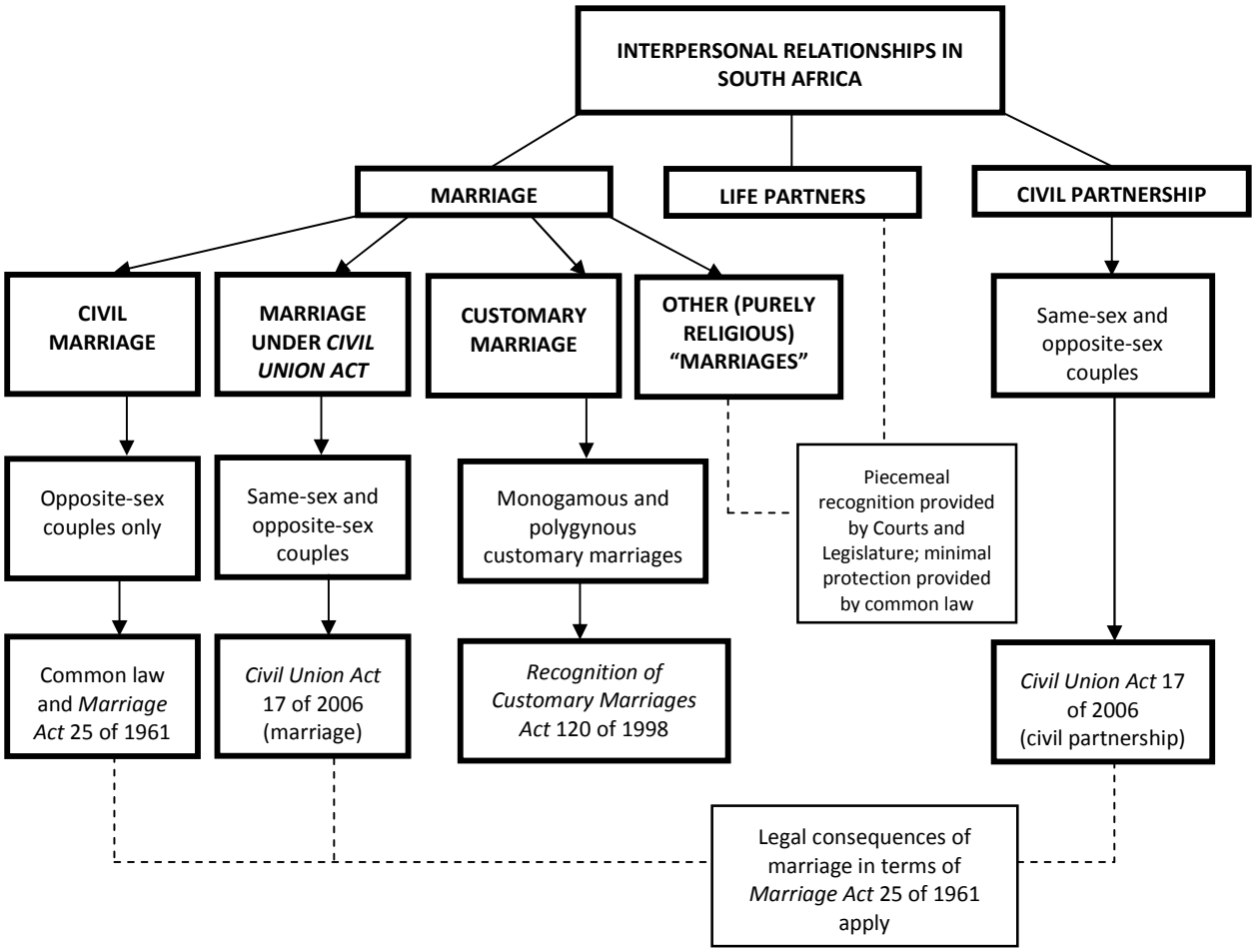

Figure 3.1: Legal recognition of interpersonal relationships in South Africa

Figure 3.1 illustrates in no uncertain terms that interpersonal relationships in South Africa are governed by an intricate and highly complex body of law. Moreover, the developments sketched throughout this Chapter show that the legal position is inconsistent and at times anomalous; particularly where non-formalised life partnerships are concerned. It is hoped that this study will

94 This graphic originally appeared in a chapter written by the author of this study in Robinson *et al* 2009 (see page 16). It has been reproduced in a slightly adapted format with permission of the editor.

contribute towards resolving some of these difficulties. To this end, the following conclusions have been reached in this Chapter:

- The notion of *consortium omnis vitae* is currently fully recognised in all valid marriages and civil partnerships entered into in South Africa. As such, the *consortium*, which as seen in Chapter 2 constitutes the essence and objective hallmark of marriage, is no longer reserved for heterosexual married couples only. The changing face of marriage in South Africa over the past two decades shows that the South African civil marriage has come full circle in embracing the reforms that have typified the "second wave" of the Enlightenment contractarian model in foreign jurisdictions.[95]

- Turning to the position of life partners, in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*[96] the Constitutional Court specifically recognised the ability of same-sex couples to establish a *consortium omnis vitae inter partes.* This decision, however, only dealt with the position of same-sex couples, with the result that unmarried heterosexual couples do not fall within the ambit of this case. Nevertheless, the validation of same-sex marriages has thrown the position of post-*Civil Union Act* life partners who have elected not to marry despite having the option to do so into sharper relief as these couples *strictu sensu* now find themselves in the same position as unmarried heterosexual couples have always done.[97] This immediately raises the question as to whether such couples can still rely on the pre-*Civil Union Act* judicial extensions occasioned by cases such as *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, or whether the so-

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95 See the discussion of these reforms in Witte 1997: 209 *et seq* and in Chapter 2 above. Also see Bonthuys 2008: 482.

96 2000 (2) SA 1 (CC).

97 See for example *Gory v Kolver NO* 2007 (4) SA 97 (CC) at par [29]; Robson 2007: 426.

called "choice argument"[98] will prevent this possibility. If the answer to this question is in the negative, the pre-*Civil Union Act* extensions will be erased; effectively drawing a line through the body of jurisprudence thus far developed regarding partners in non-formalised life partnerships.[99] This would imply that they would be deprived of the "essence and objective hallmark"[100] of their relationship *inter partes* which in principle was recognised in the *Home Affairs* case. Furthermore, it is important to remember that the extensions occasioned by the judiciary were not confined to the recognition of *consortium omnis vitae* between the same-sex partners themselves but also involved claims based on the existence of a reciprocal duty of support, adoption, etcetera. The "choice argument" therefore has grave implications for unmarried life partners as it cuts across the issue of *consortium* between such partners as well as the other extensions to which they have become entitled in the wake of the *Home Affairs* case. It also raises important issues pertaining to the autonomy of parties who should be entitled to legal protection without necessarily having to enter into a marriage in order to obtain the same. On the other hand, if the pre-*Civil Union Act* judgments still stand, it becomes clear that the law differentiates between heterosexual and homosexual unmarried couples; a situation that is equally undesirable.

The preceding paragraphs highlight the fact that the piecemeal and inconsistent recognition granted to life partners in post-1994 South Africa and the subsequent validation of same-sex marriage has spawned complex issues regarding the position of unmarried couples. One objective certainty, however, is that this state of affairs coupled with the general lack of common law protection creates a highly unsatisfactory "patchworked" legal position that requires the urgent attention of the

98 This argument involves the contention that parties who have elected not to marry one another are, by virtue of this choice, not entitled to avail themselves of the protection provided by matrimonial (property) law.

99 See Bilchitz and Judge 2007: 496, 497.

100 See 4 and 5 in Chapter 2 above.

Legislature in the form of domestic partnerships legislation drafted according to a well-defined, robust and effective domestic partnership rubric in the manner advocated in the preceding Chapter. The essential features of such a rubric and its attendant legislation would be for it to give *context-specific* effect to the *consortium omnis vitae* that exists between such partners as "the essence and objective hallmark"[101] of their relationship (by, for example, taking the extent of public commitment into account) and for it to recognise and regulate the legal consequences of such relationships in a reliable, effective and constitutionally-valid manner. In addition, legislation based on a domestic partnership rubric that co-exists with and complements the institution of marriage would serve to allay the fears expressed by authors such as Witte and Glendon[102] regarding the fact that the global shift towards a contractarian model of marriage may undermine the equality and freedom of women and the protection of children.[103] Two further salutary effects of such a rubric and its resultant legislation would be its role in "de-centering marriage as the sole and primary status to be accorded to interpersonal relationships,"[104] coupled with the role it would play in the "acknowledgment and acceptance of difference,"[105] particularly where gay and lesbian couples are concerned.[106]

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101 See 4 and 5 in Chapter 2.

102 See Witte 1997: 214, 215.

103 Also see Bonthuys 2007: 542 who opines that civil marriage law fails to protect "vulnerable family members, often women and children."

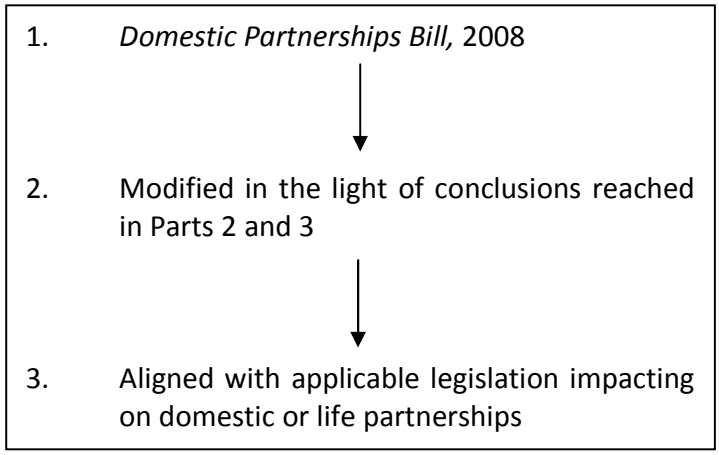
104 Bilchitz and Judge 2007: 497.

105 *Per* Ackermann J in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at par [134].

106 De Vos 2007(a): 449 describes this as a rejection of "the notion of heteronormativity" which in essence is what Ackermann J had in mind when in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) he stated that: "The acknowledgment and acceptance of difference is particularly important in our country where group membership has been the basis of express advantage and disadvantage. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people as they are. The concept of sexual deviance needs to be reviewed. *A heterosexual norm was established, gays were labelled deviant from the norm and difference was located in them. What the Constitution requires is that the law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are*. At the very least, what is statistically normal ceases to be the basis for establishing what is legally

The question that now arises is what the content of such a rubric must be. Legislative activity has thus far produced a draft *Domestic Partnerships Bill,* 2008 that saw the light of day in January of that year.[107] This Bill will—as a prototype—constitute the legislative substructure of the rubric. This substructure will be modified in the light of conclusions drawn from an in-depth analysis of the case law, common law and legislation impacting on life partnerships in South Africa in Part 2 and an analysis of the Bill itself in Part 3. The final constituent element of the rubric will involve the calibration of the substructure with existing and prospective legislation dealing with life partnerships so as to ensure legal certainty and consistency. The composition of the rubric can therefore be illustrated as follows:

Domestic Partnership Rubric =



- Before embarking on this task, a final remark must be made regarding the legal recognition of *consortium* within the context of purely religious

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normative. *More broadly speaking, the scope of what is constitutionally normal is expanded to include the widest range of perspectives and to acknowledge, accommodate and accept the largest spread of difference. What becomes normal in an open society, then, is not an imposed and standardised form of behaviour that refuses to acknowledge difference, but the acceptance of the principle of difference itself, which accepts the variability of human behaviour*" (par [134], emphasis added and footnote omitted).

107 Notice 36 of 2008 as it appeared in Government Gazette No. 30663 of 14 January 2008. The history of the Bill is discussed in Chapter 7.

marriages. While the conclusion has been reached in this Chapter that such spouses should *prima facie* at least be entitled to the recognition provided to same-sex life partners by the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs,* the precise manner in which any further recognition should occur falls beyond the parameters of this study. However, the fact that such spouses have entered into a marriage involving a public commitment should in principle entitle them to a *consortium* that is identical to that created by a valid marriage.

PART 2

THE LEGAL POSITION OF LIFE PARTNERS IN CONTEMPORARY SOUTH AFRICAN FAMILY LAW

CHAPTER 4:

TERMINOLOGY, PARAMETERS AND CRITERIA

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1. INTRODUCTION TO PART 2

Having established the need for a robust domestic partnerships rubric in accordance with which the prototype *Domestic Partnerships Bill,* 2008 is to be modified, Part 2 of this study aims to assess the legal position of persons involved in non-formalised interpersonal relationships in contemporary South African law with a view to establishing some of the principles that are to drive this modification process. This will commence with an examination of the terms used to describe these relationships in the Chapter that follows with a view to ascertaining the correct terminology and setting the parameters within which the domestic partnerships legislation should be developed. The Chapters that follow will proceed to analyse case law, common law and legislation pertaining to non-formalised interpersonal relationships with a view to establishing certain principles which should be embodied in the legislation so that its alignment with South African law in general and family law in particular can be assured.

2. TERMINOLOGY

The incidence of people who live together or cohabit outside of marriage is a world-wide phenomenon,[1] and the terms employed to describe it are as diverse as its geographical ubiquity. In this regard, Sinclair and Heaton[2] mention that terms such as "common-law marriage", "living together", "shacking up" and "concubinage" are often used to describe the union that exists between two cohabiting persons. The most recent terms to appear in South African legal literature are the terms "life partnership"[3] and "domestic partnership"[4] and the latter term is, incidentally, the term that is favoured by the South African Law Reform Commission in its 2006 *Report on Domestic Partnerships*.[5]

The terms listed above are however not all suitable in a South African context, and for this reason this Chapter will be dedicated towards explaining the terminology that will be used for the purposes of this Part of this study and substantiating the reasons for the particular option chosen.

In the paragraphs that follow the acceptable terms will first be discussed, after which the unacceptable (or less-suitable) terms will be considered. The reason for opting to deal with the acceptable terms first is that these terms are preferred precisely because they establish the parameters and criteria which will be used for the purposes of this Part of this study. Only once these parameters and criteria have been established can the rationale behind the rejection of the unacceptable terms be understood. It is therefore necessary to consider the acceptable terms first.

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1 SALRC 2006: 20; Singh 1996: 315.
2 1996: 267.
3 See for example Cronjé and Heaton 2004: 227 *et seq*.
4 See for example Schwellnus 1994: 1; Goldblatt 2003: 610.
5 SALRC 2006: 10.

2.1 Terms that are acceptable in a South African context to describe persons who are involved in non-formalised permanent marriage-like relationships

2.1.1 The terms "(extramarital) cohabitation" and "cohabitation"

Although the term "cohabitation" is generally defined as "the state or condition of living together *as husband and wife* without being married,"[6] it is generally accepted that the term is gender-neutral and that it can include both heterosexual and homosexual persons who live together in a non-formalised union.[7] Nevertheless, the term is often still used exclusively within the context of heterosexual cohabitants.[8] This may lead to confusion; a factor which may serve as a preliminary indicator of the unsuitability of this term for the purposes of this study.

The term "extramarital cohabitation" was at times encountered in South African law and literature,[9] and for many years this term would probably have been more technically correct than a simple reference to "cohabitation." As it stands, this term is however no longer appropriate, due to the fact that the word "extramarital" is problematic. The reason for making this submission is that for many years the marriage was the only means by which couples could secure full legal recognition of their relationships and the word "extramarital" could therefore be used relatively freely. This position has however changed after the coming into operation of the *Civil Union Act*[10] on 30 November 2006 due to the fact that this Act provides for both marriages and "civil partnerships" to be concluded. A "civil partnership" is available to persons who want the consequences of civil marriage

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6 Sinclair (ed) 2001: 288 (emphasis added). Also see Schwellnus 1994: 1.

7 Sinclair and Heaton 1996: 299, 300; Schwellnus 2008: N2.

8 See Schwellnus 2008: N2. It is also interesting to note that in Clark (ed) *Family law service* (2008), two separate chapters deal with "Cohabitation" (written by Schwellnus (2008)) and "Same-sex life partnerships" (by Schäfer 2008(b)) respectively.

9 See for example *B v S* 1995 (3) SA 571 (A) at 579 (D); Visser and Potgieter 1998: 4. In the first edition of their work Cronjé and Heaton (1999: 1) used the term "extra-marital relationship."

10 17 of 2006.

to apply to their unions without such unions being referred to as "marriages." The upshot of this development is that the civil partnership has provided an alternative to civil (and customary) marriage that did not exist prior to the enactment of the *Civil Union Act*, and for this reason, cohabitation can no longer be labelled as of necessity being "extramarital." It is consequently submitted that the correct definition should instead indicate the fact that cohabitants *are persons who are either unmarried or persons who have not entered into a civil partnership*. For this reason it is submitted that the term "(extramarital) cohabitation" is probably better suited as it describes the current legal position more accurately.[11]

However, the term is an ungainly one. Nevertheless, even if the term is abbreviated to "cohabitation", the problem still remains that it is often interpreted as only referring to heterosexual relationships, for, as Schwellnus[12] mentions, although the term may include same-sex couples, "[s]ome authors still use the more traditional definition that limits the term cohabitation to two people of the opposite sex living together." Furthermore, as seen in this quote, the term seems to presuppose that the parties share a common abode; something which, as will be seen below, should not necessarily be an absolute requirement. For these reasons it is suggested that the term "cohabitation" cannot be used with complete confidence.

2.1.2 The term "life partnership"

This term has become fairly prominent in recent years and is the description of choice for a number of authors including Cronjé and Heaton,[13] and Schäfer.[14] The Courts have also been prepared to use this term within the contexts of both

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11 See Robinson *et al* 2009: 39.
12 2008: N2.
13 2004: 227.
14 2006: 628.

heterosexual and homosexual relationships.[15] The term is therefore gender-neutral and flexible and consequently allows the difficulties that a term such as "cohabitation" may cause in this regard to be avoided. As a result, it is suggested that the term itself conveys the very essence of the topic under discussion. In view hereof, the term "life partnership" will be used for the remainder of this Part of this study.

2.1.2.1 Life partnership in the wide and narrow senses

The term life partnership can (much like any other term that is used to describe the relationship between two people who are involved in a non-formalised interpersonal relationship) be used in both a wide and narrow sense.[16]

2.1.2.1.1 Life partnership in the wide sense

In the wide sense a life partnership includes both the relationship (i) between two people who, regardless of their sex, live together in a permanent union without, as Hahlo[17] puts it "ever having gone through a marriage ceremony" although they are not prevented by law from validly marrying one another in terms of civil or customary law; and (ii) the relationship between two people who live together after having entered into a "marriage" that is not regarded as a valid marriage by South African law or who are prohibited from marrying one another. In the latter regard, such relationships are often (but not necessarily always) encountered within the context of "marriages" that have been concluded according to the tenets of specific religions without complying with applicable marriage

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15 See for example *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) at par [16] and *J and Another v Director General, Department of Home Affairs, and Others* 2003 (5) SA 621 (CC) at par [19].

16 See Hahlo 1975: 34 who explains the wide and narrow senses of the term "concubinage." The same differentiation can be applied to the term "life partnership."

17 1975: 35.

legislation[18] and are therefore described for the purposes of this study as "purely religious 'marriages.'"[19] They may also be encountered in the sense of "marriages" between persons who are prohibited from marrying one another by South African law,[20] or in instances where a person is involved in a life partnership with person A while being a spouse in a subsisting civil marriage with person B.[21]

2.1.2.1.2 Life partnership in the narrow sense

In contemporary South Africa in which same-sex marriages are legally permissible, a life partnership in the narrow sense refers to the first relationship mentioned above, namely two persons who, regardless of their sex, are involved in a permanent interpersonal relationship without the two of them[22] ever having participated in a marriage ceremony of any kind (or having concluded a civil partnership) despite the fact that there is no impediment to the conclusion of a valid marriage or civil partnership between them. The requirement that there must be no legal impediment to entering into a marriage or civil partnership is of necessity subject to one major exception, namely that the fact that a same-sex couple entered into a life partnership prior to the legalisation of same-sex marriages will not bar this union from constituting a life partnership in the narrow sense.[23] In the case of this group, the fact that the life partners "married" one another prior to the validation of same-sex marriage in 2006[24] or participated in a

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18 Currently the *Marriage Act* 25 of 1961, the *Civil Union Act* 17 of 2006 or the *Recognition of Customary Marriages* Act 120 of 1998.

19 See 4 in Chapter 3.

20 Hahlo 1975: 35. Such a marriage may result in a putative "marriage." The position of such "marriages" is discussed in 2.2.3 below.

21 This situation is discussed in 2.4 in Chapter 6.

22 This implies that one of the life partners may indeed have married someone else in terms of customary law or in accordance with the prescripts of a recognized and established religion—see the discussion of the requirement of monogamy at 2.1.2.2 below.

23 See Hahlo 1975: 35. This situation is often described by a plethora of terms such as "concubinage", "common-law marriage" and "*de facto* marriage." The use of these terms is discussed at 2.2 below.

24 See for example *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) at par [3].

"commitment ceremony"[25] will also be irrelevant from a legal point of view (although it may serve to prove the existence or duration of the union).

For the purposes of this study, the term life partnership will, unless otherwise indicated, refer to the narrow sense only.

2.1.2.1.3 The reason for distinguishing between life partnerships in the wide and narrow senses

Since 1994 the piecemeal legislative and judicial intervention that has taken place has resulted in a considerable number of the consequences of marriage being extended to non-formalised relationships. These developments have involved parties of the opposite sex who lived together without being married or attempting to do so, parties of the same sex who lived together and were prevented at the time from marrying one another and parties to purely religious marriages that did not comply with the requirements of a civil marriage. The important point to bear in mind is that all of these relationships *strictu sensu* involved life partnerships in the wide sense due to the fact that the parties lived together without being validly married. This (piecemeal) recognition has therefore extended to a broad range of relationships falling both within the wide and narrow categories of life partnership circumscribed above; a situation that has resulted in a complex legal position. At times, these developments overlap, while in other instances they may contradict one another. For this reason, it is important for the purposes of this Chapter and for the sake of clarity to distinguish between life partnerships in the wide and narrow senses. For example, as seen in the description of a life partnership in the narrow sense, a couple who have participated in a purely religious marriage which is not

[25] See *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as* Amicus Curiae*)* 2003 (2) SA 198 (CC) at par [4]. The fact that such parties have entered into such a "marriage" or have participated in the ceremony may be relevant for the purpose of proving the stability of their union and hence determining whether a legally-enforceable duty of support was created *inter partes*. This aspect is discussed in more detail in Chapter 5 below.

recognised by South African law will not, merely because of the fact that they are not validly married, qualify as life partners in the narrow sense. The reason for this is that legal principles regulating these relationships have developed independently from those regulating life partnerships in the narrow sense,[26] resulting in a separate body of law which must be distinguished from the legal principles that currently regulate life partnerships in the narrow sense.[27] If this is not done, absurdities will result.[28]

Care must be taken therefore to remember that, unless otherwise indicated, the term "life partnership" for the purposes of Part 2 of this study will connote such a partnership in the narrow sense.

2.1.2.2 Parameters of and criteria for life partnerships in the narrow sense

Irrespective of the terminology employed to designate non-formalised unions, a life partnership in the narrow sense should comply with certain criteria and should function within certain parameters. In the brief discussion that follows, issues such as permanence, cohabitation, dependence, monogamy and intimacy will be considered.

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26 See 3 and 4 in Chapter 3 above.

27 Writing before these developments occurred, Sinclair and Heaton (1996: 269) opined that "[w]here a putative marriage does not exist, the parties to Muslim and Hindu marriages are cohabitants." This statement was correct at the time it was made. However, subsequent judicial pronouncements and legislative developments necessitate a qualification to this statement in order for it to be valid in contemporary South Africa. In this regard, it is submitted that the distinction between life partnerships in the wide and narrow senses suggested above will serve this purpose.

28 For example in *Daniels v Campbell NO and Others* 2005 (5) SA 531 (CC) the Constitutional Court held that the *Intestate Succession Act* 81 of 1987 as well as the *Maintenance of Surviving Spouses Act* 27 of 1990 were to be extended so as to include the parties to *de facto* monogamous purely religious Islamic marriages (which are regarded as life partnerships in the wide sense). On the other hand, in *Gory v Kolver NO* 2007 (4) SA 97 (CC); 2007 (3) BCLR 294 (CC) the Constitutional Court extended the *Intestate Succession Act* of 1987 to homosexual life partnerships in the narrow sense, while in *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) the same Court refused to permit the surviving heterosexual life partner in the narrow sense to qualify as a "survivor" for the purposes of the *Maintenance of Surviving Spouses Act* of 1990. The inconsistencies that will be created by conflating life partnerships in the narrow and wide senses become obvious.

In order for a union to qualify as a life partnership in the narrow sense, it is essential for such a union to have a measure of permanence.[29] In this regard it stands to reason that whether or not a union is permanent must be determined on the facts of the matter. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [30] a comprehensive (but not exhaustive) list of factors was provided in order to ascertain whether or not a same-sex relationship was permanent.[31] Despite the fact that the case dealt with the position of same-sex couples, there appears to be no reason why the same factors would not be of assistance in order to ascertain the degree of permanence of heterosexual relationships. In addition, an analysis of case law reveals that the Courts have been prepared to make decisive findings pertaining to permanence on the evidence placed before them.[32] Suffice it to say, therefore, that a measure of permanence is an essential requirement; the existence of which must be determined with reference to all of the facts and not solely on the basis of the length of the duration of the union.[33]

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29 See for example *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (C) at 154 (C) – (F) where the order sought by the applicant (to be regarded as a "spouse" for the purposes of the *Intestate Succession Act* 81 of 1987 and the *Administration of Estates Act* 66 of 1965 and as a "survivor" and "spouse" for the purposes of the *Maintenance of Surviving Spouses Act* 27 of 1990) could not be granted due to a dispute as to "the single most important question of fact" namely as to whether or not the applicant and the deceased were permanent life partners. Also see *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [57], [86] and [88]; Hahlo 1985: 37; SALRC 2003: 8.

30 2000 (2) SA 1 (CC).

31 At par [88].

32 Most of the case law has involved relationships of fairly long duration, for example in *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) the parties had been living together for approximately 11 years. In *Bezuidenhout NO v ABSA Versekeringsmaatskappy Bpk* (unreported judgment of the Transvaal Provincial Division [now the North Gauteng High Court, Pretoria in consequence of the *Renaming of High Courts Act* 30 of 2008], case no 40688/2008 delivered on 26 February 2008) the parties had been cohabiting for almost twenty years. However, it appears that lengthy duration is not necessarily required. For example, in *Gory v Kolver NO and Others* 2006 (5) SA 145 (T) at par [5] and [18] the Court found the union to be permanent even though the parties had been cohabiting for less than one year; a factual finding that was not disputed in the subsequent confirmation proceedings in the Constitutional Court (see 2007 (4) SA 97 (CC) at par [2]). On the other hand, in *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (C) a dispute as to the existence of a permanent life partnership prevented the application being granted and prompted the Court to postpone the application for a date on which *viva voce* evidence in this regard could be heard.

33 See the preceding note.

The legal position as to whether or not permanent *cohabitation* is indeed an absolute requirement for the purposes of establishing permanence is not clear. In this regard something of a contradiction appears in the aforementioned *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* case in that while Ackermann J stated that "[p]ermanent in this context means an established intention of the parties to cohabit with one another permanently,"[34] he later listed the question as to "whether the partners share a common abode" as merely one of the factors to be considered in order to establish permanence.[35] On this basis Wood-Bodley[36] opines that permanent cohabitation is not essential and that the intention of the parties and their views as to whether or not their union is indeed permanent should be the decisive factor. It is submitted that this approach is to be supported.[37] Therefore, although permanent cohabitation is often a feature of non-formalised unions, it is suggested that in order to ascertain whether the requirement of permanence has been met it must appear, after all the facts have been considered, that the parties have evinced the unequivocal intention to regard their union as permanent.[38]

Regarding the requirement of monogamy, legal developments regarding life partnerships in the narrow sense have thus far been limited to monogamous unions.[39] Nevertheless, it is important to note Van Schalkwyk's observation that

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34 Par [86].

35 Par [88].

36 2008(b): 261.

37 Specific legislation may however require a minimum period of cohabitation. An example is section 31 of the *Special Pensions Act* 69 of 1996 which requires "a continuous cohabitation in a homosexual or heterosexual partnership for a period of at least 5 years" in order for a union to qualify as a "marriage relationship" for the purposes of the Act's definition of "spouse." Also see *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at par [175] (note 44); SALRC 2006: 152.

38 It is worthy of mention that, within the context of the law of marriage, the reciprocal duty of support continues to apply even if the parties do not share a joint household unless matrimonial guilt absolves the innocent spouse of his or her obligations in this regard (see Cronjé and Heaton 2004: 54; Visser and Potgieter 1998: 77 and 78; Van Zyl 2008: C19). The relevance of this duty within the context of life partnerships will be emphasised throughout this Chapter.

39 See Wood-Bodley 2008(b): 266. As far as purely religious marriages are concerned, the Constitutional Court recently held that surviving spouses to *de facto* polygynous Islamic marriages could qualify as intestate heirs for the purposes of section 1 of the Intestate Succession Act 81 of 1987—see *Hassam v Jacobs NO* (Case no. CCT 83/08: unreported judgment

while polygamy may be contrary to the principles governing civil marriage, the same cannot be said of customary marriages.[40] Consequently, it is submitted that the law must take note of this aspect in instances where one of the life partners is married to a third party in terms of customary law; particularly due to the fact that polygynous customary marriages are fully recognised in South Africa in consequence of the *Recognition of Customary Marriages Act*.[41]

Within the context of the civil setting, it is therefore probably correct to assume that monogamy will be required in such relationships unless specific legislation permits otherwise. This point of view is shared by Wood-Bodley[42] who summarises his opinion as follows:

> It seems likely, however, that monogamy will be regarded as one of the hallmarks of a gay or lesbian relationship that is entitled to legal recognition because the respecting of established cultural or religious systems that have always permitted polygamy is different to introducing new categories of polygamous relationship that are legally recognized.

There appears to be no reason why Wood-Bodley's observation cannot extend to heterosexual life partners. In the end result, a person should qualify as a life partner in the narrow sense if his or her life partner was validly married to another woman in terms of customary law or the principles of an established and recognised religion that permits polygamy.[43]

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of the Constitutional Court delivered on 15 July 2009). This case was briefly discussed in Chapter 3.

40 *Per* SALRC 2006: 383.

41 120 of 1998. It appears as if the SALRC has taken this into account for the purposes of its proposed unregistered domestic partnership legislation—see SALRC 2006: 379 – 383 as well as clauses 29 – 31 of the *Domestic Partnerships Bill*, 2008.

42 2008(b): 267.

43 Schäfer 2006: 642 opines that "it is hard to see why, for example, a decision to engage in a polygamous relationship should be treated differently from one involving only two partners." In this regard it is submitted that although Wood-Bodley's statement regarding the "respecting of established cultural or religious systems that have always permitted polygamy" (quoted in full above) provides a sound basis for supporting such a distinction between monogamous and

It is also important to note the distinction which Wood-Bodley[44] draws between monogamy and sexual fidelity. In this regard he is of the opinion that sexual activity beyond the confines of the relationship should not imply non-recognition of the relationship. This opinion can be supported, as it is clear that to disregard the existence of a relationship purely on the basis of sexual infidelity would discriminate against the parties thereto as a similar result would not follow if the parties were married to one another.[45] For the purposes of this Part of this study, it is therefore assumed that the life partners are involved in a monogamous union unless indicated otherwise.

The next issue to be considered is that of dependence. In this regard it can be agreed with the South African Law Reform Commission that, where a statute requires proof of "dependence", this does not necessarily imply need in the sense of having to prove that destitution would otherwise ensue for one of the partners but for the relationship.[46] Instead, the criterion of dependence should entail that the partners are "dependent upon one another for the improvement of their life" by virtue of the fact that "each is co-operating in the meeting of expenses." Such a more flexible approach to the issue would therefore entail that a statute requiring proof of dependence would be interpreted as enquiring "whether an applicant's lifestyle was 'substantially enhanced' by reason of his or her relationship with the other partner."[47] While such an approach towards determining whether dependence exists *for the purposes of a particular statute or*

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polygamous life partnerships, there are good reasons why this issue should receive specific attention in prospective domestic partnership legislation—see 5.2.2.1 in Chapter 7.

44 2008(b): 267, 268.

45 It is interesting to note that Wood-Bodley (2008(b): 267, 268) uses the law of intestate succession to contrast the respective positions of permanent same-sex life partners and married couples if the law were hypothetically to disregard the very existence of the former relationship if it could be proved that one or both parties had been unfaithful. In this regard he states that "even the most flagrant adulterer is entitled to inherit from his or her spouse on intestacy." The unfairness which would result if this criterion could negate the existence of such a relationship and deny the claim of a survivor who might be in dire need thereof illustrates why a more suitable (and objective) criterion should instead be used within the context of intestate succession and other comparable claims. As will be seen in Chapter 5, it is submitted that the existence of a reciprocal duty of support would serve this purpose.

46 SALRC 2006: 13.

47 SALRC 2006: 14.

claim can be supported, recent case law[48] leads to the conclusion that dependence cannot be viewed as the fundamental criterion for determining whether or not a given union qualifies as a life partnership in the narrow sense. It can therefore, for the purposes of this discussion, be assumed that while dependence is not an *essential* criterion, the fact of dependence can certainly be of assistance in determining whether a relationship indeed qualifies as a life partnership in the narrow sense.

This approach also answers the question as to whether a degree of intimacy is required in order for parties to qualify as cohabitants in the narrow sense. Such a non-conjugal relationship, also known as a "care partnership", refers to the situation where the persons involved are financially or emotionally interdependent on one another, without being sexually intimate.[49] In deciding whether or not to include such partnerships for the purposes of the domestic partnership legislation, the South African Law Reform Commission took cognisance of arguments both for and against their inclusion. In the former regard the Commission noted the submission that taking care of a person could "be prejudicial to the caretaker's earning power", while in the latter regard it was argued that the care partnership was based on love for which the caregiver should not wish to be rewarded, and that the needs of care partners would not be adequately addressed by legislation dealing with domestic partnerships.[50]

Contrary to the South African Law Reform Commission's recommendations,[51] it will, for the purposes of this Chapter be assumed that the parties to such care relationships will also qualify as life partners in the narrow sense, provided that

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48 See the discussion of *Bezuidenhout NO v ABSA Versekeringsmaatskappy Bpk* (unreported judgment of the Transvaal Provincial Division [now North Gauteng High Court, Pretoria], case no 40688/2008 delivered on 26 February 2008) in 3.4.2 in Chapter 5 and in 11.2 in Chapter 7.

49 SALRC 2006: 314.

50 SALRC 2006: 385, 386.

51 This issue is dealt with fully in Chapter 7.

they have never participated in a marriage ceremony (such as a purely religious marriage) and are not prevented by law from entering into a valid marriage.[52]

To summarise, it is suggested that in order to qualify as a life partnership in the narrow sense, a union must be permanent, although this need not imply permanent cohabitation. The partners must simply unequivocally regard their union to be permanent, irrespective of whether or not they cohabit on a permanent basis. The union should be monogamous unless an "established cultural or religious [system]"[53] permits otherwise. Dependence should not be viewed as an indispensable criterion for a union to qualify as a life partnership in the narrow sense, but where a statute indeed requires proof of the same, a flexible approach should be adopted.

2.1.3 The term "domestic partnership"

After conducting extensive research into the matter, the South African Law Reform Commission[54] (as mentioned above) preferred the term "domestic partnership", to such an extent that this term is the title of proposed legislation in the form of a draft *Domestic Partnerships Bill,* 2008 that appeared in January of the same year.[55]

In view of this development, it is suggested—purely for the sake of clarity—that, unless the context indicates otherwise, the term "domestic partnership" will only

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52 This approach is supported by the decision in *Bezuidenhout NO v ABSA Versekeringsmaatskappy Bpk* (unreported judgment of the Transvaal Provincial Division [now North Gauteng High Court, Pretoria], case no 40688/2008 delivered on 26 February 2008) at par [13] where the fact that the lesbian couple shared a common abode was the key consideration in a relationship that had ceased to be intimate for some time. It is submitted that the existence of a reciprocal duty of support between the life partners in non-intimate unions will be of paramount importance in justifying the reason for including such partnerships for the purposes of need-based claims in terms of domestic partnerships legislation. This aspect is dealt with in Chapters 5 and 7 below, and the case itself is discussed in 3.4.2 in Chapter 5.

53 *Per* Wood-Bodley 2008(b): 267.

54 SALRC 2006: 10. Cronjé and Heaton 2004: 227 prefer the term "life partnership."

55 The Bill appears in Government Gazette No 30663 of 14 January 2008.

be used to describe relationships as they are referred to in (and potentially stand to be regulated by) the South African Law Reform Commission's draft *Domestic Partnerships Bill,* 2008 and the rubric that will be applied in Part 3 of this study. The term "life partnership" will be used in all other senses; particularly with reference to the legislative and judicial developments that have occurred outside of this proposed legislation.

2.2 Inaccurate and unacceptable terms

In the paragraphs that follow, a number of terms that are unacceptable in a South African context will be discussed.

2.2.1 The so-called "common-law marriage"

This term is not suitable in a South African context due to the simple reason that it is alien to South African family law.[56] As the South African Law Reform Commission[57] states "there is no such thing as a 'common-law marriage' in South African law."[58] Despite this fact, the term "common-law marriage" is still often erroneously (and inconsistently)[59] employed by lay-people and jurists[60] alike. The following factors highlight the difficulty created by this term:

2.2.1.1 South African law currently recognises civil marriages, marriages under the *Civil Union Act* 17 of 2006 and customary marriages

The term does not fit well within a South African framework that currently recognises *civil* and *customary* marriages, and, in addition, provides for

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56 Hahlo 1985: 36, 37; SALRC 2006: 15; Heaton 2008(b): 459.

57 2006: 12.

58 Also see Schäfer 2006: 642.

59 *Nkonki v Nkonki* 2001 (4) SA 790 (C) at par [5]. The diverging (and confusing) use of this term in cases such as *Minister of Home Affairs and Others v Fourie* 2006 (1) SA 524 (CC) and in *Singh v Ramparsad* 2007 (3) SA 445 (D) is discussed in more detail below.

60 See for example *Singh v Ramparsad* 2007 (3) SA 445 (D) (discussed in more detail in 2.2.1.4 below); *Van Erk v Holmer* 1992 (2) SA 636 (W) at 644 (E).

marriages under the *Civil Union Act* 17 of 2006.[61] As the law stands, civil marriages are concluded in terms of the *Marriage Act* 25 of 1961, while the *Civil Union Act* provides for a form of marriage as a creature of statute. On the other hand, customary marriages are concluded in terms of the *Recognition of Customary Marriages Act* 120 of 1998. The term "common-law marriage" is inappropriate within all of these settings:

- Within the context of *civil marriage*, a unique interplay exists in South African law between the civil marriage and the common law. This is due to the fact that the *Marriage Act* of 1961 does not contain a definition of the concept of "marriage." In order, therefore, to define "marriage", recourse must be had to the common law, which as seen in Chapter 3, in essence traditionally defined "marriage" as a legally-recognised and voluntary union entered into between one man and one woman to the exclusion of all others while it lasts.[62] Although civil marriages therefore have their origin in and are concluded *according to* South African common law (as amended by the *Marriage Act*),[63] such marriages are referred to as "civil marriages" and not "common-law marriages."[64] The point to be

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61 See Chapter 3 above.

62 See *Inst* 1.9.1; *Ismail v Ismail* 1983 (1) SA 1006 (A) at 1019 (H) – 1020 (A); *Seedat's Executors v The Master (Natal)* 1917 AD 302 at 309; *Fourie and Another v Minister of Home Affairs and Others* 2005 (3) SA 429 (SCA) at par [83] – [88]. In this regard the common law *definition* of marriage should not be confused with the "common-law marriage" in the sense of the marriage concluded by informal consent prior to intervention by the Fourth Lateran Council of 1215. This topic is discussed in more detail in Chapter 2 and in 2.2.1.2 below.

63 25 of 1961.

64 Compare *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) (2000 (8) BCLR 837) at par [31] where O'Regan J appeared to be of the view that either of these terms could be used. Admittedly, confusion exists as to the precise content of these terms. See, for example Ngwenya J's statement in *Nkonki v Nkonki* 2001 (4) SA 790 (C) at par [5]: "[m]arriage law in South Africa has been a trying and complex subject matter for years. While this is to be expected in a multi-ethnic society such as ours, it is unfortunate that very little literature is available on this subject. For example, *many writers refer to common-law marriage synonymously with Christian marriage*. I am not sure whether this is not intended to refer to the *Marriage Act* 25 of 1961" (emphasis added). In addition, Sinclair and Heaton 1996: 267 (note 3) note the awkward practice of using the term "common-law marriage" to describe marriages between black persons that were concluded in terms of civil as opposed to customary law. In

made is therefore that although a civil marriage is a marriage that is concluded *according to the* common law definition of marriage, such a marriage is not valid unless it has been solemnised and registered in accordance with the provisions of the *Marriage Act*.[65]

- In as far as customary marriages are concerned, the term "common-law marriage" also creates difficulty. This is due to the fact that the common law definition of marriage only caters for monogamous unions, while customary law permits both monogamous and polygynous unions. This difficulty may be illustrated by the following example: Assume that A (an adult male) is validly married to B (an adult female) in accordance with customary law. While his customary marriage exists he is prohibited from entering into a civil marriage with any other person.[66] Assume further that he attempts to marry a second wife (C) in terms of customary law, but that this customary "marriage" is void for some or other reason. If he cohabits with C while still being married to B, neither common law nor customary law would recognise his "marriage" to C. To describe his relationship with C as a "common-law marriage" purely by virtue of the fact that he cohabits with C would therefore be a *non sequitur*.

- The *Civil Union Act* provides—as distinct from the civil marriage—for a marriage which is a creature of statute and therefore is not concluded *according to* the common law definition of marriage, but according to the provisions of the Act by which this institution was created.

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order to avoid the confusing state of affairs created by references to religion and "common law" it is suggested that the term "civil marriage" is more correct.

65 See Sinclair and Heaton 1996: 306.

66 Section 3(2) read with section 10(1) of the *Recognition of Customary Marriages Act* 120 of 1998.

2.2.1.2 The term creates unnecessary confusion between the parties involved in as far as their respective legal rights and obligations are concerned

As Hahlo[67] mentions, any reference to "common-law marriage" immediately creates confusion due to its association with the formation of a valid marriage on the basis of informal consent prior to the Fourth Lateran Council of 1215.[68] The use of the term "marriage" is therefore problematic as it may lead the partners to infer that some or all of the legal consequences of a marriage apply to their relationship.[69] Furthermore, if one considers paragraph 2.2.1.1 above, a further problem becomes apparent in that the term "marriage" in South African law has a triaxial meaning[70] in that it can refer to civil and customary marriages, as well as to marriages concluded under the *Civil Union Act* 17 of 2006. In South Africa the term therefore does not have the one-dimensional meaning that it may have in other jurisdictions. This being so, applying the term "common-law marriage" to life partners may cause even greater uncertainty due to the fact that such parties may in theory (incorrectly) ascribe the consequences of a *customary, civil or marriage under Act 17 of 2006* to what they perceive to be their "common-law marriage." In addition, the fact that the term is employed in certain foreign jurisdictions may lead the parties incorrectly to assume that as legal consequences are attached to "common-law marriages" in such jurisdictions, the same applies in South Africa, thereby leading them to assume that legal consequences exist where in reality there may be none.[71]

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67 1985: 36.

68 Also see Sinclair and Heaton 1996: 267 (note 3).

69 See Schäfer 2006: 642; Singh 1996: 318. In this regard Hahlo (1985: 36) states that in addition to being misleading, the term "confers on a union which is not a legal marriage an aura of respectability which it does not deserve." In light of the Bill of Rights it would appear as if Hahlo's sentiments are slightly harsh, but the fact remains that the reference to "marriage" is jurisprudentially unsound.

70 This dual meaning is not the one referred to by Sinclair and Heaton 1996: 305 (note 1) where the authors differentiate between the "act or ceremony" of marriage and the "marriage relationship."

71 For example, the State of Texas in the United States of America permits both common-law marriages (known as "informal marriages") as well as marriages concluded by way of a

2.2.1.3 "Common-law marriage" from the parties' perspective

The correct use of the term "common-law marriage" refers to a relationship in which a man and woman live together while regarding themselves as being married as per a mutual agreement to this effect and, on this basis, create the impression to the outside world that they are married.[72] Once again, this illustrates why the term is inappropriate within the life partnership setting, as life partners do not necessarily believe that they are, or consider themselves to be, married to one another. On the contrary, many life partners choose to live together precisely to avoid the strictures of marriage, or because they are legally prohibited from marrying one another.[73]

2.2.1.4 Case law

The problematic use of the term "common-law marriage" is not limited to literature on the subject but is also unfortunately encountered in case law. Moreover, the context within which the term has been employed in the latter regard has been inconsistent, and, it must be said, at times blatantly incorrect. Two examples from recent case law can be used to illustrate this submission. In the case of *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae)*[74] (hereafter "*Minister of Home Affairs v Fourie*") Sachs J stated that

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ceremony. The former type of marriage can be proved in two ways, by either filing a "Declaration of informal marriage" with the County Clerk or by proving the following three requirements, namely (i) that the couples have reached consensus that they are married; (ii) that they live together in the State of Texas; and (iii) that they hold themselves out as being married to outsiders—see section 2.401 of the *Texas Family Code* and *Garduno v Garduno* 760 S.W.2d 735 at 738 as well as Texas Department of State Health Services "Marriage and Divorce Frequently Asked Questions" available at http://www.dshs.state.tx.us/vs/marriagedivorce/mdfaq.shtm (accessed on 20 April 2009).

72 See SALRC 2006: 15 "[a] common law marriage arises when a couple agree between themselves to be married, hold themselves out to be married, and live together for a substantial period of time." See the preceding note for an example.

73 See Sinclair and Heaton 1996: 271 *et seq*; SALRC 2006: 22 and 24 *et seq*; Hahlo 1975: 35.

74 2006 (1) SA 524 (CC) at par [36].

> [t]he State accordingly acknowledged that partners to same-sex relationships suffer discriminatory effects and violations of dignity and privacy and that such violations should be removed. It contended, however, that granting same-sex couples *access to common-law marriage* is not the answer, constitutionally or otherwise.

Sachs J's reference to "common-law marriage" was obviously intended to refer to a marriage that is concluded in accordance with the common law *definition* of marriage and solemnised and registered in accordance with South African marriage legislation, and not within the context of a life partnership or in the sense of a purely religious marriage that has not been solemnised in accordance with relevant marriage legislation.[75] Similar references to the use of the term in this context are also to be found in other decisions of the highest court in South Africa.[76] It is submitted that, although this use of the term "common-law marriage" is technically more correct than when used in the context of a life partnership, it is apt to create confusion and is therefore not to be encouraged.

On the other hand, as recently as in the 2007 case of *Singh v Ramparsad* [77]—a matter in which the Durban and Coast Local Division of the High Court was

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75 An understanding of the correct context within which to refer to the role of the common law as far as purely religious marriages are concerned is to be found in *Ismail v Ismail and Others* 2007 (4) SA 557 (E) where Jones J described the current legal position as "[i]n recent years the highest Courts in the land have recognised the fact of an Islamic marriage for various purposes, although it was not entered into in terms of the *Marriage Act* 25 of 1961 *and may not have had the blessing of the common law*" (at 561 (D), emphasis and italics added).

76 A similar reference to "common-law marriage" in this context is to be found in *J and Another v Director General, Department of Home Affairs, and Others* 2003 (5) SA 621 (CC) at par [23]. In *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) (2000 (8) BCLR 837) at par [32] the concepts "civil marriage" and "common-law marriage" were equated. In the pre-democratic era, the Appellate Division (the highest court in South Africa at the time) referred to the term "gebruiklike huwelik" in similar vein—see *Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v Fondo* 1960 (2) SA 467 (A) at 474 (B).

77 2007 (3) SA 445 (D). Also see *Hlathi v University of Fort Hare Retirement Fund and Others* PFA/EC/9015/2006 (18 March 2009) where, in reaching the conclusion that "[i]t follows therefore that a *common law spouse* is a person of the opposite or same sex who is a partner in a *common law marriage*. In essence, there is no difference between a cohabitee and a common law spouse…" (at par [22]), the Pension Funds Adjudicator recently failed to realise that the concepts "common law marriage" and "common law spouse" do not form part of our law in the sense intended *in casu*.

asked to adjudicate on the validity or otherwise of a monogamous "marriage" that had been concluded in terms of the Hindu faith without being solemnised and registered according to the *Marriage Act* 25 of 1961[78]—the term was (incorrectly) used in the opposite sense, *id est* in the sense of a purely religious marriage that had not been concluded according to the common law *definition* coupled with appropriate legislation, but was apparently nevertheless a "lawful marriage in terms of the common law."[79] *In casu* Patel J remarked as follows:[80]

> The *Marriage Act* does not proscribe purely religious marriages. These marriages involve the solemnisation by a minister of religion who is not designated as a marriage officer for the purposes of the *Marriage Act*. *These religious marriages although they lack legal validity are regarded as lawful marriages in terms of the common law* (see *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC) (2004 (7) BCLR 735; [2003] 3 All SA 139)).[81]

As a point of departure, it must be emphasised that Patel J's statement that purely religious marriages "are regarded as lawful marriages in terms of the common law" is not correct. Instead, it reveals a misunderstanding of the fundamentals of South African marriage law and of the rationale employed in *Daniels v Campbell NO and Others* (the case relied on by Patel J for this assertion) and *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)*[82] (the case upon which the *Daniels* decision was based).

The reason for making this assertion is that both *Amod* and *Daniels* involved Islamic purely religious marriages that, by virtue of their potentially polygynous

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78 At par [1] – [3].
79 At par [37].
80 At par [39] and [40].
81 Par [37] emphasis added.
82 1999 (4) SA 1319 (SCA).

nature, are not regarded as valid *according to the common law*.[83] Therefore, even if it is true that "the institution of polygyny was viewed through the prism of the common law and the *mores* of a politically dominant but a minority section of our society",[84] the fact remains that the common law definition of marriage has not been amended for the purposes of recognising (potentially polygynous) Islamic "marriages" as lawful marriages—all that has happened is that the Courts have been prepared to recognise certain legal consequences that attach to them.[85]

This much was acknowledged by the Courts both in *Daniels* and in *Amod* where it was categorically stated that the issue to be decided was not whether the purely religious marriage was valid, but instead whether or not the protection provided by the common law duty of support (in the case of *Amod*) and the *Maintenance of Surviving Spouses Act* [86] and the *Intestate Succession Act* [87] (in the case of *Daniels*) should be withheld from a *de facto* monogamous Islamic marriage.[88] Admittedly, in *Amod* Mahomed CJ[89] did make the somewhat confusing statement (that was also relied on by Sachs J in *Daniels*)[90] to the effect that:

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83 See *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA) at par [17] – [20]; *Ismail v Ismail* 1983 (1) SA 1006 (A) at 1019 (H) – 1020 (A); *Ismail v Ismail and Others* 2007 (4) SA 557 (E) at 561 (D) and Sinclair and Heaton 1996: 158.

84 As *per* Van Reenen J in *Hassam v Jacobs NO* [2008] 4 All SA 350 (C) at par [9] (emphasis added).

85 Similar recognition has possibly even been extended to *de facto* polygynous Islamic "marriages": In the recent case of *Hassam v Jacobs NO* (Case no. CCT 83/08: unreported judgment of the Constitutional Court delivered on 15 July 2009) the Court held that the *Intestate Succession Act* 81 of 1987 was unconstitutional to the extent that it did not make provision for the spouses to such marriages.

86 27 of 1990.

87 81 of 1987.

88 Also see Nkabinde J's statement to this effect in *Hassam v Jacobs NO* (Case no. CCT 83/08: unreported judgment of the Constitutional Court delivered on 15 July 2009).

89 Mr Justice Ismail Mahomed was South Africa's first black chief justice; a position which he held since 1998 until his death in 2000—see http://www.constitutionalcourt.org.za/site/judges/justiceismailmahomed/index1.html (accessed on 4 September 2009).

90 At par [24].

> For the purposes of the dependant's action the decisive issue is not whether the dependant concerned was or was not lawfully married to the deceased, but whether or not the deceased was under a legal duty to support the dependant *in a relationship which deserved recognition and protection at common law*.

The words "in a relationship which deserved recognition and protection at common law" do not imply that the common law recognises the validity of such marriages, and the conclusion that Patel J reached in the *Singh* case does not follow from this statement.[91] Consequently, it is submitted that Patel J read too much into it, for as Sachs J reiterated in *Daniels*:

> Put another way, it is not whether it had been open to the applicant to solemnise her marriage under the *Marriage Act*, but whether, in terms of 'common sense and justice' and the values of our Constitution, the objectives of the Acts would best be furthered by including or excluding her from the protection provided. The answer, as in *Amod*, must be in favour of the interpretation which is consistent with the ordinary meaning of the word 'spouse', aligns itself with the spirit of the Constitution and furthers the objectives of the Acts.

It follows therefore, that Patel J's statement to the effect that such "marriages" "are regarded as lawful marriages in terms of the common law" is incorrect.

It might also be mentioned that the Judge's observation that although purely religious marriages "lack legal validity [they] are regarded as lawful marriages in terms of the common law" creates unnecessary confusion, and is in fact meaningless due to the fact that the common law is not self-enforcing.[92] Therefore, even if Patel J was correct in stating that such "marriages" are lawful in terms of the common law, this "validity" alone would be meaningless without

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91 Indeed, in the *Amod* case Mahomed CJ (at par [18] – [19]) criticised the Appellate Division's approach in *Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v Fondo* 1960 (2) SA 467 (A) in which the surviving spouse was required to prove that her customary marriage was lawful at common law in order to enforce her claim for loss of support.

92 *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) at par [3].

the applicable legislation to give effect to it and hence to make the common law enforceable.

A similar sentiment can be expressed regarding a statement that Patel J made two paragraphs later where the learned Judge stated that "[t]he court in coming to the conclusion which it did whilst recognizing the common law marriage did not declare it to be legally valid."[93] Juxtaposed with his earlier observation,[94] it appears as if these statements contradict one another as on the one hand "religious marriages" are described as being "lawful marriages in terms of the common law" while two paragraphs later these "lawful marriages" are described as being "recogniz[ed]… [without being] legally valid."[95] It is submitted that these statements are inaccurate and that they cause unnecessary obfuscation.

With respect, another misstatement of the law occurs where Patel J asserts that:

> Our Courts have, since the advent of the Constitution, consistently come to the aid of spouses and their children *if the marriage was one under the common law* if there was a need, especially if unfairness would result by the application of the strict letter of the law… [96]

Once again, it appears as if Patel J erred in this regard as he appeared to lose sight of the fact that a marriage which is potentially polygamous cannot be a marriage "under the common law."[97] At best, the Courts can acknowledge

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93 At par [39]. This paragraph is discussed in further detail below.

94 That is to say in par [37].

95 Also see Heaton 2008(b): 459 who points out that even par [37] (quoted above) can be construed as incorrectly implying that the common law "somehow clothes [religious marriages] with legal validity."

96 Par [38] emphasis added.

97 See *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA) at par [17] – [20]; *Ismail v Ismail and Others* 2007 (4) SA 557 (E) at 561 (D); Sinclair and Heaton 1996: 158.

certain consequences of such a "marriage", or regard it as putative where appropriate.[98]

Patel J continued as follows:

> [In *Ryland v Edros*][99] … [t]he Court in coming to the conclusion which it did *whilst recognising the common-law marriage* did not declare it to be legally valid.[100]
>
> Similarly courts have come to the assistance of dependants *in a common-law marriage* where loss of support is claimed (see *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* … The Constitutional Court has upheld the right of a surviving spouse of a marriage performed according to Muslim rites which had not been registered, to inherit (see *Daniels v Campbell* (*supra*)) … In the *Daniels* case no declaration as to the validity of the Muslim marriage was considered.[101]

As seen above, it should be noted that all three cases referred to by Patel J[102] involved Islamic marriages that had not been solemnised in accordance with South African marriage legislation. They therefore involved purely religious marriages and did not involve the typical cohabitation scenario where the parties simply live together as man and wife without necessarily being "married" in terms of religious law or in any other way (in other words a life partnership in the narrow sense as explained above).

In the light of this fact the learned Judge's statement that "whilst recognising the common-law marriage [the Court in the *Ryland* case] did not declare it to be legally valid" is worth considering in further detail. Firstly, it is submitted that this statement is misleading as it creates the impression that the Court acknowledged

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98 See 2.2.3 below.

99 1997 (2) SA 690 (C).

100 Par [39] emphasis and footnote added.

101 Par [40] emphasis and italics added.

102 These cases are *Ryland v Edros* 1997 (2) SA 690 (C); *Amod (Born Peer) v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA) and *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC).

the existence of the concept of a "common-law marriage" marriage in South African law. Instead, the Court in *Ryland* did no such thing—it merely stated that recognition could be given to the *underlying contractual obligations* that existed between the parties to a *de facto* monogamous Islamic marriage.[103] The basis of this finding is the fact that an Islamic marriage is viewed as being a contract.[104] The Court did not therefore "recognise" a "common-law marriage" (in fact, no reference to this concept is to be found anywhere in Farlam J's judgment), but instead merely gave effect to the contractual obligations of support flowing from the Islamic marriage.[105] With respect, it is therefore submitted that Patel J should rather have stated that the "[t]he Court in coming to the conclusion which it did *whilst recognising the contractual obligations arising from a* de facto *monogamous Islamic 'marriage'* did not declare it to be a valid *marriage for the purposes of South African law.*"

The question that now arises is: What did Patel J perceive a "common-law marriage" to be? In the light of the preceding discussion it appears as if the judgment in *Singh v Ramparsad* blurs the distinction mentioned in the introductory paragraphs above between (i) a marriage that is concluded *in accordance with or under the common law definition of marriage* and (ii) the so-called "common-law marriage." This much appears from the overlapping use of the phrases "marriages in terms of the common law", marriage "under the common law" and "common-law marriage" in consecutive paragraphs in the judgment. Moreover, even if one accepts the view that Patel J equated these concepts, it is still difficult to understand what he perceives a "common-law marriage" to be.

As seen above, the term "common-law marriage" is usually used in the narrow context of referring to parties who simply "live together" as man and wife without

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103 At 707 (F) – 711 (C); Heaton 2008(b): 460.

104 Cronjé and Heaton 2004: 217; Goolam 2002: 61.

105 Cronjé and Heaton 2004: 217; Heaton 2008(b): 460.

being "married" in any way.[106] However, if one considers that all three cases to which Patel J referred involved parties to purely religious marriages, it could be argued—as Heaton[107] also points out—that Patel J viewed the term "common-law marriage" as being limited to a *religious marriage* that has been concluded in terms of particular religion and that has not been solemnised in accordance with the 1961 *Marriage Act* and is therefore not valid according to South African law.[108] In this context, therefore, the existence of the religious marriage would be a precondition to Patel J's conception of the "common-law marriage." This inference is strengthened by the fact that Patel J confined his analysis of the "common-law marriage" to cases involving purely religious marriages and did not refer to one single case in which similar recognition had been granted (or refused)[109] to life partners who were not "married" to one another in any way (*id est* to life partners in the narrow sense). From this discussion it therefore appears as if Patel J assigned a novel and unique meaning to the concept "common-law marriage."[110]

However, the fact remains that, irrespective of which of the meanings of the term "common-law marriage" is ascribed to Patel J's judgment, neither of these interpretations is jurisprudentially sound as the findings in *Ryland* and *Amod* were based on the fact of a contractual duty of support flowing from the Islamic purely religious marriages entered into between the parties and not on the basis of the existence or recognition of any "common-law marriage." The inevitable conclusion is that the learned Judge erred in this regard.

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106 Hahlo 1975: 34, 35; Heaton 2008(b): 460.

107 2008(b): 460.

108 This point of view is shared by Heaton 2008(b): 460: "What [Patel J] had in mind were religious marriages that lack official recognition." Compare *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others* 1999 (3) SA 173 (C) at 183 (G) – (H) where Davis J differentiated between civil and customary marriages on the one hand and "other forms of life partnerships such as same sex partnerships, common-law marriages and Muslim and Hindu marriages" on the other. Despite the fact that Davis J could also be criticised for creating the impression that South African law recognises the so-called "common law marriage", the judge maintains a clear distinction between such a "marriage" and "Muslim and Hindu marriages."

109 See for example *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).

110 Also see Heaton 2008(b): 460.

2.2.1.5 Conclusion

It is inappropriate both from a historical and a jurisprudential point of view to use the term "common-law marriage" in order to describe a life partnership in either the wide or narrow senses. Nevertheless, a preoccupation with this term unfortunately appears to persist. Regarding the instances where the term has been employed by our courts, it is submitted that the context used by Sachs J in *Minister of Home Affairs v Fourie*[111] is the lesser of the two evils. Even so, unnecessary confusion can be eliminated by avoiding the use of the term altogether.

2.2.2 The term "concubinage"

The term "concubine" is generally defined to refer to cohabitation between a woman and a man.[112] Over and above the fact that the term does, as Hahlo[113] mentions, "[sound] somehow out-of-date", it *prima facie* appears to be derogatory and invites the inference that it refers to a mistress outside of marriage,[114] to a secondary wife,[115] or that it only caters for heterosexual couples.[116]

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111 2006 (1) SA 524 (CC) at par [36] as discussed in 2.2.1.4 above.

112 Sinclair (ed) 2001: 308 define the meaning of the word as either "(in polygamous societies) a secondary wife" or "a woman who cohabits with a man, [especially] (formerly) the mistress of a king, nobleman, etc …" Also see Allen 1991: 237; Hahlo 1972: 321.

113 1985: 36 (note 74).

114 See Sinclair and Heaton 1996: 268 (note 7) and SALRC 2006: 11 where the word "mistress" is discountenanced.

115 See Sinclair (ed) 2001: 308.

116 See for example Van der Vyver and Joubert 1991: 449. On the other hand Thomas 1984: 455 is of the opinion that the term may be used in order to describe homosexual unions as well as heterosexual ones. Examples from case law where the term has been used in the sense of a man and woman who live together "as man and wife" include *Schlesinger v Schlesinger* 1968 (1) SA 699 (W) at 700 (A) and (E) – (F); *Kannemeyer v Gloriosa* 1953 (1) SA 580 (W) at 586 (H) – 587 (A); *Van Vuuren v Van Vuuren* 1949 (4) SA 749 (D) at 757 (quoting from *Harvey v Harvey* (1923 NPD 281 at 282)).

2.2.3 The terms "*de facto* marriage" and "putative marriage"

Neither of these terms is suitable for the purpose of describing a life partnership. To begin with, the reference to the word "marriage" should be avoided for reasons similar to those outlined in paragraph 2.2.1.1 (triaxial meaning of "marriage").

As far as the term "*de facto* marriage" is concerned, there is not a single reported case in which the South African Courts have used this term with regard to life partnerships in the narrow sense,[117] nor one in which they have they been prepared to find (as the term in fact implies) that on the facts of the case a *marriage* existed between the parties involved in such a life partnership. Indeed, an analysis of the case law reveals that the Courts have in such instances at best been prepared to extend certain consequences of marriage to life partnerships.[118]

In South African law the term "putative marriage" (*matrimonium putativum*) refers to the specific instance where a void "marriage" is visited with limited legal consequences despite its invalidity provided that at least one of the parties to the "marriage" in good faith believed it to be valid.[119] The *bona fides* of (at least one of) the "spouses" constitutes the *raison d'être* for the putative marriage in that the law attempts to avoid the harsh consequences of total invalidity that would otherwise ensue. The *bona fides* requirement immediately explains one of the reasons for avoiding the term "putative marriage" in a life partnership setting, as it seldom occurs that one (much less both) life partners truly believe that they have

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117 In *Feldman v Feldman* 1949 (3) SA 493 (A) at 501 – 502 the Appellate Division quoted a passage from the judgment of the Court *a quo* in which reference was made to a "*de facto* marriage" but *in casu* the term was not used in a cohabitation context but instead to highlight the latter Court's finding that the marriage between the parties existed only in law (*de jure*) but not on the facts (*de facto*).

118 See for example *Gory v Kolver NO* 2007 (4) SA 97 (CC); *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA).

119 *Shields v Shields* 1959 (4) SA 16 (W) at 23, 24; *Zulu v Zulu and Others* 2008 (4) SA 12 (D) at 14 (H); *Solomons v Abrams* 1991 (4) SA 437 (W).

validly "married" one another.[120] In the event of this indeed being the case, such a union will be a genuine putative marriage and not a life partnership in the narrow sense.[121]

The term "putative marriage" presupposes that the parties participated in a marriage ceremony of sorts; a fact which again illustrates why the term should not be used to describe life partnerships in the narrow sense. In addition, doubt persists as to whether or not the common law requirement that all of the formalities of such a ceremony have to be complied with in order for the "marriage" to be putative forms part of our law.[122] If it does, this requirement would once again indicate why the term cannot be used to describe life partners.

A further compelling reason why this term should not be used to describe a life partnership is that the law attaches limited legal consequences to a putative marriage that would not apply in the case of a completely invalid marriage. So, for example, the common law provided that any children born of such a "marriage" were legitimate,[123] and the patrimonial consequences of such a "marriage" are generally interpreted so as to favour the *bona fide* "spouse" or, where both parties were *bona fide*, so as to give effect to the proprietary consequences that they had intended to apply to their "marriage."[124]

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120 Although this has occurred (see *Ex parte L (Also known as A)* 1947 (3) SA 50 (C) at 54) this would certainly be the exception rather than the rule.

121 See Sinclair and Heaton 1996: 268 (note 4).

122 See Cronjé and Heaton 2004: 47. This question was left open in the leading case on the matter, namely *Bam v Bhabha* 1947 (4) SA 798 (A) at 804, 805.

123 See for example *Moola v Aulsebrook NO* 1983 (1) SA 687 (N) at 690 (D): "The true importance of the concept of putative marriage lies therefore in the fact that children of such a union are legitimate with all the legal advantages of legitimate children." Also see Hahlo 1972: 322. In view of the fact that the *Children's Act* 38 of 2005 now emphasises the marital status of the parents instead of describing children as "legitimate" or "illegitimate" (see Heaton 2008(a): 49), such children will now instead be regarded as being "born of married parents." This issue is examined below.

124 Hahlo 1972: 322; Visser and Potgieter 1998: 70; Cronjé and Heaton 2004: 47, 48; Sinclair and Heaton 1996: 408, 409. For further principles underlying the putative marriage, see 2.4.2.1 in Chapter 6.

However, in the case of life partners, the general rule[125] is that no legal consequences attach to their union by operation of law,[126] and the limited legal consequences that attach to putative marriages would not apply unless the life partners (or one of them) could satisfy the requirements for such a "marriage" as explained earlier.

In the past the distinction between putative marriages and life partners as far as children were concerned was more pronounced, in the sense that at common law a child born of a putative marriage was legitimate while a child born to an unmarried couple was regarded as being illegitimate with only the mother of the child generally[127] holding parental authority over the child.[128] As Heaton[129] mentions, subsequent legislation, such as the *Children's Status Act*[130] and the *Natural Fathers of Children Born out of Wedlock Act*[131] partly codified but in essence confirmed the common law position as far as unmarried couples were concerned.[132] However, the *Children's Act* 38 of 2005 has brought about far-reaching changes to the position of such couples.[133] Heaton[134] describes the effect of the *Children's Act* on the erstwhile position in the following succinct fashion:

> [T]he law still does not treat unmarried and married parents in exactly the same way. Now, however, the law no longer uses pejorative terms like "illegitimate child" and it grants the same parental responsibilities and rights to certain unmarried fathers that it grants to married parents and unmarried mothers.

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125 Certain legal consequences can attach if the parties have contracted to this effect, or if a universal partnership can be proved, or if the developments which have been occasioned by the judiciary apply. These exceptions to the general rule are explained in Chapter 6 below.

126 SALRC 2006: 110, 111. See 1 in Chapter 5 that follows.

127 An application could be brought to the High Court for aspects of parental authority to be awarded to the unmarried father of the child—see Heaton 2008(a): 65.

128 Heaton 2008(a): 65; Van der Vyver and Joubert 1991: 450; Visser and Potgieter 1998: 200, 201.

129 2008(a): 65.

130 82 of 1987.

131 86 of 1997.

132 Also see Heaton 2007: 3-9.

133 Heaton 2008(a): 65.

134 2008(a): 49.

The current position is that the biological mother of a child born to unmarried parents automatically acquires full parental responsibilities and rights over her child,[135] while the biological father would have to satisfy the requirements of either section 20 (if the father divorced the child's mother after the child's conception but before birth) or section 21 (where the father has never been married to the mother) in order to qualify for the same. In the event of non-compliance with these provisions and in the absence of a Court order it would also be possible by virtue of section 22 of the Act for parental responsibilities and rights to be conferred on such a father by the conclusion of a parental responsibilities and rights agreement.[136] At the time of writing this section of the Act is however not yet in operation.

In accordance with section 20, a biological father who was *married* to the mother of the child at the time of the child's conception or birth or at any time in between has full parental responsibilities and rights in respect of his children. In terms of section 21 an unmarried biological father automatically[137] acquires full parental responsibilities and rights if he lives with the mother of the child in a permanent relationship at the time of the child's birth or if, regardless of whether he has ever lived with her, he (i) consents or successfully applies to be identified as the father or has paid any penalty imposed by customary law, and (ii) contributes or has in good faith attempted to contribute towards the maintenance and upbringing of the child for a reasonable period of time.[138]

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135 Section 19. In accordance with subsection (3) this rule does not apply to a child who is the subject of a surrogacy agreement. Subsection (2) creates another exception to this general rule by stating that in the instance where the biological mother is herself an unmarried child and where neither she nor the biological father are the guardians of the child, the guardian of the child's biological mother is also the guardian of the child.

136 Heaton 2008(a): 71.

137 Heaton 2008(a): 69 – 71.

138 Section 21(1)(b)(i) – (iii). Louw (2007: 329) is of the opinion that this section of the Act is ambiguous as it is unclear whether the requirements are listed in the alternative or whether they are cumulative in the sense that all three are preconditions for the acquisition of full parental responsibilities and rights. It is submitted that the requirements are cumulative. Three main reasons can be advanced for this contention: Firstly, the three requirements are listed together under a sub-heading introduced by the condition "if" which is immediately qualified by the words "regardless of whether he has lived or is living with the mother." This indicates that the only

The discussion above therefore shows that, as far as children are concerned, the *Children's Act* of 2005 has definitely narrowed the gap between the common law consequences of a putative marriage and the position in which unmarried parents currently find themselves.

Nevertheless, the interaction between the common law consequences of the putative marriage in as far as they pertain to children and those imposed by the *Children's Act* of 2005 becomes an interesting point. In this regard at least two possibilities present themselves:

(i) The first possibility is premised on the principle that the *Children's Act* has removed the categorisation of children as being "legitimate" or "illegitimate" from our law.[139] If this state of affairs is transplanted into the law regarding putative marriages, this implies that a child born of a putative marriage is no longer regarded as being "legitimate" in accordance with the common law qualification but is instead deemed to be a "child born of married parents." In principle, then, this would imply that the biological father of such a child would, in terms of section 20 of the Act, have full parental responsibilities and rights over his child.

(ii) In the alternative, it would be possible to argue—on a very technical point—that section 20 of the Act does not apply in the case of a putative marriage. This argument could be based on the fact that section 1 of the

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element of the "if" condition which is indeed optional is that of cohabitation and that the three requirements subsequently listed are therefore not negotiable. Secondly, the requirements are not separated by the alternative "or." Instead the first two requirements are separated by a semicolon while the last is separated by "and", leading to the conclusion that all three requirements are interlinked (also see Heaton 2007: 3-11). Finally, each requirement is vital in terms of giving effect to the objects of the Act as stated in section 2 which *inter alia* include giving effect to the constitutional rights of children (section 2(b)) and "generally, to promote the protection, development and well-being of children" (section 2(i)). In consequence hereof it must be agreed with Heaton (2007: 3-11) that the unmarried father must comply with all three requirements set by section 21(1)(b).

139 Interestingly section 36 the Act still uses the term "child born out of wedlock." This appears to be an oversight by the Legislature.

Children's Act defines "marriage" as one which is "*recognised* in terms of South African law or customary law."[140] If this definition is interpreted as requiring any marriage to be *a valid marriage* in terms of South African law or customary law, it could be argued that, as a putative marriage is a void marriage (and therefore not valid as per the definition in section 1 of the *Children's Act*),[141] that a child born of such a "marriage" could not be regarded as a child born of married parents and that the father of the child could therefore not be deemed to be a "married father" for the purposes of section 20 of the Act. As section 20 of the *Children's Act* would not be applicable, the next question to arise would be whether section 21 of the Act (dealing with "unmarried fathers") would apply. As this section specifically contemplates the scenario where the parents are unmarried and where no valid marriage has ever existed between them, it would appear to be wide enough also to include the parties to a putative marriage within its ambit, as a putative marriage is not a valid marriage. It follows that it could be argued that section 21 of the *Children's Act* has amended the common law position and that the father of a child born of a putative marriage would also have to comply with its provisions and hence to have been cohabitating with the mother at the time of the child's birth[142] or *inter alia* to prove that he contributes or has in good faith contributed towards the maintenance and upbringing of his children before he would be entitled to exercise full parental rights and responsibilities in respect of

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140 The ostensible distinction between "South African law" and "customary law" cannot be supported as it creates the impression that customary marriages somehow do not form part of "South African law." Ever since the coming into operation of the *Recognition of Customary Marriages Act* 120 of 1998, all customary marriages are equal in status to civil marriages and certainly form part of "South African law." It is submitted that paragraph (a) of the definition should rather read "that is recognised as a civil marriage or customary marriage in terms of South African law."

141 It could be argued that this interpretation is correct even if the definition in question were not as stringently formulated—see *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC) at par [9] where Madala J held that "[t]here is no definition of the word 'spouse' in the provisions under attack [namely the *Judges' Remuneration and Conditions of Employment Act* 88 of 1989 and the Regulations thereto]. In the circumstances the ordinary wording of the provisions must be taken to refer to a party to a marriage that is recognised as valid in law and not beyond that."

142 Section 21(1)(a).

them. If this argument were to succeed, there would be no difference between the position of unmarried life partners and "spouses" to a putative marriage as far as children are concerned.

At least two arguments can be raised to counter the second scenario described above. The first argument would thwart the contention that a putative marriage does not qualify as a marriage for the purposes of the section 1 definition in the *Children's Act*. This could be done by arguing that, although the putative marriage is not a valid marriage, the law indeed "recognises" certain of the consequences of a valid marriage,[143] with the effect that—at least as far as those specific consequences are concerned—there is no material difference between a putative marriage and valid one. Indeed, one of those instances is the precise point at issue, namely where children are involved.[144] The second argument would tie in with the first and relate to the fact (*inter alia*) that it would not be in the best interests of the child born of a putative marriage to alter the position at common law so as to place that child and his parents in a more adverse position after the coming into operation of the Act by effectively exposing them to the harsh consequences of an invalid marriage.

In the light of these arguments, it is submitted that the first possibility is the correct one, and that the father of a child born of a putative marriage will be regarded as being a married father in accordance with section 20 of the *Children's Act*. In the final analysis, the differentiation between the position of life partners and that of "spouses" involved in a putative marriage as far as children are concerned serves further to explain why the term "putative marriage" cannot be used to describe life partnerships.

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143 See Visser and Potgieter 1998: 68: "The law *recognizes* a putative marriage in order to soften certain consequences of a marriage which is null and void" (emphasis added) and *Moola v Aulsebrook NO* 1983 (1) SA 687 (N) at 690 (A) – (B).

144 See for example *Moola v Aulsebrook NO* 1983 (1) SA 687 (N) at 690 (D).

The chasm that exists between the patrimonial consequences of a putative marriage and those of a life partnership is another incontrovertible difference between these two forms of relationship. In the case of the latter group, the parties are required to regulate these consequences themselves or to rely on other protection such as the existence of a universal partnership or on the principles of unjustified enrichment.[145] As opposed to the putative marriage, the law is therefore not concerned with the *bona fides* of the parties to such a relationship and does not provide any special protection in this regard whatsoever. In addition, Hahlo[146] and Sinclair and Heaton[147] submit that the principles pertaining to the patrimonial consequences of a putative marriage are wide enough to allow for the *bona fide* surviving "spouse" to a putative marriage to inherit intestate in the event of the other "spouse" predeceasing the former without leaving a valid will. In this regard the legal position regarding life partners differs once again, as the law currently only appears[148] to permit homosexual cohabitants to inherit intestate.[149]

2.3 Conclusion—the term "life partnership"

For the purposes of Part 2 of this study, the term "life partnership" will unless indicated otherwise denote:

> In the absence of any *alternative* statutory framework or domestic partnerships rubric that provides for such persons to formalise their relationships:

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145 SALRC 2006: 110, 111.

146 1985: 115, 116.

147 1996: 409.

148 See 3.4.1 in Chapter 5 below.

149 *Gory v Kolver NO* 2007 (4) SA 97 (CC); 2007 (3) BCLR 294 (CC). See the discussion in 3.4.1 in Chapter 5 below.

1) Persons who, despite not being prevented by law from entering into a lawful marriage, are involved in a permanent life partnership without either:

   a) being married:

      - in terms of the *Marriage Act* 26 of 1961; or
      - in terms of the *Civil Union Act* 17 of 2006; or
      - in terms of the *Recognition of Customary Marriages Act* 120 of 1998; or

   b) without having concluded a civil partnership (as opposed to a marriage) in terms of the *Civil Union Act*;[150]

as well as:

2) Persons who, despite not being prevented from entering into a lawful marriage, are involved in a permanent life partnership without having participated in any marriage ceremony that has resulted in a purely religious marriage that is not recognised in terms of any one of the three Acts listed above.

3. CONCLUSION

In this Chapter it has been established that the term “life partnership” will be used for this Part (Part 2) of this study. The term has specifically been selected due to its legal correctness and in order to ensure that it is not confused with the term “domestic partnership” which term will be utilised when specifically dealing with the *Domestic Partnerships Bill* and the rubric in Part 3.

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150 17 of 2006.

CHAPTER 5:

THE JUDICIAL RECOGNITION OF LIFE PARTNERSHIPS IN SOUTH AFRICA

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1. INTRODUCTION

As seen in the background to Chapter 1, South African family law did not pay much attention to the recognition of relationships outside of civil marriage in the past. In fact, one could probably agree with the statement made by Thomas[1] in 1984 when he stated that South African family law for all intents and purposes chose largely to ignore these relationships, with hardly any provision being made in terms of regulating them either while they subsisted or after their termination.[2] In short, none of the invariable consequences which attached to a valid civil marriage attached to life partnerships, regardless of whether they existed between persons of the same or opposite sex. This meant, *inter alia*, that:

- There was no real "law of life partnerships" that existed as a parallel to matrimonial law. Instead, what existed was a mere "application of general rules of law" to the instance of (exclusively heterosexual) cohabitation.[3]

- The law did not (and in fact still does not) take any interest in, or prescribe any formalities for entering into or terminating a life partnership so that

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1 1984: 456.
2 Thomas 1984: 456; Schwellnus 1995: 135.
3 Hahlo 1972: 321.

each partner was free to terminate the life partnership at any time and on any ground, with no real risk of legal liability.[4]

- Life partners were not (and are still not) placed under an *ex lege* reciprocal duty to support one another.[5] The absence of this duty during the existence of the relationship implied that—contrary to the position of a married couple[6]—there was no duty of support which could extend beyond the termination of the relationship. Consequently:
  (i) No claim for maintenance could be instituted once a life partnership had ended due to separation; and, similarly
  (ii) No claim for maintenance could be instituted by the survivor against the deceased estate of his or her life partner.[7]

- A further consequence of the lack of an *ex lege* reciprocal duty of support during the subsistence of the life partnership was that the surviving dependent life partner had no right to institute a claim for loss of support against a third person who wrongfully and culpably injured or killed his or her life partner.[8]

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4 Van der Vyver and Joubert 1991: 450; Visser and Potgieter 1998: 5. As seen in the first bullet, liability would only be imposed as a result of the indirect application of general legal principles to the fact of the life partnership. Therefore liability could follow in the event of a breach of a contractual undertaking between the parties such as, for example, a breach of promise to marry or on the basis of a universal partnership (see in general *Sepheri v Scanlan* 2008 (1) SA 322 (C) at 323 (C) – 337 (E)). Other forms of liability such as liability on the basis of unjustified enrichment or delictual liability for injurious or contumelious conduct could also follow provided that the requirements for such actions could be met. In respect of the latter possibility, if an award for contractual damages on the basis of a breach of promise to marry has been made, this award must be taken into account for the purposes of determining whether or not it would be appropriate also to award delictual damages (see *Sepheri v Scanlan* 2008 (1) SA 322 (C) at 337 (E) – (I)).

5 *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at par [56]; Van der Vyver and Joubert 1991: 450.

6 In the case of a married couple legislation provides that the reciprocal duty of support can in applicable circumstances be extended beyond divorce (section 7(1) and (2) of the *Divorce Act* 70 of 1979) and death (the *Maintenance of Surviving Spouses Act* 27 of 1990).

7 SALRC 2006: 154 and 156.

8 SALRC 2006: 157; Sinclair and Heaton 1996: 284, 285.

- The law did not take cognisance of any form of *consortium omnis vitae* between life partners. Consequently the rights and obligations attached to this concept in the case of a valid marriage were not recognised within the context of life partners. This implied, for example, that the marital privilege which generally entitles spouses to refuse to testify against one another[9] could not apply in the case of life partners.[10] Furthermore, interference with the relationship by an outsider could not be visited with delictual liability.

- Life partners could not inherit intestate from one another.[11] The only way for a surviving life partner to inherit would be by way of a valid will. Nevertheless, the intention of the testator or testatrix would always be the primary criterion so that even a reference to "wife" or "husband" in a will could be interpreted as referring to a life partner where doing so squares with the will-maker's intention.[12]

- As far as proprietary matters were concerned, the common law made no express provision for life partners to share in each other's property, with the result, as Schwellnus[13] mentions, that "the normal rules of the acquisition of property [are] applicable."[14] The parties were (and still are) required to regulate these consequences themselves contractually or to rely on other protection such as the existence of a universal partnership, the principles of unjustified enrichment or the law of agency.[15] While certain authors have expressed their support for the universal partnership

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9 See section 195 of the *Criminal Procedure Act* 51 of 1977 and section 10 of the *Civil Proceedings Evidence Act* 25 of 1965.

10 Sinclair and Heaton 1996: 291.

11 Van der Vyver and Joubert 1991: 450; Schwellnus 1995: 150, 151.

12 Hahlo 1972: 327.

13 2008: N7.

14 Also see Visser and Potgieter 1998: 5; SALRC 2006: 159.

15 SALRC 2006: 110, 111 and 159; Schwellnus 2008: N7. These possibilities are explained in Chapter 6.

in this regard,[16] it is generally accepted that neither unjustified enrichment nor the universal partnership are particularly suitable within the context of family law in general and life partnerships in particular.[17]

- At the termination of a life partnership any property that was acquired jointly could (and still can), where the parties as joint-owners were unable to reach an agreement as to division, be divided by Court order by way of the institution of the *actio communi dividundo*.[18] On the basis of the rationale underlying this action—namely that a co-owner should generally not be forced to remain such against his will[19]—"'[t]he Court has a wide equitable discretion in making a division of the joint property, having regard, *inter alia*, to the particular circumstances, what is most to the advantage of all the co-owners and what they prefer."[20]

- A donation made by one life partner (A) to the other (B) could not (and still cannot) be reclaimed by A.[21]

- While the *Prescription Act* 68 of 1969 provided that the completion of acquisitive and extinctive prescription between persons who are married to one another was postponed as long as they remained married,[22] the Act made (and still makes) no similar reference to life partners.

- Contrary to the position of a married couple, the existence of a life partnership did not (and still does not) *ipso facto* entitle both partners to occupy the common home. Therefore, unless the home was registered in the names of both life partners or unless both of them were party to the

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16 See De Bruin and Snyman 1998: 368 *et seq*.

17 SALRC 2006: 110, 111 and 159. These possibilities are discussed in detail in Chapter 6.

18 Schwellnus 2008: N7 and 1995: 148, 149.

19 *Robson v Theron* 1978 (1) SA 841 (A) at 855 (A).

20 *Per* Joubert JA in *Robson v Theron* 1978 (1) SA 841 (A) at 855 (C) – (F). Also see *Bennett NO v Le Roux* 1984 (2) SA 134 (ZH) at 136 (B) – (C)—the Court may make any order that is "fair and equitable in the circumstances."

21 Schwellnus 2008: N7.

22 *Per* Sinclair and Heaton 1996: 420, 421. See sections 3(1)(b); 8 and 13(1)(c) of Act 68 of 1969.

lease agreement, the life partner who was neither the owner nor lessee had no right to live there.[23] The practical effect of this is illustrated by the case of *Sepheri v Scanlan*.[24] *In casu*, evidence presented to the Court established that the plaintiff and the defendant had become engaged abroad in November 1998, at which time they lived together both in Helsinki and in Stockholm and pooled their resources.[25] It appears that throughout the course of their relationship the defendant maintained the plaintiff and discouraged her from seeking employment, although she was well qualified to do so.[26] The defendant purchased property in Cape Town in 2002, which was financed by him and registered in his name only.[27] Despite frequent requests to do so, the defendant refused to register her as a co-owner of the property, and apparently attempted to avoid the issue by way of placatory promises that she need not be concerned as the property was "ours."[28] By early 2003 both parties had relocated to Cape Town.[29] They cohabited intermittently during 2003, with the plaintiff continuing to occupy the property in Cape Town while the defendant was employed for approximately six months in New Zealand before returning to Cape Town in November of that year.[30] The defendant then took up employment in Italy in early 2004; a state of affairs that persisted until the relationship was terminated in April of the same year.[31] Nevertheless, the plaintiff continued to occupy the property well beyond the termination of

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23 Sinclair and Heaton 1996: 286; SALRC 2006: 159. Although this rule was later mitigated by domestic violence legislation such as the *Prevention of Family Violence Act* 133 of 1993 and the *Domestic Violence Act* 116 of 1998, these Acts only provided limited relief as they only applied in instances of domestic violence—over and above the sources already mentioned also see *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others,* Amici Curiae*)* 2006 (1) SA 524 (CC) at par [65].

24 2008 (1) SA 332 (C).

25 At 324 (A) – (C) and at 331 (F).

26 See 324 (E) – (F).

27 At 340 (B).

28 See 325 (D) – (E). It also appears as if he had conceded in Court that he had originally intended to register both himself and the plaintiff as owners but that he had "changed his mind" before purchasing the property—see 325 (F).

29 At 325 (I) – (J).

30 At 325 (J) – 326 (E).

31 At 326 (I).

the relationship. In fact, by the time she instituted action for breach of promise to marry in 2006 she and the defendant still resided there, leading to the defendant suing the plaintiff in reconvention for damages for loss of rent and applying for an eviction order.[32] The plaintiff's defence hereto was that a universal partnership existed between herself and the defendant, and that, as a consequence, she was entitled to occupy the property and could not be deprived of the right to do so by the defendant's unilateral action.[33] Although the plaintiff was successful in her action for breach of promise (and could therefore to some extent be compensated for the fact that she was "a highly qualified person who gave up the possibilities of lucrative employment to fulfil her obligations under the engagement"),[34] Davis J held that she was unable to prove that a universal partnership existed.[35] As a consequence, she was ordered to vacate the property and to pay damages to the defendant.[36] This case serves to illustrate that, in the absence of contractual protection, the misapprehensions under which life partners may labour have no bearing on the proprietary consequences of their relationship.

- Prior to the coming into operation of the *Children's Act* 38 of 2005 any child born of an unmarried couple was regarded as being illegitimate with only the biological mother of that child having parental authority over him or her.[37] The biological father could only acquire guardianship or custody of and access to the child by way of a Court order[38] and later in terms of the now-repealed *Natural Fathers of Children Born out of Wedlock Act* 86

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32 At 323 (D) – (F) and 340 (A) – (F).

33 At 323 (F) – (G).

34 *Per* Davis J at 336 (A) – (B).

35 At 339 (J).

36 At 340 (H) – (I) and 341 (F) – (H).

37 See for example *Edwards v Fleming* 1909 TH 232 at 234, 235; *Dhanabakium v Subramanian and Another* 1943 AD 160 at 166; Sinclair and Heaton 1996: 287; Van der Vyver and Joubert 1991: 450; Visser and Potgieter 1998: 4; Sinclair 2008(a): 49.

38 *Ex parte Van Dam* 1973 (2) SA 182 (W) at 185 (A) – (D).

of 1997.[39] The biological father was nevertheless under a legal duty to maintain his child irrespective of whether or not he was able to exercise parental authority over him or her.[40]

- As far as the law of adoption was concerned, life partners were not permitted to adopt a child jointly.[41] (As will be seen below this position was altered in respect of same-sex life partners in *Du Toit and Another v Minister of Welfare and Population Development and Others*.)[42]

- In limited circumstances life partnerships did sometimes receive express recognition for the purposes of certain statutes, such as the *Insolvency Act* 24 of 1936.[43] Similar statutory recognition that has been accorded to life partnerships on an *ad hoc* basis is discussed in Chapter 6.

- Life partners were not (and still are not) subjected to the constraints imposed on married couples as far as certain delictual claims are concerned. Therefore, whereas spouses were precluded by public policy from instituting the *actio iniuriarum* against one another, life partners would not have been prevented from doing the same.[44] Whether this position should persist is questionable.[45]

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39 Section 2(1). According to section 3 of the *Children's Status Act* 82 of 1987 guardianship of any child born of a unmarried mother who was under the age of 21 and had not been declared to be a major vested in the mother's guardian, while the mother herself was the custodian of the child. A competent Court could however deviate from this general principle. In addition, the Act also regulated certain aspects pertaining to extra-marital children such as presumption of paternity (sections 1 and 2), the effects of artificial insemination (section 5) and the status and interests of an extra-marital child (sections 6 and 7).

40 Van der Vyver and Joubert 1991: 450; Visser and Potgieter 1998: 4.

41 Section 17 of the *Child Care Act* 74 of 1983; Robinson *et al* 2009: 43.

42 2003 (2) SA 198 (CC). This case is discussed in detail in 4.1 below.

43 For the purposes of section 21 of the Act which determines the effect of insolvency on the insolvent's spouse "the word 'spouse' means not only a wife or husband in the legal sense, but also a wife or husband by virtue of a marriage according to any law or custom, and also a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another" (see section 21(13) of the Act).

44 *C v C* 1958 (3) SA 547 (SR).

45 Neethling *et al* 2006: 249 (at note 34); Visser and Potgieter 1998: 104.

This brief summary makes it clear that life partnerships received scant legal recognition in pre-democratic South Africa. The advent of a human rights culture necessitated a drastic rethinking of the legal position as it stood at 27 April 1994. However, factors other than human rights also played an important role in this regard. For example, the need for the law to take cognisance of changing societal norms as such was pre-empted by Sinclair and Heaton[46] when in 1996 they asserted that:

> The increase in cohabitation is indicative of changing mores. Cohabitation has come to be accepted by many people and although the moral and social stigma attached to cohabitation has not disappeared completely it has diminished substantially. Society is undergoing drastic transformation. The traditional nuclear family—two heterosexual parents and their children—is no longer the universal norm.

Furthermore, one of the strongest arguments in favour of providing more comprehensive recognition for life partners was not necessarily from a human-rights or constitutional law perspective, but rather one of pure practical reality in that the socio-economic situation in South Africa, where poverty and unemployment was (and still is) rife, demanded that unions outside of marriage be provided with greater protection, particularly upon their termination.[47] Nevertheless, it goes without saying that the advent of a democratic constitutional dispensation with specific recognition of the rights to equality, human dignity, privacy and freedom and security of the person in South Africa would play the most prominent role as far as life partnerships were concerned.

Interestingly, however, a number of commentators appear to have been of the opinion that constitutional rights would play a more prominent role in terms of recognising the right to marry of homosexual persons than in respect of recognising the fact that the differential treatment between spouses and life

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46 1996: 271.

47 Sinclair and Heaton 1996: 301; Singh 1996: 318.

partners was unconstitutional.[48] The net effect of this line of reasoning was that, once the right to marry of homosexual couples had been confirmed, no form of non-formalised life partnership (whether heterosexual or homosexual) would be able to invoke constitutional protection as they had elected not to marry and therefore could not avail themselves of matrimonial law.[49] This so-called "choice argument" (see 5 in Chapter 3) will be considered in further detail later in this Chapter. The right of same-sex couples to marry was however only legally sanctioned in 2006,[50] with the result that, in the intervening period, the Courts, particularly as seen in Chapter 3 with respect to homosexual life partners, had no choice but to extend the consequences of marriage to life partners on the basis of constitutional rights as such.[51]

This Chapter will focus on the piecemeal recognition granted to life partners by the Courts with a view to highlighting major inconsistencies and distilling important foundational principles which ought to feature in the legislation drafted in accordance with the domestic partnership rubric.

2. RECOGNITION BY THE JUDICIARY: LAYING THE FOUNDATION

One of the first post-1994 decisions to deal expressly with the legal consequences of a life partnership was *Langemaat v Minister of Safety and Security and Others*.[52] *In casu* the applicant had been involved in a lesbian relationship and had been living with her partner for more than a decade. On the evidence it was clear that the couple shared their financial obligations and that

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48 Sinclair and Heaton 1996: 301.

49 Sinclair and Heaton 1996: 299, 300. Although the positive law indicates that the Courts have supported this line of reasoning (see for example *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at par [55] – [60] and [154]; *Gory v Kolver NO* 2007 (4) SA 97 (CC) at par [29]) the validity of this approach will be explored throughout this Chapter.

50 By way of the promulgation of the *Civil Union Act* 17 of 2006.

51 See 3 in Chapter 3.

52 1998 (3) SA 312 (T).

they were economically interdependent.[53] The applicant was a captain in the South African Police Services (SAPS) and, by virtue hereof, was registered as a member of the SAPS's medical aid scheme.[54] In accordance with its rules and regulations, the scheme permitted any person who was "the legal spouse or widow or widower or a dependant child" of the member to be registered as a dependant for the purposes of the scheme.[55] When a formal request to have her female partner registered as a dependant of the medical aid scheme was denied on the basis that her partner was not a "spouse" as required by the scheme's rules and regulations, the applicant applied to the Transvaal Provincial Division of the High Court[56] for an order declaring the regulations and the rules made in terms thereof to be in conflict with the *Constitution*.[57] [58]

In delivering his judgment and holding that the scheme's rules and regulations were unconstitutional, Roux J made a significant remark pertaining to the recognition of homosexual relationships when he stated that:

> I would ignore my experience and knowledge of several same-sex couples who have lived together for years. The stability and permanence of their relationships is no different from the many married couples I know. Both types of union are deserving of respect and protection. If our law does not accord protection to the type of union I am dealing with, then I suggest it is time it does so. This is how I understand what s 39(2) of the Constitution has in mind.[59]

This statement has been referred to with approval in subsequent case law.[60]

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53 At 314 (A) – (B).
54 At 314 (A).
55 At 314 (E) – (I).
56 In consequence of the *Renaming of High Courts Act* 30 of 2008 this Court is now referred to as the North Gauteng High Court, Pretoria.
57 Act 108 of 1996 (as it was referred to at the time).
58 At 314 (I) – 315 (C).
59 At 316 (F) – (G).
60 See *Farr v Mutual & Federal Insurance Co Ltd* 2000 (3) SA 684 (C) at 689 (F) – (G).

Judicial recognition has also been given to the fact that a stable homosexual relationship constitutes a family in a similar way as marriage does. In *Farr v Mutual & Federal Insurance Co Ltd* [61] Louw J explained that this would be the case where such a union evinced a degree of permanence and "resemble[d] for all intents and purposes" a marriage between husband and wife.[62]

Statements such as those referred to in *Langemaat* and in *Farr* were indicative of the sentiment prevailing shortly after the coming into operation of the Bill of Rights.

However, one of the most ground-breaking decisions was yet to appear. Indeed, as seen in Chapter 3, the case of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others*[63] was to set the tone according to which the law of same-sex life partnerships was to develop in the foreseeable future.[64]

The issue in this case revolved around the constitutionality of section 25(5) of the *Aliens Control Act* [65] (since repealed by the *Immigration Act* 13 of 2002) which conferred certain benefits on the "*spouse* or dependent child of a person permanently and lawfully resident in the Republic" (own emphasis) and hence did not provide for the same-sex partners of South African citizens to enjoy these benefits.

Although the repealing of the *Aliens Control Act* of 1991 implies that the specific outcome of this case is no longer as relevant today as it was at the time of the judgment, the case is extremely important in terms of ascertaining the Constitutional Court's stance regarding the position of homosexual life partners in

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61 2000 (3) SA 684 (C).

62 At 689 (G) – (I), referred to with approval in *Gory v Kolver NO and Others* 2006 (5) SA 145 (T) at par [19].

63 2000 (2) SA 1 (CC).

64 Wood-Bodley (2008(b): 260) describes this case as "the most useful judgment" of all of those dealing with the recognition of same-sex life partnerships.

65 96 of 1991.

post-1994 South Africa. In this regard, the following key points of Ackermann J's unanimous judgment deserve special mention:

- It is important to note from the outset that the decision *in casu* only extended to conjugal relationships between homosexual life partners.[66] While it could therefore certainly be argued that section 25(5) also unjustifiably excluded heterosexual life partners from its ambit, it must be emphasised that the applicants in this case were all partners in same-sex life partnerships and that the Court deliberately chose not to express itself on the issue of heterosexual couples.[67] Having said this, Ackerman J placed specific emphasis on the fact that the applicants in question were all partners to stable and committed relationships in terms of which the partners where "intimate and mutually interdependent."[68] The decision is therefore limited to the position of same-sex life partners in permanent life partnerships.

- A further aspect which is of critical importance is that the Court held that it was not reasonably possible to interpret the word "spouse" as used in section 25(5) so as to include a same-sex life partner.[69] Although it was an acknowledged principle of statutory interpretation that a constitutionally-aligned interpretation should be preferred over an unconstitutional one, this principle was limited by the fact that the legislative text had to be *reasonably* capable of bearing the constitutionally-aligned meaning.[70] The ordinary use of the word (as a "husband" or "wife" or as "a married person") coupled with the context within which the word was used in section 25(5) and in the Act's section 1 definition of "marriage" did not permit such a broader interpretation.[71]

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66 Par [60].
67 Par [60] and [87].
68 At par [17].
69 At par [23].
70 At par [24].
71 At par [25] and [26].

This implied, contrary to the respondents' contention, that it was not possible to decide the matter without adjudicating on the constitutional validity of the provision in question.[72]

- With reference to the constitutionality of section 25(5), Ackermann J held that section 25(5) potentially breached both the rights of equality and dignity. As these rights were closely related, the possible infringement of both could be dealt with simultaneously.[73]

  In this regard, two key observations were made:

  (i) Ackerman J emphasised the fact that the law as it stood at the time only recognised heterosexual marriage and did not provide adequate recognition of or protection for same-sex relationships and the parties thereto. In consequence hereof, although it was unnecessary to deal with the position of unmarried heterosexual couples, the Court acknowledged that there was a difference between the position of heterosexual couples who elected not to marry and their homosexual counterparts, who, due to the fact that they were not permitted to marry one another, only had recourse to the life partnership as a means of entering into conjugal relationships that were aligned with their sexual orientation.[74]

  (ii) In addition, the Court held that the argument raised by the respondents to the effect that, albeit that the law possibly differentiated it did not *unfairly discriminate* on the basis of marital status as homosexual persons were not prevented from marrying

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72 At par [26].
73 At par [31].
74 At par [38].

> persons of the opposite sex, was "true only as a meaningless abstraction."[75]

In the light of these observations it was clear that discrimination was not a phenomenon that could be understood or determined by dismantling it and evaluating each component thereof in isolation.[76] It was therefore not possible *in casu* to determine whether or not discrimination necessarily occurred either on the basis of marital status *or* on the basis of sexual orientation. Instead, when properly considered within the broader context of the experiences of those affected by it coupled with the fact that the law did not provide any recognition to conjugal relationships other than heterosexual marriage, it was clear that the discrimination encountered in section 25(5) overlapped in that it discriminated on both of these grounds:[77]

> The prerequisite of marriage before the benefit is available points to that element of the discrimination concerned with marital status, while the fact that no such benefit is available to gays and lesbians engaged in the only form of conjugal relationship open to them in harmony with their sexual orientation represents discrimination on the grounds of sexual orientation.[78]

In consequence, such discrimination was presumed to be unfair in accordance with section 9(5) of the *Constitution*.[79]

- In determining whether or not the discrimination was unfair, the Court held that the crucial factor was to determine what the impact of the discrimination was on the complainants individually or as members of an

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75 At paragraph [38].
76 At par [35].
77 Par [40] in summarising par [33] – [39].
78 At par [40].
79 At par [40].

affected group.[80] In this regard Ackermann J confirmed the finding in *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* [81](the so-called "sodomy case")[82] that gays were a permanent minority in society. According to Ackermann J, the same could be said of lesbians, who had also been (and still were) subject to similar patterns of disadvantage and whose relationships had generally not been respected by South African society in the same way as heterosexual relationships had been. The dignity and self-worth of persons involved in homosexual relationships was therefore undermined by pre-existing and continuing stereotyping and discrimination, leading to the conclusion that gays and lesbians clearly constituted a vulnerable group in society; a factor which increased the possibility of the discrimination being unfair.[83]

The stereotyping of gays and lesbians had often been perpetuated by focussing exclusively on the sexuality of such persons and by using the argument that couples to such relationships were not capable of procreation. Regarding the former argument, Ackermann J emphasised that the crime of sodomy had recently been abolished[84] and that the law had never criminalised consensual sexual activity between adult women.[85] With reference to the procreation argument the Court made a ground-breaking finding with reference to family law in general and gay rights in particular by holding that this argument was demeaning to those who could not or who elected not to have sexual relations or to have children, and consequently that "from a legal and constitutional point of view procreative potential is not a defining characteristic of conjugal

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80 At par [41].

81 1999 (1) SA 6 (CC).

82 See 3 in Chapter 3.

83 At par [42] - [44].

84 See the reference to the so-called "sodomy case" in the main text and in 3 in Chapter 3 above.

85 At par [49].

relationships."[86] As such it could not be concluded that the concept of "family" fell to be determined with reference to the ability to procreate.[87]

Furthermore, when viewed against the factual background comprising *inter alia* their ability *to establish*[88] a *consortium omnis vitae* (which, as seen in Chapter 2[89] constitutes the "essence and objective hallmark" of marriage) and to establish a family, it was clear that section 25(5) of the *Aliens Control Act* consequently "reinforced harmful and hurtful stereotypes"[90] of gay and lesbian persons and prevented them from protecting their "family and family life."[91]

The argument that section 25(5) should remain intact in order to protect the institution of marriage also could not stand as (i) although it was acknowledged that the institution of marriage had to be protected, such protection could not take place in such a way as to violate the constitutional rights of homosexual life partners,[92] and (ii) there was no rational connection between the government's interest in protecting heterosexual family life and the exclusion of gays and lesbians from the ambit of section 25(5): Granting the same benefits to gays and lesbians would in no way undermine the protection of heterosexual marriage and family life.[93] Furthermore, this argument did not constitute a valid countervailing interest in order to justify the discrimination occasioned by section 25(5).[94]

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86 At par [51].

87 At par [51] read with par [52].

88 The relevance of the distinction between the ability to establish a *consortium omnis vitae* and the full recognition thereof will be seen later in this Chapter (see 3.7 below) and in Part 3 of this study.

89 See 4 in Chapter 2.

90 At par [49].

91 At par [53].

92 At par [55].

93 At par [56].

94 At par [59].

On the basis of the above findings, Ackermann J concluded that section 25(5) violated the equality and dignity rights of, and therefore unfairly discriminated against, the parties to permanent same-sex life partnerships.[95]

The second part of the judgment involved the decision as to which remedial action was appropriate in order to address the unconstitutionality of section 25(5), and, more specifically, whether the provision should be declared invalid *in toto* or whether the remedy of "reading in" (in other words introducing words into a statute) should instead be adopted.[96] In this regard Ackermann J made the very important statement (that will be revisited later in this Chapter) that whatever remedy opted for by the Court would not necessarily be the end of the matter as the Legislature was entitled

> 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.[97]

The Court concluded that the words "or partner, in a permanent same-sex life partnership" were to be read in after the word "spouse" in section 25(5). A life partnership that was indeed of a permanent nature would demonstrate "an established intention of the parties to cohabit with one another permanently";[98] a question of fact which,[99] in the words of

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95 At par [57].

96 At paragraphs [1] and [62] – [63].

97 At paragraph [76] (footnotes omitted). This statement is of particular importance regarding the continued recognition (or otherwise) of the *ad hoc* extensions despite the validation of same-sex marriage—see 3.4.1.1.3 below.

98 Par [86].

99 See the discussion of the requirement of permanence as a parameter of the life partnership in the narrow sense in 2.1.2.2 in Chapter 4 above.

Ackermann J, needed to be determined by taking all relevant facts into account, including but not limited to:

- the respective ages of the partners;
- the duration of the partnership;
- whether the partners took part in a ceremony manifesting their intention to enter into a permanent partnership, what the nature of that ceremony was and who attended it;
- how the partnership is viewed by the relations and friends of the partners;
- whether the partners share a common abode;
- whether the partners own or lease the common abode jointly;
- whether and to what extent the partners share responsibility for living expenses and the upkeep of the joint home;
- whether and to what extent one partner provides financial support for the other;
- whether and to what extent the partners have made provision for one another in relation to medical, pension and related benefits;
- whether there is a partnership agreement and what its contents are; and
- whether and to what extent the partners have made provision in their wills for one another.[100]

Although this list is fairly extensive, the Court emphasised that no single fact would be indispensable.[101]

In closing, it is important to note the Court's stance on the effect of the order of unconstitutionality and the reading in of the words mentioned above. In this respect it was held that the order would be effective immediately but that in the interest of legal certainty it would not have retrospective application. To order otherwise would, according to the Court, create unnecessary uncertainty where the provisions of the Act had

100 At par [88] (bulleting introduced for the sake of readability).
101 At par [88].

> properly been applied to homosexual life partners in the past. Couples in such a position would furthermore not be prejudiced in any way as they would also now be free to obtain relief under the new wording of the Act.[102]

As stated above, the decision in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* was the first decision by the Constitutional Court in which the legal position of same-sex life partners was comprehensively dealt with, and, as such, it set the benchmark regarding the recognition and development of jurisprudence relating to life partnerships in general and homosexual life partnerships in particular. The fact that the concept of "family" in South Africa was no longer limited to the traditional family was further entrenched by a judgment following six months after the *National Coalition v Minister of Home Affairs* case in which the Constitutional Court reconfirmed the diverse nature of this concept and its significance for the parties involved therein while emphasising that a specific family form should not be entrenched in such a way as to derogate from another.[103]

From this platform the South African Courts have set out to develop further the legal position of life partners in South Africa. These developments will be discussed in the paragraphs that follow.

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102 At par [89].

103 *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para [31]. This case (*inter alia*) was referred to with approval in *Du Toit and Another v Minister of Welfare and Population Development and Others* 2003 (2) SA 198 (CC) at par [19] where Skweyiya AJ stated that: "The institutions of marriage and family are important social pillars that provide for security, support and companionship between members of our society and play a pivotal role in the rearing of children. However, we must approach the issues in the present matter on the basis that family life as contemplated by the Constitution can be provided in different ways and that legal conceptions of the family and what constitutes family life should change as social practices and traditions change."

3. TRACING THE RECOGNITION OF TWO FUNDAMENTAL CHARACTERISTICS OF MARRIAGE WITHIN THE CONTEXT OF NON-FORMALISED INTERPERSONAL RELATIONSHIPS: THE RECIPROCAL DUTY OF SUPPORT AND *CONSORTIUM OMNIS VITAE*

3.1 Introduction

One of the invariable consequences of the conclusion of a valid marriage (or a civil partnership) is that the parties thereto are obliged by operation of (common) law[104] to support one another[105] according to their respective means and needs[106] (and with due regard to factors such as their social position,[107] lifestyle[108] and the cost of living)[109] by providing one another with the necessary food, clothing, lodging, medical and dental care and other necessities of life.[110]

In *Barlow v Barlow* McGregor J described the basis of the rule thus:[111]

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104 Voet 25.3.8; *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 974 (F) – (G) and 996 (C); *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (1) SA 997 (C) at 1038 (H); *Chinamora v Angwa Furnishers (Pvt) Ltd and Another (Attorney-General Intervening)* 1998 (2) SA 432 (ZS) at 443 (H) – (I).

105 *Fourie and Another v Minister of Home Affairs and Others* 2005 (3) SA 429 (SCA) at par [124]; *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae);Lesbian and Gay Equality Project and Others v Minister of Home Affairs* 2006 (1) SA 524 (CC) at par [65]; *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) (2000 (8) BCLR 837) at par [31]; *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) at par [12]; *Jodaiken v Jodaiken* 1978 (1) SA 784 (W) at 788 (H); *Shanahan v Shanahan* (1907) 28 N.L.R. 15 at 16.

106 *Gildenhuys v Transvaal Hindu Educational Council* 1938 WLD 260 at 263, 264. One of the basic principles that underlie this duty at common law is that the spouse requiring maintenance must be in need thereof and that the other spouse must be in a position to provide it—see *Salem v Chief Immigration Officer, Zimbabwe, and Another* 1995 (4) SA 280 (ZS) at 283 (C); Van Zyl 2005: 3.

107 *Gildenhuys v Transvaal Hindu Educational Council* 1938 WLD 260 at 264.

108 Van Zyl 2005: 3.

109 Cronjé and Heaton 2004: 52.

110 Voet 25.3.8; *Zwiegelaar v Zwiegelaar* 2001 (1) SA 1208 (SCA) at par [13]; *Van Aswegen v Van Aswegen* 2006 (5) SA 221 (SE) at par [28]; *Ismael v Smith* 2000 (2) SA 526 (C) at 528 (H) – (I); *Plotkin v Western Assurance Co Ltd and Another* 1955 (2) SA 385 (W) at 394 (H) – 395 (A); SALRC 2006: 134; Hahlo 1985: 134, 135; Sinclair and Heaton 1996: 443; Cronjé and Heaton 2004: 52.

111 1920 OPD 73.

> The basis of the rule of law regarding *alimentatie* is "het recht der natuur" and the law hereon operates *ratione pietatis*. And although "natural right" may be a somewhat elusive expression, the reference to *pietas* may possibly enjoin an enquiry into the state and mode of life of the parties concerned.[112]

As is evident from the preceding remark, the scope of the duty must be determined on an *ad hoc* basis and is clearly not confined to the bare necessities just mentioned.[113]

In *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae)*[114] (hereafter "*Minister of Home Affairs v Fourie*") the Constitutional Court described the reciprocal duty of support as "an integral part of the marriage contract [that] has immense value not only to the partners themselves but to their families and also to the broader community." This duty is based on the existence of a valid marriage (or civil partnership) and consequently obtains *stante matrimonio*.[115] As a corollary hereof, the duty is in principle terminated once the marriage or civil partnership comes to an end.[116] Various statutes, such as the *Divorce Act* [117] and the *Maintenance of Surviving Spouses Act* [118] however have the effect of potentially extending the duty of support beyond the termination of the marriage and, as will be seen below, the latter statute in particular has already played a more than significant role in recent jurisprudence regarding relationships other than civil marriage.[119]

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112 At 75.

113 *Young v Coleman* 1956 (4) SA 213 (N) at 218 (C) – (E); Hahlo 1975: 113; Van Zyl 2005: 3 and 14.

114 2006 (1) SA 524 (CC) at par [65].

115 *Salem v Chief Immigration Officer, Zimbabwe, and Another* 1995 (4) SA 280 (ZS) at 283 (C).

116 *Zwiegelaar v Zwiegelaar* 2001 (1) SA 1208 (SCA) at par [12]; *Khan v Khan* 2005 (2) SA 272 (T) at par [6.3]; *Pillay v Pillay* 2004 (4) SA 81 (SE) at 86 (B); *Jerrard v Jerrard* 1992 (1) SA 426 (T) at 428 (A); *Rubenstein v Rubenstein* 1992 (2) SA 709 (T) at 711 (G) – (H); *Qoza v Qoza* 1989 (4) SA 838 (CK) at 843 (D); *Kader v Kader* 1972 (3) SA 203 (RA) at 204 (A); *Vale v Vale* 1966 (1) SA 541 (SR) at 543 (A) – (G).

117 70 of 1979.

118 27 of 1990.

119 See for example *Volks NO v Robinson* 2005 (5) BCLR 446 (CC); *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC); *Hassan v Jacobs NO* (Case no. CCT 83/08: unreported judgment of the

In the discussion that follows a number of judicial developments regarding this duty will be discussed.

3.2 Breaking the mould: Recognising a reciprocal duty of support in same-sex life partnerships prior to the validation of same-sex marriage

3.2.1 The *Langemaat* case revisited

The acknowledgment of the existence of a reciprocal duty of support in unions other than civil marriages commenced in 1998 with the *Langemaat* [120] decision referred to in 2 above. One of the core issues in this case was therefore whether the relationship between the parties gave rise to a duty of support between the life partners.[121] In granting the application, the Transvaal Provincial Division[122] made the significant remark that "[p]arties to a *same-sex* union, which has existed for years in a common home, must surely owe a duty of support, *in all senses*, to each other."[123] The South African Law Reform Commission states that the *Langemaat* case altered the legal position in that jurisdiction by extending the common law duty of support to include homosexual couples, and summarises the effect of the case as:

> The Court found that a same-sex couple who had lived together in an intimate and stable relationship for many years owed a duty of support to each other, although it seems that this is a *prima facie* right only.[124]

Constitutional Court delivered on 15 July 2009); *Kambule v The Master and Others* 2007 (3) SA 403 (E).

120 1998 (3) SA 312 (T).

121 At 315 (G); Wildenboer 2000: 59.

122 Now the North Gauteng High Court, Pretoria (see the *Renaming of High Courts Act* 30 of 2008).

123 At 316 (H).

124 2006: 135 (footnotes omitted, italics added).

Firstly, if one overlooks the unwieldy use of the words “duty” and “right” in this sentence, this statement creates the impression that the Commission was of the opinion that the duty of support was an *obligation* that existed at face value (*prima facie*) “only.” If this is the point that the Commission was trying to make, it is submitted that this statement reflects neither the legal position nor the finding in *Langemaat* correctly. Two comments can be made for the purposes of illustration:

- It appears as if the Commission used the word “only” in an attempt to differentiate between the duty of support that exists in a valid marriage and the one found to exist in the *Langemaat* case between same-sex couples and attempted to accentuate the view that the latter duty is somehow less robust than the former. This, however, is not completely true.

  Regarding the duty of support between same-sex couples, Roux J delineated the crucial requirement behind such a duty, namely that the parties to such a union must have cohabited for a noteworthy period of time. This requirement could at best indicate that the law differentiates between marriage and life partnerships in the sense that marriage instantly creates the duty while life partners need to have cohabited for a significant period of time before the duty will be recognised. This would imply that within the context of life partnerships the existence of such a duty is a question of fact, as was the case in *Ripoll-Dausa v Middleton NO and Others*[125] where a lack of factual evidence precluded the core finding that the same-sex union was permanent. This much is acknowledged. Classifying such a duty as a “*prima facie* right *only*” however does not take the matter any further as it may be argued that *any* duty of support is merely *prima facie* in nature and falls to be determined with reference to the facts of the matter at hand. For example, the existence of a duty of

[125] 2005 (3) SA 141 (C) at 154 (C) – (F).

support between spouses to a marriage is technically also only of a *prima facie* nature, as evidence may, for instance, be adduced that disproves the very existence of the marriage or that proves that other foundational elements of such a duty (namely a need for maintenance and the ability to provide it) are absent. Considered in this light it becomes clear that the reality that the duty created by marriage is instantaneous does not alter the principle that, as with the life partnership, the existence of the duty is a question of fact. Therefore, it is submitted that the Law Reform Commission's statement that the *Langemaat* decision created a "*prima facie* right only" in the case of same-sex life partners appears somewhat misleading as there is no difference between the *prima facie* nature of the duty of support recognised in *Langemaat* and that created by marriage.[126]

- As an outflow of the foregoing observation, the Commission's statement also appears mistakenly to conflate the *existence* of the duty with the *enforcement* thereof on outsiders (in this instance the right to have a dependant registered with the medical aid fund). If one scrutinises the relevant passage of the *Langemaat* case to which the Commission refers as authority for its submission,[127] it appears as if Roux J, after disposing of the doubt surrounding the applicant's *locus standi*, was of the opinion that

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126 The same observation can be made regarding the submission made by Wildenboer (2000: 59, 60) where she claims that married couples are treated differently to same-sex couples as "[i]n effect, the court held that a [same-sex life partner] must be a factual and a legal dependant before he or she will qualify as a dependant who can be registered in terms of the medical scheme." This argument loses sight of the fact that a distinction must be maintained between (i) the existence (or otherwise) of the duty of support and (ii) the right to enforce such a duty on outsiders. In addition, the very existence of *any* duty of support (even in the case of spouses to a valid marriage) is both a "factual and [a] legal" question, and, in this sense, life partners are not treated differently to married couples. *Once that duty has been found to exist*, the second part of the process then involves the exercising of the fund's discretion in terms of membership.

127 316 (D). Paragraphs (C) – (D) on this page read as follows: "It was argued that the applicant in any event would never succeed in having Miss Myburgh registered as a dependant. This submission questions her *locus standi* to bring the application. There is certainly something to be said for the suggestion that the Constitution has resurrected the *actio popularis*. Whatever, I believe the applicant has a *prima facie* right to register Miss Myburgh as a dependant. If reference is had, for example, to *Ford v Allan (supra), Motan and Another v Joosub* 1930 AD 61, *Waterson v Mayberry* 1934 TPD 210 and *In re Estate Visser* 1948 (3) SA 1129 (C), the principles certainly are not clear as to who is under a duty to maintain…"

she had a *prima facie* right *to register* her life partner as a dependant. This does not follow from the *prima facie nature* of the duty of support that existed between the same-sex couple, but instead flows from the *prima facie* right *to enforce on outsiders* a duty that has been found to exist *inter partes* (and which *inter partes* is therefore no longer *prima facie* in nature). The *existence* of the duty and the *enforcement* thereof are therefore both *prima facie* concepts that need to be determined separately. To illustrate this notion, the fact that a reciprocal duty of support exists between the spouses to a valid marriage does not automatically imply that one spouse can without more be registered as the other's dependant in a medical aid scheme. A married couple applying for registration of one of them as the dependant of the other would consequently only have a *prima facie* right to do so as the decision as to whether or not the registration would be successful would depend on the facts of the case, the rules of membership (and any provisos thereto)[128] and the proper exercising of a discretion after the merits of the application had been considered by the relevant functionary of the medical fund. Viewed from this perspective, it becomes clear that if it appears from the facts of the matter that a duty of support indeed exists between a same-sex couple, this does not imply that they can necessarily enforce that duty on outsiders. This is so because, once again, the latter depends on factors extraneous to the duty itself, such as the discretion of the chairperson of the medical aid fund.

It is consequently submitted that the Commission's summary of the finding in *Langemaat* is made out of its correct context. What the Court found was that a duty of support existed between all same-sex couples who lived together permanently, as a result of which the applicant had a *prima facie* right *to register* her same-sex life partner as her dependant with Polmed. Therefore a correct

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[128] *In casu* regulation 30(2)(b)(ii) provided two major provisos to membership for spouses, namely (i) that in the case of polygynous customary marriages only the first wife and children born to her as a result of this marriage would qualify as dependants, and (ii) that the benefits conferred on a widow or widower by this regulation would be forfeited by him or her upon remarriage.

assessment of the law in the light of *Langemaat* is that while the duty of support exists on the facts, the right *to enforce* the duty is *prima facie* irrespective of whether the parties are married, or are same-sex life partners.

Although this discussion focuses on the impact of the *Langemaat* decision as far as the judicial recognition of a duty of support between cohabitants is concerned, it must be noted that the thrust of the decision in *Langemaat* was codified in 1999 with the promulgation of the *Medical Schemes Act* 131 of 1998 which includes a "partner" as a "dependant"[129] and prohibits a medical scheme which discriminates unfairly on grounds such as sexual orientation from being registered as such.[130] However, it is important to make one final observation regarding the perceived impact of the *Langemaat* decision immediately after the judgment was delivered. In this regard Wildenboer[131] asserts that in the light of *Langemaat* married couples are treated differently to same-sex couples as "[i]n effect, the court held that a [same-sex life partner] must be a factual and a legal dependant before he or she will qualify as a dependant who can be registered in terms of the medical scheme." According to her[132] this situation furthermore implies that spouses to a civil marriage need not prove anything other than that

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129 Section 1.

130 Section 24. See Schwellnus 2008: N20A.

131 2000: 60.

132 See page 60 where Wildenboer opines that "[s]pouses in a marital relationship still do not have to prove anything but marriage to enjoy medical aid benefits, while the court *introduced two requirements* with which a same-sex couple will have to comply" (emphasis added). This comment is worth analysing further as the question arises as to what exactly Wildenboer regards these "two requirements" as being. Wildenboer opines that the question as to whether the union is "stable and permanent" is answered "by proving that the relationship has existed for some time, and also by proving that one party requires financial assistance and the other party is able to provide it." It appears as if these are the two requirements which she has in mind, as in the sentence that follows the one quoted she alleges that "[t]he same criteria *should* apply to married couples" (emphasis added). The first aspect of the stable and permanence "test" is self-evident and deserves no further comment. The second aspect is however confusing as, firstly, the need and ability to provide maintenance in no way assists in determining whether such a union is "stable and permanent." Secondly, the need and ability to provide maintenance is a core requirement for the existence of *any* duty of support and therefore does not constitute an additional requirement that only applies to same-sex couples. It is submitted that the correct approach is to state that the Court in *Langemaat* required two things namely (i) that the same-sex coupled lived together or cohabited, and (ii) that they had done so for a significant period of time.

they are married,[133] while same-sex life partners are required to prove that their union is "stable and permanent."

It is submitted that this argument loses sight of the fact that, as explained above, a distinction must be maintained between the existence (or otherwise) of the duty of support *inter partes* and the right to enforce such a duty on outsiders. In addition, as seen above, the very existence of *any* duty of support (even in the case of spouses to a valid marriage) is both a "factual and [a] legal" question, and, in this sense, life partners are not treated differently to married couples. *Once that duty has been found to exist*, the second part of the process then involves the exercising of the fund's discretion in terms of eligibility for coverage.

In terms of this second aspect, it may be true that differentiation occurs in that life partners would have to prove that they have lived together for some period of time, whereas married couples would not need to do so but would be eligible immediately.[134] At first glance, this differentiation appears to be problematic. However closer analysis reveals that this is not the case. The reason for making this assertion is that the finding of unconstitutionality in *Langemaat* removed the barrier that prevented a medical aid fund such as Polmed from extending its benefits to same-sex couples. This development paved the way for same-sex life partners in future to overcome the "duration" requirement by simply providing proof (for example, in the form of a written contractual undertaking) that they had indeed undertaken mutual duties of support. In this sense, homosexual life partners would not in any way be treated differently to their married counterparts, as the latter would also in any event be required to furnish proof of something (their marriage) before one of them could be eligible for registration as a dependant of the other. It therefore becomes clear that the fears expressed by Wildenboer may not be as acute as they first appear and that the extension of civil marriage to homosexual couples was not necessarily the only way for such

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133 Also see *Robinson v Volks NO* 2004 (6) SA 288 (C) at 298 (E) – (F).

134 See *Langemaat* at 316 (H) as well as the preceding note but one regarding Wildenboer's interpretation of the criteria set by the *Langemaat* decision.

couples to circumvent "the differentiation in the regulation and rule" in order to enjoy the medical aid benefits to which heterosexual spouses were entitled by virtue of marriage.

Nevertheless, as noted above, the differentiation between married couples and life partners (regardless of whether they are heterosexual or homosexual) has been removed by the *Medical Schemes Act*.[135] This Act, which was an important consequence of the *Langemaat* decision,[136] is discussed in more detail in Chapter 6.

In conclusion, the major relevance of the *Langemaat* decision for South African family law can be summarised into three key points: First, the case was one of the first reported cases expressly to deal with the position of same-sex life partners; second, the Court took the first step towards recognising the existence of a reciprocal duty of support between same-couples who lived together on a permanent basis; and third the decision facilitated legislative intervention[137] regarding medical aid schemes. Having said this, it must be remembered that the *Langemaat* judgment was delivered by a single judge in a provincial division of the High Court. As a consequence the decision is, at best, binding in that jurisdiction only[138] and, moreover, not binding on higher Courts.[139]

3.2.2 The *Satchwell* judgments

More explicit authority as far as the recognition of a reciprocal duty of support between same-sex life partners is provided by the case of *Satchwell v President*

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135 131 of 1998.

136 See Schwellnus 2008: N20A.

137 See Chapter 6.

138 See for example Cronjé and Heaton (1999: 61) who, writing the year after the *Langemaat* decision was delivered, mentioned that it was uncertain whether the judgment would be followed by other Courts in future.

139 See Smith and Robinson 2008(a): 383 (at note 39).

of the Republic of South Africa.[140] *In casu* Judge Satchwell of the Transvaal Provincial Division of the High Court challenged the constitutionality of the *Judges' Remuneration and Conditions of Employment Act*[141] and attendant regulations[142] which conferred benefits on the "surviving *spouse*" of a deceased Judge and therefore did not permit the Judge's same-sex life partner to be eligible for the same. The Constitutional Court held, as a point of departure, that the word "spouse" could not—as had earlier been found in the *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* case—be interpreted so as to provide for same-sex or heterosexual life partners.[143] Although both of these groups were undoubtedly excluded by the provision in question, Madala J further (and, it is submitted, correctly) emphasised that the issue of heterosexual life partners was not properly before the Court and therefore that, contrary to the respondents' submissions,[144] the position of such couples was not at issue.[145] In addition, heterosexual couples were able to marry one another leading to "different legal and factual issues" arising that were "inappropriate" for the Court to consider.[146] The only issue which consequently had to be decided was whether the Act discriminated unfairly against same-sex life partners. In confirming the High Court's finding of unconstitutionality, Madala J however emphasised that the Constitutional Court's finding was limited to same-sex couples who had, on the facts, undertaken to support one another as "[t]he Constitution cannot impose obligations towards partners where those partners themselves have failed to undertake such obligations."[147] To this end, the words "or partner, in a permanent same-sex life partnership in which the parties have

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140 2002 (6) SA 1 (CC).

141 88 of 1989. Sections 8 and 9 of the Act were challenged.

142 Regulations 9(2)(b) and 9(3)(a) of the *Regulations in respect of Judges Administrative Recesses, Leave, Transport and Allowances in respect of Transport, Travelling and Subsistence* (as *per* Madala J in par [3] of the judgment).

143 Par [9].

144 Counsel for the respondents had argued that a confirmation of the High Court's order (see *Satchwell v President of the Republic of South Africa and Another* 2001 (12) BCLR 1284 (T)) would discriminate against heterosexual couples as the High Court had extended the benefits conferred by Act 88 of 1989 to same-sex couples only—see par [15] of the judgment.

145 Par [16] and [33].

146 Par [16].

147 Par [24].

undertaken reciprocal duties of support" were ordered to be read into the statute and its regulations after the word "spouse" in order to remedy the unconstitutionality.[148]

When one compares *Langemaat* with *Satchwell* it appears that two different approaches present themselves: In the former case it appears as if Roux J assumed by virtue of the fact that they had lived together with some degree of permanence, that life partners owed each other such a duty,[149] while in *Satchwell* it appears as if the duty of support would only be acknowledged once the existence thereof was proved. In other words, according to *Langemaat*, same-sex cohabitants would (as in the case of spouses to a valid marriage) be *presumed* to be legally-obligated to support one another, while according to *Satchwell* they would need to prove that they had indeed undertaken such a duty before being entitled to the benefits enjoyed by their married counterparts.

It is therefore submitted that the *Satchwell* case confirmed the fact that the existence of a reciprocal duty of support was not an automatic consequence of a same-sex union between life partners who had lived together for a substantial period of time, but that the parties thereto must specifically have undertaken to support one another. Such an undertaking could, however, be inferred from the facts of a specific case.[150] Having said this, it is interesting to note that the Court in *Satchwell* was not prepared to commit itself as to whether or not the applicant and her lesbian partner had in fact undertaken reciprocal duties of support, but instead found that while it was "probable" that they had done so, the question was not relevant to the matter at hand as "the applicant's challenge [was] to the legislation."[151] This conclusion is intriguing in light of the fact that the Court on two occasions stated that the issue *in casu* was whether *the applicant Judge's*

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148 Par [37].

149 At 316 (H).

150 Par [25]. See also *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) discussed in 3.2.3 below.

151 Par [25].

partner should be entitled to the benefits conferred by the Act.[152] It is submitted that this issue could simply not, bearing the high premium placed on the existence of a duty of support throughout the judgment in mind,[153] be resolved without first finding that the applicant and her partner had indeed undertaken to support one another, as the very question as to whether or not the Act was unconstitutional had to be determined with reference to the relationship between the applicant and her life partner. This submission is strengthened by Madala J's finding[154] that the legislation discriminated against "persons *such as the applicant"*: The legislation could only discriminate against a person "such as the applicant" if the existence of a reciprocal duty of support between the partners had indeed been established from the outset.[155]

The judgment delivered by the Constitutional Court in 2002 was however not the end of the road for Judge Satchwell and her partner as a peculiar state of affairs necessitated a sequel to this decision which is also of great relevance for this study. Before discussing the sequel it is necessary to highlight one further aspect of the first *Satchwell* case (henceforth referred to as "*Satchwell (1)*"). As may be recalled from the discussion above, the respondents in *Satchwell (1)* argued that by extending the benefits traditionally reserved for spouses to same-sex couples only (as per the judgment of the Court *a quo*), the *Judges' Remuneration and Conditions of Employment* Act 88 of 1989 would still discriminate against heterosexual unmarried couples.[156] The respondents further

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152 Par [9] which states that: "At issue in this case is the question whether the claim by the applicant *that Ms Carnelley should be entitled* to the benefits enjoyed by the spouses of Judges under the Act should be sustained…" (emphasis added) and par [14] which reads: "The challenged provisions, the applicant contended, violated her right to equality in terms of s 9 of the Constitution because they denied *her and Ms Carnelley* certain specified benefits that are generally afforded to Judges and their spouses…" (emphasis added).

153 See par [24] and [34] in particular. Also see *J and Another v Director General, Department of Home Affairs and Others* 2003 (5) SA 621 (CC) at par [24] where the existence of a duty of support was described as "an essential element" of the *Satchwell* case.

154 Emphasis added.

155 Also see footnote 85 in Sachs J's minority judgment in *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) where the Judge expresses the opinion that the need to establish the existence of such a duty where the State was involved was "particularly strong."

156 Par [15] of the judgment.

contended that such a limited extension would not accord with the intention of the Legislature as gleaned from a Bill that had been published in the Government Gazette the year before the Constitutional Court's judgment which apparently extended the benefits to both heterosexual and homosexual partners who had registered their relationships with the relevant state functionary.[157] Without elaborating on this point, Madala J found that the Court could not take cognisance of the content of a Bill in determining an appropriate remedy for the situation at hand.[158]

To return to the discussion of the sequel, a rather strange state of affairs prompted the applicant in *Satchwell (1)* to launch an application for direct access to the Constitutional Court one year later. This application—in the identically-cited case of *Satchwell v President of the Republic of South Africa*[159] (hereinafter referred to as "*Satchwell (2)*")—stemmed from the fact that, despite the relief granted to the applicant and her partner in *Satchwell (1)*, the *Judges' Remuneration and Conditions of Employment Act* 88 of 1989 had been repealed and replaced as from 22 November 2001 by the *Judges' Remuneration and Conditions of Employment Act* 47 of 2001. The regulations relevant to the 1989 Act had similarly been superseded by new regulations as of 5 July 2002. The problem that arose was that the new 2001 Act—as had been the case under the 1989 Act—limited the benefits conferred by it to the *spouses* of Judges and

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157 Par [28]. Section 4(d) of the *Judicial Officers Amendment Bill* 72 of 2001 proposed the insertion of a definition of "partner" into Act 88 of 1989 that would be defined as "a partner, whether in a heterosexual or a same sex relationship, which is intended to be a lasting relationship as is the case with a marriage relationship and which relationship is, for purposes of this Act, registered as such with the Director-General: Justice and Constitutional Development in terms of the regulations made under section 12.'' The word "partner" would then, according to sections 11, 12 and 13 of the Bill, be inserted into sections 8, 9 and 10 of the Act respectively. The constitutionality of section 10 of Act 88 of 1989 was never raised in the *Satchwell* case. The Bill is available at http://search.sabinet.co.za/WebZ/legi_docs/bills/bills01/B072-2001.pdf?sessionid=01-53675-65485531&format=F&dbname=btracker (accessed on 26 November 2008).

158 Par [28].

159 2003 (4) SA 266 (CC).

therefore once again excluded homosexual life partners[160] from its ambit; a situation that led O'Regan J to conclude that the applicant and her life partner had gained no "effective relief" from the decision in *Satchwell (1)*.[161]

If one bears in mind that the 2001 Act had already come into operation on 20 November 2001, it becomes evident that *Satchwell (1)* had, rather bizarrely, been decided on the basis of legislation that had already been repealed even before the hearing in the Constitutional Court had commenced.[162] Contrary to what O'Regan J stated in *Satchwell (2),* the applicant and her partner had not been denied "*effective* relief" by virtue of the decision in *Satchwell (1)*, but had in fact obtained no relief whatsoever, or, in the alternative, had obtained "relief" that was utterly meaningless. Unfortunately the decision in *Satchwell (2)* offers no explanation as to how this state of affairs could present itself in the highest court in South Africa.[163] It is however ironic that while the Court in *Satchwell (1)* was, it is submitted correctly, not prepared to consider a Bill for the purposes of ascertaining the intention of the Legislature, the Court was in fact in the process of deciding the entire matter on the basis of legislation that no longer existed! Nevertheless, the Court in *Satchwell (2)* was prepared to grant the application for direct access to the Court on the basis, *inter alia*, that no factual differences presented themselves *in casu* and that the issues raised had already been traversed by the earlier *Satchwell* decisions.[164] The Court furthermore found that as the differences between the relevant provisions and regulations of the 1989 and 2001 Acts were negligible, the latter Act also unfairly discriminated against

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160 It goes without saying that heterosexual life partners were similarly excluded by the "new" Act, but, as the matter *in casu* was restricted to the position of same-sex couples, the position of their heterosexual counterparts was not at issue.

161 Par [2].

162 *Satchwell (1)* was heard on 26 February 2002 and judgment was delivered on 25 July 2002.

163 It appears that neither the Court nor the litigants in *Satchwell (1)* were ever informed of the fact that the legislation in question had been repealed. This becomes evident from judgment in *Satchwell (2)* where it was reported that the Chief Justice wrote a letter informing the parties of this development subsequent to the judgment in *Satchwell (1)*. It is astounding to think that such an oversight could occur at the highest level of constitutional litigation, particularly as the Act had been repealed even before the hearing in *Satchwell (1)* had commenced.

164 Par [7].

permanent same-sex life partners who had undertaken mutual duties of support.[165] Accordingly, the Court ordered that the omission of the words "or partner, in a permanent same-sex life partnership in which the parties have undertaken reciprocal duties of support" after the word "spouse" in both the 2001 Act and the attendant regulations was unconstitutional, and that these words were henceforth to be read into the legislation in question.[166]

In conclusion it is worth mentioning that the 2001 Act was amended on 1 November 2003 by the *Judicial Officers (Amendment of Conditions of Service) Act*.[167] The latter Act introduced a definition of "partner" that provided for "only one person with whom a Constitutional Court judge or judge, who is not legally married, is involved in a permanent heterosexual or same-sex life partnership" in terms of which reciprocal duties of support had been undertaken and which had been registered with the relevant state functionary.[168] It is however interesting to note that the preamble[169] to the amending legislation notes that this amendment was occasioned in order to "bring the provisions relating to benefits accruing to spouses and *heterosexual or same-sex life partners* of judges in line with a decision of the Constitutional Court."[170] This statement is technically not correct in that the *Satchwell* decisions were not concerned with heterosexual couples at all. Indeed, the Court had specifically elected not to express any opinion on the position of these couples.

In the final analysis the *Satchwell* judgments lead to the conclusion that a reciprocal duty of support is not created merely because two persons live together as heterosexual or homosexual partners. *Such a duty must be undertaken by the partners either expressly or tacitly, with the result that the*

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165 Par [8] – [12].

166 Par [13] and [14].

167 28 of 2003.

168 Section 1.

169 See Smith and Robinson 2008(a): 364, 365 for the relevance of preambles in interpreting legislation.

170 Emphasis added.

existence thereof may if necessary be inferred from the facts of the case in question.

3.2.3 Further implications of the contractual duty of support: The *Du Plessis* case

The next case of importance as far as the reciprocal duty of support between life partners is concerned, is the case of *Du Plessis v Road Accident Fund*.[171] In this case, the appellant (D) and his male partner (E) had been involved in an intimate relationship for just over a decade when E was killed in a motor vehicle accident in 1999.[172] From the outset it was clear that D and E had lived together and supported one another financially throughout the duration of their union. The parties had made provision for one another as heirs in their respective wills, and, moreover, after D was medically boarded in 1994 (leading to a substantial decrease in his income and concomitant ability to contribute towards the joint household) convincing evidence was adduced to support the contention that E had assumed the role of chief breadwinner until his death.[173] Regarding the seriousness of their union, the parties had "solemnised" their "marriage" in a ceremony held in 1990 and it was clear on the evidence provided that the parties would have validly married one another if the law had permitted them to do so.[174]

The facts summarised above provide the backdrop to the major issue in this case, namely whether the Road Accident Fund (as surrogate wrongdoer)[175] was liable to compensate D for the loss of support due to E's death at the hands of

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171 2004 (1) SA 359 (SCA).

172 Par [1] and [4].

173 Par [4].

174 Par [3].

175 Klopper 2000: 21 explains this principle in the following succinct terms: "[T]he basis of claims for the injury or death of a person resulting from the unlawful and negligent driving of a motor vehicle (third party claims) is delict. It involves the *statutory displacement of liability away from the wrongdoer to a statutorily created fund* (the RAF [Road Accident Fund]); provided that the requirements for liability as set out in the RAF Act of 1996 … are fully met. Apart from the displacement of liability, *actual liability remains largely based on common law principles*" (emphasis added and footnotes omitted).

the wrongdoer. A prerequisite for the Fund's surrogate liability is that the wrongdoer must be liable in delict at common law.[176] Therefore, if the wrongdoer is not liable to compensate the claimant at common law, this automatically implies that the Fund cannot be held liable either. The crisp issue[177] in this case was whether the common-law action for loss of support of a breadwinner could be extended so as to compensate a same-sex surviving life partner for the loss suffered as a result of the death of his or her breadwinner due to the unlawful and negligent driving of a motor vehicle.[178]

In its most basic form, the action for loss of support (also referred to as the "dependant's action") traditionally enabled a wife to claim patrimonial loss[179] from a third party who wrongfully killed or injured her husband.[180] In order to sustain such an action, the common law prescribed that the duty of support must have arisen by operation of law and that a contractual duty of support would therefore be insufficient to found such a claim.[181] According to Neethling *et al* [182] the rationale behind this requirement is ostensibly that the net of liability would potentially be cast too wide if a contractual duty of support could as a matter of course be enforced against outsiders.[183]

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176 See section 19(a) of Act 56 of 1996; Klopper 2000: 2.

177 A further issue that arose was whether or not the Fund was liable to compensate D for funeral expenses attendant to E's death. This issue is however not relevant for the purposes of this Chapter.

178 At par [1].

179 The claim for damages is limited to actual patrimonial loss suffered and does not include a claim for loss of *consortium omnis vitae*—see Neethling *et al* 2006: 256; Hahlo 1985: 145.

180 Although the action is instituted by the dependant in his or her own name for wrongful and culpable conduct *towards* the breadwinner, the delict is committed against the dependant—see *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 837 (H) – 838 (A); *Santam Bpk v Henery* 1999 (3) SA 421 (SCA) at 429 (G) – (J); *Brooks v Minister of Safety and Security* 2008 (2) SA 397 (C) at par [23], [24] and [28]; Neethling *et al* 2006: 256.

181 *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 at 666; *Nkabinde v SA Motor General Insurance Co Ltd* 1961 (1) SA 302 (N) at 304 (A) – (F); Sinclair and Heaton 1996: 285; Neethling *et al* 2006: 259; Klopper 2000: 32.

182 2006: 259.

183 The potential effect of a contractual duty of support on outsiders is considered in the discussion of *Volks NO v Robinson* 2005 (5) BCLR 446 (CC)—see 3.3.1.2 below.

In writing for a unanimous Court, Cloete JA confirmed that over the years this common law position had been developed by the Courts to provide for a dependant husband to claim for patrimonial loss sustained by him both for the death of his wife[184] or for injury to her[185] and for a divorcée who was by Court order entitled to maintenance to claim for the loss of support occasioned by the death of her ex-husband.[186] Perhaps even more significantly, the duty had also been extended beyond the realm of civil marriages to make provision for the surviving party to a "marriage" concluded "in accordance with a recognised and accepted faith such as Islam" to claim for loss of support as an extension of the contractual duty of support owed to her by virtue of her now-defunct "marriage."[187]

In order successfully to institute the dependant's action, Cloete JA confirmed that the most recent jurisprudence (referred to above) had prescribed two requirements, namely (i) the existence of a duty of support that was legally-enforceable between the parties;[188] and (ii) that the dependant's right to such support had, with reference to the *boni mores* of society, to be worthy of being protected so as to found an action for patrimonial loss against the wrongdoer.[189]

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184 *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 at 663 – 665.

185 See *Abbot v Bergman* 1922 AD 53 at 56 where De Villiers JA stated: "As in the case of the death of a wife, our law is, however, silent whether a husband can recover from a person who has through *culpa* injured his wife, though not fatally. But no reason can be suggested why a husband should not be allowed to recover the actual pecuniary loss sustained by him under these circumstances. If he is allowed to recover the loss sustained by him through the death of his wife, he must also be allowed to recover when the injuries are not fatal. For, in principle, no distinction can be drawn between the two cases."

186 *Santam Bpk v Henery* 1999 (3) SA 421 (SCA).

187 *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA). It is important to note that the Court did not validate Islamic marriages—see 2.2.1.4 in Chapter 4 (*cf* Neethling *et al* 2006: 258 (at note 45)).

188 *Santam Bpk v Henery* 1999 (3) SA 421 (SCA) at 427 (E) - (G) read with *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA) at par [12].

189 *Santam Bpk v Henery* 1999 (3) SA 421 (SCA) at 427 (G) read with *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA) at par [12].

The Court's finding regarding the first requirement is of particular relevance for this study. *In casu*, Cloete JA held that while it was true that for many years the recognition of a reciprocal duty of support had been confined to the institution of heterosexual civil marriage, the Constitutional Court had already taken cognisance of the instance of same-sex conjugal relationships as "another form of life partnership"[190] and in a subsequent judgment also specifically stated that the existence of a duty of support in such relationships could, with reference to the circumstances involved, be inferred on the facts of a particular case.[191] If this line of reasoning was applied to the facts of the matter at hand, Cloete JA was of the opinion that the relationship between E and D enabled such an inference to be drawn even more readily than on the facts of the precedent in which this approach was originally adopted.[192] Consequently, the Court found that E and D had tacitly bound themselves to mutually support one another and that a legally-enforceable contractual duty had thus been created in terms of which E was bound to maintain D as his dependant.[193]

As far as the second requirement was concerned, Cloete JA found that the extension of the common law dependant's action had to be adjudicated in the light of the *boni mores* of society, which, in turn, had to be informed by the values enshrined in the *Constitution*.[194] Regarding the plaintiff's claim, the values of equality and human dignity were relevant and, as was the case in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, were closely related to one another *in casu*.[195] Furthermore, drawing from the finding of the Constitutional Court in *Satchwell (1)*[196] the Court found that it was logical to assume that where the *common law*—in much the same way as the legislation

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190 Par [12] in referring to *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [35].

191 Par [13] with reference to *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC) at par [25] (discussed above).

192 Par [14].

193 Par [14] – [16]. The relevance of this contractual duty will be revisited when the case of *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) is discussed (see 3.3 below).

194 Par [18].

195 Par [17] – [19] and par [22].

196 2002 (6) SA 1 (CC). This case and its findings are discussed in detail in 3.2.2 above.

had in *Satchwell (1)*—excluded same-sex life partners who had undertaken reciprocal duties of support in permanent cohabitation relationships that were otherwise comparable to heterosexual marriages, that that would constitute unfair discrimination as well.[197] In addition, Cloete JA held that it would be "untenable" to contend that the limitation clause as contained in section 36 of the *Constitution* would be able to justify the continued exclusion of same-sex dependants.[198] After a concise yet comprehensive comparative analysis of developments relating to homosexual couples in other jurisdictions, Cloete JA concluded that the contractual duty that obliged E to support D was indeed worthy of protection so as to comply with the second requirement elucidated above.[199]

A final important issue that fell to be adjudicated was whether the judiciary was the appropriate forum by which the extension sought by the appellant was to be occasioned. In this regard Cloete JA held that, despite the fact that care should be taken not to lose sight of the fact that the Legislature was generally better equipped to facilitate major legal reform, recent jurisprudence[200] and constitutional imperatives[201] highlighted the fact that the Courts were required to ensure that the common law kept abreast of the needs of a changing society and that the Courts were enjoined to occasion such developments where they would be incremental in nature.[202] As the appellant's claim was precisely such an incremental development, Cloete JA concluded that the Court of first instance

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197 Par [24] and [25].

198 Par [27].

199 Par [33].

200 Notably, as far as the development of the common law was concerned, the cases of *Santam Bpk v Henery* 1999 (3) SA 421 (SCA) and *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA); and, concerning judicial developments to discriminatory statutes (as well as references to examples of other statutes that specifically provided for cohabitants), the cases of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); *Du Toit v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as* Amicus Curiae*)* 2003 (2) SA 198 (CC); and *J and Another v Director General, Department of Home Affairs and Others* 2003 (5) SA 621 (CC).

201 Particularly section 39(2) read with section 173 of the *Constitution*.

202 Par [36] and [37].

had erred in finding that it was the Legislature's prerogative to decide whether and to what extent the dependant's action was to be developed.[203]

In conclusion, Cloete JA held that while this judgment was in no way applicable to heterosexual unmarried couples "or to any other relationship", a surviving same-sex partner in a permanent union that compared in other respects to a marriage was entitled to institute the dependant's action where the deceased partner had been bound to support the survivor by virtue of a contractual undertaking to that effect.[204]

3.2.4 Conclusion

It is submitted that the *Du Plessis* judgment takes matters further than the *Satchwell* decision for the simple reason that in the former case the Court was prepared to make the express finding that a duty of support had indeed been undertaken by the parties to the relationship.[205] On the other hand, as seen above, while the final outcome of *Satchwell (1)* cannot be faulted (apart for the fact that the Court was delivering a judgment on the basis of legislation that no longer existed) the Court in that case was merely prepared to conclude that it was "probable" that the applicant and her partner had undertaken mutually to support one another. In fact, it is submitted that the Court in *Satchwell (1)* contradicted itself in that, despite finding that the existence of a duty of support between same-sex life partners could be inferred on the facts of the matter at hand, the Court (quite unexpectedly) found that whether or not this was actually done did not need to be considered *in casu*. As explained above, this aspect of the finding is difficult to understand and it is submitted that the Court erred in this regard, as a finding that it was not only "probable" but that such a duty had in fact existed was vital for the purposes of the judgment given. In fact, it may even be argued that in the absence of such a finding, the applicant would not be able to

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203 Par [34].
204 Par [43].
205 Par [16].

prove that she had a sufficient interest in the case and that her *locus standi* may consequently have been questionable.

Nevertheless, reading *Satchwell (1)* alongside the judgment in *Du Plessis* emphasises the following key aspects regarding the reciprocal duty of support in respect of same-sex life partners: (i) that a reciprocal duty can be inferred on the facts of a particular case,[206] (ii) that such a duty is not an automatic consequence of cohabitation, but that evidence is required to substantiate the fact that the parties to a permanent relationship indeed undertook such a duty, (iii) once this is proved, that such a contractual duty is legally enforceable, and (iv) that the infringement by an outsider of such a duty could be regarded as a wrongful act and is therefore actionable by the partner so wronged. Cognisance must be taken of these findings for the purposes of domestic partnerships legislation.

3.3 Heterosexual life partners and the reciprocal duty of support—*Volks NO v Robinson* 2005 (5) BCLR 446 (CC)

The decisions analysed in paragraph 3.2 were confined to the recognition of a reciprocal duty of support between *same-sex* life partners and, as was stated in the conclusion to that discussion, the current legal position recognises the possibility of inferring such a duty in the light of the circumstances of each particular case. Unfortunately a dearth of case law regarding the position of opposite sex life partners exists as the Constitutional Court has only expressed itself regarding the possible recognition of such a duty within the context of such partners in one reported case. The case in question is the somewhat controversial matter of *Volks NO v Robinson*.[207]

In this case (S) was a male attorney based in Cape Town who had been predeceased by his wife in 1981 and had entered into a “permanent life

206 SALRC 2006: 136.
207 2005 (5) BCLR 446 (CC).

partnership" with a woman (R) four years later; a union that existed for a period of 16 years until S's death in 2001. Although it is unclear whether they had lived together as from the commencement of their relationship in 1985, it is clear from the facts summarised by the majority decision of the Constitutional Court (*per* Skweyiya J), that the parties had lived together in a flat as from 1989 until the time of S's death; a period therefore of some 13 of the 16 years for which their relationship subsisted.[208]

The facts of the case indicated that S and R's relationship was a typical example of the classic cohabitation relationship which is often described as "living together as man and wife." As seen above, S and R had jointly occupied a flat until the deceased's death, after which R had continued to reside there for another year. R had never been employed permanently and had never received a substantial or regular income, but S had supported her financially by paying for household necessities, by "depositing money into her account whenever she needed it", by registering her as his dependant with his medical aid scheme,[209] and by providing for her as a beneficiary in his will.[210] R had reciprocated by contributing towards general expenses and by nursing and caring for S who was bi-polar and manic depressive.[211] The parties were regarded as a couple by their numerous mutual acquaintances and often attended work functions together. By the same token, S's three children born of his marriage also appear to have accepted R in a similar vein as she had on a prior occasion accompanied him on one of his

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208 In the light of this state of affairs, it appears as if Skweyiya J's description of the union being a "permanent life partnership" as from 1985 (see par [3]) seems technically incorrect as the parties only appear to have cohabited on a permanent basis as from 1989 (compare Mokgoro and O'Regan JJ at par [100] and the decision of the Court *a quo* [*Robinson and Another v Volks NO and Others* 2004 (6) SA 288 (C)] at 290 (E) – (G) where it is stated that the parties had lived together since 1985). Nevertheless, it must have been clear to both Courts that the parties had lived together as man and wife for a more than substantial period of time and that a "permanent life partnership" had without doubt existed.

209 Par [5].

210 Par [7].

211 Par [5] read with par [6].

annual visits to the United States where all three of S's children resided with their respective families.[212]

After S's death, R attempted to institute a claim for maintenance from S's deceased estate in terms of the *Maintenance of Surviving Spouses Act* 27 of 1990.

As an extension of the reciprocal duty of support that exists between the spouses to a valid marriage,[213] the *Maintenance of Surviving Spouses Act* entitles the "survivor" to a "marriage" that is terminated by the death of one of the spouses after 1 July 1990 to institute a claim for maintenance against the deceased estate to the extent to which the survivor's "own means and earnings" are insufficient.[214] The claim so instituted is however limited to the survivor's "reasonable maintenance needs" for the remainder of his or her life or until he or she remarries.[215] The Act defines the concept "own means"[216] and provides a fairly comprehensive method for determining the survivor's "reasonable maintenance needs."[217]

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212 Par [6].

213 See par [39] of Skweyiya J's judgment.

214 For a comprehensive discussion of the background to the Act, see Sonnekus 1990: 491 *et seq*.

215 Section 2(1) of the Act (emphasis added) states the following: "If a *marriage* is dissolved by death after the commencement of this Act the *survivor* shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings."

216 According to section 1 of the Act, this "includes any money or property or other financial benefit accruing to the survivor in terms of the matrimonial property law or the law of succession or otherwise at the death of the deceased spouse."

217 Section 3 of the Act states that: "In the determination of the reasonable maintenance needs of the survivor, the following factors shall be taken into account in addition to any other factor which should be taken into account:

(a) The amount in the estate of the deceased spouse available for distribution to heirs and legatees;

(b) the existing and expected means, earning capacity, financial needs and obligations of the survivor and the subsistence of the marriage; and

(c) the standard of living of the survivor during the subsistence of the marriage and his age at the death of the deceased spouse."

The problem faced by R as far as the Act was concerned, was its definition of "survivor", which is defined as a "surviving *spouse* in a *marriage* dissolved by death."[218] Consequently, when R instituted this claim, it was—quite correctly on a literal reading of the Act—rejected by the executor of the estate on the basis that R was never married to S and therefore could not qualify as a "spouse" for the purpose of the relevant statute.[219]

Consequently, R launched an application in the Cape High Court declaring her to be a "survivor" for the purpose of the Act or, in the alternative, challenging the constitutionality thereof in that the Act's references to "marriage", "spouse" and "survivor" did not provide for surviving life partners and hence did not entitle such persons to benefit in terms of the Act; a situation which allegedly violated the rights to equality and dignity as contained in the *Constitution*, 1996. The application was opposed by the executor of S's estate, who argued *inter alia* that the deceased had specifically chosen not to marry R and that granting the order sought by her would undermine the autonomous choices made by the deceased during his lifetime. Nonetheless, so the executor argued, even if the Act was held to discriminate against R, such discrimination was either not unfair or, in the alternative, could be justified by the so-called "limitation clause" as contained in section 36 of the *Constitution*.[220] R attempted to refute the executor's "choice argument" by contending that throughout the existence of the relationship she was prepared to marry the deceased; that various criteria pointed to the fact that she should be entitled to maintenance despite not having been married to the deceased;[221] that even if the deceased had disposed of his property in any way he saw fit, the Act would nevertheless have entitled her to maintenance if the parties had been married; indeed, counsel for R contended, one of the chief aims

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218 Emphasis added.

219 Par [9].

220 Par [17].

221 Par [18]. In this regard, the criteria that R urged the Court to take cognisance of were: "(a) our commitment to a shared household; (b) the financial and other dependence between us; (c) the duration of our relationship; (d) the roles we played in our relationship in relation to each other."

of the Act was precisely to provide for "vulnerable widows or persons in her position" for whom inadequate provision had been made.[222]

The Cape High Court held that the *Maintenance of Surviving Spouses Act* discriminated unfairly on the basis of equality and human dignity and ordered, in broad terms, (i) that the definition of "survivor" was to be read as if it included the words "and includes the surviving partner of a life partnership"; and (ii) that two new definitions namely "spouse" and "marriage" were henceforth to be read into the Act, both of which were to be defined as including "a permanent life partnership."[223] In accordance with apposite constitutional principles, the High Court's finding was referred to the Constitutional Court for confirmation.

It is interesting and highly relevant to note that in oral arguments placed before the Constitutional Court, counsel for both the first and second respondents (R and the Women's Legal Centre Trust respectively) were prepared to limit the scope of words to be read into the statute to life partnerships in which a mutual duty of support existed between the life partners.[224]

The material parts of the Constitutional Court's majority judgment commenced with an investigation into the "history and purpose" of Act 27 of 1990. In this regard, Skweyiya J emphasised that the Act had been promulgated in consequence of a combination of the Appellate Division's (at the time the highest Court in South Africa) refusal in the 1960's to allow a surviving spouse to institute a claim for maintenance from her deceased husband's estate, coupled with a recommendation by the South African Law Commission (as it was then known) in 1987 to the effect that such a claim be provided *ex lege* by way of specific legislation.[225] As such, when promulgated, the Act did not entitle the survivor to a benefit from the State or from any outsiders, but instead had the effect of

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222 Par [19].

223 At 302 (E) – (I) of the Court *a quo*'s judgment.

224 Par [28].

225 Par [36] and [37].

extending the reciprocal duty of support beyond the death of one of the spouses to a marriage in order to eliminate the "perceived unfairness" of the cessation of such an obligation. In so doing, Skweyiya J pointed out that the Act "seeks to regulate the consequences of marriage and speaks predominantly to those who wish to be married."[226]

In dealing with the respondents' argument that the Act could be *interpreted* in such a way as to provide the relief sought (an argument which, if successful, would have the advantage of circumventing the constitutional issue), Skweyiya J held that section 2(1) of the Act could not be interpreted in such a manner as the terms "marriage" and "spouse" had limited, specific meanings which could not be altered.[227] The Act could accordingly not be interpreted so as to include "permanent life partnerships."[228]

Considering the question as to whether the Act violated the equality rights of permanent life partners, Skweyiya J was prepared to accept that it discriminated on the basis of marital status. As a listed ground, it followed that such discrimination was presumed to be unfair.[229]

In this regard, the crux of Skweyiya J's finding was that, as marriage was constitutionally and internationally recognised as an "important social institution", it was not unfair for the law to distinguish between those who were married and those who were not and, where apposite, to benefit the former group.[230] Moreover, the position of unmarried couples could not be equated with spouses to a marriage as, *inter alia*, the institution of marriage immediately occasioned *ex lege* rights and obligations which were imposed irrespective of the wishes of the parties, while the same was not true in the case of unmarried cohabitants. In point of fact, Skweyiya J held, the maintenance obligation imposed by the Act

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226 Par [39].
227 Par [40] – [42].
228 Par [45].
229 Par [50].
230 Par [51] – [54].

was a component (and indeed an extension) of one of these consequences, namely the reciprocal duty of support.[231] As such, the Act also limited the right of a testator freely to dispose of his estate.[232]

It could also not be argued that cohabitants who expressly or by implication had undertaken to support one another could be equated to married couples, and that the only difference between them was the existence of a marriage certificate. Marriage created instantaneous obligations that at times endured beyond the death of one of the spouses, while any obligation that was created between cohabitants arose "by agreement and only to the extent of that agreement."[233] It followed that it was not unfair for the law to distinguish between surviving spouses and surviving cohabitants as far as maintenance was concerned as it would be inappropriate to impose such a duty on a deceased estate where no such duty was imposed by operation of law during the lifetime of the deceased.[234] This line of reasoning was supported by Ngcobo J in his concurring judgment[235] when he stated that:

> The decision to enter into a marriage relationship and to sustain such a relationship signifies a willingness to accept the moral and legal obligations, in particular, the reciprocal duty of support placed upon spouses and other invariable consequences of a marriage relationship. This would include the acceptance that the duty to support survives the death of one of the spouses… The law expects those heterosexual couples who desire the consequences ascribed to this type of relationship to signify their acceptance of these consequences by entering into a marriage relationship.[236]

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231 Par [55] and [56].
232 Par [57].
233 Par [58].
234 Par [60].
235 Chaskalson CJ, Langa DCJ, Moseneke, J, Van der Westhuizen J and Yacoob J concurred in Ngcobo J's judgment.
236 Par [91] and [92].

As far as the possible violation of her right to dignity was concerned, the majority of the Court held that no such violation took place as the Act did not imply that R's dignity was "worth less than that of someone who is married", but simply that the reasons outlined above justified the Act's distinction between a surviving spouse and a surviving life partner.[237]

In conclusion, while it was true that during the existence of their relationships surviving heterosexual life partners were often vulnerable and economically dependent on their partners, who, to boot, often refused to marry them or to compensate them for their domestic contributions, Skweyiya J concluded that this reality was neither caused, nor could be solved, by the extension sought by R, and that the failure to permit the extension would not discriminate unfairly against vulnerable women.[238] Instead, the solution to this problem would be for the law to regulate the "rights and obligations" of parties in such unions and for these social realities to be addressed by "the empowerment women and social policies by the [L]egislature."[239] In the end result, the order of the Court *a quo* was not confirmed.

3.3.1 A critique of the approach in *Volks NO v Robinson*

It is submitted that this case was incorrectly decided. In addition, although the point will be made that the dissenting judgment of Sachs J is for the most part to be supported,[240] it is further submitted that certain points of criticism can unfortunately be levelled at this judgment as well. To illustrate what is submitted to be the more correct approach, four aspects will be dealt with in the discussion that follows. These are (i) the so-called "choice argument" and the broader "family law-based" approach; (ii) the lack of appreciation of the value of a factual

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237 Par [61] and [62].
238 Par [65] and [68].
239 Par [66].
240 Also see Lind 2005: 129.

reciprocal duty of support; (iii) the anomaly surrounding the perceived curative effect of the extension sought by R; and (iv) the ambit of that extension.

3.3.1.1 Critical aspect 1: The "choice argument" and the broader "family law-based" approach

A consideration of the aforementioned summary makes it clear that Sachs J was correct when he concluded that both the judgments of Skweyiya J (the majority judgment) as well as that of Ngcobo J are effectively founded on what may for the purposes of this study conveniently be termed the "choice argument"; the underlying sentiment of which he succinctly summarises as follows:

> By opting not to marry, thereby not accepting the legal responsibilities and entitlements that go with marriage; a person cannot complain if she is denied the legal benefits she would have had if she had married. Having chosen cohabitation rather than marriage, she must bear the consequences.[241]

Many arguments can be raised for and against this line of reasoning, and it may be useful at this point briefly to examine the merits of the "choice argument" as applied by the majority decision in *Volks*. In this regard Schäfer[242] explores a number of advantages and disadvantages of what he prefers to describe as the "objective model of choice."[243] According to him the model possesses three main

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241 Par [154] (*per* Sachs J).

242 2006: 640 – 644.

243 Writing before the promulgation of the *Civil Union Act* 17 of 2006, Schäfer (2006: 627 and 640) describes this approach as the "objective model of choice" which he states "assesses the availability of choice for any given couple by looking only to the presence or absence of an absolute legal impediment to marriage between couples within their class. Opposite-sex couples, as a class, enjoy the freedom to marry; same-sex couples do not. This 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. For example, restricting the capacity to marry of those who are too young or of insufficient mental capacity to appreciate the legal consequences of marriage can be justified on the basis that it is necessary to protect vulnerable members of society. These impediments do not contradict the general proposition that opposite-sex couples, as a class, enjoy the (objective) freedom to marry."

advantages, namely (i) the fact that it is based on mutual consent and therefore attaches equal weight to the will of both parties to the relationship (as an example hereof Schäfer mentions that if R had been successful in her claim to have the Act extended so as to provide for her relationship, this would imply that her wish to marry would have been accorded greater weight than the deceased's election not to marry);[244] (ii) that it is a feasible approach as it "requires decision-makers to look no further than the objective means by which the law permits choice to be manifested"; and (iii) that it is the best option in terms of ensuring that all parties (including outsiders) are in no doubt as to the extent of their rights and obligations *vis-á-vis* one another.[245] On the other hand, the disadvantages include (i) the fact that the model ignores the context within which the choice to marry is exercised (although Schäfer concedes that a contextual approach "invites fine and potentially unfair value judgments" regarding the motivation behind such decisions); (ii) the fact that it ignores relationships which resemble marriage in social and functional terms; and (iii) that it makes no allowance for parties who have based their election not to marry on an uninformed choice.[246] Despite the fact that, with specific reference to the facts in *Volks*, Schäfer[247] is of the opinion that a rigid application of this model "sits uneasily" as the evidence showed that it was in reality only S who had chosen not to wed, he concludes that the objective model "should continue to serve to justify a differential allocation of rights and duties within a new hierarchy of life partnerships."[248]

Advantages and disadvantages aside, the preceding discussion highlights the major difficulty faced by heterosexual life partners in the position of R namely that—objectively speaking—it remains an indubitable fact that the law has always provided them with the option of marrying one another (and still does so). This much is trite. However, in his minority judgment Sachs J stated that this fact alone is not necessarily sufficient to serve as a basis for concluding that a

244 *Cf* Lind 2005: 123.
245 Schäfer 2006: 642, 643.
246 Schäfer 2006: 641, 642.
247 2006: 640.
248 2006: 643.

surviving life partner in the position of R should not be entitled to maintenance solely because the option to marry was never exercised. Indeed, as Sachs J convincingly pointed out, the option of marrying often exists only in theory.[249] Furthermore, Sachs J continued, a valuable lesson could be learnt from Canadian jurisprudence where the Courts have held that a distinction needs to be drawn between matters which involve the (re-) regulation or division of property between life partners and those involving matters of (spousal) support. In *Nova Scotia (Attorney General) v Walsh*,[250] Gonthier J[251] explained that this distinction is essential as:

> While spousal support is based on need and dependency, the division of matrimonial assets distributes assets acquired during marriage without regard to need.

On the basis of this distinction, the fact that the parties have not specifically elected to marry one another could not deprive one of them of a right to support, as "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."[252] Consequently, the "choice argument" would only hold water in

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249 Par [155] – [162]. Also see Schäfer 2006: 641. It is important to note that Sachs J's comments in this regard referred specifically to heterosexual cohabitants as same-sex marriage was not yet possible at the time of the *Volks* judgment. However, Wood-Bodley (2008(a): 54 *et seq* and 2008(b): 260 and 266) makes the interesting point that despite the legalisation of same-sex marriages, the election to marry is also not a realistic option for such couples due to "ongoing homophobia in society and the concomitant need for many to remain closeted to a greater or lesser degree" and, for this reason, the piecemeal recognition granted to same-sex couples by cases such as *Gory v Kolver NO* 2007 (4) SA 97 (CC); 2007 (3) BCLR 294 (CC) should be retained despite the fact that same-sex couples may now marry. Wood-Bodley's submissions are considered in the discussion of *Gory v Kolver NO and Others* in 3.4.1 below.

250 2002 SCC 83, 32 R.F.L. (5th) 81, 221 D.L.R. (4th) 1, 211 N.S.R. (2d) 273, 102 C.R.R. (2d) 1, [2002] 4 S.C.R. 325, 297 N.R. 203, 659 A.P.R. 273, REJB 2002-36303, J.E. 2003-102.

251 Mr Justice Charles Doherty Gonthier (born in 1928) served as a Judge of the Supreme Court of Canada from 1 February 1989 until his retirement on 1 August 2003. He passed away on 17 July 2009. Source: http://www.scc-csc.gc.ca/court-cour/ju/gonthier/index-eng.asp (accessed on 5 September 2009).

252 See par 203 where Gonthier J based this conclusion on the criteria posed by section 33 of Ontario's *Family Law Act* R.S.O. 1990, c. F.3 for determining the "amount and duration" of support for a "spouse, same-sex partner or parent in relation to need." The reference to "same-sex partner" has since been deleted, and the definition of "spouse" now means: "a spouse as defined in subsection 1 (1), and in addition includes either of two persons who are not married to

the case of property disputes and not where the extension sought was based on need (as is obviously the case with maintenance). The rationale behind this distinction, according to Gonthier J, is to be found in the different objectives served in these two cases: While the former seeks to divide property in accordance with a matrimonial property system, a need-based claim serves the "social objective" of providing for the needs of a spouse and his or her offspring.[253]

Sachs J appeared to favour this contextualised approach towards the "choice argument" over the one adopted by the majority of the Court. In this regard, it is submitted that Sachs J was correct as the majority judgment, while theoretically sound, fails to appreciate the social context and practical realities related to choice (such as unequal and gendered power relations and ignorance of the consequences of non-formalisation)[254] and as such represents little more than a clinical adherence to matrimonial law in circumstances in which it is clear that the "choice" to marry is often merely illusory.[255] Goldblatt[256] neatly encapsulates the latter reality in the following terms:

> The libertarian presumption of free choice is incorrect. It is itself premised on the idea that all people entering into family arrangements are equally placed. This is not so. Men and women approach intimate relationships from different social positions with different measures of bargaining power. Gender inequality and patriarchy result in women lacking the choice freely end 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

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each other and have cohabited, (a) continuously for a period of not less than three years, or (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child. ("conjoint") R.S.O. 1990, c. F.3, s. 29; 1999, c. 6, s. 25 (2); 2005, c. 5, s. 27 (4-6)."

253 Par 204 of the *Walsh* case. This finding was referred to with approval by the Supreme Court of British Columbia (*per* Neilson J) in *M.A.S. v F.K.M.* 2003 BCSC 849 (CanLII) at par 62.

254 See *inter alia* Lind 2005: 109 – 113; Goldblatt 2003: 614 and 616; De Vos 2004: 183 and SALRC 2006: 29 *et seq* for an explanation of these and other realities.

255 The need for an approach based on "family law" as opposed to "matrimonial law" is discussed and explained in the paragraphs that follow.

256 2003: 616.

> need protection … The research [conducted for the purposes of Goldblatt's contribution] showed that it usually suits men to neither marry nor formalize the partnership in any way, so that they might have the freedom to take what they want from the relationship free of any concomitant obligations. The illiteracy, ignorance and lack of access to the law and other resources compounds the already difficult position facing many women.[257]

As support for this contention, it is further submitted that if it is borne in mind that a "first-world" society such as Canada deems it necessary to adopt a context-specific approach, the adoption of a similar approach is even more imperative in a less sophisticated and less homogenous society such as South Africa which, in the eloquent phraseology quoted by Sinclair and Heaton, is "fissured by differences of language, religion, race, cultural habit, historical experience and self-definition."[258] An even greater awareness of the realities encountered in such a multifarious society would certainly be required in the latter instance. However, by effectively giving pre-eminence to the "choice argument" despite the fact that the claim *in casu* was based on need, the majority decision in *Volks* unfortunately took the diametrically opposite route and, in the words of Lind[259] "ignores the society we have become." In this regard, the decision of the majority and the rationale on which it was based 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.

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257 In the light of the legalisation of same-sex marriage, it is submitted that many of these arguments could also apply to the "choice" of persons involved in such relationships to enter into marriages or civil partnerships, particularly as far as unequal power relations and ignorance of the law are concerned. In addition, as will be seen below, the impact of factors such as homophobia on the presumption of free choice also plays a significant role within the context of same-sex relationships.

258 Sinclair and Heaton 1996: 7, who acknowledge this quote as appearing in an article written by Ken Owen that appeared in the Business Day of 26 June 1990.

259 2005: 111.

The same criticism can, with respect, be levelled at Schäfer's approach in that, while his arguments for and against the "choice argument"[260] are meritorious, he fails to address the question as to whether the "objective model of choice" is robust enough to withstand constitutional scrutiny where the claim in question is based on *need* as opposed to relating to a purely proprietary concern. It is submitted, in the light of the discussion below, that it is not. It is however important to note that this does not mean that Schäfer is incorrect when he concludes that the "choice argument" should continue to vindicate a "differential allocation of rights and duties within a new hierarchy of life partnerships." What is however suggested is that this statement should possibly be contextualised in order to permit the "choice argument" to sanction such a "differential allocation" *only within the context of property disputes*.

The determination of the issue in the *Volks* case also demands due consideration of the unique attributes of the society in which these relationships present themselves. As Sachs J pointed out, the historical fact of a patriarchal societal structure, the disruption of African family structures engineered by enforced labour migration and the problems occasioned by poverty also needed to be considered in order further to establish the background against which the issue *in casu* needed to be considered.[261] Coupled with these considerations, the learned Judge also emphasised the continuing shift from the narrow concept of the law of marriage towards the broader concept of "family law" in which—in line with prevailing social realities in South Africa—the notion of family fell to be determined with reference to the function it performed as opposed to whether it complied with the traditional common law definition of marriage.[262] This shift was

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260 As discussed above.

261 Par [163] – [166].

262 Par [167] – [174]. For examples of many of the issues which are indicative of a need for this shift, see Chapter 1 in Sinclair and Heaton 1996: 68 where (writing with specific reference to sex and gender inequality) the authors opine that "South Africa stands poised to question the assumptions that have formed the basis of its laws regulating and affecting intimate relationships. Unless attention is given to the issues cited below [including inequality in the workplace, reproductive rights, inequality within marriage and upon divorce, and the recognition of customary and Islamic marriages] only as examples, the new mould will reproduce the

also evident in the wide array of legislative developments that, particularly since 1994, had provided context-specific recognition and protection to life partners and family structures other than civil marriage.[263] All of these considerations pointed to the general emergence of a "new legal landscape" that was aligned with the behests of the *Constitution*.[264]

The "new" legal landscape elucidated above coupled with the purpose behind the promulgation of the Act (which Sachs J distils as being intended mainly to prevent widows from destitution) led Sachs J to conclude that the legal question *in casu* was whether the Act unfairly discriminated on the basis of marital status.[265] As the Act undoubtedly differentiated on a listed ground, it followed that discrimination was present, and, as such, the fairness of such discrimination fell to be determined.[266] This, Sachs J quite correctly held, could not take place within the strictures of the concept of "matrimonial law", but, instead, was to take place with reference to the broader notion of "family law."[267] The issue therefore was whether the law could be expected to assist in enforcing the conflicting responsibilities and in effectuating the expectations created between the parties to a "domestic partnership."[268]

At this juncture it is important to note—as the learned Judge himself intimated later in his judgment[269]—that the broader approach advocated by Sachs J is nothing new: Although such an approach does not appear to have been referred to in express terms in the cases already discussed that dealt with the extension

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inequalities of the old; the society may achieve non-racialism, but it will not achieve sexual equality. And [quoting from Murray and O'Regan for whom the authors provide a full reference at note 170] 'a programme for the liberation of South Africa which does not take the issue of gender discrimination seriously is incomplete'."

263 Par [175] – [181].

264 Par [181].

265 Par [186] – [187].

266 Par [190].

267 Par [191].

268 Par [193].

269 Sachs J refers to this as the Constitutional Court's "emphasis on the need to recognise diversity of family formations in South Africa" (at par [210]) and "the need to adopt a flexible and evolutionary approach to family life" (at par [211]).

of marital rights and responsibilities to same-sex life partners, precisely the same rationale as that employed by Sachs J in his minority judgment constitutes the philosophical premise of those decisions.[270] The only obvious difference between the position of homosexual and heterosexual life partners at the time was that only the latter group had the option of marriage available to them. However, as seen above, the "choice argument" is insufficient to impose an unqualified exclusion on this category of persons. Indeed, as Sachs J correctly mentioned, one of the key issues in the matter at hand was

> whether *in substantive terms* the committed life partner of the deceased bears the same relationship to the deceased in every respect as a married partner, save for not having gone through the formalities of marriage.[271]

This, it is submitted, was precisely the same reasoning employed in the same-sex cases; reasoning that certainly was indicative of a shift from the constraints of the law of marriage to a more encompassing body of "family law."

Sachs J proceeded to conclude that "marital status" was included as a listed ground in the equality clause in order to protect persons who were vulnerable due to the fact that they were unmarried.[272] While it was apparent that society generally condoned cohabitation more readily than it had done in the past, societal prejudices against such relationships had not been completely eradicated.[273] Nevertheless, the institution of marriage had to be protected due to the vital role it played in both public and private life. However, the fundamental question in Sachs J's opinion was whether this entitled marriage to exclusivity, and therefore whether the exclusivity occasioned by the Act was unfair.[274] In deciding this crucial issue, Sachs J commenced by emphasising the role played by the Constitutional Court in broadening the scope of recognised family

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270 See par [210] – [211] of Sachs J's minority judgment.
271 Par [196] (emphasis added).
272 Par [200].
273 Par [200] – [203].
274 Par [208].

formations in South African society, but also pointed out that it had to be borne in mind that no single case had heretofore dealt with the issue of life partnerships that existed between two unmarried persons of the opposite sex.[275] What needed, however, to be determined was whether there was:

> [A] *familial nexus* of such proximity and intensity between the survivor and the deceased as to render it manifestly unfair to deny her the right to claim maintenance from the estate on the same basis as she would have had if she and the deceased were married[.] [276]

Sachs J proceeded to provide two scenarios in which the denial of such a claim would in his opinion be unfair. As these scenarios are discussed as part of the second critical aspect identified earlier dealing with the factual duty of support, the discussion of Sachs J's conclusion regarding the familial nexus will momentarily be interrupted in order to present the author's conclusions from this discussion. Before doing so, it must be noted that Sachs J's minority judgment culminated in the finding that the exclusion of the benefits of the Act to married survivors only constituted unfair discrimination.[277]

To conclude: It is important to note that the issue in question was whether a claim for *maintenance* could be denied to a person in the position of the applicant.[278] It must, once again, be emphasised that such a claim is a claim that is based on need as opposed to a mere property dispute. It follows—quite obviously—that the arguments raised above in consequence of Sachs J's finding of unconstitutionality *in casu* cannot without more be transplanted into a proprietary (as opposed to need-based) setting. In other words, the points made in support of the Judge's finding that it amounted to unfair discrimination to deny a person in the position of R a claim for *maintenance* in terms of the Act could

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275 Par [210] – [211].
276 Par [213] (emphasis added).
277 Par [227].
278 See the extract from par [213] as quoted above.

not necessarily also be raised in a case where a property dispute between life partners is at issue. However, the fact that the majority of the Court was prepared to hold that the denial of a *need-based* claim to heterosexual cohabitants did not violate the right to equality does not bode well for property-based claims, as the inference can be drawn that a Court will be even less likely to hold that the non-application of matrimonial property law to a property-based claim between cohabitants was unconstitutional.

Consequently, it is submitted that:

(i) Sachs J was correct in finding that the majority judgment had taken the "choice argument" too far. As Lind states, "the real lived quality of equality remains remarkably elusive" in contemporary South Africa, with the result that a "severely gendered environment" persists, leading to the choice of formalising a relationship often being illusory. One positive aspect of the majority judgment is, however, that it illustrates clearly the need for the legislation developed in consequence of the domestic partnerships rubric to address this type of problem;

(ii) The judge's approval of the Canadian approach in terms of which a distinction is drawn between need-based claims and those involving property disputes is to be supported. This issue will be discussed in more detail in 3.3.2.2 below;

(iii) Sachs J's broader approach that advocates a shift from "matrimonial law" to "family law" is to be commended;

(iv) As the issue *in casu* was a need-based claim, it follows that a combination of conclusions (i), (ii) and (iii) only apply within the context of need-based claims (as opposed to those involving property disputes);

(v) In the light of (i) – (iv) above, the "choice argument" should have no role to play in the adjudication of the extension of need-based claims to mutually interdependent permanent life partners;[279] but

(vi) This does not imply that the "choice argument" has no role to play whatsoever, but rather that, in consequence of (i) – (v) above, it should *at best* have a role to play within the context of property disputes only.[280] This matter will be explained in further detail below;[281]

(vii) Finally, it is submitted that conclusions (v) and (vi) should be borne in mind for the purposes of the legislation based on the domestic partnership rubric referred to in (i) above.

3.3.1.2 Critical aspect 2: The value of the existence of a factual duty of support

It is submitted that Sachs J's finding regarding the unfairness of the Act and the lack of justification for the exclusion of persons other than surviving spouses was correct. Nevertheless, an important *lacuna* in this otherwise well-reasoned minority judgment must be unveiled. In order to understand this submission, the two scenarios mentioned earlier (*id est* those described by Sachs J in which denying a maintenance claim would be unfair in view of the existence of a significant familial nexus) need to be dealt with in some detail.

- Category 1: The existence of an express or tacit duty of support

The first category mentioned by Sachs J involved parties who had expressly or impliedly bound themselves to "provide each other with emotional and material

279 The necessity of the existence of a reciprocal duty of support is discussed in the second critical aspect that deals with the validity of a factual duty of support.

280 See the main text above where Schäfer's support of the "objective model of choice" is contextualised.

281 See the conclusions at 3.3.2 below.

support."[282] While it would ease matters if proof of such an undertaking could be provided by way of a "legal document", Sachs J also emphasised that such an undertaking could be inferred on the facts of a specific case (as indeed the Constitutional Court had also found in *Satchwell (1)*).[283] Moreover, while the finding in *Satchwell (1)* had been restricted to homosexual life partners, Sachs J was of the opinion that the same inference could be drawn in the case of heterosexual couples.[284] On this basis Sachs J found that the duty could extend beyond the death of one of the life partners and thus permit a claim in terms of the Act.[285]

It is submitted that Sachs J's reasoning regarding this group of persons is correct. Nevertheless, as will be seen below, Sachs J stopped short of taking this aspect of his judgment to its logical and decisive conclusion.

- Category 2: Maintenance in the absence of an express or tacit undertaking

The second instance in which Sachs J opined that the denial of a maintenance claim would be unfair seems less convincing. This category is described as one in which a maintenance obligation arises not from any agreement to that effect but instead due to "the nature of the particular life partnership itself."[286] Sachs J appeared to view this group as comprising a family unit where the survivor was not able to contribute to maintenance in material terms but rather by way of "care and concern" and "sweat equity."[287]

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282 Par [214].

283 2002 (6) SA 1 (CC). It will be recalled that it is debatable whether the Court actually found such a duty to exist *in casu*—see 3.2.2 above.

284 Par [215]. Also see Mokgoro and O'Regan JJ's dissenting judgment where they also agree that a reciprocal duty of support could be inferred from the facts of the case (at par [104]).

285 Par [216].

286 Par [218].

287 Par [219].

As mentioned above, it is submitted that this (second) category envisioned by Sachs J is less convincing than the first. The main reason for making this submission is that there is no real distinction between the first and the second category of persons mentioned by Sachs J. In other words, it is suggested that a contractual duty of support is present in both scenarios envisaged by Sachs J. This is so because although the existence of a reciprocal duty of support is based on the need of one party and the corresponding ability of the other to provide,[288] it is acknowledged by authors such as Sinclair and Heaton[289] that in such a situation the duty of support rests on the sole breadwinner.[290] It therefore does not follow from the fact that only one party is earning an income that no reciprocal duty of support exists, for as Van Zyl[291] states, the duty of support in South Africa "is always a reciprocal one." Nevertheless, contemporary socio-economic conditions make it fairly difficult to imagine a scenario where only one party contributes to the maintenance of the other party for the entire duration of the relationship without the slightest reciprocal contribution from the one who is generally being maintained.[292] For Sachs J to attempt to explicitly identify and differentiate such a category of relationship therefore appears to be somewhat artificial. Indeed, the learned Judge appears (perhaps inadvertently) to conflate the first and second scenarios himself when he states that:

> In the words of the Equality Act [*Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000], what matters is whether in the relationship there was *a commitment to reciprocal support*.[293]

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288 See for example Van Zyl 2005: 3; Cronjé and Heaton 2004: 52; Visser and Potgieter 1998: 76.

289 1996: 442 (at note 90).

290 In *Bezuidenhout NO v ABSA Versekeringsmaatskappy Bpk* (unreported judgment of the Transvaal Provincial Division [now North Gauteng High Court, Pretoria], case no 40688/2008 delivered on 26 February 2008) at par [7.3] the Court accepted, on the evidence of only one party, that that party maintained the other one "almost like a child" as the latter was unemployed and did not contribute towards household expenses. The Court therefore appears to have accepted that the former party was the sole breadwinner—see par [13].

291 2005: 3.

292 See the brief comment on *Bezuidenhout NO v ABSA Versekeringsmaatskappy Bpk* (unreported judgment of the Transvaal Provincial Division [now North Gauteng High Court, Pretoria], case no 40688/2008 delivered on 26 February 2008) in the preceding note but one and in 3.4.2 below.

293 Par [219] (emphasis added).

From this statement, it can be deduced that it is not necessarily required that *both* partners actually and continuously contribute towards reciprocal maintenance, but rather that there is a *commitment* in this respect that gives rise to a (contractually-based) reciprocal duty.

Furthermore, although none of the cases that Sachs J cited in support of his contention that a broader approach had been entrenched by the Constitutional Court in order to "recognise diversity of family formations" dealt with heterosexual life partners, it is important to note that in all of these cases it was found that it was possible *to infer* that a reciprocal duty of support existed on the facts of each case. Indeed, as pointed out earlier in the discussion of that case, the Court in *Satchwell* granted the extension sought without ever pronouncing itself on whether or not a duty of support even existed. Nevertheless, the cases cited by Sachs J all had one core aspect in common, namely the existence of a reciprocal duty of support that had been inferred on the facts of the matter. Furthermore, if the criticism against the second category identified by Sachs J is borne in mind, it becomes clear that a reciprocal duty of support exists in those circumstances as well as those of the first category.

The inevitable conclusion, therefore, is that the existence of a reciprocal duty of support is the decisive factor in determining whether or not the claim of a person in the position of R should succeed.[294] Moreover, it is clear that a reciprocal duty

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[294] In their dissenting judgment Mokgoro and O'Regan JJ also appreciated the fact that the existence of a reciprocal duty of support was essential in order to allow cohabitants to claim in terms of the *Maintenance of Surviving Spouses Act* (see par [139] and [140] as well as their proposed order as contained in par [145]). It is submitted, however, that with the exception of this aspect, their order contains a number of critical deficiencies—see the main text. The necessity of proving that a reciprocal duty of supported existed while both parties were alive also appears to have been realised by counsel for R during the confirmation proceedings, as is evident from par [28] of the majority judgment where Skweyiya J mentions that the Court had been informed that the extension sought by R (1st respondent) and the Women's Legal Centre Trust (2nd respondent) would only be required in cases where the life partners had undertaken mutual duties of support. It is however interesting to note that Mokgoro and O'Regan JJ pointed out that while the order proposed by them limited the scope of claims in terms of the *Maintenance of Surviving Spouses Act* to heterosexual couples who had undertaken mutual duties of support, "the respondents and the amicus" had argued that an order to the effect that the common law was to

of support in fact existed between the life partners in *Volks*. The failure of the majority judgment (as well as that of Ncgobo J) to recognise this fact[295] is not only incomprehensible, but, when compared to the ease with which the Courts have inferred the existence of such a duty in the same-sex cases, appears to be inconsistent.[296]

Nevertheless, while Sachs J had no qualms in acknowledging the existence of a reciprocal duty of support *in casu*, it appears (as mentioned earlier) that the learned Judge does not appear to have identified this requirement as constituting the true cornerstone of his dissenting judgment. Indeed, a finding that the reciprocal duty of support was the key to R's claim would also have facilitated the refutation of a major concern raised by Skweyiya J in his majority judgment. The reservation in question is essentially based on the differences between the obligations created *ex lege* by marriage and those created *ex contractu* between life partners and the concomitant problematic application of these obligations beyond the death of the parties concerned. In this regard Skweyiya J stated that:

> [Sachs J contends] that for the law not to oblige survivors of relationships in this category to be maintained entails unfair discrimination against the survivor simply because the survivor does not have the piece of paper which is the marriage certificate. That is an over-simplification. Marriage is not merely a piece of paper. Couples who choose to marry enter the agreement fully cognisant of the legal obligations which arise by operation of law upon the conclusion of the marriage. These obligations arise as soon as the marriage is concluded, without the need for any further agreement. They

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be developed so as to create an *ex lege* duty of support for cohabitants was to be preferred over an order which required proof of a contractual undertaking of mutual support. The reference to "the respondents and the amicus" is confusing when viewed against par [28] of the majority decision. It therefore appears that the argument attributed by Mokgoro and O'Regan JJ to "the respondents and the amicus" in fact excludes counsel for R and for the Women's Legal Centre Trust, who seemingly conceded that the existence of a contractual duty of support was required in order for their claim to succeed.

295 See Schäfer 2006: 643 who appears to share the view that the couple's relationship was clearly "marked by commitment and mutual interdependence."

296 It is self-evident that the existence of a duty of support is a question of fact and not of gender. The recognition of such a duty within the context of homosexual relationships (see the discussion above) but not in the case of a heterosexual couple is therefore an egregious anomaly.

include obligations that extend beyond the termination of marriage and even after death. To the extent that any obligations arise between cohabitants during the subsistence of their relationship, these arise by agreement and only to the extent of that agreement. *The Constitution does not require the imposition of an obligation on the estate of a deceased person, in circumstances where the law attaches no such obligation during the deceased's lifetime, and there is no intention on the part of the deceased to undertake such an obligation*.[297]

From the final sentence of this quote it appears as if Skweyiya J was of the opinion that two factors, namely (i) the lack of an obligation imposed *ex lege* and (ii) the absence of the intention of the deceased to incur such an obligation, would be decisive. Two paragraphs later Skweyiya J summarised this reservation by concluding that it would be "incongruous, unfair, irrational and untenable" to impose a duty of support on a deceased estate where "none arose by operation of law during the lifetime of the deceased."[298]

This objection to the extension sought by R deserves special attention.

- To begin with, it is to be noted that although the "intention requirement" was specifically mentioned in the extract from Skweyiya J's judgment,[299] the learned Judge only makes one reference to this requirement and does not include it as a factor in summarising this finding on two subsequent occasions.[300] However, for the purposes of this discussion it can be assumed that he nevertheless took cognisance of the deceased's (perceived) intention when considering whether or not R's claim for maintenance could succeed. However, it is submitted that ascertaining the intention of the deceased is not always a simple matter. This

297 Par [58] (footnote omitted and emphasis added).

298 Par [60]. Also see par [68] (quoted in note 300 below).

299 See the final sentence of par [58] as quoted above.

300 See par [60] (the essence of which is quoted above) and par [68]: "As I have already said, it is not unfair not to impose a duty upon the estate of a deceased where no duty of that kind *arose by operation of law* during the lifetime of that person" (emphasis added).

represents the first major difficulty with the "intention requirement" as prescribed by Skweyiya J: It attempts to formulate an absolute qualification of general application to all cohabitants on the basis of *his interpretation* of the facts in *Volks*. The learned Judge concluded that S did not intend to maintain R after his passing.[301] As no other evidence for drawing this conclusion is mentioned, it can be assumed that Skweyiya J reached this conclusion on the basis of the bequests made to R in S's will.

Considering the facts *in casu*, it is clear that S *inter alia* bequeathed a sum of R 100 000 to R in terms of his will.[302] However, it does not follow from this fact that S never intended to maintain R. On the contrary, the bequests to her may indicate that he indeed wished to maintain her, but that in his opinion the property bequeathed would be sufficient to do so. Therefore, the fact of the bequest should instead be used to assess (as the Act requires in the case of spouses to a valid marriage) the "own means" of the survivor, and not as an absolute bar to the institution of a claim in the first place. If this were to be done it would follow that R would not, on the facts of the case, be entitled to additional maintenance from S's estate as the bequest would in all probability be deemed to constitute sufficient maintenance. This much was pointed out in both dissenting judgments.[303] Moreover, this approach would also be in line with the order proposed by Sachs J in which he clearly stated that the Act in his opinion was unconstitutional to the extent that it excluded cohabitants "from *pursuing* claims of maintenance."[304] This obviously implies that each claim would be considered on merit, just as the case would be with a surviving spouse.

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301 Par [58].

302 Par [7]. She was also entitled to other assets including a motor vehicle and the contents of the flat.

303 See Sachs J's dissenting judgment at par [240] and Mokgoro and O'Regan JJ's dissenting judgment at par [142]. Also see Lind (2005: 109) for the implications of these views on the finding of the majority.

304 Par [236] (emphasis added).

- Secondly, the majority judgment does not give due recognition to the potency of a contractual (as opposed to *ex lege*) duty of support.[305] It is clear on the facts of the case that S and R had undertaken a contractual duty to support one another.[306] While it is true that one duty of support arises *ex lege* (in the case of marriage) and the other arises contractually (in the case of life partners, such as the situation *in casu*), these duties are equally worthy of protection. This fact is borne out both by legislation and by case law. Two examples can be cited:

  (i) Firstly, the *Maintenance Act* 99 of 1998 no longer recognises maintenance in the restricted circumstances provided for by its 1963 predecessor[307] in terms of which the obligation to maintain was limited to blood relations and spouses.[308] As such, section 2(1) of the 1998 Act has broadened the scope of maintenance obligations so as to include a legal duty to maintain that was created by a contractual undertaking.[309] In other words, a *contractually-created* duty of support can found a legal duty to maintain that is protected by the 1998 Act.[310]

  (ii) Secondly, in *Du Plessis v Road Accident Fund* [311] (discussed earlier) the existence of a *contractual* duty of support between the deceased and his same-sex partner played an integral role in holding the Road Accident Fund liable for damages for loss of support suffered by the survivor.[312] In this instance, a third party's

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305 Also see Lind 2005: 122, 123.

306 See for example par [240] of Sachs J's dissenting judgment and Mokgoro and O'Regan JJ's dissenting judgment at par [104].

307 The *Maintenance Act* 23 of 1963.

308 Cronjé and Heaton 2004: 58.

309 The section reads as follows: "The provisions of this Act shall apply in respect of the legal duty of any person to maintain any other person, irrespective of the nature of the relationship between those persons giving rise to that duty."

310 Cronjé and Heaton 2004: 58.

311 2004 (1) SA 359 (SCA).

312 See par [11] – [16]; [37] and [42].

interference with the *contractual* duty of support between the life partners was, due to its specific nature[313] and therefore in the light of the prevailing *boni mores* of society, found to warrant the imposition of delictual liability in the form of the dependants' action.[314] This implies that, in order for the claim against the third party to succeed, the survivor was required not only to prove that the contractual duty of support between himself and the deceased was legally enforceable, but also that the interference with this duty constituted a delict.[315] It is important to emphasise that this claim therefore involved the interests of outsiders and was not limited to those of the life partners themselves.[316]

It is true that in *Du Plessis* Cloete JA expressly refrained from commenting on the position of heterosexual couples.[317] However, if one applies the ratio of the decision in *Du Plessis* to the

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313 The legal convictions of the community (*boni mores*) test is used to determine whether the duty of support is worthy of protection in law and whether the interference therewith is wrongful—see *Brooks v Minister of Safety and Security* 2008 (2) SA 397 (C) at par [25]. As Neethling *et al* (2006: 259) mention, this implies that interference with a contractual duty of support will not be wrongful *per se*, as the nature of the relationship between the parties is instrumental in determining whether or not the interference indeed was *contra bonos mores*. It appears as if the criterion employed thus far by our Courts in this regard has been whether the contractual duty was, but for the fact that the parties were not married in terms of applicable marriage legislation, either (i) owed by virtue of a marriage concluded in terms of a "recognized and accepted faith such as Islam" (see *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA) at par [25]) or (ii) that it was undertaken in a permanent homosexual life partnership "similar in other respects to marriage" (*Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) at par [42]).

314 See Neethling *et al* 2006: 259, 260. It is interesting to note Skweyiya J's statement (in par [58]) that "[t]o the extent that any obligations arise between cohabitants during the subsistence of their relationship, *these arise by agreement and only to the extent of that agreement*." It is submitted that the *Du Plessis* judgment highlights the fact that this statement cannot be made without qualification as the contractual obligation that existed between the life partners in effect formed the basis for the outsider's delictual liability. This implies that an obligation that exists *inter partes* may be more far-reaching than this statement of the law would have one assume.

315 See par [12] and [17] of the judgment where Cloete JA summarises the core elements in the case as firstly proving that a legally-enforceable duty of support existed and, as an outflow hereof, that the killing of the deceased was wrongful and therefore actionable against the defendant in delict.

316 See note 318 that follows for the relevance hereof.

317 Par [43].

> circumstances in *Volks*, it is submitted that it is fallacious to contend that the existence of a contractual duty of support could be brushed aside with such ease in the latter case in circumstances where (in contradistinction to the relief sought in *Du Plessis*) neither the State nor a third party was required to provide the requisite support.[318] This argument is strengthened all the more if one bears Sachs J's valid criticism of the "choice argument" in mind (which, it is to be remembered, constituted the underlying reasoning of the majority judgment in *Volks*).[319]

When one applies this information to the facts in *Volks*, it becomes clear that the "intention requirement" introduced by Skweyiya J (referred to above) cannot be used in order to play *ex lege* and *ex contractu* duties of support off against one another. For example, in the case of a marriage, even if the deceased spouse had evinced a clear intention not to maintain his wife, she would still have been allowed to institute a claim in terms of the *Maintenance of Surviving Spouses Act.* The deceased spouse's intention would be irrelevant. What is important is that a duty of support existed that was worthy of protection and therefore worthy of extension beyond death. As seen above, the fact that a contractual duty of support is as robust and as worthy of protection as an *ex lege* one is borne out by case law and by legislation. Bearing this in mind, Skweyiya J's finding presents the anomalous conclusion that while the contractual duty of support that existed during the existence of the relationship between S and R could be enforced in terms of the *Maintenance Act*,[320] such a duty

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318 See par [39] of Skweyiya J's judgment: "The obligation to maintain that exists during marriage passes to the estate. The provision does not confer a benefit on the parties in the sense of a benefit that either of them would acquire from the state or a third party on the death of the other."

319 This aspect is fully discussed in 3.3.1.1 above.

320 99 of 1998.

> would—on the basis of the majority's finding—be unenforceable after the death of either of the parties.[321]

In the light hereof, it becomes clear that to exclude R's claim on the basis that no *ex lege* duty of support was present is to adopt an unnecessarily narrow approach towards contemporary South African family law, for, as Mokgoro and O'Regan JJ stated in their joint dissenting judgment:[322]

> [Skweyiya J's approach in terms of which it is fair to discriminate between relationships which occasion an *ex lege* duty of support and those which do not] defeats the important constitutional purpose played by the prohibition on discrimination on the grounds of marital status. *For if it does not constitute unfair discrimination to regulate marriage differently from other relationships in which the same legal obligations are not imposed upon the partners to that relationship by the law, marriage will inevitably remain privileged*.

Although Sachs J appeared to touch on this point in his dissenting judgment by mentioning that he could "see little reason in fairness" as to why a contractual duty could not be extended beyond the death of the survivor,[323] it is unfortunate that he did not take this point further. This could have been accomplished by expressly finding that a factual reciprocal duty of support indeed existed between S and R,[324] followed by a conclusion that—as a logical outflow hereof—Skweyiya J's argument regarding posthumous application could be thwarted due to the

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321 Ngcobo J's judgment (which concurred with the judgment of Skweyiya J) also failed to acknowledge both the fact and potency of a reciprocal duty of support. This becomes clear when one reads par [88] – [91] of the judgment where the learned Judge emphasised that the *Maintenance of Surviving Spouses Act* extends the reciprocal duty of support beyond the death of one of the spouses and in so doing safeguards the survivor's right to "receive maintenance and support from the deceased spouse." As was the case with the majority judgment, Ngcobo J failed to acknowledge both (i) the fact that a contractual duty of support existed between S and R, and (ii) that both case law and legislation have established that such a duty is just as worthy of recognition and protection as an *ex lege* duty.

322 Par [118].

323 Par [216].

324 Although Sachs J found that such a duty existed *in casu* (see par [240]) he did not drive this point home.

removal of the very premise on which it was based.[325] This same criticism can unfortunately also be levelled against Mokgoro and O'Regan JJ's dissenting judgment: Although the learned Judges found that a reciprocal duty of support had indeed existed *in casu*,[326] they also did not use this inference to counter Skweyiya J's finding by holding that it was logical that a factual duty of support which had existed while both partners were alive could be extended beyond the death of one of them.[327] Such a finding, it is submitted, would also have served better to explain why they eventually held that, in their opinion, the Act would henceforth be extended only to heterosexual couples who had indeed undertaken mutual support obligations.[328]

It is consequently submitted that the existence of a duty of support *during the existence* of a relationship is a *sine qua non* for the posthumous extension thereof under the parameters defined by the Act.[329]

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325 Also see Lind 2005: 121: "To say that a duty does not exist because the duty upon which it is premised does not exist begs the question. If the one cannot exist without the other, the Court must actively determine whether or not the latter exists in order for the former to fail." Lind however appears to focus more on the argument that the common law duty of support should have been "recast" (and that the Court should have "extended a lifetime support obligation to cohabitants" (at 114)) than on recognising the factual duty of support as such. It is submitted that extending the common law by recognising an *ex lege* support obligation between unmarried life partners was not necessary—the same result could have been achieved by simply giving effect to the *de facto* contractual duty of support that existed between S and R.

326 Par [104].

327 This point is also not taken by Schäfer (2006: 630) who, while correctly stating that "at least in relation to financial benefits, there should be a broad measure of proportionality between the extent to which the [S]tate and third parties are expected to underwrite a life partnership and the extent to which its participants have elected to assume binding legal obligations towards one another", does not apply this principle to the majority decision in *Volks* despite apparently also being of the opinion that a reciprocal duty of support indeed existed *in casu* (at 643).

328 See par [139], [140] and [145]. The order is quoted in the main text below.

329 This being the case, it is difficult to understand why Sachs J was of the opinion (at footnote 85 of his dissenting judgment) that it is more important to establish the existence of such a duty where the State is involved (as was the case in the *Satchwell* cases) as opposed to "a claim based on subsistence needs." It can surely be argued—as section 2(1) of the *Maintenance Act* 99 of 1998 (discussed above) shows—that some recognised form of legal duty or obligation to maintain is a vital requirement even in cases where the State is not directly involved. In order for such a duty to arise, some form of reciprocity is required—see Van Zyl 2005: 3. In addition, as was pointed out above, the distinction which Sachs J draws between the scenarios where a tacit or express duty of support exists and those where maintenance is based on "the nature of the life partnership itself" does not appear to be convincing. It is therefore submitted that the existence of such a duty must be proved regardless of whether one is dealing with a claim involving the

The remainder of Sachs J's minority judgment proceeded to find, and, it is respectfully submitted rightly so, that the *Maintenance of Surviving Spouses Act* unfairly excluded persons other than spouses from its ambit, and that this unfair exclusion could not be justified in terms of section 36 of the *Constitution*. The Judge's final conclusion was that:

> It follows that the continued blanket exclusion of domestic partners from the ambit of the Act, irrespective of the degree of commitment shown to the family by the survivor, cannot be justified. *The Act is accordingly invalid to the extent that it excludes unmarried survivors of permanent intimate life partnerships as identified above, from pursuing claims for maintenance*.[330]

In conclusion, it is submitted that the second critical aspect of the *Volks* judgment highlights the fact that the order proposed by Sachs J should have included a reference to the necessity of proving the existence of a reciprocal duty of support between the life partners. It is consequently proposed that the final sentence in the extract from his finding should instead have read that "[t]he Act is accordingly invalid to the extent that it excludes unmarried survivors of permanent intimate life partnerships *in which the partners have undertaken reciprocal duties of support*, from pursuing claims for maintenance."

Although the order proposed by Mokgoro and O'Regan JJ in their dissenting judgment appreciated the necessity of mutual support obligations having been undertaken between the deceased and the survivor, it is respectfully submitted that this is the only aspect of their order which can be supported. In order to

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State, a third party or one of the parties him or herself. If this cannot be done, it is submitted that Skweyiya J's argument (see par [60] of the majority judgment) regarding the inappropriateness of imposing such a duty on a deceased estate while none existed *inter vivos* would hold true.

330 Par [236] (emphasis added).

explain this submission, it is necessary to quote the relevant parts of their order:[331]

> 1. …
> 2. The definition of "survivor" in section 1 of the *Maintenance of Surviving Spouses Act*, 27 of 1990, is to be read as if it included the following words after the words "dissolved by death"–
>
> > "and includes the surviving partner of a permanent heterosexual life partnership terminated by the death of one partner in which the partners undertook reciprocal duties of support *and in circumstances where the surviving partner has not received an equitable share in the deceased partner's estate*."
>
> 3. …
> 4. Section 1 of the *Maintenance of Surviving Spouses Act*, 27 of 1990 is to be read as though it included the following at the end of the existing definition –
>
> > "Spouse" for the purposes of this Act shall include a person in a permanent heterosexual life partnership;
> >
> > "Marriage" for the purposes of this Act shall include a permanent heterosexual life partnership.
>
> 5. …

Two major difficulties appear to militate against supporting this order. These are:

- It is submitted that the inclusion of the words "and in circumstances where the surviving partner has not received an equitable share in the deceased partner's estate" is redundant. This is so because the Act already contains measures by which the merits of the survivor's claim is assessed and according to which his or her "own means" and "reasonable

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331 Par [145] (emphasis and italics added). For the sake of readability and brevity, only the orders pertaining to "reading in" are quoted. It stands to reason that the omission of the words and definitions which were to be "read in" was first found to be unconstitutional.

maintenance needs" are determined. It was therefore unnecessary for the Court to introduce any further qualification in this regard. The important point to bear in mind, therefore, is—as Sachs J pointed out in his order—that the Act needs to make provision for a surviving cohabitant to *pursue* a claim for maintenance. Once pursued, the merits of the claim would then, as in the case of a surviving spouse, be evaluated with reference to the criteria already prescribed in the Act. The order proposed by Mokgoro and O'Regan JJ would have had the effect of introducing an additional criterion in the case of a surviving life partner with which a surviving spouse would not have needed to comply. Consequently, disparate criteria would be employed to assess claims which were in essence identical. For this reason it is submitted that the only condition which Mokgoro and O'Regan JJ should have imposed is that the life partners must have undertaken to support one another.

- The second difficulty with the order proposed by Mokgoro and O'Regan JJ is that it leads to an interpretative anomaly.

By way of introduction it must be conceded that the Judges correctly found that the definition of "survivor" as it appears in the Act was unconstitutional, and, in principle, this finding cannot be faulted.[332] In consequence of the order proposed by Mokgoro and O'Regan JJ, the definition of "survivor" would henceforth be read as follows:

> "survivor" means the surviving spouse in a marriage dissolved by death *and includes the surviving partner of a permanent heterosexual life partnership terminated by the death of one partner in which the partners undertook*

[332] Mokgoro and O'Regan JJ's finding is correct in principle, but not with regard to its content. See the preceding paragraph of the main text where their finding with respect to the "equitable share" criterion is discussed.

reciprocal duties of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner's estate.[333]

However, as will be seen below, the matter would not end here as this definition needs to be read in conjunction with the other definitions proposed in the same judgment. It is submitted that this process creates the interpretative anomaly alluded to above.

Mokgoro and O'Regan JJ proposed the insertion of definitions of "spouse" and "marriage"; both of which are simply defined by the two judges as including "a permanent heterosexual life partnership." These definitions therefore make no reference to the additional criteria prescribed by the judges in their proposed definition of "survivor."[334] The problem is that the definition of "survivor" in the Act in its original form *already contains references to the words "spouse" and "marriage"*, which means that these words *also* have to be read in accordance with the "new" definitions as proposed in the dissenting judgment. The logical outflow hereof is that the words "spouse" and "marriage" *in the original definition* of "survivor" would henceforth be read so as to include the words "permanent heterosexual life partnership." Doing so, it is submitted, will have the anomalous outcome of negating the effect of the additional criteria (namely the reciprocal duty of support and the equitable share) prescribed by Mokgoro and O'Regan JJ.

The anomaly is perhaps best explained by way of a diagram that illustrates the practical effect of Mokgoro and O'Regan JJ's dissenting judgment. In the illustration that follows point 4 of the judges' order is projected onto the Act's definition of "survivor" in order to explain the full effect thereof on the latter definition:

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333 The words in italics are those which were to be read into the definition in consequence of Mokgoro and O'Regan JJ's order.

334 See point 4 of the order as quoted above.

4. Section 1 of the *Maintenance of Surviving Spouses Act*, 27 of 1990 is to be read as though it included the following at the end of the existing definition –

"Spouse" for the purposes of this Act shall include a person in a permanent heterosexual life partnership;

"Marriage" for the purposes of this Act shall *include a permanent heterosexual life partnership*.

"survivor" means the surviving spouse [including a person in a permanent heterosexual life partnership] in a marriage [including a permanent heterosexual life partnership] dissolved by death *and includes the surviving partner of a permanent heterosexual life partnership terminated by the death of one partner in which the partners undertook reciprocal duties of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner's estate*.

If one compares the shaded text with that which is italicised, it becomes clear that the additional criteria (i.e. the reciprocal duty of support and the equitable share) which were imposed on the definition of "survivor" by the Court were not imposed on the proposed definitions of "spouse" and "marriage." Moreover, the words "and includes" imply that the additional criteria are no longer essential, but that life partnerships which indeed comply with these criteria merely constitute a supplementary category of life partnership. This implies that the definitions suggested by Mokgoro and O'Regan JJ would effectively cancel out the additional criteria which they had prescribed in order for a heterosexual life partner to qualify as a "survivor." In other words, it is submitted that the new definitions of "spouse" and "marriage" as inserted by the judges would automatically include all permanent heterosexual life partnerships, *irrespective of whether or not they complied with the additional criteria*. The effect of the

subsequent addition to the definition and the additional criteria contained therein would therefore be negated. Consequently, it is submitted that it might have been more effective for the judges to have inserted a definition of "heterosexual life partnership" in the Act and to have included the criteria with which such a partnership would have to comply therein. In the alternative, the judges should have ensured that the definitions of "spouse" and "marriage" also contained identical and consistent references to the additional criteria. If this had indeed been the case, the words "and includes" would have made no difference to the interpretation of "survivor" as the additional criteria would already have been projected onto the words "spouse" and "marriage" in the first part of the definition. No anomaly could therefore arise.

For these reasons, it is proposed that the order suggested by Sachs J (as amended) reflects the more correct approach. This notwithstanding, for the purpose of the domestic partnership rubric and its attendant legislation the conclusion has been reached that the existence of a reciprocal duty of support during the subsistence of the life partnership is a *sine qua non* for extending such a duty beyond the death of one of the partners in respect of claims similar to those regulated by the *Maintenance of Surviving Spouses Act*.

3.3.1.3 Critical aspect 3: The anomaly surrounding the perceived curative effect of the extension sought[335]

One of the reasons advanced by Skweyiya J for justifying his refusal to extend the ambit of the *Maintenance of Surviving Spouses Act* was that it would not make any meaningful contribution towards improving the position of vulnerable female cohabitants.[336]

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335 Also see Lind 2005: 117, 118 and 120, 121 for perspicacious comments on this issue.

336 Par [64]. This finding appears under the heading "[v]ulnerability and economic dependence" and follows directly after Skweyiya J had found the Act neither to infringe the rights of equality nor dignity. As such, it appears to have been included as something of an afterthought, in order to

The gist of this contention was that it was the absence of legally imposed rights and obligations *during* the union—and not the restriction of the benefits of the Act after its dissolution—that constituted the true reason for the invidious position in which vulnerable life partners found themselves.[337] Widening the scope of the Act in the manner sought by R would as a consequence do little to combat vulnerability which "is a widespread problem that needs more than just implementation of what, [in the case of the illiterate and destitute], would be no more than palliative measures." [338]

It is submitted that this pragmatic approach in terms of which so much weight is attached to the curative effect of the remedy sought cannot be supported. Two reasons can be provided in support of this contention:

- Skweyiya J's approach poses an additional hurdle for heterosexual couples

The interrelationship (if any) between the "alleviation finding" and the test for fairness needs to be established. The following extract from the judgment is helpful in this regard:

> As I have already said, it is not unfair not to impose a duty upon the estate of a deceased where no duty of that kind arose by operation of law during the lifetime of that person. I have a genuine concern for vulnerable women who cannot marry despite the fact that they wish to and who become the victims of cohabitation relationships. *I do not think however that their cause is truly assisted by an extension of section 2(1) of the Act or that vulnerable women would be unfairly discriminated against if this were*

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bolster the finding already reached. The only indication of the fact that it is somehow linked to the test for fairness is the statement that "I do not think however that their cause is truly assisted by an extension of section 2(1) of the Act or that vulnerable women *would be unfairly discriminated against* if this were not done" (emphasis added).

337 Par [65].

338 Par [66].

> *not done*. The answer lies in legal provisions that will make a real difference to vulnerable women at a time when both partners to the relationship are still alive.[339]

The word "or" in the penultimate sentence of this extract seems to indicate that the question as to whether the cause of vulnerable women is assisted is independent from the test for fairness. In other words, Skweyiya J does not view the "alleviation finding" as part of the test for fairness, but rather as an independent factor (that, in this case, could conveniently be used to bolster his finding).

This notwithstanding, the difficulty with such an "add-on" factor is that it was never considered in the same-sex cases that involved comparable legal issues. Consequently, it is an additional hurdle that has been placed before heterosexual life partners which same-sex couples requesting similar relief have never been required to overcome. In order to explain this contention, it is useful to quote the general idea behind Skweyiya J's finding:

> I agree that [vulnerable women in cohabitation relationships] suffer considerably. *But it is not the under-inclusiveness of section 2(1) which is the cause of their misery. The plight of a woman who is the survivor in a cohabitation relationship is the result of the absence of any law that places rights and obligations on people who are partners within relationships of this kind during their lifetimes*. I accept that laws aimed at regulating these relationships in order to ensure that a vulnerable partner within the relationship is not unfairly taken advantage of are appropriate.

Same-sex couples have also been acknowledged to be a vulnerable minority in society,[340] and it is therefore submitted that Skweyiya J's argument applies *mutatis mutandis* to such couples. For example, in *Du Plessis v Road Accident*

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339 Par [68] (emphasis added).

340 See for example *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at par [25] and [26]*(a)* and *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [42] – [44].

Fund, it was not the under-inclusiveness of the common law that was "the cause of [the appellant's] misery", but also "the absence of any law that places rights and obligations on people who are partners within relationships of this kind during their lifetimes." Nevertheless, this fact was never mentioned in *Du Plessis* as a potential barrier to the extension sought.

- Skweyiya J's approach loses sight of the significance of incremental change in constitutional matters

The Constitutional Court has on a number of occasions emphasised that the equality doctrine should be allowed to develop incrementally after a careful consideration of the context of each case.[341] Furthermore, other Courts have also been quick to acknowledge the salutary effects of incremental changes that align the law with the needs of society.[342]

While it must be acknowledged that the relief sought by R in this case would hardly eradicate gender inequality in all its forms, it is submitted that the majority decision in *Volks* once again shifts the goal-posts for heterosexual couples by taking factors into account that were not considered in the same-sex cases. For example, if one considers the facts in *Satchwell (1)*,[343] most would agree that it could never seriously have been contended that extending the scope of the *Judges' Remuneration and Conditions of Employment Act* [344] would eradicate all inequality faced by same-sex couples. Furthermore, it is self-evident that the

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341 See *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) at par [20] *per* Ackermann, O'Regan and Sachs JJ where it was stated that: "[T]his Court should be astute not to lay down sweeping interpretations at this stage but should allow equality doctrine to develop slowly and, hopefully, surely. This is clearly an area where issues should be dealt with incrementally and on a case by case basis with special emphasis on the actual context in which each problem arises." Also see *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at par [41] and [124] (the latter forming part of Sachs J's dissenting judgment). Devenish (2005: 331) also emphasises the importance of the prudent and vigilant development of constitutional law.

342 For example, within the context of developing the common law, see *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) at par [37].

343 2002 (6) SA 1 (CC).

344 88 of 1989.

number of same-sex couples who stood to be affected by the extension of the Act would be negligible (and without a doubt would have been far fewer than those who potentially could be benefitted by the development sought in *Volks*). Simply put, the extension requested in *Satchwell (1)* was no more of a "palliative measure" than that sought in *Volks*. Nevertheless, the Court in *Satchwell (1)* was prepared to grant the extension without any references whatsoever to the scale of the beneficial consequences thereof. This begs the question as to why it was necessary to attach so much weight to this consideration in one case but not in the other. Indeed, a rigid application of this approach to earlier case law in which the constitutional validity of legislation or a common law principle (other than the common law definition of marriage)[345] was tested would lead to the absurd conclusion that, as the vulnerability of homosexual persons was not *caused* by the law or legislation in question, such law could never be unfair due to the fact that the vulnerability could be attributed to a bigger problem, namely the prohibition of same-sex marriage.[346]

In conclusion, it is respectfully submitted that Skweyiya J's reliance on the "vulnerability and economic dependence" of female life partners in order to justify

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345 None of these earlier cases expressly questioned the validity of the common law definition of marriage. As seen in Chapter 3 this matter was however eventually raised in the *Fourie* cases, namely *Fourie And Another v Minister of Home Affairs and Another (The Lesbian and Gay Equality Project intervening as* amicus curiae*)* unreported judgment of the High Court in Pretoria; Case No 17280/02 delivered on 18 October 2002; followed by an application for direct appeal to the Constitutional Court (reported as *Fourie And Another v Minister of Home Affairs and Another* 2003 (5) SA 301 (CC)); followed by an appeal to the Supreme Court of Appeal (reported as *Fourie And Another v Minister of Home Affairs and Others* 2005 (3) SA 429 (SCA)) and culminating in an appeal and cross-appeal to the Constitutional Court in *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others,* Amici Curiae*); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC).

346 An example of this can be found in *Satchwell (1)* at par [22] where Madala J states that: "The benefits accorded to spouses of Judges by the legislation *are accorded to them because of the importance of marriage in our society* and because Judges owe a legal duty of support to their spouses. In terms of our common law, marriage creates a physical, moral and spiritual community of law which imposes reciprocal duties of cohabitation and support. The formation of such relationships is a matter of profound importance to the parties, and indeed to their families and is of great social value and significance. *However, as I have indicated above, historically our law has only recognised marriages between heterosexual spouses. This narrowness of focus has excluded many relationships which create similar obligations and have a similar social value*" (emphasis added).

his finding is unconvincing and inconsistent with other case law dealing with similar issues. Perhaps Lind[347] summarises this strange state of affairs best when he states that:

> While [the majority of the Court] were prepared to acknowledge the invidious gender based inequality operating in South Africa they perceived the task of alleviating that inequality to be so great—in the context of family relationships, at least—that they withdrew from their role in producing a solution… However, the laws that were deemed to be appropriate were to be moulded by the other institutions of the state. The courts would play no part in the formative stages of the legal framework. And yet the Constitution sets up a judicial mechanism to assist the state to reverse historic trends of inequality. Judges ensure compliance with the Bill of Rights. Policy-makers and legislators may have to design a legislative and regulatory framework, but the Court has to determine whether or not that framework operates within acceptable—constitutional—bounds. While the role of government and parliament may be greater than the role of the courts, the courts should not abdicate their role.

3.3.1.4 Critical aspect 4: The true ambit of the term "permanent life partnership"

This aspect involves somewhat of a technical contention which, it is conceded, is based largely on semantics but is nevertheless worth exploring. In a nutshell, the issue is whether both Courts in *Volks* correctly interpreted the meaning of the phrase "permanent life partnership" and hence whether the ambit and implications of this phrase were fully appreciated.

If the judgment of the Court *a quo*[348] is considered, it becomes clear from the outset that R challenged the unconstitutionality of the *Maintenance of Surviving Spouses Act* on the basis that it did not provide for the survivor of the "permanent life partnership" to claim for maintenance. *In casu*, Davis J stated that R had:

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347 2005: 118.

348 *Robinson and Another v Volks NO and Others* 2004 (6) SA 288 (C).

> characterised the relationship "as a permanent life or domestic partnership" or as a "*de facto* monogamous relationship, also known and referred to herein as a permanent life partnership or domestic partnership."[349]

There can accordingly be no doubt as to the terminology used in the case. The issue as to the full extent of the relief sought in the Court *a quo* however becomes more problematic when one considers Davis J's description of the crux of the applicant's case as being (as an alternative to a straight-out declaration that she was entitled to lodge a claim in terms of the Act) a request for a declaration to the effect that the Act was unconstitutional to the extent that "***the*** life partnership" was excluded from the definition of "survivor" as it appeared in the Act.[350] This creates the impression that the relief sought was limited to the life partnership *in which R was involved*, which, quite clearly would imply that the relief sought would in its widest sense include heterosexual relationships only. However, as far as the proposed definitions of "spouse" and "marriage" were concerned, the applicant apparently requested that they be defined as including a person "in ***a*** permanent life partnership";[351] a declaration which, it is submitted, could be interpreted to include *all* life partnerships as opposed to only the one which existed between R and S. The confusing use of the definite and indefinite articles therefore places the extent of the relief sought in doubt.

This state of affairs becomes even more interesting when one analyses the eventual order granted by Davis J in which he refers throughout to "***a*** permanent life partnership."[352] Therefore, in contrast with the inconsistency that appears earlier in the judgment, the order of the Court of first instance appears to extend to *all* life partnerships, as opposed only to the one that existed between the deceased and R.

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349 At 290 (F) – (G).
350 At 291 (D) – (E).
351 At 291 (E) – (F).
352 At 302 (E) – (J).

At this juncture it is useful briefly to revisit the content of the concept "life partnership." In their chapter dealing with this topic, Cronjé and Heaton[353] state that while much of the terminology traditionally employed to describe relationships outside of marriage[354] refers only to heterosexual couples, the term "life partnership" is capable of encompassing both heterosexual and homosexual relationships. There is also support for this contention in the form of case law. For example, in *Satchwell (1)*[355] and in *J and Another v Director General, Department of Home Affairs, and Others* [356] the term was used within the context of gay and lesbian as well as heterosexual couples. There can consequently be no doubt that—as seen in Chapter 4 above—the term "life partnership" can *in principle* include both heterosexual and homosexual permanent relationships.

Furthermore, it is important to note that while all of the same-sex cases expressly limited the scope of their extensions to same-sex couples,[357] the Cape High Court's order in *Volks* in no way indicated that it was limited to the survivors of heterosexual life partnerships. Therefore, by failing to limit its order to couples of the opposite sex, it is submitted that the Cape High Court's order could *prima facie* be construed as including both heterosexual and homosexual couples within its ambit.

With this information in mind, the majority judgment of the Constitutional Court can now be considered. The judgment commenced with a summary of the issues before the Court which Skweyiya J elucidated thus:

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353 2004: 227.

354 These terms (discussed in detail in Chapter 4 above) include terms such as "living together", "concubinage" and "*de facto* marriage."

355 2002 (6) SA 1 (CC) at par [9] and [16].

356 2003 (5) SA 621 (CC) at par [19].

357 See for example *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) *inter alia* at par [1] and par [60]; *Satchwell (1)* 2002 (6) SA 1 (CC) at par [1] and [10]; *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) at par [42] and [43]. In the context of constitutional issues other than those premised on or dealing with the existence of a reciprocal duty of support, see *J and Another v Director General, Department of Home Affairs, and Others* 2003 (5) SA 621 (CC) at *inter alia* par [7]; [10]; [15]; [19]; and [28]; *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Projects as* Amicus Curiae*)* 2003 (2) SA 198 (CC) at *inter alia* par [17] and [44].

> The first respondent (Mrs Robinson) contends that the survivor of a stable permanent relationship *between two persons of the opposite sex* who had not been married to each other during their lifetime, but nevertheless lived a life akin to that of husband and wife, should be afforded the same protection that is afforded to the survivor of a marriage under the provisions of section 2(1) of the [*Maintenance of Surviving Spouses*] *Act*.[358]

In the very next paragraph Skweyiya J stated that:

> The central question for consideration in this matter is whether the protection which the Act affords to a "survivor" should be withheld from survivors of *permanent life partnerships*. The High Court (Cape Provincial Division) found that the exclusion of the surviving partner *of a permanent life partnership* from the ambit of the Act was unconstitutional. The present proceedings *follow from that order*.[359]

Bearing in mind, first, that the order of the Court *a quo* had simply referred to a "permanent life partnership", and, second, that this term may in principle include both heterosexual and homosexual relationships, it becomes clear that Skweyiya J's elucidation contains a discrepancy that could lead to potential difficulty: In the first extract, the learned Judge limits the scope of the proceedings to *heterosexual* life partnerships, while in the second he twice refers to "permanent life partnerships" without any reference to a limitation as far as gender or sexual orientation is concerned. Indeed, the learned Judge appears inadvertently to confirm the lack of limitation regarding gender or sexual orientation both in summarising the order of the Court *a quo* and in his subsequent rejection of the admissibility of further evidence in the confirmation proceedings regarding polygynous unions and the vulnerability of women. In the latter regard Skweyiya J emphasised that

> [t]he [further] evidence is not directly relevant to the issue before us. That issue is whether the protection afforded to survivors of marriage under section 2(1) of the Act

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358 Par [1] (emphasis and italics added).

359 Par [2] (emphasis added and footnotes omitted).

> should be extended to the *survivors of permanent life partnerships*. The admission of the evidence would impermissibly broaden the case before us. It cannot be admitted.[360]

Again, it is noteworthy that no reference to gender or sexual orientation appears in this extract. If the truth be known, the only instance in which the Court was specifically requested to pronounce on heterosexual life partners only was within the context of the *interpretation* of the Act. In this regard it is submitted that the majority decision was correct in holding that R's first contention in terms of which it was alleged that the Act could be "*interpreted* so as to include heterosexual cohabitants" had to fail.[361] This finding however has no bearing on the alternative relief sought by R, in terms of which the Court was requested to confirm the Act's unconstitutionality due to its failure to provide for "permanent life partnership[s]."[362]

The Constitutional Court therefore appears to have lost sight of the fact that—as explained in the preceding discussion—the term "permanent life partnership" is, in the absence of further qualification, gender-neutral. This point can be illustrated by the following extract from the judgment:

> The question for determination in this case is whether the exclusion of survivors *of permanent life partnerships* from the protection of the Act constitutes unfair discrimination. The Act draws a distinction between married people and unmarried people by including only the former. *We are not concerned with the exclusion of survivors of gay and lesbian relationships,* nor are we concerned with survivors of polygynous relationships.[363]

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360 Par [35].
361 Par [40].
362 Par [46].
363 Par [49] (emphasis added).

Despite Skweyiya J's statement to the effect that homosexual relationships were not relevant to the matter at hand, the fact remains this is not reflected in the order of the Court of first instance. This extract therefore serves to highlight the Constitutional Court's failure to take cognisance of the fact that "gay and lesbian relationships" can also constitute "permanent life partnerships" and that, in the absence of a qualification regarding gender, the term must be presumed to include both groups. Unfortunately neither this possibility nor its implications were ever appreciated by the Constitutional Court in the confirmation proceedings.

The inevitable conclusion in this regard is that the Constitutional Court should from the outset have expressed its concern over the unsatisfactory phraseology adopted by Davis J in the Court *a quo*. The fact remains that an express limitation of the order to *heterosexual* permanent life partnerships was required. Indeed, once the wider meaning of an unqualified reference to a "permanent life partnership" is properly understood, an interesting theoretical conundrum presents itself in that the Court *a quo*'s decision could be interpreted so as to include homosexual couples as well. This would immediately imply that, in the confirmation proceedings, the "philosophical premise"[364] underlying the Constitutional Court's majority judgment—in the form of the so-called "choice argument"—would be broadsided by the fact that that same Court had earlier found this argument to be "true only as a meaningless abstraction" as far as homosexual couples were concerned (who, at the time, were not capable of marrying one another).[365] This could lead to the absurd consequence that the majority decision's finding that the Act did not discriminate unfairly could, at best,[366] apply to heterosexual couples but not to their same-sex counterparts;

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364 See Sachs J's minority judgment at par [154].

365 See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [38] and *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC) at par [16].

366 That is to say disregarding the criticism already levelled at the reasoning in this judgment earlier in this Chapter.

with the obvious implication that the Act would be unconstitutional as far as one group was concerned but not the other.

While it is true that too much should not be read into this theoretical conundrum as it is extremely unlikely that it would ever present itself in practice, it is submitted that, if nothing else, it emphasises the importance of the accurate use of terminology.

3.3.2 Conclusions and suggestions in the light of the critical aspects highlighted in respect of *Volks*

3.3.2.1 The contractual duty of support

The majority decision in *Volks* failed to acknowledge the existence (and, as a result, failed to appreciate the significance) of a contractual duty of support between heterosexual life partners. In addition, this judgment is clearly irreconcilable with earlier judgments dealing with factual duties of support, where 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 this earlier case law dealt with homosexual as opposed to heterosexual couples is irrelevant as gender has no bearing on the capacity of two persons to enter into an agreement to support one another. On this count, the judgment must be criticised for the fragmented and inconsistent legal position that it has created.

At this point therefore, the first conclusion regarding the *Volks* decision can be made:

The existence of a reciprocal duty of support between life partners is the key factor in determining whether a duty of support that existed *inter vivos* could be extended posthumously. This finding must, as seen above, be borne in mind

when modifying the draft *Domestic Partnerships Bill*, 2008 in accordance with the domestic partnership rubric.

3.3.2.2 The "choice argument" and the reciprocal duty of support: Developing the "contextualised choice model"

At the time of delivering the judgment in 2005, one area in which it could certainly have been argued that the Court could legitimately distinguish between homosexual and heterosexual cohabitants would be as far as choice to marry was concerned. At that time the so-called "choice argument" entailed that only heterosexual life partners had (and always had had) the option of marriage available to them but, as they had chosen not to marry, they had to bear the consequences of this decision.

To begin with, it must be remembered that this argument formed the cornerstone of the majority decision in *Volks*.[367] In addition, another aspect which must certainly be noted is the fact that marriage has, subsequent to the decision in *Volks*, become available to same-sex couples as well. Prior to this development, authors such as Currie and De Waal[368] expressed the opinion that:

> If same-sex marriage or a form of registered partnership became available the same reasoning [as that employed by the majority judgment in the *Volks* case] would apply to gay people who opted merely to cohabit.

As seen in 3.3.1.1 above, it is submitted that this argument cannot without more be used to justify the refusal of the extension of the rights and obligations traditionally associated with civil marriage to life partners, whether of the same or

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367 See Sachs J's minority judgment at par [154].

368 2005: 256 (at note 107).

opposite sex.[369] A nuanced and flexible approach, that takes the dynamics and realities of South African society into consideration, is required. In this regard it is suggested that the approach suggested by Gonthier J in the Supreme Court of Canada case of *Nova Scotia (Attorney General) v Walsh* [370] (in terms of which a distinction is made between property disputes and claims based on need) is to be recommended as a point of departure for adjudicating similar disputes in South Africa.[371]

In the *Walsh* case Gonthier J expressed the opinion that:

> To invoke s. 15(1) of the [*Canadian Charter of Rights and Freedoms*] to obtain spousal assets without regard to need raises the spectre of forcible taking in disguise, even if, in particular circumstances, equitable principles may justify it.[372]

Section 15(1) of the *Canadian Charter of Rights and Freedoms* states that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

While section 9 of South Africa's *Constitution*, 1996 is more encompassing than its Canadian counterpart as far as the listed grounds of unfair discrimination are concerned,[373] it is submitted that the opinion expressed by Gonthier J will also

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369 Also see the discussion in 3.4.1 below of Wood-Bodley's criticism of the application of the "choice argument" to homosexual couples who, despite now being legally permitted to do so, elect not to marry one another.

370 2002 SCC 83, 32 R.F.L. (5th) 81, 221 D.L.R. (4th) 1, 211 N.S.R. (2d) 273, 102 C.R.R. (2d) 1, [2002] 4 S.C.R. 325, 297 N.R. 203, 659 A.P.R. 273, REJB 2002-36303, J.E. 2003-102.

371 Gonthier J's distinction was referred to with approval in the British Columbia case of *M.A.S. v F.K.M.* 2003 BCSC 849 (CanLII) at par 62. It has not been criticised in any reported case of which the author is aware.

372 Par 204.

373 See section 9(3): "The 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

hold true in a South African context. Consequently, the failure of the law to permit asset distribution (that is to say claims other than need-based claims) between life partners to take place in the same way as for married partners *would not necessarily constitute a violation of the right to equality*.[374]

Therefore it is *preliminarily*[375] submitted that if the extension sought by a life partner who has clearly chosen not to formalise his or her relationship by marriage or civil union is based on a property dispute (division of assets), a presumption should apply to the effect that the "choice argument" is relevant, for, as Sachs J put it "merely choosing to cohabit [is] insufficiently indicative of an intention by cohabitants to share and contribute to each other's assets and liabilities."[376] In such an instance the "choice argument" would be a highly persuasive factor in deciding to exclude the possibility of applying matrimonial (property) law to solve the dispute; as a consequence of which the ordinary principles of the law of obligations would determine the matter. However, the fact that the law of obligations does not currently provide the ideal structure for the regulation of such claims between life partners (this issue is discussed in detail in Chapter 6) provides ample evidence of the dire need for legislative intervention in this regard.

Should the extension sought be based on need (support), the "choice argument" would not be relevant, and the enquiry would then be whether or not a reciprocal duty of support was expressly or tacitly undertaken between the parties. This

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origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

374 This conclusion is borne out by the positive law position as dictated by *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) where the majority of the Court was prepared—on the basis of the "choice argument"—to hold that the denial of a claim based on need to the surviving cohabitant did not constitute a violation of the right to equality. It is submitted that, in the light of this approach, a Court would in future be hard-pressed to find that the non-application of matrimonial property law to a property-based claim between cohabitants was unconstitutional.

375 It is important to note that this is only a preliminary conclusion that is revisited and revised after an assessment of the draft *Domestic Partnerships Bill,* 2008 (see 7.3.4.2 and 11.6 in Chapter 7).

376 See the *Volks* case at par [158].

criterion would be decisive in determining whether or not the claimant's need was within sufficient proximity of the other life partner's estate.

It is submitted that this conclusion provides an objective criterion for adjudicating the permissibility of all claims based on need. It explains, therefore, why a non-intimate life partnership in the narrow sense should be regarded as such for the purposes of this study and why the surviving partner to such a life partnership should also, provided that he or she could prove the existence of a reciprocal duty of support, be entitled to a claim for maintenance from the deceased estate.

The model described above will henceforth be referred to as the "contextualised choice model."

It is submitted that this model is of considerable value as far as the domestic partnerships rubric is concerned. It is however important at this point to emphasise that the model as structured above is merely of a preliminary nature. As such it will, where necessary, be adapted or revised as this study progresses.

3.3.2.3 Terminology

The third conclusion that can be drawn in the light of the *Volks* judgments is the importance of the correct use of terminology. As seen in this case, the term "permanent life partnership" is capable of applying to both heterosexual and homosexual couples and therefore should not be used without proper qualification.

3.3.2.4 The positive law position

Despite the criticism and the suggestions explained above, it is important to remember that, unless apposite life or domestic partnership legislation is

enacted,[377] the positive law position will remain that heterosexual life partners do not owe each other a reciprocal duty of support unless such a duty has been contractually undertaken. In this regard the current legal position is that:

- Any undertakings of mutual support must be created expressly as no authority exists to support the possibility that such an undertaking may be inferred from the facts of a case;

- However, even if such a duty of support is specifically undertaken, doubt persists as to the extent to which it will be recognised. Therefore, although it has been pointed out that there should in principle be no distinction between the enforceability of a contractual as opposed to an *ex lege* duty, and, furthermore, between the level of recognition granted to such a contractual duty between same-sex as opposed to opposite sex couples, the legal position remains, as Cronjé and Heaton[378] point out, that even if an unmarried heterosexual couple were to undertake mutual support obligations, the surviving partner would, for example, have no claim for damages for loss of support against a third party who injured or killed that partner's breadwinner.

- Although certain legislative enactments in recent years, have, however, gone beyond the narrow confines of Court orders and hence removed the distinction between heterosexual and homosexual life partners, these developments have been few and far between.[379]

In the end result the inconsistent legal position created by the *Volks* case serves to underscore the necessity for the legislation developed according to the domestic partnership rubric to exist alongside marriage and to provide a

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377 See *Gory v Kolver NO* 2007 (4) SA 97 (CC) at par [27] – [29], discussed in 3.4.1.1.3 below.

378 2004: 230 and 232.

379 See for example, the definition of "partner" in the *Judges' Remuneration and Conditions of Employment Act* 47 of 2001 and the definition of "dependant" in the *Medical Schemes Act* 131 of 1998. These and other legislative developments are discussed in Chapter 6.

consistent legal framework as far as gender is concerned for both non-formalised and formalised unions. Therefore it is somewhat of a paradox that while Lind[380] is correct in stating that the majority of the Court in *Volks* elected to play no part in the "formative stages" of "the laws aimed at regulating [life partnerships]", the lessons that have been learnt from the various judgments in this case will in fact play a cardinal role in modifying the *Domestic Partnerships Bill* of 2008 in accordance with the domestic partnership rubric.

3.4 Further developments pertaining to the existence and role of a reciprocal duty of support in homosexual relationships

3.4.1 The role of the reciprocal duty of support within the context of a claim for intestate succession

3.4.1.1 Introduction: The *Gory* case

A case that was decided after the South African Law Reform Commission's 2006 *Report* appeared and which has been the subject of some debate in recent times[381] is the case of *Gory v Kolver NO and Others (Starke and Others Intervening)*.[382]

In this case, the very fact as to whether or not the deceased (B) and his male partner (the applicant) had been involved in a permanent life partnership in terms of which reciprocal duties of support had been undertaken was disputed by the parents of the former, who claimed that they were the sole heirs of their son's estate after he had died without leaving a will in 2005.[383] This dispute was

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380 2005: 118.

381 See Whittle 2008: 19 for some reactions to a (now discarded) proposal to amend the *Intestate Succession Act* 81 of 1987 in accordance with the finding in this case. The proposed amendment is dealt with in the notes to 9.3.2 in Chapter 7.

382 2007 (4) SA 97 (CC); 2007 (3) BCLR 294 (CC).

383 See the judgment of the Court *a quo* (reported as *Gory v Kolver NO and Others* 2006 (5) SA 145 (T)) at par [4] and [17]. The parties had cohabited as from June 2004 until the deceased's death

resolved by the Court *a quo* (*per* Hartzenberg J) who expressed no reservation in finding that the existence of both the relationship and the duty had been placed beyond doubt.[384] As this finding was not disputed in the confirmation proceedings it need not be addressed in any further detail, save to emphasise—once again—the readiness with which the Courts of both first and final instance were prepared *to infer* the existence of such a duty and to attach due significance thereto.[385] The core issue in this case however revolved around the constitutionality of section 1(1) of the *Intestate Succession Act* 81 of 1987, which did not make provision for an intimate partner other than the surviving "spouse" of the deceased to inherit intestate.[386]

Although the Court *a quo* did not say this in as many words, it is fairly obvious that the existence of a reciprocal duty of support was regarded as being fundamental to the applicant's case.[387] The existence of this duty having been established, the Court commenced with its enquiry into the constitutional validity of the impugned section of the Act.[388] After referring to earlier judgments in which the position of same-sex life partners had received systematic recognition,[389] the Court *a quo* concluded that

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on 30 April 2005, which is a relatively short period of time (see par [5] of the Court *a quo*'s judgment). From this Wood-Bodley 2008(b): 262 deduces that a long period of cohabitation is not essential for proving that the parties intended their relationship to be of a permanent nature. However, as will be seen throughout this Chapter, the existence of a reciprocal duty of support is a far more significant factor in respect of the type of claim sought by the applicant.

384 See the judgment of the Court *a quo* (reference in the preceding note) at par [18].

385 See the judgment of the Court *a quo* (reference in note 383) at par [18] and the judgment of the Constitutional Court (reference in note 382) at par [2]; [40] and [51].

386 See the judgment of the Court *a quo* (reference in note 383) at par [1] and the judgment of the Constitutional Court (reference in note 382) at par [1].

387 See the judgment of the Court *a quo* (reference in note 383) at par [1]; [4] and [18].

388 See the judgment of the Court *a quo* (reference in note 383) at par [18].

389 The cases referred to by Hartzenberg J were *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC); *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC); *J v Director General, Department of Home Affairs* 2003 (5) SA 621 (CC); *Farr v Mutual and Federal Insurance Co Ltd* 2000 (3) SA 684 (C); and *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA).

> [i]t is evident from all these decisions that by 30 April 2005 [the date of the deceased's death] it was generally accepted that lifelong same-sex relationships deserved the same protection as heterosexual marriages. Insofar as statutory provisions did not afford such relationships the same protection, those provisions were held to be inconsistent with the Constitution.[390]

This being so, Hartzenberg J held that the answer to the question as to whether or not the Act discriminated against the applicant became clear when it was considered that the applicant could only have been entitled to a portion of B's estate if he and B had either entered into a "written universal partnership agreement" or had benefitted one another by way of a testamentary disposition;[391] a state of affairs that clearly discriminated against the applicant and his deceased partner as they would have come under the purview of section 1(1) if they had been a "heterosexual couple."[392] It is submitted that this statement should be read with caution. This is so because it is not correct to state that section 1(1) would apply if the parties concerned had been a "heterosexual couple." Instead, it would be more correct to state that the provision would only have applied if the parties in question had at the time been a heterosexual couple *who had married one another in terms of civil, customary or Islamic religious law.*[393] In the absence of such a formal wedding, the fact that the heterosexual couple had presented each other with "wedding bands" and publicly announced their "marriage" (as the homosexual couple *in casu* apparently had done) would therefore be irrelevant. Nevertheless, it is undoubtedly true that Hartzenberg J was correct in concluding that the Act indeed discriminated against same-sex permanent life partners.

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390 Par [19] (footnote omitted).

391 In mentioning that these examples (which were made in the second and third respondents' answering affidavit) "graphically illustrated" why the Act discriminated, it can be assumed that the learned Judge did not doubt their correctness. The relevance hereof will become apparent when the universal partnership is discussed—see Chapter 6.

392 Par [22].

393 The latter development was occasioned by the decision of the Constitutional Court in *Daniels v Campbell NO* 2004 (5) SA 331 (CC). Note that the possibility of entering into a civil partnership is not mentioned simply because the option was not available at the time of the judgment.

The crux of the High Court's decision was that the Act was declared to be unconstitutional to the extent that it did not permit a spouse "or partner in a permanent same-sex life partnership in which the parties have undertaken reciprocal duties of support" to inherit intestate, but that the order would not affect intestate estates that had been finally wound up at the date of the order.[394]

As already stated above, the factual finding of the High Court regarding the relationship that existed between the deceased and applicant was not disputed in the confirmation proceedings, and the significance of both Courts' findings in this regard has already been highlighted above. For the purposes of this study, four further issues are relevant, namely (i) the Constitutional Court's finding regarding the unconstitutionality of section 1(1) of the Act; (ii) the retrospective impact of the relief granted; (iii) the Court's statements regarding the impact of the validation of same-sex marriage on pre-same-sex marriage case law;[395] and (iv) the Court's order.

3.4.1.1.1 The Constitutional Court's finding regarding the (un)constitutionality of the Act

As far as the first issue is concerned, it will suffice to say that the Constitutional Court unanimously (*per* Van Heerden AJ) confirmed the High Court's finding that, in the light of recent jurisprudence regarding homosexual couples, the Act unjustifiably infringed upon the rights of equality and dignity to the extent that it failed to provide for the surviving partner to a "permanent same-sex life partnership" in which mutual maintenance obligations had been undertaken to inherit intestate.[396]

394 At 159 (C) – (F).
395 Par [24] – [31].
396 Par [19] and [66] (f) 1 and 2.

3.4.1.1.2 Retrospective impact of relief

The second issue deals with the decision made by the Constitutional Court as to whether the order of unconstitutionality should apply prospectively or not. In this regard, one of the main arguments in favour of prospective application was that retrospective judicial interference would deprive persons (such as the deceased's parents or other family members) of rights which had vested under the legislative scheme as it prevailed at the date of the deceased's death. While the Constitutional Court was prepared to acknowledge that the matter at hand was the first to grapple with the possibility of extending marital benefits to homosexual partners in such a way as to divest outsiders to the relationship of their rights, Van Heerden AJ pointed out that similar issues had arisen within the context of male primogeniture in customary marriages;[397] the upshot of which had been to deprive the original male customary law heirs of rights which were held to have vested *ab initio* in the deceased's female relatives.

Moreover, the Court held that the supremacy clause as contained in the interim *Constitution*[398] (and retained in essence by the *Constitution*, 1996) invalidated all law or any Act that was inconsistent with its provisions as from the date of its coming into operation. This implied that a Court order to the effect that any Act was unconstitutional served—irrespective of when the cause of action arose—simply to declare the fact of unconstitutionality that had already prevailed since midnight on 27 April 1994.[399] Although a Court had no option but to declare an Act to be invalid once unconstitutionality had been established,[400] the Court was nevertheless permitted to restrict the retrospective effect of such an order if the "interests of justice and equity" so demanded.[401]

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397 *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC).

398 Section 4(1) of Act 200 of 1993.

399 Par [39].

400 Section 172 (1)(a) of the *Constitution*, 1996.

401 Par [39].

Van Heerden AJ concluded that it would not be in the interests of justice or equity to make the order prospective in nature as such an order would, in view of the facts of the matter and the violation of the applicant's rights of equality and dignity, deny the applicant any effective relief.[402] Viewed in this light, the order of the Court *a quo*—in terms of which the retrospective effect of the order was limited to estates not yet wound up on the date of the judgment—would also not serve these interests. Instead, Van Heerden AJ expressed her support for the approach of the Constitutional Court in *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another*[403] (hereafter "the *Bhe* case") in terms of which the retrospective effect of the order would extend to all transfers where the transferee(s) were on notice that a legal challenge had been brought against the transfer in question.[404]

In the final analysis, Van Heerden AJ held that in order to balance the impact of divesting third parties of their rights with the need to provide the applicant with effective constitutional relief, it was necessary to grant an order which was identical to that in the *Bhe* case both in terms of the limited retrospective effect described above, as well as in making provision for any interested party to apply to the Constitutional Court for the variation of the order where "serious administrative and practical difficulties" justified doing so.[405]

3.4.1.1.3 The impact of the validation of same-sex marriage

The third pertinent aspect of the *Gory* case is the Court's statements pertaining to the validity of the piecemeal developments occasioned by the Courts prior to the validation of same-sex marriages in South Africa.

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402 Par [40].

403 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC).

404 Par [41].

405 Par [42].

As a point of departure it must be remembered that in *Minister of Home Affairs v Fourie* [406] the Constitutional Court found the exclusion of homosexual couples from the institution of marriage to be unconstitutional. Nevertheless, the Court held that its judgment would be suspended for a period of one year as from the date of the judgment (1 December 2005) in order to allow Parliament to address this state of affairs by way of appropriate legislation. If Parliament failed to do so by 30 November 2006, the order of the Constitutional Court would come into effect immediately, which would imply that homosexual couples would henceforth automatically have been permitted to marry in terms of the same marriage legislation that up to that date had been reserved for heterosexual couples.

The *Gory* judgment was delivered on 23 November 2006, which was almost a year after the judgment in *Minister of Home Affairs v Fourie*[407] and only one week before the deadline imposed by the latter Court. This implies that by the date of the *Gory* judgment there was no doubt that same-sex marriage would be permitted in the near future, but, as the legislation prescribed in *Minister of Home Affairs v Fourie* had not yet been forthcoming, the Court in *Gory* had no way of knowing either *whether* any legislation would be promulgated, or, if Parliament did in fact respond by the deadline, what format this legislative response would assume.[408] The findings of the Court in *Gory* need to be viewed against this backdrop.

- To begin with, Van Heerden AJ reiterated the points made in the *Fourie* case that (i) both the Legislature and the Courts were free to express themselves on the continued validity of the piecemeal recognition provided by the Courts to homosexual couples who at the time were not permitted to marry; and (ii) that the *Fourie* judgment was not pre-emptive of any

406 2006 (1) SA 524 (CC).
407 2006 (1) SA 524 (CC).
408 Wood-Bodley 2008(a): 47.

future legislation regulating the relationships of persons who, irrespective of their gender, lived together in conjugal or non-conjugal relationships.[409]

- Equally important, Van Heerden AJ expressly stated that "any change in the law pursuant to *Fourie*" would not—barring express legislative amendment—have any effect either on the words that had been read into statutes by the Constitutional Court in the same-sex cases, or on any piecemeal recognition provided to same-sex cohabitants by way of legislation.[410] "In the interim" there was no reason why the Court *in casu* should "[treat] section 1(1) of the [*Intestate Succession Act*] differently from legislation previously dealt with by this Court."

  It is submitted that Van Heerden AJ's conclusions in this regard cannot be faulted.[411] Consequently, it can be concluded that despite the fact that same-sex marriages are now permitted in consequence of the promulgation of the *Civil Union Act* and that, as a consequence hereof, *same-sex couples now in principle have the choice of marrying one another*, the pre-30 November 2006 piecemeal statutory and judicial developments still stand until expressly amended by appropriate legislation.[412]

3.4.1.1.4 The order

The final noteworthy aspect is the Court's order. In this regard the gist of the finding (in as far as it is relevant for the purposes of this study) was that the

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409 Par [27]. The Court in *Fourie* did however proffer the general guideline that "whatever legislative remedy is chosen *must be as generous and accepting towards same-sex couples as it is to heterosexual couples, both in terms of the intangibles as well as the tangibles involved*. In a context of patterns of deep past discrimination and continuing homophobia, appropriate sensitivity must be shown to providing a remedy that is truly and manifestly respectful of the dignity of same-sex couples" (at par [153], emphasis added).

410 Par [28].

411 Also see Wood-Bodley 2008(a): 49; De Vos 2007(a): 462.

412 The effect of prospective legislation in the form of the *Domestic Partnerships Bill,* 2008 on the pre-30 November 2006 developments will be considered in Chapter 7.

words “or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support” were henceforth to be read in after the word “spouse” throughout section 1(1) of the *Intestate Succession Act*.[413]

3.4.1.2 The anomaly created by the *Gory* case

If the conclusion reached in the preceding paragraph pertaining to the continued relevance of the pre-*Civil Union Act* judgments is correct, it becomes self-evident that an anomaly arises in that, barring further legislative intervention, same-sex couples who have elected not to marry or to conclude a civil partnership will be entitled to inherit intestate while their heterosexual counterparts will not.[414] Although this is not the only anomaly that has arisen in the wake of the promulgation of the *Civil Union Act*,[415] this specific anomaly needs to be explored in further detail for the purposes of this discussion, as there are those who are of the opinion that no anomaly exists in the first place. For example, Wood-Bodley[416] questions the very existence of this anomaly on the basis of “a substantive approach to the right to equality.”[417] The thrust of this contention is that the continued differentiation between same- 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.[418] As Wood-Bodley states:

> [This] approach would recognize that although gay and lesbian couples are in theory able to marry, it would be difficult or unwise for many of them to do so in view of

413 Par [66].

414 See Smith and Robinson 2008(a): 373, 374.

415 See Smith and Robinson 2008(a): 368 *et seq* and 2008(b): 430 *et seq*.

416 2008(a): 54.

417 Also see Wood-Bodley 2008(b): 260 and 2008(c): 486.

418 Also see De Vos 2007(a): 463 *et seq*. In a further contribution Wood-Bodley (2008(c): 483 *et seq*) uses the same argument in support of his contention that employee benefits should be retained for the partners of employees or pensioners involved in post-*Civil Union Act* same-sex relationships who have neither married one another nor have entered into a civil partnership in accordance with that Act.

> ongoing homophobia in society and the concomitant need for many to remain closeted to a greater or lesser degree. To be *married or in a civil union* is to be unrelentingly 'out' and yet, as Altman observed more than thirty years ago, '[t]he key factor in being a homosexual in contemporary society is that very few of us do not feel, at least in part, the need to live a double life' (Dennis Altman *Homosexual: Oppression and Liberation* 2 ed (1993) 49 (a work originally published in 1971)). This statement remains true today, notwithstanding huge changes in society.[419]

Although it contains a technical deficiency,[420] the general gist of this submission regarding the effects of homophobia on the "choice argument"[421] is a powerful one. In support hereof, Wood-Bodley lists a number of examples of homophobia as encountered or experienced in contemporary South Africa. All of these examples provide compelling and thought-provoking reading; not least the reports of complaints being lodged against officials of the Department of Home Affairs for allegedly refusing to marry and/or insulting prospective same-sex spouses.[422]

On the basis of this argument (which for the sake of convenience may be called the "homophobia argument"), Wood-Bodley concludes that, with reference to the finding of the majority of the Constitutional Court in *Volks NO v Robinson*,[423] it is possible to distinguish the position of same-sex couples who elect not to marry (or to conclude a civil partnership) from the position of opposite-sex couples who similarly choose not to do likewise. This is so because "the order of the

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419 At 54, 55 (emphasis added). Also see Wood-Bodley 2008(b): 260 and 266 and De Vos 2004: 183 and 198.

420 Wood-Bodley's reference to being "married or in a civil union" is technically incorrect as the term "civil union" is defined in the *Civil Union Act* 17 of 2006 as constituting either a "marriage" or a "civil partnership." Wood-Bodley's statement should therefore rather read "[t]o be married or in a civil *partnership* is to be unrelentingly 'out'…"

421 See the discussion of *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) above.

422 Wood-Bodley 2008(a): 56.

423 2005 (5) BCLR 446 (CC).

magnitude of the obstacles to marriage or civil union[424] is so much greater in the case of same-sex partners than it is for opposite sex partners."[425]

It is submitted that three possibilities present themselves as far as Wood-Bodley's stance is concerned:

a) The first possibility is that Wood-Bodley's argument is totally incorrect. Supporters of this contention would immediately argue that the "objective model of choice"—as Schäfer[426] describes it—dictates that the legalisation of same-sex marriage implies that the same arguments used by the majority decision in the *Volks* case could be used to conclude that no unfair discrimination could be established where a same-sex couple chose not to marry one another (or to enter into a civil partnership) despite being legally permitted to do so. This point of view would also, at face value, square with Van Heerden AJ's acknowledgment in the *Gory* case that once the impediment to same-sex marriage was removed "there would appear to be no good reason for distinguishing between unmarried heterosexual couples and unmarried same-sex couples in respect of intestate succession."[427] However, as will be seen below, this argument is not as clear-cut as it seems and it is submitted that this clinical distinction between married couples (or civil partners) and unmarried couples cannot be supported.

b) The second possibility is that Wood-Bodley is correct, and that it would consequently be permissible to continue to allow same-sex couples who have not formalised their unions to inherit intestate even after the

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424 See note 420 for criticism of this terminology.

425 Wood-Bodley 2008(a): 57.

426 2006: 627 and 640.

427 Par [29]. Also see Sinclair and Heaton 1996: 300 who opine that gay couples who choose not to marry despite being permitted to do so "should be treated like any other cohabitants."

enactment of the *Civil Union Act* [428] while similarly-situated heterosexual couples would not be permitted to do the same.

As seen above, this argument is premised on Wood-Bodley's postulation that the ongoing homophobic stigmatisation of same-sex relationships is sufficient to conclude that in real terms such couples cannot avail themselves of the choice to formalise their unions.[429] It is submitted that Wood-Bodley's argument in this regard is persuasive, and that one could agree with him that same-sex couples often, (but not necessarily always), do not really have the option of marriage or civil partnership available to them. However, it must be remembered that the same is true of heterosexual couples, where—as was pointed out in the criticism of the *Volks* case above—the option of marriage often also is illusory. In fact, Bonthuys correctly points out that the same inequalities that often result in a "choice" not to marry within a heterosexual context will also often apply to same-sex couples.[430] Therefore, although Wood-Bodley insists that there is a difference between the "choice argument" within the context of same-sex and opposite sex couples,[431] the fact remains that *neither* of these groups necessarily has the option of formalising their union open to them. The fact that the *context* within which this "choice" may present

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428 17 of 2006.

429 Also see Wood-Bodley 2008(b): 260 and 266.

430 2007: 540: "[O]ne of the manifestations of inequality within couples is in the issue of who makes and who vetoes the choice to marry, which generally favours men. These vulnerabilities and inequalities can also manifest themselves in same-sex couples, particularly when they adopt gendered roles in their relationships."

431 2008(a): 59: "[T]he order of magnitude of the obstacles to marriage or civil union is so much greater in the case of same-sex partners than it is for opposite-sex partners. The basis of marriage is consent, and that is consent by both partners (Schäfer [2006: 642]). But with same-sex partners, the reason for their not marrying need not be that one partner is thwarting the wishes of the other (ie lack of mutual consent) but that they are practically unable to marry because ongoing homophobia in society creates an insuperable practical obstacle to their marriage. This is, I believe, different to the situation of the opposite-sex couple who do not marry because one of them does not wish to do so, even where the latter's resistance to marriage is assisted by unequal power relations between them. As Schäfer has remarked, 'it is plain that the many hardships imposed by our law and by societal attitudes on same-sex couples provide a context quite different from that in which differentiation between married and unmarried heterosexual partners is evaluated' (Schäfer [2006: 632])."

itself may differ is irrelevant. Rather, the critical fact is that, regardless of the gender of the parties involved, *the choice to formalise their union is often merely theoretical*.

This being the case, it is submitted that some form of objective yardstick needs to be present in order to justify the (continued) extension of one of the invariable consequences of marriage to persons who live together despite having the option of marriage or civil partnership available to them, and, in addition despite the parties not having benefitted one another in their respective wills. This yardstick, it is suggested, is the presence of a reciprocal duty of support.

At this point it may be prudent to dispel a number of concerns raised by Wood-Bodley as to the perceived paramountcy accorded to the reciprocal duty of support within the context of same-sex unions in recent case law. For the time being the analysis of the significance of this duty will be confined to the cases other than *Gory*, as the application of this duty to the latter case will be explored fully when the third possibility is evaluated.

Wood-Bodley's first point of criticism is that in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*,[432] (which he describes as the "most useful" case to deal with the recognition[433] of same-sex unions), the provision of mutual "financial support" was listed as merely one of a host of factors to consider in order to recognise such a union, and that the Court had expressed the view that none of these factors "[was] indispensable for establishing a permanent partnership."[434] Accordingly, Wood-Bodley[435] opines that the tendency in subsequent case law of

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432 2000 (2) SA 1 (CC).

433 Wood-Bodley (2008(b): 259) explains that he uses the term "recognition" in the sense of "indicat[ing] that one or more legal rights or duties have been held to accrue to a partner in a life partnership by virtue of that relationship…"

434 Par [88].

435 2008(b): 268.

placing a premium on mutual undertakings of support over the other factors enumerated by the Court in the *Home Affairs* case conflicts with this decision.

In this regard, it is submitted that Wood-Bodley loses sight of one crucial aspect, namely that the list of factors which Ackermann J enumerated was mentioned with a view to ascertaining the *permanence* of the relationship. It does not follow from this that a subsequent Court would not be permitted to place additional emphasis (or even pre-eminence) on any (additional)[436] factor which it deemed to be pivotal for the purposes of permitting a specific claim or extending a consequence of marriage to life partners.[437] Indeed, this Chapter has highlighted the fact that all of the case law in which the existence of such a duty was deemed to be crucial has involved claims in which a link between the existence of a reciprocal duty of support and the particular claim sought was fairly obvious.[438] On the other hand, the extension sought in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* was not comparable with any of these cases as the issue in that case (immigration rights) was not even remotely linked to the issue of mutual support between the parties involved.

The second objection raised by Wood-Bodley is that the reciprocal duty of support is an automatic invariable *ex lege* consequence of marriage that is not dependent on any undertaking to this effect by the spouses involved. In this regard he hastens to explain that:

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436 Ackermann J pointed out that the list was not all-inclusive—see par [88].

437 In point of fact Ackermann J appears to have intended the list of factors only to apply within the context of the matter *in casu* (i.e. the constitutionality of the *Aliens Control Act* 96 of 1991): "Whoever *in the administration of the Act* is called upon to decide whether a same-sex life partnership is permanent, in the sense indicated above, will have to do so on the totality of the facts presented…" (emphasis added).

438 See for example *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA); *Satchwell (1)* 2002 (6) SA 1 (CC) and the minority judgment of Mokgoro and O'Regan JJ in *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).

> I am not suggesting that gay and lesbian couples in a permanent same-sex partnership which is recognized by law should escape these duties of support, merely that it is artificial to suggest that these undertakings are commonly thought about, or given, by healthy, financially comfortable persons—whether they be heterosexual, gay or lesbian—who are in love and entering into a permanent relationship. To import such undertakings as a requirement for the recognition of a same-sex partnership, as Madala J has done [in *Satchwell (1)*], is in itself discriminatory. Whether the equality clause demands that couples in a permanent same-sex relationship must owe each other a reciprocal duty of support supplied by operation of law, not as a contractual undertaking, is a separate issue.[439]

Once again, it is submitted that the extension sought by non-formalised same-sex life partnerships needs to be recognised on the basis of some or other objective yardstick. Therefore, what has been said regarding Wood-Bodley's failure to appreciate the link between the reciprocal duty of support and the nature of the particular extension sought is equally relevant in this regard. The undertaking of mutual support obligations is a logical consequence of any relationship based on interdependence. Furthermore, proof of such an undertaking is required *precisely because of the fact that the law does not automatically attach such a duty to non-formalised relationships*. Consequently, to regard such an undertaking as an absolute minimum before extending a consequence of marriage which is logically linked thereto to unmarried life partners is nothing short of common-sense.[440]

Finally, proving the existence of a reciprocal duty of support is not as onerous as it may at first appear. Indeed, case law confirms that the

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439 2008(b): 269.

440 It is submitted that this may be the reason why the Courts have, according to Wood-Bodley (2008(b): 271) "not articulated" Schäfer's view (2006: 630) in terms of which the latter opines that the Courts insist on a reciprocal duty of support for the purposes of specific claims only.

existence of such a duty has readily been inferred;[441] a phenomenon which Wood-Bodley himself concedes.[442] (In fact, it is worth noting that the existence of such a duty was inferred without question in the *Gory* case despite the fact that the parties had been living together for less than one year.)[443] Furthermore, this study has shown that both case law and legislation testifies to the fact that, irrespective of the demands of the equality clause, a contractual duty of support is as worthy of recognition and protection as its *ex lege* counterpart.[444] Therefore, it is submitted that Wood-Bodley's fears pertaining to proving the existence of such a duty in circumstances where, for example, the same-sex couple is "poor or unsophisticated" or where either or both of them have been dissuaded by homophobia or bigotry from making express provision for their life partner in respect of employment benefits can be allayed by the fact that the existence of a contractual duty of support may be relatively easy to prove and is not dependent on inflexible criteria such as "mimic[king] the heterosexual marriage ceremony."[445]

In conclusion, the fact that Wood-Bodley categorically denounces the necessity of this requirement for the purposes of the legal recognition of same-sex unions in appropriate circumstances is respectfully submitted as being an oversight on his behalf; and, in turn, the reason why the possibility that Wood-Bodley's point of view is completely correct cannot be supported. The rationale behind this assertion will be explained when the third possibility is considered.

c) The third possibility is based on the premise that when Wood-Bodley's "homophobia argument" is considered in conjunction with the criticism of

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441 See for example *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) at par [14]; *Gory v Kolver NO* 2007 (3) BCLR 294 (CC) at par [2].

442 2008(b): 269, 270.

443 *Gory v Kolver NO* 2006 (5) SA 145 (T) at par [5] read with par [18].

444 See 3.3.1.2 above.

445 2008(b): 270.

the "choice argument" (as explained in the discussion of the *Volks* case above), it becomes apparent that *neither heterosexual nor homosexual couples of necessity have the option of marriage (or similar formalisation)*[446] *available to them.* Indeed, over and above the homophobia argument, it stands to reason that many of the obstacles that have traditionally negated the choice of formalisation within the context of heterosexual unions (such as unequal power relations and ignorance of the consequences of marriage or similar formalisation)[447] apply equally to same-sex post-*Civil Union Act* couples.[448] Nevertheless, as was seen in the discussion of *Volks NO v Robinson*, it was suggested that, within the context of the *Maintenance of Surviving Spouses Act*,[449] a distinction needed to be drawn between cases involving property disputes and those based on need (or support).[450] In terms of this approach—referred to as the "contextualised choice model"—it was suggested that the "choice argument" would not be relevant in cases based on need, but rather that, in order to establish a proximal nexus between the deceased estate and the survivor's need-based claim, the existence of a reciprocal duty of support would be the decisive criterion. If applied to Wood-Bodley's arguments for the continued permissibility of intestate succession claims for same-sex unmarried couples, the third possibility therefore concedes that homophobia may go as far as to negate the choices available to homosexual couples, but at the same time suggests that this lack of a real choice may (in much the same way as was argued in the case of heterosexual couples) in any event be irrelevant ***in as far as a claim based on need is concerned***.

However, before it can be determined whether the approach suggested in the discussion of the *Volks* case could be transplanted into the realm of

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446 For example, in the form of a civil partnership.

447 See note 430 above.

448 Bonthuys 2007: 540.

449 27 of 1990.

450 See 3.3.2.2 above.

intestate succession, it is first necessary to determine whether the purposes served by the respective Acts in *Volks* and *Gory* are comparable.[451] If it indeed were true that both Acts served a similar purpose—in the sense of catering for the needs of survivors as opposed to satisfying proprietary claims—it would follow that the approach suggested in *Volks* could also apply to the situation in *Gory*.

De Waal[452] describes the rationale underlying intestate succession in the following terms:

> It would be generally correct to say that most systems of intestate succession do not find their rationale in trying to establish the hypothetical intention of the deceased, *but in the legal conviction that the surviving spouse and family members are, in a sense, the deceased's 'natural heirs'*. The South African system of intestate succession, as set out in the *Intestate Succession Act*, certainly reflects this idea.[453]

In the case of *Daniels v Campbell NO and Others*,[454] a case which examined the constitutionality of both the *Maintenance of Surviving Spouses Act*[455] as well as the *Intestate Succession Act*,[456] Sachs J (writing for the majority) expressed the following view regarding the purpose of both of these statutes:

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451 See *J and Another v Director General, Department of Home Affairs, and Others* 2003 (5) SA 621 (CC) at par [24]: "*The precise parameters of relationships entitled to constitutional protection will often depend on the purpose of the statute*. For instance in [*Satchwell (1)*] where the issue was pensions and related benefits, a mutual duty of support was an essential element. In the present case, where the rights of children are implicated, this was not an essential element, though it might have been an appropriate one." (footnote omitted; emphasis added).

452 2006: 3G13.

453 Emphasis and italics added.

454 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC).

455 27 of 1990.

456 81 of 1987.

> An important purpose of the statutes *is to provide relief to a particularly vulnerable section of the population*, namely, widows. Although the Acts are linguistically gender-neutral, it is clear that in substantive terms they benefit mainly widows rather than widowers. … Widows for whom no provision had been made by will or other settlement were not protected by the common law. *The result was that their bereavement was compounded by dependence and potential homelessness—hence the statutes*. The Acts were introduced to guarantee *what was in effect a widow's portion on intestacy* as well as a claim against the estate for maintenance. The objective of the Acts was to ensure that widows would receive at least a child's share *instead of their being precariously dependent on family benevolence*.[457]

By providing for a system of "forced succession,"[458] the elucidation of the basis of intestate succession provided by De Waal, coupled with the Constitutional Court's description of the purpose of the *Intestate Succession Act* in *Daniels* makes it clear that the principle driving intestate succession in South Africa is indeed a social one,[459] aimed at "the maintenance and protection of the family as a social unit."[460] Although it may be argued that the elucidation of the purpose of the *Intestate Succession Act* by the Court in *Daniels* could be criticised for apparently overlooking the fact that members of wealthy families also die intestate, it

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457 Par [22] and [23] (emphasis added). Prior to the *Succession Act* 13 of 1934, the common law (in the form of the *Schependomsrecht*) conferred no rights of intestate succession on a surviving spouse who, in the absence of any blood relatives, survived the deceased. In such instances the inheritance was forfeited to the State as *bona vacantia*—see Corbett, Hofmeyr and Kahn 2001: 564 – 566. In 1983 the South African Law Commission (as it was then known) rejected the idea of a surviving spouse as being the sole heir, but recommended instead that a surviving spouse would compete only with the deceased's descendants, and, as such, would be treated as an additional descendant. This recommendation was included in the *Intestate Succession Act* 81 of 1987 (see SALC 1983: 12 – 14) which repealed all prior statutes and superseded the position at common law (see De Waal and Schoeman-Malan 2008: 15).

458 See De Waal 1997: 164, 165 and 166.

459 De Waal 1997: 166. Also see Ngcobo J's minority judgment in *Daniels* at par [99].

460 De Waal 2006: 3G1. On the other hand, the principle of freedom of testation (in terms of which a person is permitted to dispose freely of his or her property by means of a will) is based on economic considerations and has as its objective the transferring of wealth—see De Waal 1997: 166; Du Toit 2001: 14.

is submitted that this does not alter the fact that the Act was *in principle* enacted in order to perform a social function by supporting the family of the deceased. Furthermore, sight should not be lost of the fact that the Act applies regardless of the *de facto* financial position of the survivor; a position which is certainly liable to fluctuate throughout the existence of the relationship, and for which, it is submitted, the Act intends to provide contingent relief. Consequently, it would be incorrect to argue that, because the Act may from time to time[461] regulate the distribution of an estate involving a *de facto* wealthy survivor, intestate claims cannot be regarded as falling under the category of need-based claims.

It is submitted that it can therefore be accepted that both the *Intestate Succession Act* and the *Maintenance of Surviving Spouses Act* serve a similar fundamental purpose, namely to address the *needs* of the survivor.[462] Consequently, while it is true that the extent of the survivor's needs will differ from case to case and that the Acts do not treat the issue

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461 It appears to be a recognised fact that wealthy people are less likely to die intestate than affluent people—see De Waal 1997: 165; Du Toit 2001: 13.

462 In a thorough historical analysis Du Plessis 1990: 236 – 240 points out that Justinian's *Novellae* were promulgated in order to remove the discrepancies that had existed between male and female heirs up until that point. In this regard she mentions that *Novellae* 117 5 of 542 and 53 6 of 537 permitted a needy widow to claim a portion of the estate after death (which could amount to a quarter of the estate unless reduced in accordance with *Novella* 117 5), while in the case of divorce, *Novella* 22 18 of 536 entitled a needy spouse to 100 pounds provided that she was not blameworthy as far as the divorce was concerned. Importantly, Du Plessis states that "[v]olgens Dannenbring is die agterliggende rede vir die Romeinsregtelike kwart-reëling sosiaal van aard. Dit het berus op keiserlike genade en mensliewendheid ten aansien van die versorging van die weduwees. Die gedagte het ontstaan as gevolg van Hellenistiese en Christelike invloede. Breë maatreëls moes getref word om die arm bevolking te help waarvan die versorging van weduwees maar een was" (at 237, footnotes omitted). In early Cape law, Du Plessis mentions that the position of widows did not receive much attention, while the Natal Legislature (Act 22 of 1863) entitled a widow to a marriage out of community of property to claim one-half or one-third of the estate, depending on the circumstances. Du Plessis concludes that while the forerunner to the current Act (the *Succession Act* 13 of 1934) was highly reminiscent of Justinian's *Novellae*, the enactment of section 1(1)(a) – (c) of the 1987 Act changed the position entirely by entitling a surviving spouse to inherit the entire estate in the event of there being no descendants, while, in cases where descendants also survived the deceased "blyk dit dat die Justiniaanse *Novellae* (117 5, 53 6 en 22 8) na verloop van jare weer eens 'n 'regmatige plek' (hoewel indirek) ingeneem het" (at 240). Oosthuizen 1989: 98 also expresses the view that in addition to systematising the common law, "the lot of the surviving spouse has also been considerably improved" by the 1987 Act.

of need in an identical manner,[463] this does not detract from the fact that both pieces of legislation were enacted with a view to serving the same fundamental purpose. As such, it follows that what was said in relation to the *Volks* case above regarding the fact that the "choice argument" is irrelevant in the case of a need-based claim should apply *mutatis mutandis* to the facts in the *Gory* case. However, it would simultaneously imply that proving that a reciprocal duty of support existed between the deceased and the survivor would be essential in order to succeed with the claim to inherit intestate. (Indeed, the essentiality of proving the existence of a reciprocal duty of support is pertinently illustrated by the situation where affluent persons are involved: In the event of a wealthy survivor being a potential intestate heir [so that it may be argued that need is not at issue] it is submitted that the existence of a reciprocal duty of support would justify such a survivor's claim despite the *de facto* lack of need.)

For this reason, Wood-Bodley's[464] submission that the prerequisite of a reciprocal duty of support in both *Gory* judgments was "unwarranted" cannot be supported.[465] This argument is substantiated by the fact that, despite persuasive arguments to the contrary,[466] sight simply cannot be lost of the fact that even though the option of marriage may be illusory, the

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463 For example, the *Maintenance of Surviving Spouses Act* contains criteria to establish the "reasonable maintenance needs" and the "own means" of a survivor, while the *Intestate Succession Act* contains no similar criteria.

464 2008(a): 52.

465 In this regard the gist of Wood-Bodley's contention is that, while it is possible to understand why the existence of a reciprocal duty of support was deemed to be a prerequisite for the extension of benefits associated with marriage in a case such as *Satchwell (1)* [2002 (6) SA 1 (CC)], it is less clear why the Court in *Gory* deemed such a duty also to be a prerequisite in order for one partner to qualify as the intestate heir of the other. According to him, the failure to undertake mutual duties of support would be an "understandable omission" where neither party is in need of financial support (see Wood-Bodley 2008(b): 271). In fact, when all is said and done, Wood-Bodley's argument can be criticised on the basis that he fails to realise that, far from being redundant, the existence of a reciprocal duty of support is in fact the key to justifying the continuation of an intestate succession claim in the case of homosexual couples who have not solemnised their union by way of marriage or civil partnership—see (the second possibility ((b)) in the main text above.)

466 See for example Hartzenberg J's statement in the judgment of the Court *a quo* in *Gory* (2006 (5) SA 145 (T) at par [22]).

parties have the option of the law of testate succession at their disposal: In the absence of such testamentary provision within the context of non-formalised relationships, proof of a reciprocal duty of support is required as an objective benchmark in order to establish the proximal link between the claim based on need and the deceased estate. Viewed in this light, it is submitted that the existence of a reciprocal duty of support in a permanent relationship in fact establishes that the survivor of such a non-formalised relationship is "now regarded as close family of the deceased" thereby justifying his or her claim as one of the deceased's natural heirs.[467]

As a consequence, it is submitted that, as was concluded within the context of maintenance claims in the *Volks* case, prospective domestic partnerships legislation must take cognisance of the fact that the existence of a reciprocal duty of support is a *sine qua non* for the continued extension of the principles of intestate succession to permanent life partners who have not formalised their relationship by way of appropriate legislation.

This construction, it is further suggested, may provide the solution to the three post-*Civil Union Act* scenarios identified by Wood-Bodley,[468] all of which are based on the premise that no legislative amendment to the legal position in the light of *Gory* is forthcoming.

- The first scenario envisions an equality challenge being brought by the surviving blood relations of a deceased person who was involved in a non-formalised same-sex life partnership on the basis

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467 The quoted words are included in order to contrast this submission with that of Wood-Bodley (2008(b): 271) who states that: "Surely the reason for a 'spouse' inheriting on intestacy is because the spouse is now regarded as close family of the deceased, equivalent to a close blood relation, not because of the existence of duties of support?"

468 2008(a): 60, 61.

that they are being discriminated against as they would have been able to inherit intestate but for the fact that their deceased family member had been involved in a homosexual relationship.

- The second scenario proffered by Wood-Bodley suggests that, as an alternative to the first scenario, the surviving partner to a heterosexual life partnership may challenge the current legal position on the basis that he or she is prevented, on the basis of having elected not to marry, from exercising a right to which a same-sex survivor who had also elected not to marry is entitled.[469]

- In the final instance Wood-Bodley[470] raises the pertinent question as to whether—bearing the recently-established right to intestate succession in mind—a surviving homosexual partner to a non-formalised union would be entitled to institute a claim in terms of the *Maintenance of Surviving Spouses Act*.[471]

It is suggested that the approach adopted earlier in this study as a solution to the difficulties presented by the *Volks* case will provide an adequate solution to all three scenarios sketched by Wood-Bodley. On the basis of the "contextualised choice model" the point of departure would be to accept the premise that a maintenance or succession claim instituted after the termination of a life partnership in principle serves a social objective and forms part of the genus need-based claims (as opposed to those

469 If the Court were to find in the applicant's favour, Wood-Bodley (2008(a): 61) suggests that this would be an appropriate instance to hold that such an order should not be imposed with any retrospective effect (see the Constitutional Court's judgment in *Gory* at par [39] for an explanation of the general principles in this regard) and that Parliament should be provided with an opportunity to rectify the position before the order would take effect. It is submitted that Wood-Bodley's purely prospective approach overlooks the fact that such an order would not vindicate the successful litigant's rights. For this reason his suggestion cannot be supported.

470 Wood-Bodley 2008(a): 59; also raised in 2008(b): 270.

471 27 of 1990.

involving property disputes).[472] This fact would be sufficient to circumvent any need for recourse to the "choice argument", which, moreover, would automatically imply that this (constitutional) issue could be avoided.[473] The second aspect would then simply be for the surviving life partner to prove that a reciprocal duty of support existed between him- or herself and the deceased. The existence of this duty would, it is submitted, justify the survivor's right either to inherit intestate or to claim for maintenance.

3.4.1.3 Conclusion

While it was concluded in the earlier analysis of the *Volks* case that heterosexual unmarried couples do not necessarily have the option of formalising their unions open to them, it has been found that the same inequalities present themselves within the context of same-sex relationships.[474] This reality, coupled with a consideration of Wood-Bodley's "homophobia argument,"[475] leads to the conclusion that neither heterosexual nor homosexual unmarried couples are necessarily availed of the option of formalising their relationships. This notwithstanding, provided the claim is based on need, nothing turns on the exercising (or otherwise) of such a choice: As a claim under the *Intestate Succession Act* serves a social objective and can be regarded as a need-based claim, it follows that the "contextualised choice model"—as distilled from Canadian law and adapted in the light of South African case law—can be applied equally to a post-*Civil Union Act* claim for intestate succession, with the result that, provided a reciprocal duty of support existed during the existence of a permanent life partnership, such a claim can be instituted regardless of whether the claim arises in the context of a heterosexual or homosexual relationship.

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472 As seen above the purpose of both the *Maintenance of Surviving Spouses Act* 27 of 1990 and the *Intestate Succession Act* 81 of 1987 was to provide for need-based claims—see *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at par [22] and [23].

473 See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [21].

474 See Bonthuys 2007: 540.

475 Also see De Vos 2007(a): 463 *et seq* for a further discussion of the hardships suffered by homosexual couples.

Such an objective approach would remove the need for differentiating (and indeed possibly unfairly discriminating) between same-sex and opposite-sex life partners in a post-*Civil Union Act* context.[476] Furthermore, such an approach should be borne in mind for the purposes of modifying the *Domestic Partnerships Bill*, 2008 according to the domestic partnership rubric.

3.4.2 The relevance of a (reciprocal?) duty of support within the context of insurance agreements

3.4.2.1 The facts

In *Bezuidenhout NO v ABSA Versekeringsmaatskappy Bpk* [477] a lesbian couple (A and D) had been involved in an intimate relationship since 1982. Although the relationship ceased to be intimate in 1998 as a result of D's alcohol abuse and concomitant aggressive behaviour, the parties continued to cohabit and to share the same bedroom. The ostensible reason for this was to prevent D's destitution as she was unable to support herself.[478] In July 2000 A (the driver) and D (her passenger) were involved in a motor vehicle accident when the vehicle in which they were being conveyed left the road and overturned. It was alleged that the accident had been caused by A's negligent driving as a result of which D was seriously injured.[479] In 2005 judgment was obtained against A after she had

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476 This objective approach would also serve to iron-out the anomalies of Wood-Bodley's staggered approach (in terms of which same-sex life partners would—despite the enactment of the *Civil Union Act*—be able to inherit intestate despite choosing not to marry or to enter into a civil partnership while the same would not apply to heterosexual couples) that would result where one of the partners had altered his or her sex description and status in accordance with the procedures prescribed by the *Alteration of Sex Description and Sex Status Act* 49 of 2003. Assume, for example, that A (born male) altered his sex by gender reassignment surgery to that of a female and thereafter entered into a life partnership with B (female). In terms of section 3 of the Act, A would henceforth "for all purposes" be deemed to be a person of the "new" sex, i.e. female. On Wood-Bodley's construction A would be able to inherit intestate from B by virtue of the fact of her altered sex description, while the same would not have been permitted if A had never undergone the surgery and had (as a male) entered into the life partnership with B.

477 Unreported judgment of the Transvaal Provincial Division (now the North Gauteng High Court, Pretoria), case no 40688/2008 delivered on 26 February 2008.

478 Par [7.1] and [7.2].

479 Par [5].

conceded liability.[480] However, as her estate had been sequestrated by that time, her insurer was in principle obliged to compensate D for her damages by virtue of section 156 of the *Insolvency Act*.[481] The core issue in this case was therefore whether A's insurer was liable for the damage suffered by D as a result of the accident. The insurance policy entered into between A and her insurer contained an exclusionary clause in terms of which A would be indemnified from liability for the death or bodily injury to any person unless that person:

> (a) … is a member of [y]our immediate family;
>
> (b) … normally resides at [y]our residence, including domestic servants …[482]

By the time that the accident occurred (in July 2000), A and D had been living in a home belonging to A's sister. D was unemployed and did not contribute to any household expenses with the result that A apparently supported her "almost like a child."[483]

The plaintiff (D's curator *ad litem*) averred that the phrase "[y]our residence" did not include a situation where the insured was not the owner of the place in which he or she and the person who had been killed or injured resided. On this basis it was alleged that sub-paragraph (b) of the exclusionary clause did not exclude the insurer's liability.[484] On the other hand, counsel for the insurer contended that the phrase had to be interpreted with the purpose of the exclusion in mind, which was to limit the insurer's liability to persons other than those with whom the insured would frequently travel. On this basis, it was argued that the clause served merely to identify the category of excluded persons as being those who "normally resided" with the insured person irrespective of whether or not the insured had "any proprietary right in the sense of ownership" therein.[485]

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480 Par [5].
481 Act 24 of 1936. See par [5].
482 Par [6].
483 Par [7.3].
484 Par [8].
485 Par [8].

Fabricius AJ held that the phrase "[y]our residence" had to be interpreted within the specific context of insurance contracts.[486] On this basis, it became clear that the purpose of such an exclusionary clause was to limit the insurer's risk by excluding those who would by virtue of family ties to or cohabitation with the insured frequently travel with him or her; a risk which in addition would be further reduced by eliminating the possibility of fraudulent claims being instituted by collusion between these persons.[487] Fabricius AJ concluded that

> residence in this context is the insured's domestic establishment, and persons normally residing there would be those who normally receive their meals and accommodation from the insured gratuitously, be it the owner [or] the lessee.[488]

Accordingly it was held that it was irrelevant whether A owned or leased the property in which she and D had resided at the time of the accident. The fact remained that she "normally resided" there. Furthermore, the learned Judge held that "[i]t is clear that [D] had a close relationship with [A] and that this did not cease simply because intimacy ceased."[489] In closing, Fabricius AJ made the significant remark that, while this issue had not been raised before him, it may have been contended that sub-paragraph (a) of the exclusionary clause was applicable on the basis that D was a member of A's "immediate family."[490]

3.4.2.2 Observations

The following observations can be made regarding this decision:

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486 Par [9] and [10].
487 Par [10] read with [12].
488 Par [10].
489 Par [13].
490 Par [14].

(i) The requirement of intimacy does not seem to be essential to establish a "close relationship" and hence to constitute a life partnership in the narrow sense.[491]

(ii) The facts *in casu* illustrate why the criterion of dependence cannot be regarded as the fundamental criterion in order to determine whether a union qualifies as a life partnership in the narrow sense. This aspect is considered in more detail in 11.2 in Chapter 7.

(iii) Although this point did not feature *in casu*, it is submitted that even though A (on her evidence) virtually maintained D "as a child", a contractual reciprocal duty of support nevertheless existed between herself and D. This duty had arisen in 1982, and the fact that A almost single-handedly continued to care for and support D testifies to the fact that by her conduct she condoned this state of affairs. The only aspect of the duty that changed in the final two years of the relationship was that it came to rest on A as sole breadwinner.[492] On this basis it is submitted that if, hypothetically speaking, the union between A and D was terminated by the death of A, D should, on the basis of the "contextualised choice model", be able to institute a need-based claim (for example for maintenance) against the deceased estate.

(iv) A final observation that needs to be made concerns the angle taken by the defendant who, in view of the nature of the defence raised (namely that the exclusion clause applied *in casu*), bore the onus of proof.[493] In this regard, it is suggested that in view of the contentious and uncertain interpretation given to the phrase "[y]our residence", counsel for the defence should instead have concentrated on the phrase "[y]our immediate family." Fabricius AJ also alluded to this possibility in

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491 See 2.1.2.2 in Chapter 4.

492 See Sinclair and Heaton 1996: 442 (at note 90) and 3.3.1.2 above.

493 Par [7].

remarking that, although there was no need to decide the issue, "it could be argued that [D] was a member of [A's] 'immediate family'." It is strange that so much emphasis was placed on arguing the interpretation of the former phrase while there is ample authority in support of the contention that a homosexual couple creates and constitutes a "family."[494] (In fact, it appears from Fabricius AJ's statement quoted above that this point was not even raised at all.) It is consequently submitted that the latter option would have been a far less risky one as it would from the outset have placed the applicability of the exclusion clause beyond doubt.

3.5 Some recognition for heterosexual life partners: The *Pension Funds Act* 24 of 1956

In *Hlathi v University of Fort Hare Retirement Fund and Others*,[495] the Pension Funds Adjudicator was recently required to consider whether the pension fund of which the deceased (Mr H) had been a member until his death in 2002 had correctly apportioned the death benefit between the complainant (the deceased's mother) and the third respondent (a woman with whom the deceased had cohabited for nine years preceding his death). The fund had awarded one third of the R 400 000 benefit to the complainant and two thirds thereof to the third respondent. The complainant alleged that the third respondent was not a dependant of the deceased, and in the result felt that she was entitled to the entire benefit.[496]

Although the *Pension Funds Act* contains an updated definition of "spouse" so as to include a "permanent life partner" as such (and by virtue hereof to permit such

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494 Over and above the authority for this statement mentioned by Fabricius AJ (namely *Farr v Mutual & Federal Insurance Co Ltd* 2000 (3) SA 684 (C)) the highest Court in the Republic as well as the Supreme Court of Appeal have already established and entrenched this fact—see *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [53] and *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at par [13].

495 PFA/EC/9015/2006.

496 Par [4] – [6] and [17].

a partner to qualify as a "dependant" of the deceased), the Pension Funds Adjudicator held that the third respondent could not rely on this definition as the latter had only come into operation in 2007, while the deceased had passed away five years earlier.[497] Nevertheless, on the basis of the mutual support obligations that had clearly been undertaken, the Adjudicator was prepared to find that the third respondent and the deceased were "inter-dependent" and that the latter hence qualified as a "factual dependant" of the deceased.[498] As a result, it was concluded that the retirement fund had correctly apportioned the benefit on the one-to-two-thirds basis.[499]

This case illustrates that, for the purposes of pension law, the value of a factual duty of support that exists between heterosexual life partners appears to have been appreciated. It is however interesting to note that paragraph (b) of the definition of "dependant" (in terms of which the matter was decided by the Adjudicator) deals with the situation where the member is *not legally liable* for maintenance, but where the person is nevertheless a factual dependant of that member. On the other hand, paragraph (a) of the definition relates to a dependant "in respect of whom the member *is* legally liable for maintenance." In this regard it is submitted, as Cronjé and Heaton[500] have intimated, that the existence of a contractual reciprocal support obligation implies that a legal obligation to maintain exists between the parties involved. On this basis, it is submitted that the Adjudicator may in fact have held that the contractual support obligations undertaken between the deceased and the third respondent meant that he was in fact "legally liable" to maintain her, with the result that paragraph (a) of the definition would have been applicable. In the end result, although nothing turns on whether the matter was decided on paragraph (a) or (b) of the definition, a finding on the basis of paragraph (a) would have reiterated the potency of the contractual duty of support in contemporary South African law.

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497 Par [28] and [29].

498 Par [35].

499 Par [36] – [39].

500 2004: 229.

3.6 Conclusions regarding the reciprocal duty of support in non-formalised life partnerships

At this point it can be stated with certainty that neither homosexual nor heterosexual life partners currently owe each other an *ex lege* duty of support. Where our Courts have been petitioned to grant piecemeal extensions of the invariable consequences of marriage to unmarried same-sex couples, they have been prepared to infer the existence of such duties,[501] and, moreover, to entitle other similarly-situated couples to the same extension on the express condition that reciprocal support obligations had been undertaken by them. As far as heterosexual unmarried couples are concerned, our Courts have thus far been prepared to withhold similar extensions from such couples on the ostensible basis that they have always been in a position to avail themselves of the protection provided by the law of marriage while their homosexual counterparts have not.[502] On the basis of a minority judgment in the Canadian case of *Nova Scotia (Attorney General) v Walsh*[503] it was concluded that, as far as this "choice argument" is concerned, a distinction should be drawn between claims based on need (such as post-termination maintenance) and those involving property disputes. Embroidering on this distinction, it was concluded that the fact that parties have chosen not to marry should be irrelevant where a claim is based on need, but that the existence of a factual reciprocal duty of support would be a *sine qua non* for the extension of any such claim. The application of this theory to the majority judgment in *Volks NO v Robinson*[504] showed that this decision could not be supported; not only for its failure to infer reciprocal obligations where they clearly existed on the facts, but also for the majority judgment's

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501 See for example *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) at par [14]; *Gory v Kolver NO* 2007 (3) BCLR 294 (CC) at par [2].

502 See the approach of the majority in *Volks NO v Robinson* 2005 (5) BCLR 446 (CC), recently referred to with apprpoval by the Pensions Funds Adjudicator in *Hlathi v University of Fort Hare Retirement Fund and Others* PFA/EC/9015/2006 (at par [30]).

503 2002 SCC 83, 32 R.F.L. (5th) 81, 221 D.L.R. (4th) 1, 211 N.S.R. (2d) 273, 102 C.R.R. (2d) 1, [2002] 4 S.C.R. 325, 297 N.R. 203, 659 A.P.R. 273, REJB 2002-36303, J.E. 2003-102.

504 2005 (5) BCLR 446 (CC).

failure to appreciate the realities within which such a "choice" is often exercised in contemporary South Africa.

Building on this theory, it was concluded, with reference to the decision of *Gory v Kolver NO,*[505] that despite the validation of same-sex marriages in 2006, the prevalence of homophobia as a "lived reality"[506] in South African society at times poses an insurmountable barrier to homosexual persons who would otherwise wish to marry. As a result, it was concluded that neither heterosexual nor homosexual unmarried couples necessarily have the option of marriage open to them. In addition, it was concluded that a claim for intestate succession should in principle be regarded as a need-based claim. The coupling of these two findings implies that the "choice argument" as refined into the "contextualised choice model" could also accommodate post-*Civil Union Act* claims based on need, regardless of whether the claim arose in consequence of a heterosexual or homosexual permanent life partnership.

The discussion concluded with two recent judgments, the major relevance of which were (i) the confirmation of the view that intimacy is not a requirement for the establishment of a life partnership;[507] and (ii) that, according to the Pension Funds Adjudicator, a factual reciprocal duty of support appears to be sufficient in order to entitle the survivor to a permanent heterosexual life partnership to qualify as a dependant for the purposes of the *Pension Funds Act* 24 of 1956.[508]

As such, valuable lessons regarding the reciprocal duty of support have been learned for the purposes of the modification of the *Domestic Partnerships Bill* in accordance with the domestic partnership rubric.

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505 2007 (4) SA 97 (CC); 2007 (3) BCLR 294 (CC).

506 See Wood-Bodley 2008(c): 486 as well as De Vos 2007(a): 463 *et seq*.

507 *Bezuidenhout NO v ABSA Versekeringsmaatskappy Bpk* Unreported judgment of the Transvaal Provincial Division (now the North Gauteng High Court, Pretoria), case no 40688/2008 delivered on 26 February 2008.

508 *Hlathi v University of Fort Hare Retirement Fund and Others* PFA/EC/9015/2006.

3.7 *Consortium omnis vitae*

The description of the invariable consequence of marriage known as *consortium omnis vitae* ("a physical, moral and spiritual community of life"[509]—discussed in detail earlier in this study)[510] was described as follows in *Peter v Minister of Law and Order*: [511]

> The concept of matrimonial *consortium* has been termed an abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage… These embrace intangibles, such as loyalty and sympathetic care and affection, concern etc; as well as the more material needs of life, such as physical care, financial support, the rendering of services in the running of the common household or in a support-generating business, etc.[512]

This description was expressly quoted in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*,[513] a case that dealt with the extension of immigration rights attached to marriage to same-sex life partners. On the strength hereof, Schäfer[514] opines that the finding in the latter case serves as authority for asserting that the concept of *consortium omnis vitae* currently constitutes "the definitive hallmark" and "core quality" of a same-sex life partnership.

It is tempting to infer from Schäfer's statements that the concept of *consortium omnis vitae* as it applies in the case of a marriage has indeed been transplanted *in toto* into the realm of same-sex life partnerships. Such an inference is

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509 *Per* O'Regan J in *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at par [33].

510 See 4 in Chapter 2.

511 1990 (4) SA 6 (E).

512 At 9 (G) – (H), referred to with approval in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [46] (see note 61 of the judgment) and *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at par [33].

513 2000 (2) SA 1 (CC).

514 2008(b): R 3. Also see Schäfer 2006: 629.

bolstered immensely by Ackermann J's statement in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*[515] to the effect that "gays and lesbians in same-sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms, including affection, friendship, eros and charity" that they are "as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household" and that in short, they have the same ability to establish a *consortium omnis vitae*…"

Nevertheless, it is submitted that the positive law dictates that Schäfer's inference cannot yet be drawn. While he is correct in appreciating the importance of the concept of *consortium omnis vitae* within the context of same-sex life partnerships, it is questionable whether the *consortium* can be described as the "hallmark" thereof. To begin with, in the sense which it is employed by Schäfer, the term "hallmark" appears to create the impression that *consortium omnis vitae* is the distinctive feature *of a same-sex life partnership*. Whether or not this is true is debatable, as an analysis of case law reveals that the ability of a same-sex couple *to establish* a community of life does not without more appear to have been sufficient to justify the extension of the consequences of marriage to same-sex life partnerships. Instead, the Courts appear—most likely on the basis of the *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* judgment—to have accepted this ability as a given while often requiring "something more" (such as proof of mutual support obligations) before permitting the extension requested by the applicants. Consequently, if it were so that *consortium omnis vitae* were indeed the "core quality" of a same-sex relationship, it may be argued that the Courts have erred in posing additional requirements before granting the extensions sought for, as O'Regan J stated in the *Dawood*

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[515] 2000 (2) SA 1 (CC) at par [53].

case, "the community of life [in the context of marriage] establishes a reciprocal and enforceable duty of financial support between the spouses."[516]

Within the context of marriage, authors such as Cronjé and Heaton[517] state that the right to family life (which is protected by the constitutional right to dignity) "includes the spouses' right to have a *consortium omnis vitae*." As far as same-sex life partnerships are concerned, it is submitted that although the Courts have recognised the broad right of such partners to have their "families and family lives in such same-sex relationships respected and protected,"[518] the Courts have thus far only been prepared to recognise a form of *consortium omnis vitae* that has been contextualised for such relationships.

In stating that "[i]t would appear to be implicit from *National Coalition* that all life partnerships require at least a minimum level of legal protection although … this does not necessarily imply parity of rights and duties between all forms [of life partnership]" Schäfer[519] appears to acknowledge the fact that the "rights and duties" that are recognised in different forms of life partnership (for example those in heterosexual as opposed to homosexual partnerships) may differ. However, where his approach differs from the one that was distilled from the applicable case law in the preceding paragraph is that he does not appear to acknowledge the fact that the concept of *consortium omnis vitae* has been contextualised *for the purpose of same-sex life partnerships*. In other words, by stating that this concept "*previously* was accepted as the hallmark of marriage and marriage alone" he seems to maintain that the concept of *consortium omnis vitae* has been appropriated in its entirety to the context of same-sex life

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516 2000 (3) SA 936 (CC) at par [33]. Also see *Jooste v Botha* 2000 (2) SA 199 (T) at 206 (B): "Marriage creates a *consortium omnis vitae* which obliges the parties to live together, grant each other reasonable conjugal rights, be faithful to and love, cherish *and support each other* till death (or the Divorce Court) do them part" (emphasis added).

517 2004: 51.

518 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [54].

519 2006: 629.

partnerships while the "rights and duties" that may be recognised in *other forms* of life partnership (for example heterosexual partnerships) may differ.[520]

Support for the suggestion that *consortium omnis vitae* has not (yet) been fully recognised for the purposes of same-sex life partnerships becomes evident when one compares the definition thereof in the *Peter* case (quoted above) with the current legal position. In this case it was stated that *consortium* constitutes "the totality of a number of rights, duties and advantages *accruing to spouses of a marriage.*" If it were therefore true that *consortium* constitutes the "definitive hallmark" of a same-sex life partnership, this would create the impression that all the "rights, duties and advantages" attached to marriage would also attach to such life partners, and, moreover, that the methods in which *consortium omnis vitae* was protected in the case of marriage would also apply in order to protect the same in a same-sex relationship. To illustrate this point, it must be noted that *consortium omnis vitae* is generally not capable of being enforced directly between the spouses to a valid marriage.[521] However, the same does not hold true for third parties. In consequence, if a third party were to commit adultery with one of the spouses, a delictual claim could be instituted against that person by virtue of the infringement of the *consortium*.[522] Similar actions would also lie

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520 The sections quoted are taken from Schäfer 2006: 629.

521 *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at par [33]; *Jooste v Botha* 2000 (2) SA 199 (T) at 206 (B) – (D).

522 See for example *Biccard v Biccard and Fryer* (1891-1892) 9 SC 473; *Viviers v Kilian* 1927 AD 449; and, more recently, *Wiese v Moolman* 2009 (3) SA 112 (T); as well as Neethling *et al* 2006: 326. An interesting question arises as to whether homosexual sexual activity will qualify as "adultery" for the purposes of South African law. In the American state of New Hampshire the majority of the Supreme Court recently held (*per* Nadeau J; Dalianis and Duggan JJ concurring) in *Matter of Blanchflower* 834 A.2d 1010 (N.H. 2003) that according to Chapter 458 of the *Revised Statutes Annotated,* lesbian sexual relations could not, as (i) such activity did not constitute "sexual intercourse" in the sense of the dictionary definition of "insertion of the penis in the vagina" which, of necessity, implied heterosexual sexual activity; and (ii) although the forerunner to the relevant statute (namely the *Revised Statutes of 1842 RS 148:3*) did not define "adultery", it had been drafted at a time when adultery "meant sexual intercourse" as a result of which "spurious issue" could be born which of necessity implied heterosexual coital activity (at 1012; also see Brown 2004: 181). Brock CJ and Broderick J dissented on the basis, *inter alia*, that "[t]o strictly adhere to the primary definition of adultery in the 1961 edition of *Webster's Third New International Dictionary* and a corollary definition of sexual intercourse, which on its face does not require coitus, is to avert one's eyes from the sexual realities of our world" (at 1013). The

at the instance of the wronged spouse if the third party were to abduct or to entice the other spouse to leave the former or if the third party were to harbour the spouse with the intention of terminating the marriage.[523] There is however no authority to suggest that the same position would apply within the context of a same-sex life partnership. (In fact, in a recent judgment dealing with the continued recognition of the action based on the ground of adultery in modern-day South Africa it was held that the restriction of such a claim to married couples as opposed to persons involved in "andersoortige verhoudings" did not violate the right to equality.)[524] As a consequence the conclusion can be drawn that in respect of same-sex life partnerships the positive law currently recognises a contextualised form of *consortium omnis vitae* between the life partners *inter se* that is not enforceable against outsiders to the relationship.

Regarding *heterosexual* life partnerships, the positive law indicates that enormous differences currently exist between the "rights and duties" (if any) which the Courts have been prepared to recognise in such life partnerships versus those recognised in heterosexual life partnerships. For example, no recognition whatsoever of the concept of *consortium omnis vitae* (much less of the broader right to "family and family life") is to be found in the case law dealing with such unions. This much is untenable in view of the fact that the ability of

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latter sentiments are supported, and it is submitted that the approach of the majority of the *Blanchflower* Court would not be countenanced in South Africa, where at least two reported cases point to the fact that "adultery may have a wider interpretation than its ordinary meaning of carnal intercourse of a person who is married with one who is not the spouse of such person and may include any act such as sodomy or bestiality" (*per* Matthews J in *McGill v McGill* (1926) 47 NPD 398 at 399). In our law the delictual claim for adultery is aimed at compensating the wronged spouse for the loss of the material and immaterial aspects of *consortium* due to the intentional invasion thereof (Neethling 2006: 326 and Church 1979: 380) and it is therefore irrelevant whether this took place by way of penetration of the female vagina by the male penis, by way of sodomy or by way of bestiality—also see *Cunningham v Cunningham* 1952 (1) SA 167 (C) at 169 (B) – (E). The same line of reasoning should apply in the case of lesbian sexual activity. Moreover, it has been opined in recent case law that there is no legal reason why same-sex spouses should not be entitled to institute claims on the basis of adultery—see *Wiese v Moolman* 2009 (3) SA 122 (T) at 129 (A).

523 See in general Cronjé and Heaton 2004: 50, 51; Neethling *et al* 2006: 327.

524 See *Wiese v Moolman* 2009 (3) SA 112 (T) at 128 (I) – 129 (C). This case is discussed in Chapter 7 (see 11.9).

non-formalised heterosexual unions to establish a "family and family life" is indistinguishable from the ability of their same-sex counterparts to do the same. In addition, in *Volks NO v Robinson* [525] the majority *inter alia* held that it was fair to distinguish between married and unmarried heterosexual couples when such distinction was considered "in the larger context of the rights and obligations uniquely attached to marriage."[526] While the finding in this case has been criticised,[527] the position remains that the Courts have refused to extend the rights and obligations attached to marriage to unmarried heterosexual couples. On this basis, it is suggested that no form of *consortium omnis vitae* (even in an inchoate form) is currently recognised between the parties to a heterosexual life partnership.

The conclusion, therefore, is that the positive law indicates that a contextualised form of *consortium omnis vitae* has been recognised by our Courts in respect of same-sex life partnerships,[528] while no development in this regard has been forthcoming as far as heterosexual unions are concerned.

It is submitted that any further extension of the notion of *consortium omnis vitae* to unmarried life partners should take place by way of the Legislature, which should provide the mechanism by which *consortium omnis vitae* is, concomitant with the level of public commitment involved, extended to formalised and non-formalised life partnerships. In this regard, it is submitted that the domestic partnership rubric—which mandates the modification of the draft *Domestic Partnerships Bill* of 2008 and its calibration with existing legislation[529]—provides the ideal mechanism by which this is to be achieved; particularly in view of the fact that the Bill provides for partnerships which require a formal public

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525 2005 (5) BCLR 44 (CC).

526 Par [56].

527 See 3.3 above.

528 See *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at par [13] (g) where Ackermann J's findings in par [53] of his judgment in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) were referred to with approval by Cameron JA.

529 See the basic design of the rubric in Chapter 3 above.

commitment (a so-called "registered domestic partnership") and those which do not (the "unregistered domestic partnership"),[530] and as such provides the ideal framework within which the *context-specific* recognition of *consortium omnis vitae* prescribed in Chapter 3 can be accommodated. In consequence, as far as the former category is concerned, it may be plausible to suggest a more comprehensive or even complete extension of this concept to such partners, while retaining the nuanced form thereof for the latter group. This possibility will be investigated in Part 3 (Chapter 7) of this study.

4. MISCELLANEOUS DEVELOPMENTS RELATING TO THE POSITION OF LESBIAN COUPLES OCCASIONED BY THE SOUTH AFRICAN COURTS

4.1 The ability of lesbian permanent life partners to adopt children jointly

Prior to the Constitutional Court's decision in *Du Toit and Another v Minister of Welfare and Population Development and Others* [531] section 17 of the *Child Care Act* 74 of 1983 permitted a child to be adopted:

> (a) by a husband and his wife jointly;
> (b) by a widower or widow or unmarried or divorced person;
> (c) by a married person whose spouse is the parent of the child;
> (d) by the natural father of a child born out of wedlock.

Section 1 of the Act defines "marriage" for the purposes of that Act as:

> any marriage which is recognised in terms of South African law or customary law, or which was concluded in accordance with a system of religious law subject to specified

530 See 2 and 3 in Chapter 7 below.
531 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC).

> procedures, and any reference to a husband, wife, widower, widow, divorced person, married person or spouse shall be construed accordingly…

The criteria with which any person or persons wishing to adopt children must comply are set out in section 18 of the Act. In this regard, it is noteworthy that this provision is silent as far sexual orientation or gender is concerned.[532] Furthermore, according to section 20(1) of the Act:

> An order of adoption shall terminate all the rights and obligations existing between the child and any person who was his parent (other than a spouse contemplated in section 17 (c)) immediately prior to such adoption, and that parent's relatives.

The *Guardianship Act* 192 of 1993 (since repealed in its entirety by the *Children's Act* 38 of 2005)[533] awarded the mother of a child guardianship equal to that which the father of that child had at common law.[534] As an outflow hereof, the "father and mother" of a child were generally entitled to exercise such joint guardianship independently of one another, save for certain specified acts which required the co-operation of both joint guardians.[535]

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532 The criteria mentioned in section 18 (read with section 40) of the Act include: (i) that the Court must consider a report from a social worker or accredited social worker; (ii) that the prospective adoptive parent(s) fall(s) into a category listed in section 17 of the Act and that he, she or they have sufficient means to maintain and educate the child; (iii) that the prospective adoptive parent(s) is or are "of good repute" and is or are "fit and proper to be entrusted with the custody [now "care" in consequence of section 1 of the *Children's Act* 38 of 2005] of the child"; (iv) that the adoption will be in the interests of the child and will promote his or her welfare; (v) that, where apposite, consent has been obtained from the child's biological parent(s), foster parent(s) and the child him or herself; and (v) that due regard is given to the "religious and cultural background" of the child, his or her parent(s) and the prospective adoptive parent(s).

533 Section 313 read with Schedule 4 of this Act.

534 Section 1(1). The impact of this Act is also briefly referred to in 3.4.7.4 in Chapter 2.

535 Section 1(2) of the Act provided that: "Whenever both a father and mother have guardianship of a minor child of their marriage, each one of them is competent, subject to any order of a competent court to the contrary, to exercise independently and without the consent of the other any right or power or to carry out any duty arising from such guardianship: Provided that, unless a competent court orders otherwise, the consent of both parents shall be necessary in respect of—

(a) the contracting of a marriage by the minor child;
(b) the adoption of the child;

In the *Du Toit* case, the applicants, a lesbian couple (DT and DV)[536] who had been involved in a committed and stable relationship for over a decade, wanted to adopt two minor children jointly.[537] However, the legislation in question made no provision for same-sex couples to do so, even if they complied with the criteria stipulated in section 18 of the *Child Care Act*.[538] Consequently, despite the fact that the applicants had been screened and found to be suitable parents by the relevant authorities and that the children had been living with them and had accepted them as their parents, the fact of their homosexuality implied that it was impossible for the couple to adopt the children jointly. As a result, only one of the partners (DV) had been awarded custody and guardianship of the two children, notwithstanding that DT was the *de facto* caregiver in the light of DV's work commitments.[539]

The applicants launched a constitutional challenge against this state of affairs on four grounds, namely (i) that the prevailing legal position violated both of their rights to equality as it unfairly discriminated against them on the basis of sexual orientation and marital status; (ii) that DT's right to dignity was infringed by the fact that the law did not accord her "due recognition and status as a parent of her children"; (iii) that the imposition of a blanket prohibition on joint adoption by same-sex couples could not be in the best interests of children who were cared for by such couples and therefore violated the fundamental rights of the child as contained in section 28 of the *Constitution*, 1996 and (iv) that the right to equality

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(c) the removal of the child from the Republic by one of the parents or by a person other than a parent of the child;
(d) the application for a passport by or on behalf of a person under the age of 18 years;
(e) the alienation or encumbrance of immovable property or any right to immovable property belonging to the minor child …"

536 Ms Du Toit was the first applicant and Ms De Vos was the second applicant—see *Du Toit and Another v Minister of Welfare and Population Development and Others* 2001 (12) BCLR 1225 (T) at par [3].

537 Par [4] – [6].

538 74 of 1983.

539 Par [7] and [14]. DV was a High Court judge—see *Du Toit and Another v Minister of Welfare and Population Development and Others* 2001 (12) BCLR 1225 (T) at par [3].

and the fundamental rights of the child were also unjustifiably infringed by section 1(2) of the *Guardianship Act*.[540]

For the purposes of this study it will be sufficient to state that a unanimous bench of the Constitutional Court (*per* Skweyiya AJ) confirmed the High Court's finding that sections 17(a) and (c) and 20(1) of the *Child Care Act*[541] and section 1(2) of the *Guardianship Act*[542] were unconstitutional as they failed to accord pre-eminence to the best interests of children and infringed upon the right which all children had to a "loving and stable family life" and because the couple would have been permitted to adopt the children jointly "but for" their sexual orientation and their resulting unmarried status.[543] To this end, the following words were ordered to be read into the sections in question:

- In section 17(a), the words "or by the two members of a permanent same-sex life partnership jointly" after the word "jointly";
- In section 17(c), the words "or by a person whose permanent same-sex life partner is the parent of the child" after the word "child";
- In section 20(1), the words "or permanent same-sex life partner" after the word "spouse"; and
- In section 1(2) of the now-repealed *Guardianship Act* of 1993, the words "or both members of a permanent same-sex life partnership are joint adoptive parents of a minor child" after the word "marriage."

It is however important to note that the developments occasioned by the Court extended to same-sex life partnerships only. Consequently, the effect of the *Du Toit* decision (read in conjunction with the legalisation of same-sex marriage) is that the following couples may currently adopt children jointly, namely:

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540 192 of 1993. This section is quoted in note 535 above.
541 74 of 1983.
542 192 of 1983.
543 Par [26] read with par [30].

(i) A couple who have contracted a marriage in terms of the *Marriage Act*,[544] the *Recognition of Customary Marriages Act* [545] or in terms of the *Civil Union Act*;[546]

(ii) A couple who are married "in accordance with a system of religious law subject to specific procedures";[547]

(iii) A couple who have registered a civil partnership;[548] and

(iv) Same-sex life partners in a monogamous union.[549]

In addition, a spouse; civil union partner or same-sex life partner of the natural parent of the child is also permitted to adopt that child.[550]

Heterosexual life partners are therefore currently omitted from this group. At the time of writing this section, the *Children's Act* 38 of 2005 has not yet come into operation in its entirety. The omission of heterosexual life partners will however be cured when section 231 (under chapter 15) of this Act comes into

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544 25 of 1961.

545 120 of 1998.

546 Section 17(a) read with the section 1 definition of "marriage" in the *Child Care Act* 74 of 1983; the *Marriage Act* 25 of 1961; section 13 of the *Civil Union Act* 17 of 2006 and section 3 of the *Recognition of Customary Marriages Act* 120 of 1998.

547 Section 1 definition of "marriage" in the *Child Care Act* 74 of 1983.

548 Section 17(a) read with the section 1 definition of "marriage" in the *Child Care Act* 74 of 1983 in turn read with section 13 of the *Civil Union Act* 17 of 2006.

549 Par [44] of the *Du Toit* decision.

550 Section 17(c) read with the section 1 definition of "marriage" in the *Child Care Act* 74 of 1983; the *Marriage Act* 25 of 1961, section 13 of the *Civil Union Act* 17 of 2006, section 3 of the *Recognition of Customary Marriages Act* 120 of 1998 and par [44] of the *Du Toit* decision.

operation.[551] Until this happens, however, these couples will be prevented from adopting children jointly;[552] a situation that is *prima facie* unconstitutional.

In addition, as far as unmarried couples are concerned, an interesting state of affairs presents itself in the light of the staggered operative effect of Act 38 of 2005. As was mentioned above, one of the sections of the Act that indeed came into operation on 1 July 2007 repealed the *Guardianship Act* 192 of 1993 in its entirety. This implied that section 1(2) of this Act as qualified by the *Du Toit* decision immediately became of no force or effect. The "new" Act introduced the concept of parental responsibilities and rights and included its own provisions governing guardianship.[553] Nevertheless, the *Child Care Act* (as qualified by the *Du Toit* judgment) is still in force, which implies that this Act continues to govern adoptions pending the coming into operation of chapter 15 of the *Children's Act* (which, as seen above, will regulate adoption in future). The question that arises in the light hereof is whether the repealing of the *Guardianship Act* (and, more specifically, the consequent nullification of the *Du Toit* qualification therein regarding same-sex life partners) will affect the rights of same-sex couples to exercise guardianship in any way.

The first step towards answering this question would be to compare the provisions of the "new" Act which regulate guardianship with those of the repealed Act as qualified by the *Du Toit* case. If this is done, it becomes apparent that, at first glance, the "new" Act makes no similar clear-cut provision

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551 Subsection 1 of this section states that "A child may be adopted-
- (a) jointly by-
  - (i) a husband and wife;
  - (ii) partners in a permanent domestic life-partnership; or
  - (iii) other persons sharing a common household and forming a permanent family unit;
- (b) by a widower, widow, divorced or unmarried person;
- (c) by a married person whose spouse is the parent of the child or by a person whose permanent domestic life-partner is the parent of the child;
- (d) by the biological father of a child born out of wedlock; or
- (e) by the foster parent of the child."

552 Smith and Robinson 2008(a): 370.

553 Section 18.

for same-sex couples as far as guardianship is concerned.[554] As a result, it could—bearing the erstwhile interrelationship between the *Child Care Act* and the *Guardianship Act* in mind[555]—be tempting to think that the failure of the "new" Act to make specific provision for same-sex couples could be problematic. In other words, it may appear that while the *Child Care Act* has been extended so as to provide for same-sex couples to adopt children jointly, the failure of the *Children's Act* to contain a direct reference to same-sex life partners in its provisions dealing with guardianship may have the anomalous consequence that, while the former Act would indeed permit such couples to adopt children jointly, the *lacuna* in the latter Act would imply that no joint guardianship could be exercised by such a couple.

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554 See section 1(2) (as qualified by the *Du Toit* case) versus section 18: "**Parental responsibilities and rights**

(1) A person may have either full or specific parental responsibilities and rights in respect of a child.

(2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right-
  (a) to care for the child;
  (b) to maintain contact with the child;
  (c) to act as guardian of the child; and
  (d) to contribute to the maintenance of the child.

(3) Subject to subsections (4) and (5), a parent or other person who acts as guardian of a child must-
  (a) administer and safeguard the child's property and property interests;
  (b) assist or represent the child in administrative, contractual and other legal matters; or
  (c) give or refuse any consent required by law in respect of the child, including-
    (i) consent to the child's marriage;
    (ii) consent to the child's adoption;
    (iii) consent to the child's departure or removal from the Republic;
    (iv) consent to the child's application for a passport; and
    (v) consent to the alienation or encumbrance of any immovable property of the child.

(4) Whenever more than one person has guardianship of a child, each one of them is competent, subject to subsection (5), any other law or any order of a competent court to the contrary, to exercise independently and without the consent of the other any right or responsibility arising from such guardianship.

(5) Unless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection (3) (c)."

555 See *Du Toit and Another v Minister of Welfare and Population Development and Others* 2003 (2) SA 198 (CC) at par [13] and [30].

The solution to this problem, it is submitted, lies in a proper understanding of the concept of "parental responsibilities and rights" as introduced by the "new" Act; section 18(2) of which makes it clear that guardianship is merely a facet of the broader concept of parental responsibilities and rights. Therefore, provided that a valid adoption conveys such parental responsibilities and rights to the adoptive parents, it will follow that the adoptive parents are both entitled to exercise guardianship of the child. The provisions of the *Child Care Act* clarify this issue in that, as authors such as Heaton[556] and Schäfer[557] point out, section 20(1) and (2) of the Act makes it clear that adoption transfers all parental responsibilities and rights to the adoptive parents. Furthermore, there can be no doubt, in the light of the qualification of this section in the *Du Toit* case,[558] that the same holds true for same-sex life partners. Therefore, as guardianship is merely one of the facets of the broader concept, it follows that both same-sex life partners will have guardianship of their adopted child.

As far as heterosexual life partners are concerned, the position differs. As seen above, the *Child Care Act* does not permit such couples to adopt children jointly. This prohibition only extends to potential joint adoptive parents and therefore will not prevent one of the heterosexual life partners from adopting a child and hence becoming the sole adoptive parent. Although Smith and Robinson opine that there "is no justification for this position after the coming into operation of the *Civil Union Act*",[559] it may be argued that the position of heterosexual cohabitants is not as dire as this quote may indicate. This is so because, although the Act's provisions dealing with parental responsibilities and rights agreements are not yet in operation,[560] section 30 of the *Children's Act* (which is operational) allows "more than one person" to exercise parental responsibilities and rights over a child.[561] Furthermore, according to subsection (3):

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556 2008: 83.
557 2008(a): E29.
558 See par [44].
559 2008(a): 370 (italics added).
560 See section 22 of the Act.
561 Section 30(1).

> A co-holder of parental responsibilities and rights may not surrender or transfer those responsibilities and rights to another co-holder *or any other person,* but may by agreement with that other co-holder *or person* allow the other co-holder *or person to exercise any or all of those responsibilities and rights on his or her behalf.*

Consequently, in the event of one of the heterosexual life partners indeed adopting the child and in so doing becoming the sole adoptive parent, section 30 creates the impression that he or she may enter into an agreement with the other life partner ("other person") which will permit the other partner to "exercise any or all of those responsibilities and rights on his or her behalf." Therefore, although the other life partner will not be the child's adoptive parent as such, it appears as if he or she will in consequence of such an agreement be able to exercise parental responsibilities and rights in respect of that child. However, it is submitted that a careful reading of section 30(3) leads to the conclusion that the section in question provides no relief to the problem at hand: Section 30(3) only permits a "*co*-holder"[562] of parental responsibilities and rights to allow "another person" to exercise the same on his or her behalf. On this basis it could be argued that the section requires a minimum of two *co*-holders *from the outset*. In other words, only a co-holder can allow someone else to exercise the parental responsibilities and rights on his or her behalf—subsection 30(3) finds no application in the situation where there is only one holder of parental responsibilities and rights to begin with (such as in the case of a sole adoptive parent). This difficulty once again illustrates the vast differences in the legal positions in which same-sex and opposite-sex couples currently find themselves, and reiterates the need for legal reform in this regard.

Nevertheless, it is submitted that the key issue in this regard is to remember that the law of adoption must not be considered only from the perspective of the partners themselves, but also from the point of view of the children who are

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[562] Emphasis added.

involved. If this is done it becomes clear that the position in which heterosexual couples find themselves pending the coming into operation of section 231 of the *Children's Act* may be unconstitutional for exactly the same reasons as those relied on by Skweyiya AJ in the *Du Toit* case, namely that it "deprive[s] children of a loving and stable family life" and thus "fail[s] to accord paramountcy to the best interests of the children."[563]

4.2 The position of a lesbian life partner whose partner has given birth to a child conceived by artificial insemination

4.2.1 Introduction

In *J and Another v Director-General, Department of Home Affairs, and Others* [564] the applicants contested the constitutional validity of section 5 of the *Children's Status Act* [565] which, at the time, provided that any child conceived as a result of the artificial insemination of a wife with the gametes of a person other than one of the spouses would be deemed to be the legitimate child of that husband and wife.[566] The Act restricted this deeming provision to married couples, with the result that homosexual couples were excluded *in toto* and heterosexual couples were included only if they were married to one another.

The applicants (J and B) were a lesbian couple who, at the time of the institution of the High Court proceedings, had been living together for approximately eight years. In 2001 twins were born to the second applicant (B) after the female ova of her partner had been impregnated with the sperm of an anonymous donor.[567] The applicants applied to the Department of Home Affairs to be registered as the

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563 At par [22].

564 2003 (5) SA 621 (CC).

565 82 of 1987.

566 Section 5(1)(a). The Act further provided that "no right, duty or obligation" between the child and the donor of the gametes (or his or her blood relations) save for where the donor was either the birth-mother or the husband of the woman who was artificially inseminated—see section 5(2).

567 Par [2] and [3].

parents of the twins, with B being indicated as the "natural mother" of the children and J as their "parent." (The latter term was inserted by the parties themselves as the prescribed registration forms only made provision for a "father" in addition to the "natural mother.") Not surprisingly, this request was denied on the basis that the partners were unmarried and that neither of "the two ladies" could be regarded as the twins' father.[568] As a consequence, the constitutionality of section 5 of the Act[569] was successfully challenged in the Durban and Coast Local Division[570] in as far as it failed to provide for a "permanent same-sex life partner."[571]

In the confirmation proceedings the Constitutional Court (*per* Goldstone J) unanimously held—on the basis of the *Du Toit* case[572] that had dealt with an issue analogous to the one *in casu*—that (i) the Act unfairly discriminated against the applicants as they would have been entitled to be recognised as the parents of the twins but for their sexual orientation which was "inextricably linked" to their unmarried status,[573] and (ii) that this position could not be justified in the light of recent jurisprudence which had broadened the traditional scope of concepts such as "family" and "spouse."[574]

As an aside, it is worth mentioning that counsel for the respondents had contested the Court *a quo*'s finding on the basis that the words "permanent same-sex life partner" would unfairly discriminate against opposite-sex couples. Therefore, they argued that the Court should instead have omitted the reference to "same-sex" in its order.[575] This submission was rejected by the Constitutional

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568 See the judgment of the Court *a quo* (*J and Another v Director General, Department of Home Affairs, and Others* 2003 (5) SA 605 (D)) at par [2] and [9].

569 82 of 1987.

570 Now the KwaZulu Natal High Court, Durban—see the *Renaming of High Courts Act* 30 of 2008.

571 See par [7] of the Constitutional Court's judgment.

572 See *Du Toit and Another v Minister of Welfare and Population Development and Others* 2003 (2) SA 198 (CC) discussed above.

573 Par [14].

574 Par [15].

575 Par [19].

Court on the basis of the same Court's earlier finding in *Satchwell (1)* [576] to the effect that the separation of powers had to be respected and that the position of heterosexual couples had never been brought before the Court.[577] The correctness of this aspect of the finding in *Satchwell (1)* was discussed above and need not be repeated.[578]

Another point of interest as far as this case is concerned, is Goldstone J's remarks pertaining to the relevance of the existence of a reciprocal duty of support as far as the constitutionality of legislation that excludes homosexual life partners is concerned. In this regard, the learned Judge stated that:

> The precise parameters of relationships entitled to constitutional protection will often depend on the purpose of the statute. For instance in [*Satchwell* (1)] where the issue was pensions and related benefits, a mutual duty of support was an essential element. *In the present case, where the rights of children are implicated, this was not an essential element, though it might have been an appropriate one*.[579]

This statement is somewhat confusing, as it is unclear what Goldstone J meant by the words "though it might have been an appropriate one." The only conclusion that can be drawn from this statement is that the Court was of the opinion that even though the issue was not one which involved the estates of the parties or the extension of the patrimonial consequences of marriage to life partners, the existence of a reciprocal duty of support would nevertheless be a relevant (albeit not essential) consideration.[580]

In the end result, the Constitutional Court held that the word "married" was to be struck out throughout section 5 of the Act and that the words "or permanent same-sex life partner" were henceforth to be read in after the word "husband"

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576 *Satchwell (1)* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC).
577 Par [19].
578 See 3.2.2 above.
579 Par [24].
580 See Schäfer 2006: 630.

wherever the latter word appeared in the section. In addition, the words "as if the gamete or gametes of that woman or her husband were used for such artificial insemination" were to be struck out of section 5(1)(a). The effect of this order was that section 5 of the Act was in future to be read as follows:

> (1)
>
> (a) Whenever the gamete or gametes of any person other than a woman or her husband *or permanent same-sex life partner* have been used with the consent of both that woman and her husband, *or permanent same-sex life partner* for the artificial insemination of that woman, any child born of that woman as a result of such artificial insemination shall for all purposes be deemed to be the legitimate child of that woman and her husband *or permanent same-sex life partner* […].[581]
>
> (b) For the purposes of para (a) it shall be presumed, until the contrary is proved, that both the woman and her husband *or permanent same-sex life partner* have granted the relevant consent.
>
> (2) No right, duty or obligation shall arise between any child born as a result of the artificial insemination of a woman and any person whose gamete or gametes have been used for such artificial insemination and the blood relations of that person, except where—
>
> (a) that person is the woman who gave birth to that child; or
>
> (b) that person is the husband *or permanent same-sex life partner* of such a woman at the time of such artificial insemination.

4.2.2 Subsequent developments

The relief occasioned by this decision was, however, of short duration due to the fact that the *Children's Status Act* was repealed as of 1 July 2007 by the *Children's Act* 38 of 2005.[582] As a point of departure, it must be noted that the

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581 At this point the words "as if the gamete or gametes of that woman or her husband or permanent same-sex life partner were used for such artificial insemination" were struck out.

582 Section 313 read with Schedule 4.

"new" Act contains a provision (section 40) that is substantially similar to the *unmodified* section 5 of the *Children's Status Act*.[583] The section in question states the following:

> (1)
>
> (a) Whenever the gamete or gametes of any person other than a married person or his or her spouse have been used with the consent of both such spouses for the artificial fertilisation of one spouse, any child born of that spouse as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses as if the gamete or gametes of those spouses had been used for such artificial fertilisation.
>
> (b) For the purpose of paragraph (a) it must be presumed, until the contrary is proved, that both spouses have granted the relevant consent.
>
> (2) Subject to section 296 [dealing with surrogate motherhood], whenever the gamete or gametes of any person have been used for the artificial fertilisation of a woman, any child born of that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman.
>
> (3) Subject to section 296 [dealing with surrogate motherhood], no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete has or gametes have been used for such artificial fertilisation or the blood relations of that person, except when-
>
> (a) that person is the woman who gave birth to that child; or
>
> (b) that person was the husband of such woman at the time of such artificial fertilisation.

It is submitted that section 40 contains an interpretative problem in that subsection (1)(a) is capable of bearing two interpretations. The first (or ordinary interpretation) is that which was ostensibly intended by the Legislature, namely

583 Heaton 2007: 3-42; 2008(a): 51.

that if A (a male) and B (a female) are married to one another and the gametes of a third person (C) are used to fertilise B artificially, any child born of B is regarded as being the child of A and B for all intents and purposes. As Heaton[584] mentions, this interpretation will correspond with section 40(2). The second interpretation (or wider interpretation) is one which, although not probable is submitted nevertheless to be possible. It is constructed on two premises namely that the term "artificial fertilisation" includes surrogate motherhood[585] and secondly that subsection (1)(a) contains no indication of the fact that it is not intended to apply within the context of surrogacy. Bearing this in mind, the second interpretation envisions a situation where a female married woman is impregnated as a surrogate mother. On this basis, section 40(1)(a) could be interpreted in a totally opposite fashion: Suppose that in the example above C (female) is married to D (male). Suppose further that A and B (the commissioning parents) wish to have a child by way of surrogacy, and that A's sperm is used to impregnate C as the surrogate mother. This state of affairs could result in the reference to "spouses" and "married person" not referring to A and B (as they did in the first interpretation) but instead referring to C and D, with the absurd consequence that the child born of C would be presumed to be her and D's child. This can be illustrated more effectively by superimposing the parties onto section 40(1)(a) as it is currently framed, to wit:

> Whenever the gamete or gametes of any person *[that is to say A]* other than a married person or his or her spouse *[ie C and D]* have been used with the consent of both such spouses *[C and D]* for the artificial fertilisation of one spouse *[C],* any child born of that spouse *[C]* as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses *[C and D]* as if the gamete or gametes of those spouses had been used for such artificial fertilization.

584 2007: 3-43.

585 See Heaton 2008: 50 and Clark 1993: 769, 770.

What makes this state of affairs problematic is the fact that there is no indication in section 40(1)(a) (as for example is the case with section 40(2)) that it must be read subject to the Act's provisions regulating surrogacy. This implies that a direct conflict could potentially arise between the wider interpretation of section 40(1)(a) and the principles prescribed for surrogacy in the (yet to be enacted) chapter 19 of the Act. In order to remedy this defect, it is submitted that a proviso be inserted after the current final sentence to the effect that section 40(1)(a) shall not be interpreted so as to include surrogacy arrangements. This aspect is dealt with in more detail below.[586]

Over and above the interpretative problems which it poses, two further problematic aspects of this section are worth exploring in further detail for the purposes of this study:

4.2.2.1 The constitutionality of the Act and the so-called "choice argument"

Bearing the finding in the *J* case in mind, it is immediately apparent that section 40 of the *Children's Act* fails to provide for children born to unmarried same-sex life partners as being born of a married couple.[587] Consequently, it can be argued that the Act is *prima facie* unconstitutional.[588] Heaton[589] submits, in response to the latter contention, that:

> [I]t might, however, be argued that because same-sex couples now have the option of entering into a legally recognised civil union, their fundamental rights and those of any child they have as a result of artificial fertilisation are not infringed by section 40, or that any infringement there may be is justified by the couple's choice not to enter into a civil union.

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586 See 4.3.3 below.

587 In the past, such a child would have been termed a "legitimate" child. The *Children's Act* 38 of 2005 instead focuses on the marital status of the child's parents—see Heaton 2008: 49; 2007: 3-3.

588 See Cronjé and Heaton 2004: 233 (at note 47) writing before the *Civil Union Act* 17 of 2006.

589 2008: 51.

The argument that section 40 is not unconstitutional as the choice to marry is now available to all couples regardless of their gender is supported by Heaton in an earlier work[590] and by Louw.[591] It is submitted that this contention must be considered in further detail.

(a) Louw[592] clearly supports this contention (which for the purposes of this study is described as the "choice argument"), since, in her opinion, the decision in *J* was premised on the basis that same-sex marriage was impossible at the time of the judgment. While it must be conceded that Goldstone J indeed applied one of the findings in the *Du Toit* case—namely that it was "the applicants' status as unmarried persons which currently precludes them from joint adoption of the siblings is inextricably linked to their sexual orientation"—to find that the *Children's Status Act* discriminated unfairly, it is submitted that this was merely one of the factors upon which the judgment was premised. This is illustrated by the fact that, in considering whether or not the unfair discrimination of the legislation *in casu* could be justified, Goldstone J again quoted from the *Du Toit* case in which Skweyiya AJ had stated that:

> In this regard, [the impugned provisions of the *Child Care Act* 74 of 1983 and the *Guardianship Act* 192 of 1993] are not the only legislative provisions which do not acknowledge the *legitimacy and value of same-sex permanent life partnerships*. It is a matter of our history (and that of many countries) that *these relationships* have been the subject of unfair discrimination in the past. However, our Constitution requires that unfairly discriminatory treatment of *such relationships* cease. It is significant that there have been a number of recent cases, statutes and government consultation documents in South Africa *which broaden the scope of concepts such as ''family'', ''spouse'' and ''domestic relationship'', to include same-sex life partners*. These legislative and

590 2007: 3-42 and 3-43.
591 2007: 327 and 330.
592 2007: 327.

> jurisprudential developments indicate the growing recognition afforded to same-sex relationships.

The emphasised portions of this extract highlight the fact that the Courts in both *Du Toit* and in *J* were of the opinion that same-sex life partners were discriminated against *as a particular class of relationship which differed from marriage*.[593] The discrimination to which such couples were subjected was therefore not confined to the fact that they could not marry at the time, but also occurred in that their *relationships as such* were not recognised. This, it is further suggested, explains why Skweyiya J also categorically mentioned the fact that concepts such as "family", "spouse" and "domestic relationship" were being broadened: If the "choice argument" were henceforth to exclude permanent same-sex life partners from the ambit of the Act, this would serve to narrow these concepts instead of maintaining the trend of broadening them in accordance with the behests of the *Constitution*.[594]

(b) The second (and probably most potent) reason for submitting that the "choice argument" is untenable within the context of this type of legal problem is the fact that it focuses only on the partners themselves without taking the best interests and fundamental rights of the children into account.[595] The necessity of taking such interests and rights into account

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593 See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [36].

594 See Bonthuys 2007: 531: "In fact, by broadening the categories of people who can get married, such legislation retains and even strengthens the position of marriage as the template and ideal for all other relationships."

595 It is interesting to note that although Goldstone J mentioned the fact that "the rights of children [were] implicated" in the *J* case, he did not specifically address the issue of the twins' rights. This, it is submitted was an oversight, especially in view of the fact that the Court *a quo* had earlier held that the matter "very fundamentally concern[ed] the children in every aspect of it and [that it was] vital to take account of their best interests" (at par [8]) and later found the differentiation between married and unmarried couples to constitute "discrimination on the grounds of social origin and birth" (see par [27] of Magid J's judgment in the Court *a quo*).

is borne out by the *Constitution* itself[596] and by the *Children's Act*.[597] The argument that section 40 of the *Children's Act* in its unmodified state is constitutionally valid *simply due to the fact that same-sex couples now have the option of marriage available to them* would therefore contravene a constitutional imperative and its concomitant legislative supplement.

It is important to note that although it is correct to state that the issue at hand is whether the child conceived as a result of artificial fertilisation is deemed to be *born of married parents* (in other words in the pre-*Children's Act* sense of being born within wedlock), sight should not be lost of what this issue truly entails. This is because it is easy—particularly where unmarried couples are concerned—to overlook the deeper significance of this question, namely whether the life partner other than the birth mother can for all intents and purposes be regarded as being *the parent* of the child. For example, if such a life partner were not to be regarded as the parent of a child born of the birth mother this would imply that (notwithstanding the fact that he or she had willingly consented or been involved in the decision to impregnate the birth mother) no legal duty of support could arise between that partner and the child as he or she is not a "spouse" (or civil union partner).[598] This would possibly even be the case where (as on the facts of the *J* case) a female life partner's oocytes had been used along with donor sperm to impregnate the birth mother by way of *in vitro* fertilisation, as the definition of "parent" in section 1 of the *Children's Act* categorically excludes "any person who is biologically related to a child by reason only of being a gamete donor for purposes of

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596 See section 28(2) of the *Constitution*: "A child's best interests are of paramount importance in every matter concerning the child."

597 See *inter alia* sections 6(2); 7; 9; 10; 31 of Act 38 of 2005.

598 Consequently, even though it is true, as Lupton (2008: J 126) mentions, that "[t]he liability of a husband to maintain an AID [artificial insemination by donor] child born to his wife will hinge on the issue of consent," it appears as if the fact that the life partner is not a "spouse" in terms of section 40 will exclude such a partner's liability for maintenance.

artificial fertilisation."[599] Such a state of affairs would clearly not serve the best interests of the child so conceived.

(c) Thirdly, the contention that the "choice argument" cannot succeed within the context of section 40 of the *Children's Act* of 2005 is supported by other provisions of the same Act. An example hereof is to be found in the sections of the Act which will in future regulate adoption.[600] This branch of the law is chosen as an example specifically in the light of the *Du Toit* case (in which the failure of relevant legislation to provide for joint adoption by same-sex couples was held to be unconstitutional) as the rationale employed in that case was for the most part also employed in the *J* case.[601] Over and above providing for "a husband and wife" to adopt a child jointly, section 231 of the Act also provides for "partners in a permanent domestic life-partnership" to do the same. It is noteworthy that the Act does not differentiate between heterosexual and homosexual unmarried couples. Consequently, if the Act is prepared to allow unmarried persons to *adopt* children, it is submitted that there is no reason for the Act to regard a child born to such a couple by way of artificial fertilisation as not being the child of both of those unmarried parents.

(d) One final aspect to be borne in mind is the fact that the "choice argument" has, as discussed above, been criticised within the context of both heterosexual and homosexual couples, to the extent that it has been suggested earlier in this Chapter that the "contextualised choice model" dictates that this argument should only have a role to play in limited circumstances.[602] It is submitted that this criticism could also strengthen

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599 See para (b) of the definition of "parent."

600 Chapter 15 (sections 228 – 253).

601 See point (a) above.

602 See 3.3.2.2 above. As far as homosexual couples are concerned it is particularly interesting to note Wood-Bodley's submissions (2008(a): 54 *et seq* and 2008(b): 260 and 266) regarding the effects of homophobia on the decision to marry or to conclude a civil partnership.

the argument as to why the failure of section 40 to provide for life partners is unconstitutional.

In the light of the aforesaid it is submitted that Louw's statement does not reflect the true premise upon which the judgment in *J* was based. In addition, her contention[603] that the Legislature's reference to the word "spouse" is indicative of a conscious choice not to provide for same-sex life partners cannot be supported. It is submitted that the Act's failure to provide for life partners (whether of the same or opposite sex) both to be regarded as the parents of children conceived of artificial fertilisation is an oversight which should be remedied as soon as possible. Moreover, a combination of considerations (a) – (d) as explained in the preceding discussion highlights the fact that the "choice argument" should not be relevant in matters dealing with children. In such instances the best interests of the children should be the paramount consideration.

4.2.2.2 Practical consequences of section 40 of the Act: An analysis of the Act's differential treatment of heterosexual married and unmarried couples; male and female same-sex couples and relationships involving persons who have legally altered their sex description

(a) Opposite-sex couples

Assume that A (male) and B (female) are a heterosexual married couple. The ordinary interpretation of section 40(1)(a)[604] would lead to the conclusion that if B were to be fertilised artificially with the sperm of an outsider, A and B would be deemed to be the parents of the child so conceived.

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603 Louw 2007: 330.

604 See 4.2.2 above.

If A and B were an unmarried couple, section 40(1)(a) would not apply. If however B were artificially fertilised and later gave birth to a child, section 40(2) would come into play with the result that the child would be regarded as B's child. Until section 231 of the *Children's Act* comes into operation, A would not be able to adopt the child.

(b) Same-sex couples

As far as homosexual couples are concerned section 40 will apply within the context of same-sex relationships as the references in the section to "husband", "wife", "spouse" and "married person" will be interpreted so as to include such couples who have married one another or have concluded a civil partnership in terms of the *Civil Union Act* 17 of 2006.[605]

This notwithstanding, it is submitted that the Act will differentiate between male and female same-sex spouses or civil union partners in the event of a child having been conceived by artificial fertilisation.

i) Female couples

Assume that a lesbian couple (A and B) have married one another or entered into a civil partnership. On the ordinary interpretation of section 40(1)(a)[606] any child born to one of them as a result of artificial fertilisation will be regarded as the child of A and B and no further problems could arise. This state of affairs would be confirmed by section 40(2).[607]

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605 Section 13. Also see Heaton 2007: 3-42; 3-43; Louw 2007: 326 and 330.

606 See the explanation of the possible interpretations of section 40(1)(a)) in 4.2.2 above.

607 In the unlikely event of a surrogate mother being used to bear a child for a lesbian couple, the possibility of the second interpretation of section 40(1)(a) would have to be borne in mind. Pending the enactment of chapter 15 of the Act, this could result in the child born of a married surrogate mother being regarded as being the child of the surrogate.

If A and B were an unmarried couple, section 40(1)(a) could not apply. Nevertheless, in terms of section 40(2), the child conceived by artificial fertilisation will be presumed to be the child of the birth mother. The other life partner will be able to adopt the child in light of the decision in *Du Toit v Minister of Welfare and Population Development and Others*.[608]

ii) Male couples

If A and B in the example were a married male couple, it is self-evident that section 40(1)(a) would not be able to apply on the ordinary interpretation of section 40(1)(a) as neither A nor B could be fertilised or could give birth to the child. However, bearing in mind that the provisions on surrogacy have not yet come into operation, section 40(2) could result in any child born of a surrogate mother (C) as a result of her being artificially fertilised by the sperm of A or B being regarded as the child of C and not of A or B.[609] This would imply that, until the provisions regulating surrogacy come into operation, the only way in which the same-sex married couple[610] could both acquire parental responsibilities and rights over the child would be to adopt the child jointly.[611] This would be permissible in view of the *Du Toit* decision.

The same legal position would obtain if A and B were an unmarried couple.

(c) The position where one of the spouses has successfully applied for the alteration of his or her sex description

The *Alteration of Sex Description and Sex Status* Act 49 of 2003 regulates the position of persons who wish to alter their sex description in their birth register by virtue of the fact that they are intersexed or as a consequence of their congenital

608 2003 (2) SA 198 (CC).

609 The second interpretation of section 40(1)(a) [see 4.2.2 above] would strengthen this conclusion.

610 Or a couple who have entered into a civil partnership.

611 See Louw 2007: 330.

sexual characteristics having been altered by gender reassignment surgery or by natural evolvement.[612] In the event of such an application being successful, the Act provides that such a person is regarded as being of the amended sex description as from the date of the recording thereof.[613]

The impact of section 40 of the *Children's Act* [614] on the position of a person whose sex description has successfully been altered in terms of Act 49 of 2003 will depend on the person's "new" sex description, and as a consequence hereof, whether the marriage or life partnership entered into by such a person is viewed by the law as being between two persons of the same or opposite sex.

At least four possibilities present themselves in this regard:

Possibilities 1 and 2: Sex description altered from male to female

1. Assume that A was born male and that A's sex description is later altered from male to female. In consequence of a successful application in terms of Act 49 of 2003, A will now for all legal purposes be regarded as being a female. Should A marry a male person (B), the marriage will be a heterosexual marriage. The issue of artificial fertilisation as contemplated in section 40(1)(a) would however in all probability not arise in this scenario as neither A nor B would be capable of being fertilised or of bearing the child. This would imply that, despite the fact that the marriage is for all intents and purposes viewed by the law as being a heterosexual marriage, the impact of section 40 of Act 38 of 2005 on the position of a child conceived by artificial fertilisation will (pending the enactment of chapter 19 of the Act) be the same as that of an all-male *married* same-sex couple as explained in (b)(ii) above. This would imply that, bearing in

612 Section 1 of the Act defines an "intersexed" person as someone "whose congenital sexual differentiation is atypical, to whatever degree."

613 Section 3(2).

614 Act 38 of 2005.

mind that the provisions on surrogacy have not yet come into operation, section 40(2) could result in any child born of a surrogate mother (C) as a result of her being artificially fertilised by the sperm of A[615] or B being regarded as the child of C and not of A or B.[616] This would imply that until the provisions regulating surrogacy come into operation, the only way in which this heterosexual married couple[617] could both acquire parental responsibilities and rights over the child would be to adopt the child jointly.

If A and B were an unmarried couple, section 40(2) would once again imply that the child born of C was C's child. However, because of the fact that A and B are regarded as a heterosexual couple, they would not be able to adopt the child jointly until section 231 of the *Children's Act* [618] comes into operation.

2. On the other hand, if A (now female) marries a female person (C), the marriage will be a same-sex marriage, with the result that the legal position set out in (b)(i) above regarding female same-sex couples would apply.

If A and C were an unmarried couple, section 40(2) would apply, with the result that if C were fertilised artificially she—as the birth mother—would be regarded as the parent of the child so born. As it is a same-sex life partnership, A would be permitted to adopt the child in the light of the *Du Toit* decision.

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615 Assuming, for example, that A had frozen his sperm prior to the alteration of his sex.

616 The second interpretation of section 40(1)(a) [see 4.2.2 above] would strengthen this conclusion.

617 Or a couple who have entered into a civil partnership.

618 38 of 2005.

Possibilities 3 and 4: Sex description altered from female to male

3. Assume that (D) was born female and later had her sex description altered to that of a male. If D were to marry a female person (E), artificial fertilisation as contemplated in section 40(1)(a) could take place if E were to be fertilised artificially by the sperm of an anonymous donor. In such an instance, D and E would be deemed to be the parents of the child so conceived.

   However, if D and E were an unmarried couple section 40(1)(a) would not apply. If however E were artificially fertilised and later gave birth to a child, section 40(2) would come into play with the result that the child would be regarded as E's child. Until section 231 of the *Children's Act* comes into operation, D would however not be able to adopt the child as the *Child Care Act* makes no provision for joint adoption by heterosexual life partners.

4. If D (now male) were to marry another male person (F), the issue of artificial fertilisation as contemplated in section 40(1)(a) would once again in all probability not arise in this scenario as neither D nor F would be capable of being fertilised or of bearing the child.[619] This would imply that the impact of section 40 of Act 38 of 2005 on the position of a child conceived by artificial fertilisation would (pending the enactment of chapter 15 of the Act) be the same as that of an all-male same-sex couple. Any

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619 In the absence of any case law on the matter, it is uncertain to what extent the *Alteration of Sex Description and Sex Status Act* 49 of 2003 requires the person applying for gender reassignment to assume the biological characteristics of the "new" sex. For example, it is unclear whether a person in the position of D in this example would have to prove that he or she is no longer capable of procreating as a female (D's original sex) before the application for the alteration of D's sex description from female to male would be successful. According to Lupton (2008: J4) gender reassignment from female to male "requires a mastectomy since testosterone treatment only results in a moderate reduction in breast size. The next step involves a hysterectomy and the removal of the ovaries. Phallus construction usually commences in conjunction with the hysterectomy and is adequate for the purposes of urination but is not suitable for coitus" (footnotes omitted).

child born of a surrogate mother (G) as a result of her being artificially fertilised by the sperm of F would, in consequence of section 40(2), be regarded as the child of G and not of F.[620] This would imply that, until the provisions regulating surrogacy come into operation, the only way in which the same-sex married couple[621] could both acquire parental responsibilities and rights over the child would be to adopt the child jointly.

The same legal position would obtain if D and F were an unmarried couple.

(d) Summary

The position described above is summarised by the diagram on the page that follows (Figure 5.1):

620 The second interpretation of section 40(1)(a) [see 4.2.2 above] would strengthen this conclusion.

621 Or a couple who have entered into a civil partnership.

OPPOSITE SEX relationships		**SAME-SEX relationships**				**PERSONS WITH AN ALTERED SEX DESCRIPTION**							
		FEMALE		MALE		"New" sex FEMALE				"New" sex MALE			
Married	Unmarried	Married	Unmarried	Married	Unmarried	Married to:		Unmarried and living with:		Married to:		Unmarried and living with:	
						Female	Male	Male	Female	Female	Male	Male	Female
Applicable provision in *Children's Act* 38 of 2005:													
40(1)(a)	40(2)	40(1)(a)	40(2)	40(2)	40(2)	40(1)(a)	40(2)	40(2)	40(2)	40(1)(a)	40(2)	40(2)	40(2)
Consequences regarding parentage and adoption:													
Both are parents	Only birth mother is parent Other life partner may not yet adopt	Both are parents	Only birth mother is parent Other life partner may adopt	Surrogate birth mother is parent Same-sex married couple may adopt	Surrogate birth mother is parent Same-sex unmarried couple may adopt	Both are parents	Surrog birth mother is parent Hetero married couple may adopt jointly	Surrog birth mother is parent Hetero life partners may not yet adopt jointly	Birth mother is parent Other life partner may adopt	Both are parents	Surrog birth mother is parent Both may adopt jointly	Surrog birth mother is parent Both may adopt jointly	Birth mother is parent Other life partner may not yet adopt

Figure 5.1: The legal position prior to the coming into operation of the remainder of the Children's Act 38 of 2005

(e) The position that will obtain once chapter 19 of the Children's Act 38 of 2005 comes into operation

i) Introductory remarks

In order to appreciate the impact of the *Children's Act*'s chapter dealing with surrogate motherhood (chapter 19), the following introductory remarks need to be made:

- Section 1 of the Act defines the concepts "surrogate mother"; "commissioning parent" and "surrogate motherhood agreement" as follows:

> **'surrogate mother'** means an adult woman who enters into a surrogate motherhood agreement with the commissioning parent;
>
> **'commissioning parent'** means a person who enters into a surrogate motherhood agreement with a surrogate mother;
>
> **'surrogate motherhood agreement'** means an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent.

- A "commissioning parent" can be a single person, or a person involved in a "permanent relationship." [622]

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622 As deduced from section 293(1), which states that: "Where a commissioning parent is married or involved in a permanent relationship, the court may not confirm the agreement unless the

- The commissioning parent(s) is / are required to enter into a "surrogate motherhood agreement" with the surrogate mother. This agreement must be in writing and must be confirmed by a High Court with appropriate jurisdiction before the agreement will be valid. [623]

- In the case of a commissioning parent who is involved in a permanent relationship, the High Court may not confirm the surrogate motherhood agreement unless the "husband, wife or partner" of such parent has consented in writing to the agreement and, in so doing, has become a party thereto. [624]

- A surrogate mother may not be fertilised artificially unless the agreement has been confirmed by the High Court. Once confirmed, the artificial fertilisation must take place within 18 months of such confirmation. [625]

- A valid surrogate motherhood agreement has the effect that any child born of the surrogate mother in consequence of the agreement is for all purposes regarded to be the child of the commissioning parent(s) as from childbirth. [626]

- This notwithstanding, once the child has been born, a surrogate mother "who is also a genetic parent of the child" may terminate the agreement within sixty days of the child's birth. [627] Termination takes place by written notice to the Court concerned, and, once confirmed by that Court, the parental rights which would have vested in the commissioning parent(s)

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husband, wife or partner of the commissioning parent has given his or her written consent to the agreement and has become a party to the agreement."

623 Section 292.

624 Section 293(1).

625 Section 296. This section is particularly relevant as it is specifically referred to as a precondition to section 40(2) of the Act.

626 Section 297(1)(a).

627 Section 298(1).

> are terminated and now vest in "the surrogate mother, her husband or partner, if any, or if none, the commissioning father." [628]

Bearing the above in mind, the enactment of chapter 19 of the Act will have a definite impact on the treatment of heterosexual married and unmarried life partners, male and female same-sex life partners and relationships involving persons who have legally altered their sex description. This impact can be illustrated by projecting the changes (in the shaded areas) onto the same diagram as Figure 5.1 above. It must be noted that Figure 5.2 illustrates the legal position if chapter 19 were to become operational in isolation. *In other words, it is presumed that the provisions of the Children's Act that deal with adoption (such as section 231) are not yet operative.*

The diagram assumes that a valid surrogate motherhood agreement has been entered into and carried out.

Figure 5.2 (overleaf) illustrates the position once chapter 19 becomes operational in isolation:

628 Section 299(a) read with section 298(1) and (2).

OPPOSITE SEX relationships		**SAME-SEX relationships**				**PERSONS WITH AN ALTERED SEX DESCRIPTION**							
		FEMALE		MALE		"New" sex FEMALE				"New" sex MALE			
Married	Unmarried	Married	Unmarried	Married	Unmarried	Married to:		Unmarried and living with:		Married to:		Unmarried and living with:	
						Female	Male	Male	Female	Female	Male	Male	Female
Applicable provision in *Children's Act* 38 of 2005:													
40(1)(a)	40(2)	40(1)(a)	40(2)	40(2) subject to 296	40(2) subject to 296	40(1)(a)	40(2) subject to 296	40(2) subject to 296	40(2)	40(1)(a)	40(2) subject to 296	40(2) subject to 296	40(2)
Consequences regarding parentage and adoption (Assuming that a valid surrogate mother agreement was entered into):													
Both are parents	Only birth mother is parent Other life partner may not yet adopt	Both are parents	Only birth mother is parent Other life partner may adopt	Chapter 19 of Act: Commis parents are parents of child. No adoption needed	Chapter 19 of Act: Commis parents are parents of child. No adoption needed	Both are parents	Chapter 19 of Act: Commis parents are parents of child. No adoption needed	Chapter 19 of Act: Commis parents are parents of child. No adoption needed	Birth mother is parent Other life partner may adopt	Both are parents	Chapter 19 of Act: Commis parents are parents of child. No adoption needed	Chapter 19 of Act: Commis parents are parents of child. No adoption needed	Birth mother is parent Other life partner may not yet adopt

Figure 5.2: Effect of the coming into operation of chapter 19 of the Act (light grey shaded areas)

(f) The legal position if chapter 19 of the Children's Act as well as section 231 of the Act were to come into operation

As seen above, section 231 of the Act permits a child to be adopted:

> (a) jointly by-
> (i) a husband and wife;
> (ii) partners in a permanent domestic life-partnership; or
> (iii) other persons sharing a common household and forming a permanent family unit;
> (b) by a widower, widow, divorced or unmarried person;
> (c) by a married person whose spouse is the parent of the child or by a person whose permanent domestic life-partner is the parent of the child;
> (d) by the biological father of a child born out of wedlock; or
> (e) by the foster parent of the child.

If this section were to come into operation along with chapter 19 of the *Children's Act* 38 of 2005, this would have the effect that joint adoption would be permitted within the context of *all* life partnerships (whether heterosexual or homosexual) and that the life partner of the birth mother of a child conceived by artificial fertilisation would be permitted to adopt the child. However, bearing the current wording of section 40 in mind, adoption would be the only way for the life partner of the birth mother to be regarded as the parent of the child. On the page that follows, the legal position after the coming into effect of both section 231 and chapter 19 of the *Children's Act* is illustrated. The effect of chapter 19 is illustrated by the same grey shading as in Figure 5.2, while that of section 231 is illustrated by the darker grey shaded sections:

OPPOSITE SEX relationships		**SAME-SEX relationships**				**PERSONS WITH AN ALTERED SEX DESCRIPTION**							
		FEMALE		MALE		"New" sex FEMALE				"New" sex MALE			
Married	Unmarried	Married	Unmarried	Married	Unmarried	Married to:		Unmarried and living with:		Married to:		Unmarried and living with:	
						Female	Male	Male	Female	Female	Male	Male	Female
Applicable provision in *Children's Act* 38 of 2005:													
40(1)(a)	40(2)	40(1)(a)	40(2)	40(2) subject to 296	40(2) subject to 296	40(1)(a)	40(2) subject to 296	40(2) subject to 296	40(2)	40(1)(a)	40(2) subject to 296	40(2) subject to 296	40(2)
Consequences regarding parentage and adoption (Assuming that a valid surrogate mother agreement was entered into):													
Both are parents	Only birth mother is parent Other life partner may adopt	Both are parents	Only birth mother is parent Other life partner may adopt	Chapter 19 of Act: Commis parents are parents of child. No adoption needed	Chapter 19 of Act: Commis parents are parents of child. No adoption needed	Both are parents	Chapter 19 of Act: Commis parents are parents of child. No adoption needed	Chapter 19 of Act: Commis parents are parents of child. No adoption needed	Birth mother is parent Other life partner may adopt	Both are parents	Chapter 19 of Act: Commis parents are parents of child. No adoption needed	Chapter 19 of Act: Commis parents are parents of child. No adoption needed	Birth mother is parent Other life partner may adopt

Effects of section 231 of Act 38 of 2005

Figure 5.3: Effect of section 231 read with chapter 19 of the Act

As can be seen from Figure 5.3, the difficulty that remains is that, despite the coming into operation of section 231, no life partner of a birth mother (irrespective of sex) is legally regarded as being the parent of the child as from birth.

(g) Remaining differential treatment after section 231 and chapter 19 have come into operation

As seen above, even if section 231 as well as chapter 19 of the *Children's Act* 38 of 2005 come into operation, the law will still differentiate between married and unmarried couples in that section 40(2) of the Act will still regard the birth mother of a child conceived by artificial fertilisation to be the only parent in the case of unmarried couples.

It is submitted that this position cannot be countenanced. This submission is strengthened by the fact that, in the case of a surrogacy agreement, section 293 of the Act will in future require the life partner of a commissioning parent to consent to the surrogacy agreement (and thereby become a party thereto) before a Court is permitted to confirm the agreement. [629] Once the child is born, both commissioning parents are then regarded as being the parents of the child. [630] On the other hand, the fact that section 40(1)(a) of the Act does not make provision for life partners implies (i) that the consent of such a partner is not required for the artificial fertilisation of the birth mother, and (ii) that such persons cannot be regarded as the parents of any children so conceived. Consequently, adoption would be the only option for such couples.

It simply does not make sense to require the life partner of a commissioning parent to consent to a surrogacy agreement (and thereafter to allow such life partner to be the parent of the child), while neither requiring (nor permitting) the

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629 Section 293(1).

630 Section 293(1).

same in the case of artificial fertilisation, thereby forcing such a partner to adopt the child in order to be regarded as its parent.

It is consequently suggested that section 40(1)(a) and (3) should be amended so as to provide for a life partner who has consented to the artificial fertilisation of his or her partner also to be regarded as the parent of the child so conceived. Doing so would not only eliminate the differential treatment of such persons, but would also eliminate the circuitous (and unnecessary) adoption route which they would otherwise be required to take.

In order to accomplish this, it is suggested that the amendments to the fore-runner of section 40 (namely section 5 of the *Children's Status Act*) [631] as ordered by the Constitutional Court in *J and Another v Director-General, Department of Home Affairs, and Others* [632] should in substance be transplanted into the Act. The only deviation from the order in the *J* case would be that the Act would simply provide for "permanent life partners" as opposed to same-sex life partners only.

In order to facilitate the operational effect of this amendment, it is also suggested that section 40(2) be amended so as to make its application subject to that of section 40(1)(a). If this is not done, section 40(1)(a) and 40(2) would be in conflict with one another to the extent that they both applied to an *unmarried* woman who was fertilised artificially.

As these are not the only amendments suggested for section 40 of the *Children's Act*, this aspect will be revisited in the concluding remarks to this section (see 4.3 below). For now, it will suffice to say that section 40(1)(a) should be amended to the extent suggested above.

631 82 of 1987.

632 2003 (5) SA 621 (CC) at par [28].

The effect of the amendments suggested for section 40 along with the coming into operation of section 231 and chapter 19 of the *Children's Act* are illustrated by Figure 5.4 (overleaf). It is important to note that if section 40 is amended as this study suggests, this will have the effect of overlapping with the effect of the coming into operation of section 231 of the Act (as shown by the dark gray shaded areas in Figure 5.3). For this reason, the effect of the amended section 40 is also illustrated in the same dark grey shading in Figure 5.4.

OPPOSITE SEX relationships		**SAME-SEX relationships**				**PERSONS WITH AN ALTERED SEX DESCRIPTION**							
		FEMALE		MALE		"New" sex FEMALE				"New" sex MALE			
Married	Unmarried	Married	Unmarried	Married	Unmarried	Married to:		Unmarried and living with:		Married to:		Unmarried and living with:	
						Female	Male	Male	Female	Female	Male	Male	Female
Applicable provision in *Children's Act* 38 of 2005:													
40(1)(a)	**40(1)(a)**	40(1)(a)	**40(1)(a)**	40(2) subject to 296	40(2) subject to 296	40(1)(a)	40(2) subject to 296	40(2) subject to 296	**40(1)(a)**	40(1)(a)	40(2) subject to 296	40(2) subject to 296	**40(1)(a)**
Consequences regarding parentage and adoption (Assuming that a valid surrogate mother agreement was entered into):													
Both are parents	Both are parents No adoption needed	Both are parents	Both are parents No adoption needed	Chapter 19 of Act: Commis parents are parents of child. No adoption needed	Chapter 19 of Act: Commis parents are parents of child. No adoption needed	Both are parents	Chapter 19 of Act: Commis parents are parents of child. No adoption needed	Chapter 19 of Act: Commis parents are parents of child. No adoption needed	Both are parents No adoption needed	Both are parents	Chapter 19 of Act: Commis parents are parents of child. No adoption needed	Chapter 19 of Act: Commis parents are parents of child. No adoption needed	Both are parents No adoption needed

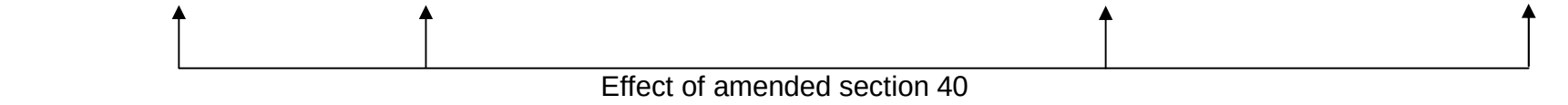

Figure 5.4: Effect of amended section 40 read with section 231 as well as chapter 19 of the Act

4.3 Conclusions regarding adoption and artificial fertilisation

4.3.1 Conclusion: The "choice argument"

It is submitted that a globular approach comprising the considerations which formed the true premise in both the *J* and the *Du Toit* cases; the broader scheme of the *Children's Act* 38 of 2005 and the criticism which has been levelled at this approach earlier in this Chapter highlights the fact that the so-called "choice argument" cannot be relevant in instances where the interests of children are concerned.

4.3.2 Conclusion regarding adoption within the context of life partnerships

The current position that allows all couples other than unmarried heterosexual life partners to adopt children cannot be countenanced for the reasons set out in 4.1 above and is unconstitutional to the extent that it infringes upon the fundamental rights of the child as contained in section 28 of the *Constitution* and consequently does not accord pre-eminence to the best interests of children who could otherwise be adopted by such couples. The enactment of section 231 of the *Children's Act* (which will broaden the scope of persons entitled to adopt quite considerably) is therefore eagerly anticipated.

4.3.3 Conclusions regarding artificial fertilisation and life partners

(i) Section 40 of the *Children's Act* has nullified the Constitutional Court's judgment in *J and Another v Director-General, Department of Home Affairs, and Others.* [633] The preceding discussion in 4.2 however highlights, bearing the best interests of the child, the lack of validity of the "choice argument" and the legislative scheme of the remainder of the Act in mind, the necessity of making the following submissions:

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633 2003 (5) SA 621 (CC).

- section 40 of the Act as it is currently framed is unconstitutional to the extent that it has deviated from the Constitutional Court's order in the *J* case (and therefore does not allow *same-sex* life partners both to be regarded as the parents of a child conceived by artificial fertilisation); and

- the Act is also unconstitutional to the extent that it does not provide for *heterosexual* life partners both to be regarded as the parents of a child conceived as a result of artificial fertilisation.

(ii) Section 40(1)(a) of the Act poses an interpretative problem when considered in the light of surrogate motherhood and should be amended in order to circumvent this difficulty. [634] This amendment is illustrated in point (ix) below.

(iii) Pending the coming into operation of section 231 and chapter 19 of the *Children's Act*, section 40 of the Act will differentiate in its treatment of heterosexual married and unmarried couples; male and female same-sex couples and relationships involving persons who have legally altered their sex description. This differentiation is illustrated in Figure 5.1.

(iv) If section 231 and chapter 19 are enacted, the position will improve as far as surrogacy and adoption by heterosexual life partners is concerned (see Figures 5.2 and 5.3).

(v) Nevertheless, despite the coming into operation of section 231 and chapter 19, life partners of persons artificially fertilised will still not (in consequence of section 40(2) of the Act) be regarded as the parents of children so conceived. It is submitted that this position is untenable.

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634 See 4.2.2 above.

(vi) In the light of all of the above, it is suggested that section 40(1)(a); 40(2) and 40(3)(b) of the *Children's Act* should be amended.

(vii) The final issue that remains is to determine which terminology should be adopted in the proposed amendments to section 40 of the Act. In this regard, it is suggested that the safest route would be to suggest terminology that is consistent with that employed by proposed legislation that will in all probability regulate the legal position of life partners in future. In this regard, the domestic partnership rubric dictates (as seen in Chapter 3) that the draft *Domestic Partnership Bill,* 2008 should serve as the starting point. This Bill is dealt with comprehensively in Chapter 7 below (where it is modified in accordance with the conclusions drawn in this Part of this study and further aligned with other legislation as prescribed by the domestic partnerships rubric). [635] At this stage it will suffice to say that the Bill defines the term "domestic partnership" as including both "registered" and "unregistered" domestic partnerships. However, it does not deal with the position of children conceived by artificial fertilisation in a satisfactory or clear-cut manner, and the solution to this problem will be dealt with in Chapter 7. [636] For now cognisance can be taken of the fact that the provisions of the *Children's Act* and the Bill itself require urgent amendment in order for true alignment between these two pieces of legislation to be achieved. However, the first step towards achieving this goal is to make use of consistent terminology, and to this end it is suggested that the term "domestic partnership" be used in the proposed amendments to section 40, and that the reference to "life-" in section 231

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635 See 5 in Chapter 3 above.

636 In 12.2.4 of that Chapter it will be suggested that the definition of "child of a domestic partnership" must be amended so as to specifically provide for such children, and that a definition of "child *born into* a domestic partnership" should be inserted so as to ensure that clause 17 of the Bill (which presumes the male partner to a registered domestic partnership to be the biological father of a child born into that relationship) functions effectively.

of the *Children's Act* be amended to refer instead to a "domestic partnership." [637]

(viii) As an outflow of point (vii) above, it is also suggested that definitions of "domestic partner", "domestic partnership" and "unregistered domestic partnership" be inserted into section 1 the *Children's Act*. The proposed definitions should read as follows:

> **"domestic partner"** means a partner to a registered or unregistered domestic partnership in accordance with the *Domestic Partnerships Act of …*
>
> **"domestic partnership"** means a registered or unregistered domestic partnership in accordance with the *Domestic Partnerships Act of …*
>
> **"unregistered domestic partnership"** means an unregistered domestic partnership in accordance with the *Domestic Partnerships Act of …* [638]

(ix) Bearing points (i) – (viii) in mind, the suggested amendments to section 40 are the following:

- Deleting the word "married" wherever it appears in the section;
- Inserting the words "or permanent domestic partner" in section 40(1)(a) and (b) after the words "spouse" and "spouses";
- Deleting the words "as if the gamete or gametes of those spouses had been used for such artificial fertilisation" in section 40(1)(a);

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[637] This aspect is addressed again in Chapter 7, where it is also suggested that a number of other sections of the *Children's Act* of 2005 (such as sections 21 and 242(1)(a)) will also have to be amended so as to be aligned with the Bill.

[638] Although the necessity for the insertion of this particular definition will not be immediately apparent, it is necessary so as to align the Bill with section 21 of the *Children's Act* of 2005 ("Parental responsibilities and rights of unmarried fathers"). This will be explained in detail in 12.2.4 in Chapter 7.

- Inserting a proviso after the final sentence (in its amended form) to the effect that section 40(1)(a) shall not be interpreted so as to include surrogacy arrangements;
- Inserting the words "in circumstances other than those contemplated in subsection 1(a)" after the words "whenever the gamete or gametes of any person have been used for the artificial fertilisation of a woman" in section 40(2); and
- Inserting the words "or permanent domestic partner" after the word "husband" in section 40(3)(b).

Section 40 of the Act should be amended to read as follows (words inserted are italicised and words deleted are indicated by […]):

Rights of child conceived by artificial fertilisation

(1)

(a) Whenever the gamete or gametes of any person other than a [...] [639] person or his or her spouse *or permanent domestic partner* have been used with the consent of both such spouses *or permanent domestic partners* for the artificial fertilisation of one spouse *or permanent domestic partner*, any child born of that spouse *or permanent domestic partner* as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses *or permanent domestic partners*: *Provided that this subsection shall not be interpreted in such a way as to include a surrogate motherhood agreement*.

(b) For the purpose of paragraph (a) it must be presumed, until the contrary is proved, that both spouses *or permanent domestic partners* have granted the relevant consent.

639 It is proposed that the word "married" be deleted.

(2) Subject to section 296, whenever the gamete or gametes of any person have been used for the artificial fertilisation of a woman *in circumstances other than those contemplated in subsection 1(a)*, any child born of that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman.

(3) Subject to section 296, no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete has or gametes have been used for such artificial fertilisation or the blood relations of that person, except when-

(a) that person is the woman who gave birth to that child; or

(b) that person was the husband *or permanent domestic partner* of such woman at the time of such artificial fertilisation.

5. CONCLUSION

In this Chapter the most important judicial pronouncements on the legal position of life partners in South Africa were analysed with a view to drawing conclusions for the purposes of modifying the *Domestic Partnerships Bill*, 2008 in accordance with the domestic partnership rubric advocated in Chapters 2 and 3. One of the major contributions in this regard was the development in this Chapter of the so-called "contextualised choice model." This model was developed on the premise of a number of important lessons regarding the distinction between need-based and property disputes and their relationship with the so-called "choice argument", namely the contention that parties who have elected not to marry one another are, by virtue of this choice, not entitled to avail themselves of the protection provided by matrimonial (property) law. While traditionally applied only within the context of heterosexual couples, this argument has, since the coming into operation of the *Civil Union Act* 17 of 2006, acquired an extra dimension due to the fact that same-sex couples now also have the option of marriage (or similar

formalisation) [640] available to them. However, on the basis of a detailed analysis of *Volks NO v Robinson* coupled with valuable research conducted by authors such as Wood-Bodley, [641] it was concluded that neither heterosexual nor homosexual unmarried couples necessarily have the option of formalising their relationships available to them. This finding was taken a step further by coupling it with the rationale employed by the highest Courts in South Africa as a result of which it was concluded that the "choice argument" should play no role in deciding whether or not to extend a need-based claim that was previously reserved for spouses to unmarried partners, but that the vital ingredient for the extension thereof should instead be the presence or otherwise of a reciprocal duty of support. As a corollary hereof, the preliminary conclusion was reached that the "choice argument" may have some role to play in instances where life partners who have elected not to formalise their relationships attempt to avail themselves of matrimonial property law in order to solve their property disputes. In the end result, it is submitted that cognisance must be taken of these findings in the legislation that will be suggested in consequence of the domestic partnership rubric.

Regarding the extent to which the concept of *consortium omnis vitae* is currently recognised between life partners, it was concluded that a nuanced form of this concept has indeed been recognised by our Courts, but that this notion requires further development (preferably by the Legislature) in order for it to be comparable with that encountered in the law of marriage. It is suggested that the *Domestic Partnerships Bill,* 2008 as modified in accordance with the rubric is the ideal vehicle for facilitating this process, as the Bill's distinction between registered and unregistered domestic partnerships (and the concomitant distinction between relationships wherein a formal public commitment has been undertaken and those where there is none) would provide the ideal framework

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640 By way of the civil partnership in terms of the *Civil Union Act*. Note that this option is also available to heterosexual couples—see 3 in Chapter 3.

641 2008 (a): 46 *et seq*. Also see Bonthuys 2007: 540, 541 and De Vos 2007(a): 463 *et seq*.

within which the notion could be extended to such partners. This possibility will be explored in Chapter 7.

In the final part of this Chapter the judicial developments regarding lesbian life partners and children were considered. In this regard it was concluded that section 40 of the *Children's Act* 38 of 2005 must be amended in order to ensure a consistent legal position as far as children conceived by artificial fertilisation and born in terms of surrogacy agreements are concerned, and that, while the inconsistent position regarding all unmarried couples and children will be ameliorated by the coming into operation of section 231 and chapter 19 of the *Children's Act*, this inconsistency will only finally be resolved by proper alignment of this Act with the prospective domestic partnership legislation developed in the light of the rubric.

In the Chapter that follows the (piecemeal) protection provided by the law of obligations and by legislation will be evaluated with a view to distilling further principles for guiding the development of family law in general and the rubric in particular.

CHAPTER 6:

PROTECTION PROVIDED BY THE LAW OF OBLIGATIONS AND DEVELOPMENTS OCCASIONED BY THE LEGISLATURE

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1. INTRODUCTION

As seen in the background to Chapter 1[1] and in the introduction to Chapter 5 the law as it stood at 27 April 1994 did not extend any of the invariable consequences of marriage to life partnerships. While the previous Chapter has shown that in post-1994 South Africa the Courts have extended certain consequences of marriage to unmarried couples, this piecemeal recognition has not created a "law of life partnerships" as such. Nevertheless, "the ordinary rules and remedies of the law"[2] such as the law of obligations (notably the law of contract) can in apposite circumstances be utilised by life partners to obtain some form of recognition of their relationship, and to assist in regulating the (patrimonial) consequences of its termination. In addition, the Legislature has also provided piecemeal recognition to life partnerships over the last seventy or so years. This Chapter aims to evaluate the efficacy of these options.

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1 See 1 in Chapter 1 above.

2 SALRC 2006: 110.

2. PROTECTION PROVIDED BY THE LAW OF OBLIGATIONS

2.1 The law of contract

2.1.1 The "cohabitation contract"

Life partners (regardless of their sex) are permitted to enter into an express contractual agreement that will regulate their respective obligations during the subsistence of their union and the (patrimonial) consequences of the termination thereof. Such agreements are sometimes referred to as "cohabitation contracts" or "domestic partnership agreements." In order to avoid confusion between these agreements and those provided for by the *Domestic Partnerships Bill,* 2008 the term "life partnership agreement" will be used for the purposes of this Chapter.

2.1.1.1 Enforceability

As far as enforceability is concerned, life partnership agreements have traditionally presented two problems, namely (i) that they are only enforceable between the parties thereto, and (ii) that Courts could potentially refuse to enforce such agreements on the grounds that they were immoral.[3] While the first contention is *strictu sensu* correct, it has been seen that an undertaking between life partners may nevertheless entail consequences for persons not party thereto.[4] Regarding the second difficulty, it has been opined that a Court may refuse to sanction or to enforce an agreement between two persons who cohabit while being aware of the fact that they are not married, on the basis of the general principle that the Courts refuse to sanction any agreement that

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[3] See SALRC 2006: 117 – 119; Sinclair and Heaton 1996: 279, 280; Schwellnus 1995: 155 – 157.

[4] See the opinion regarding the impact of the decision in *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) on outsiders in the discussion of *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) in 3.3.1.2 in Chapter 5.

"promotes immorality."[5] However it is true, as Hahlo[6] points out, that the mere fact of cohabitation will not invalidate an agreement between the cohabitants that is not related to their conjugal relationship. So, for example, where a married man and his mistress lived together for over two decades while she was aware of the fact that he was married, the Court—as far back as in 1953—held that a legitimate contract of partnership had been entered into between them "as the object of the partnership was to provide for their own livelihood and that of their children."[7] In 1984 the finding that a universal partnership could be created tacitly between persons who were not validly married in terms of South African law provided further support for the argument that life partnership agreements could no longer be regarded as *contra bonos mores*.[8]

In contemporary South Africa it is submitted that there is no longer room for arguing that a contractual undertaking between cohabitants can be null and void *per se*.[9] As will be seen in more detail in Chapter 7,[10] public policy is "rooted in our Constitution and the fundamental values it enshrines"[11] giving rise to "an objective normative value system."[12] A contract will consequently be viewed as contrary to public policy when the *Constitution* itself cannot sanction its enforcement.[13] As far as life partners are concerned, since the coming into operation of the Bill of Rights in 1994 and the subsequent decision of the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister*

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5 Labuschagne 1985: 222. Also see Schwellnus 1995: 155.

6 1985: 37 and 1972: 324, 325.

7 See *V (also known as L) v De Wet, NO* 1953 (1) SA 612 (O) at 616 (G).

8 Thomas 1984: 456.

9 See Van der Merwe *et al* 2007: 11 "[t]he view that a contract is constituted by agreement signifies the recognition of individual autonomy as a philosophical premise… Freedom of contract [as a derivative of the notion of autonomy] means that an individual is free to decide whether, with whom, and on what terms to contract… The rules of the law of contract reflect the attempts in the legal system to achieve a balance between relevant principles and policies so as to satisfy prevailing perceptions of justice and fairness, as well as economic, commercial and social expediency. For this reason the law of contract has a dynamic and changing nature."

10 The influence of public policy in the law of contract is discussed in detail in 7.2.2.2.2 in Part 3 (Chapter 7) below.

11 *Per* Cameron JA in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at par [91].

12 *Per* Griesel J in *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C) at par [24].

13 *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at par [91].

of Home Affairs,[14] it is trite that the *Constitution* guarantees the rights of equality and dignity of gays and lesbians, with the result (*inter alia*) that such couples' right to have their family life respected and protected has been confirmed.[15] As marriage was, until 2006, simply not an option for such couples, the only way for them to regulate certain aspects of their relationship and family life in the absence of alternative statutory regulation was to resort to contractual protection.[16] If such a same-sex couple were to do so by way of express agreement it could certainly not be argued that this would offend the constitutionally-founded and value-driven notion of public policy. In fact, bearing the lack of alternative protection in mind, the contrary would surely be true.[17] This point is underscored by the fact that our Courts have, in the absence of any such express agreement, on a number of occasions been prepared to infer the existence of, and give effect to tacit reciprocal support obligations between homosexual life partners.[18] As far as heterosexual couples are concerned, although the Constitutional Court in *Volks NO v Robinson*[19] failed to infer the existence of a reciprocal duty of support,[20] the Court expressed no objection to the possibility of cohabitants regulating certain aspects of their relationship by agreement.

The argument that cohabitation contracts are contrary to public policy *per se* is therefore no longer valid. In short, Singh[21] is correct when she states that "[a]n agreement between non-marital partners is unenforceable only *to the extent* that it *explicitly* rests upon the immoral and illicit consideration of meretricious sexual services."[22]

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14 2000 (2) SA 1 (CC).

15 At par [53] and [54].

16 Bala 2000: 190.

17 See Sinclair and Heaton 1996: 280, 281.

18 See for example *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) at par [25]; *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) at par [11] – [16].

19 2005 (5) BCLR 446 (CC) at par [55] – [58].

20 This case is discussed in detail in 3.3 in Chapter 5.

21 1996: 323.

22 Emphasis in the original. This view is supported by the SALRC (2006: 119) and Schwellnus 1995: 156, 157.

2.1.1.2 Contents of the agreement

It is self-evident that the contents and nature of a life partnership agreement will depend on the needs of the parties. In certain instances a universal partnership may be apposite, while in others it may be more advisable for the parties not to enter into such a partnership for, as Schwellnus[23] points out, doing so may have "far-reaching consequences."[24] Nevertheless in accordance with the normal principles governing the law of contract, the principle remains that the parties may include any provision in the agreement that is not illegal, *contra bonos mores* or contrary to public policy.[25]

More specifically, it is noteworthy that the literature on this subject appears to focus on the need for regulating the financial aspects during the existence of the relationship[26] and on stipulations regarding property ownership and division at the termination thereof.[27] While this aspect is undoubtedly of cardinal importance (even more so, it is submitted, in view of the so-called "choice argument" which can now *strictu sensu* be applied to both same-sex and heterosexual life partners

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23 2008: N22.

24 The universal partnership is discussed in 2.1.2 below. Thomas (1984: 457 – 459) favours the partnership construction.

25 Hutchings and Delport 1992: 125 mention that the life partners "may state their collective and individual goals in the relationship" and that a provision stating the "duration of the relationship, for example, for a life-time, fixed period or until a specified event" may be included. With respect, it is difficult to see the need for such provisions.

26 Schwellnus 2008: N22, Thomas 1984: 457 – 459 and Singh 1996: 321 encourage the inclusion of provisions relating to the apportionment of household expenses, and the first-mentioned author mentions that the agreement should be limited to these aspects unless the parties wish to make specific provision for one to support the other in case of unemployment or where young children need to be reared. It is submitted that this opinion unfortunately loses sight, first, of the emphasis placed on a reciprocal obligation of support in recent case law and, second, of the crucial importance thereof as the key element in order to enforce need-based claims such as maintenance—see Chapter 5 above.

27 See Singh 1996: 32; Hutchings and Delport 1992: 125 and Schwellnus 2008: N22. The parties are advised to list all property that is owned separately at the inception of the relationship as well as that acquired during its existence; to stipulate a procedure for the division of joint property; to refer to the proportion of co-ownership of immovable property; and to regulate the procedure for reimbursement of the life partner who has paid for improvements to immovable property owner by the other partner. It is important to note that immovable property that is co-owned must be reflected as such in the title deed.

in consequence of which the piecemeal extensions previously granted to the former may fall away if the argument were ever to receive appropriate sanction),[28] it is submitted that parties to a life partnership agreement should also include a specific provision in a written, witnessed and attested agreement[29] in terms of which they undertake mutual support obligations during the existence of the relationship.[30] This will negate the need for a Court to infer such a duty after the death of one of the parties and will assist in establishing the causal link required for claims *inter alia* relating to maintenance from the deceased estate, intestate succession and wrongful death. What is more, it is submitted that the existence of such a duty will lend credence to claims not yet recognised or permitted by the Courts. For instance, it is submitted that a person in the position of R in the case of *Volks NO v Robinson* [31] would be in a far stronger position successfully to claim for maintenance from the deceased estate of his or her life partner if such an agreement could be adduced as evidence for, as concluded in Chapter 5,[32] the "contextualised choice model" dictates that this obligation is a *sine qua non* for all claims based on need.[33]

The parties can of course in their agreement make express provision for maintenance after the termination of the relationship, which Schwellnus[34] opines should be confined to a specific period and should be rehabilitative in nature. In

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28 See 5 in Chapter 3 and Chapter 5 in general.

29 Singh 1996: 312; Schwellnus 2008: N22 and Hutchings and Delport 1992: 125 recommend a formal written, signed and witnessed agreement for evidentiary reasons. The example provided by Thomas 1984: 457 *et seq* also requires the agreement to be signed.

30 It is interesting that none of the authors consulted (i.e. Schwellnus 2008: N22; Thomas 1984: 455 *et seq*; Hutchings and Delport 1992: 121 *et seq* and Singh 1996: 317 *et seq*) express the need for such a provision.

31 2005 (5) BCLR 446 (CC). In this case R (the surviving partner to a heterosexual life partnership) unsuccessfully asserted that she was entitled to qualify as a "spouse" for the purposes of the *Maintenance of Surviving Spouses Act* 27 of 1990. This case is discussed in detail in 3.3 in Chapter 5 above.

32 See 3.3.2.2; 3.4.1.2; 3.4.1.3 and 3.6 in Chapter 5.

33 It is also important to note that the *Domestic Partnerships Bill,* 2008 does not oblige the parties to an unregistered domestic partnership to support one another (see clause 27). It is therefore submitted that the inclusion of such a provision in a life partnership agreement in the case of unregistered domestic partners is advisable in order to obviate any uncertainty in this regard. The Bill is discussed in Part 3 (Chapter 7).

34 2008: N22.

this regard it is once again submitted that the inclusion of a specific provision in terms of which mutual support obligations are undertaken during the course of the relationship will facilitate the enforcement of a claim for maintenance after its termination.

A provision that regulates dispute resolution between the partners may be included.[35]

2.1.2 The application of the universal partnership in the context of family law

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.[36]

In order for a partnership to exist, Stratford AJA confirmed in *Rhodesia Railways and Others v Commissioner of Taxes* [37] that South African law requires compliance with four essential requirements, namely:

> First, that each of the partners brings something into the partnership, or binds himself to bring something into it, whether it be money, or his labour or skill. The second essential is that the business should be carried on for the joint benefit of both parties. The third is that the object should be to make profit. Finally, the contract between the parties should be a legitimate contract.

The form of partnership that is most often encountered in a family law context is the so-called *societas universorum bonorum*, or partnership in terms of which the partners agree to share all current and future profits acquired individually or

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35 Hutchings and Delport 1992: 125.

36 See for example *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at par [125]; *V (also known as L) v De Wet, NO* 1953 (1) SA 612 (O); *Ally v Dinath* 1984 (2) SA 451 (T).

37 1925 AD 438 at 465.

collectively from commercial undertakings or otherwise.[38] When applied in this setting, such a partnership effectively implies that community of property is created between the (unmarried) partners.[39]

The current legal position is that a *societas universorum bonorum* can be created expressly or tacitly.[40] In the latter case the existence of the partnership can be inferred if the facts indicate that it is more probable than not that the agreement was in fact concluded,[41] something which the Appellate Division (now the Supreme Court of Appeal) has held would be difficult to prove within the context of a business built up between a man and his wife who were married out of community of property as services greatly exceeding those normally required of a wife in that position would be required.[42] The motive behind such a partnership does not have to be pecuniary profit in the strict sense, as it has been held that "the achievement of another material gain, such as a joint exercise for the purpose of saving costs" is sufficient.[43] It is also accepted that a tacit universal partnership may be created in the event of a putative marriage where no

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38 See *Annabhay v Ramlall and Others* 1960 (3) SA 802 (N): 805 (A); *Sepheri v Scanlan* 2008 (1) SA 322 (C) at 338 (A) – (B); SALRC 2006: 111; Henning 1997: 59, 60. Another form of partnership is the *universorum quae ex quaestu veniunt* which Pothier described as one in which "[t]he parties … contract a partnership of all that they may acquire during its continuance, *from every kind of commerce*" (as quoted by Searle J in *Isaacs v Isaacs* 1949 (1) SA 952 (C) at 955, emphasis added). The emphasised section indicates why this form of partnership is not generally utilised in a family law context (compare *V (also known as L) v De Wet, NO* 1953 (1) SA 612 (O) as discussed in note 49 below).

39 *Sepheri v Scanlan* 2008 (1) SA 322 (C) at 338 (C).

40 *Ally v Dinath* 1984 (2) SA 451 (T) at 453 (G) – 455 (A). The only proviso is that "a clear contract is required"—see 454 (H) and Labuschagne 1985: 221, 222. Henning (1997: 61 – 63) opines that much of the uncertainty surrounding this possibility could have been avoided if proper cognisance had been taken of the opinion expressed by the jurist Hector Felicius (as adapted by Hugo Boxelius in 1666) in the work entitled *Tractatus desideratissimus de Communione seu Societate* that such a partnership can be created tacitly by an "act of partnership" coupled with three requirements, namely "cohabitation, sharing of profits and freedom from accounting to one another." In the alternative, these writers opined that the existence of such a partnership could be construed by considering the opposite of dissociative conduct. Felicius's work (albeit not on this specific point) has received judicial recognition—see *Van Staden v Venter* 1992 (1) SA 552 (A) at 560 (H) – 561 (C).

41 *Charles Velkes Mail Order 1973 (Pty) Ltd v Commissioner for Inland Revenue* 1987 (3) SA 345 (A) at 357 (H); *Mühlmann v Mühlmann* 1984 (3) SA 102 (A) at 124 (C); *Sepheri v Scanlan* 2008 (1) SA 322 (C) at 338 (E) – (F).

42 *Mühlmann v Mühlmann* 1984 (3) SA 102 (A) at 124 (D); SALRC 2006: 116.

43 *Ally v Dinath* 1984 (2) SA 451 (T) at 455 (A) – (C).

antenuptial contract excluding community of property has been entered into and where (i) both parties were of the *bona fide* belief that the marriage was valid or (ii) only one was *bona fide* and it is to that party's advantage to do so.[44]

The common law dictates that when a partnership comes to an end the assets are divided between the partners in accordance with any express agreement to this effect. If there is no agreement, they share in accordance with their respective contributions unless their contributions were equal or unless it is impossible to determine whether one has contributed more than the other, in which case the partnership assets are divided equally.[45]

Returning to a family law context, case law—both recent and dated—provides no doubt as to the application of the universal partnership in the following instances within the context of this branch of the law:

- Prior to the legislative provision of a judicial power of redistribution,[46] the universal partnership was at times employed in order to effect a redistribution of assets to which both spouses had contributed when marriages that were concluded with complete separation of property were terminated through divorce proceedings;[47]

- In the case of putative marriages (as mentioned above);[48] and

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44 See *Ex parte L (Also known as A)* 1947 (3) SA 50 (C) at 59 *et seq*; *M v M* 1962 (2) SA 114 (GW) at 117 (G) – (H); *Mograbi v Mograbi* 1921 AD 274 at 275; Labuschagne 1985: 221; Erasmus *et al* 1983: 32.

45 *Isaacs v Isaacs* 1949 (1) SA 952 (C) at 961; *Fink v Fink* 1945 WLD 226 at 241; *V (also known as L) v De Wet, NO* 1953 (1) SA 612 (O) at 615 (F) – (H); SALRC 2006: 112.

46 Section 7(3) – (6) was inserted into the *Divorce Act* 70 of 1979 when the *Matrimonial Property Act* 88 of 1984 came into operation on 1 November 1984.

47 SALRC 2006: 112; Sinclair and Heaton 1996: 279; *Fink v Fink* 1945 WLD 226.

48 *Mograbi v Mograbi* 1921 AD 274; *M v M* 1962 (2) SA 114 (GW); *Ex parte L (also known as A)* 1947 (3) SA 50 (C). A recent and interesting addition to the body of case law on this topic is the case of *Zulu v Zulu and Others* 2008 (4) SA 12 (D). This case is discussed in detail in 2.4.2 below.

- Within the context of life partnerships in the wider sense of the word (such as, for example purely religious marriages).[49]

De Bruin and Snyman[50] suggest, in the light of the recognition of tacitly-created *societas universorum bonora* coupled with the flexible approach regarding the distribution of partnership assets adopted by the Appellate Division in *Robson v Theron*,[51] that such partnerships are a realistic and effective solution to ensure an equitable distribution of assets following not only the termination of "marriages" that are not recognised according to South African law, but also extra-marital cohabitation arrangements (or, as seen in Chapter 4, life partnerships in the narrow sense).

For the purposes of this study, it is the application of the universal partnership in the latter context that is of particular relevance. In this regard a perusal of recent case law reveals compelling authority for the applicability of the universal partnership in principle but unfortunately not in practice.[52] In other words, while post-1994 case law has removed all doubt as to the fact that such a partnership may be applied within the context of a life partnership in the narrow sense, the Courts have not been prepared to find such a partnership to exist on the facts.

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49 *Isaacs v Isaacs* 1949 (1) SA 952 (C); *Ally v Dinath* 1984 (2) SA 451 (T). This situation could also occur in the case of a cohabitation arrangement where the parties were legally prohibited from marrying one another and had never participated in a "marriage ceremony" of any sort (also a form of a life partnership in the wide sense for the purposes of this study—see Chapter 4). For example in *V (also known as L) v De Wet, NO* 1953 (1) SA 612 (O) the parties cohabited for 21 years until the male partner (L) passed away. The surviving cohabitant had at all times during the existence of the relationship been aware of the fact that L was lawfully married to another woman. The parties had both been involved in a painting and decorating commercial venture, and on L's death the survivor alleged that she was entitled to a half share of his estate on the basis that a universal partnership (in this case, the commercial form or *universorum quae ex quaestu veniunt*) had existed between them (at 614 (H)). Although the cohabitants had intended to marry one another in community of property once L's first marriage had been terminated, De Beer JP held that this fact alone did not imply that no partnership could be created in the interim (at 615 (F)). As all the requirements for a partnership had been complied with, the executor of L's estate was ordered to pay one half of the assets in the estate to L (at 616 (A) – 617 (B)).

50 1998: 368 *et seq*.

51 1978 (1) SA 841 (A) at 856 (F) - (G).

52 As discussed in the following paragraph.

2.1.2.1 Hypothetical recognition

Proof of the recognition in principle of the universal partnership by the Courts is provided in two cases, namely *Gory v Kolver NO* [53] and *Volks NO v Robinson*.[54] The *Gory* case (which was discussed in Chapter 5)[55] dealt with a same-sex life partnership in which the surviving partner alleged that the *Intestate Succession Act* 81 of 1987 was unconstitutional to the extent that it did not permit same-sex life partners who had undertaken mutual support obligations to inherit from their deceased partners' intestate estates. In holding that the Act discriminated against such persons, the Trial Court (Hartzenberg J) stated that the respondents' very reason for alleging that the Act was *not* unconstitutional (namely that "the applicant and the deceased could have made wills in favour of each other *and could have entered into a written universal partnership agreement*") in fact "graphically illustrated" why the Act did in fact discriminate.[56]

Similarly, in Mokgoro and O'Regan JJ's dissenting minority judgment in *Volks NO v Robinson*[57] (a case in which a surviving heterosexual life partner unsuccessfully contested the constitutionality of the *Maintenance of Surviving Spouses Act* 27 of 1990) the learned Judges stated that a contract "in which the parties agree to put in common all their property, both that which they presently own and that which they are to acquire in the future" could assist life partners, and, moreover, that such a contract need not be entered into expressly.[58] Therefore, while the Trial Court's remark in *Gory* may intimate that the agreement must be in writing, the Constitutional Court's remarks in *Volks* dispel this impression.

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53 2006 (5) SA 145 (T).
54 2005 (5) BCLR 446 (CC).
55 See 3.4.1 in Chapter 5.
56 Par [22] (emphasis added).
57 2005 (5) BCLR 446 (CC), discussed in detail in 3.3 in Chapter 5.
58 Par [125].

2.1.2.2 Lack of practical recognition: Problems posed by the universal partnership

Theoretical recognition aside, academic authority mentions and apposite case law illustrates the biggest practical problem that is occasioned by the universal partnership, namely proof of its existence.[59] For example, in *Sepheri v Scanlan*[60] the plaintiff and the defendant had cohabited during the period for which they were engaged to be married, had supported one another and had pooled their resources. While they were betrothed the defendant had purchased property which was registered in his name only, despite apparently originally intending to register both of them as owners. When confronted by the plaintiff as to why he had done so, he apparently reassured her by telling her that ownership of the property was irrelevant as it was "ours."[61] Once the relationship had terminated, the plaintiff successfully instituted an action for breach of promise against the defendant; a claim that was adjudicated on the assumption that the parties would have been married with community of property.[62] As far as the property itself was concerned, the plaintiff attempted to defend the defendant's counterclaim for eviction by alleging that she was entitled to continue to reside there on the basis that a universal partnership had come into existence between herself and the defendant. In response to this contention, the Court appeared to find that "genuine consensus" about such a partnership was required; something which the defendant's placatory remarks to the plaintiff or the loose phraseology employed in his testimony[63] could not be construed as having established. Consequently, it appears that the defendant's persistent refusal to transfer the property to the plaintiff served to indicate the absence of true consensus.[64]

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59 See for example *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at par [125]; Sinclair and Heaton 1996: 279; SALRC 2006: 116, 117.

60 2008 (1) SA 322 (C). The facts of this case appear in Chapter 5.

61 At 325 (B) – (F).

62 At 336 (D) – (F).

63 See the examples mentioned by Davis J at 339 (B) – (C).

64 At 339 (A) – (J). It is interesting to note that the Court did not express itself on the general principles pertaining to the regulation of proprietary interests between life partners in South African law.

The fact that the parties in the *Sepheri* case were betrothed and that the plaintiff was compensated for breach of promise serves to mask the serious consequences that may ensue for life partners in the absence of contractual protection. For the purposes of illustration it is worth pausing for a moment in order to speculate on the potential outcome of this case if a breach of promise to marry had never occurred (for example if the parties had mutually agreed to terminate their engagement), and the plaintiff had instead based her claim to a half share of the property squarely on the existence of a universal partnership; a situation which would have resembled the typical life partnership scenario that is currently encountered in South Africa. Under these circumstances, it must be remembered that the fact that the plaintiff was aware of the intention to be married in community of property and that such community would only commence as from the date of marriage would not necessarily imply that no universal partnership was created in the interim.[65] Nevertheless, it is submitted that Davis J was correct in holding that the evidence did not prove that a universal partnership existed between the parties. Consequently, the flexible approach prescribed for the division of partnership assets in *Robson v Theron* [66] and advocated by De Bruyn and Snyman[67] would come to nothing as no partnership existed in the first place. The prevailing legal position would thus imply that despite the defendant's continuous reassurances to the plaintiff and references in Court to the effect that the property formed part of "our assets",[68] the fact that the property was paid for by him and registered in his name only coupled with his refusal to transfer a half share to her would have left the plaintiff without any proprietary rights to the property whatsoever. Consequently, the *Sepheri* case confirms the fears expressed by the South African Law Reform

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65 See *V (also known as L) v De Wet NO* 1953 (1) SA 612 (O) at 615. Although the partnership in this case was a *societas universorum quae ex quaestu veniunt* as opposed to a *societas universorum bonorum,* it is submitted that this principle applies equally to the latter type of partnership.

66 1978 (1) SA 841 (A) at 856 (F) – (G).

67 1998: 368 *et seq*.

68 At 339 (B) – (C).

Commission[69] and others[70] as far as proof of existence of a universal partnership is concerned.

A second fear expressed by the Commission is that a universal partnership does not provide a juristic basis for reciprocal maintenance between the former partners.[71] It is submitted that this issue does not present a problem of any great significance. To illustrate: As far as maintenance is concerned there is an abundance of case law that indicates that our Courts have in the post-1994 democratic constitutional dispensation increasingly held the existence of a duty to maintain to be a question of fact.[72] Furthermore, the existence of such a factual contractual duty implies that the *Maintenance Act* [73] immediately becomes applicable to such a relationship as section 2 of the Act provides that "[t]he provisions of this Act shall apply in respect of the *legal duty of any person to maintain any other person irrespective of the nature of the relationship between those persons giving rise to that duty.*"[74] A contractual duty to maintain is therefore—as was pointed out in Chapter 5[75]—no less robust than an *ex lege* duty. Furthermore, in the same Chapter[76] the distinction between a claim based on need and a claim of a purely proprietary nature was pointed out, and it was shown that in order to succeed with the former type of claim, it would be necessary to prove that a reciprocal duty of support existed between the unmarried life partners. A claim for maintenance is clearly a claim based on need, while a claim to share in partnership assets is undoubtedly a claim of a proprietary nature. Consequently, all that is required for a maintenance

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69 2006: 116, 117.

70 See for example *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at par [125]; Sinclair and Heaton 1996: 279.

71 SALRC 2006: 117.

72 See for example *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC) at par [25] and *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) at par [11] – [16] with respect to life partnerships in the narrow sense and *Khan v Khan* 2005 (2) SA 272 (T) at par [10] with reference to life partnerships in the wide sense.

73 99 of 1998.

74 Cronjé and Heaton 2004: 58.

75 See 3.3.1.2 in Chapter 5.

76 3.3.2.2.

obligation to arise between life partners is proof of the fact that they have undertaken mutual support obligations. In fact, as was explained in Chapter 5, the existence of such support obligations between the life partners would serve to create the requisite proximal nexus between the person instituting the need-based claim and the person or estate against whom or which the claim is pursued. This line of reasoning therefore proves why the Commission's fears are unfounded. As far as need-based claims are concerned the existence of a universal partnership is therefore irrelevant as the existence of such a partnership would at most be used in order to facilitate the *patrimonial* consequences of the termination thereof.

The *Sepheri* case can again be used to illustrate the effects of the above discussion. To begin with, although this aspect of the case was never categorically addressed by the Court, it is clear that a reciprocal duty of support existed between the plaintiff and the defendant. This much becomes clear when it is considered that the parties initially "pooled their resources";[77] that they "paid for expenses more or less on a 50/50 basis;"[78] and that the defendant later maintained her while he was abroad[79] while it appears as if the plaintiff reciprocated by assuming responsibility for domestic tasks.[80] (In fact, Davis J described the fact that the parties provided each other with financial assistance while they were engaged as being "natural in such a relationship".)[81] If, for example, Ms Sepheri required maintenance during the existence of the life partnership, she would—on the strength of the contractual duty of support that existed between them—be able to approach the Maintenance Court for a maintenance order in terms of the *Maintenance Act* 99 of 1998.[82] If the life partnership was terminated while both she and Mr Scanlan were alive, it

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77 At 324 (B).

78 At 324 (C).

79 At 325 (J) and 326 (A).

80 At 326 (E).

81 At 339 (I).

82 See section 2(1) of the Act and Cronjé and Heaton 2004: 229 but compare Schwellnus 2008: N9. Both Schäfer (2008(b)) and the SALRC (2006: 148 – 165) are silent on this issue.

appears—by way of analogous principles in matrimonial law—as if the *Maintenance Act* would without more be of no assistance, as the reciprocal duty of support that existed between them would be terminated once the relationship came to an end.[83] Although it is submitted that there is room for arguing that a contractual duty of support may survive the fact that life partners no longer share a joint household,[84] this aspect has yet to be subjected to judicial scrutiny. However, there appears to be no doubt that if the parties had by way of a cohabitation agreement agreed to extend their maintenance obligations beyond the termination of their relationship, the *Maintenance Act* could be used to

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[83] The reciprocal duty of support created by marriage (or civil partnership) generally terminates when the marriage is dissolved unless specific legislation extends it. At this stage only section 7 of the *Divorce Act* 70 of 1979 and section 2 of the *Maintenance of Surviving Spouses Act* 27 of 1990 do so. Furthermore, the *Maintenance Act* only applies to the extent that a "legal duty" compels one person to maintain another, with the result that the contractually-created "legal duty" falls away once the reciprocal duty of support is terminated. Specific legislation is therefore necessary in order to extend the duties of support that exist between life partners beyond the termination of their relationships. Failing such legislation, it appears as if an ex life-partner will only be able to claim post-separation maintenance if a contractual undertaking to this effect exists. There may however be some room for arguing that an obligation to maintain may survive the fact that the life partners no longer share a joint household—see the note that follows.

[84] The argument for such a possibility is premised on the following points: (i) It is generally accepted that a marriage does not *ipso facto* create a joint household, but that the existence of such a joint household is a question of fact (*per* Van Zyl J in *Excell v Douglas* 1924 CPD 472 at 476, 477. Also see Sinclair and Heaton 1996: 444; Hahlo 1985: 203, but compare *Oelofse v Grundling* 1952 (1) SA 338 (C) at 341 (A) where Hall J, interestingly enough citing the *Excell* case as support, states that "and it has been laid down, generally, that a wife who is married in community of property is entitled to enter into contracts for the supply of necessaries without the assistance of her husband, and that this power *flows from the fact that a common household is established through marriage*"). (ii) The ability to establish a common household is not confined to married spouses, as the ability of same-sex life partners to enter into and sustain a common household and to establish and enjoy a family life "which is not distinguishable in any significant respect from that of heterosexual spouses" has been confirmed by the Constitutional Court (see par [53] (v) read with (viii) of Ackermann J's unanimous judgment in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC)). (iii) It has been emphasised throughout this study that a contractual duty of support is as robust and capable of enforcement as the *ex lege* duty of support that flows from the fact of marriage—see 3.3.1.2 in Chapter 5 above. (iv) According to Sinclair and Heaton (1996: 444) "[t]he duty of support [in a marriage] does not necessarily come to an end if the joint household breaks up. On the principle that no one can escape a legal obligation by his or her own wrongdoing, it continues if the separation was caused by the person liable for support—for example if one spouse deserts the other or drives him or her away by matrimonial misconduct. The same, it would seem, holds true where the spouses separate by mutual consent without having entered into an agreement relating to maintenance, and one of them is not able to support himself or herself" (footnotes omitted). If statements (i), (ii) and (iii) are applied to statement (iv), it may be argued that the same legal principles will apply to life partners.

enforce such a contractual undertaking.[85] This option is consequently the safest route to take.

On the other hand, if the life partnership had been terminated by the death of (for example) the defendant, it is submitted (on the basis of the "contextualised choice model" adopted in Chapter 5 and explained above) that the survivor should be permitted to institute any need-based claim against the estate of the deceased. So, for example, the survivor should be permitted to pursue a claim for maintenance against the deceased estate, and, where appropriate, to inherit intestate and to institute a claim for loss of support if the defendant was wrongfully and culpably killed by an outsider.

The patrimonial consequences of the termination of the life partnership in such a case deserve special consideration. In the discussion above the hypothetical position was considered where the engagement was terminated by mutual consent, leading to a claim for the distribution of assets on the basis of a universal partnership. The position if the life partnership had been dissolved by the death of one of the partners would however be less straightforward. In such an instance, a universal partnership comes to an end by operation of law.[86] However, as seen in Chapter 5[87] above, when dealing with the patrimonial consequences of the termination of a life partnership, the fact that the life partners elected not to marry one another (the so-called "choice argument") could play a role. In these circumstances, it was tentatively concluded that matrimonial (property) law would have no role to play but that the law of obligations instead would resolve the dispute as to what was to happen to the assets of the deceased person. Consequently, a universal partnership could be utilised provided that the *essentialia* of such a partnership could be proved. Once proven, the flexible approach towards the distribution of partnership assets

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85 Cronjé and Heaton 2004: 229.

86 *Botha v Deetlefs and Another* 2008 (3) SA 419 (N) at par [14].

87 See 3.3.2.2 in Chapter 5.

adopted in *Robson v Theron* [88] could potentially assist the survivor in obtaining a favourable settlement.

The argument for avoiding matrimonial law in a life partnership setting is predicated on the fact that the parties have elected not to marry, and have therefore specifically chosen not to apply matrimonial property law in order to regulate the division of their assets.[89] However, adapting the basic facts in *Sepheri* provides interesting food for thought: What would the position be where a life partnership is terminated by the death of one of the partners *who are engaged to be married to one another* and, moreover, have already selected the matrimonial property system that will apply to their prospective marriage? Would the fact that the parties are engaged and have thus elected to marry in future imply that the "choice argument" is no longer relevant to their life partnership with the result that the principles of matrimonial property law could, on application to Court, conceivably be extended to such a life partnership? It is submitted that these questions should be answered in the negative. Although there is no precise consensus regarding the nature of an engagement,[90] it is generally accepted that an agreement to marry is a contract *sui generis.*[91] As an outflow hereof, a contract of engagement is terminated when one of the parties dies.[92] However, the law of obligations may have some role to play in determining the fate of the assets involved. If certain assets were donated by the deceased to the survivor, these assets are, unless the contrary was clearly intended, returned to the donor's estate; it being assumed *ex lege* that the gifts were conditional upon the marriage.[93] Our Courts have also held that the proceeds of an insurance policy are not payable to the deceased estate as no donation had occurred between the deceased and the survivor but that the proceeds instead

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88 1978 (1) SA 841 (A) at 856 (F) – (G).

89 See Sachs J's quotes from par [203] and [204] of *Nova Scotia (Attorney General) v Walsh* [2002] 4 SCR 325 in par [160] of *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).

90 See Joubert 2008: A8.

91 *Triegaardt v Van der Vyver* 1910 EDL 44 at 45; Hahlo 1985: 46; Cronjé and Heaton 2004: 7 (note 1); Sinclair and Heaton 1996: 315; Van Warmelo 1954: 110.

92 Joubert 2008: A8; Sinclair and Heaton 1996: 319; Hahlo 1985: 50.

93 *Van Duyn v Visser* 1963 (1) SA 445 (O) at 450 (D) – (E); Hahlo 1967: 61.

formed part of a contract for the benefit of a third party (a so-called *stipulatio alteri*) which became irrevocable once the survivor accepted the benefit on the death of the *stipulans*.[94]

In the light hereof it appears as if the contract of engagement should be seen as exactly that—a *sui generis* juristic act which is terminated by the death of one of the parties so that all contractual obligations between the couple come to an end unless the specific rules of the law of obligations justify their extension beyond death. Viewed in this way, the fact that a couple were engaged to be married and intended (for example) to marry in community of property implies nothing more than that the parties had reached consensus regarding the fact that *once married* each of them would *ex lege* become a "tied" co-owner of an undivided half share in the joint estate.[95] Therefore, if the engagement is terminated by the death of one of the parties this would not be sufficient to refute the "choice argument" and to conclude that the principles of matrimonial property law could be extended to such a life partnership. Consequently, the current legal position dictates that, unless the survivor is provided for by the law of succession, the only way for him or her to share in the estate of the deceased would be in the event of the law of obligations providing such a claim (for example in the case of a donation, universal partnership or contract for the benefit of a third person).

This discussion should make it abundantly clear that legislative intervention predicated on the domestic partnership rubric must regulate the patrimonial

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94 *Botes, NO v Afrikaanse Lewensversekeringsmaatskappy Bpk en 'n Ander* 1967 (3) SA 19 (W). In this case Rabie J held that an insurance policy which was taken out on the life of the deceased with his fiancée as beneficiary constituted an agreement between the deceased (as *stipulans*) and the insurance company (as *promittens*) in terms of which the latter was required, upon the former's death, to make an offer to the third party (the fiancée). Once accepted, the agreement existed between the *promittens* and the third party (at 23 (E) – (H)). The learned Judge expressed the opinion that a man in the position of the *stipulans* who did not want his fiancée to benefit if the marriage could not take place could facilitate this by either providing for such an eventuality in the insurance policy or by contracting with his fiancée (at 23(H) – 24(A)). Although criticised by Hahlo 1967: 60 – 62, the finding in this case is supported by Van Warmelo 1969: 185 – 187 and the authors cited by the latter (at 187). It has also found support in case law—see for example *Hees NO v Southern Life Association Ltd* 2000 (1) SA 943 (W) at 951 (J) – 952 (H).

95 *Ex parte Menzies et Uxor* 1993 (3) SA 799 (C) at 811 (F); Hahlo 1985: 158, 159.

consequences of the termination of life partnerships in a comprehensive fashion. Such legislation would provide for a range of factors for the Courts to consider in order to guarantee an equitable distribution of the proprietary interests involved. As far as non-formalised (unregistered) life partnerships are concerned, the fact that the parties were engaged to be married to one another could constitute one of these factors.[96]

As an aside, it is submitted that the current state of affairs may provide some justification for arguing that South African family law should continue to recognise claims based on breach of promise to marry. The facts of *Sepheri v Scanlan*[97] can, once again, be used to explain this contention. In this case it must be remembered that the Court awarded Ms Sepheri damages for breach of promise on the basis of the fact that she and the defendant would eventually have married one another with community of property. In the opinion of the Court this entitled her (before deductions on the basis of her prospects of remarriage) to half of: (i) the value of the property, (ii) the motor vehicles, (iii) the household furniture and effects, (iv) the defendant's cash balance and (v) the value of the defendant's shares and stocks.[98] As far as the fixed property was concerned, the Court was not prepared to recognise that a universal partnership existed between herself and the defendant and consequently was not prepared to recognise that the property formed part thereof.[99]

The new constitutional dispensation in South Africa has led to calls from both the bench and from academic commentators for the outright abolition,[100] or, in the alternative, the reconsideration[101] of claims based on breach of promise. As the law stands, however, this has not yet happened. However, if, hypothetically

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96 Clause 32 of the *Domestic Partnerships Bill*, 2008 (titled "Property division") permits "any other relevant factors" to be taken into account by a Court considering such an application.

97 2008 (1) SA 332 (C).

98 At 336 (E) – 337 (E).

99 At 337 (J) – 339 (J).

100 See for example *Lloyd v Mitchell* [2004] 2 All SA 542 (C) at 547, 548; Sinclair and Heaton 1996: 314 (note 8).

101 *Sepheri v Scanlan* 2008 (1) SA 322 (C) at 330 (I) – 331 (A).

speaking, South African law were to abolish all claims based on an agreement to marry, a life partner in the position of Ms Sepheri would, in the absence of domestic partnership legislation and bearing in mind that she could not prove that a universal partnership had existed between herself and the defendant and that the Courts have no discretion to redistribute life partnership assets, have been left with no remedy whatsoever.

While it is conceded that legislative intervention into the law of life partnerships would certainly strengthen the argument for a re-evaluation of the permissibility or constitutionality of attaching legal consequences to the wrongful termination of engagement agreements, it is submitted that the prevailing legal position justifies the continued recognition of such claims so that persons in the position of Ms Sepheri are provided with at least some means of protection.

2.1.2.3 Conclusion

This analysis shows that, as opposed to need-based claims, it is within the context of patrimonial claims, rather, that the efficacy of the universal partnership needs to be evaluated, and evidentiary problems aside, the universal partnership undoubtedly has a role to play. However, in the absence of such a partnership, it becomes clear that unmarried partners currently have little more than alternative remedies provided by the law of obligations at their disposal.[102] Nevertheless, it is submitted that the relatively high level of sophistication required in order for the universal partnership to provide an effective solution dictates that as such it is awkward to apply to the South African family law context,[103] and that legislative intervention that is tailor-made for family law would undoubtedly be a better solution.

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102 See 2.2 that follows.

103 SALRC 2006: 121.

2.2 Other protection

Over and above the law of contract, other branches of the law may provide some form of protection to life partners. In the discussion that follows the efficacy of these alternative methods will be assessed.

2.2.1 Unjustified enrichment

As part of the law of obligations, unjustified enrichment presents itself as "an obligation arising whenever one person's estate has been increased at the expense of another person's estate and sufficient legal ground (*causa*) for the retention of such increase is lacking."[104]

At the termination of a life partnership, the law of unjustified enrichment could—at least in theory[105]—provide relief to an impoverished party who successfully claims (i) a contribution for (non-sexual!) services rendered to the economically-active partner, (ii) a claim for "tangible improvements" made to the property of the other life partner,[106] or (iii) compensation for any other "genuine financial contribution" to the estate of the other, where such contribution, improvements or services were made or rendered *sine causa*.[107] According to Hutchings and Delport[108] an example of such a financial contribution occurs where one life partner (the non-owner) contributed towards purchasing property that was registered only in the name of the other.[109]

As far as "novel" claims based on unjustified enrichment are concerned, the judgment of the Appellate Division (now the Supreme Court of Appeal) in *Nortje v*

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104 Eiselen and Pienaar 1999: 3.

105 There is as yet no explicit authority where these claims have been recognised within the context of life partnerships.

106 *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at par [126].

107 Hutchings and Delport 1992: 123.

108 1992: 123.

109 Also see SALRC 2006: 122, 123.

Pool[110] was for many years thought effectively to have closed the door on the recognition of enrichment claims which could not be accommodated along the lines of the recognised *condictiones*.[111] As pointed out by the same Court almost three decades later,[112] the failure of the Court to broaden the scope of enrichment liability by way of the recognition and delimitation of a general enrichment action may have been perceived as reluctance to assume a law-making role and in doing so to deviate from its judicial responsibility. This reluctance could not mean, the Court stated, that other Courts would in future be precluded from imposing liability for unjustified enrichment where doing so was necessary or desirable simply because such liability had not been imposed in identical or even similar circumstances in the past.[113]

Although this statement of the law sparked some relaxation of the strictures surrounding enrichment claims,[114] our law has yet to recognise either a general enrichment action (a call for such recognition was once again made in a case reported as recently as in 2008)[115] or any specific enrichment liability within the context of life partners. For this reason, it must be concluded that reliance on unjustified enrichment as an effective remedy for disputes involving life partners is speculative at best.[116]

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110 1966 (3) SA 96 (A).

111 Visser 2002: 261, 262. Eiselen 1992: 125 points out that while the Court denied that a general enrichment action existed in Roman-Dutch law, the Court did not however shut the door on the possibility of such an action being recognised in future. For a suggested enrichment action, see in general Smith 2002.

112 *Kommissaris van Binnelandse Inkomste en 'n Ander v Willers en Andere* 1994 (3) SA 283 (A) at 333 (C).

113 *Kommissaris van Binnelandse Inkomste en 'n Ander v Willers en Andere* 1994 (3) SA 283 (A) at 333 (D).

114 See for example *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd* 1997 (2) SA 35 (A) at 40 (A) – (B); *First National Bank of South African Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA) at par [28].

115 See *Watson NO and Another v Shaw NO and Others* 2008 (1) SA 350 (C) at par [10].

116 SALRC 2006: 123: "The law is, however, still not clear—relying on these laws is risky and unpredictable. Courts are very concerned about certainty and if there is any doubt and a judge is unclear, he or she might be unwilling to make any decision."

2.2.2 Proprietary estoppel (also known as estoppel by encouragement or estoppel by acquiescence)[117]

In English law proprietary estoppel has played a significant role within the context of life partnerships. In this regard where a life partner was to his or her detriment encouraged (or by way of an omission led to believe) that he or she had acquired a legal right to property while this was in reality not true, the owner (or the executor of the estate) could be estopped from asserting the truth, provided that the non-owner could prove that the inference was reasonable given the situation created.[118] The onus of proof rests on the non-owner, who must prove reliance and detriment.[119] The encouragement or representation must relate to a specific asset or pool of assets.[120] The reliance need not be based on a purely financial contribution, for as the Law Commission of England and Wales states "'domestic activities' and associated sacrifices of paid employment, may constitute detrimental reliance for the purposes of proprietary estoppel", provided that the non-owner can prove that the contribution was given on the basis of the representation and was not an automatic consequence of the relationship.[121]

English case law provides an illustration of how proprietary estoppel can affect the consequences of the termination of a life partnership. For example, in *Wayling v Jones*[122] the deceased partner in a homosexual life partnership bequeathed property to W in his will, but by the time of the deceased's demise the property had already been sold to an outsider.[123] W alleged that this property had been promised to him by the deceased, on the basis of which promise he had lived with the deceased and worked for him for a pittance. On appeal, the

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117 See the English case of *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1981] 1 All ER 897.

118 Singh 1996: 319; SALRC 2006: 122.

119 Singh 1996: 319; SALRC 2006: 122. In English law the onus shifts to the owner once the non-owner can prove that the owner made a promise that induced him to act to his detriment—see *Ottey v Grundy* [2003] EWCA Civ 1176 at par 56.

120 EWLC 2007: 160.

121 EWLC 2007: 161.

122 1993 WL 963305 (CA (Civ Div)); [1993] 69 P. & C.R. 170.

123 Sonnekus 2000: 207.

Court held that the deceased had made a promise to W on which he had relied to his detriment, as a result of which his appeal was successful.[124] The *Wayling* case has been referred to with approval in subsequent English case law.[125]

A further example from English law is the case of *Ottey v Grundy*[126] where the deceased failed to provide for his former live-in female "companion" in his will, but had in a so-called "letter of intent" promised her a life interest in a houseboat as well as ownership of an apartment in Jamaica.[127] The Court of first instance (confirmed on appeal) awarded her an amount of £ 50,000 and ordered the executor of the estate to "use his best endeavours to secure a transfer of the Jamaica apartment into the name of Miss Ottey and in default to pay her the further sum of £ 50,000."[128]

The current position in English law, therefore, is that the Courts have a wide discretion in terms of deciding how the non-owner's "equity" against the owner is to be satisfied. According to the Law Commission of England and Wales:

> In some cases, they will give effect to the applicant's expectation. In others, they will simply compensate the applicant for the loss suffered in relying on the assurance, rather than giving the applicant what was promised. The remedy will frequently involve conferring on the applicant some sort of proprietary interest, although not necessarily a

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124 See the summary of the case as obtained from http://international.westlaw.com/print/printstream.aspx?sv=Full&prid=ia7448749000 (accessed on 14 May 2009). Although it is accepted that "the doctrine of proprietary estoppel cannot be treated as subdivided into three or four watertight compartments" (*per* Robert Walker LJ in *Gillett v Holt* [2000] 2 All ER 289 at 301), representation (promise or assurance), reliance and detriment constitute the core elements of this claim in English law. The promise or assurance does not have to constitute the only inducement that led to the detrimental conduct, but there must be a causal nexus between the promise and the plaintiff's detrimental conduct. Once promise and inducement have been established, the onus shifts to the defendant to prove that the plaintiff did not rely on the promises made—see *Gillett v Holt* [2000] 2 All ER 289 at 302, 303 and *Ottey v Grundy* [2003] EWCA Civ 1176 at par 56, both citing Balcombe LJ in *Wayling v Jones* 1993 WL 963305 (CA (Civ Div)); [1993] 69 P. & C.R. 170 at 173).

125 See *Gillett v Holt* [2000] 2 All ER 289 at 302, 303; *Ottey v Grundy* [2003] EWCA Civ 1176 at par 56.

126 [2003] EWCA Civ 1176.

127 Par 2 read with par 18 and 19.

128 Par 33 of the judgment of the Court of Appeal (Civil Division).

> beneficial share; or it may entail monetary compensation. In some cases, the court may conclude that no remedy is necessary at all in view of benefits enjoyed by the applicant which cancel out the disadvantage he or she sustained.[129]

In view of the above, it is submitted that doubt persists as to the extent (if any) to which the doctrine of proprietary estoppel can play a role in South African law. The most important reasons for making this assertion are the following:

(i) Sonnekus[130] mentions that the approach in the *Wayling* case would not succeed in South African law as, with the exception of an antenuptial contract, any contract[131] that attempts to fetter testamentary freedom is *contra bonos mores*,[132] and hence estoppel could not be relied on to accomplish something that could not have been accomplished by contract. It is submitted that this (correct) line of reasoning appears to put paid to any thoughts of applying estoppel where the law of succession is involved.

(ii) Bearing point (i) in mind, the next question that arises is whether proprietary estoppel can play a role where the life partnership is terminated while both parties are still alive (so that no question of freedom of testation arises). When one considers academic writing on this topic, both Singh[133] and the South African Law Reform Commission[134] appear to accept that this doctrine may provide an "alternative" to "disadvantaged" life partners. The problem that however presents itself is that neither of these sources provide any firm South African authority in support of their

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129 Footnotes omitted.

130 2000: 207.

131 The term "contract" means any document that does not comply with formalities prescribed for a valid will as prescribed by the *Wills Act* 7 of 1953. A *donatio mortis causa* is an example of a contract that will curtail freedom of testation if it complies with the formalities prescribed by this Act—see De Waal and Schoeman-Malan 2008: 218.

132 See for example *McAlpine v McAlpine NO and Another* 1997 (1) SA 736 (A) at 746 (H) – 747 (F); *Borman en De Vos NNO en 'n Ander v Potgietersrusse Tabakkorporasie Bpk en 'n Ander* 1976 (3) SA 488 (A) at 501 (A) – (E); De Waal and Schoeman-Malan 2008: 213.

133 1996: 318, 319.

134 2006: 122.

views: The Commission cites Singh as its sole source, while Singh, in turn, cites no authority whatsoever in support of her opinion. In contrast, when the issue of proprietary estoppel is discussed by Sinclair and Heaton,[135] these authors make it clear that they are discussing English as opposed to South African law. The difficulty is that neither Singh nor the Commission attempt to provide any explanation as to two fundamental problems with the application of the English approach to South African law, namely, first, that in our law estoppel does not found a cause of action but is a defence,[136] and second that estoppel cannot lead to acquisition of ownership.[137] In English law "proprietary estoppel" is recognised as a cause of action.[138] In addition, the second problem, in particular, illustrates why a finding such as that in the *Ottey* case would not be possible in South Africa, as estoppel cannot be used to "create a title."[139] Failing an express adoption of the English law relating to proprietary estoppel, it appears that the doctrine could currently, at best, permit the non-owner to remain in possession of the property (in accordance with the established principles governing estoppel in South Africa) or to be compensated along similar lines to the *Wayling* case, namely for "investing energy and labour in the business,"[140] or for "domestic activities"[141] that relate directly to the owner's representation as opposed to the relationship between the owner and the non-owner.

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135 1996: 274, 275 (note 26).

136 *Pandor's Trustee v Beatley & Co* 1935 TPD 358 at 364: "Estoppel is a weapon of defence, and not one of offence" (*per* De Wet J).

137 Sonnekus 2000: 197. Estoppel can be used to enable the litigant relying on estoppel to remain in possession of property, but ownership remains vested in the true owner—see *Apostoliese Geloofsending van Suid-Afrika (Maitland Gemeente) v Capes* 1978 (4) SA 48 (C) at 56 (E) – 58 (E).

138 Sonnekus 2000: 22 (note 107).

139 *Biloden Properties (Pty) Ltd v Wilson* 1946 NPD 736 at 749, 750.

140 *Per* Sonnekus 2000: 207. In such an instance an election may need to be made between instituting a claim based on unjustified enrichment versus relying on estoppel.

141 EWLC 2007: 161.

In the light of the aforegoing, it appears that both Singh and the Law Reform Commission may be overly (perhaps unduly?) optimistic about the extent to which proprietary estoppel may play a role in South Africa.

There is however no doubt that South African law permits estoppel to be raised in order to prevent a life partner from denying that he or she was the agent of the other partner; with the result that partners who have held themselves out as being married may be liable for each other's contracts for household necessaries in the same way as they would have been if they were validly married.[142]

2.2.3 The constructive trust

According to the Cape High Court in *Administrators, Estate Richards v Nichol* [143] South African law requires five essential elements in order for a valid trust to be constituted.[144] These are:

i) The trust founder must have the intention to create the trust;
ii) This intention must be expressed in a mode apt to create an obligation;
iii) The trust property must be defined with reasonable certainty;
iv) The object of the trust must be defined with reasonable certainty (for example whether the trust has a personal or impersonal object and who the trust beneficiaries are); and
v) This object must be lawful.[145]

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142 *Thompson v Model Steam Laundry Ltd* 1926 TPD 674; Sinclair and Heaton 1996: 284; SALRC 2006: 122; Schwellnus 2008: N7.

143 1996 (4) SA 253 (C) at 258 (E) – (F).

144 See also Olivier 1990: 32 *et seq*.

145 In *Peterson and Another NNO v Claassen and Others* 2006 (5) SA 191 (C) an important distinction was drawn between a lawful trust object and a lawful trust purpose. As the reasons for this distinction fall beyond the scope of this work, it will suffice to say that the two cannot be equated and that an unlawful purpose will not necessarily invalidate the trust—see paragraphs [16], [17], [21], [22], [24] and [28].

Recent case law such as *Land and Agricultural Bank of South Africa v Parker and Others*[146] has emphasised the need for what Du Toit[147] describes as two "ancillary requirements" to be present, namely (i) that the trust founder must relinquish control over the trust property, and (ii) that a functional separation between control over the property and enjoyment thereof must be maintained.

The first requirement listed above has been described as necessitating a "clear and unambiguous intention"[148] which makes it clear that a trust cannot be created unintentionally.[149] This immediately explains the first of two reasons why the constructive trust as recognised in English law (where it is often pleaded in the alternative to proprietary estoppel)[150] has not been received into South African law, as "constructive trusts are imposed on persons in situations where they clearly had no intention of being bound by a trust."[151] Furthermore, the constructive trust is simply redundant in South African law, because other remedies (such as delictual liability for breach of trust and liability based on unjustified enrichment) can be used in order to achieve the same results.[152] Consequently, there is little motivation or need for introducing the constructive trust into South African law either within the context of the law of trusts proper or as a remedy available to life partners.[153]

There is of course nothing to preclude life partners from creating a trust in accordance with established South African legal principles in terms of which either or both are designated as trust beneficiaries. Interestingly, although the

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146 2005 (2) SA 77 (SCA); [2004] 4 All SA 261 (SCA).

147 2007: 27.

148 Du Toit 2007: 28.

149 Honoré and Cameron 2002: 117. This is not to say, however, that peremptory language and the use of words such as "trust" and "trustee" are essential—the intention of the founder is of paramount importance, and the intention to create a trust may be inferred through interpretation of the trust instrument (normally a will or a contract) as well as the surrounding circumstances—see Du Toit 2007: 28; Pace and Van der Westhuizen 2008: B 8.1.

150 EWLC 2007: 160.

151 *Per* Honoré and Cameron 2002: 131.

152 For a detailed discussion see Honoré and Cameron 2002: 131 – 136.

153 Sinclair and Heaton 1996: 277; SALRC 2006: 124.

life partners may be living together in a "family unit", the fact that they are not related to one another may enable them to escape the "independent outsider" requirement as imposed by Cameron JA on family trusts in *Land and Agricultural Bank of South Africa v Parker and Others.*[154]

2.2.4 Will

It is self-evident that life partners who wish to benefit one another as heirs or legatees should make use of a will in order to do so.[155]

2.3 Conclusion

The analysis of universal partnerships, proprietary estoppel and constructive trusts conducted above makes it clear that none of these options offer reliable and consistent protection to life partners. As a result the inevitable conclusion must be that the task of regulating the patrimonial consequences of life partnerships must be assigned to the legislation developed in consequence of the domestic partnerships rubric advocated in Chapter 3.

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154 2005 (2) SA 77 (SCA) at par [35]: "The debasement of the trust form evidenced in this and other cases, and the consequent breaches of trust this entails, suggest that the Master should, in carrying out his statutory functions, ensure that an adequate separation of control from enjoyment is maintained in every trust. This can be achieved by insisting on the appointment of an independent outsider as trustee to every trust in which (a) the trustees are all beneficiaries *and* (b) the beneficiaries are all related to one another" (emphasis added). Pace and Van der Westhuizen (2008: B.6.2.3.1) seemingly share this opinion when they opine that "persons living together" will "most probably" be excluded from its ambit. In view of the broadening notion of a "family unit" in contemporary South Africa a reconsideration of terms such as "related" may in future be required.

155 Cronjé and Heaton 2004: 236; Schwellnus 2008: N22.

2.4 An interesting (and uncertain) situation: The application of the putative spouse doctrine to life partnerships in the wide sense and to bigamous marriages

In the case of *Zulu v Zulu and Others* [156] a male spouse in a subsisting civil marriage attempted to enter into a second civil (and consequently bigamous) "marriage." Upon his death, his second "wife" approached the Courts for relief, only to be denied the same due to the invalidity of her "marriage." This type of scenario could easily present itself within the context of a life partnership, where it may occur that one of the life partners has already concluded a civil marriage with someone else (hence—as seen in Chapter 4—implying a life partnership in the wide sense). The question as to whether it is possible for a married person to "create a community of property"[157] with a second "spouse" or with a life partner and the role to be played by the putative spouse doctrine in this regard is therefore relevant for both the law of marriage and for prospective legal developments pertaining to life partners. This question in turn raises a number of pertinent issues such as the need to recognise a putative community between the married person (the common spouse) and the second "spouse" or partner, and the basis (if any) upon which the parties involved ought to be permitted to share therein. In the discussion that follows an analysis of the regulation of this issue in certain jurisdictions will be conducted with a view to pointing the way forward for South African law. From the outset it must be emphasised that the discussion that follows will attempt to "cherry-pick" elements of the putative spouse doctrine from these jurisdictions despite the fact that the operating environments in which the doctrine functions in some of these jurisdictions may differ quite considerably from that in South Africa. In addition, as most of these jurisdictions thus far only apply the putative spouse doctrine in the case of marriage (as opposed to life or domestic partners) the discussion that follows will

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156 2008 (4) SA 12 (D).

157 Singh 1996: 324; SALRC 2006: 121.

for the most part be limited to that context. Nevertheless, it will be seen that many of these principles could be equally relevant in a life partnership setting.

2.4.1 Comparative analysis[158]

As it has been suggested that the South African Legislature may do well to consider the approach adopted by the State of California,[159] it is convenient to consider the legal position in the United States as the point of departure for the comparative analysis that follows. Due to the specific nature of the matrimonial property regimes encountered in the *Zulu* case (i.e community of property), the discussion of American law will focus mainly on California, Texas and Louisiana which are so-called "community property jurisdictions" that specifically adopt the putative spouse doctrine in its pure form (thus according *de facto* validity to a marriage which is void), and entitle the second "wife" to community property rights in the estate created during the second "marriage."[160]

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158 The author of this thesis would like to express his gratitude towards the anonymous reviewer of an article submitted (after this thesis had been assessed) to the *International Journal of Law, Policy and the Family* for his or her helpful and insightful comments pertaining to this comparative analysis.

159 See Singh 1996: 324.

160 See Sarno 2010: § 2[a]: "On the other hand, many jurisdictions not adopting the 'putative spouse doctrine' are willing to grant some relief to a party whose good faith cohabitation with a bigamous spouse was under color of marriage, the courts generally proceeding on the basis of partnership, constructive or resulting trust, or other equitable theories. Nonetheless, the terms 'putative spouse' and 'putative marriage' are not infrequently used by courts in these jurisdictions which do not formally recognize the 'putative spouse doctrine.' While the courts in the latter cases evidently use the term 'putative spouse' to connote approximately the same thing as it denotes in jurisdictions adopting the 'putative spouse doctrine,' the outcome of the cases differs between the two types of jurisdictions, in terms of the respective property rights of a lawful spouse and a 'putative spouse,' since only under the pure 'putative spouse doctrine' is *de facto* validity accorded to the otherwise invalid bigamous marriage" (italics added).

2.4.1.1 The United States of America

2.4.1.1.1 California

With reference to South African law Singh[161] observes that "real problems do arise with the enforcement of a cohabitation agreement—express or implied—where the partner being sued is still legally married to a third party." In this regard she opines that:

> Further assistance to South African lawmakers may be garnered from the California Family Law Act of 1972. Section 118 of this Act was amended to provide that the earnings and accumulations of both spouses while living separate and apart from the other spouse, are the separate property of the spouse concerned. Consequently, it is possible for a cohabiter to create a community of property with his or her partner to whom he or she is not married which has no effect on the community of property established with his spouse.[162]

The *California Family Law Act* to which Singh refers was repealed in 1994, and the relevant provisions are now embodied in the *California Family Code*. Section 771(a) of the Code provides that in the case of a married person who lives "separate and apart" from his or her spouse in a sequential relationship, "the earnings and accumulations" of that person and any minor children living with him or her is regarded as separate property. This is of particular relevance as far as the position of a married person who cohabits with another is concerned, as the Code also permits a married person to "convey" his or her separate property without his or her spouse's consent.[163] In accordance with the decision of the Supreme Court of California in *Marvin v Marvin*,[164] property sharing between a married person and his or her cohabitant will ostensibly take place as per

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161 1996: 323.

162 1996: 324.

163 Section 770 (b).

164 (1976) 18 Cal. 3d 660. This case is discussed in 2.4.3.4.2 below.

agreement, whether express or tacit. In consequence, it appears as if Singh is correct in stating that in terms of Californian law a married person may indeed create some form of community of property with his or her partner, provided that he or she does not cohabit with his or her spouse.[165]

In terms of the *Family Code* a marriage concluded by a person while his or her former spouse is still alive is void *ab initio* unless the aforementioned conditions are met or unless the spouse is "generally reputed or believed by the person to be dead at the time the subsequent marriage was contracted."[166] With the obvious exception of condition (ii), a subsequent marriage is valid until declared null and void.[167]

Section 2251 of the *Family Code* provides that in the event of a Court finding that a marriage is putative in nature (the concept for the most part being defined in the same way as South African law, save that a California Court may also declare a *voidable* marriage to be putative),[168] the Court shall, where property division is at issue, divide all property acquired during the union which would have been community property or quasi-community property[169] but for the voidness or voidability of the "marriage" according to the general rules relating to the division of property as set out in sections 2500 to 2660 of the Code. This implies that property division takes place in the same way as if the putative marriage had been a valid marriage, with the only difference being that property so divided is known as "quasi-marital property," as a valid marriage is required

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165 Singh 1996: 324 (referring to section 118 of the erstwhile *California Family Law Act* of 1972).

166 Section 2201(a)(1) and (2).

167 Section 2201(b).

168 Section 2551(a).

169 According to section 125 of the Code: "'Quasi-community property' means all real or personal property, wherever situated, acquired before or after the operative date of this code in any of the following ways:

(a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.

(b) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition."

for a true community of property to arise.[170] Californian law is not clear on the issue of whether a *mala fide* spouse is entitled to a half share of the quasi-marital property, but the opinion has been expressed that the *bona fide* "spouse's" expectations are not thwarted by an equal division as the parties would have accepted an equal division as a consequence of the dissolution of a valid marriage and would have prepared accordingly.[171]

Due to the fact that the *California Probate Code* (which governs property distribution on death) is silent on the position of intestate succession by a putative spouse, the Courts permit such estates to be distributed on the basis of equity.[172] Upon the death of the common spouse (the person "married" twice), equitable principles dictate that at least one half of the "quasi-marital property" is awarded to the putative (as opposed to legal) spouse.[173] Where the common spouse dies intestate the remaining half must, on the evidence presented, be characterised as either community property of the legal marriage or separate property of the common spouse. The law of intestate succession then determines the fate of the property.[174] In the event of the common spouse leaving a valid will, the common spouse's half of the quasi-marital property is once again characterised, and he or she will be entitled to dispose of one half of the property characterised as community property of the common spouse and the legal spouse (with the legal spouse being entitled to the other half), and to dispose of all property characterised as his or her separate property.[175]

A final important aspect to consider is that the California Legislature enacted the *Domestic Partner Rights and Responsibilities Act* of 2003[176] on 1 January 2005,

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170 Section 2251(a)(2); Raye and Pierson 2009: § 20: 104.

171 Raye and Pierson 2009: § 20: 105, drawing on *Marvin v Marvin* (1976) 18 Cal. 3d 660.

172 *Estate of Vargas* 36 Cal.App.3d 714 at 718, 719.

173 *Sousa v Freitas* 10 Cal.App.3d 660, 89 Cal.Rptr. 485 (1st Dist. 1970); Raye and Pierson 2009: § 20: 109; Wallace 2003: 100. The putative spouse only shares in property acquired during the putative marriage—see *Estate of Ricci* 201 Cal.App.2d 146, 19 Cal.Rptr. 739 at 149.

174 Raye and Pierson 2009: § 20: 109.

175 Raye and Pierson 2009: § 20: 109.

176 Also known as Assembly Bill 205 of 2003 (Chapter 421, Statutes 2003).

which greatly improved the legal position of such partners by extending most of the rights and responsibilities attached to marriage to registered domestic partners.[177] According to section 297(a) of the *California Family Code*, domestic partners "are two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring." Domestic partners must be of the same sex (in California marriage is restricted to heterosexual couples),[178] unless at least one partner is a minimum of 62 years of age, in which case a heterosexual couple may qualify as such. Section 297(2) contains a vital qualification for such a partnership in that neither partner is permitted to be married or involved in another subsisting domestic partnership. Sections 297.5(a) through (d) make it clear that domestic partners, former domestic partners and the surviving party to a domestic partnership terminated by death enjoy and are subject to most of the legal rights, responsibilities and obligations that attach to marriage, including those related to children. Termination of a registered domestic partnership must take place by way of an order of Court, unless special conditions are present.[179] The California Court of Appeal has recently held that the putative spouse doctrine is applicable in the case of a registered partnership that was not properly registered in accordance with

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177 *Ellis v Arriaga* 162 Cal.App.4th 1000; 76 Cal.Rptr.3d 401 at 405; SALRC 2006: 251. Although California became the first American State to establish a domestic partnership registry in 1999, very few rights were extended to such partners. This changed when the *Domestic Partner Rights and Responsibilities Act* was enacted—see http://en.wikipedia.org/wiki/Domestic_partnership_in_California (accessed on 29 April 2009).

178 In November 2008 the California electorate voted in favour of "Proposition 8", a proposition to restrict the right to marry to two persons of the opposite sex. A lawsuit was filed in the California Supreme Court challenging the constitutional validity of this proposition, but the Court upheld its validity on 26 May 2009—see http://ballotpedia.org/wiki/index.php/California_Proposition_8_(2008) (accessed on 14 September 2009).

179 This takes place by way of a Notice of Termination of Domestic Partnership that is filed with the Secretary of State in the event of all of the conditions listed in section 299(a)(1) – (10) being present. Unless the termination is revoked, the partnership is dissolved six months after filing (section 299(b)). A Superior Court may set aside the termination, and in addition has jurisdiction over any aspect pertaining to such dissolution (section 299(c) and (d)). With the exception of the conditions listed in section 299(a)(1) – (10), the dissolution or annulment of a domestic partnership or legal separation of the partners follows the same procedures and occasions the same rights and responsibilities as a marriage—section 299(d); *Ellis v Arriaga* 162 Cal.App. 4th 1000; 76 Cal.Rptr.3d 401 at 406.

statutory requirements.[180] The significance of this finding for South African law will be discussed in Chapter 7 that deals with the *Domestic Partnerships Bill,* 2008.

The conclusion, then, is that Californian law will permit a spouse to create a separate community of property either (i) by way of express or implied contract with a cohabitant; or (ii) in the event of such spouse being a party to a putative marriage or "putative" domestic partnership.

2.4.1.1.2 Texas and Illinois

The decision of a Federal Court in Illinois in the case of *Central States v Gray*[181] provides valuable insight into the regulation of putative marriages in two American States, namely Illinois and Texas. Before this case is discussed, it must be mentioned that section 7.001 of the *Texas Family Code* stipulates the "general rule" regarding property division at the termination of a marriage:

> In a decree of divorce or annulment, the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.

The importance of this general rule will become evident in the discussion that follows.

In *Gray*, the deceased (J) had entered into a marriage with S in 1965 in Louisiana. Although a judgment of separation had been entered in 1971, the parties had never been divorced. Both S and J had "remarried" despite this impediment: S had married M in 1973 and J married P in 1984. J and P were

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180 *Ellis v Arriaga* 162 Cal.App. 4th 1000; 76 Cal.Rptr.3d 401. This judgment was delivered on 6 May 2008.

181 2003 WL 22339272 (N.D.Ill). See Brown 2004: 182 for a brief summary of the case.

divorced in 1997, but J was married again three years later, this time to G. The latter marriage subsisted until J's death in the State of Texas in 2001.[182]

The central issue that arose for determination in this case was whether S or G qualified as J's "surviving spouse" for the purpose of a pension benefit. For a few months after J's death the benefit was paid to G, but when S submitted a claim on the basis of allegedly being the decedent's surviving spouse, the Fund suspended all payments pending the resolution of this question by way of an interpleader action instituted by the Fund.[183] As the pension plan was administered in the State of Illinois, the interpleader action was instituted in the federal Court of that State.

The *terminus a quo* for deciding this matter was the wording of the plan itself, but, as no guidance could be obtained in this regard, the Court held that recourse was to be had to State law in order to determine which party was J's "surviving spouse." This immediately raised the issue as to which State's law was to apply, for, as seen above three potential jurisdictions were concerned. This question was quickly resolved by Senior Judge Plunkett's finding that the legal system that obtained where J was domiciled at the date of his death was decisive.[184]

According to the Court Texas law recognised the concept of a putative marriage, and provided that in such a "marriage" the *bona fide* spouse had "the same right in property acquired during the marital relationship as if she were a lawful spouse."[185] In the circumstances, the Court was prepared to accept that G qualified as a *bona fide* putative spouse under Texas law, with the result that the

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182 At 1.

183 At 1 and 2.

184 At 3.

185 *Garduno v Garduno* 760 S.W.2d 735 (Tex.App.1988) at 738, 739. Along with recognising the concept of a putative spouse, Texas law provides for both common-law as well as ceremonial marriages—see note 71 in Chapter 4. If a spouse attempts to marry another person while already a party to an existing valid marriage, the second "marriage" is void (section 6.202(a) *Texas Family Law Code*). The second "marriage" however becomes fully valid once the prior marriage is dissolved provided that the parties to the second marriage "have lived together as husband and wife and represented themselves to others as being married" (section 6.202(b)).

attendant patrimonial consequences were apposite.[186] Furthermore, as the Courts in that State applied a so-called "acceptance-of-the-benefits" doctrine,[187] Texas law estopped S from contesting the validity of the termination of her marriage after having accepted and benefitted from the same since 1971.[188] In light of the above, and of the fact that S had neither relied on J for economic support since 1971 nor anticipated any marital benefit at his death, the Court concluded that G was entitled to the benefit as his "surviving spouse."[189]

In order to substantiate this conclusion, Judge Plunkett remarked that the case would have had the same outcome if Illinois law had been applicable, as the *Illinois Marriage and Dissolution of Marriage Act* states that a putative spouse (a person who, after going through a marriage ceremony, cohabits with another person in the *bona fide* belief that the marriage is valid) "acquires the rights conferred on a legal spouse."[190] (It should be borne in mind that this is at best a federal Judge's view of what the Illinois State Court's decision would be.) Further, in the event of there being a legal spouse or other putative spouse

> [the] rights acquired by a putative spouse do not supersede the rights of the legal spouse or those acquired by other putative spouses, but the court shall apportion property, maintenance and support rights among the claimants *as appropriate in the circumstances and in the interests of justice* ...[191]

Even though both S and G fell within the ambit of possible protection under the extract quoted above, the Court held that the criteria therein demanded that G be regarded as the surviving spouse. In addition, on the basis that it would be

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186 At 3.

187 "The doctrine is based on the equitable principle of estoppel and precludes a litigant from accepting the benefits of a judgment and then subsequently challenging that portion of the judgment affording him those benefits" (at 3).

188 At 3.

189 At 3.

190 A putative spouse's status as such and acquisition of further rights terminates when he or she becomes aware of the invalidity of the marriage.

191 Section 305.

contrary to public policy to permit her to receive benefits from a marriage after accepting the benefits of its termination, S could be estopped from alleging that she was J's surviving spouse.[192] This conclusion was strengthened by the fact that the deceased had earned the benefits in question after he and S had been separated.[193] In the end result, G was therefore held to be J's surviving spouse.

Another Texas case which is of relevance (in this case within the context of divorce) is the case of *Garduno v Garduno*.[194] In this case the appellant (R) and appellee[195] (M) had cohabited as from 1980 until their relationship ended in 1986. Throughout the course of their relationship, the parties had held themselves out as being married. A year into the relationship, M found out that R was still married. After convincing M that he was still intent on marrying her, R attempted to divorce his wife in the Mexican Courts, as the latter still resided in that country.[196] R and M exchanged wedding rings in the meantime (in 1982), and informed all who inquired that they were married.[197] In 1984 R was able to provide M with proof of a decree of divorce, only for him to be telephoned by his Mexican legal representative not long thereafter and informed that an appeal against this order had been upheld by a Mexican Appellate Court. R informed M of this development.[198] R and his wife were eventually divorced by a Texas Court in 1986, but within months of this development his relationship with M had also come to an end. M attempted to obtain a decree of divorce on the basis of the common-law marriage which she alleged to have existed between herself and R. The Trial Court recognised both the existence of the common-law marriage as well as the putative marriage that had existed while R was still married to his first wife. On this basis, M was awarded a substantial share of R's

192 At 4.
193 Footnote 4 of the judgment.
194 760 S.W.2d 735 (Tex.App.1988).
195 This term, foreign to South African law, is the term used by the Court in *Garduno*.
196 At 737.
197 At 739, 740.
198 At 740.

half share of the community property that had existed between himself and his first wife.[199]

On appeal, the Court held that the evidence did not support the conclusion that the parties had attempted to enter into a common-law marriage prior to M becoming aware of R's married status in January 1981. As a consequence, there was no possibility of the marriage being putative up until that point.[200] A common law agreement had however come into existence in 1982, and therefore, provided she was able to prove that she was of the *bona fide* belief that R's first marriage had been dissolved by the Mexican Court in 1984, a putative marriage could have existed after she had been shown that Court's divorce decree.[201] As M had testified that neither she nor R had believed the information received from the Mexican lawyer in 1984 to be true, the Texas Court had to adjudicate whether this disbelief was sufficient to satisfy the *bona fides* requirement so as to render the marriage putative. As it had been received from a reputable source, the Court held that she was no longer *bona fide* once the information received from the Mexican lawyer had been imparted to her. Nevertheless, nothing turned on the fact that the marriage was indeed putative up until that time, as no property in dispute had been acquired during this period.[202] A common-law marriage had indeed come into existence between R and M once R and his first wife had been properly divorced in 1986,[203] as a result of which a new community of property had been created consisting of items acquired after that date. As the disputed property had been acquired prior to the existence of the latter marriage, M could have no community interest therein, as it formed part of the community that existed (and had been divided) between R

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199 At 737 and 738. The other half of the community property belonged to R's first wife by virtue of their marriage.

200 At 740.

201 At 740.

202 At 740, 741.

203 This principle was previously stipulated in section 2.22 of the *Texas Family Code,* but is now contained in section 6.202(a) and (b) of the Code (these provisions are quoted in note 185 above).

and his first wife.[204] R was however free to dispose of his interest in the latter community as he wished, with the result that M would only be able to retain gifts made to her on this basis.[205]

In conclusion, it is clear that Texas law allows a putative spouse all the rights of a lawful spouse, with the result that on divorce property (which is limited to that which was acquired during the existence of the putative marriage) is apportioned on the basis of principles of equity.[206]

If the property stands to be divided due to the death of the common spouse, two separate estates are recognised namely the legal and the putative. The putative wife is entitled to the same rights in property acquired during the putative marriage as she would have been if she were a lawful wife.[207] Under community property law, she is entitled to an undivided half of the putative estate that existed between herself and the deceased, while the legal wife and the heirs of the putative marriage share the other half equally (that is to say one quarter to the legal wife and the other quarter to the heirs of the putative marriage).[208] The legal wife and the heirs of the lawful marriage are each entitled to an undivided half of the legal estate as it existed until the putative marriage was entered into.[209] Where a bigamist dies intestate and is survived only by his wives, the lawful wife will receive the entire legal estate, while the putative estate will be shared equally between the legal wife and the putative wife.[210]

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204 At 741.

205 At 741.

206 *Davis v Davis* 521 S.W.2d 603, 606 (Tex. 1975); Wallace 2003: 97; Fine 1983: 722; http://www.powerfamilylaw.com/marriage.html (accessed on 23 April 2009).

207 *Davis v Davis* 521 S.W.2d 603 at 606.

208 *Parker v Parker* 222 F. 186 at 194, 195; Sarno 2010: §§ 5, 11.

209 *Parker v Parker* 222 F. 186 at 194, 195; Sarno 2010: § 5.

210 *Hammond v Hammond* 49 Tex.Civ.App. 482, 108 S.W. 1024 at 484.

2.4.1.1.3 Louisiana

The law relating to putative marriages in Louisiana was in the past characterised by inconsistent application of Spanish and French law despite the fact that the *Louisiana Civil Code* of 1825 had transplanted articles 201 and 202 directly from the *Code of Napoleon*.[211] Although the *Civil Code* of 1870 retained the original wording, in 1987 article 196 introduced the prevailing legal position. Due to the influence of French and Spanish law, the law relating to putative marriages constitutes a blend of statutory law as interpreted in the light of these sources.[212]

Nevertheless, the Code provides that a putative spouse to a void "marriage" who in good faith believed it to be valid is entitled to the civil effects of marriage.[213] As such, spouses in good faith will each receive one-half of the community property.[214] Where a second "marriage" has been entered into while the first subsists, Louisiana distinguishes between the situation where the common spouse was in good or in bad faith.[215] If the common spouse was in good faith, the position is similar to French law in that the common spouse is entitled to half of the putative community, while the other half is shared equally between the legal and putative spouses.[216] If the common spouse was *mala fide*, he (or his heirs) forfeit(s) the right to share in the putative community, with the result that it is split between the legal spouse and the putative spouse.[217]

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211 Fine 1983: 712; Wallace 2003: 82.

212 Wallace 2003: 82, 83.

213 "Art. 96. Civil effects of absolutely null marriage; putative marriage
An absolutely null marriage nevertheless produces civil effects in favor of a party who contracted it in good faith for as long as that party remains in good faith.
When the cause of the nullity is one party's prior undissolved marriage, the civil effects continue in favor of the other party, regardless of whether the latter remains in good faith, until the marriage is pronounced null or the latter party contracts a valid marriage.
A marriage contracted by a party in good faith produces civil effects in favor of a child of the parties.
A purported marriage between parties of the same sex does not produce any civil effects."

214 Wallace 2003: 94.

215 Fine 1983: 713; Wallace 2003: 95.

216 Wallace 2003: 95; Fine 1983: 714.

217 Wallace 2003: 83 – 85 and 95; Fine 1983: 713.

2.4.1.1.4 States that have enacted legislation based on the *Uniform Marriage and Divorce Act*, 1973

As family law falls within the law-making domain of individual States, this has resulted in a fragmented and inconsistent body of law, with some States permitting "easier" divorces (and sometimes using this as a form of tourist attraction!),[218] leading to couples attempting to obtain divorces across State lines in so-called "divorce-mill [S]tates."[219]

In an attempt to curb this problematic state of affairs the *Uniform Marriage and Divorce Act* of 1973 was approved in 1974 with a view to standardising the law. States were encouraged to enact this legislation, and those that have done so include Arizona, Colorado, Illinois, Kentucky, Missouri, Montana and Washington.[220] States which have enacted section 209 of the Uniform Act[221] will treat a putative marriage in a similar way as the State of Illinois (discussed above) does. As an example hereof, section 518.055 of the *Minnesota Statutes* states the following:

> Any person who has cohabited with another to whom the person is not legally married in the good faith belief that the person was married to the other is a putative spouse until knowledge of the fact that the person is not legally married terminates the status and prevents acquisition of further rights. A putative spouse acquires the rights conferred upon a legal spouse, including the right to maintenance following termination of the status, whether or not the marriage is

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218 According to http://www.divorceresourcecenter.com/UMDA.htm (accessed on 4 May 2009) the State of Nevada at one time required a minimum residency period of six weeks in order to secure a divorce. In order to circumvent this requirement while simultaneously increasing tourism, holiday packages at horse ranches were available where divorcing couples were accommodated for the requisite period of time, after which they could obtain the decree of divorce.

219 Verschraegen 2007: 5-3; Friedman 1985: 503; http://www.divorceresourcecenter.com/UMDA.htm (accessed on 4 May 2009). See Friedman 1985: 495 *et seq* for other problematic issues pertaining to diverging divorce and marriage laws in the United States.

220 Information obtained from http://www.law.cornell.edu/uniform/vol9.html#mardv (accessed on 4 May 2009).

221 Over and above Illinois, only Colorado, Minnesota and Montana have enacted section 209.

prohibited or declared a nullity. *If there is a legal spouse or other putative spouses, rights acquired by a putative spouse do not supersede the rights of the legal spouse or those acquired by other putative spouses, but the court shall apportion property, maintenance, and support rights among the claimants as appropriate in the circumstances and in the interests of justice*.[222]

2.4.1.2 France

As is the case in South African common law,[223] French law also acquired the doctrine of the putative marriage from Canon law.[224] Article 201 of the *French Civil Code* holds that provided it was concluded in good faith, the effects of a marriage will obtain in the event of a marriage being declared a nullity. Consequently, if both parties are in good faith, each is permitted to retain the benefits to which he or she was legally entitled. In the event of only one "spouse" being *bona fide*, the incidents of marriage will apply to that person only.[225] In the latter instance, the *bona fide* spouse may relinquish this right if the consequences of doing so would be more favourable to him or her and may in addition institute an action for damages against the blameworthy "spouse."[226] Good faith is presumed by law and is permitted to relate to error of fact or of law.[227] Over and above the requirement of good faith, a second essential requirement for putativity is participation in a marriage ceremony.[228] The civil effects of a putative marriage inure to the date of nullification and not, as in South Africa and in other jurisdictions, until a party is no longer in good faith.[229] Fine[230]

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222 Emphasis added.

223 Hahlo 1985: 111 (note 69).

224 Fine 1983: 709.

225 Coester-Waltjen and Coester 2007: 3-152; Fine 1983: 709. As far as the effects of annulment on children is concerned, article 202 provides that the consequences of a marriage apply irrespective of the *bona fides* of the spouses themselves and that a judge determines aspects pertaining to parental authority as he or she would have done in the case of divorce.

226 Coester-Waltjen and Coester 2007: 3-152. Article 1382 states that "Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it"—see http://www.lexinter.net/ENGLISH/civil_code.htm (accessed on 26 April 2009).

227 Lee 1954: 44; Fine 1983: 709, 710.

228 Lee 1954: 44; Fine 1983: 709, 710.

229 Wallace 2003: 80.

summarises the consequences of a putative marriage in the following succinct terms:

> [A]ll civil effects which came, or should have come, to the good faith participants during the period between the ceremony and the judicial declaration are confirmed. The term "civil effects" encompasses, broadly speaking, all rights exigible at law because of the marriage, whether they can be enforced against the other participant in the void ceremony, against third parties, or against the State.

Article 147 of the *Civil Code* provides that no person may enter into a subsequent marriage until the first has been dissolved. Bigamy is consequently a ground for absolute nullity, with the result that such an impediment cannot be rectified in order to validate the marriage.

After much debate as to how property was to be apportioned where a person had died leaving both a legal and a putative spouse,[231] the French writers reached consensus on the following position: The deceased estate is entitled to a half share of the entire community (that is, the community existing between himself and his legal wife at the time of the second "marriage" added to that accumulated until his death).[232] The first wife is entitled to half of the estate as it had existed at the time the second marriage was entered into.[233] As she was also a party to the community that existed by virtue of the second "marriage" (the "putative community"), she is entitled to a half share of this community as well. However, the putative wife is also entitled to a half-share of the latter community, as both communities were co-extensive. As this implies that both claims (which are equally robust and worthy of protection) involve the same property, the property is split and each wife is awarded a half-share thereof (which is to say each

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230 1983: 710.

231 See Henderson 1941: 64 *et seq* for an exposition of the development of the various schools of thought.

232 Henderson 1941: 67; Wallace 2003: 82.

233 Henderson 1941: 67.

receives one quarter of the putative community).[234] "In other words, the putative community would be divided one-half to the successors of the deceased common spouse, one-fourth to the legal spouse, and one-fourth to the putative spouse."[235] Over and above her one-quarter from the putative estate, the legal spouse is also entitled to her half of the estate as it existed at the time of the conclusion of the second "marriage."

2.4.2 South African case law

Before the case of *Zulu v Zulu and Others* [236] is discussed, it is important to note that this case did not involve a life partnership, but instead dealt with the law of marriage. For this reason the discussion that follows and the conclusions reached will for the most part be confined to the law of marriage. In the concluding paragraphs of this discussion, reference will be made to the relevance of these conclusions in a life partnership setting.

As seen in 2.4 above, the recent South African High Court decision of *Zulu v Zulu and Others* [237] provides a convenient backdrop against which the complexities surrounding a spouse's ability to "create a community of property" with a second "spouse" or with a life partner can be explored. *In casu* the applicant had entered into a civil "marriage" with the deceased in 1985. Unbeknownst to her, the deceased had already entered into a civil marriage with the first respondent eleven years earlier. Both "marriages" to which the deceased had been a party were concluded in community of property. As the first marriage was still in existence, there was no doubt that the second "marriage" was bigamous and therefore void *ab initio*.[238] Alleging that she only became aware of the deceased's prior marriage after his death, the applicant claimed that the "marriage" to which she was a party was putative in nature and that she was, by

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234 Henderson 1941: 68; Wallace 2003: 82.
235 Wallace 2003: 82.
236 2008 (4) SA 12 (D).
237 2008 (4) SA 12 (D).
238 At 14 (A) – (F).

virtue of the intended community of property, entitled to a half share of the deceased estate.[239] Hugo J was prepared to accept that the applicant had not been aware of the fact that the deceased was already married and that she had entered into the second "marriage" in good faith.[240] After reiterating that *bona fides* on the part of at least one "spouse" was required in order for a marriage to be putative, Hugo J stated that where such a "marriage" was intended to be in community of property, the *bona fide* spouse was entitled to have the assets shared on that basis. This being the case, the learned Judge stated that he was however unable to find any precedent where "there is an existing valid community of property."[241] As a spouse to a marriage in community of property was unable to transfer his or her undivided half share of the joint estate to another person, the Court held that it followed that in the absence of any permissible exclusions therefrom, all of the assets in the deceased estate formed part of the joint estate which had been created when the first marriage had been solemnised.[242] As for the applicant's claim that a universal partnership existed between herself and the deceased, Hugo J held that this was impossible when the requirements for a valid partnership were considered as: (i) any such "agreement" between the parties was unlawful as the deceased was already married; (ii) the intention to create such a partnership was absent; and (iii) there was no profit motive. In the end result, the Court found that the applicant was not entitled to any of the deceased's property.[243]

2.4.2.1 Problematic aspects of the *Zulu* case

It is respectfully submitted that this case is flawed in a number of respects which include the remedy requested by the applicant as well as the judgment itself. These difficulties will now be considered.

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239 At 14 (F) – (G).
240 At 15 (A).
241 At 15 (C).
242 At 15 (E) – (H).
243 At 16 (A) – (C).

The premise behind the recognition of the concept of a putative marriage is that it is "a device to mitigate the harshness of annulment to an innocent spouse but also, and more particularly, to mitigate the harshness of that annulment to children born of the union."[244] As children were not at issue *in casu*, only the first part of this statement is relevant for the purposes of the current discussion. As far as the proprietary consequences of a putative marriage are concerned, our Courts have on a number of occasions confirmed the common law position that community of property (in the form of a tacit universal partnership) arises irrespective of the fact that the marriage is null and void, so that, provided that doing so would be to his or her advantage, the *bona fide* "spouse" could "enforce the rights of property which would have been competent to him or her if the marriage had been valid."[245] In view of the finding in *M v M* [246] where the plaintiff had requested only that which she had brought into the "marriage" with her step-father, it is clear that the Court is not bound to order a strict equal sharing of property, but may deviate from the general rule if a strict equal sharing has not been pleaded.[247]

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244 *Per* Friedman J in *Moola and Others v Aulsebrook NO and Others* 1983 (1) SA 687 (N) at 693(G) – (H), referred to with approval by Findlay AJ in *W v S and Others* (1) 1988 (1) SA 475 (N) at 484 (I) – 485 (B). Although made within the context of American law (with reference to the law in the State of Louisiana) Henderson (1941: 55) explains this premise as follows: "The law, however, in its omnipotence does not weigh the scales of justice too harshly against those who are innocent violators, but makes an exceptional provision in favor of those who, acting in good faith, have entered into an invalid marriage" (footnote omitted). This statement corresponds with the underlying sentiment in South African law.

245 See the common law authority quoted by Ogilvie Thompson AJ in *Ex parte L (also known as A)* 1947 (3) SA 50 (C) at 59; the gist of this finding being referred to with approval by De Vos Hugo J in *M v M* 1962 (2) SA 114 (GW) at 117 (G) – (H); Erasmus *et al* 1983: par 49; Sinclair and Heaton 1996: 408 and Hahlo 1985: 115.

246 1962 (2) SA 114 (GW) at 117 (G) – (H). In this case the defendant had been married to the plaintiff's mother, which marriage had been terminated by the death of the latter. The plaintiff was born of a prior marriage, with the result that she was the defendant's step-daughter. While still a minor, the plaintiff had been raped by and coerced into "marrying" the defendant, without her knowing that the "marriage" was null and void. Four children were born of the "marriage." The plaintiff approached the Court for an order that *inter alia* declared the children born of this putative marriage to be legitimate and permitted the assets which she brought into the "marriage" to be returned to her. Her claims were successful.

247 At 117 (G) – (H).

Before the application of these principles to the facts in *Zulu* is discussed, it is important to point out a confusing aspect of the applicant's claim, which becomes evident as a result of Hugo J's description thereof. In this regard it was stated that the applicant alleged that she was "entitled to a one-half share of the deceased's estate."[248] This description causes confusion as it is uncertain whether the applicant was claiming that she was entitled to a half share of the "joint estate" that allegedly existed between herself and the deceased, or whether the applicant was in fact claiming a half share of the deceased estate which was available for distribution *after the proprietary consequences of the joint estate between the deceased and his first wife had been dispensed with*.[249] The Judge's use of the possessive case with reference to the deceased estate ("deceased's estate") seems to support the latter interpretation. Enquiries made for the purposes of this study led to the conclusion that although Hugo J's wording appears to indicate the contrary, the first interpretation must be accepted as being the correct one.[250]

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248 At 14 (F) – (G).

249 These two interpretations could have had a drastic effect on the amount claimed. For example, if the first interpretation were true, this would imply that the applicant was effectively requesting the Court to ignore the existence of the deceased's first marriage. If she succeeded in this claim, she would have been entitled to a half share of the joint estate that existed between herself and the deceased, with the result that the first wife would have received nothing. If, on the other hand, the second interpretation were true, this would imply (as had been the case in *M v M* see note 246) that the applicant in *Zulu* was not claiming an equal share of the joint estate (in *M* the plaintiff had only claimed that which she had brought into the marriage—at 117 (G)), but that she was in fact claiming a smaller amount than that to which she would have been entitled on the basis of the first interpretation. To illustrate: Assuming that the entire joint estate between the deceased and the first wife was valued at R 300 000, the second interpretation suggests that she in fact claimed half *of the deceased's share* of the joint estate that existed between the deceased and his legal wife (i.e. half of R 150 000) or R 75 000. In any event, what does become clear is that the applicant never considered the possibility of requesting the Court to order that the entire joint estate in actual fact comprised the assets and liabilities contributed by all three parties (i.e. those of the applicant, the first respondent and the deceased) and that this estate could therefore be apportioned between the three of them (which, as will be seen in 2.4.3.4 below, is submitted may quite conceivably have been claimed).

250 This confusing aspect of the case was clarified by a telephonic enquiry to the first respondent's attorneys (Ms Sarah Pugsley of Sarah Pugsley & Associates) on 15 April 2009, who confirmed that the applicant had in fact averred that no estate whatsoever existed between the deceased and his first wife with the result that she (the applicant) was entitled to a half-share of the "joint estate" that existed by virtue of her "marriage" to the deceased.

Once clarified, this aspect highlights a fatal flaw in the applicant's case, in that she was in fact claiming something which it is submitted even the widest interpretation of the principles underlying the putative marriage doctrine and the nature of community of property could never sanction, namely the negation of the fact that the deceased was involved in a legitimate marriage with the first respondent which had never been terminated prior to his death. Nevertheless, as Hugo J did not express himself as to the fact that he was constrained by the applicant's claim, it is submitted that it may be fair to disregard the applicant's flawed pleadings for a moment and to evaluate the outcome of the case solely as far as the law relating to putative marriages is concerned. What follows is a frank assessment of the judgment on the basis of the underlying rationale behind the principles regulating the *matrimonium putativum*.

As seen above, the putative marriage is based on the premise that the harsh consequences of a void marriage should be avoided for the sake of the *bona fide* "spouse." One of the ways in which this is achieved is by regulating the patrimonial consequences of such a "marriage." Although existing case law on this matter such as *Ex parte L (also known as A)* and *Mograbi v Mograbi* was distinguished by Hugo J on the basis that neither case dealt with the situation where a joint estate was already in existence, it is submitted that this fact alone should not detract from this premise.[251] In fact, despite Hugo J's acknowledgement of the *bona fides* of the applicant[252] and of the deceased's awareness that he was already married and that his second "marriage" was unlawful,[253] the approach adopted by the learned Judge flies in the face of the

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251 The argument that there is no need to deviate from the established consequences of the putative marriage in the case of bigamy being committed seems to be supported by the fact that an author such as Lee (1954: 40) devotes only two sentences to his discussion of this concept: "Bigamy was a frequent source of putative marriages in the old law as it is today. It does not call for any special comment in this place."

252 The test for the *bona fides* of an applicant in the position of the applicant is discussed in 2.4.3.3.2(c) below.

253 At 15 (A) and 16 (A) respectively. While the finding that the second "spouse" was *bona fide* appears justified on the facts, it is submitted that the finding regarding the deceased's awareness of the unlawfulness of that "marriage" is quite contentious in the light of the prevalence of

well-entrenched *raison d'être* of the putative marriage by in fact penalising the innocent "spouse" for the actions of the party who was not only fully aware of the fact that he was already married, but, moreover, according to the Judge was fully aware of the unlawfulness of his second "marriage."[254]

While it appears to be true that there is no South African precedent that deals with the fact of bigamy coupled with an existing joint estate,[255] it is submitted that this fact alone does not justify such a radical departure from (and indeed negation of) established legal principles. The putative marriage exists as a "common-law qualification" to the general rule that a void marriage has no legal consequences.[256] As such, it forms part of the body of common law which, in terms of the *Constitution*, the Constitutional Court, the Supreme Court of Appeal and all High Courts have the inherent power to develop, "taking into account the interests of justice" and in such a way as to "promote the spirit, purport and

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polygyny in South Africa and the uncertainty that the recognition of and interrelationship between civil and customary marriages creates—see the note that follows.

254 That such a situation cannot be countenanced is underscored by Jansen (2003: 128): "In a country where polygamy prevails, the courts and the legislator should consider the different views and not simply declare the second marriage (whether civil or customary) a nullity, otherwise 'women will be punished for the transgressions of their husbands who may not be aware of the legal consequences of their actions, or who may disagree with the conceptual legal and theoretical separation between these types of marriage'." The latter quote is taken from Bonthuys and Pieterse 2000: 624.

255 Lee (1954: 41) does refer to a case that is reported by Boel and Loenius in their *Decisien en Observationes* where an Englishman by the name of Joris Stevensz (referred to as "Stevenszoon" by Gane J in *Potgieter v Bellingan* 1940 EDL 264 at 268) had entered into a second marriage believing his first wife to have died while he was living abroad in Holland. When his first wife appeared in Amsterdam a few years later, he was ordered to return to her and the estate between himself and his second wife was divided between them, and he was ordered to pay an annual amount towards the support of the children born from the second "marriage." The major relevance of this case does not however appear to be the order dividing the joint estate, but rather the fact that the children were later declared to be legitimate after the man had petitioned the States of Holland and West Friesland to declare this fact, and the latter had done so after seeking the advice of the Court of Holland (see Van der Keessel (translated by Lorenz) *Theses* 64 and 65). Although this case is distinguishable from the situation in *Zulu* on the basis of the husband's knowledge of the prior marriage in the latter case, it does provide some indication that the second "wife" in such a case should at least be entitled to a share of the joint estate. Whether this can be done at the expense of the first wife is however debatable, and it is submitted that a more equitable distribution will be required in modern law. This aspect is discussed in detail below.

256 Cronjé and Heaton 2004: 42. This concept originated in Canon law, and was later adopted by the law of Holland—see *Moola v Aulsebrook* 1983 (1) SA 687 (N) at 690 (F) – (G) and Lee 1954: 40.

objects of the Bill of Rights."[257] Leaving a *bona fide* person in the position of the applicant with nothing at all after years of being involved in a "joint estate" to which she contributed both directly and indirectly surely does not square with these principles. This point is driven home even further when it considered that although Hugo J pointed out that the applicant would have had a claim for damages against the deceased estate on the basis of being induced to enter into an invalid marriage, an analysis of the relevant case law reveals that such claims have thus far only been granted for non-patrimonial loss by way of the institution of the *actio iniuriarum* for *iniuria* and *contumelia*.[258] In any event, it is suggested that it is unfair to expect a person in the position of the applicant in *Zulu* to comply with the onerous requirement of proving delictual liability while she already has the putative marriage on the basis of which to receive some form of recognition of her "marriage."

As seen above, the only barrier to the application of the aforegoing principles was the fact that the applicant's pleadings were not legally sound. Unfortunately, Hugo J failed to point this out. Consequently one can only speculate on the extent (if any) to which the learned Judge would have deviated from his general reasoning if the pleadings had in fact been framed correctly.

2.4.2.2 Conclusion

The *Zulu* case tells a tale of two errors; the first created by the applicant's pleadings leading inexorably to the second by the Judge, culminating in an unsatisfactory legal position. It is therefore submitted that the applicant should have requested the Court to develop the common law; a situation which would have placed Hugo J in a better position to have provided guidance as to how the

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257 Section 173 read with section 39(2) of the *Constitution*, 1996.

258 See *Snyman v Snyman* 1984 (4) SA 262 (W) and *Arendse v Roode* 1989 (1) SA 763 (C). In the latter case, an amount of damages was also awarded on the basis of seduction, but, as was pointed out by Hodes AJ, a claim for seduction is an action *sui generis* (at 765 (H)). The remedial scope of this type of claim may possibly not even extend to all personality rights—see Claasen 1987: 61 who opines that it is questionable whether an infringement of *fama* takes place in such a case.

principles governing the putative marriage might have been applied to this *de novo* situation; a situation which, it is submitted, is becoming increasingly relevant in view of the pluralistic nature of South African society and the confusion and uncertainty that often accompanies the interrelationship between and diverging consequences of customary and civil marriages,[259] which, furthermore, will undoubtedly require the development of the common law in future.[260] The question now arises as to how the common law may have been developed. This aspect will now be considered along with any any other alternative solutions to the problems posed by the *Zulu* case.

2.4.3 Developing the common law: A hypothetical approach towards solving future problems in cases similar to *Zulu*

2.4.3.1 Introduction

The approach towards developing the common law was recently set out by Heher JA in *Linvestment CC v Hammersley and Another*:[261]

> The power [to develop the common law] is confirmed in s 173 of the Constitution 'taking into account the interests of justice'. Thus, without abandoning our legal heritage, the courts can and should examine *how developed legal systems cope with common problems*. By appropriate application of the knowledge thus derived, a modification of our existing law may better serve the interests of justice *when the existing law is uncertain or does not adequately serve modern demands on it*.[262]

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259 See for example Jansen 2003: 120 *et seq*. This explains why Hugo J's finding that the deceased was aware of the fact that his second marriage was unlawful (at 16(A) – (B)) is contentious as, in the absence of specific proof to the contrary, the reality is that many South Africans are unaware of the distinction that the law makes between civil and customary marriages as far as polygyny is concerned.

260 Although this issue was not raised in the *Zulu* case, it is a fact that in a country where polygyny prevails many African couples are unaware of the differences between customary and civil marriages and of the fact that a civil marriage may only be monogamous—see Jansen 2003: 128; Bonthuys and Pieterse 2000: 624.

261 2008 (3) SA 283 (SCA) at par [25].

262 Emphasis added.

From the dearth of South African authority on this issue, it becomes clear that in a situation such as the one in *Zulu*, the "existing law is [indeed] uncertain." In addition, it is clear that the demands posed by a multicultural society in which the co-existence of and differentiation between civil and customary marriages is often problematic, demands a re-evaluation of the common law position. In this regard, it is submitted that valuable guidance is provided by the approaches in American and French law.

2.4.3.2 A summary of comparative law

As a point of departure, it must be agreed with Blakesley[263] that it is particularly useful from a comparative viewpoint to analyse the legal position in the United States (particularly the States of Texas, Louisiana and California) as they "provide a laboratory for study of the confluence of civil and common law."

While the various States apportion property in different ways, there is no doubt about the fact that, regardless of the method of apportionment, the *bona fide* party "has a right to some portion of the property accumulated during the relationship."[264] In California, property is divided in the same way as in a valid marriage, and where the claims of a putative and a legal spouse compete after the death of the common spouse, the former is entitled to "*at least* one-half of the quasi-marital property", regardless of whether he or she died testate or intestate.[265]

In Illinois and in other States that have enacted section 209 of the *Uniform Marriage and Divorce Act* of 1973, the rights of neither spouse trump the other, and the property is apportioned "*as appropriate in the circumstances and in the*

263 1985: 32.
264 Blakesley 1985: 31.
265 Raye and Pierson 2009: § 20: 109.

interests of justice ...",[266] while in Texas equity is the decisive criterion on divorce, but not on death.

French law allocates one-half of the *entire* estate to the deceased common spouse's estate; entitles only the legal wife to her share of the first community as it existed prior to the putative marriage; and splits the remaining putative estate between the legal and putative spouses (so that they each receive one-half of the latter estate). In Louisiana, the same position as in France generally applies, with the only difference being that a distinction is drawn between the *mala fide* and the *bona fide* spouses.

Finally, States such as Texas, Illinois and Delaware apply the co-called "acceptance-of-the-benefits" doctrine to prevent the legal spouse from accepting the benefits of a separation and later challenging the disadvantages thereof.[267]

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266 Section 305 of the *Illinois Marriage and Dissolution of Marriage Act* (750ILCS5/); *Central States v Gray* 2003 WL 22339272 (N.D.Ill.) at 4.

267 This doctrine was neatly described in a decision of the Supreme Court of Delaware (*Smith v Smith* 893 A.2d 934; 2006 Del. LEXIS 113) as follows: "'No rule is better settled than that a litigant who accepts the benefits or any substantial part of the benefits of a judgment or decree is thereby estopped from reviewing and escaping from its burdens. [The litigant] cannot avail [herself] of its advantages, and then question its disadvantages in a higher court.'" Accordingly, it is well-settled law that an appellant who accepts the benefits of a judgment cannot pursue an appeal that may invalidate the rights to those benefits if successful" (at 937).

Figure 6.1: **COMPARATIVE ANALYSIS: The patrimonial consequences of "marriages" involving competing claims between a legal spouse and a putative spouse**

Facts: Assume that A entered into a civil marriage in community of property with B (the legal spouse) in 2000. Five years later (in 2005), he married C (the putative spouse) while his marriage to B still subsisted. At the time of entering into the second marriage in 2005 the value of the joint estate between A and B was worth R 200 000. The second "marriage" was also a civil "marriage" in community of property. When A died in 2009, the value of the joint estate (consisting of the legal marriage as well as the putative marriage), was worth R 500 000. If both B and C lay claim to the estate, the various legal positions will be the following:

California:

If A dies *intestate*:

- C has a right to at least one-half of the "quasi-marital property", i.e.½ (R 300 000).
- Evidence presented will determine whether remainder is separate property of A or part of community property with B. Intestate succession laws apply.

If A dies *testate*:

- C has a right to one-half of the "quasi-marital property", i.e.½ (R 300 000).
- If remaining property is community property (between A and B), A may dispose freely of one-half thereof; B gets the other half.
- A may dispose freely of any property classed as his separate property.

France:

A's estate is entitled to one-half of entire community, i.e. ½ (R 500 000).

B is entitled to half of property existing before putative marriage (i.e. ½ of R 200 000).

B and C share the remaining putative estate (R 150 000) equally.

Therefore:

- A's estate receives R 250 000.
- B receives R 175 000 (i.e. R 100 000 + R 75 000).
- C receives R 75 000.

Louisiana:

If A was *bona fide,* the same position as in French law applies.

If A was *mala fide*, he (or his heirs) forfeit(s) the right to share in the putative community, and this is divided between B and C on an equal basis.

Texas:

Under community property law B is entitled to one half of the estate between herself and A (i.e. R 100 000), while the other half is distributed between the heirs of A and B. C is entitled to one half of the putative estate (i.e. R 150 000), while the other half is shared between B and the heirs of A and C. If A dies intestate leaving no children, B will be awarded the entire legal estate, while she and C will each be awarded half of the putative estate.

States that have enacted section 209 of the *Uniform Marriage and Divorce Act*:

Rights of one spouse do not supersede the other and property is apportioned *"as appropriate in the circumstances and in the interests of justice."*

South Africa (current position):

Only community between deceased and first wife recognised. Putative spouse must rely on a claim for damages.

2.4.3.3 Conclusions based on comparative analysis

Bearing the comparative analysis in Figure 6.1 in mind, it is immediately apparent that the South African position as created in the *Zulu* case is out of kilter with the position in the jurisdictions in America and in France. Due to the fact that certain facets of the approaches in these jurisdictions may be comparable with South African law, it is submitted that the correct approach is to adopt a combination of these approaches that accords with the fundamental principles of the South African marriage in community of property, but nevertheless permits the Court to exercise its discretion in order to "fine-tune" the end result where it is just and equitable to do so.

2.4.3.3.1 General principle

It is submitted that the approaches in California, Texas, Louisiana and France can be supported to the extent that they base the apportionment on the "legal" and "putative" estates. Although such a *physical* differentiation would run counter to the South African concept of community of property (as our law determines that there is in reality only one joint estate), it is submitted that a *theoretical* differentiation between the legal and putative estates is nevertheless required in order to facilitate a distribution that is aligned with the fundamental notion that the joint estate consists of all pre- and post-marital assets and liabilities of each spouse, of which they become co-owners of undivided equal shares.

Therefore, while the approach in these jurisdictions is supported in principle, it is submitted that a slight deviation is required in order to give effect to the fact that South African law recognises one continuous community. Therefore South African law will (i) regard all three "spouses" as equal owners of the putative estate, and (ii) recognise the fact that the putative spouse also has a right to share in the deceased common spouse's share of the joint estate as it existed

between himself and the legal spouse at the date of entering into the putative marriage.

Viewed in this way, a Court would not be asked to sanction a transfer of the common spouse's undivided half-share of the community of property that existed between himself and his first wife to the applicant, but instead would have viewed the putative spouse as *becoming a party to* the existing joint estate.

However, it is submitted that the strict application of these principles is not desirable, as a multitude of scenarios could arise within the context of putative marriages. For example, the legal spouse may have entered into a second marriage herself, or may have been *mala fide*. For this reason it is suggested that valuable guidance can be obtained from the States that have enacted section 209 of the *Uniform Marriage and Divorce Act* of 1973 and which therefore permit their Courts to exercise a broad discretion. It is therefore submitted that the South African Courts should be permitted to deviate from a strict application of the general principle outlined above where it would be just and equitable to do so, taking into account any relevant factors.

The next question that arises is to determine whether or not other factors that play a role in the jurisdictions analysed could also have a role to play in South Africa.

2.4.3.3.2 Additional factors

(a) The "acceptance-of-the-benefits" doctrine

Under this doctrine, which is based on estoppel, a litigant is precluded from challenging the validity of a judgment in a higher Court when that litigant has voluntarily accepted a substantial portion of the benefits occasioned by the

judgment of the lower Court.[268] Various American Courts have held that this doctrine (a form of the broader rule of estoppel) may be applicable within the context of family law cases, as it is based "upon the public policy of protecting the marital status and good character of innocent third persons …"[269] In this manner, the Courts have, for example, estopped a person from challenging the correctness of the original divorce order where he had accepted all of the benefits (in the form of property) thereof.[270] In the State of Illinois, the Court recently held that this principle could also apply to estop a person who had "remarried" after never being formally divorced from later alleging that she was her first husband's surviving spouse.[271]

The question arises as to whether this doctrine may find application in a South African context. In this instance the following must be noted:

- The notion that underpins the application of the doctrine in the United States—namely that it "is founded upon the public policy of protecting the marital status and good character of innocent third persons"—may accord with South African law. This is illustrated by the fact that in our law, public policy is "now rooted in the Constitution and the fundamental values it enshrines, thus establishing an objective normative value system"[272] and that the Constitutional Court has confirmed that marriage is a social

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268 See for example Friedman 1993: 742; *Smith v Smith* 893 A.2d 934; 2006 Del. LEXIS 113 at 8; *Central States v Gray* 2003 WL 22339272 (N.D.Ill.) at 3 and 4.

269 *Forest v Forest* 9 Ill.App.3d 111, 291 N.E.2d 880 at 114; *Central States v Gray* 2003 WL 22339272 (N.D.Ill.) at 4.

270 *Goodman v Goodman* 125 Ill.App.2d 190, 260 N.E.2d 257. In this case the defendant had obtained a divorce decree in 1965 and had received substantial property in terms of the divorce agreement. He was subsequently on two occasions found guilty of willful contempt for failing to make child support payments. In 1968 he petitioned for leave to vacate the 1965 decree of divorce (at 259). The Court (*per* Justice Moran) found that he had accepted the benefits of the divorce decree and was therefore estopped from challenging the validity thereof (at 260).

271 *Central States v Gray* 2003 WL 22339272 (N.D.Ill.) at 3 (referring to the decision of the Texas Court of Appeals in *Hawkins v Hawkins* 999 S.W.2d 171, 178 (Tex.App.1999) and at 4.

272 *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C) at par [24]. Also see *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at par [91].

institution of "intense private significance" for the parties themselves which is also of considerable "public significance."[273]

- A number of problems however present themselves when the application of estoppel is considered in the context of South African family law:

  (i) To begin with, this aspect has received very little attention from our Courts, and the only instance in which estoppel has been applied to a family law situation is where nullity (as opposed to validity) of a marriage has been asserted. In this regard there is authority for the view (*Pretorius v Pretorius*)[274] that a spouse who was a minor at the time of entering into a marriage without the requisite parental consent (a ground which at the time implied nullity), but who had continued to live with her husband after attaining majority, could be estopped from asserting that the marriage was void.[275] Sonnekus[276] however opines that the case did not involve estoppel by representation (which was also never pleaded) and that it was instead decided on the ground of public policy.

  (ii) Point (i) therefore illustrates that while estoppel has been applied in order to prevent a person from asserting the nullity of a marriage, there is as yet no authority for the position (as there is in the United States) where a person has attempted to assert the *validity* of the marriage.

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273 *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at par [31].

274 1948 (4) SA 144 (O).

275 *Pretorius v Pretorius* 1948 (4) SA 144 (O); Sinclair and Heaton 1996: 399; Sonnekus 2000: 184, 185.

276 2000: 108, 109 and 185.

(iii) Thirdly, it must be agreed with Sinclair and Heaton[277] that estoppel is unnecessary as a defence to annulment, as no formal act of annulment is required when a marriage is already null and void *ab initio*.

(iv) Fourthly, and most significantly, it is an accepted principle of South African law that "estoppel cannot remedy a fundamental error as to status or legal capacity."[278] This immediately militates against the application of estoppel in the context of marriage which, by definition, is status-defining. Therefore, until Sonnekus's viewpoint is confirmed that the *Pretorius* case was decided on the basis of public policy considerations, it appears that the application of estoppel in a family law context should be viewed with some circumspection.

- Finally, it appears as if the acceptance of the benefits doctrine is only applied in the United States to prevent an attack on a "*judgment or decree*" that has been issued by a Court of law.[279] The doctrine will therefore not find application where one party has "remarried" after she had merely separated from her first husband and as a result believed her first marriage to have been dissolved—some Court process pertaining to the first marriage is required. In this regard another fundamental difference between South African and American law presents itself in that most American States permit "judicial (or legal) separation" as an alternative to divorce.[280] In terms of this approach, property is distributed and the parties live apart *although they remain legally married to one*

277 1996: 400.

278 Sonnekus 2000: 182.

279 *Smith v Smith* 893 A.2d 934; 2006 Del. LEXIS 113 at 7 (emphasis added).

280 According to http://www.womansdivorce.com/separation.html (accessed on 6 May 2009) the only States that do not recognise legal separation are Delaware, Florida, Georgia, Mississippi, Pennsylvania, and Texas. Judicial separation was abolished in South African law by section 14 of the *Divorce Act* 70 of 1979.

another.[281] Therefore, while it is true that the Court in *Central States v Gray* applied the "acceptance-of-the-benefits" doctrine to a person who had "remarried" without having been validly *divorced*, the couple had indeed received a Court order for judicial separation, which, when challenged by her, meant that the doctrine could find application as she had accepted the benefits of the *separation* order.

- In the light of the above, three conclusions can be reached:

  (i) As South African law does not recognise any form of judicial separation, it follows that a married couple has no "in-between" status, but remain married until divorced by a Court of law. The "acceptance-of-the-benefits" doctrine therefore cannot be applied in order to prevent the first (legal) spouse who has "remarried" without being legally divorced from the deceased common spouse from asserting that she is still his surviving spouse.

  (ii) However, while the doctrine itself could not find application due to the fact that there was no Court order, there is no reason why the fact that a legal spouse has "remarried" while still being validly married to his or her first spouse cannot be taken into account as a relevant factor in order for the Court to apportion the deceased estate in a manner that is "just and equitable."

  (iii) There is some merit in contending that the doctrine may have a role to play where an *invalid* divorce order was obtained as a result of which one of the spouses accepted benefits and thereafter "remarried."[282] However, it may be agreed with Kahn[283] that the

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281 Hahlo 1975: 329: "Judicial separation—'*separatio a mensa et thoro*', '*separatie van tafel, bed en bijwoning*'—is a half-way house between marriage and divorce. It does not dissolve the marriage tie but puts, for the time being, and end to the personal consequences of marriage by suspending the reciprocal duty of the spouses to live together."

282 The following set of facts (based on Kahn 1975: 671) illustrates this scenario: A and B entered into a civil marriage in 1991. While on holiday in a foreign jurisdiction in 1999, A "divorced" B and entered into a marriage with C. The divorce was invalid according to South African law, but none of the parties were aware of this. B received (and accepted) property as well as

> fact that status is involved once again militates against allowing such a doctrine to view the spouse as being unmarried. Nevertheless, it is submitted that any benefits accepted by that spouse as a consequence of the "divorce" should be taken into account for the purposes of apportioning the estate in a just and equitable manner.[284]

The conclusion therefore is that the "acceptance-of-the-benefits" doctrine can at best be applied for the purposes of ensuring a just and equitable distribution.

(b) What role (if any) should mala fides *play?*

The California Courts have held that *mala fides* on the part of one of the "spouses" to the putative marriage will not affect the rights of the *bona fide* "spouse" as he or she is in any event entitled to one half of the quasi-marital property.[285] Whether the same holds true for South African law will, as seen below, depend on the facts of the case. This is because the approach that is suggested for South Africa does not automatically entitle the putative spouse to one half of the putative community, but in fact entitles both the legal and the putative spouses to share in each other's estates. It is therefore suggested that *mala fides* may have a role to play where the *bona fide* putative spouse receives

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maintenance from A until she married D in 2002. When A died in 2008, B laid claim to his estate on the basis that she was still validly married to him in terms of South African law. In such an instance a South African Court may well be tempted to apply the "acceptance-of-the-benefits" doctrine in order to prevent B's challenge to the validity of the divorce action and so as to protect C. However, it is submitted that Khan (1975: 672) correctly opines that although such a rule (which he describes as a rule "akin to estoppel") may have some role to play—particularly in respect of persons "in privity with the person 'estopped'"—it cannot and should not play a role in instances (such as the one described above) where status is involved. It is consequently submitted that, unless fraudulent action was involved, a person in the position of B should still be regarded as A's lawful spouse, but that her "remarriage" and the benefits already received from A should be taken into account in apportioning the deceased estate.

283 1975: 672.

284 See note 282 in which such a scenario is sketched.

285 Raye and Pierson 2009: § 20: 105.

less than she would have if her marriage had been valid. This will become clear in the paragraphs that follow.

(c) Further guidance: How to assess the bona fides *of a "spouse" to a putative marriage*

The South African Courts have not addressed the *bona fides* requirement as far as putative marriages are concerned in any great detail. Although it is clear from the case of *Ngubane v Ngubane*[286] that good faith is a question of fact, the formulation of a "test" for the same has not yet been required. Some guidance in this regard is however provided by the Court in *Potgieter v Bellingan*[287] where Gane J referred to a case reported by Loenius in which "a genuine and effective deception" was required in order for the Court to find a marriage to be putative. It is submitted that the finding in *Zulu* provides a foundation from which to attempt to provide guidance in this respect. As will be recalled from the synopsis of the facts above, the applicant in *Zulu* was not totally oblivious to the possibility that she was involved in a bigamous union:

> Where one or both parties in good faith are ignorant of the fact that their marriage is in fact invalid, but they believe it to be valid, then the marriage is at most a supposed or putative marriage. But in law the term 'putative marriage' is not merely one which a supposed marriage partner believes to be valid, but one which the law itself characterises as such and then attaches to it certain legal consequences… According to the applicant, during the subsistence of her marriage, *she heard rumours* of the deceased being married. When she had confronted him with the rumours he denied them and she accepted that fact. She was, however, aware that the deceased had children from the other woman. She denies the first respondent's allegation that she was aware of his prior marriage and submits that this fact was discovered after the demise of the deceased. From the evidence before the court I am satisfied that the applicant was unaware of the deceased's prior marriage *at the time of her marriage* and

286 1983 (2) SA 770 (T) at 772 (C) – (E).
287 1940 EDL 264.

> by entering into her marriage with the deceased she acted in good faith. The question is then whether the applicant's marriage to the deceased was therefore a putative marriage, which carried with it proprietary consequences.[288]

While there was no doubt that the applicant had been *bona fide* when she entered into the "marriage" in 1985, Hugo J did not comment on whether or not the fact that the she had been alerted to the possibility of her being party to a bigamous union affected the potential putative status of the second "marriage."

Case law in the United States provides valuable assistance in this regard. For instance, in *Garduno v Garduno*,[289] the Court held that in Texas the good faith requirement was a question of fact, which, drawing on Louisiana precedent, would "not be vitiated by 'unconfirmed rumours or mere suspicions.'" However

> when *reliable knowledge* of an impediment does come to the party, however, he cannot simply declare his disbelief of this information and continue as if it were untrue, but is then *under a duty to investigate further*: "a party alleging good faith can not close her eyes to information or her ears to suspicious circumstances. She must not act blindly or without reasonable precaution."[290]

In the State of California, the standard for assessing the good faith of a party who asserts a putative marriage is an objective one which must be satisfied by "facts that would cause a reasonable person to harbor a good faith belief in the existence of a *lawful* … marriage." [291]

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288 At 14 (H) – 15 (B), emphasis added.

289 760 S.W.2d 735 (Tex.App.1988).

290 At 740 (emphasis added). The Court quoted from the Louisiana decision of *Succession of Chavis* 211 La. 313, 29 So.2D 860 (1947) at 863.

291 *In re Marriage of Vryonis* (1988) 202 Cal.App.3d 712, 718; recently confirmed in 2008 in the case of *Ellis v Arriaga* 162 Cal.App.4th 1000; 76 Cal.Rptr.3d 401 at 404.

Applying these principles to the facts in *Zulu* makes for interesting speculation. To begin with, the applicant conceded that she had heard rumours regarding her husband's marital status. On the approaches in Texas and Louisiana, mere rumours would not be sufficient to abrogate her good faith. However, the facts indicate that she had not only heard rumours, but that she was in fact aware that her husband had children with the first respondent. Yet, she apparently accepted her husband's denial without question. In addition, the first respondent contested the applicant's ignorance of the true state of affairs. Taken together, these factors all indicate that good faith on behalf of the applicant was by no means an incontrovertible fact and that it may well have been argued that she was in fact "clos[ing] her eyes to information or her ears to suspicious circumstances" that should—objectively speaking—have moved her towards further investigation. On this basis a Court may have concluded that the marriage ceased to be putative before the deceased's death. Moreover, depending on whether it was acquired before or after the truth came to light, such a finding could imply that she had no entitlement to the disputed property.

2.4.3.4 A suggested solution

2.4.3.4.1 Developing the common law

For the sake of convenience, the example used in the comparative analysis (Figure 6.1) will be repeated in order to illustrate the proposed development of the common law:

> Assume that A entered into a civil marriage in community of property with B (the legal spouse) in 2000. Five years later (in 2005), he married C (the putative spouse) while his marriage to B still subsisted. At the time of entering into the second marriage in 2005, the value of the joint estate between A and B was worth R 200 000. The second "marriage" was also a civil "marriage" in community of property. When A died in 2009,

> the value of the joint estate (consisting of the legal marriage as well as the putative marriage), was worth R 500 000 …

Should both B (the "legal spouse") and C (the "putative spouse") wish to lay claim to the property, the following solution that draws from and adapts the position in the jurisdictions considered, is suggested:

(i) The starting point would be for the Court to proceed from the well-established principle underlying the putative marriage, namely that it exists so as to avoid the harsh consequences of nullity.

(ii) The second principle would be for the Court to ascertain whether the deceased's marriage to his first wife had legally been terminated at any time. (In this regard it is noteworthy that South African law presumes that in the case of two consecutive marriages both are legal, with the result that the first is deemed to have been properly dissolved before the second was contracted.)[292]

(iii) Bearing in mind the fact that both "marriages" were concluded in community of property, a Court would thirdly need to ascertain which of the spouses were *bona fide*.

(iv) Once this has been established, the Court would have to determine whether it would be to the putative spouse's advantage to regard the marriage as being in community of property.

(v) Even if it would be to C's advantage to recognise community of property between her and A, case law indicates that the Courts are not bound to order the strict application of this regime but may award a lesser amount to the *bona fide* "spouse" in accordance with the relief sought in the pleadings.[293]

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[292] Hahlo 1985: 88.

[293] See *M v M* 1962 (2) SA 114 (GW) at 117 (G) – (H). This case is briefly discussed in note 246 above.

(vi) It must be remembered that B is entitled to her share of the community as it existed at the time of A entering into the putative marriage. C has no claim to any of this property.

(vii) A also has a claim to one-half of the community between himself and B as it existed at the time of his entering into the putative marriage.

(viii) However, as soon as the putative marriage was entered into with C, C became entitled to *one-half of A's half* of this estate as they were married in community of property.

(ix) As the community of property between A and B was never terminated, B is also a party to the putative estate (of which A and C are also entitled to equal shares). Therefore, A, B and C all have equal rights to the putative estate.

(x) As these are all "equal claims on the same object",[294] they must be reduced proportionately, with the result that A, B and C are each entitled to one third of the putative estate.

(xi) Finally, the Court is permitted to deviate from a strict application of these principles if it should deem this to be just and equitable, taking into account all factors relevant to the situation.[295] These factors may include:

- The *mala fides* of any party; and
- The extent of the contributions of the respective parties; and
- The extent to which any party has accepted benefits as a result of the termination or purported termination of a union.

With these principles in mind, it is submitted that the Court could allocate the property as follows:

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294 Henderson 1941: 68.

295 This approach is in line with the approach required by clause 22(2) the *Domestic Partnerships Bill,* 2008 for a Court to apportion the assets of a registered domestic partnership in the event of a dispute: "Upon an application for the division of joint property, a court must order the division of that property which it regards just and equitable with due regard to all relevant factors." (Also see clause 32 of the Bill which contains a similar provision in the case of unregistered domestic partnerships.)

1) Where both A and C were *bona fide*, or where only C was *bona fide* and it would be in the interest of C to regard her marriage as in community of property:

Formula:

B is entitled to:	½ (estate A + B) + ⅓ (estate A + B + C)
C is entitled to:	¼ (estate A + B)[296] + ⅓ (estate A + B + C)
A's estate is entitled to:	¼ (estate A + B)[297] + ⅓ (estate A + B + C)

Therefore:

B is entitled to:		½ (R 200 000) + ⅓ (R 300 000)
	=	R 100 000 + R 100 000
	=	R 200 000
C is entitled to:		¼ (R 200 000) + ⅓ (R 300 000)
	=	R 50 000 + R 100 000
	=	R 150 000
A's estate is entitled to:		¼ (R 200 000) + ⅓ (R 300 000)
	=	R 50 000 + R 100 000
	=	R 150 000.

2) In the example above, it so happens that the amount which C receives (R 150 000) is equal to that which she would have received if her marriage to A (which was in community of property) had been valid (i.e. R 300 000 ÷ 2). It may however happen that this is not the case. For example, assume that the estate between A and B in 2005 had remained worth R

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296 As one-half of A's half of this estate.

297 As one-half of A's half of this estate.

200 000, but that the entire estate at A's death had instead been worth R 600 000. This would imply that the putative estate was now worth R 400 000. If the marriage between A and C had been valid, she would have been entitled to R 200 000 (i.e. R 400 000 ÷ 2). However, if the formula used above is applied, she will end up receiving less than this:

B would be entitled to:		½ (R 200 000) + ⅓ (R 400 000)
	=	R 100 000 + R 133 333
	=	R 233 333

C would be entitled to:		¼ (R 200 000) + ⅓ (R 400 000)
	=	R 50 000 + R 133 333
	=	R 183 333

A's estate would be entitled to:		¼ (R 200 000) + ⅓ (R 400 000)
	=	R 50 000 + R 133 333
	=	R 183 333

C would therefore receive R 16 667[298] less than the R 200 000 which she would have been entitled to if her marriage to A had been valid. If both she and A were *bona fide*, it is submitted that this would not be a problem. However, if A was *mala fide*, it is suggested that the Court could, by virtue of its discretion as to what was just and equitable, order that his estate should forfeit an amount equal to C's shortfall in order to make up the full amount to which she would otherwise have been entitled. Therefore:

A's estate would be entitled to R 183 333 – R 16 667 = R 166 666, and C would receive her full R 200 000.

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298 (R 200 000 less R 183 333).

3) If C was *bona fide*, and it would *not* be in her interest to view her "marriage" to A as being in community of property (for example where she brought far more into the marriage than A), the "marriage" would simply be regarded as being out of community of property. The joint estate between A and B would be split between them as if no community of property existed.

4) Where B had benefitted from her separation from A (for example had "remarried"), the Court could apply a form of the "acceptance-of-the-benefits" doctrine in order to prevent her from being entitled to the full benefit described above in accordance with its prerogative to order a just and equitable division.

If these principles were to be applied to *Zulu*, it is submitted that the applicant should instead have requested the Court to exercise its inherent power to develop the common law in the manner described above, taking into account all relevant factors of the situation.[299] Unfortunately, the facts reported in *Zulu* do not permit an extensive illustration as to how the solution described above may have been applied in that case. However, it is submitted that the formula described above could have been applied to begin with, after which the Court may have been guided by the following factors in exercising its discretion:

- That *bona fides* on behalf of both spouses appears to have been assumed; and
- That Mr Zulu appears to have been *mala fide* in the sense that he knew that his second "marriage" was null and void.

This approach would have ensured that the second "Mrs Zulu" was not left out in the cold.

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[299] See note 295.

2.4.3.4.2 An alternative to developing the common law: The principles of South African matrimonial property law

As an alternative to developing the common law, it is worth considering whether the principles of South African matrimonial property law may have provided a solution to the problem encountered by the second "Mrs Zulu." As a point of departure it is useful to consider the South African Law Reform Commission's analysis of this type problem, which is based on a decision of the Supreme Court of California in *Marvin v Marvin*[300] (which was briefly mentioned in the summary of Californian law in 2.4.1.1.1 above) and an article published by Singh in 1996.[301] It is of cardinal importance to note that the South African Law Reform Commission and Singh's observations were made in the context of life partners and not putative spouses. This notwithstanding, the analysis that follows will show that it makes no difference whether the applicant was a second civil "spouse" or a life partner of someone already married: The conclusion would be the same in either case.

In the *Marvin* case a man (defendant) and a woman (plaintiff) cohabited as from October 1964 until May 1970.[302] The plaintiff alleged that they entered into an oral agreement as from the beginning of their cohabitation to the effect that "they would combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts whether individual or combined."[303] At the time of entering this agreement, the defendant was still lawfully married to his wife (B); a marriage that was only terminated in January 1967. After the relationship was terminated by the defendant asking her to leave the common residence, the plaintiff applied for declaratory relief regarding her proprietary and contractual rights, as well as for the Court to impose a

300 (1976) 18 Cal. 3d 660.

301 See Singh 1996: 317 *et seq*.

302 As a matter of interest, the male cohabitant in question was the celebrated American actor Lee Marvin (1924 - 1987), famous for his roles in films such as *Cat Ballou* (1965, co-starring Jane Fonda); *The Dirty Dozen* (1967) and *Shout at the Devil* (1976, alongside Sir Roger Moore).

303 At 666.

constructive trust on her half of the property.[304] The defendant attempted to defend these assertions on the basis that the contract entered into in 1964 could not be enforced as doing so would amount to a violation of public policy as it was based on the "immoral" relationship between himself and the plaintiff.[305] The Court refused to entertain this assertion, pointing out that the case law upon which the defendant relied indicated that a contractual undertaking between unmarried partners was "unenforceable only *to the extent* that it *explicitly* rests upon the immoral and illicit consideration of meretricious sexual services."[306] Provided that this boundary was not overstepped, unmarried intimate cohabitants could regulate the proprietary consequences of their relationship as they saw fit, and these agreements could be enforced by the Courts without falling foul of public policy.[307]

The defendant's second contention—namely that the contract violated public policy as it infringed upon his legal wife's interest in the community of property—also had to fail as an "improper" attempt to transfer a share of the joint estate was not null and void but simply voidable at the instance of the wronged spouse.[308]

The South African Law Reform Commission concluded that Singh was correct in asserting that the Court's reasoning in *Marvin*—to the effect that that an improper transfer of community of property was merely voidable—would be equally acceptable in South African law as the provisions of section 15 of the *Matrimonial Property Act* of 1984 "are similar in effect."[309] In the light hereof, the Commission concluded that a community of property could in fact be created between a

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304 At 666.
305 At 668.
306 At 669.
307 At 674.
308 At 672.
309 SALRC 2006: 121, italics added.

married man and a life partner which would have "no effect" on the joint estate which existed between himself and his legal spouse.[310]

It is submitted that this conclusion is problematic for a number of reasons. First, there is no clarity in South African law as to whether or not non-compliance with the requirements of section 15 of the *Matrimonial Property Act* leads to invalidity or mere voidability.[311] The only authority to which the Commission refers in support of the latter conclusion is a statement made in these terms by Singh in 1996, which is not entirely convincing as she provides no authority in support of her contention that non-compliance with section 15 results in voidability. Furthermore, subsequent case law does not appear to support Singh's assertion. To begin with, a number of cases have held that the consent requirements prescribed by section 15 are peremptory,[312] and it is generally accepted that non-compliance with any peremptory statutory provision implies invalidity.[313] Secondly, the provisions of section 15(2) and (3) are capacity-defining in that they deal with a spouse's capacity to perform a juristic act. In view of these two considerations it appears that non-compliance with the consent requirement implies that such an agreement is void.[314]

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310 SALRC 2006: 121.

311 For example, Christie (2006: 229) contends that a contract concluded without the consent prescribed by section 15(2) is "unenforceable" while Van der Vyver and Joubert (1991: 556) view such a transaction as being "aanvegbaar" (impugnable). Others appear to view contracts that are concluded with third parties without the requisite consent as being void (see Sonnekus (updated by Clark) 2008: B28; Van Heerden *et al* 1998: 98, 99; Visser and Potgieter 1998: 127) unless the provisions of section 15(9)(a) are applicable (namely where the third party "does not know and cannot reasonably know" that the contract was concluded without the necessary consent).

312 See *Govender and Another v Maitin and Another* 2008 (6) SA 64 (D) at par [11] (regarding section 15(2)(g)); *Bopape and Another v Moloto* 2000 (1) SA 383 (T) at 387 (D) – 388 (F) (regarding section 15(3), albeit mistakenly referring to "[s]ubsection (2)" at 386 (E)) and *Amalgamated Bank of South Africa Bpk v Lydenburg Passasiersdienste BK en Andere* 1995 (3) SA 314 (T) at 322 (F) – (G)) (with reference to section 15(2) in general).

313 See *Commercial Union Assurance Company of South Africa Ltd v Clarke* 1972 (3) SA 508 (A) at 518 (B).

314 See *Bopape and Another v Moloto* 2000 (1) SA 383 (T) at 387 (D) – 388 (F); Sonnekus (updated by Clark) 2008: B28; Van Heerden *et al* 1998: 98, 99; Visser and Potgieter 1998: 127. In *Pinnacle Point Casino (Pty) Ltd v Auret NO and others* [1999] 2 All SA 511 (C) a man married in community of property had signed an agreement for the sale of immovable property that was subject to a suspensive condition (namely the granting of a casino licence) without the written consent of his

wife as required by section 15(2)(b). The agreement was signed on 12 February 1999 while his wife ratified it four days later (at 523). The Court held that an agreement that did not comply with section 15(2)(b) was "not invalid *per se*" as it could be ratified by the spouse or upheld if it could be deemed to be valid in order to protect the interests of a *bona fide* outsider in accordance with section 15(9). The Court held that it could not be argued that the agreement concluded on 12 February was not "valid and binding" (at 524). It is submitted that this finding does not imply that the Court was of the opinion that transactions entered into without the requisite consent prescribed by section 15 were voidable (as opposed to null and void). This is because the phrase "not invalid *per se*" simply indicates that two exceptions to the general rule of invalidity exist, namely ratification or the protection offered by section 15(9). Furthermore, it is a general principle of South African law that ratification applies retrospectively so that the agreement is validated as from the date of its conclusion and not from the date of the ratification itself (see *Torgos (Pty) Ltd v Body Corporate of Anchors Aweigh and Another* 2006 (3) SA 369 (W) at par [95]). Consequently, the fact that the Court stated that a "valid and binding agreement" existed as from 12 February 1999 should not be read as implying that the agreement was valid *at the moment that it was signed*, but instead that it was retrospectively validated by the subsequent ratification. A final case to consider is that of *Markram v Scholtz and another* [2000] 4 All SA 452 (NC). *In casu*, the appellant appealed to the full bench of the Northern Cape Division of the High Court (now the Northern Cape High Court, Kimberley) against an order upholding the validity of an agreement in terms of which he was to purchase immovable property from the first and second respondents, who were married in community of property. In terms of the agreement, the appellant was to guarantee payment of the purchase price within 90 days of the agreement being signed. The first respondent and the appellant signed on the same day (8 January 1998), but when the appellant became aware of the fact that the second respondent (the first respondent's wife) had not yet signed the agreement towards the end of the 90-day-period, the appellant assumed the agreement to be void for lack of compliance with section 15(2)(b) of the *Matrimonial Property Act* 88 of 1984. The second respondent signed the agreement on 16 April 1998, which was 8 days after the expiration of the period within which the appellant had been required to provide the guarantee. The respondents contended that the agreement had been ratified by the second respondent within a reasonable time (as required by section 15(4) of the Act) and that the agreement was therefore valid. On appeal, the full bench held that the appellant had made an offer to the respondents on the 8th of January, and that, by 8 April 1998 "was daar nog nie 'n geldige en afdwingbare ooreenkoms tussen die partye nie." Furthermore, the Court held that at this date it was unlikely that the parties had intended the appellant to render performance in terms of a "nietige ooreenkoms" (at 462). Ratification had not taken place within a reasonable time, with the result that the appellant's offer had already been repudiated or withdrawn by the time the agreement had been signed on 16 April (at 463). The appeal was consequently upheld. Although this case has been cited in support of the view that non-compliance with section 15 implies that a contract that has been signed by only one spouse is conditional upon the other spouse signing and is therefore only visited with nullity once this condition has not been fulfilled within a reasonable time (see Cronjé and Heaton 2004: 79 (note 72)), this view cannot be supported. It is clear that in the matter at hand the agreement involved was multipartite in nature. As such, "[i]n the absence of clear indications to the contrary", such a contract "does not bind any of the parties unless signed by all of them" (Christie 2006: 108, referring to this very case as authority for his statement). Consequently, until both respondents had signed the agreement, no acceptance of the appellant's offer could take place and no agreement could come into being. This is clear from Steenkamp JP's statement that, pending the second respondent's signature, no "geldige en afdwingbare" (valid and enforceable) agreement existed. This statement cannot be interpreted in any other way as to indicate that the "agreement" was void; a fact which the learned judge confirmed when, in the same sentence, he stated that "en dit is onwaarskynlik dat die partye sou bedoel het dat die

Although it is generally accepted that ratification of a transaction rendered void by statute is impossible[315]—a principle which may provide support for the argument that non-compliance with the consent requirement in section 15 in reality implies mere voidability in view of the fact that subsection (4) thereof permits ratification[316]—it is submitted that a deviation from this principle may be permitted where legislation that is couched in peremptory terms expressly provides for such ratification, as section 15 clearly does. The Commission's conclusion that the gist of section 15 is to impose voidability as opposed to invalidity is therefore questionable to say the least.

However, even if is accepted that the Commission is correct in its view that non-compliance with section 15 leads to voidability, two further problems arise.

First, the Commission's conclusion is made out of context. As mentioned above, the Commission based its entire analysis of the difficulties in enforcing cohabitation agreements where one partner was already married on an article published by Singh. The difficulty that arises is that Singh's concluding word on the topic (the emphasised sentence in the quote below) was not made in reference to South African law but was in fact made in reference to American law, which she opined could possibly be considered by the South African Legislature:

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appellant ingevolge 'n nietige ooreenkoms moes presteer het." In order to understand the full import of this statement, regard must be had to the context within which it was made. The facts indicated that, in order to furnish the guarantee, the appellant would have needed to sell his farm. This need would obviously not only arise once the agreement had been signed by both respondents, but was a reality which was present from the very moment at which the offer was made (as from 8 January 1998). Consequently, when the Court stated that it was unreasonable to expect this type of conduct from someone on the basis of a "nietige ooreenkoms" (void agreement), it becomes clear that Steenkamp JP did not state that the agreement became void only once the reasonable period of time had lapsed, but that it was in fact void as from 8 January; a fact which would only change if and when the offer had been properly accepted by the second respondent's signature.

315 See *Cape Dairy and General Livestock Auctioneers v Sim* 1924 AD 167 at 170; *Neugarten and Others v Standard Bank of South Africa Ltd* 1989 (1) SA 797 (A) at 808 (G) – (H).

316 This argument was raised in *Bopape and Another v Moloto* 2000 (1) SA 383 (T) at 388 (C) – (D).

> Further assistance to South African lawmakers may be garnered from the California Family Law Act of 1972. Section 118 of this Act was amended to provide that the earnings and accumulations of both spouses while living separate and apart from the other spouse, are the separate property of the spouse concerned. *Consequently, it is possible for a cohabiter to create a community of property with his or her partner to whom he or she is not married which has no effect on the community of property established with his spouse*.[317]

The Commission appears to have overlooked this and to have accepted that the final sentence in this quote was an opinion of the current position *in South African law*. Consequently, the Commission's final word on the matter (which is quoted almost verbatim from Singh's final paragraph)[318] has been made completely out of context.

This critical oversight exposes a logistical problem with the Commission's final conclusion, because the mere fact that non-compliance with section 15 implies that a transaction is voidable does not explain why a community of property may be created with a partner that has no effect on an existing community of property established by marriage. The Court's finding in *Marvin* was that such a purported transfer was voidable *at the instance of the aggrieved spouse*. This possibility can simply not without more justify the conclusion that a new community of property can be created with an outsider, as the aggrieved spouse would always have the option of voiding any such transaction. Something more is required in order to guarantee that such a transaction would have "no effect" on the existing community of property. What the Commission in fact needed to appreciate in order for its conclusion to hold water was that section 15 provides a mechanism whereby an outsider to a marriage in community of property can be protected in

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317 1996: 324 (emphasis added).

318 The Commission's conclusion [par 3.1.55] reads as follows: "Consequently, it is possible for a domestic partner to create a community of property with his or her partner to whom he or she is not married which has no effect on the community of property established with his spouse."

certain circumstances.[319] This, it is submitted, might provide a solution to the problem.

However, in order for the protective mechanism in section 15 to become applicable in the first place, a greater problem would need to be overcome, namely that section 15 of the *Matrimonial Property Act* lists *specific transactions* to which it applies, none of which expressly deal with the situation where a spouse attempts to permit an outsider to become a party to the *entire* joint estate which exists between himself and his spouse. This was, in effect, what the deceased attempted to do in *Zulu*, and it is therefore regrettable that none of the Commission's submissions arose for adjudication in that case.

Nevertheless, superimposing the facts in *Zulu* onto the Commission's assertion that a community of property may be created with an outsider to a subsisting civil marriage in community of property does provide an interesting possibility, namely that it could be argued that such an attempted transaction is covered by a *combination* of the individual transactions listed throughout section 15 of the Act. In other words, the creation of a further community of property over a number of years with an outsider would be viewed as constituting a myriad separate transactions, the most important of which[320] would all, at some time or another, have constituted one or more of those listed in section 15. On this construction, the principles governing section 15 could be invoked in order to (i) sanction and (ii) regulate the purported creation of a further community of property.[321]

In the alternative, if it was alleged that this argument would be stretching section 15 too far, it could at least have been contended that certain *specific transactions* of the attempted transfer were covered by section 15. In this way, for example, it

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319 Section 15(9)(a). The impact of this section is referred to later in the paragraphs that follow.

320 Cronjé and Heaton 2004: 78.

321 Such transactions may typically involve the alienation or conferring of a real right in immovable property [section 15(2)(a) and (b)] and the donation or alienation without value of assets forming part of the joint estate to a third party [section 15(3)(c)]).

may have been contended that the transaction to convey a share of the immovable property on which the applicant resided was governed by section 15(2).

Irrespective of which of these options was decided upon, bringing the applicant's claim within the purview of section 15 of the *Matrimonial Property Act* would be vital for, as seen above, it could then be contended that the second "Mrs Zulu" was not a spouse but in fact an outsider to the deceased's first marriage who was worthy of the protection offered by section 15(9)(a) of the Act, which reads as follows:

> When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) of this section, or an order under section 16 (2), and—
>
> (a) that person *does not know and cannot reasonably know* that the transaction is being entered into contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3), or while the power concerned of the spouse has not been suspended, as the case may be; …

As the *bona fides* of the second "Mrs Zulu" had (albeit, as seen in 2.4.3.3.2 above, not totally convincingly) been established by the Court, it could certainly be argued that she did not know nor reasonably could have known that the transactions were concluded without the consent of the legitimate spouse and that the transactions were consequently valid. Indeed, this unawareness would also immediately differentiate such a case from the finding in *Bopape and Another v Moloto* [322] in which it was held—ostensibly on the basis that the defendant had been aware of the fact that the first and second plaintiffs were validly married[323]—that "it would smack of injustice if a paramour were to be allowed to retain gains which are clearly prejudicial to a joint estate."[324]

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322 2000 (1) SA 383 (T).

323 At 384 (F).

324 At 388 (F).

Finally, as the deceased in *Zulu* was found to have been aware of the fact that his second "marriage" was illegal (on which basis he could be presumed to have known that his legitimate spouse would not have consented to his transactions with the second "Mrs Zulu"), it is further submitted that, in accordance with section 15(9)(b) of the Act, the first spouse would still be protected in some way as she would be allowed to insist on an adjustment in her favour at the division of the joint estate.

Although this possibility seems to be more realistic than the first, there is no precedent to support the argument that a second "spouse" (or for that matter a life partner) may in fact be a *bona fide* third party for the purposes of section 15(9). In addition, even if such an interpretation were permissible, the disadvantage would be that only specific transactions (as opposed to the recognition of a second "spouse's" claim to a share of the entire estate) could be upheld.

In the end result this discussion shows that there is no clear answer as to whether or not the existing matrimonial property law could be interpreted in such a way as to accommodate a "second" spouse (or life partner) where a civil marriage with community of property already exists.

2.4.3.4.3 Conclusion

As it stands, South African law does not recognise the claim of a second (putative) "wife" to share in any portion of a "joint estate" where two civil "marriages" that were both concluded in community of property co-exist with one another. This position is untenable, and two potential solutions to this problem were examined in the preceding paragraphs. The first is to develop the common law, while the second is based on an interpretation of existing principles and legislation (section 15 of the *Matrimonial Property Act*)[325] governing transactions

[325] 88 of 1984.

of spouses married in community of property. The latter solution is however fraught with uncertainty and depends on conjecture which makes this option speculative and therefore undesirable. As a result, the first option (namely development of the common law) is to be favoured. It is submitted that this possibility should be brought to the attention of the Courts.

In closing, having seen that the *Zulu* case illustrates the need for the common law to be developed in order to protect the interests of *bona fide* "spouses" to bigamous marriages, the further question arises as to whether a contextualised form of the putative marriage doctrine should be available to assist in resolving similar difficulties where life partnerships are involved. For example, should this doctrine assist the parties who are of the *bona fide* belief that they have entered into a valid registered domestic partnership, only later to learn that it was never properly registered? What would the position be where a "bigamous" domestic partnership is entered into in the sense of a married man attempting to register such a partnership with a second woman? These questions will be answered in Part 3 dealing with the modification of the *Domestic Partnerships Bill,* 2008 in the light of the domestic partnership rubric. For now it has been established that the South African Law Reform Commission's conclusions regarding the enforcement of an agreement between two partners when one of them is still married to someone else have been made out of context and are of dubious accuracy. This notwithstanding, it will be seen in Part 3 that a number of the lessons learned from the comparative study conducted above may be equally applicable within the context of life partnerships.

2.5 Conclusion: Common law protection

From the analysis conducted it becomes clear that the common law provides insufficient protection for life partners. While the law of contract offers the only meaningful protection, this option remains unenforceable against outsiders and in addition requires a certain level of sophistication that unfortunately makes it an

unrealistic option for many South Africans. It has also been concluded that the prevailing legal position (in consequence of the case *Zulu v Zulu*)[326] provides no protection for a "spouse" who is "married" to someone who is still a spouse to a subsisting valid civil marriage with someone else. Within the context of this type of situation it has been suggested in consequence of a comparative analysis that the common law should be developed in order to protect the second "spouse." Whether or not the development suggested should also be extended to protect a person involved in a life partnership with someone who is already married or in a similar status-altering relationship will be considered in Part 3 of this study.

As far as the domestic partnerships rubric is concerned, the lack of common law protection highlighted throughout paragraph 2 of this Chapter emphasises the need for this state of affairs to be improved by way of effective, accessible and consistent domestic partnership legislation.

In the paragraphs that follow the piecemeal recognition granted to life partnerships by the Legislature will be considered.

3. RECOGNITION OF LIFE PARTNERSHIPS BY THE SOUTH AFRICAN LEGISLATURE

3.1 Introduction

The piecemeal recognition accorded to life partnerships is not limited to that granted by the South African Courts. In fact, the first step towards greater recognition of cohabitation was taken by the Legislature before the Second World War: In terms of insolvency legislation,[327] the word "spouse" has, since 1 July

326 2008 (4) SA 12 (D).

327 The *Insolvency Act* 24 of 1936.

1936,[328] been defined as not only including marriages "in the legal sense", but also those "according to any law or custom" as well as "a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another" for the purposes of determining the effect of sequestration on the property of the insolvent's spouse.[329] Although a number of similar legislative developments followed,[330] these developments were—not surprisingly in view of the prevailing laws of the time—limited to heterosexual cohabitants.

The impetus for greater recognition for both heterosexual and homosexual life partnerships was provided by the Bill of Rights and by legislation promulgated in order to give effect thereto, such as the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000.[331] Incidentally, the interim *Constitution* of 1993[332] made specific provision for the right of all detained and sentences prisoners to "communicate with, and to be visited by, his or her spouse or partner."[333] Building on this foundation, a number of Acts which provide specific legal recognition to life partnerships in the narrow sense of the phrase have been promulgated since 27 April 1994.[334] The aim of this part of this Chapter is to provide a brief overview of this legislation with a view to ascertaining the efficacy of this piecemeal system. Building on this, that facet of the domestic partnership rubric that requires an effective interrelationship between these Acts and the draft *Domestic Partnerships Bill,* 2008 will be dealt with in Part 3 (Chapter 7).

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328 This was the date on which Act 24 of 1936 came into operation.

329 Section 21(13).

330 See for example Schäfer 2006: 626 (note 2); Sinclair and Heaton 1996: 285 (note 69) and 290 (note 84); Schwellnus 1994: 6.

331 SALRC 2006: 148.

332 Act 200 of 1993.

333 Section 25(1)(d). This provision was included in the *Constitution*, 1996 (section 35(2)(f)(i)). Also see *Langemaat v Minister of Safety and Security and Others* 1998 (3) SA 312 (T) at 316 (G) – (H) (discussed in Chapter 5) where reference was made to the relevance of this section.

334 For additional examples, see SALRC 2006: 148 *et seq* and note 44 of Sachs J's minority judgment in *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at par [175].

3.2 An overview of the legislative enactments that have taken place since 1994 that deal with life partnerships

3.2.1 Maintenance legislation

As seen in Chapter 5 that dealt with the judicial developments, the *Maintenance Act* 99 of 1998 widened the scope of persons who are legally obliged to maintain others beyond the confines of blood relations and spouses.[335] Section 2(1) of this Act states that the Act applies "to the legal duty" of any person to maintain another "irrespective of the nature of the relationship" that creates that duty. Therefore, the Act does not only apply to married couples, but also includes a duty to maintain that arises by virtue of a contractual undertaking. Consequently, same-sex or opposite-sex life partners who have contracted to maintain one another are included for the purposes of this Act.[336]

3.2.2 Domestic violence and sexual offences

- In seeking to provide more comprehensive protection for the victims of domestic violence, the *Domestic Violence Act* 116 of 1998 defines a "domestic relationship" in such a way as *inter alia* including unmarried persons who "live or lived together in a relationship in the nature of marriage" even if they are or were unable to marry one another,[337] as well as persons who "share or recently shared the same residence."[338]

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335 See 3.3.1.2 in Chapter 5. Also see Cronjé and Heaton 2004: 58.

336 Cronjé and Heaton 2004: 58. Also see the decision of the Pension Funds Adjudicator in *Hlathi v University of Fort Hare Retirement Fund and Others* PFA/EC/9015/2006 at par [27]. It is interesting to note that neither Schäfer (2008(b)) nor the SALRC (2006: 148 – 165) express themselves as to the impact of section 2(1) of the *Maintenance Act* on life partners. By virtue of her statement that "[n]o enforceable right to claim maintenance from a cohabitation partner exists either during the cohabitative relationship, or after termination of the relationship" it can be inferred that Schwellnus (2008: N9) is not of the opinion that a contractual duty of support that exists between cohabitants can be enforced in terms of this Act.

337 Par (b) of the definition.

338 Par (f) of the definition.

- A "same sex or heterosexual permanent life partner" qualifies as an "interested person" for the purposes of chapter 5 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.[339] This implies that a life partner is regarded as having a "material interest in the well-being" of a victim of a sexual offence which, for example, entitles such a person to bring an application for the alleged offender to undergo a HIV test.[340]

3.2.3 Children

- The *Children's Act* 38 of 2005 contains a number of provisions that specifically refer to life partners. The relevant provisions in this Act which refer to life partners are *inter alia* those that deal with adoption and surrogate motherhood.[341] As these topics have already been covered in Chapter 5, the reader is referred to that Chapter.[342] However, as far as the interrelationship of the *Children's Act* and the draft *Domestic Partnerships Bill,* 2008 is concerned, it is necessary for a number of further amendments to be made to both the Act and the Bill. Due to their esoteric nature, these proposals will be dealt with comprehensively in Chapter 7 that deals exclusively with this facet of the rubric.

3.2.4 Labour and social security law

- Labour law legislation currently makes fairly extensive provision for the life partners of employees and members of pension funds:

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339 Section 27.

340 Definition of "interested person" in section 27 read with section 30.

341 Chapters 15 and 19 respectively.

342 See 4.1, 4.2 and 4.3 of that Chapter.

- In accordance with the *Employment Equity Act*,[343] an employee may not be discriminated against unfairly on a number of grounds, including "family responsibility."[344] The latter ground is in turn defined to include an employee's responsibility towards his or her "spouse or partner."[345]

- An employee is entitled to three days' paid family responsibility leave per annual leave cycle in the event of the death of, amongst others, his or her "spouse or life partner";[346]

- Provided that he or she leaves no widow or widower behind, a person with whom an unmarried deceased employee was "living as husband and wife" is regarded as that employee's dependant for the purposes of the *Compensation for Occupational Diseases and Injuries Act*;[347]

- The *Unemployment Insurance Act* 63 of 2001 entitles a deceased contributor's life partner who complies with the provisions of the Act to apply for the dependant's benefits;[348]

- The "surviving spouse or partner" of any Judge is entitled to certain benefits in terms of the *Judges' Remuneration and Conditions of Employment Act* 47 of 2001. Section 1 of this Act defines the word "partner" as:

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343 55 of 1998.
344 Section 6.
345 Section 1.
346 Section 27(2)(c)(i) of the *Basic Conditions of Employment Act* 75 of 1997.
347 130 of 1993, section 1 definition of "dependant of an employee" (paragraph (c)).
348 Section 30.

only one person with whom a Constitutional Court judge or judge, who is not legally married, is involved in a permanent heterosexual or same-sex life partnership-

(a) in which the Constitutional Court judge or judge and the person concerned have undertaken reciprocal duties of support; and

(b) which is, for the purposes of this Act, registered as such with the Director-General: Justice and Constitutional Development in accordance with the regulations made under section 13.

- Prior to the definition of "spouse" in the *Pension Funds Act* 24 of 1956 being amended to include a "permanent life partner or spouse or civil union partner" in accordance with marriage legislation or the tenets of a specific religion as of 13 September 2007,[349] Cronjé and Heaton[350] opined that a surviving life partner may qualify as a "dependant" of the member "even if the member did not contractually undertake to maintain [that] person" by virtue of the discretion granted by the Act to the board of trustees to regard the partner as such. This opinion was recently confirmed by the Pension Funds Adjudicator in *Hlathi v University of Fort Hare Retirement Fund and Others*[351] when the Adjudicator confirmed the apportionment made to the surviving life partner as a "factual dependant" of the deceased who had died before the amendment of 2007 had been enacted. This case was discussed in 3.5 in Chapter 5 above.

- In terms of the rules which regulate the *Government Employees Pension Law, 1996* the word "spouse" includes "a life partner

349 This amendment was occasioned by the *Pension Funds Amendment Act* 11 of 2007.

350 2004: 229.

351 PFA/EC/9015/2006.

(including same sex life partner)" of an unmarried person. A member or pensioner is required to register such a person as a spouse, and registration implies that the person is *prima facie* regarded as being a "spouse" for the purpose of the Act. This notwithstanding, a person who is not registered may qualify as such after submitting proof to the satisfaction of the Board of Trustees;[352] and

- The *Special Pensions Act* 69 of 1996 directs that for the purposes of that Act the definitions of "spouse" and "marriage relationship" include civil marriages, customary marriages, marriages concluded according to religious marriage systems and "a continuous cohabitation in a homosexual or heterosexual partnership for a period of at least 5 years."[353]

3.2.5 Medical schemes

- The *Medical Schemes Act* 131 of 1998 defines a "dependant" so as to include a "spouse or partner" to whom the member is duty-bound to provide "family care and support." In addition, section 24 of the Act requires the Council for Medical Schemes to be satisfied that a prospective medical scheme does not discriminate unfairly on grounds including gender, sexual orientation and marital status before it may be registered as such in terms of the Act.[354]

- The "spouse or partner" of an older person who is incapable of consenting to his or her admission to a residential facility may consent to such

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352 See the definition of "spouse" in section 1 of the Rules of the Government Employees Pension Fund as contained in Schedule 1 of the Law.

353 Section 31(1) read with subsection (2). Also see *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at par [175] (note 44); SALRC 2006: 152.

354 Section 24(2)(e); Cronjé and Heaton 2004: 231; *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at par [175] (note 44); SALRC 2006: 149.

> admission on behalf of the older person in terms of section 21(3)(b)(i) of the *Older Persons Act* 13 of 2006.[355]

3.2.6 Tax law

Life partners are treated in the same way as spouses for the purposes of tax legislation such as the *Transfer Duty Act*,[356] the *Income Tax Act* [357] and the *Estate Duty Act* [358] where the word "spouse" is, for the purposes of all of these Acts, defined so as to include a person's partner in a permanent "same-sex or heterosexual union."[359]

3.2.7 Insolvency

As seen above, for the purpose of determining the effect of insolvency on the property of the insolvent's spouse, section 21(13) of the *Insolvency Act*[360] states that the word "spouse":

> means not only a wife or husband in the legal sense, but also a wife or husband by virtue of a marriage according to any law or custom, and also a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another.

By virtue of this section, the Master and thereafter the trustee becomes the owner of both the solvent as well as the insolvent life partners' estates.[361] The solvent partner (or "spouse") can however regain ownership of property listed in

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355 See Schäfer 2008(b): R33.

356 40 of 1949.

357 58 of 1962.

358 45 of 1955.

359 See the section 1 definition of "spouse" in both Acts.

360 24 of 1936.

361 See Sharrock *et al* 2000: 55 who also points out that according to the case of *Chaplin NO v Gregory (or Wyld)* 1950 (3) SA 555 (C) where the insolvent is a married person who is cohabitating with a life partner, only the property of the "legal spouse" will vest in the trustee.

section 21(2),[362] and may apply to Court for an order releasing any property that vests in the trustee.[363]

According to Schwellnus,[364] the wording of this section indicates that it does not apply to same-sex couples. This statement appears to be correct as it will not be possible for a Court to *interpret* the words "man" or "woman" as anything other than exactly that.[365] Consequently, with the exception of unions involving a person who has undergone a legally-valid alteration of sex description and sex status[366] so as to render the union a heterosexual one,[367] all other same-sex couples[368] will be excluded from the ambit of section 21 of the *Insolvency Act,*[369] with the result that the interesting situation arises that the very same Act which in 1936 was one of the first expressly to provide for relationships outside of civil marriage is currently *prima facie* unconstitutional.[370]

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362 "The trustee shall release any property of the solvent spouse [life partner] which is proved—
(a) to have been the property of that spouse immediately before her or his marriage to the insolvent or before the first day of October, 1926; or
(b) to have been acquired by that spouse under a marriage settlement; or
(c) to have been acquired by that spouse during the marriage with the insolvent by a title valid as against creditors of the insolvent; or
(d) to be safeguarded in favour of that spouse by section twenty-eight of this Act; or
(e) to have been acquired with any such property as aforesaid or with the income or proceeds thereof."

363 Section 21(4).

364 2008: N7. Also see Meskin *et al* 2008: 5.30.1.1.

365 See *Fourie and Another v Minister of Home Affairs and Others* 2005 (3) SA 429 (SCA) at par [28] – [33] where the majority (*per* Cameron JA) was not prepared to *interpret* the words "wife (or husband)" as "lawful spouse" (as proposed by Farlam JA in his minority judgment at par [132] – [138]), but suggested that the remedy of "reading in" was preferable.

366 By virtue of the *Alteration of Sex Description and Sex Status Act* 49 of 2003.

367 For example, where A (born male) has undergone gender reassignment surgery so as to become female and he lives with a male person (B) or where C (born female) undergoes gender reassignment surgery so as to become male and lives with a female person (D).

368 This will include unions which are regarded as being between two persons of the same sex due to the fact that one of the parties has altered his or her sex description and sex status in terms of Act 49 of 2003. For example, where A (born male) has undergone gender reassignment surgery so as to become female and he lives with another female person (F) or where C (born female) undergoes gender reassignment surgery so as to become male and lives with another male person (H).

369 24 of 1936.

370 See Meskin *et al* 2008: 5.30.1.1.

It is consequently submitted that the wording of section 21(13) will need to be amended by the Legislature (or, if the matter should come before the Courts, be altered by "reading in") in such a way as not only to be constitutionally valid but also to be in line with prospective domestic partnership legislation (as embodied in the *Domestic Partnership Bill,* 2008 and modified in accordance with the domestic partnerships rubric). To this end it is submitted that the words "and also a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another" in subsection (13) should be deleted and replaced with the words in italics so as to read:

> In this section the word 'spouse' means not only a wife or husband in the legal sense, but also a wife or husband by virtue of a marriage according to any law or custom, and also a *person who lives with*[371] *the insolvent in a permanent domestic partnership*.

It is further proposed that a definition of "domestic partnership" be inserted into section 1 of the *Insolvency Act* of 1936 to read:

> **'domestic partnership'** means a registered or unregistered domestic partnership in accordance with the *Domestic Partnerships Act* … of …

3.2.8 Membership of Boards or appointment as Commissioners in terms of specific legislation[372]

- Both the *South African Civil Aviation Authority Act* 40 of 1998[373] and the *Road Traffic Management Act* 20 of 1999[374] contain

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371 Although the 2008 Bill does not specifically require cohabitation (see SALRC 2006: 393), it is suggested that the requirement of living together be retained in order to remain true to the legislative purpose of section 21(13) (see Meskin *et al* 2008: 5.30.1.1) and in view of the principle that the criteria prescribed by any given Act prior to the coming into operation of specific domestic partnership legislation should as far as possible be respected—see 12.1 in Chapter 7.

372 Also see *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at par [175] (note 44); SALRC 2006: 152, 153.

provisions requiring disclosure and adjudication of any financial interest which any member or, amongst others, his or her "life partner" may have in a matter to be dealt with at a meeting of the Boards which govern the South African Civil Aviation Authority and the Road Traffic Management Corporation respectively.[375] In addition, both Acts prescribe certain requirements before a Chief Executive Officer or his or her "spouse, immediate family member, life partner or business associate" may hold any financial interest in the activities which are regulated by those Acts.[376]

- The word "spouse" is regarded as including a "*de facto* spouse" for the purposes of ascertaining which persons will be disqualified from membership of the Independent Media Commission which is created in terms of the *Independent Media Commission Act* 148 of 1993.[377]

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373 Section 9(4). This Act stands to be repealed by the *Civil Aviation Act* 13 of 2009. In terms of section 24(2) of the new Act, any member of the Aviation Safety Investigation Board or any member of the "staff or accredited representatives, experts and advisers" may not hold any financial interest in a civil aviation activity or in that industry without prior written approval of the Minister of Transport. Section 84(1) of the same Act regulates potential conflicts of interest involving *inter alia* the "life partner" of a member of the Civil Aviation Authority Board. According to section 93, the Director of the latter board and his or her "life partner" (amongst others) may not hold any financial interest in any civil aviation activity or in that industry without the prior written approval of the Minister. Section 98 contains a similar provision in that "any person appointed to perform any function in terms of this Act" as well as his or her "life partner" may not hold any such financial interest without the Director's approval.

374 Section 10(2).

375 By the same token the position of a member of the National Lotteries Board (established in terms of the *Lotteries Act* 57 of 1997) who holds or obtains any financial or commercial interest personally or by virtue of a "spouse or life partner, immediate family member, business partner or associate" is regulated by section 3(7) of the Act. The Act also imposes restrictions on this group of persons once the member's membership of the Board has terminated—see section 3(8). In addition, section 7(5) imposes restrictions on the employment and other benefits which an employee of the relevant government Department whose duties relate to any lottery or which any person who has at any time served on the Board as well as the "spouse or life partner, immediate family member, business partner or associate" of such a person may receive. Also see *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at par [175] (note 44); SALRC 2006: 152.

376 See section 11(5)(b) of Act 40 of 1998 and section 15(9) of Act 20 of 1999.

377 Section 6(2).

- If the "business or life partner" (amongst others) of a member of the Board of Directors or of an employee of the Land and Agricultural Development Bank of South Africa submits an application or agreement for financial services which are to be rendered by the Bank, such member or employee is not permitted to be involved in the decision-making process at any meeting of the Board.[378] The same disqualification also applies if the application or agreement is submitted by a close corporation which has a member who is the life partner of that member of the Board or employee of the Bank.[379]

- The National Nuclear Regulator is created in terms of the *National Nuclear Regulator Act* 47 of 1999 and is, similar to the other legislation discussed above, also governed by a Board of Directors. The Act stipulates that no director may be present during or participate in any decision-making process on any matter in which (*inter alia*) his or her life partner has any form of financial interest.[380]

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378 *Land and Agricultural Development Bank Act* 15 of 2002; section 21(3)(a).

379 Section 21(3)(d). Other provisions relating to offences committed by the life partners of certain individuals are listed in section 47 of the Act.

380 Section 8(9). Section 6(4) of the *National Energy Regulator Act* 40 of 2004 prescribes similar restrictions for members of the National Energy Regulator. According to section 6(3)(c) of the same Act, every member (whether full- or part-time) must upon his or her appointment "disclose to the Minister and the Energy Regulator if his or her spouse, *life partner* or child is in the employ of or acts as a consultant to, or has any relationship with, any person, firm, association or company engaged in the electricity, piped-gas and petroleum pipelines industries, or has any pecuniary interest in any such person, firm, association or company" (emphasis added). The Minister and the Regulator must also be informed in writing if a life partner, spouse or child of a member should acquire any such interest in future—see section 6(6). Members of the Board which governs the South African National Energy Development Institute are also required to make similar disclosures as those mentioned in section 6(3)(c) of Act 40 of 2004 regarding the functions of that Institute—see section 8(10)(b) of the *National Energy Act* 34 of 2008. Disclosure and non-participation requirements regarding life partners are also prescribed for members of the Construction Industry Development Board which is established in terms of section 3 of the *Construction Industry Development Board Act* 38 of 2000 (see section 9). No member of the Railway Safety Regulator (established by the *National Railway Safety Regulator Act* 16 of 2002) may attend any meeting of or participate in any decision taken by the Board involving any matter in which that member's life partner (amongst others) has any direct or indirect financial interest (section 8(9)).

- Whereas the preceding examples contain clear-cut provisions, the *National Credit Act* 34 of 2005 provides an interesting example of uncertainty as far as its use of the word "partner" is concerned. In prescribing the requirements for membership of the Board that governs the National Credit Regulator, section 20(2)(b) of the Act states that a person will not be eligible for membership of that Board if he or she *inter alia*:

> personally or through a *spouse, partner or associate*—
>
> (i) has or acquires a direct or indirect financial interest in a registrant; or
>
> (ii) has or acquires an interest in a business or enterprise, which may conflict or interfere with the proper performance of the duties of a member of the Board.[381]

As the words "spouse", "partner" or "associate" are not defined by the Act, it is uncertain—particularly if one bears the commercial context of the Act in mind[382]—whether the word "partner" refers to a partner in the commercial or in the domestic sense of the word. What makes the position in terms of this Act particularly uncertain is the fact that another piece of legislation which has also made use of the phrase "spouse, partner or associate" has included an express provision regarding the interpretation to be given to the word "spouse",[383] while no similar provision appears in Act 34 of 2005.

In addition, the positioning of the word "partner" between the words "spouse" and "associate" makes either conclusion plausible: The

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381 Emphasis added.

382 See the preamble to the Act.

383 Section 6(2) of the *Independent Media Commission Act* 148 of 1993 provides that, for the purposes of that section, the word "spouse" includes a "*de facto* spouse." This concept is however not defined.

word “spouse” may support the domestic conclusion, while the word “associate” may strengthen the commercial conclusion. In view of this uncertainty, it is submitted that the safest route to take is to assume that the word “partner” can encompass both senses. This conclusion is strengthened by the fact that the word “associate” appears to be wide enough to encompass a “partner” in the commercial legal sense of the word.[384]

In order to clarify this aspect, an amendment to the Act is proposed in Chapter 7.

3.2.9 Miscellaneous

- A person who is involved in “a permanent homosexual or heterosexual relationship” as prescribed in the regulations to the Act qualifies as a “spouse” for the purposes of the *Immigration Act* 13 of 2002.[385]

- For the purposes of Schedules 1[386] and 2[387] of the *Local Government: Municipal Systems Act* 32 of 2000, the word “partner” is defined as “a person who permanently lives with another person in a manner as if married.”

- Section 4(1) of the *Rental Housing Act* 50 of 1999 provides that a landlord may not discriminate unfairly against a prospective or current tenant or

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384 See for example Allen *ed* 1991: 65. Further support for this contention is provided in section 40(2)(d)(i) of the same Act, which does not contain a mere unqualified reference to “partner” but instead specifically refers to a “spouse or *business* partners.”

385 Section 1 definition of “spouse.” See the regulations in the Government Gazette of 27 June 2005 (GN 616 in Gazette no 27725) where the method of proving the existence of a “permanent homosexual or heterosexual relationship” is set out. These regulations are quoted in Chapter 7 (note 630).

386 This schedule contains the Code of Conduct for Councillors.

387 This schedule contains the Code of Conduct for Municipal Staff Members.

against the members of the tenant's family or against his or her visitors on grounds which include marital status and sexual orientation.[388]

3.2.10 Developments that are expected in future

- The *Diplomatic Immunities and Privileges Amendment Act* 35 of 2008 was signed on 25 November 2008 but is yet to come into operation. If this happens, it will amend section 2(b) of the *Diplomatic Immunities and Privileges Act* 37 of 2001 so as to include "the life partner, officially recognised as such by the sending State or the United Nations, a specialised agency or an international organisation" as a "member of a family" or, where applicable, as a "spouse and [relative] dependant" for the purposes of the Conventions[389] which have force of law in South Africa.

- If the *Judicial Service Commission Amendment Act* 20 of 2008 comes into operation,[390] the "life partner" of a Judge will be regarded as being an "immediate family member" for the purposes of Chapter 2[391] of the *Judicial Service Commission Act* 9 of 1994.

4. CONCLUSION

An analysis of the protection currently provided to life partners by the law of obligations has revealed that such protection is largely inadequate. The conclusion was reached that proprietary estoppel and the law of (constructive) trusts find no application to life partnerships in South African law, while any

388 Cronjé and Heaton 2004: 229.

389 According to section 1 of the Act, these are: the *Convention on the Privileges and Immunities of the United Nations*, 1946, the *Convention on the Privileges and Immunities of the Specialised Agencies*, 1947, the *Vienna Convention on Diplomatic Relations*, 1961, and the *Vienna Convention on Consular Relations*, 1963. These Conventions are set out in the Schedules to Act 37 of 2001.

390 The Amendment Act was assented to on 22 October 2008 but has not yet come into force.

391 Chapter 2 is inserted by section 9 of the Amendment Act and is entitled "Oversight over judicial conduct and accountability of judicial officers."

protection provided by the law of unjustified enrichment remains theoretical in nature. The law of contract appears to provide the only noteworthy form of protection. Nevertheless, the major problems caused by this option remain that contractual undertakings are not enforceable against outsiders and that contractual protection requires a relatively high level of sophistication of the partners involved. In addition, it has been seen that the law provides no means by which the position of a second "spouse" who is "married" to someone who is already a spouse to a valid subsisting civil marriage with another person is regulated effectively, and in this regard the development of the common law putative spouse doctrine has been propagated in accordance with guidance obtained from foreign jurisdictions. Whether or not this doctrine and the theories propagated in consequence of the comparative analysis should form part of the domestic partnerships rubric will be considered in Part 3 of this study.

The analysis of the law of obligations conducted above provides a number of valuable guidelines for prospective domestic partnerships legislation, such as (i) that it must create a framework within which the rights and obligations attached to a life partnership are recognised and enforceable against outsiders, and (ii) that the rubric must cater for the needs of sophisticated as well as less sophisticated members of society by providing legislative protection that is accessible and consistent and that is applied on the basis of flexible and context-specific criteria.

A perusal of the statutes discussed in the second part of this Chapter makes it fairly obvious that South African legislation deals with life partnerships in a haphazard fashion. Terminology employed in the various statutes is inconsistent, and, at times possibly unconstitutional due to gender discrimination. From these preliminary observations the conclusion is reached that further legislative intervention will be required in order to remove these inconsistencies and to pre-empt constitutional challenges to legislation such as the *Insolvency*

Act.[392] If this is to be achieved, it is imperative that benchmarking legislation is developed in accordance with the domestic partnerships rubric and that the Acts discussed in this Chapter are aligned therewith. The means to achieve this goal will be discussed in Part 3 (Chapter 7).

[392] 24 of 1936.

PART 3

APPLICATION OF THE RUBRIC

CHAPTER 7:

THE MODIFICATION AND CALIBRATION OF THE DRAFT *DOMESTIC PARTNERSHIPS BILL,* 2008 IN ACCORDANCE WITH THE BEHESTS OF THE DOMESTIC PARTNERSHIP RUBRIC

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1. INTRODUCTION TO PART 3 OF THIS STUDY

Parts 1 and 2 of this study have assessed the need for a legislation drafted according to a domestic partnership rubric and, in consequence of a detailed investigation into apposite case law, common law and legislation, to draw a number of conclusions which should feature as part of the legislation. The structure and content of the rubric was set out in chapter 3, but for the sake of convenience, this is repeated:

Domestic Partnership Rubric =

1. *Domestic Partnerships Bill,* 2008

↓

2. Modified in the light of conclusions reached in Parts 2 and 3

↓

3. Aligned with applicable legislation impacting on domestic or life partnerships

In this, the penultimate part of the study, the rubric will be put into action. This must, according to the preceding diagram, take the draft *Domestic Partnerships Bill*, 2008 as a point of departure as the legislative substructure. Once the basic ambit of the Bill has been determined, the remainder of this Part will entail the modification thereof in the light of the conclusions drawn in Part 2 of this study (as well as further conclusions reached in this Part), and the calibration of the Bill with attendant legislation impacting on domestic or life partnerships so as to ensure legal certainty. In the end result, this Part aims to culminate in the provision of robust, consistent, accessible, realistic and context-specific South African domestic partnership legislation.

2. BACKGROUND TO THE DRAFT *DOMESTIC PARTNERSHIPS BILL*, 2008

The first *Civil Union Bill* [1] as it appeared in August 2006 in response to the decision of the Constitutional Court in *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*[2] (hereinafter "*Minister of Home Affairs v Fourie*") included a chapter (chapter 3) dealing with registered and unregistered domestic partnerships. However, as the deadline set by the *Fourie* case for the enactment of same-sex marriage legislation loomed, it was proposed in the Home Affairs Portfolio Committee's deliberations on the Bill to jettison this chapter.[3] This proposal, which was made on 7 November 2006, was supported the following day by the ruling party (the African National Congress), following which a new draft *Civil*

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1 [B 26—2006].

2 2006 (1) SA 524 (CC). See the discussion of the developments leading to the validation of same-sex marriages in Chapter 3.

3 http://www.pmg.org.za/minutes/20061106-civil-union-bill-deliberations (accessed on 5 June 2009).

Union Bill [4] was tabled on 9 November.[5] This draft was eventually enacted on 30 November that year as the *Civil Union Act* 17 of 2006.

The draft *Domestic Partnerships Bill,* 2008 appeared in the Government Gazette of 14 January 2008.[6] In effect, its proposals are almost identical to chapter 3 of the original *Civil Union Bill* which, in turn, was based on the proposals contained in chapters 6 and 7 of the South African Law Reform Commission's Project 118 *Report on Domestic Partnerships* as it appeared in March 2006.[7]

The 2008 draft Bill attempts to regulate two possible categories of domestic partnership. The first is the so-called "registered domestic partnership" in terms of which the parties undertake a public commitment[8] by registering their relationship in accordance with chapter 3 of the Bill, so that the legal consequences set out therein become applicable to their partnership. The second is described as an "unregistered domestic partnership" and is regulated by chapter 4 of the Bill. This partnership does not require the public commitment prescribed for the first category, but instead applies by default and allows—within limits[9]—an application to be brought to a competent Court that is endowed with a wide discretion to make an order pertaining to maintenance, intestate succession or property division on the termination of the partnership.[10] As such, chapter 4 of the Bill embodies the so-called *ex post facto* "judicial discretion model" under which legislation does not automatically clothe the relationship with a certain

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4 [B 26B—2006].

5 http://www.pmg.org.za/minutes/20061107-civil-union-bill-deliberations (accessed on 5 June 2009).

6 Notice 36 of 2008, Government Gazette No. 30663.

7 See Smith and Robinson 2008(a): 357, 358 for a more comprehensive discussion of the legislative history of the *Civil Union Act* 17 of 2006. These authors have also opined that, by enacting the civil partnership, the Legislature in effect legislated on domestic partnerships despite the decisions taken on 7 and 8 November (at 378).

8 SALRC 2006: 320.

9 See clause 26(4) (a Court may not make an order in respect of a relationship involving a person already married in terms of civil law, or already a partner in a civil partnership or other registered domestic partnership with someone else) and 26(5) (at least one partner must either be a permanent resident or be a citizen of the Republic).

10 Clause 26.

status under pre-defined circumstances,[11] but instead permits the applicant(s) to "opt-in" to the mechanisms provided by the Act by way of a Court application "where any prejudice is imminent as a result of the fact that the relationship has ended."[12]

Although the 2008 Bill has thus far only appeared in draft form, its manifestation in this form should not lead one to conclude that it is a novice on the legislative scene. This is so because virtually the entire content of the 2008 Bill debuted already in 2006—albeit in somewhat of a different guise—in the original *Civil Union Bill*. Consequently this Chapter (and the rubric) takes as its point of departure that the 2008 draft Bill provides a more than reliable idea of what the Legislature perceives domestic partnership legislation ultimately to require. In the light hereof this Chapter will aim, firstly, to ascertain the parameters of domestic partnerships under the current Bill and thereafter to assess the impact of the Bill on the prevailing legal position pertaining to life partnerships. In compliance with the second and final facets of the rubric, various modifications to the Bill itself as well as amendments to ancillary legislation will be suggested.

In view of the large number of amendments that will be proposed throughout this Chapter it will be vital, for the sake of clarity, to convey a number of "ground rules" in order to assist the reader:

- Unless otherwise indicated, all new insertions to the Bill or to any other Act will be indicated in italics; and
- Unless otherwise indicated, all words or provisions that are deleted will be indicated by "strikethrough" text (e.g. "In the interests of all ~~married~~ couples….") or by […] with a footnote reference citing the deleted text.

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11 Under the so-called "ascription model" the domestic partnership legislation protects the parties during the existence as well as after the termination of the partnership by automatically imputing a certain status to all relationships that comply with pre-defined criteria (such as a minimum duration requirement)—see SALRC 2006: 366 – 369.

12 SALRC 2006: 375.

3. ASCERTAINING THE AMBIT OF DOMESTIC PARTNERSHIPS UNDER THE BILL

3.1 The preamble to the Bill

The South African Law Reform Commission's *Recommended Domestic Partnership Act* as contained in Annexure E[13] of its 2006 *Report* contains no suggestion as far as the wording of the preamble to the proposed Act is concerned. The preamble to the 2008 Bill reads as follows:

> WHEREAS section 9(1) of the Constitution of the Republic of South Africa, 1996, provides that everyone is equal before the law and has the right to equal protection and benefit of the law;
>
> AND NOTING that there is no legal recognition or protection *for opposite-sex couples* in permanent domestic partnerships …[14]

In contrast to the wording of the 2008 Bill, the preamble to the original *Civil Union Bill* of 31 August 2006 made it clear that the Bill was drafted bearing in mind the fact "that there is no legal recognition or protection for *same-sex and opposite-sex couples* in permanent domestic partnerships."[15] It will be noted that this version of the Bill still contained a chapter dealing specifically with domestic partnerships.[16] While it is true that this chapter was later discarded, it is submitted—particularly in view of the fact that chapter 3 of the 2006 Bill was almost identically transplanted into the 2008 Bill—that the preamble to the former is relevant to the latter.

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13 At 451 *et seq*.
14 Emphasis added.
15 Emphasis added.
16 Chapter 3.

The use of preambles to legislation as an interpretative tool was discussed in research conducted and published as part of the background to this study.[17] In the publication in question it was pointed out that the *Civil Union Act* 17 of 2006 creates a number of interpretative difficulties (a point that will receive further attention in Chapter 8), as *inter alia*, certain provisions of the Act create the impression that it only permits same-sex couples to enter into civil unions. In addition, it was opined that the preamble to the Act was of little value in resolving this difficulty, due to the fact that the preamble itself also only made reference to "same-sex couples" and therefore strengthened the *prima facie* case for arguing that only same-sex couples were entitled to marry or to conclude civil partnerships under the Act.[18]

It is submitted that the *Domestic Partnerships Bill,* 2008 transgresses on the same score, albeit in opposite form: In the case of the Bill, the provisions of the Bill create the impression that it caters for both same-sex and opposite-sex couples, while its preamble conveys a conflicting message. Consider, for example, clause 17 of the Bill:

> Where a child is born into a registered domestic partnership *between persons of the opposite sex,* the male partners [sic] in the registered domestic partnership is deemed to be the biological father of that child and has the legal rights and responsibilities in respect of that child that would have been conferred upon him if he had been married to the biological mother of the child.[19]

The inclusion of the italicised wording ("between persons of the opposite sex") implies that same-sex domestic partnerships are also possible, as, if the opposite were true, the italicised words would not have been necessary.[20]

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17 See Smith and Robinson 2008(a): 364, 365.

18 At 364, 365.

19 Emphasis added.

20 Clause 17 of the Bill can be contrasted with Smith and Robinson's statements regarding section 8(6) of the *Civil Union Act* 17 of 2006 which states that: "A civil union may only be registered by prospective civil union partners who would, *apart from the fact that they are of the same sex,*

Further proof that domestic partnership legislation was not intended to apply to heterosexual couples only is provided by the South African Law Reform Commission's *Report* in which it is made abundantly clear that even if same-sex marriage were to be legalised, a need would still remain for an alternative to marriage to enable both same-sex and opposite-sex couples to formalise their relationships and in so doing to obtain protection over and above that provided by the law of contract.[21]

Consequently, the inevitable conclusion to be reached is that the preamble to the Bill needs to be amended. This amendment should reflect the fact that the Bill provides for both same-sex and opposite-sex couples, and should also—bearing the fragmented legal position discussed in Chapters 5 and 6 in mind—describe the extent of legal recognition and protection currently granted to such couples in a more accurate fashion.[22]

3.2 Ascertaining the ambit of persons who are covered by the Bill in greater detail: Age, prohibited degrees and so-called "care partners"

The discussion of the preamble in 3.1 above makes it clear that it can be accepted that domestic partnerships may be entered into by both same-sex and opposite-sex couples. According to the definition of "domestic partnership" in clause 1 of the Bill, both domestic partners are required to be at least 18 years of

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not be prohibited by law from concluding a marriage under the *Marriage Act* or *Customary Marriages Act*" (emphasis added). In this case, Smith and Robinson opine that the word "are" should be replaced with the words "may be" so as to reflect the fact that the Act also caters for heterosexual couples. In contrast, clause 17 of the Bill does not presuppose that the parties *are necessarily* of the opposite sex, but clearly seeks to regulate the circumstances where this *may be* the case.

21 SALRC 2006: 320. The protection provided by the law of contract was discussed in Chapter 6 above.

22 This could be achieved by amending the relevant portion of the preamble to read "AND NOTING that there is no *comprehensive and consistent* legal recognition or protection for *same-sex or* opposite-sex couples in permanent domestic partnerships …"

age.[23] In addition, only monogamous *registered* domestic partnership are permitted and neither of the parties to such a partnership may be married in terms of applicable marriage legislation or may have entered into a civil partnership.[24] A Court is furthermore prohibited from making an order under the chapter dealing with unregistered partnerships where a person is also a spouse in a civil marriage or civil union, or a partner in either a civil partnership or a registered domestic partnership with a third party.[25] A noteworthy exception in this regard is the customary marriage, which implies that a relationship involving a spouse to such a marriage may ostensibly constitute an unregistered domestic partnership.[26]

An analysis of the requirements relating to the prohibited degrees of affinity or consanguinity reveals an intriguing state of affairs. As far as registered domestic partnerships are concerned, clause 4(5) of the Bill provides that "[a]ny persons who would be prohibited by law from concluding a marriage on the basis of consanguinity or affinity may not register a domestic partnership." The immediate conclusion to be reached from the words "may not register" is that while domestic partners who are related within the prohibited degrees will be precluded from entering into a *registered* partnership, the same will *prima facie* not hold true in the case of an unregistered partnership. This conclusion is strengthened by the fact that neither the definition of "unregistered domestic partnership" (namely a "partnership that has not been registered as a domestic partnership under Chapter 3 of this Act"), nor any provision in chapter 4 of the Bill contains any restriction similar to clause 4(5).

Before the implications hereof are discussed, it is worth mentioning that in its 2006 *Report* the South African Law Reform Commission recommended a

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23 "[D]omestic partnership" means 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…"

24 Clause 4(1) and (2).

25 Clause 26(4).

26 The position of spouses to a purely religious marriage is considered in 11 below.

definition of "unregistered partnership" that differed from the one eventually included in the 2008 Bill. The Commission's proposed definition was the following:

> "**unregistered partnership**" means a relationship between two adult persons who live as a couple and are not related by family.

The rationale behind this definition, according to the Commission, was to restrict such partnerships to conjugal relationships and to leave the regulation of non-conjugal "care partnerships"[27] to a "proper study."[28] This definition later reappeared in the first *Civil Union Bill* of 2006[29] but, as mentioned, was conspicuously absent from the 2008 Bill.

A few comments may be made in this regard. First, it is submitted that a mere reference to "family" would not be sufficient to exclude "care partnerships" from the ambit of the Bill, as such partnerships do not only present themselves in a family-related context.[30] Nevertheless, the words "not related by family" were clearly intended not only to exclude care partners, but also to prevent parties who were related in the prohibited degrees of consanguinity or affinity from alleging that their relationship constituted an unregistered domestic partnership. (In fact, an interesting spin-off of the definition proposed by the Commission is that the unqualified use of the words "related by family"[31] would have implied an even wider exclusion than the prohibited degrees prescribed for a civil marriage, as

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27 See 2.1.2.2 in Chapter 4. A useful description of what a "care partnership" involves is provided by section 5(1)(b) of the *New South Wales Property (Relationships) Act* of 1984: "A [non-conjugal] close personal relationship … between two adult persons, *whether or not related by family*, who are living together, one or each of whom provides the other with domestic support and personal care" (emphasis added). It is interesting to note that the SALRC mistakenly states that the New South Wales Act restricts such relationships to persons who are not related—see SALRC 2006: 241.

28 SALRC 2006: 386, 387.

29 [B 26 — 2006]: definition of "unregistered domestic partnership" in clause 1.

30 See section 5(1)(b) of the New South Wales *Property (Relationships) Act*, 1984 (quoted above).

31 The definition of "family" in clause 1 of the 2006 Bill as "includ[ing] partners in an unregistered partnership and their dependants" does little to assist in resolving the uncertainty regarding care partners and persons related in the prohibited degrees.

any family relationship would be excluded, such as persons related by affinity in the collateral line and blood relations who were further than one degree from their common ancestor.)[32] Nevertheless, as it stands the 2008 Bill appears to preclude neither "care partnerships" nor relationships between persons who are related within the prohibited degrees from being regarded as "unregistered domestic partnerships."

The (most likely inadvertent) inclusion of the former category is supported due to the fact that, as the Commission itself states (albeit not in direct reference to non-conjugal relationships), "one must recognise that there are large numbers of people in dependence-producing relationships who are ignored by the law."[33]

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[32] In this regard it is important to note that the New South Wales *Property (Relationships) Act* 1984 (upon which the SALRC's initial proposals regarding conjugal and non-conjugal relationships were modelled) specifically defines the concept of a family relationship, while neither the SALRC's 2003 *Discussion Paper* (see Annexure E) nor the first *Civil Union Bill* of 2006 did the same. Section 5A of the New South Wales Act describes a "family relationship" thus:

(1) For the purposes of sections 4 and 5, persons are related by family if:
  (a) one is the parent, or another ancestor, of the other, or
  (b) one is the child, or another descendant, of the other, or
  (c) they have a parent in common.

(2) For the purposes of this section:
  (a) a person is taken to be an ancestor or descendant of another person even if the relationship between them is traced through, or to, a person who is or was an adopted child, and
  (b) the relationship of parent and child between an adoptive parent and an adopted child is taken to continue even though the order by which the adoption was effected has been annulled, cancelled or discharged or the adoption has otherwise ceased to be effective, and
  (c) the relationship between an adopted child and the adoptive parent, or each of the adoptive parents, is taken to be or to have been the natural relationship of child and parent, and
  (d) a person who has been adopted more than once is taken to be the child of each person by whom he or she has been adopted.

(3) In subsection (2), "adopted" means adopted under the law of any place, whether in Australia or not, relating to the adoption of children."

The same occurs in section 4AA(6) of the Australian Commonwealth *Family Law Act* of 1975 which states that two persons are "related by family" if "(a) one is the child (including an adopted child) of the other; or (b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent); or (c) they have a parent in common (who may be an adoptive parent of either or both of them). For this purpose, disregard whether an adoption is declared void or has ceased to have effect."

[33] SALRC 2006: 22. In addition, the Bill's apparent provision for care partners appears to be in line with sentiments expressed by South Africa's highest Court to the effect that the decision not to engage in sexual intimacy is part and parcel of the entitlement to freedom and privacy, and is

Furthermore, it is submitted that the fears expressed by certain respondents to the effect that attempts to regulate care partnerships may lead to exploitation and abuse could to some extent be allayed by the fact that no order under chapter 4 could be granted without prior judicial scrutiny of the specific application in question.[34]

A perusal of foreign legislation which caters for non-conjugal partnerships reveals that certain restrictions are sometimes prescribed for such relationships. For example, the New South Wales *Property (Relationships) Act,* 1984 states that:

> [A] close personal relationship is taken not to exist between two persons where one of them provides the other with domestic support and personal care:
>
> (a) for fee or reward, or
>
> (b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).[35]

Although these restrictions were also contained in the South African Law Reform Commission's 2003 *Discussion Paper*,[36] they were presumably removed from the 2006 *Report* on the assumption that the Commission's modified 2006 proposals no longer provided for non-conjugal relationships. As was seen above, this assumption appears to have been erroneous, as there is no provision in the entire Bill that either excludes non-conjugal relationships from qualifying as domestic partners nor insists on intimacy as a requirement for their recognition. In view of the fact that the Bill is capable of being interpreted so as to permit non-

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therefore to be supported: See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [51] *per* Ackermann J: "I would even hold [the argument that procreative potential is a defining characteristic of conjugal relationships] to be demeaning of a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy."

34 SALRC 2006: 386: "Concern was furthermore expressed that the legal recognition of care partnerships may be susceptible to abuse and could lead to exploitation of people in need of care."

35 Section 5(2).

36 SALRC 2003: 320.

conjugal care partners related in the prohibited degrees to qualify as unregistered domestic partners, it is submitted that the restrictions mentioned in the New South Wales Act pertaining to reward and care by proxy should be reintroduced into the 2008 Bill. This development would further curb the risk of exploitation and abuse identified by respondents to the Commission's 2003 proposals.[37]

Another issue that is of importance for the purposes of the instant discussion is whether the Bill does in fact intend to permit *conjugal* relationships that fall into the prohibited degrees of consanguinity or affinity to qualify as unregistered domestic partnerships. In this regard the first difficulty with the Bill in its current form is that it in effect countenances the crime of incest. According to the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007, this crime is perpetrated by "persons who may not lawfully marry each other on account of consanguinity, affinity or an adoptive relationship and who unlawfully and intentionally engage in an act of sexual penetration with each other" irrespective of whether or not such an act was consensual.[38] This crime, although defined with reference to marriage, is not committed by the fact of a marriage between persons who fall into the prohibited degrees, but is committed by the sexual activity between such persons.[39] At common law the crime was limited to an act of heterosexual sexual intercourse (that is to say penetration of the vagina by the penis),[40] but the 2007 Act has broadened the scope of the offence to any form of sexual penetration.[41] It is trite that no dispensation can be

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37 See SALRC 2006: 386.

38 Section 12(1).

39 Burchell and Milton 2000: 535.

40 Burchell and Milton 2000: 535.

41 Section 1 of Act 32 of 2007 defines "sexual penetration" as including "any act which causes penetration to any extent whatsoever by-

(a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;

(b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or

(c) the genital organs of an animal, into or beyond the mouth of another person …"

It is interesting to consider that Labuschagne (1990: 424, 425) argues that incest is nothing more than a "sociological anachronism" and proposes that incestuous sexual relations between adults

granted to validate a marriage entered into between persons in the prohibited degrees.[42] It follows, from the outset, that the 2008 Bill therefore cannot sanction conjugal relationships between such persons by regarding them as unregistered domestic partners.

In determining how this strange state of affairs created by the 2008 Bill came about, it is insightful to consider the provisions of the legislation proposed in the Commission's 2003 *Discussion Paper* as well as the statute upon which these proposals were seemingly based, namely the New South Wales *Property (Relationships) Act*, 1984.

To begin with, the 2003 proposals differentiated between "intimate" and "care" partnerships, with the difference between the two obviously being based on conjugality. These proposals correspond with the aforementioned New South Wales *Property (Relationships) Act*, 1984 which also differentiates between conjugal and non-conjugal "domestic relationships", with the former being referred to as a "*de facto* relationship"[43] and the latter as a "close personal relationship." The Act further distinguishes between these relationships as far as family ties are concerned by specifically stating that a *de facto* relationship is one in which the parties are not "related by family" while it is irrelevant whether persons involved in a "close personal relationship" are related to one another or not.[44]

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as well as between children should be decriminalised. If anything, it appears as if the 2007 Act has broadened rather than narrowed the scope of this crime.

42 *Loedolff & Smuts v Robertson and Others* (1861 – 1863) 4 Searle 128 at 146, 147; Hahlo 1985: 70.

43 Italics added.

44 According to section 4(1): "(1) For the purposes of this Act, a de facto relationship is a relationship between two adult persons:

(a) who live together as a couple, and

(b) who are not married to one another or related by family."

Section 5(1) states that: "(1) For the purposes of this Act, a domestic relationship is:

(a) a de facto relationship, or

(b) a close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care."

Considering the progression of the South African proposals pertaining to domestic partnership legislation that have appeared since 2003 and comparing them with the relevant provisions of the Australian legislation on which they were based leads to two important conclusions: First, the requirements restricting the ambit of conjugal unregistered domestic partnerships to those not related by family appears to have fallen through the cracks during the 2008 Bill's drafting process; and second, (as explained earlier) the use of the word "family" is unsuitable in a South African context as it unreasonably widens the degrees of affinity and consanguinity, with the result that a cross-reference to the restrictions imposed by marriage (as appears in clause 4 of the Bill) is to be preferred.

Furthermore, as seen earlier in this discussion, the 2008 Bill should in fact cater for non-conjugal care partnerships irrespective of any family tie that may exist between the parties thereto. In the light of the conclusions drawn in this paragraph it is submitted that two additional subsections should be inserted into clause 26 of the Bill which should state the following:

(6) [A] Court may not make an order under this Chapter regarding a relationship between two persons who would be prohibited by law from concluding a marriage on the basis of consanguinity or affinity, unless that relationship was a non-conjugal relationship in terms of which one person provided the other with domestic support and/or personal care.

(7) [A] Court may not make an order under this Chapter regarding a relationship between two persons where one of them provided the other with domestic support and/or personal care:

(a) for fee or reward, or

(b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).

As a final note, it is submitted that in view of the fact that it would be impossible for a Court to make an order under chapter 4 in the case of a *conjugal* relationship that offended the prohibited degrees, the only recourse for parties to such a relationship would be to petition the Court to extend the putative spouse doctrine to such relationships provided, of course, that at least one of the parties was of the *bona fide* belief that their union was legally permissible. This issue is discussed in greater detail in 5 below.

3.3 Conclusion

Despite the wording of its preamble, the Bill permits both same-sex and opposite-sex couples to enter into domestic partnerships. While the prohibited degrees of affinity are clearly applicable in the case of registered domestic partnerships, in its current form the Bill does not apply the same restriction to unregistered domestic partnerships; a distinction which, it is submitted, is created by an oversight on the part of the Legislature that must be corrected so as clearly to show that *conjugal* relationships that offend the prohibited degrees do not come within the ambit of chapter 4 of the Bill. On the flip side of the coin, the Bill appears—with respect correctly—to permit unregistered domestic partnerships in the form of so-called “care partners.” Regarding the requirement of monogamy, the Bill appears clearly to require absolute monogamy in the case of registered partners, while an unregistered partnership may be constituted by a person who is already a party to a customary as opposed to a civil marriage.

The analysis conducted above merely attempts to set out the framework of the Bill in its current form with a view to setting the scene for the assessment which follows. As such, various aspects pertaining to the feasibility of the legal position described above will be addressed throughout the course of this Chapter.

4. THE INTERRELATIONSHIP BETWEEN THE BILL AND THE CURRENT LEGAL POSITION PERTAINING TO LIFE PARTNERSHIPS

4.1 Introduction

In Chapter 5 the impact of the legalisation of same-sex marriage was considered on those developments that had been occasioned by the judiciary in respect of life partnerships prior to the promulgation of that Act. The conclusions reached were, in the main, based on remarks made by Van Heerden AJ in *Gory v Kolver NO*,[45] which judgment was delivered at a time when the legalisation of same-sex marriage was imminent as a consequence of the decision in *Minister of Home Affairs v Fourie*.[46] To recap, it was concluded that Van Heerden AJ was correct in holding that the Legislature and the Courts were free to express themselves on these developments, and that the finding in the *Fourie* case was not pre-emptive of legislation pertaining to life partnerships.[47] Furthermore, the learned Judge also (it is submitted correctly) held that the developments brought about by the Courts while marriage was denied to gays and lesbians would not be affected unless legislation expressly demanded this.[48] Sinclair[49] appears to agree with this conclusion when she states that the Court's finding in *Gory* entails that:

> [S]ame-sex couples who do not invoke their right to marry remain protected in terms of the legislation that formed the basis of the judgments designed to protect those who could not marry. Heterosexual couples who cohabit but do not marry do not enjoy that protection. They never did. Unless the legislature intervenes, it seems they never will.

Sinclair's opinion undoubtedly reflects the correct positive law position as created by the Courts. However, it was ostensibly written prior to the publication of the

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45 2007 (4) SA 97 (CC); 2007 (3) BCLR 294 (CC).
46 2006 (1) SA 524 (CC).
47 Par [27].
48 Par [28]. See the discussion in 3.4.1.1.3 in Chapter 5.
49 2008: 407, 408.

2008 draft *Domestic Partnerships Bill*. The issue that now needs to be addressed is how the Bill will (if enacted) affect this state of affairs.

It must also be borne in mind that, over and above the pre-*Civil Union Act* developments occasioned by the Courts, the Legislature has also played a significant role in recognising life partnerships (see Chapter 6). The impact of the coming into operation of specialised domestic partnership legislation on this state of affairs consequently also needs to be considered.

4.2 Ascertaining the impact of the 2008 Bill on the current legal position

4.2.1 Domestic partnerships *vis-à-vis* marriage

As seen in 3.1 above, the rationale behind the South African Law Reform Commission's proposals regarding registered domestic partnership legislation was to create an institution which would provide an *alternative* to marriage.[50] As it can therefore be accepted that marriage and domestic partnership are two distinct institutions, the interrelationship between these two deserves no further mention.[51]

4.2.2 Domestic partnerships *vis-à-vis* pre-*Civil Union Act* case law

4.2.2.1 The *registered* domestic partnership

Chapter 3 of the Bill regulates the registered domestic partnership. As its name dictates, the parties to such a relationship are required to register their partnership with a designated registration officer, which signifies a "public commitment" in consequence of which they obtain the protection afforded by the

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50 SALRC 2006: 320.

51 The question as to whether a marriage can be converted into a domestic partnership and *vice versa* is however briefly considered in 9.4 below.

Bill.[52] By virtue of this commitment, the relationship assumes a "formal status-creating" character,[53] which differentiates it from the unregistered partnership. Therefore, once the parties have concluded a valid registered domestic partnership, the provisions of chapter 3 of the Bill will govern their relationship alongside any other legislation (for example tax legislation)[54] that makes specific provision for unmarried couples. (The position is therefore analogous to that of a civil marriage, the formation of which is governed by the *Marriage Act* 25 of 1961 while other legislation such as the *Matrimonial Property Act* 88 of 1984 and the *Divorce Act* 70 of 1979 regulate certain aspects pertaining to its functioning and termination.)

As such, chapter 3 therefore represents an express attempt by the Legislature to regulate formalised life partnerships, so that one would assume that the Legislature has, in keeping with its legislative prerogative, "exercise[d] final control over the nature and extent of the benefits"[55] to which such partners would be entitled. This notwithstanding, any provision of that chapter could be subjected to constitutional scrutiny in future on the basis that it infringes the Bill of Rights. However, at least as far as the pre-*Civil Union Act* judicial developments are concerned, it does so happen that all of these developments have at any rate already been accommodated in the Bill.[56] By happy symmetry, therefore, no

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52 SALRC 2006: 320.

53 See SALRC 2006: 322: "The Commission was of the opinion that the registered partnership option should be available to people who are not involved in a formal status-creating relationship such as marriage *or another registered partnership* only" (emphasis added).

54 This refers to the legislation that specifically provides for unmarried couples as analysed in Chapter 6.

55 *Per* Ackermann J in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [30].

56 The reader is referred to the summary in tabular form at 4.2.2.2 below. Comparing this table to chapter 3 of the Bill reveals the following: (1) Registered partners owe one another an *ex lege* duty of support (clause 9); (2) Registered domestic partners will qualify as "spouses" for the purposes of the *Immigration Act* 13 of 2002, provided that they comply with the regulations prescribed under that Act; (3) The partner of a Judge who is involved in a registered domestic partnership will qualify as a "partner" for the purposes of the *Judges' Remuneration and Conditions of Employment Act* 47 of 2001, provided that they comply with the requirements of the Act; (4) A surviving registered domestic partner may institute a delictual claim for loss of support (clause 21); (5) A surviving registered domestic partner may institute a claim for maintenance from the deceased partner's estate (clause 19); and (6) A surviving registered

discrepancies between these developments and the Bill exist; thereby—as will be seen below—negating the need for the type of analysis required in the context of unregistered partnerships.

4.2.2.2 The *unregistered* domestic partnership

The position of the unregistered domestic partnership is more complex. In this instance it needs to be remembered that under the so-called "judicial discretion model" adopted by chapter 4 of the Bill it is envisioned that chapter 4 will apply by default, so as to allow one or both parties to any unregistered partnership that qualifies as such to "opt-in" by bringing an application to a competent Court.[57] In the past, such an application was not possible due to the fact that the legislation in question only catered for spouses to valid marriages; a position that necessitated the Courts to evaluate the validity of the recognition sought bearing the fact in mind that the institution of marriage was not available to same-sex couples.

Before the interrelationship between the developments occasioned by the Courts and the legal position that will obtain if the 2008 Bill were to be enacted can be understood, it is first necessary to determine the extent to which the pre-*Civil Union Act* judicial extensions are already accommodated by the Bill in its current form, and thereafter to adjudicate the merits of any discrepancies which remain unaccounted for. This position is summarised by the following table (Figure 7.1):

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domestic partner may inherit intestate from the deceased partner's estate (clause 20). Certain aspects pertaining to the discrepancies relating to children have been dealt with in Chapter 5 and will not be considered here. The remaining discrepancies will be dealt with later in this Chapter (at 12.2.4) when the *Children's Act* 38 of 2005 is discussed with a view to aligning that Act with the Bill.

57 SALRC 2006: 375 – 379.

	Case	Major relevance of the finding in contemporary terms	Similar provision for unregistered domestic partners in the *Domestic Partnerships Bill*?	Similar provision in any other legislation?	Does a discrepancy exist?
1.	*Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T)	Reciprocal duty of support exists in same-sex life partnerships	None	None	**YES**
2.	*National Coalition v Minister of Home Affairs* 2000 (2) SA 1 (CC)	Denial of exemptions to same-sex life partners under *Aliens Control Act* 96 of 1991 unconstitutional	Not required	*Immigration Act* 13 of 2002	**NO**
3.	*Satchwell v President of the RSA* 2002 (6) SA 1 (CC) and 2003 (4) SA 266 (CC)	*Judges' Remuneration and Conditions of Employment Act* 88 of 1989 unconstitutional to the extent that it did not provide for same-sex couples	Not required	*Judges' Remuneration and Conditions of Employment Act* 47 of 2001 (as amended)	**NO**
4.	*Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA)	Common-law action for loss of support extended to same-sex life partners	No	None	**YES**
5.	*Volks NO v Robinson* 2005 (5) BCLR 446 (CC)	Survivor of a heterosexual life partnership not entitled to claim maintenance from deceased estate	Yes (clauses 29 and 30)	Not required	**NO** (as there was no extension to begin with)
6.	*Gory v Kolver NO* 2007 (4) SA 97 (CC)	Same-sex life partners may inherit intestate	Yes (clause 31)	Not required	**NO**
7.	*Du Toit v Min of Welfare and Pop Development* 2003 (2) SA 198 (CC)	Same-sex life partners may adopt jointly	Not required	Section 231 of the *Children's Act* 38 of 2005	**YES** (pending enactment of section 231)
8.	*J v Director-General Dept of Home Affairs* 2003 (5) SA 621 (CC)	Lesbian life partner recognised as parent of children conceived by assisted reproduction of her life partner	No adequate protection at present, but problem addressed in Chapter 5 and later in this Chapter	No adequate protection at present, but problem addressed in Chapter 5 and later in this Chapter	**YES** (unless amendments suggested in Chapter 5 are enacted)

Figure 7.1 Comparison of the provisions of the Bill with judicial developments

Figure 7.1 shows that a number of discrepancies exist between the pre-*Civil Union Act* judicial pronouncements and the legal position that will obtain if the 2008 Bill were to be enacted in its current form. These discrepancies fall into two

categories, namely (i) those that relate to the duty of support (numbers 1 and 4) and (ii) those that relate to children (numbers 7 and 8). As the solution to the discrepancies relating to children has been dealt with comprehensively in Chapter 5 and will again be considered in 12.2.4 below, these issues are not pertinent to the current discussion. Attention will therefore be confined to the first category (that is to say discrepancies 1 and 4 that both relate to the duty of support).

4.2.2.2.1 Should these discrepancies be rectified?

The first argument that springs to mind when one considers whether chapter 4 of the Bill should iron-out discrepancies 1 and 4 is the so-called "choice argument." In this regard, it will be remembered that the premise underlying the pre-*Civil Union Act* judgments was the fact that same-sex couples did not have the option of marriage available to them, while opposite-sex life partners were not faced with the same problem.[58] The question that now arises is whether the fact that this barrier no longer exists should of its own accord preclude the findings in these cases from being transposed onto the *Domestic Partnerships Bill,* 2008. The following considerations should be borne in mind in contemplating the answer to this question:

(i) Chapter 4 of the Bill was formulated with the express purpose of providing for those life partners who had either deliberately or unintentionally elected not to formalise their relationship by way of marriage or civil partnership or by entering into a registered domestic partnership.[59] As such, it appears that while the pre-*Civil Union Act* judgments were based on the premise that same-sex couples *absolutely could not* marry, the Bill provides for situations where the unregistered partners either (deliberately or unintentionally) *chose not to* formalise their relationships **or** where they

[58] See Sinclair 2008: 406.
[59] SALRC 2006: 375.

could not do so due to the dynamics of the relationship.[60] As far as the second group is concerned (those who *could not* formalise their relationships) it is submitted that any decision as to whether or not the pre-*Civil Union Act* judgments are to be extended to unregistered life partnerships must take cognisance of the fact that the Bill caters for partners who, due to their unique private circumstances, in effect find themselves in a position comparable to those who in the past were absolutely prohibited by law from marrying one another.

(ii) While consideration (i) would thwart the application of the "choice argument" to those who *could not* formalise their relationships, the position of the other category (namely those who *chose* not to do so) would still need to be considered. It is submitted that over and above the fact that it has been opined that "even the most ardent choice made to cohabit impacts disproportionately upon women and men",[61] the argument that this choice should preclude extension is easily disposed of, at least within the context of need-based claims. This is so because as, proved in Chapter 5, the "contextualised choice model" dictates that *domestic partnership legislation must give effect to the conclusion which holds that the "choice-argument" is irrelevant as far as any need-based claim is concerned.* Instead, the only relevant consideration in respect of such a claim would be whether the parties had undertaken reciprocal obligations of support.[62]

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60 This could occur where the stronger party to the relationship resisted any attempt or request by the weaker party to formalise the relationship or convinced such party that formalisation was unnecessary. In addition, such a partner may, in the words of Sachs J in *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) have contributed "her care and sweat equity" to the relationship which led to her remaining economically inactive while her partner's estate flourished. As the SALRC (2006: 369) states "[t]his model is heralded as a way to compensate the weaker partner in a relationship who may have been exploited by the emotionally or financially stronger partner who is reluctant to formalise the partnership."

61 Lind 2005: 119.

62 See 3.3.2.2 in Chapter 5.

(iii) In the light of considerations (i) and (ii) it could therefore be concluded that it makes no difference whether the unregistered life partners *chose not* to or *could not* formalise their relationships as the "choice argument" is irrelevant as far as any claim based on need is concerned.

(iv) Nevertheless, as was concluded in Chapter 5, the fact that the "choice argument" does not apply within the context of need-based claims under the "contextualised choice model" does not imply that it has no role to play whatsoever. Instead, the model proposes that the argument could indeed play a role within the context of *property disputes* where the parties to a non-formalised relationship who have chosen not to formalise it attempt to rely on legislation or common law that regulates the patrimonial consequences of formalised relationships such as marriages (or, for that matter, registered domestic partnerships).

(v) A final consideration would be the fact that the pre-*Civil Union Act* decisions were made *within a different legal context* (i.e. one in which marriage was the only family form that was legally sanctioned) to the one that will obtain if the Bill were to be enacted. The difference in context between the position of unregistered partnerships under the Bill and the life partnerships which formed the subject-matter of pre-*Civil Union Act* litigation would be that in the case of the former group the Courts would automatically be vested with powers by empowering legislation that is tailor-made for non-formalised relationships, while the Courts in the latter category were constrained to read words into statutes that were designed with spouses and not life partners in mind. The fundamental question then would be to determine whether there was a difference between a need-based claim in the context of the pre-*Civil Union Act* judgments (which were based on extending the law of marriage) versus a similar claim in the context of an unregistered life partnership in terms of the Bill. The answer to this question is fairly obvious in view of the analysis

> conducted throughout this study: Provided that a reciprocal duty of support existed between the parties to the relationship, the partners should in principle be permitted to enforce any need-based claim between themselves *irrespective of the nature of their relationship* (i.e. irrespective of whether it is a non-formalised life or domestic partnership or a purely religious marriage).

From these remarks it becomes clear that there is in principle no sound reason for the Bill not to make provision for any need-based claim that was extended to life partners by any pre-*Civil Union Act* judgment. The only exception to this finding would—in line with Van Heerden AJ's remarks in *Gory v Kolver NO*[63]—be where the Legislature expressly (and moreover justifiably) intended to retract or modify any such extension.

In the light of these conclusions, discrepancies 1 and 4 can now be analysed individually, with a view to ascertaining whether or not the Bill is in need of being modified.

a) Discrepancy 1: The reciprocal duty of support

As seen in Chapter 5 the common law does not create or impose a legal duty on unmarried persons to support one another.[64] However, in *Langemaat v Minister of Safety and Security*[65] Roux J made the ground-breaking statement that "[p]arties to a same-sex union, which has existed for years in a common home, must surely owe a duty of support, in all senses, to each other."[66] Although our Courts have confirmed that no such duty exists by operation of law,[67] they have

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63 2007 (4) SA 97 (CC) at par [28].

64 SALRC 2006: 395.

65 1998 (3) SA 312 (T).

66 At 316 (H) – (I).

67 *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at par [56]; *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) at par [12].

been prepared to infer the existence of such a duty in case law involving same-sex life partners.[68]

In its 2006 *Report* the South African Law Reform Commission concluded that the judicial discretion model could not support the creation of an *ex lege* duty of support between unregistered domestic partners.[69] The Commission based this conclusion on the *ratio* of the finding of the majority of the Court (*per* Skweyiya J) in *Volks NO v Robinson*,[70] which, according to the Commission, was "that no duty of support arises by operation of law in the case of unmarried cohabitants, and thus no duty to maintain the surviving partner could be passed on to the estate of the deceased."[71] However, in Chapter 5 *ante* the submission was made that the majority of the Court in the *Volks* case had not paid sufficient attention to the enforceability and robustness of the contractual (as opposed to *ex lege*) duty of support in permanent life partnerships in contemporary South Africa.[72] Furthermore, it was suggested that Skweyiya J's ratio would have fallen away if the Court had—as had already been done in the same-sex cases[73]—appreciated

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68 See for example *Gory v Kolver NO and Others* 2006 (5) SA 145 (T) at par [18]; *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) at par [25]; *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) at par [11] – [16]. As was pointed out in Chapter 5, it is submitted that the Courts erred by not inferring the existence of mutual support obligations on the facts in *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).

69 "With the dismissal of the *de facto* option the possibility of extending the common-law duty of support to unregistered partners also had to be dismissed"—see SALRC 2006: 397 (italics added).

70 2005 (5) BCLR 446 (CC).

71 SALRC 2006: 397. The Commission refers to paragraphs [56] and [60] of Skweyiya J's judgment. These paragraphs read as follows: "[56] The distinction between married and unmarried people cannot be said to be unfair when considered in the larger context of the rights and obligations uniquely attached to marriage. Whilst there is a reciprocal duty of support between married persons, no duty of support arises by operation of law in the case of unmarried cohabitants. The maintenance benefit in section 2(1) of the Act falls within the scope of the maintenance support obligation attached to marriage. The Act applies to persons in respect of whom the deceased person (spouse) would have remained legally liable for maintenance, by operation of law, had he or she not died" and "[60] I conclude that it is not unfair to make a distinction between survivors of a marriage on the one hand, and survivors of a heterosexual cohabitation relationship on the other. In the context of the provision for maintenance of the survivor of a marriage by the estate of the deceased, it is entirely appropriate not to impose a duty upon the estate where none arose by operation of law during the lifetime of the deceased. Such an imposition would be incongruous, unfair, irrational and untenable."

72 See 3.3.1.2 in Chapter 5.

73 See note 68 above.

the fact that the facts *in casu* clearly supported the inference of the existence of such a duty during the existence of the relationship between the survivor and the deceased. As the survivor's claim was need-based in nature, giving effect thereto would simply have required the logical extension of a duty which already existed *inter vivos* beyond the deceased's death. The crucial point, however, was that this study has found that the legislation drafted according to the domestic partnership rubric requires the fact to be acknowledged that the existence of a reciprocal duty of support is a *sine qua non* for the permissibility of this and any other similar need-based claim within the context of domestic partners under the Bill.[74]

It is submitted that the South African Law Reform Commission also overlooked these facts. This much becomes evident when one considers their proposal as far as a claim for maintenance after the termination of an unregistered domestic partnership is concerned:

> The Commission recommends that a limited statutory right to maintenance be available to former partners in unregistered partnerships after separation or death. A Court can consider the merits of an application for such an order after it has concluded that the couple has indeed lived as a couple under clause 25.[75]

The Legislature's lapse in reasoning surfaces when one considers that neither clause 28 of the Bill ("Application for maintenance order after separation") nor clause 29 thereof ("Application for a maintenance order after death of unregistered domestic partner") make any reference whatsoever to the need for the parties to have undertaken mutual support obligations *while the relationship existed*. As such, the Commission as well as the Legislature appear to have lost sight of the fact that it is not possible to extend something which has not been found to exist in the first place. In consequence, the Commission's proposal as

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74 See 3.3.1.2 in Chapter 5.

75 SALRC 2006: 401. The reference to "clause 25" appears to have been made in error. The correct reference should have been to clause 26 of the legislation proposed in Annexure E of the *Report*.

embodied in the Bill not only implies that the *sine qua non* for such an extension is not complied with, but in fact contradicts the very *ratio* of the decision on which it was based in the first place![76]

As far as the issue of "formal public commitment"[77] is concerned, while the absence hereof may be sufficient to prevent an *ex lege* duty of support arising,[78] there can certainly be no question of such a commitment being required in order to establish a contractual reciprocal duty of support between life partners, as the existence of such a duty is simply a question of fact.[79]

In conclusion, the fact that the Commission concluded that no reciprocal duty of support would be imposed *by operation of law* on unregistered domestic partnerships can be supported. However, the failure to appreciate the pivotal nature of a *contractual* duty within the context of *all need-based claims* cannot. The need for amendments to the Bill in this regard will be discussed later in this Chapter.[80]

b) Discrepancy 2: The development of the common law claim for loss of support

In *Du Plessis v Road Accident Fund* [81] the Supreme Court of Appeal (*per* Cloete JA) extended the dependant's claim for loss of support to "a same-sex partner of the deceased in a permanent life relationship similar in other respects to

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76 The same criticism can be levelled at clause 31 of the Bill, which provides for intestate succession. Such a claim—which, as seen in Chapter 5 is also a need-based claim— similarly demands the existence of a reciprocal duty of support as a *sine qua non* thereof.

77 See SALRC 2006: 395, 396.

78 See par 10.3.12 of the SALRC's 2003 *Discussion Paper*.

79 This much becomes clear from a perusal of the same-sex life partnership cases where the existence of such a duty was readily inferred despite the fact that there was no form of "*formal* public commitment" because, although any form of ceremony (such as a so-called "commitment ceremony") involving such partners fulfilled the requirement of publicity, such ceremonies were not "formal" because they were legally invalid. Despite this invalidity, the public nature of the commitment has been of assistance in proving the permanence of the relationship and the existence of a reciprocal duty of support—see for example *Gory v Kolver NO and Others* 2006 (5) SA 145 (T) at par [18] and *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) at par [14].

80 See 11 below.

81 2004 (1) SA 359 (SCA).

marriage, in which the deceased had undertaken a contractual duty of support to [such partner]."[82]

In respect of *registered* domestic partners, clause 21(2) of the 2008 Bill provides that the fact that the partners were not married to one another will not preclude the surviving partner from instituting a delictual claim based on the wrongful death of the deceased. However, as far as unregistered partners are concerned, the Bill does not provide for a similar claim. The issue as to whether or not this discrepancy should be rectified is made all the more vexing when one considers that, on the interpretation in *Gory v Kolver NO*,[83] if the Bill were enacted in its current form, the decision in *Du Plessis* would still stand. This would not only imply that all same-sex couples who complied with the requirements set out by Cloete JA in the former case would be able to institute such a claim regardless of whether or not they had entered into a registered domestic partnership, but also that the anomaly identified by Cronjé and Heaton[84] would persist in that heterosexual unregistered partners would have no similar claim.

It goes without saying that the dependant's claim for loss of support is a need-based claim. In light hereof, it is submitted that the same criticism that was levelled regarding discrepancy 1 is relevant here: The Bill loses sight of the fact that such a claim—as a need-based claim—requires only that the partners to the permanent union have undertaken reciprocal support obligations in order for it to be instituted. As was the case with the claims discussed in discrepancy 1, the existence of a "public formal commitment" is as irrelevant for the unregistered partners as it was for the same-sex couple in the *Du Plessis* case.[85] As before,

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82 Par [42].

83 See par [27] – [31] of the case, the gist of which is briefly discussed in 4.1 above.

84 2004: 232: "[E]ven if heterosexual life partners contractually undertake a duty of support, the surviving heterosexual life partner does not have a claim for damages for loss of support, while a surviving same-sex life partner has such a claim."

85 Although the couple in *Du Plessis* had attempted to "marry" one another, such a "marriage" was obviously invalid—see note 79 above regarding the "formal public commitment" requirement.

the need for amendments to the Bill in order to remedy this discrepancy will be discussed later in this Chapter.[86]

4.2.2.2.2 Conclusion

It has been established that both discrepancies 1 and 2 require the Bill to be amended. This will take place in paragraph 11 of this Chapter, where the position of the unregistered domestic partnership is considered *in extenso*. (As seen in Figure 7.1 discrepancy 7 will be rectified by the enactment of section 231 of the *Children's Act* 38 of 2005, while discrepancy 8 was addressed in Chapter 5 of this study.)

4.2.3 Domestic partnerships *vis-à-vis* pre- and post *Civil Union Act* legislation

It will be recalled that the final phase of the domestic partnership rubric involves the alignment of the modified *Domestic Partnerships Bill* of 2008 with other legislation that deals with life or domestic partnerships. For the sake of complying with the procedure prescribed for the rubric, this facet of the rubric will be dealt with towards the end of this Chapter (paragraph 12). For now it will suffice to say that a significant number of Acts will need to be aligned with the Bill. It is important to note, however, that the calibration process does not only involve the alignment of legislation that *already provides* for life partnerships with the Bill, but may also necessitate the amendment of other Acts (such as the *Wills Act* 7 of 1953) that do not currently provide for domestic partnerships so as for them to be aligned with the modified Bill.

[86] See 11 below.

5. ASSESSING THE NEED FOR THE MODIFICATION OF THE FORMAL AND SUBSTANTIVE REQUIREMENTS FOR ENTERING INTO AND RECOGNITION OF DOMESTIC PARTNERSHIPS AND INVESTIGATING THE ROLE (IF ANY) TO BE PLAYED BY THE PUTATIVE SPOUSE DOCTRINE

In Chapter 6 the question was posed as to whether or not the putative spouse doctrine[87] could be applied in a contextualised form to regulate the position where parties have entered into a domestic partnership that is null and void. This question is relevant not only as far as the patrimonial consequences of such a partnership are concerned, but also where children are involved. The investigation into this possibility is important as it may expose a number of weaknesses in the Bill regarding the regulation of domestic partnerships that are defective (as opposed to null and void). These issues will be examined in the paragraphs that follow.

5.1 Can the putative spouse doctrine in principle be applied to relationships other than marriage?

5.1.1 Introduction

As South African law does not currently have any legislation dealing with domestic partnerships *per se*,[88] it stands to reason that our Courts have not yet

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87 A so-called putative marriage exists in the instance where one or both parties to a marriage that is null and void in good faith believe it to be valid. The purpose of the doctrine is to avoid the harsh consequences of a void marriage by protecting the *bona fide* spouse or spouses as far as the patrimonial consequences are concerned and by preventing the offspring of such a "marriage" from being regarded as born of unmarried parents—see Sinclair and Heaton 1996: 404 *et seq*; *Moola and Others v Aulsebrook NO and Others* 1983 (1) SA 687 (N) at 693 (G) – (H); *W v S and Others* (1) 1988 (1) SA 475 (N) at 484 (I) – 485 (B) and *M v M* 1962 (2) SA 114 (GW) at 17 (H).

88 It will be recalled that the *Civil Union Act* 17 of 2006 provides for both marriages and for civil partnerships to be concluded. As both of these options are identical in law to civil marriages under the *Marriage Act* 25 of 1961 (see section 13(1) of Act 17 of 2006) they do not exist

been faced with the question as to whether the putative spouse doctrine could be applied within the context of such partnerships. This question has however arisen in the American Courts, and it is submitted that the case in question could be of assistance for the purposes of this study.

In *Ellis v Arriaga*[89] the 4th Appellate District of the California Court of Appeal was confronted with the question as to whether the putative spouse doctrine applied to domestic partnerships. *In casu*, the requisite declaration of domestic partnership had been signed and notarised, but was never filed with the California Secretary of State as required by section 298 of the *California Family Code*. An appeal was lodged against the Trial Court's conclusion that the doctrine could not apply to domestic partnerships.

On appeal, the Court held that the question to be resolved involved the interpretation of the *California Domestic Partner Rights and Responsibilities Act* of 2003;[90] a statute that had greatly narrowed the erstwhile distinction between spouses and domestic partners.[91] The approach towards interpreting the statute was, according to Fybel J's unanimous judgment, to construe the language "in the *context* of the statute as a whole and the overall statutory scheme, and we give 'significance to every word, phrase, sentence, and part of an [A]ct in pursuance of the *legislative purpose*.'"[92]

On the basis of the fact that a Court was enjoined by the statute itself to interpret it in a liberal fashion[93] and, moreover, that the Act's stated purpose was to extend "all the rights, benefits and obligations" of marriage to such partners, it followed

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independently of marriage and the putative spouse doctrine will, by virtue of section 13(2), apply to a marriage or civil partnership concluded under the 2006 Act.

89 162 Cal.App. 4th 1000; 76 Cal.Rptr.3d 401.

90 At 403.

91 At 405.

92 At 403 (emphasis added). As will be seen below (at 5.1.2), this approach is consistent with the approach adopted by the South African Courts.

93 Chapter 421, statutes 2003 (section 15) "This act shall be construed liberally in order to secure to eligible couples who register as domestic partners the full range of legal rights, protections and benefits, as well as all of the responsibilities, obligations, and duties to each other, to their children, to third parties and to the state, as the laws of California extend to and impose upon spouses."

that the putative marriage doctrine—which did not fall into the category of rights and obligations which the statute was not empowered to extend (namely those extended to marriage by federal law, the California Constitution and initiative statutes)—could in principle be applied to improperly registered domestic partnerships.[94] This finding was strengthened by section 299(d) of the Code that provides that in the dissolution of a domestic partnership, the same procedures shall be followed as in the dissolution of a marriage, and that the parties thereto "shall possess the same rights, protections, and benefits, and be subject to the same responsibilities, obligations and duties" as apply to the termination or annulment of a marriage.[95] In addition, earlier case law[96] had established the fact that domestic partners were "the equivalent of spouses" and were not to be discriminated against in favour of married couples.[97] Finally, the Court concluded that another earlier decision of the same Court (*Velez v Smith*)[98] was incorrectly decided to the extent that that Court had held that the putative spouse doctrine could not be applied within the context of domestic partnerships.[99]

5.1.2 Could the reasoning in *Ellis* apply in South Africa?

In order to answer this question, it is necessary to consider both the similarities and differences between the positions in California and in South Africa. As far as the differences are concerned, two immediately become evident:

- First, the *contexts* within which domestic partnership legislation in California was, and in the case of South Africa stands to be promulgated, differ. In California, same-sex marriages are not currently permitted,[100] with the result that the registered domestic partnership is the only way in which these relationships can be recognised and protected. Bearing this

94 At 403 and 405.
95 At 406.
96 *Koebke v Bernardo Heights Country Club* (2005) 36 Cal.4th 824.
97 At 405, 406.
98 (2006) 142 Cal.App.4th 1154.
99 At 407 - 410.
100 See note 178 in Chapter 6.

in mind, it may well be correct to state that California is an example of a legal system where domestic partnerships *replace* marriage at least as far as same-sex couples are concerned.[101] On the other hand, the *Civil Union Act* 17 of 2006 has made same-sex marriage a reality in South Africa, and, furthermore, has clothed marriages (or civil partnerships) concluded under that Act and marriages concluded under the *Marriage Act* of 1961 with identical status in law.[102] Consequently, while it may be true that the purpose behind the promulgation of the Californian statute was "to equalize the status of registered domestic partners and married couples", the same might not hold true for the South African domestic partnerships legislation *as the Civil Union Act provides the means by which such equivalent status can be obtained*. The enactment of same-sex marriage legislation in South Africa therefore meant that the domestic partnership would in future serve as a "proper *alternative*" to marriage that was accessible, affordable and provided rights that were enforceable against third parties.[103] This notwithstanding, any differentiation between married and unmarried couples could always be subjected to constitutional scrutiny on the basis that it discriminated unfairly on the ground of marital status (for example) and therefore violated the equality clause as contained in section 9 of the *Constitution*, 1996. Caution should therefore be exercised in assuming that domestic partnerships are not entitled to any consequence of marriage that has not explicitly been extended to them by way of domestic partnership legislation.

- A second consideration pertains to the consequences ascribed to the putative spouse doctrine in California *vis-à-vis* South Africa. In Californian law, it is clear that the "quasi-marital property" of a putative marriage is dissolved in the same way as a valid marriage and that, in the case of a polygamous union, a putative spouse has the same rights as a legal

101 See SALRC 2006: 320.
102 See section 13 of the Act.
103 SALRC 2006: 320.

spouse provided that either or both are *bona fide* in their belief that the marriage is valid.[104]

By contrast, in South African law, the doctrine of the putative marriage as it currently stands only provides for children born of such a union to be regarded as having been born of married parents,[105] and for the patrimonial consequences of such a "marriage" to be interpreted in favour of the *bona fide* spouse. Over and above these exceptions to the general consequences of voidness, it has been suggested (but not yet confirmed) that a *bona fide* putative spouse may be entitled to inherit intestate,[106] and to claim maintenance provided to, and to retain maintenance benefits received from, the *mala fide* spouse.[107] Furthermore, in the only case to date involving the patrimonial consequences of a bigamous "marriage" that was concluded in good faith, our Courts have failed to recognise any patrimonial consequences as far as the "second" marriage in community of property was concerned.[108] As seen in Chapter 6 it is submitted that this case was incorrectly decided, and that the common law should have been developed in order to come to the aid of the *bona fide* second "spouse." However, as the law stands, it is clear that the legal position in California differs considerably from that in this country.

On the other hand, there are cogent reasons for suggesting that the rationale in *Ellis* could provide valuable guidance to the South African Courts if they were to be confronted with the same question:

- The Court's purposive and contextual approach to the interpretation of the California *Domestic Partner Rights and Responsibilities Act* is consistent

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104 Wallace 2003: 99. Also see Figure 6.1 in Chapter 6.
105 See 2.2.3 in Chapter 4 where this consequence is presumed.
106 Sinclair and Heaton 1996: 409; Hahlo 1985: 115, 116.
107 Visser and Potgieter 1998: 70, 71.
108 See *Zulu v Zulu* 2008 (4) SA 12 (D), discussed *in extenso* in Chapter 6.

with the approach to statutory interpretation that prevails in South African Courts;[109]

- The premise underlying the *Domestic Partnerships Bill,* 2008 as gleaned from its preamble is to give effect to the rights of equality and to provide legal recognition to "permanent domestic partnerships."[110] The stated objects of the Bill are to "ensure the rights of equality and dignity" and to "reform family law" so as to align it with the Bill of Rights.[111] This is consistent with the object of the California statute which "is intended to help California move closer to fulfilling the promises of inalienable rights, liberty, and equality contained in Sections 1 and 7 of Article 1 of the California Constitution…";[112]
- Although the Bill does not do so as comprehensively as its American counterpart,[113] it extends many of the invariable consequences of civil marriage to domestic partners;
- As was the case with the Californian legislation, the *Domestic Partnerships Bill* will, if enacted, also "change the entire manner in which rights are granted to and responsibilities are imposed on … domestic partners";[114] and
- Finally, in the light of the preceding points, it is submitted that in a South African context there would also simply be "no sound reason" to deprive a person who was of the *bona fide* belief that he or she was involved in a valid (registered or unregistered) domestic partnership of even the minimal protection which the putative spouse doctrine affords to a *bona fide* "spouse" to a valid marriage.

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109 See Smith and Robinson 2008(a): 363 *et seq*.

110 As seen in 3.1 above, the reference to "opposite-sex couples" in the Preamble needs to be amended so as to include same-sex couples.

111 Clause 2.

112 See section 1(a).

113 See in particular section 4 of the Act that amended section 297.5(a) of the *California Family Code* to read "Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses."

114 At 405.

5.1.3 Preliminary conclusion

Weighing up the considerations for and against applying the rationale in *Ellis* to the *Domestic Partnerships Bill* makes it clear that although the purpose of the South African Bill is not to extend *identical* rights to domestic partners as to their married counterparts, there can be no doubt that the Bill (at the very least) does attempt to provide an equally effective (if not identical) means of regulating the consequences of such relationships.

5.2 Applying these principles to domestic partnerships under the *Domestic Partnerships Bill,* 2008

In order to investigate the possible effect of the putative spouse doctrine on domestic partnerships, it is first necessary to determine what the precise effect of non-compliance with the provisions of the Bill will be so as in turn to ascertain which specific grounds will lead to voidness, as in South African law the doctrine only applies to a void marriage.[115]

5.2.1 Grounds that do not (presently)[116] nullify the domestic partnership *ab initio* under the Bill

5.2.1.1 Non-registration / defective registration of a domestic partnership

The situation where parties have entered into a domestic partnership that has either (i) never been registered or (ii) been registered in a defective fashion presents a problem. Firstly, the Bill itself does not indicate what the consequences of non- or defective registration would be. Furthermore, the unique legal position created by the Bill implies that the analogous circumstances that present themselves in the case of a civil or customary marriage (where non-

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115 In Californian law, for example, the putative spouse doctrine applies to void and voidable marriages—see section 2251(a) of the *California Family Code*.

116 In other words, instances in which the Bill *in its current form* does not impose nullity.

or defective registration does not affect the validity of the marriage)[117] are of no assistance. This is because the *validity* of the domestic partnership is not really the issue. However, compliance with the registration requirement is all-important because registration symbolises a "formal commitment"[118] and therefore constitutes the very mechanism by which the statute determines which one of the two options has been selected by the partners. Therefore, while the *validity* of the domestic partnership is not the issue, its *classification* as either "registered" or "unregistered" is. Consequently, if a domestic partnership has not been registered in accordance with chapter 3 of the Bill, the effect will simply be that it is regarded as an *unregistered* domestic partnership under chapter 4 (provided, of course, that it complies with the validity requirements prescribed by the latter chapter).[119]

Bearing the considerable differences between the legal effects of registered and unregistered partnerships in mind, this consequence may be particularly harsh in the event of one or both of the parties to such a partnership in good faith believing it to have been properly registered while this was not in reality so. Indeed, although non- or defective registration of the partnership would not imply that the partnership is void, the fact that it is deemed to be "unregistered" would be tantamount to voidness *in as far as the consequences that would have ensued if it had been a registered domestic partnership are concerned.* For example, both partners to such an unregistered partnership would no longer automatically have the right to occupy the family home, and the non-owner or non-lessee would no longer have the right not to be evicted therefrom.[120] The position sketched above would be just as harsh if the non- or defective registration was due to the *bona fides* of the State official, who, for example, in good faith believed that he was competent to register the domestic partnership while this was not truly the case.

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117 See Cronjé and Heaton 2004: 39; Sinclair and Heaton 1996: 358; section 4(9) of the *Recognition of Customary Marriages Act* 120 of 1998.

118 SALRC 2006: 364.

119 See definition of "unregistered partnership" in clause 1 of the Bill.

120 Clause 11(1) and (2) of the Bill.

In order to remedy this state of affairs, it is submitted that a provision should be inserted into clause 8 of the Bill that is similar to the condoning provisions included in the *Marriage Act* 25 of 1961.[121] Such a clause could read:

> Where the registration requirements of this Chapter have not been complied with due to an error, omission or oversight committed in good faith by the registration officer or other official involved in the registration process or by one or both domestic partners, a competent Court may, provided that the domestic partnership is lawful in all other respects contemplated by this Chapter, direct that such partnership was a registered partnership as from a date which the Court deems appropriate, taking into account the interests of the partners themselves, any child or children born of that domestic partnership, any interested parties and any other relevant factors.

If legislative intervention does not take place, the question then arises as to whether the putative spouse doctrine could come to the aid of such a domestic partner. The answer to this appears to be in the negative, due to the fact that non-compliance with the registration requirement does not result in an *invalid* domestic partnership. As far as the proprietary consequences of the partnership are concerned this is probably just as well, because even a partner who in good faith believed the partnership to be properly registered would—under the position that will obtain if the partnership is regarded as an unregistered partnership—find him or herself in a better position by virtue of the consequences created in chapter 4 of the Bill (maintenance, property sharing, intestate succession) than he or she would have been if the putative spouse doctrine were applied *strictu sensu*, as the remedial effect of the latter doctrine does not currently provide such extensive protection.[122]

However, in as far as the children born into such a relationship are concerned, if the consequences of non-compliance with the registration requirement were not

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121 See for example section 6 and section 30 of the Act.

122 A *bona fide* "spouse" would, for example, have no claim for maintenance from a void marriage—see Visser and Potgieter 1998: 71 and 5.1.2 above.

rectified by the legislative insertion suggested above, this would imply that clause 17 of the Bill[123] would not be applicable with the result that the male partner would no longer be deemed to be the biological father of the children. Such a child would then be deemed to have been born of unmarried parents, which would result in only his or her biological mother having automatic parental responsibilities and rights and the father having to *acquire* the same in terms of section 21 of the *Children's Act* 38 of 2005. Such a situation would clearly be both unnecessary and illogical.

These considerations serve to indicate the necessity of the insertion to clause 8 proposed above.

5.2.1.2 Prohibited degrees of affinity or consanguinity

In 3.2 above it was pointed out that while the Bill expresses itself clearly on the issue of the prohibited degrees of affinity as far as registered domestic partnerships are concerned, it contains no similar requirement in the case of unregistered domestic partnerships. If this analysis is correct, it would follow that non-compliance with clause 4(5) of the Bill[124] would lead to the consequences as set out in chapter 4 of the Bill becoming applicable, so that a party to such an "invalid" *registered* domestic partnership would be entitled to the protection set out in chapter 4 (that includes claims for maintenance, property sharing, intestate succession etc). This would further imply, as was the case in scenario 5.2.1.1 above, that a partner who in good faith believed the registered domestic partnership to be valid would, under the position created by the unregistered partnership, find him or herself in a better position than he or she would have been even if the putative spouse doctrine could have been applied, as the remedial effect of the latter doctrine does not currently extend as far.

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123 Quoted in 3.1 above.

124 "Any persons who would be prohibited by law from concluding a marriage on the basis of consanguinity or affinity may not register a domestic partnership."

Even though this *strictu sensu* is what the Bill in its current format entails, it has been shown earlier in this study that the Bill's failure to regulate the position regarding the prohibited degrees of affinity within the context of the unregistered domestic partnership cannot be countenanced, as the Bill should reflect the fact that any **conjugal** relationship that is entered into while offending the prohibited degrees cannot be sanctioned by the law and is void, with the result that it would be impossible to obtain an order under chapter 4 of the Bill in such circumstances. Nonetheless, as far as the proprietary consequences of such a relationship are concerned, it is submitted that if the Legislature were to broaden the scope of chapter 4 in the manner advocated, this could be the perfect situation for the Courts to extend the putative spouse doctrine along the lines proposed in the discussion of *Zulu v Zulu*[125] in Chapter 6, provided, of course that at least one of the "unregistered partners" was genuinely unaware of the illegality of their union.

A further interesting situation presented by a "registered" domestic partnership that contravenes the prohibited degrees of affinity arises in respect of the children of such a relationship. In this regard an intriguing state of affairs presents itself in that, even if the *strictu sensu* application of the Bill in its current form described above were correct (*id est* that the partners find themselves in a better position than the "spouses" to a putative marriage) the child of such a relationship would be regarded as having been born of unmarried parents, with the result that his or her father could only acquire full parental responsibilities and rights in respect of the child after complying with section 21 of the *Children's Act* 38 of 2005. It is submitted that this consequence is problematic when it is considered that:

(i) The registration process is viewed as an indication of the partners' "formal commitment" to the consequences of a valid registered domestic

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125 2008 (4) SA 12 (D).

partnership,[126] in much the same way as the marriage ceremony indicates the spouses' "formal commitment" to the consequences of a valid marriage;

(ii) One of the consequences of such a valid registered partnership would (as in the case of the male spouse to valid marriage) be that the male partner is deemed to be the father of that child and that he has the concomitant rights and responsibilities in respect of him or her;

(iii) However, despite the same "formal commitment" leading to the same intended legal consequences, the law would still differentiate by recognising putativity in the case of a void "marriage" between parties within the prohibited degrees where one or both "spouses" were *bona fide*,[127] while not allowing the same in the case of a "registered" domestic partnership simply because the latter was not null and void but instead was "transformed" into an unregistered partnership; and

(iv) Although it is true that this "transformation" rescues the partnership from voidness, this does not change the fact that such "transformation" is in fact tantamount to voidness in as far as the consequences *that would have ensued if it had been a registered domestic partnership are concerned*.

It is submitted that a combination of considerations (i) to (iv) indicates that this position may constitute unfair discrimination not only on the ground of marital status, but that it might also unfairly infringe upon the child's best interests. If this argument were to be brought to the attention of the Courts it is submitted that a further development of the common law putative marriage doctrine would be appropriate.

The conclusion to be reached from scenarios 5.2.1.1 and 5.2.1.2 above is that the grounds that will lead to a *marriage* being void *ab initio* (such as the prohibited degrees of affinity) do not have the same effect on registered or

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126 See SALRC 2006: 364.

127 See for example *M v M* 1962 (2) SA 114 (GW).

unregistered domestic partnerships under the *Domestic Partnerships Bill,* 2008. This is chiefly because of the fact that the Bill provides for an interplay between the two forms of domestic partnership, resulting in the "unregistered" option complying with the rubric's requirement by providing catch-all relief, thereby avoiding nullity and hence—at least as far as the patrimonial consequences of the termination of the partnership are concerned—obviating the need for the theoretical application of the putative spouse doctrine. Consequently it becomes clear that this doctrine will only possibly have a role to play in two instances, namely (i) where children are born to partners related within the prohibited degrees and (ii) to regulate the patrimonial consequences of the termination of a union that does not qualify as any form of "domestic partnership" with the result that it is null and void *ab initio* for the purposes of the Bill.[128]

5.2.2 Grounds that do lead to nullity under the Bill

5.2.2.1 "Polygamous" or "bigamous" domestic partnerships

As far as *registered* domestic partnerships are concerned, clause 4(1) and (2) of the *Domestic Partnerships Bill* states the following:

> (1) A person may only be a partner in one registered domestic partnership at any given time.
>
> (2) A person who is–
>
> (a) married under the Marriage Act;
>
> (b) married under the Recognition of Customary Marriages Act; or
>
> (c) a spouse or partner in a civil union,
>
> may not register a domestic partnership.

The corresponding provision regulating the position where an *unregistered* domestic partnership exists is clause 26(4), which reads as follows:

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[128] In other words a union that is neither a registered nor an unregistered domestic partnership.

> A court may not make an order under this Act regarding a relationship of a person who at the time of that relationship, was also a spouse in a civil marriage or a partner in a civil union or a registered domestic partnership with a third party.[129]

Clause 4 makes it abundantly clear that a person who is married in terms of South African marriage legislation or who has concluded a civil partnership may not register a domestic partnership, and that only monogamous registered partnerships are permitted. Consequently, it is clear that non-compliance with this requirement will result in an absolute bar on registering the partnership. The clause does however pose a rather serious interpretative predicament regarding purely religious marriages that have not been solemnised in terms of the mentioned legislation (for example parties to a Hindu marriage) in that it is silent on whether persons involved in such "marriages" are *also* not permitted to register a domestic partnership.[130]

As the clause stands, the following consequences could conceivably ensue:

(i) Subsections (1) and (2) of clause 4 appear to permit "spouses" to monogamous purely religious marriages to register domestic partnerships, with the result that if A and B are "married" to one another according to a system of religious law, they may register a domestic partnership between themselves.

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129 This clause does not apply where customary marriages are involved or where marriages have been concluded according to a system of religious law (so-called "purely religious 'marriages'"). In addition, the reference in the clause to "Act" appears to be an oversight which should be corrected to read "Chapter."

130 Here it is interesting to note that subsection (2) of the clause proposed by the South African Law Reform Commission simply stated that "[a] *married person* may not register a partnership" (emphasis added). The wording "married person" casts the net wider than the clause formulated in the Bill, with the consequence that the Commission's formulation would presumably include persons who have concluded a purely religious marriage, with the result that such couples would not be permitted to register a partnership.

(ii) Furthermore if A and B are married to one another in terms of such a purely religious marriage, A may register a domestic partnership with C to whom he is not so married.[131] Should this occur, his "marriage" to B will not be regarded as an unregistered domestic partnership, as clause 26(4) of the Bill prevents a court from making any order where a registered partnership or valid civil marriage or civil partnership already exists.

(iii) Finally, it appears as if clause 26(4) does not proscribe an unregistered domestic partnership that exists alongside a purely religious marriage. Therefore, if A enters into such a marriage with B, his non-formalised relationship with C would qualify as an unregistered partnership provided that he was not already a party to any civil marriage, civil partnership or registered domestic partnership with anyone else.

While consequences (i) and (iii) appear to be justified (albeit that further amendments to the Bill will have to take place in order for consequence (iii) to take full effect)[132] it is submitted that the situation envisaged in consequence (ii) cannot be countenanced. This is because it is submitted that the general legislative scheme that is manifested in clause 4(1) and (2) as far as registered domestic partnerships are concerned is precisely not to sanction polygamous unions *in any form*, and that the interpretation in consequence (ii) is therefore simply a legislative oversight. However, for the original intention to be conveyed by the Bill, it will be necessary for clause 4 to be amended. Such an amendment will, in addition, have to reflect the fact that the Bill was not drafted with the purpose of regulating purely religious marriages, but that specific legislation in this regard would be better suited to regulating this issue. It is consequently

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131 On this interpretation A would in fact be able to be married to more than one person in terms of his religion, provided that he is only a party to one registered domestic partnership.

132 For example, the Bill currently only regulates competing claims of the survivor to an unregistered domestic partnership and a "customary spouse," but makes no reference to other unregistered partnerships—see clauses 29(3)(c), 30(c) and 31(3). These clauses need to be amended in order to provide for multiple relationships that do not fall foul of clause 26(4) such as purely religious marriages. This issue is discussed in 11 below.

recommended that the amendment should take cognisance of this fact. To this end, it is proposed that the following provision be inserted after clause 4(2):

> 3(a) Subject to paragraph (b) of this subsection, persons who are parties to a monogamous marriage that has not been solemnised in accordance with the legislation mentioned in subsection (2) but that has been concluded in accordance with a system of religious law subject to specified procedures may register a domestic partnership between themselves;
>
> (b) The registration of a partnership in the circumstances contemplated in paragraph (a) shall not prevent the conversion of such a registered partnership into a marriage in accordance with the provisions of any Act that has been promulgated with the specific purpose of recognising the validity of; requirements for; regulation, proprietary consequences and termination of; or status and capacity of spouses to any marriage that has been concluded in accordance with a system of religious law.[133]

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[133] At first glance it is tempting to suggest that the insertion should provide for any such specific religious marriage legislation (such as, for example the draft *Muslim Marriages Bill*, 2009 [accessed from http://search.sabinet.co.za/WebZ/legi_docs/policydocs/policies09/DI030578.pdf?sessionid=01-58959-333645081&format=F&dbname=pold on 1 May 2009) to override the provisions of registered domestic partnership legislation in the event of a conflict arising between the two statutes. However when the issue is carefully considered, it is submitted that this should not be the case as the partners who elect to register a domestic partnership exercise a choice and undertake a "formal commitment" towards one another and indeed towards the State (see SALRC 2006: 364). Consequently, it is suggested that such an "overriding" provision should instead be apposite only in instances where no such formal commitment has been undertaken (i.e. in circumstances where an *unregistered* partnership exists between parties to such a purely religious marriage). Finally, it must be remembered that if the *Domestic Partnerships Bill* were to come into force *prior* to the promulgation of any specific legislation providing for the validation of purely religious marriages, the law would only provide the religious spouses (who, for religious or other reasons do not wish to conclude a civil marriage) with two options in order to formalise their union, namely either by registering a domestic partnership or entering into a civil partnership in terms of the *Civil Union Act* 17 of 2006. Although the consequences flowing from the exercising of either option would to varying degrees reflect those of a civil marriage, neither of these options would give full effect to the status or validity of their *religious marriage* as such. In the light hereof is it strongly recommended that the specific religious marriage legislation should provide for the conversion of a registered domestic partnership (or civil partnership) into such a marriage. The method by which such legislation would facilitate the conversion falls beyond the scope of this study, but suffice it to say that the draft *Muslim Marriages Bill,* 2009 currently only provides for the spouses to an existing *civil marriage* to elect to have the Bill

The amendment suggested above would go a long way towards "tightening up" the provisions of chapter 3 of the Bill by ensuring monogamy in all instances.

Accepting then that no person may be a party to more than one *registered* partnership, the next question to answer is whether it follows that non-compliance with this requirement will result in an *unregistered* domestic partnership. For example, A enters into a registered domestic partnership with B, and, a few years later enters into a second "bigamous" registered domestic partnership with C while his partnership with B still subsists. Will the relationship between A and C qualify as an unregistered domestic partnership? This question must be answered in the negative, as clause 26(4) of the Bill (that forms part of chapter 4 dealing with unregistered domestic partnerships) states that

> [a] court may not make an order under this Act regarding a relationship of a person who at the time of that relationship, was also a spouse in a civil marriage or a partner in a civil union or a registered domestic partnership with a third party.

Therefore, in contrast with the position in scenarios 5.2.1.1 and 5.2.1.2 above, a polygamous relationship that contravenes clause 26(4) would not even qualify as an *unregistered* partnership, with the result that the relationship will be void *ab initio* as far as the Bill is concerned. The following example illustrates the current position:

Assume that X (male) enters into a civil marriage in community of property with Y (female) and later (through an administrative oversight on behalf of the authorities) succeeds in registering a domestic partnership with Z (female) while his marriage to Y still subsists. Assume further that X is aware of the fact that his domestic partnership does not comply with the Bill, while Z is unaware of X's

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applied to their marriage and (with the exception of the patrimonial consequences) to determine the extent of such application (see clause 2(4)). While section 13 of the *Civil Union Act* 17 of 2006 will presumably allow this clause to be interpreted so as to include partners to an existing civil partnership, no provision is made for domestic partners.

married status and in good faith believes her relationship to be a valid registered domestic partnership. The fact that the relationship between X and Z cannot qualify as either a registered or unregistered domestic partnership implies that the parties will be viewed as parties to a non-formalised life partnership in the wide sense, with the result that they will at best be able to rely on the scant protection offered to such relationships by the common law; an invidious position which will no doubt be exacerbated by the fact that none of the *ad hoc* recognition provided to life partners by the Legislature or by the Courts has yet been found to apply to polygamous or "bigamous" relationships. The fact of Z's *bona fides* will not assist her in any way.

It is this context, then, that it is submitted that a contextualised form of the putative spouse doctrine should come to the assistance of a person in the position of Z. However, in order for the doctrine to provide her with any relief as far as the patrimonial consequences of her "registered partnership" is concerned, it would be necessary for the doctrine to be developed as was suggested in the discussion of *Zulu v Zulu* [134] in Chapter 6. Doing so would entitle Z to request the Court to exercise its discretion in order to distribute joint assets of the partnership (which also form part of the joint estate between X and Y) in a just and equitable fashion between all parties concerned.

In addition, if a child had been born to X and Z, the fact that the partnership is neither registered nor unregistered would imply that X could not be presumed to be the father of the child with the responsibilities and rights of a married father. Unless the putative spouse doctrine could apply in order to deem the child to be born of married parents, X would be regarded as an unmarried father with the result that he would have to comply with section 21 of the *Children's Act* 38 of 2005 in order to exercise the same.

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134 2008 (4) SA 12 (D).

It is also important to consider the position of the "polygamous" unregistered domestic partnership. In the preceding discussion it was found that any contravention of clause 26(4) of the Bill would result in voidness. With this general principle in mind, the exact scope and ambit of clause 26(4) needs to be determined. It is clear that the provision in question excludes the possibility of any order under chapter 4 in three circumstances, namely (i) where a civil marriage[135] or marriage concluded under the *Civil Union Act* 17 of 2006 is in existence between one of the "unregistered domestic partners" and a third person; (ii) where a civil partnership has been concluded between one of the "unregistered domestic partners" and a third person; and (iii) where a registered domestic partnership subsists that involves one of the "unregistered domestic partners" and a third person. Three noteworthy exceptions immediately come to mind namely (i) customary marriages; (ii) so-called purely religious marriages and (iii) unregistered domestic partnerships. Consequently, it appears as if clause 26(4) will not prevent a Court from making an order under chapter 4 of the Bill if the applicant is the unregistered domestic partner of a man who is married to someone else in terms of customary law or who is already "married" to one or more women in terms of a purely religious marriage. Furthermore, it appears as if the applicant may also be the unregistered domestic partner of a person who is also a party to an unregistered domestic partnership with someone else (which, for the sake of explanation may be termed a "polygamous" unregistered domestic partnership).[136] Therefore the hypothetical set of facts considered above involving X, Y and Z would have had a completely different outcome if it did not contravene clause 26(4). For example, if X and Y had been spouses to a customary marriage and X had later entered into an unregistered domestic partnership with Z while still married to Y there would be no objection to an application brought by Z under chapter 4 of the Bill upon the termination of her relationship with X. Furthermore, there would be no reason to consider the

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135 This refers to a marriage under either the *Marriage Act* 25 of 1961.

136 This interpretation squares with the South African Law Reform Commission's view that "the remedies in the legislation only be available to partners who have not also been in a civil marriage or registered partnership with a third party at the time of the unregistered partnership" (SALRC 2006: 383).

application of the putative spouse doctrine to the relationship between X and Z for the simple reason that it was not a void partnership. If a child was born into the relationship between X and Z, X would not be deemed to be the biological father of the child and would not have the parental responsibilities and rights deemed to accrue to a married father by virtue of the *Children's Act*,[137] but instead would have to satisfy the requirements of section 21 of that Act in order to acquire the same just like any other unmarried father.[138] The same position would obtain if X and Y had been married to one another in terms of a purely religious marriage and X had entered into an unregistered domestic partnership with Z while still "married" to Y, or if X had been involved in an unregistered domestic partnership with Y and had later entered into a similar relationship with Z while the relationship with Y still subsisted.[139] Clause 26(4) therefore appears to create an exception to the "rule" expressed in the definition of "domestic partnership" in clause 1 in terms of which such a partnership is restricted to "*two persons* who are both 18 years of age" (emphasis added). The interpretation does however highlight a problematic aspect as far as the third type of relationship is concerned (that is to say the "polygamous" unregistered domestic partnership) in that it would appear that such a relationship would generally only be sanctioned if the parties would "in the ordinary course of events as part of their culture become a partner in a multiple relationship."[140] The strict application of this culture-based criterion may however result in severe detriment to a vulnerable partner who may have been unaware of the fact that she was not the only person involved in an intimate relationship with what may for the sake of convenience be called the "common partner." It is submitted that the best way to resolve this position is not automatically to reject "polygamous" unregistered domestic partnerships that are not culture-based, but instead to employ an

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137 38 of 2005.

138 This would tie in with the amendment to section 21 that is suggested in 12.2.4 below namely, that the particular section should apply to unregistered domestic partners only.

139 This discussion makes it clear that it is essential for the claims under Chapter 4 of the Act (for example intestate succession and maintenance) to be expanded in order to cater for these scenarios. This aspect will be addressed later in this Chapter (see 11.2 *et seq*).

140 SALRC 2006: 383.

effective threshold criterion (coupled with flexible *indicia*) which, if satisfied in the opinion of the Court, will permit a party to such a "polygamous" union to be recognised as an unregistered partner in apposite circumstances. (The issue relating to the "threshold criterion" for unregistered domestic partnerships will be returned to later in this Chapter (see 11.2). For now it will suffice to assume that clause 26(4) should permit the parties to "polygamous" unregistered domestic partnerships in principle to be entitled to the legal protection offered by the Bill. In this regard it is worth noting that clause 26(2)(i) permits "the relationship status of the unregistered domestic partners with third parties" to be taken into account when an application is brought under chapter 4 of the Bill. Similarly, clause 28(2)(h) permits the "relevant circumstances of another unregistered domestic partnership" to be considered for the purposes of maintenance claims.)

On the other hand the position must be considered if clause 26(4) was indeed contravened. If, for example, X and Y had entered into a civil marriage and, while this marriage subsisted, X entered into an unregistered domestic partnership with Z, clause 26(4) would preclude any application by Z under chapter 4 of the Bill. Furthermore, even if Z was *bona fide* unaware of the existence of X's marriage, the legal position is currently unclear as to whether or not she would be able to rely on the existence of a universal partnership between herself and X, particularly if X and Y were married in community of property.[141] It is once again in this context that it is submitted that an application to Court should either permit the extension of the putative spouse doctrine to the *bona fide* partner in Z's position or, in the alternative, to consider interpreting the principles of matrimonial property law in the manner advocated in 2.4.3.4.2 in Chapter 6 so as to sanction a "transfer" of property to Z. Doing so would provide her with an alternative to the (highly uncertain to begin with) universal partnership route and, moreover, would create a more equitable position for all of the parties concerned.

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[141] Compare *V (also known as L) v De Wet NO* 1953 (1) SA 612 (O) with *Zulu v Zulu* 2008 (4) SA 12 (D). Interestingly, the facts in the former case make no mention of the deceased partner's wife contesting any claim by the surviving partner.

A final question to consider is the relationship between the unregistered domestic partnership and a "marriage" that is not recognised by South African law. For example, if A and B enter into a purely religious marriage without solemnising their marriage in terms of applicable marriage legislation, can this qualify as an unregistered domestic partnership and hence entitle the parties thereto to the protection conferred by the Bill? The immediate answer to this question is in the affirmative, provided that the marriage ceremony between A and B did not purport to create a valid and binding civil or customary marriage.[142] However, it will be important to take note of two important points, namely (i) the fact that the *Children's Act* will not regard the biological father of a child born of such a "marriage" as being an unmarried father;[143] and (ii) that legislation that is tailor-made for such marriages may be forthcoming (an example hereof is the draft *Muslim Marriages Bill,* 2009).[144] In the event of such legislation being promulgated, it is proposed that the latter should override the provisions of more generic legislation such as the *Domestic Partnerships Bill*. To this end it is strongly recommended that a provision to this effect should be inserted into chapter 4 of the latter prospective Act. Such a provision should read as follows:

> In the event of a conflict between the provisions of this Chapter and a provision in any Act that has been promulgated with the specific purpose of recognising the validity of; requirements for; regulation, proprietary consequences and termination of; or status and capacity of spouses to any marriage that has been concluded in accordance with a system of religious law subject to specified procedures, the provisions of that Act shall prevail in respect of a claim instituted by such a spouse.

A second context in which the relationship between the unregistered domestic partnership and marriage needs to be considered is in the case of a void civil or

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142 See section 11(3) of the *Marriage Act* 25 of 1961.

143 See the section 1 definition of "marriage" in the *Children's Act* which includes a marriage "concluded in accordance with a system of religious law subject to specified procedures."

144 See the main text above for a discussion on the interaction between such legislation and the *registered* domestic partnership. It will be recalled that it was mentioned in Chapter 3 that litigation is underway regarding the enactment of this Bill.

customary marriage. For example, if C and D purport to enter into a civil marriage with one another and that "marriage" turns out to be void *ab initio*, would either C or D be able to petition a Court for an order under chapter 4 of the *Domestic Partnerships Bill* (i.e. to request their "marriage" to be regarded as an unregistered domestic partnership)?[145]

It is submitted that the scenario between C and D needs to be differentiated from the one between A and B. In the former case (involving C and D), the parties have elected to enter into a relationship governed by the law of marriage, while in the latter instance the parties have not. Furthermore, in consequence of the "well-known canon of construction that we cannot infer that a statute intends to alter the common law,"[146] it can be presumed that the consequences that normally ensue in the case of a void "marriage" would ensue for C and D.

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[145] There are two more contexts in which the relationship between the unregistered domestic partnership and marriage must be analysed:

(i) Assume that E (male) is "married" to more than one wife (F and G) in terms of religious law and that neither of these marriages has ever purported to be a valid civil or customary marriage. Could one of the "spouses" (for example F) allege that she was an unregistered domestic partner at the termination of her "marriage" to E? On a technical interpretation it appears that this would be possible as the "marriage" between E and G is neither a civil marriage nor a civil partnership and therefore does not contravene clause 26(4). The same principle would apply if the application were brought by G. In fact, on the basis of this technical construction of clause 26(4) it may be possible to argue that both F and G could apply for the relief under chapter 4 at the termination of their relationships with E (for example due to his death), particularly (i) as entering into multiple relationships would indeed form part of the culture of E, F and G, and (ii) that, as seen in the main text, clause 26(4) appears to override the restriction of monogamy that appears to flow from the definition of "registered domestic partnership" in clause 1. This argument would be strengthened by the fact that as neither of their "marriages" are valid they should both qualify as unregistered domestic partners.

(ii) Assume that H (male) attempted to enter into a civil marriage with I, but that this marriage was null and void. If H later entered into an unregistered domestic partnership with J the latter relationship would qualify as an unregistered domestic partnership while the former "marriage" would not.

[146] *Per* Wessels J in *Casserly v Stubbs* 1916 TPD 310 at 312. Also see *S v Collop* 1981 (1) SA 150 (A) at 164 (A). This rebuttable presumption applies equally to statutory as well as common law, and an existing statute is presumed not be altered by a later one unless this is done "expressly or by necessary implication"—see *Ndlovu v Ngcobo; Bekker v Jika* 2003 (1) SA 113 (SCA) at par [87] and the authorities cited. For a comprehensive discussion of this presumption see Du Plessis 2002: 177 – 181; Botha 1999: 64 - 67 and, with specific reference to recent family law legislation (in the form of the interpretative problems posed by the *Civil Union Act* 17 of 2006), Smith and Robinson 2008 (a): 366, 367.

Therefore, if the "marriage" between C and D is void *ab initio* due, for example, to the fact that the marriage officer who purported to solemnise their civil marriage was not legally competent to do so, the law of marriage would dictate what the consequences—if any—of such a "marriage" would be. The "marriage" could therefore qualify as a putative marriage if either C or D (or both of them) *bona fide* believed it to be valid.

There is a further reason for submitting that a purported civil or customary marriage that is null and void cannot qualify as an unregistered domestic partnership, namely that an anomaly would result where a "marriage" was void by reason of bigamy. For example, assume that E and F were validly married, but that E purported to enter into a further civil marriage with G. There is no doubt that the second "marriage" is void due to the fact that E is already a spouse to an existing civil marriage. However, if it were true that a void marriage could indeed qualify as an unregistered domestic partnership, the anomalous result would be that the "marriage" between C and D (in the previous example) that was void due to the incompetent marriage officer could in fact qualify as an unregistered partnership while clause 26(4) of the Bill would prevent the same result in the "marriage" between E and G.[147] It is submitted that such a distinction would be irrational and unfair.

It is acknowledged that the unregistered domestic partnership could potentially offer better protection to "spouses" to a void marriage than that provided by the law of marriage itself (including that provided by the putative spouse doctrine if this were apposite). Nevertheless, the preceding analysis shows that such protection will not be available under the 2008 Bill in its current guise. Therefore, if such spouses are desirous of better protection it is submitted that their only option would be to allege that the legal position that would obtain if the Bill were

147 "A court may not make an order under this Act regarding a relationship of a person who at the time of that relationship, *was also a spouse in a civil marriage* or a partner in a civil union or a registered domestic partnership with a third party" (emphasis added).

enacted is unconstitutional due to the inequality of the protection offered by the law of marriage *vis-à-vis* that provided by the Bill.[148]

To summarise, therefore, any "marriage" that has been entered into between two parties will qualify as an unregistered domestic partnership provided that the parties thereto have never purported to enter into a valid civil or customary marriage. This general principle would be subject to the rather obvious qualification that such a relationship must comply with chapter 4 of the *Domestic Partnerships Bill*.

5.2.2.2 Age

The Bill requires both partners to be at least 18 years of age.[149] Should this requirement not be complied with due to the *bona fides* of either or both parties, the partnership will be void and will qualify as neither a registered nor unregistered domestic partnership. In such an instance it is submitted that the contextualised putative spouse doctrine should be applied, with the result that effect could be given to the intended patrimonial consequences of the partnership and that, provided that the parties had purported to enter into a registered domestic partnership, any children born as a result will be regarded as being born of married parents.

5.2.3 Miscellaneous modifications required for entering into a registered domestic partnership

The impact of other grounds that would generally lead to the invalidity of a marriage require brief consideration.

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148 See 7.3.4.2 below for an analysis of a similar constitutional challenge on the basis of inconsistent protection under the equality clause within the context of the distinction between the registered domestic partnership and matrimonial property law.

149 Clause 1 defines a "domestic partnership" 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."

5.2.3.1 Witnesses

Witnesses have been prescribed as a requirement for the validity of marriages since the *Decretum Tametsi* of 1563,[150] and in contemporary South African law it is trite that a civil marriage concluded without at least two competent witnesses as prescribed by the *Marriage Act*[151] is void.[152] While it is undoubtedly true that the consequences of a marriage are far-reaching and status-altering, entering into a registered domestic partnership also entails important consequences for the partners,[153] their children[154] and for the State.[155] Furthermore, as seen in the preceding discussion, the very status of the domestic partnership hinges on the registration procedure as a manifestation of the parties' "formal commitment" towards entering into a registered as opposed to an unregistered partnership. The importance of being able to prove that valid registration took place is therefore of critical importance for all parties involved.[156]

In formulating its proposal regarding the registration procedure, the South African Law Reform Commission commented that its earlier proposal (under the 2003 *Discussion Paper*) was "very formal" involving designation by the Minister of Home Affairs of registration officers, the procedure itself being conducted before such an officer and two witnesses, and record-keeping of all registrations.[157]

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150 See 3.3 in Chapter 2 above.

151 25 of 1961, section 29A.

152 See for example Hahlo 1985: 80; Sinclair and Heaton 1996: 356; 388; Cronjé and Heaton 2004: 41; *Fourie and Another v Minister of Home Affairs and Others* 2005 (3) SA 429 (SCA) at par [71].

153 For example, the rights and duties attached to the partnership by the Bill immediately become applicable to the parties' relationship upon registration without further ado, while in the case of an unregistered domestic partnership the consequences are not automatic but depend on a wide array of factors that need to be considered by a Court before it makes an order upon application by one or both partners (see clause 26).

154 The father of the child is deemed to be a married father with the attendant automatic parental responsibilities and rights granted by the *Children's Act* 38 of 2005.

155 For example, clause 21 of the Bill will have the effect of widening the liability of the Road Accident Fund to compensate unmarried partners, as, in apposite circumstances both heterosexual and homosexual partners would be included and not (as the law stands) only homosexual couples who have undertaken mutual support obligations—see the discussion of *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) in Chapter 5 above.

156 SALRC 2006: 327.

157 SALRC 2006: 325.

This proposal, the Commission continued, was generally favourably received, although "many respondents favoured a more informal form of a declaration that would accommodate poor and less sophisticated people."[158] Other than this comment, the Commission's 2006 *Report* offers no further explanation on its final registration proposal. It is however noteworthy that the only difference between the 2003 proposal and the Commission's final proposal in the *Report* was that the three questions[159] that were originally prescribed to be put to each prospective partner as well the witnessing requirement were jettisoned. While it may be argued that the first change may have "informalised" proceedings to some extent,[160] it is difficult to see how the witnessing requirement could make proceedings overly formal. This is especially true when it is considered that there are many run-of-the-mill legal transactions that today require witnessing that are hardly comparable in terms of significance to that of a status-creating relationship.[161]

To this end, it is submitted that a provision requiring the registration procedure to take place in the presence of two competent witnesses and for the register to be signed by them would be a salutary development which, furthermore, will not derogate significantly from the South African Law Reform Commission's stated objective of keeping the registration procedure as simple and straightforward as possible.[162] This requirement will be dealt with later.

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158 SALRC 2006: 326.

159 These questions were the following: (i)"Do you A., B. declare that you voluntary [sic] want to register your relationship as a registered partnership in terms of the Registered Partnerships Act, 20.. (Act No. … of 20..)?" (ii) "Do you A. B. declare that you are aware of the legal rights and obligations that follow this registration?" and (iii) "Do you A. B. declare that you are aware of the process that must be followed to effect the termination of a registered partnership?"

160 It is submitted that these three questions would in fact have gone some way towards ensuring that the partners were aware of the gravitas of their actions, which is a cogent argument in favour of their retention.

161 One need not look far for an example: Section 15(2) read with subsection (5) of the *Matrimonial Property Act* 88 of 1984 lists many transactions where the consent required in order for such a transaction to be valid must be attested by competent witnesses.

162 See SALRC 2006: 326.

5.2.3.2 Incompetent registration officer

As it stands the Bill does not make provision for the situation where an incompetent registration[163] officer acting in good faith attempts to register a domestic partnership. This oversight is remedied by the legislative insertion proposed in 5.2.1.1 above.

5.2.3.3 Prescribed documentation

Strangely enough, the *Domestic Partnerships Bill* does not require prospective domestic partners to produce any form of identity documentation before permitting the registration officer to proceed with the registration procedure. In view of the fact that the registration of a domestic partnership involves a formal public commitment that is status-altering and for which monogamy is an absolute requirement (see clause 4(1) and (2)), the omission of a requirement similar to that prescribed for entering into a marriage[164] or civil partnership[165] is certainly an oversight that requires urgent attention. With this in mind, it is submitted that a provision similar to section 7 of the *Civil Union Act* should be inserted before clause 4 of the *Domestic Partnerships Bill*. (In order to avoid confusion regarding the numbering of remainder of the Bill, this clause is numbered "3A"):

> **3A Prohibition of registration of domestic partnership without production of identity document or prescribed affidavit**
>
> No registration officer may register a domestic partnership unless-
>
> (a) each of the prospective partners in question produces to the registration officer his or her identity document issued under the provisions of the Identification Act;

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163 The designation of registration officers is regulated by clause 5 of the Bill.

164 See section 12 of the *Marriage Act* 25 of 1961; section 7 of the *Civil Union Act* 17 of 2006 and the Regulations to the *Recognition of Customary Marriages Act* 120 of 1998 as they appeared in notice 1101 of Government Gazette No. 21700 of 1 November 2000.

165 Section 7 of the *Civil Union Act* 17 of 2006.

(b) each of such partners furnishes to the registration officer the prescribed affidavit; or

(c) one of such partners produces his or her identity document referred to in paragraph (a) to the registration officer and the other furnishes to the registration officer the affidavit referred to in paragraph (b).

Non-compliance with this requirement will imply that the "registered domestic partnership" is void. Provided that the relationship between the parties complies with the requirements of chapter 4 of the Bill, such a relationship may however qualify as an unregistered domestic partnership.

5.3 Conclusion

The *Domestic Partnerships Bill,* 2008 should be amended in order to provide for non-or defective registration of so-called "registered domestic partnerships" and in order to ensure that all such partnerships are monogamous. Where apposite, the putative spouse doctrine should be applied (and where necessary developed in order to be applied) to provide for the interests of children born of defective registered partnerships and to regulate the patrimonial consequences of partnerships that are void *ab initio* in terms of the Bill.

In order to ensure effective interrelationship between the Bill and potential legislation regulating purely religious marriages, it is recommended that any specific legislation that is promulgated with the aim of regulating and validating marriages concluded under a system of religious law should provide for the conversion of a domestic partnership into such a marriage and that a provision be inserted into the Bill that regulates potential conflict between chapter 4 thereof and any such legislation. As far as the formal requirements for entering into a registered domestic partnership are concerned, it has been recommended that a witnessing requirement should be reintroduced and that the Bill should require the production of identity documents and/or affidavits.

6. THE RECOGNITION OF THE CONCEPT OF *CONSORTIUM OMNIS VITAE* WITHIN THE CONTEXT OF THE (REGISTERED) DOMESTIC PARTNERSHIP

6.1 Introduction

When the possibility of the application of the putative spouse doctrine to domestic partners was considered in 5 above, the conclusion was reached that while the *Domestic Partnerships Bill* was not drafted with a view to providing domestic partners with *identical* rights and responsibilities to those which a marriage or civil partnership will occasion, its purpose was at the very least to ensure effective regulation of these partnerships.[166] Furthermore, it was concluded that an interplay exists between the registered and the unregistered partnership under the Bill, with the result that the grounds that will lead to the nullity or voidability of a marriage will not necessarily have the same effect on the domestic partnership. However, despite these differences, it must still be true that in certain instances the domestic partnership may be so closely linked with the institution of marriage that the extension of a specific consequence of marriage to the domestic partnership may not only be justified, but may well be essential. In this regard it is of cardinal importance to recall the conclusion reached in Chapter 3 in terms of which it was noted that one of the essential features of the legislation drafted in accordance with the domestic partnership rubric would be for it to give context-specific effect to the *consortium omnis vitae* that exists between domestic partners as "the essence and objective hallmark" of their relationship. In addition, in Chapter 5 it was concluded that, in view of the rubric's requirement for the *context-specific* recognition of *consortium*, it may be prudent to suggest a more comprehensive or even complete recognition of this concept (that is to say as it exists in marriage) to domestic partners who have undertaken a formal public commitment, while retaining a more nuanced form

166 See 5.1.3.

thereof for partnerships that have never been formalised.[167] In the discussion that follows the Bill will be assessed in this regard.

6.2 The current legal position pertaining to *consortium* and life partnerships

In Chapter 5 it was pointed out that it is incorrect to assume that the concept of *consortium omnis vitae* has been fully recognised in the context of life partnerships. Instead, it was concluded that as far as same-sex couples are concerned, a contextualised form of *consortium omnis vitae* has thus far been recognised by our Courts,[168] while no similar development has as yet taken place as far as heterosexual life partners are concerned.[169] In the discussion that follows it will be argued that the *Domestic Partnerships Bill* should not maintain this *status quo*.

6.3 Searching for common ground between marriage and the domestic partnership

6.3.1 The point of departure

According to Madala J in *Satchwell v President of the Republic of South Africa and Another*:[170]

> In terms of our common law, marriage creates a physical, moral and spiritual community of law [sic] which imposes reciprocal duties of cohabitation and support. The formation of such relationships is a matter of profound importance to the parties, and indeed to their families and is of great social value and significance.

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167 See 3.7 in Chapter 5.

168 See *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at par [13] (g) where Ackermann J's findings in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) were referred to with approval by Cameron JA.

169 See 3.7 in Chapter 5.

170 2002 (6) SA 1 (CC) at par [22].

The question that needs to be answered is whether there is any fundamental reason for reserving this statement of the law for marriage, or whether it should be equally applicable within the context of the domestic partnership.

The point of departure for answering this question is an understanding of the noteworthy differences between the registered and unregistered domestic partnership models provided for in the Bill. In this regard, the registered model provides an alternative to marriage by which the partners can, by undertaking a formal public commitment, obtain legal protection of their union as from the date of the registration thereof.[171] On the other hand, the latter model does not require any formal commitment or registration and simply provides a means by which the partners to such a relationship can apply for certain relief at the termination thereof.[172] If there are any additional parallels to be drawn between marriage and domestic partnerships over and above those already provided for in the Bill, the preceding discussion makes it clear that they are more likely to occur within the realm of the registered as opposed to unregistered partnership models. This conclusion is substantiated by the fact that South Africa's highest Court has already intimated that even non-formalised same-sex life partners are "*as capable*" of creating a *consortium omnis vitae* as heterosexual spouses.[173] If this capability is *in principle* recognised within the context of non-formalised relationships, the case for inferring that a comprehensive or even complete *consortium* in fact exists must be even stronger where a formal public commitment has been undertaken by the parties that embodies a change of status with concomitant rights and responsibilities.

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171 See SALRC 2006: 314 – 320.

172 See SALRC 2006: 375 – 379.

173 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [53].

6.3.2 Assessing the similarity between marriage and the registered domestic partnership

The quote taken from the *Satchwell* case above confirms the recognised fact that in addition to changing the status of the spouses, marriage "creates" the *consortium omnis vitae* between the parties.[174] The fact of marriage obliges the parties to cohabit with one another, to support one another and to maintain fidelity throughout the existence of their marriage, all with a view to maintaining "sound domestic relations."[175] In the light of this brief summary, it is submitted that if the essence of this concept can be found to apply to the parties to a registered domestic partnership, a logical consequence thereof would be that a *consortium* should be recognised as an automatic consequence of such a relationship.

6.3.2.1 Similarities between the consequences of marriage and those of the registered domestic partnership that are occasioned by the *Domestic Partnerships Bill,* 2008

(i) In much the same was as a marriage does, the parties to a registered domestic partnership undertake a formal public commitment as a result of which they "gain official state and societal recognition."[176]

(ii) Once a registered domestic partnership has been concluded, the parties are no longer able to enter into a similar relationship or a marriage with anyone else.[177]

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174 Church 1979: 376.
175 Church 1979: 377; Robinson 1991: 509; *Wiese v Moolman* 2009 (3) SA 122 (T) at 126 (B) – (C).
176 SALRC 2006: 315.
177 Clause 4(1) and (2).

(iii) Registered domestic partners are placed under the same restrictions regarding affinity and consanguinity as those that apply to spouses to a valid marriage.[178]

(iv) A codification of the *pater est quem nuptiae demonstrant* principle (the "father is he whom the marriage points out")[179] applies in contextualised form in the case of a registered domestic partnership between two persons of the opposite sex.[180]

(v) As an outflow of the previous point, the male partner in a heterosexual domestic partnership is deemed to be a married father in respect of any child born into the relationship with the result that such a partner has the same parental rights and responsibilities in respect of that child as he would have had if he had been married to the female domestic partner.[181] This effectively implies that such a child is deemed to be born of married parents.

(vi) Registered domestic partners owe one another a reciprocal duty of support that, as with a marriage, attaches to the relationship by operation of law.[182]

(vii) As in the case of spouses to a valid marriage, the capacity to act of the registered partners is affected as far as joint property is concerned.[183]

(viii) Both domestic partners acquire a right to occupy the "family home", and the partner who owns the family home may not evict the non-owner.[184] The same applies in the case of a marriage.

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178 Clause 4(5).
179 Hiemstra and Gonin 1992: 253.
180 Clause 17 of the Bill.
181 Clause 17.
182 Clause 9.
183 Clause 10.

(ix) As in the case of a surviving spouse in a valid marriage, the surviving registered domestic partner has a right to inherit intestate from the deceased partner's estate.[185]

(x) At the termination of a registered domestic partnership, such partners are deemed to be spouses for the purposes of delictual claims, are dependants for the purposes of the *Compensation for Occupational Injuries and Diseases Act* [186] and the survivor may institute claims based on the wrongful death of the deceased partner.[187] The same consequences apply in the case of a marriage.

(xi) Although it stands to reason that they do not limit themselves to *registered* domestic partners, various statutes make specific provision for life partners or regard them as being spouses for the purposes of that legislation.[188]

(xii) Very significantly, the enactment of (registered) domestic partnership legislation will have the important consequence that, as in the case of spouses to a valid marriage, the partners' rights will henceforth "largely [be] fixed by law, and not by agreement, unlike the case of parties who cohabit without being married."[189]

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184 Clause 11(1) and (2).

185 Clause 20.

186 130 of 1993.

187 Clause 21.

188 See 3 in Chapter 6 and the discussion of the proposed amendments to these statutes in 12 below.

189 *Per* Skweyiya J in *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).

6.3.2.2 A few of the more significant differences that exist between marriages and registered domestic partnerships in terms of the 2008 Bill

(i) One of the first major differences between civil or customary marriages and domestic partnerships is that the age requirement in order to conclude a domestic partnership is absolute (18 years),[190] while in the case of a civil or customary marriage a minor may marry provided that the requisite consent is obtained. It is important to note that the *Civil Union Act* 17 of 2006 also poses an absolute age requirement of 18 years of age.[191] This discrepancy will be discussed in Chapter 8.

(ii) It is trite that a minor who enters into a valid civil or customary marriage automatically becomes a major, and this status is retained even if the marriage is dissolved through death or divorce prior to the minor reaching the age of majority.[192] Due to the fact that it prescribes a minimum age requirement that is identical to the age of majority, a civil union will not have the effect of conferring majority status on a minor.[193] If the *Domestic Partnership Bill* retains the absolute age requirement of 18 years, the same will hold true for a registered domestic partnership.

(iii) While section 17 of the *Matrimonial Property Act* 88 of 1984 regulates this position fairly comprehensively, the *Domestic Partnerships Bill* is silent regarding the capacity to litigate of registered domestic partners.

(iv) The "husband" or "wife" of an accused person is generally competent but not compellable to give evidence for the prosecution in criminal

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190 See the definition of "domestic partnership" in clause 1.

191 See the definition of "civil union" in section 1 of the Act, as well as Van Schalkwyk 2007: 168 and Sinclair 2008: 408.

192 See for example Van der Keessel *Th* 108; Gr 1.6.4.

193 See Heaton 2008(a): 114.

proceedings,[194] and any communication between spouses is similarly privileged.[195] As far as civil proceedings are concerned, a "husband" is not compelled to disclose communication made to him by his "wife" made during the existence of a marriage, and *vice versa*.[196] The *Domestic Partnerships Bill* contains no similar provisions relating to privileged communication or compellability.

When one considers the differences listed above, it becomes clear that although differences (i) and (ii) may appear to be fairly profound, closer analysis reveals that the *Domestic Partnerships Bill* appears to square with the trend in recent legislation (such as the *Civil Union Act*) in terms of which a minimum age requirement of 18 is prescribed so as to align that legislation with the age of majority prescribed by the *Children's Act* 38 of 2005. Whether the differentiation between marriage and other interpersonal relationships regarding age should persist is difficult to say, as an analysis of the history behind the various age requirements proposed by the South African Law Reform Commission over the years creates significant doubt as to whether these discrepancies were ever intended to begin with.[197] Furthermore, whether or not the absolute age

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194 Section 195 of the *Criminal Procedure Act* 51 of 1977 contains a number of exceptions to this rule, such as in the case of bigamy (subsection (1)(d)) or the shirking of maintenance obligations in terms of section 31(1) of the *Maintenance Act* 99 of 1998 (section 195(1)(c)).

195 Section 198 of the *Criminal Procedure Act* 51 of 1977.

196 Section 10(1) of the *Civil Proceedings Evidence Act* 25 of 1965.

197 In its 2003 *Discussion Paper* on domestic partnerships, the South African Law Reform Commission (2003: 270) proposed that "[s]ince the registered partnership will be used by couples in a conjugal relationship, there is a prohibition on the registration of relationships between siblings and people who are relatives in the descending or ascending line. For the same reason it is submitted that the requirements of marriage relating to age [as amended by the SALRC's earlier proposed *Review Marriage Act*] be applied to the registered partnership model." In the corresponding Bill that was proposed by the Commission (Annexure D) no specific mention of age is to be found, but it appears as if clause 4(6)(b) of the Bill which states that "[a] partnership may only be registered … by prospective registered partners who would, apart from the fact that are of the same sex, not be prohibited by law from concluding a marriage" may, in the absence of any qualification to the contrary, have been included with the aim of importing (*inter alia*) the age requirements pertaining to marriage into such partnerships. In the 2006 *Report* no specific mention of age is to be found as far as registered domestic partnerships are concerned. In addition, clause 4(4) of the Bill (Annexure E of the *Report*) qualifies its 2003 counterpart by stating that "[p]ersons who would be prohibited by law from concluding a marriage *on the basis of consanguinity* may not register a partnership" (emphasis added). In

requirement posed by the prospective domestic partnership legislation can be retained will to a large extent depend on whether a proposal that is made at the end of this study is adopted by the Legislature.[198] In the final analysis it is

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consequence, it can be concluded that—whether by oversight or otherwise—the legislation proposed in the 2006 Report prescribed no age requirement. The next document to consider is the first *Civil Union Bill* as it appeared in August 2006 [B 26—2006]. As far as age was concerned, the Bill defined a "civil partnership" as being concluded between "two adult persons." The Bill therefore *prima facie* intended the age of majority to apply, which at that stage was still set at 21 years. This notwithstanding, clause 8(5) stated that "[a] civil partnership may only be registered by prospective civil partners who would, apart from the fact that they are of the same sex, not be prohibited by law from concluding a marriage." As was the case with the 2003 *Discussion Paper*, it is submitted that the latter provision may be interpreted as having made the age requirements pertaining to marriage applicable to civil partnerships, with the result that a person under the age of 21 could have entered into such a partnership with the necessary consent. On the other hand, as far as *registered* domestic partnerships were concerned, the definition in the 2006 Bill contained no similar reference to "adult persons." In addition, clause 16(4) of the Bill provided that "[p]ersons who would be prohibited by law from concluding a marriage *on the basis of consanguinity* may not register a domestic partnership" (emphasis added). As was the case with the 2006 *Report*, it can be concluded that no age requirement was prescribed for the conclusion of a registered domestic partnership. This position becomes truly baffling when one considers that the Bill did in fact include the qualification pertaining to "adult" in its definition of the "*unregistered* domestic partnership." Moving along, the *Domestic Partnerships Bill,* 2008 leaves one in no doubt as to the fact that the Legislature intended an absolute age requirement of 18 as both the definition clause as well as clause 6 of the Bill categorically prescribe this requirement. In addition, clause 4(5) of the Bill contains the express qualification that persons who are prohibited from marrying one another on the grounds of "consanguinity or affinity" may not enter into a registered domestic partnership. The inconsistencies described above have been dealt with in detail with the aim of throwing a problem pertaining to the interpretation of the *Civil Union Act* 17 of 2006 into sharper relief. In this regard it will be recalled that the Act defines a "civil union" as being between "two persons who are both 18 years of age or older…" It is therefore generally accepted that the *Civil Union Act* poses an absolute age requirement and that it therefore deviates from the age requirements prescribed by marriage legislation (see for example Sinclair 2008: 408). But, is this necessarily so? If one considers section 8(6) of the Act which makes the unqualified statement that "[a] civil union may only be registered by prospective civil union partners who would, apart from the fact that they are of the same sex, not be prohibited by law from concluding a marriage under the *Marriage Act* or *Customary Marriage Act*" (italics added) *it could in fact be contended that the age requirements pertaining to marriage have also been made applicable to civil unions*. If this were indeed so, no "mistaken inconsistency" (as Sinclair 2008: 408 puts it) could arise between the *Marriage Act* 25 of 1961 and the *Civil Union Act*. While it is probably safest to assume that the Legislature intended an absolute age requirement of 18, it is submitted that this uncertain position provides yet another example of the uncertainties that surround the interpretation of the *Civil Union Act* (see Smith and Robinson 2008(a) and 2008 (b) as well as 4.3.1.1 in Chapter 8 for others).

198 In Chapter 8 it is proposed that the *Civil Union Act* be repealed and that all marriages should henceforth take place in terms of the *Marriage Act* of 1961. As far as the civil partnership is concerned, it is proposed in the same Chapter that it should be superseded by the legislation as modified in accordance with the domestic partnerships rubric developed in this study. A proper decision as to whether or not the absolute age requirement prescribed by the *Domestic Partnerships Bill* should be retained can only be made once the Legislature has decided whether

submitted that the Legislature should revisit this issue in the light of the observations made thus far as well as in the light of the broader proposals made by this study.[199]

As far as the third difference is concerned, it is important to note that section 17 of the *Matrimonial Property Act*[200] does not restrict the *locus standi in iudicio* of all spouses, but only applies to marriages that are concluded in community of property. Furthermore, in accordance with clause 7(1) of the Bill the default property regime[201] for a registered domestic partnership is complete separation of property, while the partners are permitted to conclude a registered domestic partnership agreement in which—presumably—any deviations from this principle may be contained.[202] In the light hereof, the fact that the Bill does not regulate the capacity to litigate of registered domestic partners is probably not surprising, and, moreover, cannot without more lead to the conclusion that a domestic partnership is not comparable with marriage. As far as privileged communications and compellability as a witness are concerned it must be

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or not to retain the *Civil Union Act*. To illustrate: If one accepts that the *Civil Union Act* prescribes an absolute age requirement of 18 (see the preceding footnote), the retention of this Act coupled with the enactment of domestic partnership legislation will imply that both of these Acts prescribe identical absolute age requirements of 18 and that they are therefore aligned with one another. On the other hand, if the *Civil Union Act* were to be repealed in the manner suggested in Chapter 8 of this study, this would imply that an age differentiation would occur between marriage (irrespective of whether concluded in terms of the *Marriage Act* 25 of 1961 or the *Recognition of Customary Marriages* Act 120 of 1998) and domestic partnerships due to the fact that minors would be permitted to enter only into the former. While it is submitted that there will be no reason to justify such a differentiation to occur with respect to *registered* domestic partnerships once the domestic partnership rubric is adopted (formal public commitment, identical *consortium omnis vitae* to marriage and many of the same invariable consequences as marriage), there may—over and above the enormous legal differences between the two institutions—be further good reasons for insisting on a minimum age requirement as far as the unregistered domestic partnership is concerned. These would include the need for legal certainty as well as the prevention of abuse. The Legislature is however in the best position to adjudicate on this issue.

199 See the two preceding notes.

200 88 of 1984.

201 Compare SALRC 2006: 338 where the Commission states that "no default property regime" exists. The fact that "there is no general community of property between registered partners" implies that there is indeed a default property regime.

202 The position regarding the proprietary consequences of a registered domestic partnership is discussed in 7 below.

remembered that this privilege is in fact an extension of the *consortium omnis vitae* that is created by marriage.[203] It follows that if it can be proved that an identical *consortium* should be recognised in the case of the registered domestic partnership, the rationale for distinguishing between married couples and registered domestic partners in respect of privileged communications would automatically fall away.

6.3.2.3 Conclusion

According to the South African Law Reform Commission:

> The registered partnership model's qualities of stability, certainty and publicity make registered partnerships comparable to marriage, and the rights and obligations that the couple acquire are often similar to marriage.[204]

The comparison conducted above makes it clear that despite subtle differences between the two institutions, there are significant similarities between marriage and the registered domestic partnership. These similarities confirm that, as in the case of the spouses to a valid marriage, the act of entering into a registered domestic partnership alters the legal status of the parties involved.[205] Moreover, as far as *consortium omnis vitae* is concerned, it is clear that the autonomous choice to enter into a status-altering registered domestic partnership creates the same "physical, moral and spiritual community of life which imposes reciprocal duties of cohabitation and support"[206] as that triggered by marriage. Consequently, it is submitted that there is no reason for permitting the lack of recognition of this concept between parties to a subsisting registered domestic partnership (as opposed to recognising such a claim only at the termination thereof as clause 21 of the Bill appears to do). It is however essential for the

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203 Robinson *et al* 2009: 110.

204 SALRC 2006: 315.

205 SALRC 2006: 322.

206 *Per* Madala J in *Satchwell v President of the Republic of South African and Another* 2002 (1) SA 6 (CC) at par [22].

Domestic Partnerships Bill to confirm this theoretical recognition in express terms.[207] In the light hereof it is submitted (i) that a provision be inserted into the Bill which permits the Courts to give effect to claims based on *consortium omnis vitae*, and (ii) that the *Criminal Procedure Act* [208] and the *Civil Proceedings Evidence Act* [209] must extend the privilege relating to marital communication to registered domestic partners. The first goal can be achieved by the insertion of a provision that recognises that a *consortium omnis vitae* exists between the parties to a subsisting registered domestic partnership that is identical to marriage. This will be done in 8 below.

The second goal—namely that relating to marital privilege—was recommended in the legislation proposed by the Commission's 2003 *Discussion Paper*,[210] but was inexplicably discarded in the *Report* that appeared three years later. It is submitted that the discussion above makes it clear that this cannot be countenanced. It is therefore proposed that a subsection (3) be inserted into section 1 of the *Criminal Procedure Act*[211] which states that: "For the purposes of this Act, any reference to 'husband', 'wife' or 'spouse' shall include a partner to a registered domestic partnership in accordance with the *Domestic Partnerships Act* … and any reference to 'marriage' shall bear a corresponding meaning." By the same token, it is recommended that the same definition be inserted as subsection (2) to section 1 of the *Civil Proceedings Evidence Act* 25 of 1965.

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207 The impression may otherwise be created that such claims only relate to claims based upon the death of the breadwinner-partner—see SALRC 2006: 356.

208 51 of 1977.

209 25 of 1965.

210 Clause 23 of Annexure D. No reference was however made to this privilege in the *Criminal Procedure Act* 51 of 1977.

211 51 of 1977.

7. THE PROPERTY REGIME OF THE REGISTERED DOMESTIC PARTNERSHIP AND MATTERS RELATED THERETO

7.1 Introduction

It goes without saying that the property regime that governs a registered domestic partnership is a matter of no small significance. Various considerations may play a role in attempting to identify the regime that is best suited to the registered domestic partnership. To begin with, it can be agreed with Van Schalkwyk who opined to the South African Law Reform Commission that the default system that applies in the case of a civil marriage (the marriage in community of property) is a suitable option due to its economic viability.[212] On the other hand, the fact that the accrual system is becoming increasingly popular in South Africa[213] would certainly be a valid consideration in favour of that particular regime. However, it must be remembered that whatever regime is selected as the default property regime, it should at the very least cater for the needs of less sophisticated persons,[214] and should be affordable.[215] Finally, the fact that the registered domestic partnership is viewed as an alternative to marriage would also justify the conclusion that the property regimes applicable to domestic partnerships should not simply replicate the framework governing matrimonial property law.[216] This notwithstanding, a certain amount of cross-pollination with matrimonial property law may be required in apposite circumstances. In the light of these broad considerations an attempt will be made to identify the finer policy arguments that are (or should be) foundational to this issue.

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212 See SALRC 2006: 330.
213 See Cronjé and Heaton 2004: 69.
214 SALRC 2006: 330.
215 SALRC 2006: 320.
216 Goldblatt 2003: 621; SALRC 2006: 273, 274.

7.2 The policy considerations that should in terms of the rubric underpin the framework governing the proprietary consequences of the registered domestic partnership

In dealing with the proprietary aspects of the termination of the domestic partnership Goldblatt considers a number of the arguments mentioned above, and concludes that in order to protect both the autonomy of domestic partners and the plurality that exists within family law, it is necessary to ensure that the domestic partnership does not become a carbon copy of marriage.[217] Furthermore, she recommends that the domestic partnership should be accommodated within a flexible framework that not only recognises the fact that matrimonial property law is complex, but also takes cognisance of the fact that "the existing law of marriage is not ideal."[218] While these sentiments can be supported, it must be remembered that the unregistered domestic partnership model appears to be axiomatic to Goldblatt's conclusions, with the result that some contextualisation of her suggestions may be required in order for them to be applied to partnerships where the parties have indeed undertaken a "formal public commitment" by registering the partnership. In addition, it is submitted that this study has so far shown that an additional consideration to those mentioned by Goldblatt must be borne in mind, namely that under the "contextualised choice model" it should *in principle* be appropriate to consider the fact that the parties have chosen not to marry whenever attempts are made to apply or extend *matrimonial* property law to non-formalised relationships.[219] As a consequence, while it is acknowledged that a unique system is required in order to regulate the proprietary consequences of a domestic partnership, it is submitted that any attempt at cross-pollination with matrimonial property law beyond the confines of that permitted by domestic partnership legislation should bear the "contextualised choice model" in mind. It is however important, from a policy point of view, to reiterate that matrimonial property law should not simply be replicated in

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217 Goldblatt 2003: 621.

218 Goldblatt 2003: 622.

219 See 3.3.2.2 in Chapter 5.

registered domestic partnership legislation. As a consequence, the cross-pollination suggested should only be enforced where absolutely necessary, and for the remainder should only be available for extension to domestic partnerships on application where doing so is apposite or necessary.

A final aspect that needs to be addressed is the binding effect of a registered domestic partnership agreement on third parties. Due to the fact that third parties may incur liability towards the registered domestic partners, it is essential that interested parties have access to information pertaining to the partners' property regime in the form of a public register.[220] In the same way that registration binds outsiders to an antenuptial contract between spouses,[221] registration of a partnership agreement in a public register will be essential in order for the same to hold true for outsiders to that agreement. In this regard it is important to note that a domestic partnership agreement that does not comply with the formalities prescribed by the Bill is regulated by the normal principles of the law of contract as far as *inter alia* entering into and variation is concerned and is therefore binding only on the parties thereto. This consequence is of particular importance as far as the argument in favour of making the registered domestic partnership as informal as possible is concerned: Parties who elect not to comply with the formalities prescribed for the agreement by the Bill should be free to do so, but the *caveat* that outsiders are not bound then becomes applicable. Nevertheless, from a policy point of view it is suggested that the Bill should still make provision for the protection of interested parties irrespective of whether or not the formalities for binding outsiders are complied with.

The discussion that follows will attempt to assess the validity of the *Domestic Partnerships Bill* based on these policy arguments.

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220 SALRC 2006: 327.

221 *Ex parte Kloosman et Uxor* 1947 (1) SA 342 (T) at 347; *Ex parte Spinazze & Another NNO* 1985 (3) SA 650 (A) at 658 (D).

7.2.1 The proposals in the 2003 *Discussion Paper*

In the proposed registered partnership legislation that appeared in Annexure D of its 2003 *Discussion Paper* the South African Law Reform Commission recommended that the accrual system should be the default property regime for registered domestic partners,[222] while couples who did not wish to make use of the accrual system could enter into a so-called "pre-registration agreement" in terms of which:

> (a) community of property or community of profit and loss is made applicable to the registered partnership;
> (b) the accrual system is excluded from the registered partnership; or
> (c) certain property is excluded from the accrual system.[223]

Both prospective partners were required to sign this agreement, after which it was to be notarially executed, submitted to the registration officer and attached to the registration certificate which the registration officer was in terms of clause 7(4) required to issue to the partners.[224] The registration certificate would serve as *prima facie* proof of the existence of the partnership, while the pre-registration agreement would serve as *prima facie* proof of the property regime that governed it.[225] In order to facilitate the suggested default property regime, the proposed legislation contained a number of provisions that explicitly incorporated a contextualised form of the accrual system as it applies in the law of marriage into this new framework.[226] It is however interesting to note that the 2003 proposed Bill contained no similar provisions in terms of which the alternative proprietary regimes permitted in terms of clause 10(1) were specifically incorporated into (or contextualised for) the proposed statute. A further noteworthy aspect is that the 2003 prospective Bill provided little if any scope for registered domestic

222 Clause 9.
223 Clause 10(1).
224 Clause10(2).
225 Clause 4(5) read with clause 10(2)(d).
226 See Clauses 11 – 17 and 34.

partnerships to deviate from the traditional matrimonial property regimes. In this respect it therefore appeared to lose sight of the autonomy and plurality principles identified above and of Goldblatt's[227] argument that the "existing law of marriage is not ideal" particularly due to the complexity of matrimonial property law.

7.2.2 The proposals in the 2006 *Report*

7.2.2.1 Introduction

After considering the viewpoints of respondents to the 2003 *Discussion Paper*, the argument that the accrual system was an overly complex property regime found favour with the Commission and in its 2006 *Report* the Commission decided to do away with the accrual system as the default property regime for registered domestic partnerships. In its stead, the Commission opted for a proposal in terms of which

> the registration of a partnership should not result in a prescribed property regime. The registered domestic partnership would thus by default be out of community of property, *ie* each partner to the relationship remains the owner of his or her property before and after the establishment of a domestic partnership. In the event of any dispute as to the division of property, the partners will have to approach the Court. Some property will be acquired and subsequently used for joint purposes. It may also happen that a registered partner contributes directly or indirectly to the acquisition, maintenance or improvement of the separate property of the other registered partner. In the absence of agreement between the registered partners, such joint property and separate property should be divided by a Court with the discretion to order a fair and equitable division.[228]

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227 2003: 622.

228 SALRC 2006: 331.

Despite this general proposition, the Commission proposed that the legislation should also permit couples to enter into a so-called "registered partnership agreement" in order to permit them to "[regulate] the consequences of their relationship, including their proprietary rights."[229] The provisions of the 2008 Bill can now be considered against the backdrop of the Commission's conclusions.

7.2.2.2 The provisions of the 2008 Bill

In order to give effect to their conclusions as set out above, the Commission proposed a clause dealing with the "property regime" of registered domestic partners that was embodied in the 2008 Bill. Clause 7 of this Bill states the following:

> (1) Except as provided in this section, there is no general community of property between partners in a registered domestic partnership.
> (2) In the event of a dispute regarding the division of property after a registered domestic partnership has ended, section 21[230] of this Act applies.
> (3) Registered partners may conclude a registered domestic partnership agreement.
> (4) **…**

According to clause 1 of the Bill a "registered partnership agreement" is "a written agreement concluded and undersigned by prospective registered partners to regulate the financial matters pertaining to their partnership." According to the same clause, the concept "financial matters" includes matters relating to the "property" or "financial resources" of either or both of the parties to the registered

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229 SALRC 2006: 332.

230 The reference to "section 21" (that deals with delictual claims) is clearly erroneous. Instead, the reference should be to the appropriate parts of chapter 3 that deal with property division after the termination of the registered domestic partnership.

partnership agreement. The Bill also contains definitions of both of the latter concepts.[231]

In view of what has been said, an important question that immediately springs to mind is to what *extent* the parties are entitled to regulate the "financial matters" pertaining to their partnership. Are the parties able to deviate from the general rule that the partnership is without community of property, and, if so, to what extent does the definition of "financial matters" permit them to exercise such a power? Equally importantly, does the Bill in its current form provide adequate protection for the domestic partners themselves and for outsiders to any such agreement? In a nutshell, it is submitted that the answers to these questions are respectively yes and no. The rationale behind this submission will now be explained.

7.2.2.2.1 Deviation from the default regime

The autonomy and plurality arguments must be the starting point for arguing that registered domestic partners must be provided with the discretion to deviate from the default property regime prescribed by the Bill. Various factors appear to indicate that the 2008 Bill does exactly this. To begin with, with the exception of clause 8 of the Bill in terms of which a Court is effectively permitted to override the wishes of the parties as expressed in the registered partnership agreement

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231 "'**property'** means any movable or immovable property and includes any present, future or contingent right or interest in or to movable or immovable, corporeal or incorporeal property, money, and a debt;"

"'**financial resources**' in relation to either or both of the domestic partners includes–

(a) a prospective claim or entitlement in respect of a scheme, fund or arrangement under which pension, retirement or similar benefits are provided;

(b) property which, pursuant to the provisions of a discretionary trust, may become vested in or used or applied in or towards the purposes of the partners or either of them;

(c) property, the alienation or disposal of which is wholly or partly under the control of the partners or of either of them and which is lawfully capable of being used or applied by or on behalf of the partners or by either of them in or towards their or his or her own purposes; and

(d) any other benefit with a value."

where “serious injustice” demands that this be done, the Bill evinces no further intention to restrict the power of the registered partners to order the financial consequences of their relationship as they deem fit. In addition, the nebulosity of the definitions of “financial matters”, “financial resources” and “property” (quoted above) implies that these definitions are capable of being interpreted in such a way as to permit a dramatic departure from the default property regime. The conclusion then is that the partners are in principle permitted to regulate the proprietary consequences of their relationship as they please, provided that in doing so the agreement does not fall foul of clause 8 by resulting in “serious injustice.” The effect of this conclusion is that if A and B enter into a registered domestic partnership they may, for example, by way of a registered partnership agreement agree that their relationship is one with community of property, or that it is subject to the accrual system, or that it is subject to a property system of their own creation. In this regard the 2008 Bill appears to trump its 2003 predecessor in terms of its willingness not to confine registered domestic partnerships to the shackles of traditional matrimonial property law, and, in so doing, takes cognisance of Goldblatt’s[232] cautionary remark referred to above.

7.2.2.2.2 Deviation in principle, but deviation in practice?

The fact that the Bill permits a deviation from the default property regime *in principle* is one thing, but whether the Bill does so in the *most effective* manner possible is quite another. In this regard the main concern is that—contrary to its 2003 prototype—the 2008 Bill provides very little guidance as to how the traditional matrimonial property regimes are to be contextualised for the purposes of registered domestic partnerships. For example, although it differed from its 2008 counterpart in that it prescribed the accrual system as the default proprietary system, the 2003 version of the Bill included specific provisions in terms of which a nuanced version of this system (as it originally appeared in the

[232] 2003: 622.

Matrimonial Property Act of 1984)[233] was specifically adapted for the purposes of domestic partnerships.[234] The same can unfortunately not be said of the 2008 Bill. However, while the 2003 version of the Bill was commendable in this respect, it is important to note that it was not completely flawless as it provided no hint of similar contextualisation as far as the other traditional property regimes (for example community of property) were concerned; a deficiency which—with the exception of a provision relating to the disposal of "joint property"[235]—has regrettably also been carried over into the 2008 Bill.

The upshot of this state of affairs is that if A and B wish to deviate from clause 4(1) of the Bill, their registered partnership agreement would have to do so without the benefit of any guiding or contextualising provisions of the *Domestic Partnerships Bill*. The effect hereof would be that as A and B are not *married* to one another they would not without more be able to rely on statutes such as the *Matrimonial Property Act*[236] or on the common law principles applicable to matrimonial property. This would mean that if, for example, A and B wish to register a domestic partnership with community of property, they would have to rely on the scant protection provided by the sole provision of the Bill that regulates disposal of joint property between them,[237] and in order to secure any further protection or to facilitate any further regulation of their proprietary affairs they would specifically have to incorporate into their agreement the common law and statutory provisions which are necessary for this system to function effectively between them. It goes without saying that this would require their agreement to be drafted by a seasoned legal professional. Moreover, it also stands to reason that any flaws in such an agreement would expose not only the parties themselves, but also outsiders to unnecessary potential risk; a perilous state of affairs that would be exacerbated by the fact that their unmarried status

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233 88 of 1984.

234 See clauses 11 – 17 and 34.

235 Clause 10.

236 88 of 1984.

237 Clause 10: "A registered domestic partner may not without the written consent of the other registered partner sell, donate, mortgage, let, lease or otherwise dispose of joint property."

would leave them with little protection at common law.[238] Although it could surely be argued that clause 8 of the Bill would provide relief to parties where "serious injustice" would occur as a result of giving effect to the agreement, further analysis of the position of parties in the position of A and B is required in order to determine whether this is an acceptable (much less ideal) state of affairs. This analysis will take place on the basis of three main considerations:

(a) The ambit of clause 8 of the Bill

Clause 8 of the Bill states the following:

> (1) In proceedings regarding the division of property between registered partners under this Act, a court may consider the fact that parties have concluded a registered domestic partnership agreement: Provided that the registered domestic partnership agreement has been indicated on and attached to the registration certificate.
>
> (2) If the court, having regard to all the circumstances, is satisfied that giving effect to a registered domestic partnership agreement would cause serious injustice, it may set aside the registered domestic partnership agreement or parts thereof.
>
> (3) The court may, in deciding in terms of subsection (2) whether giving effect to a registered domestic partnership agreement would cause serious injustice, have regard to-
>
> (a) the terms of the registered domestic partnership agreement;
>
> (b) the time that has elapsed since the registered domestic partnership agreement was concluded;
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> (c) whether the registered domestic partnership agreement was unfair or unreasonable in the light of all the circumstances at the time it was made;
>
> (d) whether the registered domestic partnership agreement has become unfair or unreasonable in the light of any changes in circumstances since

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238 See Chapter 6.

it was made and whether those changes were foreseen by the parties or not;

(e) the fact that the parties wished to achieve certainty as to the status, ownership and division of property by entering into the registered domestic partnership agreement;

(f) the contributions of the parties to the registered domestic partnership; and

(g) any other matter that the court considers relevant.

(4) A court may make an order in terms of this section notwithstanding that the registered domestic partnership agreement purports to exclude the jurisdiction of the court to make that order.

(5) A court may decide any other matter regarding a registered domestic partnership agreement on the applicable principles of the law of contract.

Clause 8 of the Bill appears to be based on section 49 of the New South Wales *Property (Relationships) Act* of 1984.[239] A notable difference between this Act and clause 8 of the Bill is that the former makes provision for a Court to "*vary or* set aside" the provisions of a "domestic relationship agreement" while the South African Bill only provides for a setting aside competency in its equivalent of the Australian agreement. This aspect of clause 8 is commendable due to the established principle that a South African Court is not empowered to replace an

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[239] Section 49 entitled "[v]ariation of terms of domestic relationship agreements" states the following:

(1) On an application by a party to a domestic relationship for an order under Part 3, a court may *vary or set aside* the provisions, or any one or more of the provisions, of a domestic relationship agreement (but not a termination agreement) made between the parties to the relationship, being a domestic relationship agreement which satisfies the matters referred to in section 47 (1) (b), (c), (d) and (e), where, in the opinion of the court, the circumstances of the parties have so changed since the time at which the agreement was entered into that it would lead to serious injustice if the provisions of the agreement, or any one or more of them, were, whether on the application for the order under Part 3 or on any other application for any remedy or relief under any other Act or any other law, to be enforced.

(2) A court may, pursuant to subsection (1), *vary or set aside* the provisions, or any one or more of the provisions, of a domestic relationship agreement notwithstanding any provision of the agreement to the contrary."

agreement reached between the parties with "a construction of its own"[240] so as to create an agreement that differs markedly from that which was originally intended.[241] Nevertheless it is important to note that if it should become evident that the *Domestic Partnerships Bill* does not provide adequate regulation of the proprietary consequences of such a partnership, it may be necessary for the Courts to be clothed with certain powers in order better to regulate these consequences or in order to give proper effect to the parties' original intentions. As a conclusion in this regard can only follow after a proper evaluation of the Bill, it will be dealt with later. The present discussion will therefore focus on problems created by the clause that are immediately noticeable.

The first such problem is to be found in the proviso to subsection 1, where it becomes clear that a Court is not permitted to consider the terms of a contract that has not "been indicated on and attached to the registration certificate." Over and above the fact that this provision is in direct conflict with clause 7(4) of the Bill,[242] it is submitted that this provision frustrates the entire purpose behind the conclusion of a registered partnership agreement in the first place. This is because it loses sight of a basic principle of matrimonial property law that surely by way of analogy must be relevant in the context of registered domestic partners (a presumption that is in fact confirmed by clause 7(4)),[243] namely that at common law a lack of compliance with a formality that is intended to give effect to the publicity principle does not imply that such an informal antenuptial contract

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240 Kerr 2002: 408.

241 *Laws v Rutherford* 1924 AD 261 at 264; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 16 (G) – (I); *Gero v Linder* 1995 (2) SA 132 (O) at 136 (A) – (E); *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel v Kuhn* 2008 (2) SA 375 (C) at par [41] – [43].

242 "Where no indication of the existence of a registered domestic partnership agreement has been effected on, or no copy of such registered domestic partnership agreement has been attached to, a registration certificate as required in terms of section *6(5)* and *(6)* of this Act, and where no indication of the existence of such a registered domestic partnership agreement has been made as required in terms of section *6(8)* of this Act, such agreement binds only the parties to the agreement."

243 See the preceding note for the text. If it is true that, as will be suggested later in the main text, that "any other matter" referred to in clause 8(5) implies any matter other than the setting aside of the agreement in terms of clause 8(2) when a property division is at issue, then the "applicable principles of the law of contract" must overrule the proviso to clause 8(1), especially if read with clause 7(4).

is void, but simply that it cannot be enforced against outsiders to the agreement.[244] However, as it stands, clause 8(1) of the Bill will have the dubious consequence of immediately compelling a Court to disregard a contract that—unless it falls foul of clause 8(2)—should at least still be valid and binding *inter partes*. This, furthermore, would have the added outcome that whatever property regime was contracted on by the parties would effectively be nullified with the result that the default property regime (namely that there is no general community)[245] would automatically apply to their relationship. It is submitted that this consequence not only runs counter to basic principles of the law of contract, but may be blatantly unfair.

A second characteristic of clause 8 that requires some comment is the strange dichotomy that it creates between division of property disputes between the registered domestic partners and "any other matter."[246] To begin with, subsection 1 of clause 8 makes it clear that a Court is only empowered to consider the fact that a registered domestic partnership agreement exists "in proceedings regarding the division of property between registered partners…" According to subsection (2), a Court is empowered to set aside the agreement or any part thereof if "giving effect" thereto would "cause serious injustice", and in subsection (3) a list of factors is provided in order to ascertain whether "serious injustice" may occur. An outflow of subsection 1 read with subsections (2) and (3) is therefore that, as a Court may only consider the existence of an agreement where division of property between the partners is at issue (subsection 1), the setting aside competency as encapsulated in subsections 2 and 3 *only pertains to issues involving the division of property between the partners*.

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244 As Price J stated in *Ex parte Kloosman et Uxor* 1947 (1) SA 342 (T) at 347: "[A]ll that registration does is to give notice to the world of, and to bind creditors to give effect to, a state of affairs that has existed since the inception of the marriage." Also see *Ex Parte Spinazze and Another NNO* 1983 (4) SA 751 (T) at 754 (C) – (F) and, on appeal (1985 (3) SA 650 (A)) at 658 (A) – (C) and *Ex parte Andersson* 1964 (2) SA 75 (C) at 77 (B).

245 See clause 7(1).

246 See clause 8(5).

According to subsection (5) of clause 8 "[a] Court may decide any other matter regarding a registered domestic partnership agreement on the applicable principles of the law of contract." It is widely acknowledged that the "the applicable principles of the law of contract" are founded, *inter alia*, upon the notions of freedom of contract and *pacta sunt servanda* (contractants must be held to their agreements).[247] Nevertheless, while it is true that the South African law of contract is a firm adherent to the principle that "[t]he Court cannot make new contracts for parties; it must hold them to bargains into which they have deliberately entered,"[248] it is also a firmly-entrenched principle of our law that the concept of *pacta sunt servanda* may be trumped by the Courts if the contract or a provision therein offends public policy and is consequently unlawful.[249] In *Sasfin (Pty) Ltd v Beukes* [250] Smalberger JA cautioned that this power

> should be exercised sparingly and *only in the clearest of cases*, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's *individual sense of propriety and fairness*.[251]

In *South African Forestry Co Ltd v York Timbers Ltd* [252] Brand JA expounded the prevailing legal position as follows:

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247 *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) at 767 (A); *Standard Bank of SA Ltd v Wilkinson* 1993 (3) SA 822 (C) at 826 (F) – (G); *Ex parte Minister of Justice: In re Nedbank Ltd v Abstein Distributors (Pty) Ltd & Donelly v Barclays National Bank Ltd* 1995 (3) SA 1 (A) at 17(H); Hefer 2004: 1; Corbett 1987: 64.

248 *Laws v Rutherford* 1924 AD 261 at 264; Kerr 2002: 187.

249 *Eastwood v Shepstone* 1902 TS 294 at 302*; Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 891 (G); *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 7 (I) – 9 (A); *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 781 (I) – 783 (C); *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at par [91]*; Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at par [8]; *Juglal v Shoprite Checkers (Pty) Ltd* 2004 (5) SA 248 (SCA) at par [12]; *SA Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 (SCA) at par [14]; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at par [12]; [28] and [29].

250 1989 (1) SA 1 (A) at 9 (A) – (B).

251 Emphasis added.

252 2005 (3) SA 323 (SCA) at par [27], referred to by Christie 2006: 17.

> [A]lthough abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, *they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships*. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. *They cannot be acted upon by the courts directly*. Acceptance of the notion that judges can refuse to enforce a contractual provision *merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty*. After all, it has been said that *fairness and justice, like beauty, often lie in the eye of the beholder*. In addition, it was held in [*Brisley v Drotsky* 2002 (4) SA 1 (SCA)] and [*Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA)] that—within the protective limits of public policy that the courts have carefully developed, and consequent judicial control of contractual performance and enforcement—constitutional values such as dignity, equality and freedom require that courts approach their task of striking down or declining to enforce contracts that parties have freely concluded, with perceptive restraint.[253]

The conclusion to be reached is that abstract values such as good faith and reasonableness cannot of their own accord be used to strike down the provisions of a contract.[254] Instead, the law of contract is generally flexible enough for adaptations to concepts such as *pacta sunt servanda* to be accommodated within existing rules without recourse to such values,[255] and only in cases where such accommodation is not possible will public policy become the definitive criterion.[256] Nevertheless, a contract may only be found to offend public policy in the clearest of cases, where the actual implementation of the contract or the term (and not the mere possibility of implementation) will lead to "unconscionable, immoral or illegal conduct,"[257] will result in "harm to the public that is

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253 Emphasis added.

254 Hefer 2004: 12, 13; Brand 2009: 83, 84; *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at par [24]; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at par [32].

255 Hefer 2004: 13.

256 Christie 2006: 16.

257 *Juglal v Shoprite Checkers (Pty) Ltd* 2004 (5) SA 248 (SCA) at par [12], referred to with approval in *SA Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 (SCA) at par [14].

'substantially incontestable'"[258] or will be "inimical to the values enshrined in our *Constitution*."[259]

Returning to the *Domestic Partnerships Bill*, when clause 8 is read with the conclusion reached above in respect of subsections (1), (2) and (3), a strange dichotomy presents itself regarding the legal principles on which a Court's setting aside competency are based, in that the "serious injustice" criterion will be applied in the context of issues related to property division between the partners, while the "applicable principles of the law of contract" (that is to say the existing common law as complemented by the criterion of public policy) will be applied to "any other matter." Although a precise analysis of the differences between these two criteria falls beyond the scope of this study, it must be mentioned that there is no apparent reason for subsection (2) to deviate from the public policy criterion. As Christie[260] states:

> [I]t can be said with some confidence that public policy is a sufficiently flexible and tested concept in South Africa to achieve all the results that could be achieved by the concept of good faith and to achieve them in a more predictable way.[261]

It must be mentioned that it is highly questionable whether the "serious injustice" criterion can be viewed as a "substantive rule" that is capable of being applied independently of a judge's "personal sense of fairness and equity."[262] In fact the quote from Brand JA in the *South African Forestry* case above points in exactly the opposite direction.[263] In addition, there is no reported South African decision

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258 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 9 (C) (quoted with approval in *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) at par [22]); *Standard Bank of South Africa Ltd v Wilkinson* 1993 (3) SA 822 (C) at 828 (A) – (B).

259 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at par [29] (italics added).

260 2006: 17.

261 This is not to say that the concept does not require further development by, for example, learning from other jurisdictions and in consequence of "greater awareness and imagination on the part of practitioners"—see Brand 2009: 87 – 89.

262 *Per* Brand JA in *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at par [27].

263 "After all, it has been said that *fairness and justice*, like beauty, often lie in the eye of the beholder" (emphasis added) at par [27].

in which the criterion of "serious injustice" has been used in order to set aside a contract or any term contained therein. As such, the concept is bereft of the sufficient definition required in order to ensure certainty in its application. Moreover, the generality of the factors listed in clause 8(3)—particularly the "catch-all" factor listed in paragraph (g)[264]—does little to allay this fear. In the end result it would appear that the "serious injustice" criterion is precisely the type of "abstract value" that should not of its own accord be used for the purposes of determining whether to strike down a contract or any part thereof.

Before any solution to this problem can be suggested, it is important to note that specific legislative codification of the principles underlying the setting aside of unfair contracts and contractual provisions appears to be unnecessary as the common law for the most part grants sufficient and well-established powers to the Courts to do so,[265] and where the common law is lacking, constitutional values and norms (which were introduced into the realm of the law of contract via the concept of public policy and today form the backbone thereof)[266] permit the common law to be developed.[267] By the same token, the omnipresence of the Bill of Rights and its radiating effect on all fields of South African law explains why an explicit statutory reference to the necessity of taking constitutional values into account in apposite cases is equally unnecessary.[268] Nevertheless, an attempt by the Legislature to guide the Courts in terms of factors which may assist them in reaching a conclusion can certainly not be objectionable, provided, of course, that these factors are linked to the correct criterion to begin with. Even so, there would appear to be no sound reason for distinguishing between issues relating to property division and "any other matter" regarding such a contract.

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264 "[A]ny other matter that the court considers relevant."

265 See Christie 2006: 15 with reference to the power granted by the common law to strike down contracts that are "unconscionable" or "oppressive."

266 *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at par [91]; Brand 2009: 84.

267 See Christie 2006: 14; 15 and 19; Hefer 2004: 5.

268 Section 8(1) of the *Constitution,* 1996. For the effect of the Bill of Rights on the law of contract see *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at par [27] – [30].

In conclusion, it is therefore suggested:

- That both clause 8(1) and the proviso thereto must be adapted so as to give effect not only to the established principles of the law of contract as far as enforceability is concerned, but also to remove the distinction between property division and "any other matter."

- Secondly, clause 8(2) and (3) should be amended in order to refer to "public policy" instead of "serious injustice"; and

- Clause 8(5) should be incorporated into the amended clause 8(2). This would imply that the "normal principles of the law of contract" could at any time be relied on, for example, where a party alleges that the contract is void for lack of consensus or where the parties wish to request the Court to exercise its common law power to rectify an agreement that does not reflect their true intention.

The amended clause 8 would now read:

> (1) In any proceedings *involving either or both registered domestic partners,* a court may consider the fact that parties have concluded a registered domestic partnership agreement: Provided that ~~the~~ a registered domestic partnership agreement ~~has been indicated on and attached to the registration certificate~~ *that does not comply with the requirements of section 7(3)*[269] *of this Act shall bind only the parties thereto*.
>
> (2) *A Court may decide any matter regarding a registered partnership agreement on the applicable principles of the law of contract, and, in particular, if* the court, having regard to all the circumstances, is satisfied that giving effect to a registered domestic partnership agreement *or any part thereof* would ~~cause~~

[269] The necessity for a reference to section 7 will become apparent when the need for notarial execution and registration in the deeds registry is explained in 7.3 below.

~~serious injustice~~ *be in conflict with public policy*, it may set aside the registered domestic partnership agreement or parts thereof.

(3) The court may, in deciding in terms of subsection (2) whether giving effect to a registered domestic partnership agreement *or any part thereof* would ~~cause serious injustice~~ *be in conflict with public policy*, have regard to—

(a) the terms of the registered domestic partnership agreement;

(b) the time that has elapsed since the registered domestic partnership agreement was concluded;

(c) whether the ~~registered domestic partnership agreement has become unfair or unreasonable~~ *implementation of the terms of the* registered domestic partnership agreement *would have resulted in conduct that* was *unconscionable, immoral or illegal* [270] *or in substantially incontestable harm to the public* [271] in the light of all the circumstances at the time it was made;

(d) whether the *implementation of the terms of the* registered domestic partnership agreement *would result in conduct that* has become ~~unfair or unreasonable~~ *unconscionable, immortal or illegal* [272] *or would result in substantially incontestable harm to the public* [273] in the light of any

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270 Amendments based on Heher JA's judgment in *Juglal v Shoprite Checkers (Pty) Ltd* 2004 (5) SA 248 (SCA) at par [12]: "Because the courts will conclude that contractual provisions are contrary to public policy only when that is their clear effect (see the authorities cited in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 8C - 9G) it follows that the tendency of a proposed transaction towards such a conflict (*Eastwood v Shepstone* 1902 TS 294 at 302) can only be found to exist if there is a probability that *unconscionable, immoral or illegal conduct* will result from the *implementation of the provisions according to their tenor*. (It may be that the cumulative effect of implementation of provisions not individually objectionable may disclose such a tendency.) If, however, a contractual provision is capable of implementation in a manner that is against public policy but the tenor of the provision is neutral then the offending tendency is absent. In such event the creditor who implements the contract in a manner which is unconscionable, illegal or immoral will find that a court refuses to give effect to his conduct but the contract itself will stand. Much of the appellant's reliance before us on considerations of public policy suffered from a failure to make the distinction between the contract and its implementation and the unjustified assumption that, because its terms were open to oppressive abuse by the creditor, they must, as a necessary consequence, be against public policy" (emphasis added).

271 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 9 (C).

272 Amendments based on Heher JA's judgment in *Juglal v Shoprite Checkers (Pty) Ltd* 2004 (5) SA 248 (SCA) at par [12] (quoted in the preceding note but one).

273 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 9 (C).

changes in circumstances since it was made and whether those changes were foreseen by the parties or not;

(e) the fact that the parties wished to achieve certainty as to the status, ownership and division of property by entering into the registered domestic partnership agreement;

(f) the contributions of the parties to the registered domestic partnership; and

(g) any other matter that the court considers relevant.

(4) A court may make an order in terms of this section notwithstanding that the registered domestic partnership agreement purports to exclude the jurisdiction of the court to make that order.

~~(5) A court may decide any other matter regarding a registered domestic partnership agreement on the applicable principles of the law of contract.~~

Even if clause 8 were to be amended in the manner suggested above, it is important to note that the amended clause would merely provide for better regulation of issues arising from registered partnership agreements. This would however not necessarily iron out other problems pertaining to the regulation of the proprietary consequences of registered domestic partnerships that may occur during their existence or at their termination. This aspect will be addressed in the paragraphs that follow.

(b) The position of "interested parties" under the Bill

(i) The registered partnership agreement

An analysis of the position of "interested parties"[274] under the Bill must commence with a discussion of the proprietary consequences of the registered

[274] According to clause 1 of the Bill **"'interested party'** means any party with an interest in, or who could reasonably be expected to have an interest in-

(a) the joint property of the domestic partners;

(b) the separate property of either of the domestic partners; or

(c) the partnership debt of the domestic partners."

domestic partnership. In this regard it has so far been seen that registered domestic partners may in principle deviate from the default regime by entering into a registered partnership agreement. In addition, in the policy arguments described in 7.2 above, it was seen that in order for knowledge of the contents of such an agreement to be imputed to such parties, the public registration of the agreement is essential.[275] Finally, as pointed out in the discussion of clause 8 of the Bill, an agreement that does not comply with the formal registration requirements as prescribed by the Bill should still bind the parties to the agreement. It goes without saying that a cross-reference to the provision in which these requirements are contained (presently clause 6 of the Bill) is pointless unless that provision is effective in achieving the publicity goal. The first question that therefore needs to be asked is whether clause 6 of the 2008 Bill in fact does so.

The relevant provisions (subsections (5) – (10)) of the clause in question state the following:[276]

> (5) The registration officer must *indicate the existence* of a registered domestic partnership agreement, where applicable, on the registration certificate.
>
> (6) The registration officer must *issue the partners with a registration certificate* stating that they have registered their domestic partnership and, where applicable, *attach a certified copy of the registered domestic partnership agreement to the registration certificate*.
>
> (7) The registration certificate issued by the registration officer is *prima facie* proof of the existence of a registered domestic partnership between the partners.
>
> (8) Each registration officer *must keep a register* of all registrations of domestic partnerships conducted by him or her and *indicate the existence* of a registered domestic partnership agreement, where applicable, in the register.

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275 See SALRC 2006: 327. Within the context of marriage and antenuptial contracts see *Ex parte Kloosman et Uxor* 1947 (1) SA 342 (T) at 347 and *Ex parte Spinazze & Another NNO* 1985 (3) SA 650 (A) at 658 (D).

276 Emphasis and italics added.

(9) The registration officer must transmit the said register to the officer in the public service with the delegated responsibility for the population register in his or her district of responsibility.

(10) Upon receipt of the said register the officer contemplated in subsection (9) responsible for the population register must cause the *particulars* of the registered domestic partnership concerned to be included in the population register in accordance with the provisions of section 8(e) of the *Identification Act*.[277]

When one considers the extract quoted above, it becomes clear that the *existence* of a registered partnership agreement is required to be indicated on the registration certificate (subsection (5)). The partners themselves are required to be furnished with a registration certificate to which a certified copy of the registered partnership agreement (if the parties have indeed entered into such agreement) is attached (subsection (6)). According to subsection (8) the officer must keep a register of all registrations which he or she has conducted "and indicate *the existence*" of an agreement in such register. After doing so, the register must be transmitted to the relevant officer in the public service, after which "the *particulars* of the registered domestic partnership" are to be included in the population register (subsection (9) and (10)).[278]

The difficulty that should immediately become apparent when the provisions of clause 6 are analysed is that there is no certainty as to what is to happen with the original registered partnership agreement as entered into by the prospective partners. In all relevant cases, mention is made only of the need for the "existence" of such an agreement to be indicated on the registration certificate and for the "particulars" of the partnership to be included in the population register. Clause 6 provides no clear indication as to whether or where the registered partnership agreement *itself* will be available for public inspection.

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277 The necessity for an amendment to section 8(e) of the *Identification Act* 68 of 1997 will be discussed in 12.2.3 below.

278 Emphasis added.

This state of affairs is highly problematic for, as has been emphasised throughout this discussion, in order for the agreement to bind third parties it is imperative for the Bill to provide for a system in terms of which all registered partnership agreements are registered in a central register to which interested parties have access. This aspect will be embroidered upon in the conclusion to this discussion.[279]

(ii) Other protection currently provided by the Bill

The Bill must provide for protection of interested parties over and above the mere facilitation of the means for them to acquire knowledge of the contents of a registration agreement. In this respect the Bill currently provides protection in two chief forms, firstly by imposing certain duties on the parties themselves or their estates at the termination of registered partnerships, and secondly by requiring the Courts to ensure that the interests of such parties are protected and vesting them with a relatively broad power to do so. In the first category, clause 24 stipulates that all interested parties are to be informed in writing when the registered domestic partnership is terminated *inter vivos* or by the death of one or both registered partners. As far as the second category is concerned, clause 25 provides as follows:

> (1) A court considering an application under section 21 of this Act must have regard to the interests of a *bona fide* purchaser of, or other person with an interest or vested right in, the property concerned.
>
> (2) A court may make any order proper for the protection of the rights of interested parties.

The first problem that clause 25 presents is that due to its inclusion under Part V of chapter 4 (entitled "[p]roperty division after termination of registered domestic partnership") clause 25 only appears to apply to the *termination* of a registered

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279 See 7.3 below.

domestic partnership.[280] This poses the difficulty that subsection 2 of that clause cannot be relied upon during the existence of the partnership. The adverse implications hereof for outsiders are obvious.

A second difficulty appears when one considers the wording of clause 25(1). In this regard the reference to "section 21" is not only clearly incorrect (section 21 deals with delictual claims, and it is assumed that the Legislature intended a reference to "section 22" that deals with property division) but is also, it is submitted, unnecessarily restrictive as there is no good reason for the interests of a *bona fide* purchaser or any other person with a vested right in the property in question only to be considered at the *termination* of the partnership or only within the context of property division. The reference to "section 21" should thus be replaced with a reference to the correct provision of the Bill. In addition, a duplicate version of clause 25 should be included in an appropriate part of the Bill so as to make it clear that the considerations of that clause do not only apply at the *termination* of a registered partnership.

(c) Protecting both the partners themselves as well as outsiders in respect of joint property

If prospective registered domestic partners in the position of A and B in the example in 7.2.2.2.1 above wish to register a partnership that is in community of property, the only provision that refers to such property is clause 10 which, in dealing with the disposal of "joint property" (defined in clause 1 as "household goods and property owned jointly in equal or unequal shares by the domestic partners") states that:

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[280] See *Turffontein Estates v Mining Commissioner Johannesburg* 1917 AD 419 at 431 *per* Innes CJ: "Where the intention of the lawgiver as expressed in any particular clause is quite clear, then it cannot be overriden by the words of a heading. But where the intention is doubtful, whether the doubt arises from ambiguity in the section itself or from other considerations, then the heading may become of importance. The weight to be given to it must necessarily vary with the circumstances of each case." Also see *President of the RSA v Hugo* 1997 (4) SA 1 (CC) at par [12].

> A registered domestic partner may not without the written consent of the other registered partner sell, donate, mortgage, let, lease or otherwise dispose of joint property.

While it is conceded that the aim of the *Domestic Partnerships Bill* is not to duplicate marriage or matrimonial property law, it is important to note that its failure to make provision for certain vital aspects of a community of property cannot be accepted in view of the complexities that often surround the administration of joint property, particularly where one of the parties is not cooperative.[281] Therefore, although various amendments will be suggested in the paragraphs that follow, they are not aimed at cloning the marriage in community of property but instead are intended to give effect to vital principles in the context of matrimonial property law, the incorporation of which is deemed to be essential for realising the greater aim of protecting the domestic partners as well as outsiders to their relationship.

The efficacy of clause 10 can be illustrated by the following hypothetical example in which it is assumed that A and B register a domestic partnership and conclude a registered partnership agreement in terms of which their partnership is in community of property. If, during the existence of the relationship, A sells an asset that forms part of the joint property to an outsider (Z) without obtaining B's written consent, this would imply that an infringement of clause 10 would take place with the probable result that the transaction between A and Z would be void for non-compliance with a peremptory statutory provision.[282] It goes without saying that being a party to an "agreement" that is void could be highly prejudicial

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281 See http://www.lawinfo.org.za/yourfamily/matrimonial.asp (accessed on 18 June 2009); Cronjé and Heaton 2004: 105; Visser and Potgieter 1998: 88. Compare Van Wyk 1985(a): 22 and 1985(b): 61 who does not mention this as a problem and in the latter source states that "[t]he reformed community of property seems the most suitable system for the average young couple starting married life with few assets … *This system works fairly simple in practice* and gives equal recognition to both spouses; it thus reflects the reality of most households" (emphasis added).

282 *Schierhout v Minister of Justice* 1926 AD 99 at 110. It could however possibly be argued that non-compliance with clause 10 does not lead to nullity in view of the fact that this would be detrimental to outsiders. This possibility is discussed below.

to Z. To make matters worse, in its current format clause 25 would be of little assistance to Z unless the registered partnership was being terminated,[283] and even if a duplicate of clause 25(2) were to be inserted as was suggested above, this would necessitate a Court application by Z. Furthermore, even if Z could somehow succeed in validating the transaction between himself and A,[284] B would be adversely affected by the fact that no statutory provision would be made for a right of recourse in order to be compensated for his or her loss.

The scenario sketched above would have a completely different outcome if clause 10 were to include a statutory provision similar to section 15(9) of the *Matrimonial Property Act*[285] that *deems* such a transaction to be valid provided that certain requirements are met. It is therefore suggested that a customised format of this provision should be inserted into clause 10 of the Bill.

In furthering the attempt to secure greater protection for the registered domestic partners, it must be mentioned that clause 10 appears to be lacking for not being framed broadly enough as it is silent on other types of transactions for which consent should certainly be required.[286] To this end it is suggested that the clause in question ought to be amended so as to include transactions involving the burdening, ceding, or pledging of joint property. In addition, clause 10 should

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283 See b(ii) above.

284 This may, for example, occur if it could successfully be argued that clause 10 is not of a peremptory nature. In *Meeg Bank Ltd v Waymark* 2004 (5) SA 529 (SCA) at par [15] Mpati DP (as he then was) stated that "[w]hether a provision is peremptory or directory may very well depend on the scope and purpose of the legislation at issue." This consideration, coupled with the fact that one of the stated objectives of the Bill is to protect "interested parties" (see clause 2) may lead to the conclusion that the harsh effect of voidness on "interested parties" would subvert one of the stated objectives of the Act (see *Commercial Union Assurance Co of SA Ltd v Clarke* 1972 (3) SA 508 (A) at 518 (C)). This conclusion is however highly speculative and it is therefore submitted that the safest route would be to assume that clause 10 is peremptory in nature and that, as suggested in the main text, a contextualised form of section 15(9) of the *Matrimonial Property Act* 88 of 1984 should therefore be inserted into Clause 10.

285 88 of 1984.

286 In the context of the marriage in community of property consent is required for transactions which may be prejudicial to the other spouse's share of the joint estate—see *Amalgamated Banks of SA Bpk v De Goede* 1997 (4) SA 66 (SCA) at 74 (D). Van Wyk 1985(a): 22 states that the joint consent requirement is required regarding assets of a capital nature. It is submitted that the same principle should apply to registered domestic partners.

provide a mechanism by which a registered domestic partner's power to bind the joint property can be suspended where this is necessary for protecting the interests of either partner. Finally, as was pointed out above, non-compliance with clause 10 of the Bill (as it stands) would more than likely result in a transaction performed without the written consent of both registered domestic partners being void *ab initio* for contravention of a peremptory statutory provision. While the inclusion of the consent requirement in this clause as a general rule is undoubtedly sound, it is submitted that the failure of clause 10 to provide for ratification to take place makes it unduly formalistic and implies that it is not in keeping with the Law Reform Commission's stated aim of simplifying the registered partnership model.[287] It is consequently submitted that a ratification provision similar to that contained in the *Matrimonial Property Act* will solve this problem. Such a clause should however heed the fact that matrimonial property law holds that ratification is not possible in a select category of transactions.[288]

The amended clause 10 of the Bill should therefore read as follows (all amendments and insertions in italics):

(1) A registered domestic partner may not without the written consent of the other registered partner sell, donate, mortgage, *burden, cede, pledge,* let, lease or otherwise dispose of joint property.

(2) The consent required for the purposes of subsection (1) may, except when required for the registration of a deed in a deeds registry or for the purposes of suretyship, also be given by way of ratification within a reasonable time after the act concerned.

(3) On application by a registered domestic partner a Court may suspend for a definite or indefinite period the powers granted to either of the partners to deal with joint property under a registered partnership agreement or under any law if

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287 SALRC 2006: 320.

288 Ratification is not possible in the case of transactions that require registration in the deeds office (section 15(2)(a) of the *Matrimonial Property Act* 88 of 1984) and where a spouse attempts to bind him- or herself as surety (section 15(2)(h) of the same Act).

the Court is of the opinion that doing so is necessary to protect the interests of either or both registered domestic partners;

(4) When a registered partner enters into a transaction with a person contrary to the provisions of subsection (1) or (3) of this section, and

(a) that person does not know and cannot reasonably know that the transaction is being entered into contrary to either of the said subsections, it is deemed that the transaction is entered into with the consent required under subsection (1);

(b) that registered partner knows or ought reasonably to know that he or she will probably not obtain the consent required in terms of subsection (1) or that his or her powers have been suspended under subsection (3) and the other registered partner's share of the joint property suffers a loss as a result of that transaction, an adjustment shall be effected in favour of that other registered partner upon the division of the joint property.

(5) A Court may, on application of a registered domestic partner, grant him or her leave to conclude a transaction without the consent required under subsection (1) if the Court is of the opinion that such consent is being withheld unreasonably, or may dispense with such consent where the Court is of the opinion that there is a good reason for doing so.

7.2.2.2.3 Preliminary conclusion

The default property regime as provided for in the *Domestic Partnerships Bill* requires better regulation in order to protect both the registered domestic partners themselves as well as outsiders. To this end it has been suggested that the Court's power to consider the contents of and to set aside the registered partnership agreement or any part thereof needs to be revised and that the registration requirements for such agreements need to be expanded. It has also been opined that valuable lessons can be learned from matrimonial property law in terms of protecting the joint property of the partners.

7.3 Application of these findings

7.3.1 General

After considering the arguments and findings in the foregoing discussion it should be clear that the Bill in its current form exposes both the prospective parties to a registered partnership agreement as well as other interested parties to a substantial risk in as far as the property regime of a registered domestic partnership is concerned. The amendments proposed in the preceding paragraphs should therefore be implemented. However, as mentioned in the policy considerations in 7.2 above, further modification of the Bill will need to take place in order to bind third parties to registered partnership agreements and to provide better protection to the partners themselves as well as to outsiders in terms both of the contents of such agreements as well as the amendment thereof. In order to address these issues, the following solutions are proposed:

7.3.2 Notarial execution

In the 2003 *Discussion Paper* the Commission recommended that all pre-registration agreements had to be notarially executed before being handed to the registration officer.[289] In the 2006 *Report* this requirement was presumably revised for the sake of a less complex and more informal registration process.[290] It is submitted that if this is indeed the case, the rationale behind discarding the requirement of notarial attestation is not convincing. To begin with, it has been seen that not only the parties themselves, but also outsiders potentially stand to be bound by the contents of a registered partnership agreement.[291] This alone points to the fact that such an agreement is not comparable to an ordinary contract which binds only the parties thereto. Consequently, as a matter not only of policy but also of pure pragmatism, there is simply no good reason for

289 Clause 10(2)(b) and (c).
290 SALRC 2006: 331.
291 Clause 7(4) of the Bill (in its original form).

permitting the parties to a registered domestic partnership effectively to achieve the same results by virtue of their agreement as spouses who have entered into an antenuptial contract could without requiring of the former group to comply with comparable formal requirements in order to do so.

In addition, it has been seen that even if the amendments proposed in the preceding paragraphs were to be implemented this would not sufficiently circumvent the risks to which parties to a badly-drafted agreement could be exposed. In this respect, if the age-old proverb that "an ounce of prevention is better than a pound of cure" is to be believed, the question could rightly be asked as to why remedial as opposed to pro-active action would be required in order to protect vulnerable parties to such an agreement. These sentiments draw attention to a paradoxical situation created by the 2008 Bill in that, in attempting to purge the registered domestic partnership of excessive rigidity and formality in the interests of removing the possibility that "an unsophisticated couple register a partnership and find themselves in a property regime that they did not expect and do not understand,"[292] the Bill in its current form provides virtually no protection for the same "unsophisticated couple" who may enter into a contract without proper legal advice. In fact, the question can rightly be asked whether the Bill does even a more "sophisticated" couple any favours by leaving them to their own devices in order to regulate a vital aspect of their relationship in the almost fatalistic hope that their partnership will successfully be able to withstand the vicissitudes of domestic life and of legal traffic.[293] Simplicity clearly has limits beyond which it cannot be pressed. After all, as Albert Einstein is reported to have said "everything should be made as simple as possible, but not simpler."[294]

As a notary public is responsible for the "correctness of all aspects of [a] notarial deed"[295] it is suggested that clause 7 of the Bill should be amended in order to

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292 SALRC 2006: 331.

293 This issue is considered in 7.3.4.2 below.

294 Shapiro and Epstein 2006: 231.

295 Christie 2008: 1.5.

provide for notarial execution of all registered partnership agreements as a means of protecting the parties and outsiders. The proposed amendment to this clause will be illustrated after the paragraph that follows.

7.3.3 Registration of domestic partnership agreements and witnessing requirement

When the position of outsiders was dealt with in 7.2.2.2.2 (b) above, it was concluded that a central register for all registered domestic partnership agreements was essential in order for the protection of such persons. This could conceivably be accomplished in one of two ways, either (i) by the creation of such a central register in the Department of Home Affairs, or (ii) by making use of the same registration procedure provided for in the case of antenuptial contracts in the case of marriage.

In deciding which one of these two possibilities is preferable it must be remembered that the fact that third parties stand to be bound by the registered partnership agreement implies that the requirement of a central registration system is not debatable. Registration in a public registry is a *sine qua non* for binding outsiders to the agreement. The question is therefore not *whether* such a system is required, but rather *how* it should function.

While the first option (a register in the Department of Home Affairs) may succeed to some or other extent in maintaining the “informal” character of registered domestic partnerships, it is submitted that the arguments that were listed in paragraph 7.3.2 where the case for notarial attestation was put forward point to the second option (the deeds registry) as the most viable. In addition to these arguments, the following points should be considered:

- The system of registration in the deeds registry is an established and reliable system;

- By making use of an infrastructure that is already in place the deeds registry option would not require the establishment of a new system and would avoid the structural and administrative expenditure and resource allocation that such a new system would otherwise require;
- The requirement of registration in the deeds registry would link up with the requirement of notarial attestation that was suggested for registered partnership agreements in 7.3.2 above; and
- The requirement of registration in the deeds registry would avoid confusing the registration requirements prescribed for antenuptial contracts with those prescribed for registered partnership agreements.

A few obvious downsides of the deeds registry requirement would be that it would involve expenditure for the partners, and that it would formalise the process to some extent and, as a consequence, in itself require a certain level of "sophistication" of the partners. The first concern can for the most part be disposed of by considering the arguments mentioned in paragraph 7.3.2 above, with the result that the increase in formality and the minimal expenditure required would be a fair price to pay in order for the parties to be able to achieve what their married counterparts could by way of an antenuptial contract. Regarding the second concern it is submitted that it cannot seriously be contended that parties who are "sophisticated"[296] enough to enter into a partnership agreement in the first place are not also "sophisticated" enough to have the agreement properly registered. Indeed, "unsophisticated" parties would have the default property regime available to them, or, failing that, the unregistered partnership model. By the same token, it must be remembered that the notarial attestation and registration requirements are only prescribed for the agreement to be binding on persons who are not parties to the agreement. Nothing would prevent the domestic partners (regardless of their degree of "sophistication") from concluding an agreement which would only be valid *inter partes*. The additional formalities suggested above would therefore not overcomplicate matters for parties who

[296] See SALRC 2006: 331.

prefer to regulate their property regime in a less formal manner, provided that they take cognisance of the *caveat* that would then apply, namely that their agreement does not bind outsiders thereto.

In an aside, while the aspect of witnesses is not directly relevant either to the position of third parties or to the property regime of registered domestic partners, it will be recalled that in 5.2.3.1 above it was mentioned that the witnessing requirement is still necessary in view of the formal public commitment undertaken by the parties and in view of the status-altering effect of the decision to conclude a registered domestic partnership. As such it is convenient to include the amendments suggested in this regard to the amendments suggested regarding the registered partnership agreement. It must be noted that if clause 7 of the Bill is amended in the manner suggested below, this will remove the necessity for clause 6(5) – (10) of the Bill being amended.

The amended versions of clauses 6 and 7 of the *Domestic Partnerships Bill* would read as follows (proposed insertions in italics):

6. Registration of domestic partnerships

(1) Subject to section 4, any two persons who are both 18 years of age or older, may register their relationship as a domestic partnership as provided for in this section.

(2) A registration officer must conduct the registration procedure on the official premises designated for that purpose and in the manner provided for in this section.

(3) The prospective partners must individually and in writing declare their willingness to register their domestic partnership by signing the prescribed documents in the presence of the registration officer *and two competent witnesses*.

(4) The registration officer *and the two competent witnesses* must sign the prescribed documents to certify that the declaration referred to in subsection (3) was made voluntarily and in his or her presence.

(5) …

7. Property regime

(1) Except as provided in this section, there is no general community of property between partners in a registered domestic partnership.

(2) In the event of a dispute regarding the division of property after a registered domestic partnership has ended, *section 22* of this Act applies.

(3) Registered partners may conclude a registered domestic partnership agreement *which must—*

(a) be signed by both prospective registered partners;

(b) be attested by a notary public;

(c) be handed to the registration officer before or on the date of registration of the registered partnership; and

(d) be registered in a deeds registry within three months of execution or within such extended period as a court may on application allow.

(4) Registration of a registered domestic partnership agreement in any one deeds registry in the manner prescribed in this section shall be effective as registration for the whole Republic: Provided that if any transaction in connection with which evidence of such agreement is necessary takes place in a deeds registry other than that in which such agreement has been registered, a copy of such agreement certified by the registrar of the place of registration or a notary public shall be recorded and filed in such first-mentioned deeds registry.[297]

(5) Where ~~no indication of the existence of a registered domestic partnership agreement has been effected on, or no copy of such~~

[297] Section 87(3) of the *Deeds Registries Act* 47 of 1937.

~~registered domestic partnership agreement has been attached to, a registration certificate as required in terms of section *6(5)* and *(6)* of this Act, and where no indication of the existence of such a registered domestic partnership agreement has been made as required in terms of section *6(8)* of this Act~~, *the requirements of subsection (3) of this section have not been complied with,* such agreement binds only the parties to the agreement.

The amendment of clause 7(3) explains the necessity for the cross-reference between this provision and clause 8(1) of the Bill as illustrated in 7.2.2.2.2 (a) above.

7.3.4 The supervisory role of the Courts

7.3.4.1 Alteration of the property regime and division of joint property

One aspect that seems to have been overlooked in both the Bill as it appeared in the 2003 *Discussion Paper* as well as in the 2008 draft Bill is the possibility that registered domestic partners may wish to amend a particular provision in their agreement or even to alter their property regime *in toto*. By virtue of the fact that registration of the registered partnership in the deeds registry has been suggested in the preceding discussion, it follows that any post-registration amendment to such an agreement will also require an amendment to the registered deed. A question that immediately comes to mind is what the position will be where registered domestic partners attempt to amend their property regime (as regulated by a properly-registered partnership agreement) by way of an informal agreement that does not comply with the formalities prescribed by the Bill. The prevailing position regarding matrimonial property law provides a starting point for predicting the possible outcome of such a decision, as the issue as to whether an informal post-nuptial agreement that has been entered into by spouses amends a valid and properly-registered antenuptial contract came

before the Witwatersrand Local Division[298] in the case of *Honey v Honey* in 1991.[299] *In casu* the Court held that the second contract (which although it had been notarially executed had not been registered in the deeds registry) was void.[300] Van Schalkwyk[301] correctly points out that the judgment can be criticised on the basis that the authority relied on by Du Plessis J (section 2 of the *Matrimonial Property Act* 88 of 1984) does not deal with postnuptial agreements but regulates the position with regard to antenuptial agreements. Van Schalkwyk does however acknowledge that nothing turns on the dubiousness of this authority as it does not affect the outcome of the case. He also mentions that the Court's finding that the immutability principle (in terms of which the matrimonial property system is presumed to be inalterable so as to protect third parties)[302] is an independent substantive common law rule is justified on the Court's interpretation of the common law authority. As a result, Van Schalkwyk opines that the Court's finding is both logical and correct.[303] In consequence of the *Honey* judgment the positive law dictates that such a second informal "agreement" is null and void, with the result that the first agreement stands. This valuable lesson should not be overlooked in domestic partnership legislation.

It is submitted that Van Schalkwyk's conclusion that section 21(1) of the *Matrimonial Property Act* creates a statutory means of overcoming the strictures of the common law rule as it was applied in the *Honey* case can be used to strengthen the argument for similar statutory regulation of the amendment of registered partnership agreements. If however, no such legislative regulation were to be forthcoming, registered domestic partners would be left with two choices, namely either (i) to attempt to vary their property regime (as contained in

298 Now the South Gauteng High Court, Johannesburg—see the *Renaming of High Courts Act* 30 of 2008.

299 1992 (3) SA 609 (W).

300 At 614 (H) – (I).

301 1993: 218-221.

302 See *Sperling v Sperling* 1975 (3) SA 707 (A) at 723 (B) – (C).

303 At 220. Cronjé and Heaton (2004(a): 179) opine that the immutability principle cannot be used to justify the argument that the second agreement cannot at least be binding *inter partes*, as no prejudice to third parties could result from an agreement that binds only the parties thereto.

the properly-registered domestic partnership agreement) by entering into a second informal agreement and to take the chance that the informal agreement will be found to be null and void; or (ii) to opt, from the outset of their relationship, for concluding an informal registered partnership agreement that is only binding *inter partes* and therefore although being capable of subsequent informal amendment is not binding on outsiders to the agreement. It stands to reason that neither situation is desirable, with the result that statutory intervention is urgently required.

7.3.4.2 Extension of matrimonial property law to registered domestic partnerships—the "contextualised choice model" revisited

The difficulties created by the 2008 Bill are unfortunately not limited to a lack of statutory provision for the amendment of a registered partnership agreement or to its failure to prescribe proper formalities in order for it to bind third parties. Indeed, as seen in the discussion above, one of the biggest hazards is created by the fact that the *Domestic Partnerships Bill* of 2008 provides no guidelines regarding the contents of a registered partnership agreement, which implies that the parties are left to their own devices regarding the proprietary consequences of their relationship. While the process of notarial execution was suggested above with the precise aim of ironing out many of these difficulties right from the outset of the relationship, the preceding analysis of clauses 8, 24 and 25 of the Bill above makes it clear that these provisions do not provide adequate protection *during the existence of the relationship* as far as either the parties themselves or outsiders are concerned. It may therefore be necessary for the partners to have recourse to the High Court where insurmountable difficulties surface while the partnership subsists.

Upon first contemplation of this problem the solution that immediately springs to mind is to suggest that any *lacunae* created or caused by a lack of adequate regulation of the property regime of a domestic partnership could be cured by

means of a process of "cross-pollination" with matrimonial property law. This issue is, however, not as simple as it seems. This much has been pointed out throughout this study within the context of the so-called "choice argument" and the resultant "contextualised choice model." In this regard it may be recalled that, on the basis of the Canadian case of *Nova Scotia (Attorney General) v Walsh,*[304] a distinction was drawn in Chapter 5 between claims based on "spousal support" (need-based claims) and those which involve the "division of matrimonial assets" (property disputes).[305] While the choice not to marry could not justify the refusal to extend the former type of claim to unmarried couples, the model holds that the refusal to extend principles of *matrimonial property law* to unmarried couples may be justifiable on the basis that they have purposefully elected not to marry one another and hence not to "opt in" to the proprietary consequences of marriage. On the basis of this finding it was concluded in that Chapter that:

> While section 9 of South Africa's *Constitution,* 1996 is more encompassing than its Canadian counterpart as far as the grounds of unfair discrimination are concerned, it is submitted that the opinion expressed by Gonthier J [in *Walsh*] will also hold true in a South African context. Consequently, the failure of the law to permit asset distribution (that is to say claims other than need-based claims) between life partners to take place in the same way as for married partners *would not necessarily constitute a violation of the right to equality*.[306]

It was further opined, in the light of *Volks NO v Robinson*,[307] that if it is borne in mind that the Constitutional Court was prepared—on the basis of the "choice argument"—to hold that the refusal to extend a *need-based claim* to an unmarried heterosexual cohabitant did not constitute unfair discrimination, it would be even more difficult for a subsequent Court to hold that the refusal to

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304 2002 SCC 83, 32 R.F.L. (5th) 81, 221 D.L.R. (4th) 1, 211 N.S.R. (2d) 273, 102 C.R.R. (2d) 1, [2002] 4 S.C.R. 325, 297 N.R. 203, 659 A.P.R. 273, REJB 2002-36303, J.E. 2003-102.

305 *Per* Gonthier J in *Walsh* at par 203.

306 See 3.3.2.2 in Chapter 5, footnotes omitted.

307 2005 (5) BCLR 446 (CC).

extend an aspect of *matrimonial property law* to a cohabitant in a similar position *did* in fact violate the right to equality.[308]

As a result the "contextualised choice model" made the *preliminary* conclusion that:

> [I]f the extension sought by a life partner who has clearly chosen not to formalise his or her relationship is based on a property dispute (division of assets), a presumption should apply to the effect that the "choice argument" is relevant, for, as Sachs J put it "merely choosing to cohabit [is] insufficiently indicative of an intention by cohabitants to share and contribute to each other's assets and liabilities." In such an instance the "choice argument" would be a highly persuasive factor in deciding to exclude the possibility of applying matrimonial (property) law to solve the dispute; as a consequence of which the ordinary principles of the law of obligations would determine the matter. However, the fact that the law of obligations does not currently provide the ideal structure for the regulation of such claims between life partners (this issue is discussed in detail in Chapter 6) provides ample evidence of the dire need for legislative intervention in this regard.[309]

It is of cardinal importance to note that these conclusions were drawn within the context of life partnerships in the narrow sense, where the partners (i) are not married in terms of civil, customary or religious law or (ii) have not concluded a civil partnership in the prevailing family law system *while no alternative statutory framework exists* within which they are enabled to solemnise their relationship. However, if it were to be enacted as an Act of Parliament, the *Domestic Partnerships Bill* would have a dramatic effect on this state of affairs by (at least in principle) providing the said alternative statutory framework. However, as seen in Chapter 3, the domestic partnership rubric requires that the Bill should—where appropriate—be modified in accordance with the conclusions reached in (*inter alia*) Part 2 of this study. The 2008 Bill provides the ideal sounding-board

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308 See 3.3.1.1 in Chapter 5.

309 See 3.3.2.2 in Chapter 5, footnotes omitted.

for testing the preliminary conclusions reached regarding the "contextualised choice model."

The starting point in this regard is to note—as has been explained earlier—that the long title of the Bill as well as its preamble and stated objectives[310] leave no doubt as to the fact that it is intended to provide the legislative substructure[311] of the domestic partnership in South African law (and, therefore, of the domestic partnership rubric).[312] As such, the Bill should be expected, through comprehensive and effective regulation of these partnerships, to provide a *realistic alternative* to marriage. The method by which the Legislature appears to intend to do so is illustrated in the preamble to the Bill, which notes firstly that according to section 9(1) of the *Constitution,* 1996 "everyone is equal before the law and has the right to equal protection and benefit of the law", and secondly that there is no existing "legal recognition or protection" for domestic partners.[313] From the way in which this preamble is constructed the conclusion can be reached that the Bill intends to regulate domestic partnerships by way of correlating the right to equality with the recognition provided. In other words, *the right to equality is to provide the benchmark for determining the extent to which the current lack of recognition and protection of such partnerships is to be cured* by the Bill.

Given the content of the 2008 Bill, the question that needs to be answered is whether any discrepancy that persists between matrimonial property law and the property regime as provided for in the Bill may constitute an infringement of the equality clause to the extent that the Bill does not provide "equal protection and benefit of the [matrimonial property] law." The following example illustrates a scenario that may potentially arise if the Bill were to be enacted in its present form:

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310 Clause 2.

311 See 1 above.

312 See 5 in Chapter 3.

313 The need for a correction of the reference to "opposite-sex couples" was explained in 3.1 above.

Assume that X and Y enter into a registered domestic partnership. They approach an attorney who drafts a registered partnership agreement in terms of which the accrual system is made applicable to their domestic partnership by means of the following provisions:

(1) At the termination of the registered domestic partnership between X and Y, the accrual of each partner's estate is to be determined by subtracting the net value of each partner's estate at the commencement of the partnership from the net value of his or her estate at the termination of the partnership.

(2) The partners agree that the inventories of assets and their corresponding values as listed in the annexures to this agreement are to be used for the purposes of proving the net commencement value of the partners' respective estates. X's inventory is attached as Annexure A, and Y's inventory is attached as Annexure B.

(3) At the termination of the partnership, the registered partner whose estate shows no accrual or a smaller accrual than the estate of the other registered partner, or his or her estate if he or she is deceased, acquires a claim against the other registered partner, or his or her estate if he or she is deceased, for an amount equal to half of the difference between the accrual of the respective estates of the registered partners.[314]

No other provision pertaining to the accrual system is to be found in the agreement. Furthermore, as notarial attestation is not required by the relevant legislation, the agreement was never scrutinised by such a professional prior to being signed by the parties. Shortly before X and Y's relationship begins to deteriorate, Y inherits the sum of R 500 000 from her father who died intestate. When X and Y decide to terminate their partnership, X, *inter alia* relying on the principle of *pacta sunt servanda*, insists that Y's inheritance must form part of the

[314] Example taken from clause 14(1) of the proposed registered partnership legislation as contained in Annexure D of the SALRC's 2003 *Discussion Paper*.

accrual calculation as their agreement contains no provision that excludes such an inheritance from the calculation. Y alleges that the *Domestic Partnerships [Act]* is unconstitutional to the extent that it violates section 9 of the *Constitution*, 1996 by not providing her with "equal protection and benefit" that section 5(1)[315] of the *Matrimonial Property Act*[316] provides for spouses to a marriage to which the accrual system applies. Would Y succeed in her claim?

In attempting to answer this question it is submitted that valuable insights can be gained from the judgment of the Constitutional Court in *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae).*[317] In this case the crisp issue was whether the fact that section 18(b) of the *Matrimonial Property Act*[318] did not provide for a spouse married in community of property to be compensated for patrimonial loss for bodily injuries sustained due to the fault of the other spouse—while the same restriction did not apply to spouses married out of community of property—constituted a violation of the right to equality.[319]

One of the first important aspects of this case is that it was argued that the impugned section in Act 88 of 1984 violated section 9(1) and 9(3) of the *Constitution* by infringing a spouse married in community of property's "right to equal protection and benefit of the law", as well as by discriminating unfairly on the listed ground of "marital status."[320] Dealing with the latter contention first, Moseneke DCJ held that the distinction created by section 18(b) did not involve a benefit that was reserved for married as opposed to unmarried couples, but instead differentiated between married couples on the basis of their respective

315 This section states that "[a]n inheritance, a legacy or a donation which accrues to a spouse during the subsistence of his marriage, as well as any other asset which he acquired by virtue of his possession or former possession of such inheritance, legacy or donation, does not form part of the accrual of his estate, except in so far as the spouses may agree otherwise in their antenuptial contract or in so far as the testator or donor may stipulate otherwise."

316 88 of 1984.

317 2006 (4) SA 230 (CC).

318 88 of 1984.

319 Par [1] and [3].

320 Par [44].

matrimonial property regimes.[321] For this reason this case differed from earlier case law dealing with this listed ground (all of which had revolved around the distinction between married versus unmarried couples) as the matter *in casu* dealt with different regimes *within* the law of marriage.[322] Without making a decisive ruling in this regard, Moseneke DCJ expressed his reservations as to whether the listed ground of "marital status" could be interpreted so liberally as to include a matter of this nature for "[i]f that were so, it would imply that any difference in proprietary consequences of marital regimes prescribed by the common law or legislation is presumptively discriminatory and unfair unless shown not to be."[323]

Instead, Justice Moseneke held that the case fell to be decided with reference to section 9(1) of the *Constitution*, and therefore, in accordance with the test for unfair discrimination as formulated in *Harksen v Lane NO and Others*,[324] it had to be determined whether "the differentiation bear[s] a rational connection to a legitimate government purpose."[325] The premise from which this analysis needed to proceed was "to ensure that the [constitutional] State is bound to function in a rational manner."[326] According to Moseneke DCJ, it was true that laws often treated persons differently. However

> when a law *elects to make differentiation between people or classes of people it will fall foul of the constitutional standard of equality if it is shown that the differentiation does not have a legitimate purpose or a rational relationship to the purpose advanced to validate it*. Absent the pre-condition of a rational connection the impugned law infringes, at the outset, the right to equal protection and benefit of the law under s 9(1) of the *Constitution*. This is so because the legislative scheme *confers benefits or imposes*

321 Par [45].
322 Par [46].
323 Par [47].
324 1998 (1) SA 300 (CC).
325 *Per* Goldstone J in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at par [53] as quoted by Moseneke DCJ at par [42].
326 *Per* Ackermann, O'Regan and Sachs JJ in *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at par [25] as quoted by Moseneke DCJ at par [48].

> *burdens unevenly and without a rational criterion or basis*. That would be an arbitrary differentiation which *neither promotes public good nor advances a legitimate public object*. In this sense, the impugned law would be inconsistent with the equality norm that the *Constitution* imposes, inasmuch as it breaches the 'rational differentiation' standard set by s 9(1) thereof.[327]

The distinction created by section 18(b) was, according to the Court, based on the notion that pre-eminence had to be given to preserving the joint estate as a cohesive unit that in turn implied that inter-spousal claims for patrimonial loss were futile as they would be paid from and immediately fall back into the joint estate. However, this rationale was a "relic of the common law of marriage" which not only was outdated, arbitrary and detrimental to third parties, but could easily be remedied by providing for any damages awarded to an injured spouse to fall into that spouse's separate estate.[328] Furthermore

> by prohibiting recovery of patrimonial damages for personal injury, s 18(b) arbitrarily prevents the fullest possible compensation for spouses who are victims of violence, negligent driving or other wrongdoing that leads to bodily harm by their marriage partners.[329]

On behalf of the Road Accident Fund it was contended that the limitation imposed by section 18(b) was justifiable on the basis that the matrimonial property regime that applied to any given marriage was a matter of choice to which, once exercised, the spouses were immutably bound.[330] This argument—categorised by the Court as implying a "waiver defence" that effectively entailed that the spouses to a marriage undertook not to challenge any laws to which their marriage were subjected[331]—was disposed of by the Court on two counts:

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327 Par [49] (emphasis and italics added).
328 Par [51] – [55].
329 Par [56].
330 Par [59].
331 Par [60].

(i) The *Constitution* itself, and not the "personal choice, preference, subjective consideration or other conduct of the person affected [thereby]" determined the constitutional validity of a law;[332] and

(ii) The State had not submitted any grounds upon which a legitimate purpose for the limitation in question could be construed.[333]

In the end result the court held that section 18(b) "[failed] the rational connection test"[334] and therefore needed to be rectified by severing the words which imposed the distinction between patrimonial and non-patrimonial loss therefrom, and by reading words to the effect that any damages so awarded fell into the separate estate of the injured spouse into it.[335]

Returning to the position of X and Y: Would Y succeed in her claim that the *Domestic Partnerships [Act]* is unconstitutional to the extent that it does not protect her in the same way as section 5(1) of the *Matrimonial Property Act*[336] would have done if she had been married to X? Her counsel could aver that the broader legislative scheme differentiates between spouses and registered domestic partners by conferring benefits on an inconsistent basis. In order to substantiate this argument she could rely on the following *dictum* by Sachs J in *Minister of Home Affairs v Fourie*:[337]

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332 Par [61].

333 Par [62], [63].

334 Par [70].

335 Par [80]. As a postscript it is noteworthy of mentioning that section 21 of the *Judicial Matters Amendment Act* 66 of 2008 (which came into operation on 15 February 2009) has amended section 18(b) in order to give effect to the order in the *Van der Merwe* case. The subsection in question now reads: "Notwithstanding the fact that a spouse is married in community of property-

(a) …

(b) he or she may recover from the other spouse damages in respect of bodily injuries suffered by him or her and attributable either wholly or in part to the fault of that spouse and these damages do not fall into the joint estate but become the separate property of the injured spouse."

336 88 of 1984.

337 2006 (1) SA 524 (CC).

> The law must be measured in the context of what is provided for *by the legal system as a whole*. In this respect, exclusion by silence and omission is as effective in law and practice as if effected by express language.[338]

While counsel for Y may concede that the *Domestic Partnerships [Act]* does not *exclude* her from the protection, she could allege that a differentiation nevertheless exists as section 5(1) of the *Matrimonial Property Act* applies *by operation of law* to all spouses married out of community of property with the accrual system *unless they include a provision to the contrary in their antenuptial contract.* While married couples are therefore automatically entitled to the protection unless specifically opting out of it, registered domestic partners such as X and Y have to regulate this matter themselves and will only be entitled to the protection that is explicitly contained in their registered partnership agreement. Therefore, within the context of property regimes that are essentially identical, the one Act allows protection by default while the other places an onerous duty on the parties to act positively in order to secure the same. For an Act to expect such action, so Y's counsel could contend, is unreasonable and incongruous and simply expects too much of the ordinary South African citizen.[339]

Applying the test as formulated in *Harksen v Lane NO*[340] to the position of Y would firstly require that, in order to fall foul of the section 9(1) "equality clause", there should be no rational connection between the differentiation and any legitimate government purpose. The purpose behind the introduction of the registered domestic partnership model in its current form can be gleaned from the South African Law Reform Commission's 2006 *Report* where it is stated that "[i]nstead of largely duplicating marriage, a simplified version of registered

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338 Par [81] (emphasis added).

339 See *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) at par [24]: "the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them."

340 1998 (1) SA 300 (CC).

partnerships would serve as a proper *alternative* to marriage, making it more accessible to vulnerable partners and affordable to indigent people…"[341] As far as the property regime of a registered domestic partnership as such is concerned, the *Report* states that the "complexities" of the 2003 model had been revisited in the light of the less complicated registration procedure that was put forward in the 2008 Bill. The Commission therefore opted for separation of property as the default regime,[342] but concluded that "it should nevertheless be open" to the registered partners to enter into a registered partnership agreement.[343] Therefore, although accessibility seems to have been the major reason for the suggested default property regime, the autonomy of the partners appears to have been the overriding motive for permitting a deviation therefrom. In view of the wide array of settings within which life partnerships present themselves, the diverging reasons for cohabitation and the vastly differing financial arrangements which the partners may require to suit their unique needs,[344] it appears that the autonomy argument may constitute a legitimate government purpose. Consequently, it can be deduced that the government's purpose behind the introduction of the model in its current form was to ensure the autonomy of the partners. The question is, however, whether this legitimate purpose is advanced by distinguishing between a spouse married out of community of property with the accrual system and a registered domestic partner in the position of Y.

Although the autonomy consideration is a powerful one, it is suggested that it cannot be rationally connected to the lack of protection provided by the Bill in its current form. In much the same way as the reason for protecting the joint estate as a cohesive unit was found to have fallen away in *Van der Merwe*,[345] it is submitted that the justification for distinguishing between the legal protection to which married couples and registered domestic partnerships are entitled must

341 SALRC 2006: 320 (emphasis in original).
342 See clause 7(1) of the Bill.
343 SALRC 2006: 332.
344 See in general Goldblatt 2003: 613 – 615; SALRC 2006: 19 – 35.
345 See par [51].

also fall away with the enactment of the *Domestic Partnerships [Act]*. There can surely be no legitimate government purpose behind denying protection to a person who has entered into a relationship which, in the same way as marriage does, involves both the undertaking of a formal public commitment before the State as well as an alteration of legal status.[346]

In consequence it is submitted that the only way in which the autonomy argument could be rationally connected to the provision in question would be if the [Act] instead provided an "opt-out" provision (similar to that which applies to spouses) by which protection similar to that conferred by section 5(1) of Act 88 of 1984 applies unless the parties have expressly agreed that it does not, or, in the alternative, if the [Act] granted the Courts the competency to extend matrimonial property law to registered domestic partnerships in circumstances similar to those in which Y finds herself.

In the alternative, if a Court were somehow to conclude that section 9(1) is not infringed, the second leg of the *Harksen* test would come into operation, in terms of which it would have to be determined whether the law discriminates unfairly against registered domestic partners.[347] To this end, it must first be established whether the differentiation takes place on a listed ground, and, more particularly, whether the ground of "marital status" is at issue. Applying the rationale in *Van der Merwe* shows that there is no clear-cut answer to this question. This is because the position in which X and Y find themselves falls somewhere between the distinction drawn by Moseneke DCJ between jurisprudence involving (i) married versus unmarried couples (such as in *Volks NO v Robinson*)[348] and (ii) a distinction between the rights and obligations occasioned by the "different

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346 Although listed within the context of a need-based claim (maintenance from a deceased estate) and as part of the test for unfair discrimination, the fact that many of the distinctions between marriage and unmarried cohabitants mentioned by Skweyiya J in *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at par [55] and [56] would fall away once the Bill is enacted could be mentioned in further support of this contention.

347 See par (b) of the test formulated in *Harksen v Lane NO* 1998 (1) SA 300 (CC) at par [53].

348 2005 (5) BCLR 446 (CC).

property regimes *within* marriage" (such as in *Van der Merwe*).[349] X and Y's case therefore constitutes a "mixture" of these two categories: They are neither married nor "unmarried" in the sense of a life partnership in the narrow sense (as in *Volks*), yet their case indeed involves a distinction between the various property regimes encountered *within* domestic partnerships and marriage. Nevertheless, where Y's situation differs from the situation in *Van der Merwe* is that in her case the differentiation indeed involves a benefit "that attaches to married people but is denied to unmarried people."[350] Consequently, it can be concluded that the differentiation takes place on "marital status" and is therefore presumed to be unfair in accordance with section 9(5) of the *Constitution*. According to the *Harksen* case it follows, then, to determine the impact of the discrimination on a person in the position of Y.[351] In this regard, relying on the majority judgment in *Volks NO v Robinson*,[352] "one must consider the differences between the two groups."[353] Although the latter case had involved a need-based claim and therefore differs from the matter *in casu*, it was decided chiefly on the basis of the differences between marriage and unmarried life partnerships, most of which would fall away with the enactment of the *Domestic Partnerships [Act]*. For example, registered domestic partners would not be free to withdraw from their relationships at will, and a number of significant legal duties (such as a reciprocal duty of support) would attach to such partnerships by operation of law. Furthermore, as was suggested earlier in this study, a solid case could be presented in favour of arguing that a *consortium omnis vitae* that is in all respects identical to that created by marriage exists between registered domestic partners.[354] More particularly, as far as "the nature of the provision or power and the purpose sought to be achieved by it" is concerned, it was seen above that the autonomy argument simply cannot be regarded as "achieving a worthy and important societal goal" by the legislative scheme not providing similar *ex lege* or

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349 Par [46] (emphasis added).

350 *Per* Moseneke DCJ at par [45].

351 See paragraph b(ii) of the test as formulated in *Harksen* at par [53].

352 2005 (5) BCLR 446 (CC).

353 *Per* Skweyiya J at par [51].

354 See 6 above.

alternative protection to registered domestic partners who wish to make the accrual system applicable to their marriage as it does for spouses who wish to do the same.[355]

Finally, as far as the justification analysis on the basis of the "choice argument" is concerned, one need look no further than Moseneke DCJ's comments in *Van der Merwe*. In this regard it has already been seen that such a "waiver defence" argument will not hold water as the constitutional validity of an Act is independent of any choice exercised by the parties who are affected thereby.[356] As a result, the fact that X and Y chose to enter into a registered partnership agreement in order to deviate from the default property regime will not change the fact that the *Domestic Partnerships [Act]* fails a person in the position of Y and is therefore unconstitutional.

In conclusion, it is submitted that the hypothetical scenario sketched above may have important implications for the application of the preliminary conclusions concerning the "contextualised choice model" to registered domestic partnerships.[357] As a point of departure it can be assumed that the fact that the partners have entered into such a partnership reflects a *positive choice to enter into the same*. By implication, this encompasses a positive choice on their behalf *not to marry*, which, *strictu sensu*, would on the conclusions thus far reached in this study "be a highly persuasive factor in deciding to exclude the possibility of applying matrimonial (property) law to solve the dispute." The scenario explored above however points to the fact that the application of the model needs to be revised, particularly within the context of registered domestic partnerships. Indeed, the preceding analysis cautions that it may be unconstitutional to use this argument in support of such a contention. It is therefore submitted that even if legislation that specifically regulates domestic partnerships were to be enacted,

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355 Quotes *per* Ackermann J in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [41].

356 Par [61].

357 See the quotes taken from Chapter 5 above.

the “contextualised choice model” could only be applied in order to exclude the application of matrimonial property law to property disputes *if that legislation provided an effective and well-defined alternative to matrimonial property law*. The *Domestic Partnerships Bill,* 2008 clearly does not achieve this goal and must therefore be amended in order to avoid the risk of unconstitutionality.

It is of the utmost importance to note that the aim is therefore not *to replicate* matrimonial property law in registered domestic partnerships legislation. Doing so would not only be pointless, but would run counter to the policy considerations identified in the introductory paragraphs to this discussion. Instead, what is suggested is that the means be provided by which the protection provided by matrimonial property law should be available by way of a Court application *where this is necessary*. Such protection is therefore not enforced onto registered domestic partnerships, but is simply available if needed.

In the result, it is submitted that the most equitable outcome will be achieved by an amendment that takes the golden midway between outright autonomy and sufficient legal protection. The solution must therefore be framed in such a way as to be able to accommodate the individual requirements of the partners and the principles of the law of obligations, and yet be robust enough in order to protect a vulnerable partner *if necessary*. In order to achieve this, it is submitted that the Courts be given the competency, on application by either or both domestic partners, and provided that there are sound reasons for doing so, to extend any principle of matrimonial property law in order to give effect to the original intention expressed by the parties in their registered partnership agreement. Applying this amendment to the scenario between X and Y above, Y would be able to approach the High Court for an order extending the application of section 5(1) of the *Matrimonial Property Act*[358] to her situation provided that this accorded with the original intention expressed in her agreement with X. As it is clear that X and Y intended the accrual system to apply to their partnership, the extension sought

[358] Act 88 of 1984.

would give proper effect to their intention as expressed in their original agreement without falling foul of the principle of *pacta sunt servanda* or of the rule that a Court cannot make a contract for the parties.

A final remark that must be made is that, while the example above dealt with a situation involving the termination of a registered domestic partnership, it is of the utmost importance to note that an extension of matrimonial property law may also be required *during the existence* of the partnership. The need for such a power will probably be particularly necessary in the case of domestic partnerships that are entered into with community of property, where there literally are "two captains" of the same ship.[359] For example, assume that C and D entered into a registered domestic partnership with community of property but that their registered partnership agreement neglected—through a *bona fide* oversight or fault of their attorney—to regulate the liability for delicts committed by one of them. In such an instance it is submitted that the same rationale as that explained in the case of X and Y above may be used to justify an application to Court for an extension of the principles contained in section 19 of the *Matrimonial Property Act* (which as in the case of section 5 of that Act applies by default to married couples)[360] so as to compel the "guilty" partner to include a provision in the registered domestic partnership entitling the "innocent" partner to a claim for adjustment at the termination of the partnership.[361]

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359 Sonnekus (updated by Clark) 2008: B21.

360 Section 19 ("[l]iability for delicts committed by spouses") reads as follows: "When a spouse is liable for the payment of damages, including damages for non-patrimonial loss, by reason of a delict committed by him or when a contribution is recoverable from a spouse under the *Apportionment of Damages Act*, 1956 (Act 34 of 1956), such damages or contribution and any costs awarded against him are recoverable from the separate property, if any, of that spouse, and only in so far as he has no separate property, from the joint estate: Provided that in so far as such damages, contribution or costs have been recovered from the joint estate, an adjustment shall, upon the division of the joint estate, be effected in favour of the other spouse or his estate, as the case may be" (italics added).

361 With reference to this specific example, an interesting question arises as to the applicability of clause 21(1) of the 2008 Bill which is included under Part III of the Bill that deals with the termination of a registered domestic partnership and states that "[f]or the purposes of claiming damages in a delictual claim, partners in a registered domestic partnership are deemed to be spouses in a legally valid marriage." The question that arises is whether the "innocent" partner may, relying on this clause, allege that section 19 of the *Matrimonial Property Act* deems her to

The proposed amendment is included below.

7.3.4.3 Conclusion

It is imperative that the registered domestic partnership should not only provide an *alternative* to marriage, but that such an alternative must be a *realistic* option for prospective partners. The preceding discussion shows that although the 2008 Bill provides greater accessibility to the general public, it in fact provides less protection to them than its 2003 predecessor, thereby creating serious doubts as to its efficacy. Therefore while the 2008 Bill succeeds on the autonomy and plurality counts, it may be criticised for the risk to which it exposes domestic partners (not to mention outsiders) who elect to deviate from the default regime.

It is submitted that, in order to prevent the abuse of this state of affairs, the High Court should be endowed with a broad power—on application—to alter or intervene with the property regime entered into by the parties. Such a power must make specific provision[362] for instances where mutual co-operation

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be in the same position as a spouse married in community of property at any rate, thereby entitling her to an adjustment without the need for seeking a specific extension of matrimonial property law. Two major problems present themselves in this regard. First, the innocent spouse would not be "claiming damages" against the other spouse, but would simply be requesting an adjustment or amendment to the registered partnership agreement. (If anything, damages are being claimed *from* her half of the joint estate and not *by* her.) Second, in the absence of an express legislative power granting the Courts the power to make such an order, it is doubtful whether the Courts could, on the basis of clause 21(1) in its current form, interfere with the contract that exists between C and D. Nevertheless, even if the two problems just identified could somehow be overcome, it is still submitted that the amendment proposed in the main text would be more successful, for the simple reason that not all extensions sought by the registered domestic partners will necessarily involve delictual claims, and that the need for the extension sought will not necessarily only arise at the termination of the partnership.

362 It is interesting to note that neither the 2003 *Discussion Paper* nor the 2006 *Report* makes provision for this possibility. In the case of a registered domestic partnership agreement that is binding on outsiders, the interests of such persons demand that a formal procedure involving an application to Court will be required. These formal requirements would obviously not apply if the agreement was only binding *inter partes.* The question can rightly be asked why an application to Court is required for a *change* to the parties' property regime while, as seen below, it is possible under certain circumstances for the parties to terminate their partnership by mutual agreement without having to approach a Court to do so. It is submitted that the answer

between the partners is lacking or where the formalities prescribed by clause 7 have not been complied with,[363] and must also be flexible enough to enable it to be exercised regardless of the peculiarities of any property regime selected or designed by the parties. In addition, the Court should be empowered to suspend the powers of a registered domestic partner, to order the immediate division of joint property or property subject to a deferred community of property (such as the accrual system) and to replace the partners' property regime with one that the Court deems fit. This proposal is contained in subsections (2) to (6) of the insertion suggested below.

It is also submitted that in order to provide a counterbalance for the lack of regulation in terms of the proprietary consequences of registered domestic partnerships—particularly those that elect to deviate from the default property regime—the Courts should, in appropriate circumstances, be given the discretion to extend any principle of matrimonial property law to a registered domestic partnership. This power is reflected in subsections (7) and (8) of the proposal that follows.

In the final instance (as pointed out in 7.2.2.2.2 (b) above) it is also vital for a Court to be mindful of the impact which the exercising of these broad powers may have on interested parties. In order to ensure that this takes place subsections (9) and (10) below enjoin the Courts to consider the interests of other interested parties and to make any order it deems fit in order to protect the same.

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to this question can be found in the fact that in the former instance a replacement notarial deed is required (necessitating an order of a competent Court) while in the latter instance the existing notarial deed is simply being endorsed with a termination certificate. In order to secure the protection of interested parties (such as creditors of the partners) in the case of such a termination it is submitted that the parties should be required to give adequate notice to the registrar of deeds as well as to all interested parties and that the notary public responsible for the termination procedure should ensure that the termination agreement includes a provision that preserves the rights of all interested parties.

363 Specific legislative provisions to this effect are unnecessary as this can be achieved by virtue of the provisions that allow for amendments to the property regime.

(For the sake of avoiding later confusion, this insertion is listed as Clause 8A.)

8A General powers of the Court

(1) Notwithstanding the provisions of section 7 the court may, subject to such conditions as it may deem desirable, authorize postnuptial execution of a notarial contract having the effect of a domestic partnership agreement, if the terms thereof were agreed upon between the intended partners before the registration of the registered partnership, and may order the registration, within a specified period, of any contract so executed.

(2) Notwithstanding that the registered domestic partnership agreement purports to exclude the jurisdiction of the Court to make any order, a Court may, on application by both registered domestic partners, if it is satisfied that—

(a) there are sound reasons for doing so;

(b) sufficient notice has been given to all interested parties; and

(c) no other person will be prejudiced thereby;

order that the property regime as stipulated in the registered partnership agreement shall no longer apply to that registered domestic partnership, and authorise the partners to enter into a registered partnership agreement to regulate the financial matters of their partnership on conditions which the Court deems fit;

(3) The provisions of section 7(3) and (5) shall *mutatis mutandis* apply in respect of an agreement entered into under subsection (2), and the provisions of section 89(2) and (3) as well as section 97 of the *Deeds Registries Act* of 1937 shall apply in respect of such an agreement.

(4) Notwithstanding that the registered domestic partnership agreement purports to exclude the jurisdiction of the Court to make any order, a Court may, on application by a registered domestic partner, if it is satisfied that—

(a) the interests of that partner are being or will probably be seriously prejudiced by the conduct or proposed conduct of the other registered domestic partner;

(b) that notice has been given to the registrar of deeds concerned in circumstances in which a registered domestic partnership agreement that complies with section 7(3) is in existence; and

(c) that no other person will be prejudiced thereby;

order the immediate division of any joint property or accrual of the estate of a registered domestic partnership[364] in accordance with the terms of the property regime as stipulated in the registered partnership agreement, or on such other basis as the Court deems just;

(5)

(a) A Court making an order under subsection (4) may order that the property regime governing the registered domestic partnership be replaced by another property regime, as the Court may deem just.

(b) Subject to subsection (5)(c), the provisions of section 7(3) and (5) of this Act shall *mutatis mutandis* apply to a registered domestic partnership agreement entered into in consequence of an order granted under subsection (5)(a).

(c) Where an order is granted under subsection 5(a) in circumstances where a registered domestic partnership agreement that complies with section 7(3) of this Act is in existence, the registrar shall send a copy thereof to the registrar of deeds concerned who shall cause an appropriate reference to the new property system to be made on the registry duplicate of the registered domestic partnership agreement concerned and on every copy thereof tendered to him for endorsement.[365]

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364 It is suggested that a definition of "accrual of the estate of a registered partnership" should be inserted into clause 1 of the Bill that reads: "means the amount by which the net value of that estate at the termination of the registered partnership (or order for division under section 8A) exceeds the net value of the estate at the commencement of that registered partnership."

365 Section 8(3) of the *Matrimonial Property Act* 88 of 1984.

(d) A registrar of deeds who receives notice of a new matrimonial property system in terms of subsection (5)(c), shall notify all other registrars of deeds accordingly and furnish each of them with a copy of the court order, and every registrar of deeds so notified shall cause an appropriate reference to the new property system to be endorsed on the copy, if any, of the registered domestic partnership agreement concerned filed in his registry and on every copy thereof tendered to him for endorsement.[366]

(6) Notwithstanding that the registered domestic partnership agreement purports to exclude the jurisdiction of the Court to make any order, a Court may, on application by a registered domestic partner, suspend for a definite or indefinite period the powers granted to either of the partners under a registered partnership agreement or under any law if it is of the opinion that doing so is necessary to protect the interests of either or both registered domestic partners;

(7) Notwithstanding that the registered domestic partnership agreement purports to exclude the jurisdiction of the Court to make any order, a Court may, on application by both registered domestic partners at any time during the existence of a registered domestic partnership, and provided that

(a) there are sound reasons for doing so;

(b) sufficient notice has been given to all interested parties; and

(c) no other person will be prejudiced thereby;

grant the extension of any principle of matrimonial property law which the Court deems necessary in order to give proper effect to the property regime which the applicants intended to apply to the registered domestic partnership at the time it was registered or since it was amended in accordance with this section.

(8) In determining whether there are sound reasons for the extension sought under subsection 7 the Court must have regard to all the

366 Section 8(4) of the *Matrimonial Property Act* 88 of 1984.

circumstances of the registered domestic partnership including, but not limited to:

(a) The terms of a registered domestic partnership agreement, if any;

(b) The extent to which the partners deliberately intended not to apply the principles of matrimonial property law to their domestic partnership;[367]

(c) The interests of the applicant registered domestic partners;

(d) The interests of any child of the domestic partnership.

(9) A Court considering an application under this section must have regard to the interests of a *bona fide* purchaser of, or other person with an interest or vested right in, the property concerned.

(10) A Court considering an application under this section may make any order proper for the protection of the rights of interested parties.

The insertion of clause 8A in this form will necessitate the insertion of a new definition into clause 1 of the Bill, to wit: "'Deeds Registries Act' means the *Deeds Registries Act* 47 of 1937."

7.4 Conclusion

Throughout the preceding discussion a number of modifications were suggested to the Bill in view of the policy considerations identified above. While many of these suggestions may create the impression of rigidity and excessive formality as far as the registered domestic partnership agreement is concerned, it is important to note that prospective partners are free to choose not to comply with the same, with the result that the normal principles of the law of contract regulate their agreement and its variation, and that outsiders are not bound thereto. The aim of the amendments suggested above is therefore to ensure that better

[367] It is submitted that it will be acceptable—in view of the "contextualised choice model" to take this choice into account as merely one of the factors.

protection is not necessarily enforced on the parties or on outsiders, but rather that it is available if required.

8. THE LEGAL CONSEQUENCES OF REGISTERED DOMESTIC PARTNERSHIPS

Only three comments need be made in this regard. The first is that, as seen in 6 above, it is clear that the act of registering a domestic partnership creates a *consortium omnis vitae* that is identical to that created by marriage (or civil partnership) between such partners. In order to obviate any uncertainty in this regard, it is submitted that this consequence should be expressly listed as a legal consequence of a registered domestic partnership.

A second observation is that the Bill is silent as far as the liability of registered domestic partners for household necessaries is concerned. While the 2003 *Discussion Paper* made specific provision for the regulation of this matter,[368] the 2008 Bill contains only a definition of "household goods" in section 1, with no reference whatsoever being made to necessaries of the joint household or as to the liability of the parties in respect of the same.

In this respect it is useful, once again, to compare the registered domestic partnership with marriage. Here it becomes evident that both of these institutions impose *ex lege* support obligations and, as seen above, create a *consortium omnis vitae* between the parties thereto. This implies that the requirements for such a duty to exist in the case of a marriage, namely a valid marriage and a joint

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[368] See clause 8(2) – (4) in Annexure D:

"(2) The registered partners are jointly liable for debts incurred for household expenses.

(3) Each registered partner may enforce the joint responsibility established in this section against the other registered partner through legal proceedings in a court of law.

(4) A party to whom debts are owed by either or both registered partners relating to household expenses incurred may enforce the joint liability against either or both partners through legal proceedings in a court of law."

household,[369] can easily be transplanted into the registered domestic partnership setting. On this premise the fact that the law of marriage holds that liability regarding household necessaries is not dependent on the property regime selected by the spouses[370] implies that the same principle should apply in the case of a registered domestic partnership. In consequence, the conclusion can be reached that the Bill should reflect the fact that registered domestic partners should, as in the case of their married counterparts, be jointly and severally liable to third parties for debts incurred in respect of household necessaries.

Although it is true that the obligation in respect of household necessaries in the case of marriage at times coincides with the reciprocal duty of support, such overlapping is not always precise.[371] Many authors nevertheless elect to include the discussion of this obligation under the concept "reciprocal duty of support" due to the close relationship between these two concepts.[372] In deciding where to include this obligation in the *Domestic Partnerships Bill* it is therefore submitted that it can be grouped under the provisions of the Bill that will (if amended as suggested above) deal with the duty of support and *consortium*.

In the light of the preceding comments it is submitted that clause 9 should be expanded to read as follows:

9. Duty of support and *consortium omnis vitae*

(1) Registered domestic partners owe each other a duty of support in accordance with their respective means and financial needs.

(2) A registered domestic partnership creates a consortium omnis vitae between the domestic partners that is, subject to this Act, in all respects comparable to that created by marriage.

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369 *Du Preez v Cohen Bros* 1904 TS 157 at 160; *Excell v Douglas* 1924 CPD 472 at 476, 477.

370 See sections 17(5) and 23(5) of the *Matrimonial Property Act* 88 of 1984.

371 Cronjé and Heaton 2004: 54; Sinclair 1996: 456.

372 Hahlo 1985: 137; Cronjé and Heaton 2004: 54; Sinclair 1996: 445 *et seq*.

(3) Regardless of the property regime that applies to a registered domestic partnership, both registered domestic partners are jointly and severally liable to third parties for all debts incurred by either of them in respect of necessaries for their joint household.

Finally, the need for an amendment to clause 10 ("[l]imitation on disposal of joint property") of the Bill has already been explained in 7.2.2.2.2 above.

9. THE TERMINATION OF THE REGISTERED DOMESTIC PARTNERSHIP AND MATTERS RELATED THERETO

9.1 Introduction

While the act of entering into a registered domestic partnership occasions an alteration of status and a number of important patrimonial consequences, the dissolution of such a partnership in principle terminates many of the same. The domestic partnership rubric should consequently require a considerable amount of energy to be devoted to this topic. In the paragraphs that follow the efficacy of the 2008 Bill will be assessed in compliance with this mandate.

9.2 Circumstances leading to termination

According to clause 12(1) of the 2008 Bill, a registered domestic partnership can be terminated in three ways, namely by the death of either or both partners, by mutual agreement or by Court order.

9.2.1 Termination by mutual agreement

In its 2003 *Discussion Paper* the South African Law Reform Commission provided for registered domestic partners to terminate their partnership by

entering into a termination agreement before a notary public that complied with a number of formal requirements.[373] If the partners elected to terminate their partnership by mutual agreement, they had no option but to enter into such an agreement.[374] The agreement was required to be filed with the registration officer in the area in which the partners were ordinarily resident.[375]

In an attempt to align the termination procedure with the less complicated registration procedure proposed in its 2006 *Report*, the Commission decided to reduce the requirements for termination to two major ones, namely (i) that "the termination of the partnership by agreement must be done voluntarily and in writing before a registration officer," and that such an officer "must issue a termination certificate and ensure publication of the termination."[376] This informal option would however only be available where no minor children were involved, as the Commission felt that it would be in the best interests of such children to require the partnership that existed between their parents to be terminated by an order of Court.[377] These proposals were for the most part included in clauses 12 through 14 of the 2008 Bill.[378] A number of important aspects of the termination

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373 According to clause 30(2) "The mutual agreement must—
(a) state that it is entered into voluntarily by both registered partners;
(b) declare that the registered partners have come to a mutual agreement to terminate the partnership;
(c) set out the following information:
(i) any conditions of the termination;
(ii) the division of accrued or joint property;
(iii) arrangements regarding the family home;
(iv) settlement of pension and other similar claims; and
(d) …"

374 Clause 30(1).

375 Clause 30(2)(d).

376 SALRC 2006: 344.

377 SALRC 2006: 344.

378 These clauses state the following:
"**12. Termination of registered domestic partnership**
(1) A registered domestic partnership terminates upon—
(a) the death of one or both registered domestic partners;
(b) agreement as contemplated in section l4; or
(c) a court order as contemplated in section 15.
(2) A death certificate, or a termination certificate issued in terms of this Act, or a termination order made by the court in terms of this Act, is *prima facie* proof that such a registered domestic partnership has ended.

procedure as it appears in the 2008 Bill will be discussed in the paragraphs that follow.

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13. Registration of a termination agreement

(1) A registration officer must conduct the termination procedure on the official premises used for that purpose and in the manner provided for in this section.

(2) Registered domestic partners who intend to terminate their domestic partnership must present the registration officer with a certified copy of the registration certificate as proof that a registered domestic partnership exists between them.

(3) Registered domestic partners must individually and in writing declare their desire to terminate the registered domestic partnership by signing the prescribed documents in the presence of a registration officer.

(4) The registration officer must sign the prescribed documents to certify that the declaration referred to in subsection (3) was made voluntarily and in his or her presence.

(5) The registration officer must issue the registered domestic partners with a certificate stating that their domestic partnership has been terminated and make a notification of the existence of a termination agreement, where applicable, on the certificate.

(6) Each registration officer must keep a register of all registered domestic partnerships terminated by him or her and indicate the existence of a termination agreement, where applicable, in the register.

(7) The registration officer must transmit the register contemplated in subsection (6) and the documents concerned to the officer in the public service with the delegated responsibility for the population register in his or her district of responsibility.

(8) Upon receipt of the register contemplated in subsection (6) the officer with the delegated responsibility for the population register as contemplated in subsection (7) must cause the particulars of the terminated domestic partnership to be included in the population register in accordance with the provisions of section *8(e)* of the Identification Act.

14. Termination agreement

(1) Registered domestic partners who want to terminate their registered domestic partnership may conclude a termination agreement to regulate the financial consequences of the termination of their registered domestic partnership.

(2) A termination agreement must be in writing, signed by both registered domestic partners and must declare that it is entered into voluntarily by both partners.

(3) A termination agreement may provide for-

(a) the division of joint and separate property;

(b) the payment of maintenance to the other registered domestic partner;

(c) arrangements regarding the family home; and

(d) any other matter relevant to the financial consequences of the termination of the registered domestic partnership."

9.2.1.1 Discretion to enter into a "termination agreement"

As was pointed out above, the version of the Bill that appeared in the *Discussion Paper* of 2003 insisted upon the entering into of a written mutual agreement whenever the parties opted to terminate the agreement without going to Court. On the other hand, the 2008 Bill allows the parties to enter into such an agreement if they wish to do so.[379] In the discussion that follows a number of reasons will be set out as to why this approach cannot be supported as there are good reasons for insisting upon the conclusion of a termination agreement under certain circumstances where a registered partnership is terminated out of Court. What this state of affairs also highlights is that, in its current form, the heading to clause 13 "[r]egistration of a termination agreement" is incorrect as not only is the existence of such an agreement not an absolute requirement, but the clause in question also makes no mention of such an agreement being "registered", but only refers to the need for the "existence" and the "particulars" thereof to be included in the applicable registers.[380] It is submitted that the heading should therefore be amended to read "Termination procedure" instead.

9.2.1.2 The formalities pertaining to the termination of a registered domestic partnership

This aspect of the procedure requires urgent attention, particularly in view of the amendments proposed earlier in this Chapter in respect of the registered partnership agreement. In order to explain this contention, it is necessary to bear in mind that it was suggested in 7 above that notarial attestation as well as registration in the deeds registry of all registered partnership agreements would be non-negotiable requisites in order for such agreements to be binding on outsiders. Many reasons were proffered in support of these requirements, including the need for better protection of the parties themselves and for all other

379 See the use of the words "where applicable" in clause 13(5) and (6) and the word "may" in clause 14(1).

380 See note 378 above.

interested parties. In addition, it was also pointed out that it would be ludicrous—as would indeed be the case if the Bill were not amended as suggested—for the law to permit registered domestic partners essentially to achieve the same results by virtue of their agreement as the parties to a marriage could in an antenuptial contract without subjecting both of these agreements to similar formal requirements in order to do so.

It is submitted that many of the same arguments referred to above explain why it is crucial for the principles pertaining to the termination of a registered domestic partnership to be revisited. The first factor to consider is that partners who opt for the mutual agreement termination procedure will not have the benefit of being protected by the High Court as spouses to a divorce would be. This would *inter alia* entail that no judicial scrutiny of a termination agreement would take place leading to the obvious risk that one of the parties (usually the "weaker" or more vulnerable one) could contract to his or her detriment. While a measure of autonomy (and risk) may be condoned where no duly registered domestic partnership agreement is in existence, it is submitted that the same cannot hold true in the event of a formal registered contract. (In the former context an aggrieved party would still be able to rely on the normal principles of the law of contract to have the contract or any part thereof invalidated on the grounds of public policy, *et cetera*.)[381]

Furthermore, it appears as if the doubt that persisted regarding the publicity requirement for the registered partnership agreement has been carried over into the prospective termination procedure, as neither clauses 13 nor 14 of the Bill make any mention of a central register for such agreements. Indeed, as was pointed out in the preceding paragraph, all that the Bill requires is for the registration officer to indicate the "existence" of such an agreement in his or her

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[381] See for example *Baart v Malan* 1990 (2) SA 862 (E) where a provision in a settlement agreement (which, incidentally, was incorporated into the divorce decree) in terms of which the applicant was "deprive[d] of any benefit to her arising from her professional employment" (at 869 (E) – (F)) was—on application two years later—deleted on the grounds that it violated public policy.

register[382] and for the "particulars" of the terminated partnership to be included in the population register.[383] The Bill also makes no reference whatsoever as to what the effect of termination will be on any registered partnership agreement that may have been entered into at the commencement of the partnership. A further motivation in support of procedural reform is that it is crucial for the termination procedure to be aligned with the requirements proposed for the registered domestic partnership agreement above, as the latter amendments would be of little value if the termination procedure was not synchronised with them. This would require, *inter alia*, that where a registered domestic partnership agreement binds outsiders due to it being registered in the deeds registry, that partners must give timeous notice to all interested parties as well as to the registrar of deeds of the imminent termination of their agreement.[384] Finally, over and above the requirement of adequate notice, it is also crucial for the termination procedure to protect the interests of creditors and other interested parties. To this end, it is strongly recommended that the termination agreement must be required to contain a provision that preserves the rights of the parties' creditors. As a result it is suggested that:

- In the absence of judicial scrutiny, the requirement of notarial attestation and adequate notice is essential in order to protect the interests of the parties involved as well as interested parties;
- As was suggested in the case of the commencement of a registered domestic partnership, the requirement of witnesses for the termination procedure should also be reintroduced;
- The registration officer must specifically be required to file all termination agreements; and
- Where the partners entered into a registered partnership agreement which was registered in a deeds registry, the registration officer must be required to transmit a copy of the termination certificate to the deeds registry in

382 Clause 13(5) and (6) as set out in note 378 above.

383 Clause 13(8) as set out in note 378 above.

384 This would presumably require notice in the *Government Gazette* and in local newspapers.

order for it to be endorsed on that registered domestic partnership agreement.

(As a matter purely of convenience, it would be recommended that clauses 13 and 14 of the Bill be switched around, as the procedure for termination should logically follow the stipulations pertaining to the compulsory agreement. In order to avoid confusion the original order is however retained.)

The embodiment of the amendments suggested above can be illustrated as follows (all amendments in italics):

12. Termination of registered domestic partnership

(1) A registered domestic partnership terminates upon-

(a) the death of one or both registered domestic partners;

(b) agreement as contemplated in *sections 13 and 14*;[385] or

(c) a court order as contemplated in section 15.

(2) A death certificate, or a termination certificate issued in terms of this Act, or a termination order made by the court in terms of this Act, is *prima facie* proof that such a registered domestic partnership has ended.

13. ~~Registration of a termination agreement~~*Termination procedure*

(1) A registration officer may not commence with the termination procedure unless he is satisfied that the requirements of section 14(2) have been complied with.

(2) A registration officer must conduct the termination procedure on the official premises used for that purpose and in the manner provided for in this section.

(3) Registered domestic partners who intend to terminate their domestic partnership must present the registration officer with a certified copy of

[385] Although not discussed above, it is clear that this clause must be amended to refer to both of these sections.

the registration certificate as proof that a registered domestic partnership exists between them.

(4) Registered domestic partners must individually and in writing declare their desire to terminate the registered domestic partnership by signing the prescribed documents in the presence of a registration officer *and two competent witnesses*.

(5) The registration officer *and the two competent witnesses* must sign the prescribed documents to certify that the declaration referred to in subsection (4) was made voluntarily and in his or her presence.

(6) The registration officer must issue the registered domestic partners with a certificate stating that their domestic partnership has been terminated and make a notification of the existence of the termination agreement on the certificate.

(7) Each registration officer must keep a register of all registered domestic partnerships terminated by him or her and indicate the existence of the termination agreement in the register.

(8) *Each registration officer must file all termination agreements that regulate the termination of any registered domestic partnership that is terminated by him or her.*

(9) The registration officer must transmit the register contemplated in subsection (7) and the documents concerned to the officer in the public service with the delegated responsibility for the population register in his or her district of responsibility.

(10) Upon receipt of the register contemplated in subsection (7) the officer with the delegated responsibility for the population register as contemplated in subsection *(9)* must cause the particulars of the terminated domestic partnership to be included in the population register in accordance with the provisions of section *8(e)* of the Identification Act.[386]

(11) *Where, at any time during the existence of their domestic partnership, the registered domestic partners entered into a registered partnership*

[386] Section 38(e) of this Act should be amended in the manner suggested in 12.2.3 below.

agreement that was registered in the deeds registry as prescribed in section 7, the registration officer must transmit a certified copy of the termination certificate to the registrar of deeds concerned in order for it to be endorsed on the registry duplicate of the domestic partnership agreement and on every copy thereof tendered to him or her for endorsement.

(12) Upon receipt of the termination certificate contemplated in subsection (10) the registrar of deeds must cause that certificate to be endorsed on the registered partnership agreement.

(13) A registrar of deeds who receives a termination certificate contemplated in subsection (11), shall notify all other registrars of deeds accordingly and furnish each of them with a copy of the certificate, and every registrar of deeds so notified shall cause an appropriate reference to the termination certificate to be endorsed on the copy, if any, of the domestic partnership agreement concerned filed in his or her registry and on every copy thereof tendered to him or her for endorsement.[387]

14. Termination agreement

(1) Registered domestic partners who wish to terminate their registered domestic partnership *in accordance with section 12(1)(b)* may conclude a termination agreement to regulate the financial consequences of the termination of their registered domestic partnership: *Provided that where the registered domestic partners entered into a registered domestic partnership agreement that was registered in a deeds registry at any time during the existence of their partnership, the conclusion of an agreement that complies with the requirements set out in subsections (2) and (3) is an absolute requirement.*

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[387] Section 8(4) of the *Matrimonial Property Act* 88 of 1984.

(2) A termination agreement contemplated in the proviso to subsection (1) must—

(a) be in writing;

(b) declare that it is entered into voluntarily by both partners;

(c) be signed by both registered domestic partners;

(d) be attested by a notary public;

(e) contain a provision preserving the rights of interested parties;

(f) be handed in to the registration officer responsible for conducting the termination procedure in accordance with section 13 of this Act before or on the date of termination; and

(g) be filed by the registration officer contemplated in paragraph (e) above.

(3) The termination agreement contemplated in subsection (2) may not be executed by the notary public concerned unless sufficient notice has been given to the registrar of deeds concerned and to all interested parties.

(4) A termination agreement may provide for-

(a) the division of joint and separate property;

(b) the payment of maintenance to the other registered domestic partner;

(c) arrangements regarding the family home; and

(d) any other matter relevant to the financial consequences of the termination of the registered domestic partnership.

9.2.1.3 Responsibility to notify interested parties of termination

It is submitted that clause 24 of the Bill should in principle be retained, but that the reference to "the surviving partner" in subsection (2) thereof should be deleted:

> (1) When a registered domestic partnership is terminated, both registered partners are liable to give written notice of the termination to interested parties.
>
> (2) When one or both registered domestic partners die, ~~the surviving registered partner or~~ the executor of the estate of either registered domestic partner as the case may be, is liable to give written notice of the termination of the registered domestic partnership to interested parties.

9.2.1.4 Conclusion

While the 2008 Bill's move towards a more informal termination procedure is commendable, it is submitted, as was the case with the registered partnership agreement, that certain formalities simply cannot be dispensed with, particularly where outsiders are affected by the process. The amendments proposed above are therefore vital for ensuring that the termination procedure for a registered domestic partnership functions smoothly and provides better protection for all involved. For those who may argue that the procedure is overly formalistic, it must be remembered that the formal requirements are not compulsory: As was also pointed out in the discussion of the registered partnership agreement, nothing will prevent the partners from entering into a termination agreement that does not comply with the formalities prescribed. The important consequence of such an agreement would however be that only the parties thereto would be bound thereby. As a result, it is submitted that the formal requirements proposed above would not intrude unreasonably on the goal of simplification.

9.2.1.5 A further benefit: The *Deeds Registries Act* 47 of 1937

A final—and highly relevant—beneficial "spin-off" of the amendments to the registration procedures proposed for both registered partnership and termination agreements presents itself in the context of the *Deeds Registries Act*.[388]

It will be recalled that in 4.2.3 it was mentioned that the calibration phase of the domestic partnership rubric requires the amendment of a significant number of Acts that currently provide for life partners in the narrow sense in order to be aligned with the "legislative substructure" that would be created by the enactment of the (modified) *Domestic Partnerships Bill*. Furthermore, it was also mentioned that this phase of the rubric is not restricted to aligning legislation that *already provides* for unmarried life partners with the *Domestic Partnerships Bill*, but that it may also involve the converse situation namely where it becomes clear that an Act that does not (yet) provide for persons other than married spouses also needs to provide for domestic partners. The *Deeds Registries Act* is one of these Acts.

While the precise scope of the amendments required in order for this Act to provide for domestic partnerships falls outside the scope of this study, it will suffice to state that this Act will in future have to provide for such partnerships. For example, it is to be expected that many registered domestic partners may wish to purchase or dispose of immovable property. Section 17(1) of the Act currently provides as follows:

> From the commencement of the *Deeds Registries Amendment Act,* 1987, immovable property, real rights in immovable property and notarial bonds which would upon transfer, cession or registration thereof *form part of a joint estate* shall be registered in the *name of the husband and the wife,* unless that transfer, cession or registration takes

388 47 of 1937.

> place only in the name of a partnership, and the *husband or wife* is involved therein only in the capacity of partner in that partnership.[389]

It is self-evident that this provision will have to be amended in order to provide for domestic partnerships. There are also other provisions that require similar amendment.[390]

A further important point to take note of is that it is possible for registered domestic partners to deviate from the default property regime by entering into a domestic partnership agreement.[391] Due to the principle that the autonomy of domestic partners must as far as possible be respected, it was seen above[392] that it is possible for the parties literally to construct a unique tailor-made property regime that will regulate their partnership. The nub of this issue is that, unlike in the case of marriage where there are certain crystallised, well-known and well-regulated property regimes, registered domestic partners can create their own property regimes that are simply not capable of such precise classification. Therefore, if an Act requires a spouse to disclose the matrimonial property regime that applies to his or marriage, it is a matter of relative ease to do so due to the precise parameters involved. This neat categorisation also allows an outsider to the relationship to attach immediate significance to the information so provided. On the other hand, disclosing the precise nature and ascertaining the immediate implications of the property regime that governs a registered domestic partnership will not always be as simple. Section 17(2) of the *Deeds Registries Act* provides the following example:

> Every deed executed or attested by a registrar, or attested by a notary public and required to be registered in a deeds registry, and made by or on behalf of or in favour of any person, shall-

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389 Emphasis added.

390 For example, see the remainder of section 17 and sections 14; 21; 25; 45; 45bis; 67; 92 as well as the definition of "owner" in section 102.

391 See clause 7 of the Bill.

392 See 7.2 above.

(a) state the full name *and marital status* of the person concerned;

(b) where the marriage concerned is governed by the law in force in the Republic or any part thereof, *state whether the marriage was contracted in or out of community of property* or whether the matrimonial property system is governed by customary law in terms of the *Recognition of Customary Marriages Act*, 1998;

(c) where the person concerned *is married in community of property*, state the full name of his spouse; and

(d) where the marriage concerned is governed by the law of any other country, state that the marriage is governed by the law of that country.[393]

Considering the point made above, the emphasised portions of this extract illustrate why it may be difficult for the specific information required by this section to be supplied and or ascertained. For this reason it is submitted that the requirement of registering a registered partnership agreement or termination agreement in a deeds registry would be a salutary development as it would contribute towards the accessibility of the information required in the extract above and as a result would facilitate the functioning of the *Deeds Registries Act* whenever registered domestic partnerships are at issue.

9.2.2 Termination by order of Court

9.2.2.1 Circumstances in which a Court order is required

According to clause 15(1) of the Bill registered domestic partners do not have the option of mutual termination available to them where they "have minor children from the registered domestic partnership." This requirement was originally inserted in the 2003 *Discussion Paper* "in order to protect vulnerable parties"[394] and is in line with the pre-eminence given to the best interests of the child as embodied in section 28 of the *Constitution,* 1996 and the *Children's Act* 38 of

393 Emphasis added.

394 SALRC 2003: 283.

2005 and is therefore to be supported. It will however be seen below that a Court application should not only be prescribed by the Bill in the event of children being involved.

9.2.2.2 The welfare of minor children

This aspect is regulated by clause 16 of the Bill which states the following:

(1) A court may not order the termination of a registered domestic partnership unless the court is satisfied that the provisions made or contemplated with regard to the welfare of any minor child or dependent child of the registered domestic partnership are in the best interests of such child.

(2) In order to determine that the circumstances set out in subsection (1) exist, the court may order that an investigation be instituted and for that purposes the provisions of section 4 of the Mediation in Certain Divorce Matters Act apply, with such changes as may be required by the context.

(3) Before making the termination order, the court may consider the report and recommendations referred to in section 4(1) of the Mediation in Certain Divorce Matters Act.

(4) In order to determine that the circumstances set out in subsection (1) exist, the court may order any person to appear before it and may order either or both the registered domestic partners to pay the costs of an investigation and appearance.

(5) A court granting an order to terminate a registered domestic partnership may, in regard to-

(a) the maintenance and education of a dependent child of the registered domestic partnership; or

(b) the custody or guardianship of, or access to, a minor child of the registered domestic partnership, make any order which it deems fit in the best interest of such minor child.

(6) Unless otherwise ordered by a court, the rights of and obligations towards children of a registered domestic partner under any other law are not affected by the termination of the registered domestic partnership.

(7) For the purposes of this section, the court may appoint a legal practitioner to represent a child at the proceedings and may order either or both the registered partners to pay the costs of the representation.

The clause is generally speaking correct in as far as it is aligned with the gist of the procedures that apply in respect of children at the termination of a marriage by either divorce (section 6 of the *Divorce Act* 70 of 1979) or annulment (section 39 of the *Children's Act* 38 of 2005).[395] A number of problematic aspects pertaining to this clause nevertheless need to be highlighted. These are:

(i) The use of the word "may" in subsection (3) leads to the conclusion that a Court has the discretion as to whether or not the Family Advocate's report and recommendations are to be considered. The granting of a discretion as to whether or not to take cognisance of such a report is not in keeping with the well-entrenched principle at divorce and annulment proceedings in terms of which a Court is *compelled* to *consider* but not necessarily to *follow* the report and recommendations.[396] It is submitted that the Bill should not deviate from this principle.

(ii) The references in subsection (5) to "custody" and "access" are incorrect as they do not reflect the terminology (respectively "care" and "contact") introduced by section 2 of the *Children's Act* in 2007.[397]

(iii) Although the Bill provides for an order for "custody", "guardianship" or "maintenance" to be granted, it does not provide for the rescission,

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395 Section 39 in effect re-enacts section 6 and 7 of the now-repealed *Children's Status Act* 82 of 1987—see Heaton 2007: 3-41.

396 Section 6(1)(b) of the *Divorce Act* 70 of 1979; Visser and Potgieter 1998: 165; Bosman and Van Zyl 1997: 4.2.

397 Section 2 of the Act reads as follows: "In addition to the meaning assigned to the terms 'custody' and 'access' in any law, and the common law, the terms 'custody' and 'access' in any law must be construed to also mean 'care' and 'contact' as defined in this Act."

suspension or variation of such an order.[398] This aspect requires urgent attention, and it is submitted that an equivalent of section 8(1)[399] of the *Divorce Act* 70 of 1979 should be inserted in order to remedy this defect.

(iv) The reference to "minor" throughout this clause (as well as clause 15 for that matter)[400] is redundant as a child is any person under the age of 18 years[401] and the age of majority has recently been reduced from 21 years to 18 years.[402] The erstwhile position in terms of which a person who was between the ages of 18 and 21 was still a minor no longer forms part of our law.

The problems identified above make it clear that clause 16 of the Bill ought to be amended. In determining the form which such amendment should take, it is important to note that the best interests of the child are of paramount concern with the result that neither the autonomy of the parties nor the fact that a registered domestic partnership is intended to be an alternative to marriage (thereby justifying a departure from principles applicable to matrimonial law) have a role to play. When this is borne in mind it becomes clear that there is no

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398 Strangely enough, this aspect was also overlooked in the 2003 *Discussion Paper* (see clause 32 of Annexure D).

399 Subsections (1) and (2) (italics added) read as follows:

"(1) A maintenance order or an order in regard to the custody or guardianship of, or access to, a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefor: Provided that if an enquiry is instituted by the Family Advocate in terms of section 4 (1) (b) or (2) (b) of the *Mediation in Certain Divorce Matters Act*, 1987, such an order with regard to the custody or guardianship of, or access to, a child shall not be rescinded or varied or, in the case of an order with regard to access to a child, not be suspended before the report and recommendations referred to in the said section 4 (1) have been considered by the court.

(2) A court other than the court which made an order referred to in subsection (1) may rescind, vary or suspend such order if the parties are domiciled in the area of jurisdiction of such first-mentioned court or the applicant is domiciled in the area of jurisdiction of such first-mentioned court and the respondent consents to the jurisdiction of that court."

400 Clause 15(1) should be amended to read: "Registered domestic partners who have ~~minor~~ children from the registered domestic partnership, and who intend to terminate the registered domestic partnership must apply to the court for a termination order."

401 Section 1 definition of "child" in the *Children's Act* 38 of 2005.

402 Section 17 of the *Children's Act* 38 of 2005.

reason for the Bill to deviate from the tried and tested principles relating to divorce and annulment as embodied in the *Divorce Act*[403] and (of late) the *Children's Act*.[404] In fact, consistency between all three pieces of legislation will ensure that the law adopts a uniform approach in respect of all children involved in the dissolution of their parents' relationships, regardless of their form or structure.

Nevertheless, it is suggested that one important deviation from the provisions of the *Divorce Act* of 1979 must be recommended. This deviation relates to the problem identified above regarding the fact that clause 16 of the Bill currently makes no provision for the variation of maintenance and related orders, requiring an insertion of provisions that are the equivalent of section 8(1) and (2)[405] of the *Divorce Act*.[406] It is suggested that while the wording of section 8 must for the most part be transplanted verbatim into the amended clause 16, the fact that the latter provision is relevant only to maintenance orders pertaining to children must be expressed clearly. This is because the position as to whether section 8(1) of the *Divorce Act* permits the variation of a maintenance order regarding a divorced *spouse* is somewhat unclear as there is authority for the view that section 8(1) only applies to the variation of maintenance orders pertaining to children: In *Botha v Botha*[407] it was held that the appropriate forum for the variation of a maintenance order that was duly granted by the High Court at the time of divorce is the Maintenance Court, "from which an appeal or review would lie to [the High Court]."[408] In order to obviate this uncertainty, it is suggested that

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403 70 of 1979.

404 38 of 2005. Although section 39 of this Act was only enacted on 1 July 2007, the fact that it embodies sections 6 and 7 of the *Children's Status Act* 82 of 1987 testifies to the durability of the principles contained therein.

405 See note 399 above for the wording.

406 70 of 1979.

407 2005 (5) SA 228 (W).

408 Par [10]. In this case the amount of an inter-spousal maintenance order granted in terms of section 7 of the *Divorce Act* 70 of 1979 had been reduced two years later by the Maintenance Court. Barely a year later the applicant applied to the High Court for an order limiting the duration of the order to a period of five years as from the first payment. The Court held, *inter alia*, that section 8 of the *Divorce Act* did not empower it to grant the order sought as it was not

the amended version of clause 16 should specifically refer to a maintenance order "in respect of a child."

There is another reason for insisting that clause 16 must expressly state that it is limited to orders in respect of children. This is because, even if a future Court were to decline to follow the judgment in *Botha v Botha* (and hence to hold that section 8(1) of the *Divorce Act* also permits the variation of maintenance orders between the erstwhile spouses) an informal maintenance agreement between the spouses could still not be varied in terms of section 8(1) for, as Van

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applicable to inter-spousal maintenance but only applied to the variation of orders pertaining to children—see par [9] and [10]. This approach has been criticised—see Van Schalkwyk 2007: 426, 427 who opines that such a limited interpretation of section 8(1) is incorrect, and that the correct approach would have been for the Court to find that it had no jurisdiction to hear the matter at all on the basis that the Maintenance Court's variation in the interim implied that the original order had been terminated (at 427). Van Schalkwyk's conclusion regarding the jurisdiction issue is supported, but for a different reason, as it is submitted that the Court's interpretation of section 8(1) may have been correct. This conclusion is based on the following reasoning: (i) It can be accepted that Van Schalkwyk is correct in stating that at common law only the Court granting the order has the power to vary the same, unless a statute specifically empowers another Court to do so, and, moreover, that the Maintenance Court is empowered to vary a High Court maintenance order, while the High Court is not permitted to do likewise. (ii) However, on the basis of the decision in *Cohen v Cohen* 2003 (3) SA 337 (SCA), "[t]he principle is clear: the existing Supreme or High Court order ceases to be of force and effect, *but only insofar as the order of the maintenance court expressly or by necessary implication replaces such order*" (emphasis added). This clearly implies that the mere variation of the *amount* of the High Court's original order does not mean that the entire order ceases to be of force and effect. Therefore, in principle, it appears as if the High Court would still have the jurisdiction to vary that portion of its order that was still intact (*cf* Van Schalkwyk 2007: 428), provided that a statute did not curtail its common law power to do so. (iii) It is submitted that a literal reading of the provision indicates that the Court in *Botha* interpreted section 8(1) correctly. The first indication appears from the fact that "a child" is the only subject referred to throughout the provision; a notion which is reinforced by the comma after the words "access to" in the sentence "[a] maintenance order or an order in regard to the custody or guardianship of, or access to*, a child*, made in terms of this Act." Furthermore, if maintenance orders other than those relating to children were intended, it is submitted that the words "in terms of this Act" would have been included after the words "maintenance order" in the sentence in question (i.e. "[a] maintenance order *under this Act* or an order in regard to …"). (iv) In consequence of this interpretation, it is submitted that section 8(1) does in fact curtail the common law power of the High Court to vary the order made at divorce. This does not, however, mean that the High Court has no role whatsoever to play in inter-spousal maintenance proceedings, but simply entails—as Willis J indicated in *Botha*—that the Maintenance Court is the correct forum to approach for a variation of the order granted at divorce, from which an appeal or review lies to the High Court (see section 25 of the *Maintenance Act* 99 of 1998). It is therefore submitted that Van Schalkwyk is correct in concluding that the High Court did not have jurisdiction to hear the matter, but it is submitted that the Court in *Botha*'s interpretation of section 8(1) is in fact the *causa* for this lack of jurisdiction.

Schalkwyk[409] states, the wording "maintenance order" specifically refers to an order of Court. However this does not mean

> dat 'n onderhoudsooreenkoms wat nie in 'n hofbevel opgeneem is, sonder regsgevolg is nie. Dit kan soos enige ander kontrak privaatregtelik afgedwing word … Ook sal só 'n ooreenkoms nie ingevolge die bepalings van artikel 8 van die Wet op Egskeiding gewysig kan word nie, omdat daar nie 'n onderhoudsbevel ingevolge die wet bestaan nie.

Furthermore, in the case of inter-spousal maintenance within the context of divorce proceedings, section 7 of the *Divorce Act* requires such an order to be granted at the time of the proceedings by the Court that grants the order of divorce, with the result that such an order cannot be sought thereafter.[410] This state of affairs is particularly pertinent in the case of domestic partnerships, for, as will be seen below, it will be suggested that the Bill should not require an inter-partner maintenance order to be granted at the time of the termination order, but instead should permit an application for such an order to be made within a certain time period after the termination of the partnership.[411] Therefore, if the *Domestic Partnerships Bill* merely contained a cross-reference to section 8(1) of the *Divorce Act*, the reference in the latter section to "an order … *made under this Act*" may create the impression that a maintenance order between the partners would, as in the case of divorce, also have to be granted at the time of the termination order and could never be granted thereafter. However, expressly limiting the application of clause 16 to children would mean that the fact that only a maintenance *order* could be varied in terms of the amended clause could never pose any difficulty as far as children are concerned. This is because the Bill's insistence that the partners *are compelled* to approach a Court from the outset of the termination proceedings precisely because there are children involved

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409 1990: 69, 70.

410 *Schutte v Schutte* 1986 (1) SA 872 (A) at 882 (D) – (F); *Sempapalele v Sempapalele* 2001 (2) SA 306 (O) at 312 (D) – (E); Van Schalkwyk 1990: 69; Hahlo and Sinclair 1980: 43.

411 See clause 23 of the Bill as discussed in 9.3.4 below.

implies that there will always be a maintenance *order* which is capable of subsequent amendment.

To conclude: In order to address the problems identified above as well as to ensure the greatest possible consistency between the *Divorce Act*, the *Children's Act* and the *Domestic Partnerships Bill*, it is suggested that clause 16 should be remodelled as follows:

(1) Unless otherwise ordered by a Court, the rights of and obligations towards children of a registered domestic partner under any other law are not affected by the termination of the registered domestic partnership.[412]

(2) No registered domestic partnership may be terminated until the relevant court has inquired into and considered the safeguarding of the rights and interests of a child of that partnership.[413]

(3) Section 6 of the Divorce Act and section 4 of the Mediation in Certain Divorce Matters Act apply, with the necessary changes required by the context, in respect of such a child as if the proceedings in question were proceedings in a divorce action and the termination of the registered domestic partnership were the granting of a decree of divorce.[414]

(4) A maintenance order in respect of a child [415] *or an order in regard to the care or guardianship of, or contact with, a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to contact with a child, be suspended by a court if the court finds that there is sufficient reason therefor: Provided that if an enquiry is instituted*

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412 This provision was originally listed as subsection (6) of clause 16. It is recommended that it should be retained in order to reinforce the notion that the termination of a registered domestic partnership does not have retroactive effect and therefore has no effect on the rights and obligations towards such a child. Provisions with similar effect are included in section 39 of the *Children's Act* 38 of 2005 due to the fact that the annulment of a voidable marriage generally has retrospective effect—see Heaton 2007: 3-41.

413 Based on section 39(2) of the *Children's Act* 38 of 2005.

414 Based on section 39(3) of the *Children's Act* 38 of 2005.

415 As seen in the main text above, the emphasised words are intentionally added to the otherwise almost verbatim insertion of section 8(1) of the *Divorce Act* 70 of 1979 (see note 399 above for the original wording). The inserted provision also updates the original wording of section 8(1) as far as the terms "care" and "contact" are concerned.

by the Family Advocate in terms of section 4(1)(b) or (2)(b) of the Mediation in Certain Divorce Matters Act, such an order with regard to the care or guardianship of, or contact with, a child shall not be rescinded or varied or, in the case of an order with regard to contact with a child, not be suspended before the report and recommendations referred to in the said section 4(1) have been considered by the court.

(5) A court other than the court which made an order referred to in subsection (4) may rescind, vary or suspend such order if the parties are domiciled in the area of jurisdiction of such first-mentioned court or the applicant is domiciled in the area of jurisdiction of such first-mentioned court and the respondent consents to the jurisdiction of that court.

(6) A reference in any law—

(a) to a maintenance order or an order relating to the custody or guardianship of, or access to, a child in terms of the Divorce Act must be construed as a reference also to a maintenance order or an order relating to the custody or guardianship of, or access to, a child in terms of that Act as applied by subsection (3);

(b) to the rescission, suspension or variation of such an order in terms of the Divorce Act must be construed as a reference also to the rescission, suspension or variation of such an order in terms of that Act as applied by subsection (4).[416]

The cross-references to the *Divorce Act* in the amended form of clause 16 would also require a definition of "*Divorce Act*" to be inserted into section 1 of the *Domestic Partnerships Bill* to read "means the *Divorce Act*, 1979 (Act 70 of 1979)."

The need for clause 17 of the Bill ("[c]hildren of registered partners of opposite sex") to be reconsidered will be explained in 12.2.4 below.

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[416] Section 39(5) of Act 38 of 2005 (italics added).

9.2.2.3 Termination of registered domestic partnership by Court order where a partner refuses to cooperate

A final question that arises with reference to the termination of a registered domestic partnership by order of Court is whether this option is available to childless registered domestic partners.

As a point of departure, it is clear that the mutual termination option is available to childless domestic partners, while a Court order is required the moment any children are involved. In fact, reading clause 12 with clause 15 implies that the mutual termination procedure is not merely *available* to childless partners but in reality is actually *prescribed* for them. In this respect it is submitted that the 2008 Bill contains a vital shortcoming—it is silent as to the process that is to be followed where one of the partners simply refuses to cooperate with the termination process. This situation could obviously occur irrespective of whether there are any children involved. The problem is that even the Court procedure that is prescribed for partners who have children appears to be predicated on the assumption that the parties *both desire to terminate their partnership*. As a result, while a domestic partner who is involved in a partnership into which children were born *must* approach the Court for an order terminating the partnership, the Bill—by not prescribing any means for a Court to assess whether the partners' circumstances are such that an order of termination should be granted and empowering the Court to make such an order accordingly—does not cater for the situation where one of the parties refuses to cooperate in the termination process. To summarise, the current position created by the Bill implies:

(i) That a registered domestic partner involved in a childless partnership has no way of approaching the Court to terminate his or her partnership where the cooperation of the other partner cannot be secured; and

(ii) That although a Court order is prescribed where children are involved, the Bill neither empowers a Court to grant a termination order in the absence of mutual agreement between the parties nor provides the grounds upon which the Court can assess whether or not to do so.

This possibility was foreseen in the Bill proposed in the 2003 *Discussion Paper*, and was specifically referred to in the 2006 *Report* in the following terms:

> In order to protect vulnerable partners, a termination agreement had to comply with prescribed formalities (clause 30 [in Annexure D to the 2003 *Discussion Paper*]). Registered partners had to apply for a Court order to terminate the partnership where they had children or where they could not come to an agreement to terminate the partnership or as to the division of the joint property (clause 31 [of the same document]). The Court would make a termination order if it was satisfied that the registered partnership had reached a state of disintegration and there was no reasonable prospect of the restoration of the relationship (clause 33).[417]

Despite specifically referring to this approach, the 2006 *Report* strangely enough took the matter no further, with the ostensible result that this *lacuna* was also carried over into the 2008 Bill.

Another cause for concern is that the 2008 Bill provides no scope for a Court to consider (nor to incorporate into its final order) any agreement between the registered domestic partners which is the equivalent of a consent paper or deed of settlement between spouses involved in divorce proceedings. In fact, the only reference to any type of agreement is found in clause 18 in terms of which the Court is empowered to make a maintenance order "in the absence of a maintenance agreement." The trouble is, however, that the Court is not given the power to consider such an agreement to begin with. The granting of such a power is essential because not all partnerships will involve a dispute between the

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417 SALRC 2006: 341 (paragraphs 6.6.4 and 6.6.5 combined).

partners as to property division, maintenance *etcetera*. This oversight in the 2008 Bill has important implications for partners with children as the Bill—while forcing them to obtain a Court order due to the fact that children are involved—does not currently envision the situation where no dispute is involved and the partners simply wish to enter into a "settlement agreement" which can be incorporated into the order of Court.

It is submitted that clauses 31 and 33 as proposed in Annexure D of the 2003 *Discussion Paper* contain important principles without which domestic partnerships legislation will simply not be able to function effectively and which can be used in order to cure the Bill of the ailments identified above. It is therefore essential for clause 15 of the Bill to be expanded in order to provide for a Court application where one of the partners refuses to co-operate in the termination procedure, and to provide for a Court to consider a "settlement agreement" entered into between the partners. Furthermore, although it is a known fact that a Court is not bound by such an agreement between the parties to divorce proceedings,[418] this should expressly be confirmed in the domestic partnership context in order to protect a vulnerable partner. To this end the Court should be vested with a wide discretion to deviate from the agreement reached between the partners so as to grant an order that is just and equitable.[419] Clause 15 should therefore be modified as follows:

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418 See Van Schalkwyk 1990: 72, 72 and the authorities cited. Where children are involved, the Court is duty-bound to determine whether the agreement between the divorcing spouses is in the best interests of the children—see *Rowe v Rowe* 1997 (4) SA 160 (SCA) at 167 (C).

419 According to Bonthuys (2001: 208, 209) the South African Courts have tended to accept that divorce settlement agreements are contracted voluntarily, with the result that the weaker bargaining position in which women often find themselves in relation to their husbands is not taken into account when property is divided. Women are also far more likely than men to forgo economic wealth in order to secure an order for custody (now "care") of their children (at 209, 210). In order to address this state of affairs, she proposes *inter alia* that: "[C]ourts should integrate the interests of children with the division of property on divorce, and construct paradigms of property division which take their interests into account. Secondly, systems of property division and spousal maintenance should be re-integrated with women's child-care labour during and after marriage." It is submitted that the wide powers which are granted to a Court under clause 22 of the Bill (to which, as will be seen in the main text it is suggested that the amended clause 15 should cross-refer) will empower a Court to consider such factors.

15. Termination by Court order

(1) The registered partners or a registered partner must apply to the court for an order to terminate the registered partnership if—

(a) the registered partners have minor children; and/or

(b) the registered partners cannot come to an agreement regarding the-

(i) termination of the registered partnership; or

(ii) division of property upon termination of the registered partnership.[420]

(2) An application to terminate a registered partnership is made to the court in accordance with the provisions of the *Supreme Court Act*, 1959 (Act No. 59 of 1959).[421]

(3) A Court may grant an order to terminate a registered partnership in accordance with subsection (1) if it is satisfied that the registered partnership has reached such a state of disintegration that there is no reasonable prospect of the restoration of the relationship between the partners.[422]

(4) If it appears to the court that there is a reasonable possibility that the partners may become reconciled through counselling, treatment or reflection, the court may postpone the proceedings in order that the partners may attempt a reconciliation.[423]

(5) A court granting an order to terminate a registered partnership may make an order with regard to the division of property of the registered partners or the provision of maintenance by one partner to the other[424] *in accordance with a written agreement between such partners if it deems it just and equitable*.[425]

(6) Where there is no written agreement about the division of the property of the registered partners or if the court is not satisfied that the division of property

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420 Clause 31(1) of Annexure D in the 2003 *Discussion Paper.*

421 Clause 31(2) of Annexure D in the 2003 *Discussion Paper.*

422 Based on clause 33(1) of Annexure D in the 2003 *Discussion Paper* which in turn is based on section 4(1) of the *Divorce Act* 70 of 1979.

423 Based on section 4(3) of the *Divorce Act* 70 of 1979. It is submitted that, while this possibility may rarely present itself in practice, the Court should still be permitted to make such an order where necessary.

424 The specific reference to maintenance is recommended in order to remedy the problem referred to in the main text regarding clause 18(1) of the 2008 Bill.

425 Based on clause 33(2) of Annexure D in the 2003 *Discussion Paper*.

agreed to by the registered partners is just and equitable, the court may make an order to divide the property in a manner which it deems just and equitable, in accordance with section 22(2) – (5) of this Act.[426]

9.2.2.4 Extension of matrimonial property law by Court order

In 7.3.4.2 above it was argued that the Courts should be given the discretion, on application, to grant the extension of any principle of matrimonial property law in order to give effect to the originally-intended property regime selected by the parties. This argument was based on the need to re-evaluate the application of the so-called "contextualised choice model" in view of the Bill's failure to *provide an effective and well-defined alternative to matrimonial property law*.[427] It was also explained that such a power should be available both during the existence of and at the termination of the registered domestic partnership. In fact, bearing the dynamics of human relationships in mind, it is likely that the need for an extension of matrimonial property law to registered domestic partnerships will arise more often in the case of the termination of such relationships than during their existence. In addition, such a need may be particularly necessary in a partnership to which the accrual system is made applicable due to the fact that its results only become visible at the termination of the union as it is in effect "a deferred community of gains."[428] Be that as it may, the insertion of a provision

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426 Based on clause 33(3) of Annexure D in the 2003 *Discussion Paper.* See note 419 for the need for a cross-reference to clause 22 of the Bill. The 2003 version of the Bill included a final provision (clause 33(4)) which read "[a] court granting an order to terminate a registered partnership may make an order with regard to the division of the joint property of the registered partners in accordance with a pre-registration agreement between the partners if it is satisfied that such agreement is valid." It is submitted that this provision is unnecessary as the cross-reference to section 22(2) - (5) that is proposed in subsection (6) already empowers the Court to consider the provisions of such an agreement.

427 It will be recalled that within the context of property disputes, the gist of the "contextualised choice model" is that it may be fair for a Court to refuse to extend matrimonial property law to unmarried couples who have chosen not to marry one another. However, it was pointed out in 7.3.4.2 that the application of this aspect of the model could only apply where domestic partnership legislation *provided an effective and well-defined alternative to matrimonial property law*. As the 2008 Bill does not do so, the strict application of this argument should be relaxed by providing a Court with the power to grant an extension in meritorious cases.

428 Hahlo 1985: 304.

into clause 15 that is substantially similar to that proposed for clause 8A[429] above is strongly recommended. As a consequence, subsections (7) and (8) should be added to the proposed amended form of clause 15 in the preceding paragraph:

> *(7) A Court may, on application by either or both registered domestic partners at the termination of a registered domestic partnership, and provided that*
>
> *(a) there are sound reasons for doing so; and*
>
> *(b) that no other person will be prejudiced thereby;*
>
> *grant the extension of any principle of matrimonial property law which the Court deems necessary in order to give proper effect to the property regime which was intended to apply to the registered domestic partnership at the time it was registered or since it was amended in accordance with section 8A.*
>
> *(8) In determining whether there are sound reasons for the extension sought under subsection 7 the Court must have regard to all the circumstances of the registered domestic partnership including, but not limited to:*
>
> *(a) The terms of a registered domestic partnership agreement, if any;*
>
> *(b) The extent to which the partners deliberately intended not to apply the principles of matrimonial property law to their domestic partnership;* [430]
>
> *(c) The interests of the applicant registered domestic partner or partners;*
>
> *(d) The interests of any child of the domestic partnership.*

9.3 Consequences of termination

9.3.1 Inter-partner maintenance beyond termination of the partnership

Post-termination maintenance is regulated by clause 18 of the Bill, which states the following:[431]

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429 See 7.3.4.3 *ante*.

430 It is submitted that it will be acceptable—in view of the revised "contextualised choice model"—to take this account as merely one of the factors.

431 Italics added.

Maintenance after termination

(1) In the absence of a maintenance agreement, a court may, after termination of a registered domestic partnership as provided for in section 12(1)(b) and (c), upon application, make an order which is just and equitable in respect of the payment of maintenance by one registered domestic partner to the other for any specified period or until the registered partner in whose favour the order is given—

(a) dies;

(b) marries under the Marriage Act;

(c) marries under the Recognition of Customary Marriages Act;

(c) enters into a civil union; or

(d) enters into a registered domestic partnership.

(2) When deciding whether to order the payment of maintenance and the amount and nature of such maintenance, the court must have regard to—

(a) the respective contributions of each partner to the registered domestic partnership;

(b) the existing and prospective means of each of the registered domestic partners;

(c) the respective earning capacities, future financial needs and obligations of each of the registered partners;

(d) the age of the registered partners;

(e) the duration of the registered domestic partnership;

(f) the standard of living of the registered domestic partners prior to the termination of the registered domestic partnership; and

(g) any other factor which in the opinion of the court should be taken into account.

The first observation that needs to be made regarding this clause is the problem created by the words "[i]n the absence of a maintenance agreement" in subsection (1). For purposes of illustrating the difficulty created by this provision, it is useful to compare section 7(1) of the *Divorce Act* of 1979 which states that:

> A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.

It is settled law that the use of the word "may" in section 7(1) entitles the Court hearing a divorce matter to exercise its discretion as to whether or not to incorporate the "written agreement" or part thereof into its final order.[432] When one compares this position to the extract from clause 18(1), the problem becomes evident that under the latter provision a Court may only make an order under clause 18 where there is no maintenance agreement between the parties. Put differently, clause 18(1) dictates that the moment an agreement between the parties is placed before the Court, the Court has no discretion but to follow it; a situation that would be nothing short of preposterous.

While it is true that expecting the Courts to scrutinise all written arrangements may considerably impair the contractual autonomy of the parties thereto,[433] it is submitted that the trend in post-1994 South African legislation,[434] coupled with the dire need for the protection of vulnerable partners[435] (possibly even more so in the context of novel and untested domestic partnerships legislation) may justify this intrusion. It is therefore submitted that subsection (1) should be expanded so as not only to overcome the limitation identified in the preceding paragraph, but also—as was also proposed in the context of clause 15—to vest the Court with a wide discretion to deviate from the agreement reached between the partners so as to grant an order that it deems to be just and equitable. Provided

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432 See Van Schalkwyk 1990: 72, 73 and the authorities cited.

433 See Van Schalkwyk 1990: 73.

434 See section 7(6) and (7)(b) of the *Recognition of Customary Marriages Act* 120 of 1998 which requires a man who wishes to enter into a second or further customary marriage to conclude a written contract to govern the matrimonial property system of his marriages which must be submitted to a Court for approval. Subsection (7) empowers the Court to permit further amendments to the contract, to impose any conditions or to "refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract."

435 See in general Bonthuys 2001: 192 *et seq*.

that the agreement satisfies this condition, the contractual freedom enjoyed by the parties to such an agreement will remain unfettered.[436]

A second observation pertaining to subsection (1) of clause 18 is that it imposes a greater restriction in terms of the duration of a maintenance order granted by the Court itself (as opposed to an order merely confirming the written agreement) than that imposed by section 7(2) of the *Divorce Act*. This is because the *Divorce Act* only empowers a Court to grant an order "until the death or remarriage of the party in whose favour the order is granted," while clause 18 makes specific provision for civil unions and for registered domestic partnerships.[437] Clause 18 is commendable in this regard, as it correctly reflects the recent evolution of South African family law. In fact, while a significant portion of this Chapter will be devoted towards improving the 2008 Bill by aligning it with established legislation,[438] it is suggested that this time around a well-entrenched statute such as the *Divorce Act* should in fact be amended in accordance with clause 18.[439]

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436 Parties to an agreement can therefore agree, for example, that the maintenance obligation will endure beyond the death or remarriage of either of the parties thereto, or that it is subject to a *dum casta et sola vixerit* provision (that is, that the maintenance obligation will cease if the indebted party should lead an unchaste life—see Van Schalkwyk 1990: 74). According to Cronjé and Heaton (2004: 153) a *dum casta* clause is today "usually limited to living with another person in a life partnership outside marriage" with the result, it is submitted, that entering into an unregistered life partnership will henceforth also bring an end to such maintenance. Such a provision must, however, be specifically included in the agreement (Van Schalkwyk 1990: 75). Whatever the parties decide to include in their agreement, it is of the utmost importance for them to ensure that the boundaries of their agreement are clearly-demarcated. For example, in the recent case of *Odgers v De Gersigny* 2007 (2) SA 305 (SCA) the Supreme Court of Appeal held that the duty of the liable party to maintain the party who is entitled to claim maintenance continues beyond the remarriage of the latter if the consent paper does not expressly state that it terminates upon such an occurrence. The parties will therefore be held to the terms of their agreement, which cannot be overridden by implied terms that contradict their intention as expressed in the agreement (*in casu* the appellant had contended that in terms of the common law it was implicit that a maintenance obligation fell away upon the remarriage of the party who is entitled to claim maintenance)—see par [4] and [10].

437 See subsection (1)(c) and (d).

438 See 12 below.

439 It is suggested that the words "or entering into a civil partnership in accordance with the *Civil Union Act*, 2006 (Act 17 of 2006) or registered domestic partnership in accordance with the *Domestic Partnership [Act]* …" should be inserted after the word "re-marriage" in section 7(2) of the *Divorce Act* 70 of 1979. A secondary beneficial effect of this amendment is that it will also

It appears, by way of analogous case law regarding section 7(2) of the *Divorce Act*,[440] that the Court will not be empowered to grant an order for maintenance that operates beyond the death of the liable partner.[441]

A further observation regarding the ambit of the Court's discretion in terms of subsection (1) is that it is noticeable that no reference is made to a Court's restriction regarding an unregistered domestic partnership. This presumably implies that a Court could include such a limitation if it deemed doing so to be "just and equitable."[442] If such a restriction were not imposed by the Court, the fact that the party who is entitled to claim maintenance enters into an unregistered domestic partnership would not constitute a "marriage" for the purposes of clause 18(1) and therefore could not terminate a maintenance order granted by the Court.[443] Nevertheless, the fact that the party who is entitled to claim maintenance is being maintained by someone else may be taken into account in terms of reducing the amount payable according to the original order or perhaps cancelling it outright.[444]

Regarding the factors to be considered when a Court is required to decide "whether" to make an order and what the "amount and nature" thereof should be, clause 18 does not differ markedly from section 7(2) of the *Divorce Act*. The only difference is that the parties' "conduct in so far as it may be relevant to the break-down of the [relationship]" is not listed as a separate factor in the former

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indirectly "update" the *Recognition of Customary Marriages Act* 120 of 1998 (section 8(4) of which contains a direct cross-reference to section 7 of the *Divorce Act* of 1979).

440 70 of 1979.

441 *Hodges v Coubrough NO* 1991 (3) SA 58 (D), *dictum* at 66 (C) – (G) (dealing with the distinction between the specificity of maintenance obligations imposed on a deceased estate *ex contractu* versus the generality of those imposed by statute) referred to with approval in *Odgers v De Gersigny* 2007 (2) SA 305 (SCA) at par [9]. Compare Cronjé and Heaton 2004: 155, 156 who opine that the principle that an action for loss of support lies against a person who negligently killed an ex-spouse who was liable for maintenance (*Santam Bpk v Henery* 1999 (3) SA 421 (SCA)) should imply that the deceased estate can still be liable for maintenance under an order granted in terms of section 7(2) of the *Divorce Act*.

442 Hahlo and Sinclair 1980: 44.

443 Hahlo and Sinclair 1980: 44.

444 Hahlo and Sinclair 1980: 44.

provision. As no degree of (mis)conduct is specified,[445] it is submitted that nothing hinges on this omission as the conduct of the partners could in any event be taken into account as "any other factor which in the opinion of the Court should be taken into account."[446]

In conclusion, two submissions regarding amendment are made:

(i) It is submitted (i) that the words "or, if the court is not satisfied that the maintenance agreement entered into between the registered partners is just and equitable in the light of the factors listed in subsection (2) of this section," be inserted into subsection (1) of clause 18 after the words "In the absence of a maintenance agreement;"[447] and

(ii) Section 7(2) of the *Divorce Act* 70 of 1979 should be amended to restrict the Court's power to grant an order for maintenance beyond the time at which the party who is entitled to claim maintenance enters into a civil partnership or a registered domestic partnership with someone else.[448]

9.3.2 Maintenance of a surviving registered domestic partner and intestate succession

It is submitted that no drastic amendments are required to these clauses (19 and 20)[449] of the Bill.[450] Nevertheless, for the purposes of certainty, it is suggested

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445 For example, section 9 of the *Divorce Act* 70 of 1979 which specifically requires "*substantial* misconduct" (emphasis added) to be considered.

446 Subsection 2(g).

447 Where a written agreement has been entered into the parties would be free subsequently to have that agreement varied or set aside by application to the Maintenance Court in accordance with the provisions of the *Maintenance Act* 99 of 1998.

448 See note 439 where the precise wording of this amendment is proposed.

449 These clauses respectively state:

"**19. Maintenance after death**

For purposes of this Act, a reference to 'spouse' in the Maintenance of Surviving Spouses Act must be construed to include a registered domestic partner.

20. Intestate succession

For purposes of this Act, a reference to 'spouse' in the Intestate Succession Act must be construed to include a registered domestic partner."

that the reference to "spouse" in clause 19 should be expanded to refer to "spouse and survivor" so as to reflect the terminology employed by the *Maintenance of Surviving Spouses Act* 27 of 1990.

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[450] Although it is perhaps only of academic interest at this stage, mention may be made of a recent attempt to amend the *Intestate Succession Act* 81 of 1987. In this regard, the original version of the *Judicial Matters Amendment Bill* [B48–2008] that appeared on 18 June 2008 attempted, amongst many other things, to amend section 1 of Act 81 of 1987 in order formally to align it with the Constitutional Court's finding in the case of *Gory v Kolver NO* 2007 (4) SA 97 (CC) (discussed in 3.4.1 in Chapter 5 above). Of particular importance was the proposed insertion of an additional subsection to section 1 of the 1987 Act (in the form of a subsection (8)) which was to read as follows:

> "(8) *(a)* The provisions of this section relating to a partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support are, subject to paragraph *(b),* deemed to have come into operation on 27 April 1994 and only apply in respect of such partners if the court is satisfied that the partners in question were not able to formalise their partnership as contemplated in the Civil Union Act, 2006 (Act No. 17 of 2006).
>
> *(b)* The provisions of paragraph *(a)* shall not affect any transfer of ownership that has taken place pursuant to the distribution of the residue of any estate, unless it is established that, when such transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds of an entitlement to benefit from an intestate estate."

This proposal was met with strong reservations by the Law Society of South Africa who expressed the opinion that subsection (8) was "legally untenable, absurd, repugnant to the rule of law and [that it] opened the legislation to constitutional challenge" (see Whittle 2008: 19). These sentiments appear to have been accepted in the latter half of 2008 as the Portfolio Committee Amendments to the Bill rejected this proposal *in toto* in the second version of the Bill (Bill A [B48A-2008]). Nevertheless, three important lessons can be learnt from this particular situation: First, it is submitted that the introduction of subsection (8)(a) would have been blatantly unconstitutional as it would not provide for heterosexual life partners to avail themselves of a right to intestate inheritance by proffering reasons why they could not marry or formalise their relationships by way of a civil partnership under the *Civil Union Act* 17 of 2006. Second, subsection (8) clearly loses sight of the fact that, in terms of the "contextualised choice model" a claim for intestate succession is a need-based claim (see 3.4.1.2 in Chapter 5 above), with the result that the choice (or lack thereof) of formalising a relationship (whether it be heterosexual or homosexual in nature) *is irrelevant as long as the surviving partner can prove that a reciprocal duty of support existed while the relationship existed*. Finally, the entire exercise of amending legislation such as the *Intestate Succession Act* so as to align the same with pre-*Civil Union Act* judicial pronouncements would be unnecessary if the *Domestic Partnerships Bill* were enacted along with the amendments suggested throughout this study in accordance with the rubric. This development would serve to streamline the entire process regarding the law of intestate succession by providing for both registered and unregistered domestic partners to inherit intestate in appropriate circumstances and would correctly reflect the relevance and status of the so-called "contextualised choice model" in contemporary South African family law. It can therefore be concluded that the proposed amendments to Act 81 of 1987 were rightly rejected.

On the other hand it is submitted that the *Maintenance of Surviving Spouses Act*[451] may need to be amended in order to be aligned with the possibility that a "survivor" may not only remarry but may conceivably also enter into a registered domestic partnership which—as in the case of remarriage—should also terminate the maintenance obligation imposed on the deceased estate. It is therefore submitted that section 2(1) of the Act should be amended in order to reflect this possibility:

> If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage *or until entering into a registered domestic partnership* in so far as he is not able to provide therefor from his own means and earnings.

In order further to facilitate this amendment, a definition of "registered domestic partnership" ought to be included in section 1 of the Act to mean "a registered domestic partnership entered into in accordance with the provisions of the *Domestic Partnerships Act* ..."

No amendment to the *Intestate Succession Act* [452] appears to be required.

9.3.3 Delictual claims

Clause 21 of the Bill states the following:

> **21. Delictual claims**
>
> (1) For the purpose of claiming damages in a delictual claim, partners in a registered domestic partnership are deemed to be spouses in a legally valid marriage.

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451 27 of 1990.

452 81 of 1987.

(2) A partner in a registered domestic partnership is not excluded from instituting a delictual claim for damages based on the wrongful death of the other partner merely on the ground that the partners have not been legally married.

(3) A partner in a registered domestic partnership is a dependant for purposes of the Compensation for Occupational Injuries and Diseases Act.

This clause was cloned from a provision that appeared in the 2003 *Discussion Paper*.[453] The only real difference that appears in the 2008 Bill is that it is included under that part of the Bill (Part III) that deals with the termination of domestic partnerships as such.[454]

Regarding this clause, it is not immediately apparent why the Legislature saw the need for enacting both subsections (1) and (2). This is because these sections overlap to such an extent that subsection (2) appears to be redundant: The fact that a registered domestic partner is deemed to be a spouse according to subsection (1) of necessity implies that this entitles him or her to institute a claim based on the wrongful death of his or her partner.[455] Secondly, it is also not clear why the Legislature included a claim for occupational injury or death under the heading delictual liability, as the latter form of liability is of a statutory as opposed to purely delictual nature. Furthermore, in terms of the latter claim there is no apparent reason for distinguishing between registered and unregistered domestic partners (there is no similar provision in chapter 4 of the Bill). Such a distinction is irrational and fails to take cognisance of the fact that this Act has catered for life partners in the narrow sense since 1998,[456] and, moreover, that only providing for registered domestic partners would drastically reduce the protection

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453 See clause 21 of Annexure D in the 2003 *Discussion Paper*.

454 This fact poses specific problems in relation to the recognition of *consortium omnis vitae* between registered domestic partners—see 6.3.2.3 above.

455 Subsection (1) would also permit a registered domestic partner to institute claims based on the infringement of *consortium omnis vitae*, such as adultery, harbouring or enticement.

456 The definition of "dependent" was amended by the *Compensation for Occupational Injuries and Diseases Amendment Act* 61 of 1997 that came into operation on 1 March 1998.

provided by the Act.[457] This state of affairs highlights the necessity of amending the *Compensation for Occupational Injuries and Diseases Act* so as to allow both a registered and an unregistered domestic partner to qualify as a "dependant of an employee", for, if this were to occur, the necessity for retaining clause 21(3) would fall away altogether. This amendment will be dealt with in 12 below.[458] In the light of these comments it is proposed that the clause dealing with delictual liability should simply state that:

> For the purpose of claiming damages in a delictual claim, partners in a registered domestic partnership are deemed to be spouses in a legally valid marriage.

As alluded to in the introductory paragraph, there is no reason why a provision of this nature should only appear under that part of the chapter dealing with the termination of a registered domestic partnership. Indeed, it is submitted that the fact that partners are deemed to be spouses in this context should instead be regarded as an automatic legal consequence of entering into a registered domestic partnership. For this reason it is suggested that the provision should be shifted to Part II of chapter 3 and inserted as clause 11A of the Bill.

9.3.4 Time limits for applications by registered domestic partners

Before the clause dealing with property division (clause 22) is discussed, a few remarks must be made regarding clause 23 of the Bill which attempts to prescribe a time limit within which a registered domestic partner may institute

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457 In its 2003 *Discussion Paper* the South African Law Reform Commission appears to have appreciated the need for permitting unregistered partners to qualify as dependants for the purposes of *inter alia* Act 130 of 1993 as it included a footnote reference to this Act when it stated that: "Besides the consequences provided for in the Bill, additional consequential amendments would have to be made so as to include the definitions of these relationships in other relevant legislation" (see SALRC 2003: 305).

458 In 12.2.3 "[t]he insertion of the words 'domestic partnership' as well as the insertion of a definition of that term which should read 'domestic partnership' means a registered or unregistered domestic partnership in accordance with the *Domestic Partnership Act* …" will be proposed.

proceedings against his or her erstwhile partner. The provision in question (clause 23) states that:

> (1) Except as otherwise provided for by this section, an application to a court for an order under *section 21* of this Act must be made within two years after the termination of the registered domestic partnership.
>
> (2) A court may, at any time after the expiration of the period referred to in subsection (1), grant leave to an applicant to apply to the court for an order under *section 21* of this Act, if the court is satisfied, having regard to such matters as it considers relevant, that greater hardship would be caused to that applicant if the leave was not granted than would be caused to the respondent if the leave was granted.[459]

It must be mentioned, from the outset, that the origin and scope of this provision are bewildering to say the least. To begin with, no similar clause is to be found in Annexure D of the 2003 *Discussion Paper*. The first time a clause of such a nature appears on the legislative scene with respect to registered domestic partnerships is in the Commission's 2006 *Report* in which, without any explanation, one finds a clause that applies a time limit of two years not to a claim under any specific provision of the proposed legislation, but to "an application to a court for an order *under this Chapter*."[460] This provision was carried over into the first *Civil Union Bill* that appeared on 31 August 2006,[461] clause 35 of which deviated from its predecessor's cross-reference to "this Chapter" by instead referring to "clause 34" (the provision dealing with a claim for property division).[462] Following this development, the *Domestic Partnerships Bill,*

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459 Emphasis added.

460 See SALRC 2006: 361.

461 [B 26—2006].

462 Clause 35(1) states that: "Except as otherwise provided by this section, an application to a court for an order under section 34 ["Property division"] must be made not later than two years after the termination of the registered domestic partnership." A mistake however appears to have slipped into subsection (2) of clause 35: "(2) A court may, at any time after the expiration of the period referred to in subsection (1), grant leave to an applicant to apply to the court for an order under *section 33*, where the court is satisfied, having regard to such matters as it considers

2008 appeared which, as can be seen from the extract above, once again differed from its immediate predecessor in terms of its applicability by cross-referring to "section 21" (which in fact has nothing to do with property division but instead deals with delictual claims).

This brief analysis shows that, in as far as time limits are concerned, the proposed registered domestic partnership legislation that has appeared in recent years has vacillated from imposing no time limit whatsoever, to a time limit imposed on all claims under that specific chapter of the Bill (therefore including claims for maintenance, intestate succession, delictual liability, property division and, oddly enough, even applying the time limit to cases where children are involved), to claims regarding property division only, and finally—and most unexpectedly—to delictual claims as such. In the light hereof it need hardly be said that ascertaining the precise ambit of the intended time limit is a matter of no small conjecture; a fact that is compounded by the Law Reform Commission's silence on the matter.

It is only when the Commission's proposal regarding the *unregistered* domestic partnership is considered, that some clue as to the origin of clause 23 is to be found. In this regard the Commission makes a reference to the New South Wales *Property (Relationships) Act* of 1984's definition of "contribution" following which a provision similar to clause 23 appears, once again without any further explanation.[463] The only conclusion, therefore, is that the Commission decided to model what was to become clause 23 of the 2008 Bill (and its earlier equivalents) on the Australian example. Proceeding from this postulation, the correctness of clause 23 can now be assessed.

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relevant, that greater hardship would be caused to that applicant if the leave were not granted than would be caused to the respondent if the leave were granted" (emphasis added). Clause 33 refers to delictual claims and the reference thereto is clearly incorrect. The discrepancy between these two subsections may have led to the incorrect reference in the 2008 Bill.

463 SALRC 2006: 416, 417.

Part 3 of the New South Wales *Property (Relationships) Act* 1984 is entitled "[p]roceedings for financial adjustment" and it permits claims to be instituted for both maintenance and/or for the adjustment of the property interests of either or both parties to a "domestic relationship."[464] Furthermore, according to section 18(1) of the Act, an application under Part 3 must be made within two years of the termination of the domestic relationship, unless leave is granted for an extension of this period.[465] Of great significance for the purposes of this study is that the time limit applies "to an order under this Part" with the result that it applies to *both* maintenance and/or property adjustment claims. A further matter of significance is that the Act does not require a claim for maintenance and property readjustment to be instituted simultaneously.[466] Nevertheless, if a claim is instituted for maintenance, the Court is empowered, in deciding "whether" to make such an order and, if so, what the *quantum* thereof will be, to consider "any order made or proposed to be made under section 20 with respect to the property of the parties to the relationship."[467] In the end result it is therefore clear (i) that the time limit does not only apply to property division applications, and (ii) that an interrelationship exists between an order for maintenance and any order regarding property division.

An important difference that exists between the position in New South Wales and that proposed under chapter 3 of the South African Bill is that the former does not subscribe to the registered partnership model. Therefore, contrary to the position

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464 Section 14(1). It will be recalled that section 5(1) of the Act defines a "domestic relationship" as including both "*de facto*" (conjugal) as well as "close personal" (non-conjugal) relationships—see 3.2 above.

465 According to subsection (2) of section 18, a Court may grant leave for an application after the expiry of the two-year period "where the court is satisfied, having regard to such matters as it considers relevant, that greater hardship would be caused to the applicant if that leave were not granted than would be caused to the respondent if that leave were granted." The only exception to this provision is where, in terms of section 27(1)(b), a claim for rehabilitative maintenance has been granted as a result of the applicant's earning capacity being adversely affected by the circumstances of the relationship.

466 Section 14(2): "An application referred to in subsection (1) may be made whether or not any other application for any remedy or relief is or may be made under this Act or any other Act or any other law."

467 Section 27(2)(d).

that will obtain if chapter 3 of the South African Bill comes into operation, the Australian Act does not provide for the registration of the domestic relationship, and hence for the necessity for the relationship as such to be terminated by a Court order in apposite circumstances. Instead, by adhering to the so-called "judicial discretion" or *ex post facto* model, the Act provides the means by which the applicant can approach the Court for an order which—provided the Court is satisfied that the relationship meets certain requirements—regulates the financial consequences of the termination of the relationship.[468] This important distinction between these Acts needs to be borne in mind.

To return to the position in South Africa, a comparison of the inconsistent cross-references in the prospective legislation contained in the 2006 *Report*, the first *Civil Union Bill* and the 2008 Bill reveals that it can be accepted that the overall intention of the Legislature is to apply the time clause to property division as such. Therefore, the reference in clause 23 to "section 21" is clearly incorrect, as is the reference in the 2006 *Report* to "an order under this Chapter."

It will be recalled that the *Domestic Partnerships Bill* only insists on an application to Court for the termination of the partnership where the registered domestic partners have children. Therefore, where childless domestic partners wish to terminate their partnership an application to Court is unnecessary, and the parties are permitted to regulate aspects such as maintenance or property division by way of a written agreement between themselves.[469] The position therefore differs from the case of a marriage in which case a High Court order is an absolute prerequisite in order to terminate the marriage while both spouses are alive, regardless of whether or not there are children involved. Therefore, within the context of the proposed South African registered partnership model that permits a certain degree of informality and is intended specifically to cater for vulnerable parties, it *prima facie* appears to be fair not to require an application to

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468 See SALRC 2006: 367.

469 See 9.2.2 above where amendments to this position are proposed.

be brought *immediately* after the termination of the partnership provided (i) that no children are involved, and (ii) that a time limit of some kind is imposed in the interests of legal certainty. Such an option would, however, also have to take cognisance of the fact that a written agreement may have been entered into between the parties *prior* to the application sought, with the result that the Court considering the application will have to be empowered to disregard the terms of such an agreement where it would be just and equitable to do so. In addition, the comparison with Australian law shows that the additional period of time granted for such an application should not only be limited to claims regarding property division, but should also apply to a claim for inter-partner maintenance under clause 18 of the Bill. Finally, the fact that both clauses 18 and 22 of the Bill do not limit the Court's discretion but permit it to consider all other relevant factors[470] will facilitate the interrelationship between such claims. In other words, the wide discretion permitted in both of these clauses will permit a Court, in considering a claim for property division under clause 22, to consider the fact that a maintenance award has or will be made under clause 18.[471]

It is consequently submitted that clause 23 of the Bill should be amended to read:

> (1) Except as otherwise provided for by this section, an application to a court for an order under *sections 18 and/or 22* of this Act must be made within two years after the termination of the registered domestic partnership.
>
> (2) A court may, at any time after the expiration of the period referred to in subsection (1), grant leave to an applicant to apply to the court for an order under *sections 18 and/or 22* of this Act, if the court is satisfied, having regard to such matters as it considers relevant, that greater hardship would be caused to that applicant if the leave was not granted than would be caused to the respondent if the leave was granted.

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470 See clauses 18(2)(g) and 22(4)(f).

471 Also see the discussion of *Beaumont v Beaumont* 1987 (1) SA 967 (A) in 9.3.5.3 below.

9.3.5 Property division

Clause 22 of the Bill states the following:

(1) In the event of a dispute regarding the division of property after a registered domestic partnership has terminated, one or both of the registered domestic partners may apply to court for an order to divide their joint property or separate property, as the court may deem fit.

(2) Upon an application for the division of joint property, a court must order the division of that property which it regards just and equitable with due regard to all relevant factors.

(3) Upon an application for the division of separate property or part of the separate property, a court may order that the separate property or part thereof of the other registered domestic partner as the court regard just and equitable, be transferred to the applicant.

(4) A court considering an order contemplated in subsections (2) and (3) must take into account-

  (a) the existing means and obligations of the registered domestic partners;

  (b) any donation made by one registered domestic partner to the other during the subsistence of the registered domestic partnership;

  (c) the circumstances of the registered domestic partnership;

  (d) the vested rights of interested parties in the joint and separate property of the registered domestic partners;

  (e) the existence and terms of a registered domestic partnerships agreement, if any between the registered domestic partners; and

  (f) any other relevant factors.

(5) A court granting an order contemplated in subsection (3) must be satisfied that it is just and equitable to do so by reason of the fact that the registered domestic partner in whose favour the order is granted, made direct or indirect contributions to the maintenance or increase of the separate property or part of the separate property of the other registered domestic partner during the existence of the registered domestic partnership.

9.3.5.1 Aligning clause 22 with clause 18 as well as with the time limit imposed by clause 23

In view of the conclusions reached in 9.3.1, the first recommendation that needs to be made is that clause 22 should be aligned with clause 18 of the Bill and should provide for an application to be brought to a Court to overrule an agreement that has been entered into between the parties if the Court deems it just and equitable to do so. This can be achieved by combining subsections (1) and (2) of the original clause:

> (1) In the event of a dispute regarding the division of property after a registered domestic partnership has terminated, *or, if the court is not satisfied that an agreement entered into between the registered partners in consequence of the termination of a registered domestic partnership other than in circumstances envisioned in section 15*[472] *is just and equitable as far as the division of property is concerned in the light of the factors listed in subsection (3) of this section, a Court may, upon application by* one or both of the registered domestic partners, ~~may apply to court for an~~ order *the division of* ~~to divide~~ their joint property or separate property, as the court may deem fit.
>
> …

9.3.5.2 The *quantum* and merit processes

In respect of the Court's competence to order the division of joint or separate property, it is submitted that valuable guidelines can be obtained from section 7 of the *Divorce Act* of 1979. The latter Act permits a redistribution of assets between spouses to certain marriages that were entered into with complete

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[472] This provision envisions a situation where the property has not already been divided as per a Court order obtained under section 15 but where, for example, an informal agreement was entered into containing a division which one of the partners alleges not to be just and equitable.

separation of property.[473] In this regard, section 7(4) requires such a redistribution to be just and equitable *in view of the fact that* a spouse contributed either directly or indirectly to the maintenance or increase of the other spouse's estate.[474] While the requirement of a contribution is purely a question of fact, the just and equitable requirement "involves the exercise of a purely discretionary judgment in equity."[475] Once a Court is satisfied that these conjoined criteria have been satisfied, section 7(5) lists a number of factors (which are substantially similar to those listed in clause 22(4)) which must assist the Court in determining the *quantum* of such a redistribution.

Subsection (4) of the current version of clause 22 of the *Domestic Partnerships Bill* states the following:

> (4) A court considering an order contemplated in subsections (2) and (3) must take into account-
>
> (a) …

If this subsection were to be enacted in this form, it would create a subtle, but nonetheless significant discrepancy between the redistribution processes prescribed by the *Divorce Act* and the *Domestic Partnerships [Act]* as far as *separate* property is concerned in that in the former Act the factors are specifically used to determine the *quantum* of the redistribution, while in the latter case these factors will be part of the test to determine whether the redistribution is just and equitable. In effect, the *Domestic Partnerships [Act]* will therefore conflate the *quantum* and merit assessments and thereby depart from the established principle regarding re-distributing *separate* property in terms of which

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473 According to section 7(3) of the *Divorce Act* 70 of 1979, these marriages are (i) marriages concluded out of community of property and out of community of profit and loss without the accrual system that were entered into before 1 November 1984; or (ii) marriages between black persons that were concluded before 2 December 1988 in terms of section 22(6) of the *Black Administration Act* 38 of 1927. In addition it is also required that the parties (irrespective of whether they form part of category (i) or (ii)) must not have been able to enter into a deed of settlement regarding the division of their assets.

474 *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 988 (I).

475 *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 988 (I) – 989 (A).

the second "jurisdictional precondition"[476] (the purely discretionary "just and equitable" requirement) must be evaluated with reference to the first precondition (the factual contribution criterion), and *thereafter* the listed factors are considered to determine the *quantum*. It is submitted that there is no reason for doing so.

The second possibility, namely the competence to redistribute *joint* property, obviously requires a different approach due to the fact that there is no separate estate towards which the applicant partner is capable of contributing. In this regard, therefore, it appears to make sense to consider the factors enumerated in subsection (4)(a) - (f) for the purposes of determining whether the division sought is just and equitable.

In order to align the approach under clause 22 with the approach in the law of divorce, it is submitted that subsection (4) should be amended as follows:

> (4) A court considering *whether to grant* an order contemplated in subsection (2) and *determining the assets or part thereof to be transferred under subsection* (3) must take into account-
>
> (a) …

9.3.5.3 The application of the redistribution competency: Guidance from the (divorce) Courts

In exercising their power to redistribute the separate property of the partners to a registered domestic partnership under the *Domestic Partnerships Bill* the Courts will be exercising this power outside the realm of marriage for the very first time. Even more significantly, the Courts will be moving into completely unchartered territory as far as the competence to redistribute *joint* property is concerned. It is submitted, nevertheless, that valuable lessons can be learned in both instances

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476 *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 988 (H) – (J); confirmed by *Buttner v Buttner* 2006 (3) SA 23 (SCA) at par [22].

from the way in which the redistribution competency has been exercised by the South African Courts within the context of the law of divorce.

As far as the redistribution of separate property is concerned, the case of *Beaumont v Beaumont*[477] provides an appropriate first port of call. Over and above the significance of the Court's finding regarding the nature of the "contribution" required for the purposes of the redistribution,[478] this case provides authority for the view that neither the so-called "one-third starting point" (in terms of which the guideline applies that one third of the assets should be allocated to the spouse with fewer assets) nor any other similar "judicial glosses" which may fetter the Court's discretion have any place in our law.[479] In addition, the Court in *Beaumont* confirmed the fact that an interrelationship exists between an order for post-divorce spousal maintenance and an order for the redistribution of assets, so that the former order can be taken into account as "any other factor" when considering the *quantum* of the latter.[480] This finding is of particular significance for the purposes of this study as, although no similar direct cross-reference is found in the Bill (in the sense that the maintenance provision does not refer by name to the provision dealing with property division) it lends credence to the assertion in 9.3.4 above that such an interrelationship can be considered by virtue of the "any other factor" provisions that appear in both clauses. With reference to the so-called "clean-break principle" Botha JA expressed his support for the Courts to grant divorce orders that are geared towards "[achieving] a complete termination of the financial dependence of the one party on the other, if the circumstances permit."[481] Finally, the Court in *Beaumont* confirmed that a "conservative approach will be adopted in assessing a party's misconduct as a

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477 1987 (1) SA 967 (A).

478 It has become settled law that the "ordinary duties of 'looking after the home' and 'caring for the family'" will qualify as such (at 997 (F) – (G)) and *Katz v Katz* 1989 (3) SA 1 (A) at 15 (D) – (I)) and that such a contribution must be of a positive nature—see *Kritzinger v Kritzinger* 1989 (1) SA 67 (A) at 88 (D) – 89 (H).

479 At 991 (A) – (H), confirmed by *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA) at par [22].

480 At 991 (I) – 992 (F).

481 At 993 (A) – (B). This approach has been referred to with approval in subsequent case law such as *Katz v Katz* 1989 (3) SA 1 (A) at 11 (C) – (D) and *Meyers v Marcus and Another* 2004 (5) SA 315 (C) at 326 (A).

relevant factor" and that there should be a "conspicuous disparity" between the conduct of the spouses before a Court should consider the same.[482] This finding should also be applied in the context of property division in registered domestic partnerships, where the aim of such division is similarly not punitive.

A second set of highly relevant lessons can be taken from *Bezuidenhout v Bezuidenhout*,[483] a case in which the Trial Court had, on the basis of English jurisprudence, held that in assessing the *quantum* of a redistribution order, the point of departure should be for a Court to attempt to share the sum-total of the spouses' combined estates equally unless there was a good reason for not doing so.[484] This approach did not find favour with the Supreme Court of Appeal. Writing for a unanimous Court, Brand JA held that the imposition of a starting point such as the one suggested by the Court *a quo* would contradict the approach in *Beaumont* and would place an untenable restraint on the "wide discretion" granted by section 7(3).[485] Moreover, Justice Brand cautioned that the approach in English law did not sit well with the redistribution competency granted to the South African Courts:

> [I]t is a well-known fact that our common law provides for marriages in community of property as the norm while the English system does not. The result is that, unlike in England, a marriage can in our law be concluded out of community of property only if the parties consciously elect to do so in terms of an antenuptial agreement executed before a notary public. Of course we know that these contracts often led to great inequity and unfairness, particularly towards wives who performed their traditional role. This, after all, was the *raison d'être* for the enactment of s 7(3). Nevertheless, its formulation reflects a deliberate choice on the part of the Legislature to limit the courts' discretion in interfering with the contractual election—good or bad—made by the parties when they entered into their marriage. For instance, the section applies only to

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482 At 994 (E) – (J); confirmed by *Buttner v Buttner* 2006 (3) SA 23 (SCA) at par [30].

483 2005 (2) SA 187 (SCA).

484 At par [25].

485 Par [22] and [23].

> marriages that were entered into prior to the commencement of the *Matrimonial Property Act* 88 of 1984 on the basis of an antenuptial contract. With regard to marriages entered into subsequently, in terms of an antenuptial contract, the section finds no application at all. (They are governed by ch 1 of the *Matrimonial Property Act* 88 of 1984.) Women whose marriages were entered into later and with the exclusion of the accrual system may therefore be in the same disadvantaged position as before. Some suggest that the Legislature was too conservative and the reasons for its choice difficult to understand … One can sympathise with these views. The fact remains, however, that the Courts cannot go further than the Legislature allows them to go and that the Legislature does not allow them to treat all marriages upon divorce as if they were in community of property and without an antenuptial contract.[486]

It is important to note that the *Bezuidenhout* case held that a 50:50 division cannot be the "*starting point or general guide.*"[487] This does not however mean that an equal division cannot be made when on the facts it is clear that the parties made a conscious choice to regard themselves as "partners" so that their respective contributions were deemed by them to be of equal value. In *Buttner v Buttner* [488] the Supreme Court of Appeal held that in such a case "fairness demands that effect be given, on divorce, to the principle of equal sharing which the parties consciously applied throughout their married life."[489] To summarise, a combined reading of *Beaumont*, *Bezuidenhout* and *Buttner* shows that while there is no "general guide" or "starting point", the Court may, in exercising the wide judicial discretion granted to it under section 7(3), find that the principle of fairness demands a 50:50 sharing on the facts of the matter at hand.

It is submitted, within the context of property redistribution in terms of the *Domestic Partnerships Bill*, that at least two valuable lessons can be taken from this statement. The first, that pertains to the redistribution of separate property

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[486] Par [21] (emphasis and italics added).
[487] Par [22] (emphasis added).
[488] 2006 (3) SA 23 (SCA).
[489] Par [25].

under subsections (3), (4) and (5), is that the *dictum* quoted above is equally applicable to registered domestic partnerships with the result that no 50:50 *starting point* should be applied in attempting to redistribute such property. The second, and probably most valuable lesson of all, pertains to the division of the *joint property* of the registered domestic partners. In this regard it is submitted that the same *dictum* quoted above would be just as applicable regarding the division of such property. This is because even though it is tempting to suggest that by virtue of the facts (i) that the *Domestic Partnerships Bill* imposes the opposite proprietary "norm" to that of a marriage thus leading to the assumption that the approach in English law could far more readily be accommodated within the realm of the registered domestic partnership than in the case of a marriage, and (ii) that the issue at hand involves the division of joint as opposed to separate property thereby justifying the inference that the parties intended to share in that property on an equal basis, these considerations would do little to change the fact that—as is the case with section 7(3) of the *Divorce Act*—the Legislature has deliberately elected not to fetter the Court's discretion in dividing the property.[490] (In fact, it may be argued that in dividing joint property the Court enjoys an even wider discretion than in dividing separate property as the contribution criterion need not be satisfied with the result that the division is made on the basis of a "[pure] discretionary judgment in equity" without any precondition needing to be satisfied.)[491]

9.3.5.4 Deferral of claims

Clause 22 makes no provision for the satisfaction of an order granted by the Court to be deferred. This is an oversight which must be remedied; particularly in view of the fact that the possibility of deferral is provided for in the case of the

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490 As a consequence, it would appear in the light of decisions such as *Bezuidenhout* (at par [17] – [18]) and *Buttner* (at par [20]) that this wide discretion will imply that a misdirection by the Court of first instance would be a prerequisite for such a discretion to be interfered with on appeal.

491 *Per* Botha JA in *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 988 (I) – 989 (A).

unregistered domestic partnership.[492] The following insertion is consequently recommended:

> (6) A court granting an order contemplated in subsection (3) may, on application by the registered domestic partner against whom the order is granted, order that satisfaction of the order be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court regards just and equitable.

9.3.5.5 A note on the constitutionality of the redistribution competency

A final remark under this topic concerns the possible unconstitutionality that might be created (or in fact perpetuated) by the granting of a power to divide property such as that contained in clause 22.

Over the years, various authors have opined that limiting the discretion of a Court to grant a redistribution order according to the date on which a marriage was concluded[493] may be unconstitutional.[494] In this regard Heaton[495] opines that contemporary antenuptial contracts often exclude the accrual system, and, moreover, that such exclusion often occurs at the instance of the spouse whose estate is more likely to flourish during the course of the marriage. As a consequence, the purpose behind the introduction of the judicial power to redistribute—namely to benefit those to whom the accrual system was not available prior to 1 November 1984—is frustrated.[496] According to Heaton:[497]

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492 See clause 32(6).

493 See note 473 for a summary of the restrictions imposed by section 7(3) of the *Divorce Act* 70 of 1979.

494 See for example Visser and Potgieter 1998: 185.

495 2005: 3C26.

496 Also see *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA) where Brand JA remarked that female spouses to post-1984 marriages with complete separation of property "may therefore be in the same disadvantaged position as before" (at par [21]).

497 2005: 3C26.

> Viewed in this light, it seems that the differentiation between the two groups purely on the ground of their wedding date infringes the guarantee of equality before and equal protection and benefit of the law.

Furthermore, Sinclair and Heaton submit that:[498]

> If the purpose of the adjustive discretion is to avoid injustice, and that was the justification adduced for its introduction into our legal system, then the date of one's marriage and the range of the available choices should not constrain the power of the court. It has to be recognized that the premise of adjustive judicial power is to avoid grossly inequitable discrepancies in the financial position of the parties on divorce. Such discrepancies do not depend solely or even fundamentally on the nature of the matrimonial property system. All that can be said is that some systems, notably complete separation of property, are more likely than others to produce injustice. *If this is so, then, at the very least, whenever complete separation of property applies, the court should be able to intervene*.

Within the context of the proposed domestic partnership legislation, the South African Law Reform Commission acknowledges a related cautionary remark made by Van Schalkwyk to the effect that a deviation from the approach to the redistribution of assets as contained in the *Divorce Act* "might be discriminatory" and that "a general judicial discretion should be applicable under all circumstances."[499] It is a pity that the Commission did not express itself on this opinion for, should the *Domestic Partnerships Bill* be enacted, the argument that section 7(3) of the *Divorce Act* unfairly discriminates will undoubtedly receive added impetus. Indeed, it is submitted that the argument of unconstitutionality would be strengthened by virtue of the facts not only that a Court would be permitted to order a property division irrespective of the date on which the partnership was entered into, but also that the Bill would permit this discretion to

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498 Sinclair and Heaton 1996: 147 (emphasis added).

499 SALRC 2006: 412.

be exercised irrespective of the parties' property regime, with the result that it would exceed the minimum standard proposed by Sinclair and Heaton in the emphasised portion of the extract quoted above.

Although this argument falls beyond the scope of this study, it is suggested that Van Schalkwyk's submission to the Commission regarding a general judicial discretion is to be supported. As far as the opponents of such a discretion are concerned, their argument that it would lead to legal uncertainty are easily thwarted by Heaton's counter-contentions that the barrage of litigation initially predicted in 1984 has never occurred and that a minimal amount of uncertainty is preferable to unwavering rigidity.[500] The same holds true for the argument that the introduction of a judicial discretion to redistribute would interfere with the contractual autonomy of the spouses for, as Sinclair and Heaton[501] point out, this argument did not prevent the Legislature from interfering with the same in 1984 and again in 1988. As was the case regarding maintenance claims, it is therefore submitted that the *Divorce Act* may benefit from cross-pollination with the proposed domestic partnerships legislation, and the concomitant insertion of a broader power to divide assets irrespective of property regime or date of marriage as currently provided for in clause 22 of the 2008 Bill is therefore proposed.

9.3.5.6 The amended version of clause 22

> (1) In the event of a dispute regarding the division of property after a registered domestic partnership has terminated*, or, if the court is not satisfied that an agreement entered into between the registered partners in consequence of the termination of a registered domestic partnership other than in circumstances*

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500 Also see Sinclair and Heaton 1996: 143 *et seq*.

501 1996: 146.

envisioned in section 15[502] *is just and equitable as far as the division of property is concerned in the light of the factors listed in subsection (3) of this section, a Court may, upon application by* one or both of the registered domestic partners, ~~may apply to court for an~~ order *the division of* ~~to divide~~ their joint property or separate property, as the court may deem fit.

(2) Upon an application for the division of joint property, a court must order the division of that property which it regards just and equitable with due regard to all relevant factors.

(3) Upon an application for the division of separate property or part of the separate property, a court may order that the separate property or part thereof of the other registered domestic partner as the court regard just and equitable, be transferred to the applicant.

(4) A court considering *whether to grant* an order contemplated in subsection (2) and *determining the assets or part thereof to be transferred under subsection* (3) must take into account-

(a) the existing means and obligations of the registered domestic partners;

(b) any donation made by one registered domestic partner to the other during the subsistence of the registered domestic partnership;

(c) the circumstances of the registered domestic partnership;

(d) the vested rights of interested parties in the joint and separate property of the registered domestic partners;

(e) the existence and terms of a registered domestic partnerships agreement, if any between the registered domestic partners; and

(f) any other relevant factors.

(5) A court granting an order contemplated in subsection (3) must be satisfied that it is just and equitable to do so by reason of the fact that the registered domestic partner in whose favour the order is granted, made direct or indirect contributions to the maintenance or increase of the separate property or part of

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502 This provision envisions a situation where the property has not already been divided as per a Court order obtained under section 15 but where, for example, an informal agreement was entered into containing a division which one of the partners alleges not to be just and equitable.

the separate property of the other registered domestic partner during the existence of the registered domestic partnership.

(6) A court granting an order contemplated in subsection (3) may, on application by the registered domestic partner against whom the order is granted, order that satisfaction of the order be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court regards just and equitable.

9.4 Conversion of a registered domestic partnership into a marriage and *vice versa*?

One final aspect that needs to be addressed within the context of the registered domestic partnership is whether the Bill should provide for the conversion or transformation of a registered domestic partnership into a marriage and *vice versa*.

Regarding the possibility of converting a marriage into a registered domestic partnership, the South African Law Reform Commission opined in 2003 that, although a jurisdiction such as the Netherlands permits such an option, "this element of the Dutch model may be criticised for the fact that it is susceptible to abuse" as the parties may attempt to avoid the more arduous route of divorce.[503] The Commission however had no qualms regarding the conversion of a registered partnership into a marriage. This notwithstanding, while clause 4(5) of the legislation proposed in the 2003 *Discussion Paper* suggested that "partners in a registered partnership may at any time marry each other or enter into a civil union with each other,"[504] both the 2006 *Report* and the first *Civil Union Bill* of 2006 are silent on this issue.

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503 SALRC 2003: 269, reiterated in SALRC 2006: 323.

504 SALRC 2003: 272 and 273.

Although Dutch law and the various options available to Dutch couples regarding the formalisation of their relationships will be dealt with comprehensively in Chapter 8, it suffices for now to say that the Dutch *Burgerlijk Wetboek* currently provides its citizens with three such possibilities namely civil marriage, *geregistreerd partnerschap* (registered partnership) and the cohabitation contract.[505] Barring certain differences in respect of the adoption of children and the presumption of paternity, all of the consequences of a civil marriage (including the patrimonial consequences)[506] apply to a registered partnership.[507] Until 1 March 2009 Dutch law permitted a marriage to be converted into a registered partnership (article 1: 77a) and *vice versa*, but since the repeal of this provision only the conversion of a registered partnership into a marriage is currently permitted (article 1: 80g).[508] Conversion takes place by the relatively simple procedure of entering into an *akte van omzetting* (deed of conversion) before a state official that is entered into the marriage register. It is submitted that the fact that, in contrast with Dutch law, the patrimonial consequences of a marriage and a registered domestic partnership in South Africa stand to follow diametrically opposite points of departure (the former is by default in community of property while the opposite is true in the case of the latter) justifies not permitting such an option in South African law, at least not until the Legislature has had sufficient opportunity to consider the impact of domestic partnership legislation and the more comprehensive formal requirements for entering into the same and for binding outsiders advocated earlier in this Chapter. It is further submitted that, should the Legislature indeed decide to permit registered partners to marry one another, the involvement of a notary public in terms similar to those suggested for entering into a termination agreement (clause 14(1) – (3), as amended) should at the very least be prescribed in order for such a conversion to take place.

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505 See 3 in Chapter 8 below.

506 Article 1: 80b.

507 Van der Burght 2000: 84.

508 http://wetten.overheid.nl/BWBR0002656/Boek1/Titel5/Afdeling5A/geldigheidsdatum_05-10-2009 (accessed on 5 October 2009).

9.5 Conclusion

In the preceding discussion various aspects pertaining to the termination of the registered domestic partnership have been considered. These have included the suggestion that the circumstances under which Court intervention to terminate the partnership should be re-assessed, that principles of matrimonial property law should be extended where apposite and that the principles pertaining to property division and post-termination maintenance should be streamlined. It is submitted that these modifications are aligned with the approach mandated by a robust and effective domestic partnership rubric.

10. MISCELLANEOUS AMENDMENTS TO MARRIAGE AND CIVIL PARTNERSHIP LEGISLATION THAT WILL BE NECESSITATED BY THE ADVENT OF THE REGISTERED DOMESTIC PARTNERSHIP IN SOUTH AFRICA

Mention has been made of the need for the amendment to section 7(2) of the *Divorce Act* 70 of 1979 in order for it to take cognisance of the fact that an erstwhile spouse may enter into a registered domestic partnership under the *Domestic Partnerships Bill* and the resultant effect hereof on a maintenance order granted by the Courts.[509] A number of amendments to other Acts will also be necessitated by the coming into operation of registered domestic partnership legislation. Now that the legal nature of such partnerships has been explained, it is appropriate to consider these amendments.

10.1 Interaction with marriage and civil partnership legislation

The amendments now suggested are based on the fact that a registered domestic partnership is a status-altering relationship in which absolute

[509] See 9.3.1 above.

monogamy is required and which creates a *consortium omnis vitae* that is identical to that created by marriage. As such, it has been seen that clause 4 of the Bill does not permit a prospective registered domestic partner to be either (i) married in terms of the *Marriage Act* 25 of 1961; the *Recognition of Customary Marriages Act* 120 of 1998 or the *Civil Union Act* 17 of 2006 or (ii) to be a party to a civil partnership concluded in terms of the *Civil Union Act* 17 of 2006. As a corollary hereof, it is suggested that these pieces of legislation should in turn reflect the fact that a marriage or civil partnership may not be entered into while a party to such marriage or civil partnership is already involved in a registered domestic partnership. Before the amendments are suggested, it must first be mentioned that a draft *Marriage Amendment Bill* appeared in 2009,[510] clause 13 of which intends—it is submitted correctly—to insert the following provision into the *Marriage Act* 25 of 1961:

12A Requirements for solemnization of marriage

(1) A person may only be a spouse in one marriage at any given time.

(2) A foreigner who intends to marry a South African citizen or permanent resident must-

(a) in the prescribed manner, notify; and

(b) submit to, a letter issued by the relevant authorities in his or her country of birth as proof of no lawful impediment, the Director-General 30 days prior to the date of the intended marriage.

(3) A person in a marriage under this Act may not conclude a civil union under the Civil Union Act or a marriage under the Recognition of Customary Marriages Act.

(4) The provisions of subsection (3) shall not apply to a man and a woman married under the Recognition of Customary Marriages Act who are

[510] Government Gazette No. 31864 of 13 February 2009.

neither spouses in any other subsisting customary marriage with any other person.

(5) A prospective spouse who has previously been-

(a) registered as a civil union partner under the Civil Union Act;

(b) married under the Recognition of Customary Marriages Act; or

(c) married under this Act, must present a certified copy of the divorce order or death certificate of the former civil union partner or spouse, as the case may be, to the marriage officer as proof that the previous civil union or marriage has been terminated.

(6) No marriage officer shall proceed with the solemnization of the marriage unless in possession of the relevant documentation referred to in subsection (5).

In the light hereof it is submitted that:

(i) Section 12A of the proposed amendment to the *Marriage Act* of 1961[511] should be enacted as a matter of priority. The enactment of domestic partnership legislation would however necessitate an amendment to clause 13 of the *Marriage Amendment Bill*, 2009 in order to provide for registered domestic partnerships. The amended clause 13 and the resultant section 12A of the *Marriage Act* should therefore read:

12A Requirements for solemnization of marriage

(1) A person may only be a spouse in one marriage at any given time.

(2) A foreigner who intends to marry a South African citizen or permanent resident must-

(a) in the prescribed manner, notify; and

511 Act 25 of 1961.

(b) submit to, a letter issued by the relevant authorities in his or her country of birth as proof of no lawful impediment, the Director-General 30 days prior to the date of the intended marriage.

(3) A person in a marriage under this Act may not conclude a civil union under the Civil Union Act or a marriage under the Recognition of Customary Marriages Act *or a registered domestic partnership under the Domestic Partnerships Act*.

(4) The provisions of subsection (3) shall not apply to a man and a woman married under the Recognition of Customary Marriages Act who are neither spouses in any other subsisting customary marriage with any other person.

(5) A prospective spouse who has previously been-

(a) registered as a civil union partner under the Civil Union Act;

(b) married under the Recognition of Customary Marriages Act; ~~or~~

(c) registered as a domestic partner under the Domestic Partnerships Act; or

(d) married under this Act, must present a certified copy of the divorce order, *termination certificate* or death certificate of the former civil union partner or spouse, as the case may be, to the marriage officer as proof that the previous civil union, ~~or~~ marriage *or registered domestic partnership* has been terminated.

(6) No marriage officer shall proceed with the solemnization of the marriage unless in possession of the relevant documentation referred to in subsection (5).

In addition, a definition of "*Domestic Partnerships [Act]*" should be inserted into section 1 of the *Marriage Act*, to read "means the *Domestic Partnerships Act* ..."

(ii) Section 8 of the *Civil Union Act* 17 of 2006 should be amended in a similar vein, to wit:

8 Requirements for solemnisation and registration of civil union

(1) A person may only be a spouse or partner in one marriage or civil partnership, as the case may be, at any given time.

(2) A person in a civil union may not conclude a marriage under the Marriage Act or the Customary Marriages Act *and may not enter into a registered domestic partnership under the Domestic Partnerships Act*.

(3) A person who is married under the Marriage Act or the Customary Marriages Act *or who is a party to a registered domestic partnership under the Domestic Partnerships Act* may not register a civil union.

(4) A prospective civil union partner who has previously been-

(a) married under the Marriage Act or Customary Marriages Act;

(b) registered as a spouse in a marriage or a partner in a civil partnership under this Act; or

(c) *registered as a domestic partner under the Domestic Partnerships Act,*

must present a certified copy of the divorce order, *termination certificate* or death certificate of the former spouse or partner, as the case may be, to the marriage officer as proof that the previous marriage or civil union has been terminated.

(5) The marriage officer may not proceed with the solemnisation and registration of the civil union unless in possession of the relevant documentation referred to in subsection (4).

(6) …

In addition, a definition of "*Domestic Partnerships [Act]*" must be inserted into section 1 of the *Civil Union Act*, to read "means the *Domestic Partnerships Act* ..."

(iii) The *Recognition of Customary Marriages Act* 120 of 1998 should be amended by the insertion of subsection (2A) into section 3 thereof:

> No spouse in a customary marriage shall be competent to enter into a registered domestic partnership under the *Domestic Partnerships Act* … during the subsistence of such customary marriage.

It must be noted that these amendments are predicated on the assumption that the *Civil Union Act*[512] will be retained despite the enactment of domestic partnership legislation (in Chapter 8 it will be suggested that the *Civil Union Act* is superfluous and that it should be repealed). Nevertheless, until this occurs, the abovementioned amendments are crucial for the alignment of domestic partnerships legislation with the subsisting law of marriage and civil partnership.

10.2 The *Wills Act* 7 of 1953

This Act is another example of a piece of legislation that should be amended in view of the status-altering nature and *consortium omnis viate* attached to the registered domestic partnership. In its 2003 *Discussion Paper*, the South African Law Reform Commission included a provision in its proposed registered domestic partnership legislation that aimed to have the same legal effect as section 2B of the *Wills Act* of 1953 which states that:

> If any person dies within three months after his marriage was dissolved by a divorce or annulment by a competent court and that person executed a will before the date of such dissolution, that will shall be implemented in the same manner as it would have been implemented if his previous spouse had died before the date of the dissolution concerned, unless it appears from the will that the testator intended to benefit his previous spouse notwithstanding the dissolution of his marriage.

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512 17 of 2006.

It is submitted that, instead of inserting a similar provision into the *Domestic Partnerships Bill*, section 2B of the *Wills Act* should simply be amended by inserting references to the termination of registered domestic partnerships where appropriate, coupled with the insertion of a definition of "registered domestic partnership" as meaning "a domestic partnership registered according to the *Domestic Partnerships Act* …" into section 1 of the Act. The amended section 2B should read as follows:

> **2B Effect of divorce or annulment of marriage *or termination of registered domestic partnership* on will**
>
> If any person dies within three months after his marriage was dissolved by a divorce or annulment by a competent court *or his registered domestic partnership was terminated in accordance with section 12 of the Domestic Partnerships Act* and that person executed a will before the date of such dissolution, that will shall be implemented in the same manner as it would have been implemented if his previous spouse *or registered domestic partner* had died before the date of the dissolution *or termination* concerned, unless it appears from the will that the testator intended to benefit his previous spouse *or registered domestic partner* notwithstanding the dissolution of his marriage *or termination of his registered domestic partnership*.[513]

10.3 Conclusion

It goes without saying that other pieces of legislation that do not currently provide for relationships other than marriage will need to be amended if and when domestic partnership legislation is enacted. The Acts mentioned above serve merely as examples, as a much broader analysis of South African legislation is necessary in this regard.[514]

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513 Gender neutral references would obviously be preferred to the continued references to "his" in the Act. This aspect deserves legislative attention.

514 This process must be differentiated from the calibration of the Bill with legislation *that already provides* some form of recognition for non-marital unions that will be conducted in 12 below.

11. THE UNREGISTERED DOMESTIC PARTNERSHIP

11.1 Introduction

The scope and ambit of the chapter of the *Domestic Partnerships Bill* that deals with unregistered partnerships (chapter 4) and the interplay that exists between the registered and unregistered domestic partnership were dealt with earlier in this Chapter.[515] In the discussion that follows, the specific provisions of the Bill that deal with the requirements for and consequences of the recognition of the unregistered domestic partnership will be discussed.

11.2 Part I of chapter 4: "Property division after termination of unregistered domestic partnership"

11.2.1 Clause 26 of the Bill

Clause 26 of the Bill bears the title "[c]ourt application" and states that:

> (1) One or both unregistered domestic partners may, after the unregistered domestic partnership has ended through death or separation, apply to a court for a maintenance order, an intestate succession order or a property division order.
>
> (2) 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 the following matters as may be relevant in a particular case:
>
> (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;

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[515] See 1 and 5 above.

(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.

(3) A finding in respect of any of the matters mentioned in subsection (2), or in respect of any combination of them, is not essential before a court may make an order under this Act, and regard may be had to further matters and weight to be attached to such matters as may seem appropriate in the circumstances of the case.

(4) A court may not make an order under this Act regarding a relationship of a person who, at the time of that relationship, was also a spouse in a civil marriage or a partner in a civil union or a registered domestic partnership with a third party.

(5) A court may only make an order under this Act regarding a relationship where at least one of the parties to the relationship is a South African citizen or a permanent resident.

According to the South African Law Reform Commission:

In accordance with the Commission's recommendation to provide for the fair and equitable conclusion to the financial consequences of the termination of an unregistered partnership through a Court procedure, provision must be made to establish *which relationships deserve such protection*. For this purpose the Commission proposes a procedure whereby a Court determines after the end of the relationship whether the conduct of the parties during the relationship *points to an implied agreement to incur rights and obligations*. Where partners have neither married nor registered their partnership in order to create and obtain legal rights and obligations,

> the intention of *mutual commitment* must be *inferred* from the circumstances of their cohabitation.[516]

Briefly stated, chapter 4 of the Bill ostensibly envisions the situation whereby, at the termination of a relationship, either or both persons can apply to a competent Court, which, on the basis of a list of factors, will determine whether the relationship qualifies for the protection provided by the Bill. Once this evaluation has been completed, the merits of the claim itself (such as a claim for property division or maintenance) will be assessed with a view to making a final order.[517] The procedure therefore in theory comprises two separate enquiries, both of which should be answered in the affirmative, namely (i) the assessment as to whether the relationship in which the applicant was involved satisfies a threshold criterion for recognition, and (ii) if so, the assessment of the merits of the particular claim sought.

The trouble with clause 26 of the Bill is that it does not convey this message. Upon reading subsection (2), the first problem that one encounters is the wording "[w]hen deciding an application *under section 26* of this Act." It will be noted that "section 26" is actually a reference to this very provision (i.e. clause 26). This immediately causes confusion, as in reality no application is in fact being made *in terms of section 26*. Instead, section 26 is merely intended to provide the threshold criterion, which if satisfied, will then enable the Court to enter into the second enquiry in terms of which the merits of the claim petitioning the Court to grant any specific relief *under the subsequent provision(s) of the Bill* are to be assessed. In its current form clause 26 does not convey this intention. Instead, subsection (2) contains no reference to any form of threshold criterion which is intended to be satisfied with recourse to the factors listed therein. On the contrary, in its current form clause 26 creates the impression that the factors listed in subsection (2) are prescribed over and above the factors listed in any

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516 SALRC 2006: 387 (emphasis added).

517 SALRC 2006: 393.

other subsequent provision. In other words, it appears as if the factors in subsection (2) must be considered in conjunction with any factors which may be prescribed in any subsequent section for the purposes of the particular relief sought. This state of affairs is both procedurally and jurisprudentially unsound.

The solution to this problem appears to be quite straightforward, at least in theory: Subsection (2) must contain a direct reference to a threshold criterion and must clearly state that the factors listed in that subsection are to be considered as indicators for the purposes of determining whether that criterion is satisfied. Having said this, the difficult part is to identify a suitable criterion. In this regard a number of possibilities come to mind. For example, the South African Law Reform Commission states that the decisive criterion should be whether the parties "have lived as a couple" from which, once satisfied, it can be assumed "that there was a mutual commitment."[518] Further options in terms of a threshold criterion may conceivably include those considered in Chapter 4 for the purposes of life partnerships, namely permanence, monogamy and interdependence. Regardless of which of these options is selected, it can be accepted that the list of *indicia* to be considered in order to determine whether the threshold criterion has been satisfied should not constitute a *numerus clausus* and that no one *indicium* should be indispensable. This would imply, for example, that no minimum duration should be prescribed and that uninterrupted cohabitation should not be an absolute requirement for recognition. The duration of the relationship and the extent of cohabitation ought nevertheless to be considered in terms of determining whether the threshold criterion has been satisfied.[519]

11.2.2 Identifying the correct threshold criterion

In its current form, clause 26(2) of the Bill compels a Court, when deciding any application, to consider "all the circumstances of the relationship" as well as a

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518 SALRC 2006: 393.

519 See SALRC 2006: 392, 393.

number of other matters where they are relevant. The difficulty, however, is that no indication is provided as to what the point of this exercise is, because, as stated above, no threshold criterion is prescribed. As seen in the introductory paragraph, such a criterion is a vital requirement for the purposes of establishing whether any given relationship is *prima facie* entitled to the protection provided by the remainder of the Bill.

It is submitted that the South African Law Reform Commission's proposal in this regard—namely that the parties must "have lived as a couple" in such a way as to permit a Court to "[accept] that there was a mutual commitment"[520]—is unsuitable as it is simply too vague: What precisely does "[living] as a couple" mean and to what exactly are the parties required to have "[mutually] committed" themselves? In addition, the very notion of a "*mutual* commitment" is susceptible to undue emphasis being placed on the sexual fidelity of the parties or, moreover, may drastically undermine the position of vulnerable (usually female) partners in what Goldblatt describes as "easy-come, easy-go" relationships which may have existed for a significant period of time.[521] Finally, although the criterion that the parties must "live together as a couple" is favoured by, for example, the New Zealand *Property (Relationships) Act* 1976,[522] it is submitted that the "living together" requirement over-accentuates the requirement of cohabitation,[523] and

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520 SALRC 2006: 393.

521 See Goldblatt 2003: 613: "This usually, (but not exclusively) occurs among young people. Often the women would like the relationship to become more stable or lead to marriage but they do not have major expectations that the men will see it their way. The women often squirrel away money and then hide their purchases such as cutlery and crockery. This approach to cohabitation can exist in relationships of long duration and even where the couple has children together. A number of domestic workers said that they no longer cohabit as men use them to get free accommodation, food and money. One woman interviewee, a domestic worker, described her arrangement as follows: 'We are only keeping each other company. There is not much in the relationship'."

522 Section 2D. Also see section 4 of the New South Wales *Property (Relationships) Act* 1984.

523 In Queensland the *Discrimination Law Amendment Act* 2002 (No. 74, 2002) has inserted an amended definition of "de facto partner" in a number of statutes (such as the *Anti-Discrimination Act* 1991). This amended definition expressly states that mere cohabitation is not sufficient to conclude that the parties are "living together as a couple on a genuine domestic basis"—see section 4B of the amended 1991 Act.

that the "couple" requirement may be unsuitable in a South African context to the extent that it implies monogamy.[524]

Although not tasked with drafting proposed legislation as such,[525] it is useful to compare the eligibility criteria recently recommended by the Law Commission of England and Wales for cohabitants to qualify for financial relief at the termination of their relationships. The thrust of the Commission's conclusion is that cohabitants are persons who are neither married nor are civil partners and "are living as a couple in a joint household."[526] The fact that either person is already married, involved in a civil partnership or cohabitating with an outsider is irrelevant, but if sexual activity between the parties is capable of prosecution on the basis of age or due to the fact that they are relatives, this would preclude them from approaching a Court for relief under the proposed framework.[527] Although a "checklist" of factors in order to assist in determining whether the baseline criteria have been met is not prescribed, the Commission provides a list of "six signposts" which a Court may consider in cases of doubt.[528] The duration of the relationship is irrelevant where children have been born into it, while in childless relationships a minimum duration of anything between two and five years has been proposed.[529] Depending on the period of duration that is finally chosen, the Commission recommends that the minimum period should also apply in cases where children have not been born of both parties (such as in the case of step- or foster children), provided that that minimum is not longer than two years. If a longer period were chosen, the Commission recommends that the Courts be vested with the power to dispense with the duration requirement where

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524 See for example Van Schalkwyk's submission in SALRC 2006: 383 as well as the discussion in 5.2.2.1 above, and in 2.1.2.2 in Chapter 4.

525 EWLC 2007: 48.

526 EWLC 2007: 48.

527 EWLC 2007: 63.

528 EWLC 2007: 50. These are: The existence of a joint household (this is in fact an express requirement for recognition and not merely a "signpost"—see EWLC 2006: 50 at note 21); the stability of the relationship; the financial arrangements between the parties; the responsibility for children; the existence of a sexual relationship between the parties; and the extent of public recognition or acknowledgment thereof.

529 EWLC 2007: 57.

doing so would be "in the interests of justice."[530] In all cases cohabitation is essential; and, moreover, must be continuous.[531]

Comparing the English proposals with their South African equivalent warrants the following observations:

(i) The English threshold criterion, namely that the parties have lived together as a couple is unsuitable in a South African context for the same reasons as mentioned in respect of the New Zealand *Property (Relationships) Act*, 1976;

(ii) The English approach towards concurrent relationships differs from that proposed in clause 26(4) of the South African Bill. The latter proposals do however correctly reflect the South African Law Reform Commission's general opposition towards polygamous relationships that do not square with the condition of monogamy in terms of formalised civil as opposed to customary relationships;[532]

(iii) The English restrictions based on consanguinity and affinity do not appear in chapter 4 of the South African Bill, with the result that—as seen earlier in this Chapter—the latter document appears to sanction so-called "care partnerships." In order for this intention to be conveyed correctly (and appropriately), it is submitted that clause 26(4) should restrict the ambit of such partnerships. This aspect has been addressed in 3.2 above; and

(iv) The *Domestic Partnerships Bill*'s lack of a minimum duration requirement avoids the at times tenuous differentiation in English law between

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530 EWLC 2007: 59.

531 EWLC 2007: 53; 60.

532 See Van Schalkwyk's comments regarding polygamy in the context of customary relationships (SALRC 2006: 383).

childless couples and relationships where children are involved.[533] This correctly reflects the fact that the best interests of children are the paramount consideration and that the existence or otherwise of children in domestic partnerships should not have a direct bearing on the recognition of such partnerships *inter partes*. In addition, the absence of a minimum duration requirement in the 2008 Bill removes the necessity for a technical analysis of whether or not the currency of the relationship was ever interrupted. The South African approach is consequently supported.

This brief comparison shows that despite the lack of an explicit and clearly-defined threshold criterion, the gist of clause 26 of the Bill allows for a contextualised and pluralistic approach to South African conditions that is in keeping with the demands of the domestic partnership rubric, with the result that a substantial deviation from the approach suggested in England and Wales can in principle be upheld.

Returning to the attempt to identify a threshold criterion for the South African Bill, the parameters or criteria of permanence, monogamy and dependence referred to in Chapter 4 of this study must be evaluated. In this regard the following remarks are apposite:

- The issue of a so-called "polygamous" unregistered domestic partnership has been dealt with earlier in this Chapter and need not be revisited at this point.[534]

- The criterion of dependence, while theoretically sound, should be approached with caution. As seen in Chapter 4 a flexible approach was recommended to this criterion on the basis of "whether an applicant's lifestyle was 'substantially enhanced' by reason of his or her relationship

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533 See EWLC 2007: 51 – 59.

534 See 5.2.2.1 above.

with the other partner."[535] While it cannot be doubted that such a flexible approach is apposite within the context of unregistered domestic partnerships, the flexibility of this criterion implies that its reliability as a sole threshold criterion is questionable. For example, if one considers the facts in the case of *Bezuidenhout NO v ABSA Versekeringsmaatskappy Bpk* [536] where no intimate relationship existed between the partners[537] and where the one had maintained the other "almost like a child" due to the fact that the latter "had no-one to care for her, had no other place to live, and had no other means of support,"[538] there could be no doubt that the dependent partner would satisfy the criterion of "dependence." However, if the tables were turned, the elevation of the criterion of dependence to a *threshold criterion* would imply that the maintaining partner would be hard-pressed to prove that an unregistered domestic partnership existed due to the fact that there was certainly no question of "co-opera[tion] in the meeting of expenses."[539] Furthermore, it is doubtful whether the maintaining partner's *lifestyle* was "substantially enhanced by reason of [her] relationship with the other partner."[540] It is submitted that this example illustrates why interdependence should not be the *sole* criterion but, as was the case with criteria such as cohabitation and mutual commitment, should nevertheless be relevant for the purpose of establishing whether any given relationship qualifies for the protection provided by the Bill.

- It is submitted, then, that the only truly reliable threshold criterion that can be used as a litmus test is whether the relationship is (or was) of a permanent nature. This criterion is not only an objective question of fact,

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535 SALRC 2006: 14.

536 Unreported judgment of the Transvaal Provincial Division (now North Gauteng High Court, Pretoria), case no 40688/2008 delivered on 26 February 2008. The facts of the case are described in more detail in 3.4.2 of Chapter 5.

537 Par [7.2].

538 Par [7.3].

539 SALRC 2006: 14.

540 *Per* SALRC 2006: 14 (see the discussion in 2.1.2.2 in Chapter 4).

but there is also ample case law in which the permanence (or otherwise) of the relationship has been regarded as decisive for the purpose of determining whether it is to be protected.[541] (In fact, the preamble to the Bill also specifically mentions that cognisance is taken of the fact that "there is no legal recognition or protection for … couples in *permanent* domestic partnerships".)[542] In contrast with criteria such as dependence, cohabitation or mutual commitment, the criterion of permanence is simply indispensable. It follows, therefore, that it should be the *sine qua non* for the recognition of any given relationship under chapter 4 of the Bill.

Proceeding from this conclusion, the next issue is to decide how this threshold criterion should be accommodated within clause 26 of the Bill. In this regard it is submitted—as mentioned above—that clause 26 of the Bill should unequivocally convey the message that it aims to provide the framework within which the first or preliminary enquiry in the process is to be assessed, namely whether the relationship is *prima facie* worthy of protection under the Bill. In order for this to be achieved, the threshold criterion (i.e. permanence) should simply be linked to that which is being ascertained, namely whether the relationship qualifies *as an unregistered domestic partnership* for the purposes of the Bill.[543] In addition, as seen above, the reference to "section 26" of the Bill needs to be removed so as to reinforce the notion that an application is being made for relief granted under *the remainder* of the Bill. Consequently, it submitted that clause 26(2) should be amended as follows:

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541 See for example *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [86] and [88]; *Ripoll-Dausa v Middleton and Others* 2005 (3) SA 141 (C) at 154 (C) – (D); *Gory v Kolver NO and Others* 2006 (5) SA 145 (T). Also see Wood-Bodley 2008(b): 259 – 266 and 273: "It is essential to the recognition of a same-sex conjugal relationship to establish that the parties regarded their relationship as permanent." In proposing the definition of a domestic partnership as "a permanent, intimate life partnership between two adults" Goldblatt (2003: 624) also appears to view the requirement of permanence as being essential. (As far as her insistence on the requirements of monogamy and intimacy are concerned, it has been seen that these requirements cannot be essential—see 2.1.2.2 in Chapter 4 as well as the main text above.)

542 Preamble to the draft *Domestic Partnerships Bill,* 2008 (emphasis added).

543 See for example section 4(2) of the New South Wales *Property (Relationships) Act* 1984 where the list of indicators is geared towards determining whether a "*de facto* relationship" exists between the parties (italics added).

(2) When deciding an application for an order under ~~section 26 of this Act~~ *this Chapter*, a court must, *in ascertaining whether the relationship qualifies as a permanent unregistered domestic partnership for the purposes of this Chapter,* have regard to all the circumstances of the relationship, including the following matters as may be relevant in a particular case:

(a) …

As a final recommendation, it is submitted that in order to avoid confusion, the heading to Part I of chapter 4 should be amended to read "Application procedure" instead of "Property division after termination of unregistered domestic partnership." This is recommended, quite simply, because an order for property division is not the only order for which an application can be brought under the Bill, and also because Part III of chapter 4 already bears this title.

11.2.3 The indicators listed in clause 26(2)

With the exception of a direct reference to intimacy, subsection (2)(a) – (i) of the Bill recasts section 4(2) of the New South Wales *Property (Relationships) Act* of 1984 and section 2D of the New Zealand *Property (Relationships) Act*, 1976.[544] It also reflects at least five of the "six signposts" mentioned by the Law Commission of England and Wales.[545] It is submitted that the non-exhaustive list of indicators provided in subsection (2) correctly reflects the domestic partnership rubric's need for a flexible and nuanced approach that entitles a Court to exercise an unfettered discretion in determining whether a relationship qualifies for the protection provided by the Bill. It is however important to reiterate that such a wide discretion is meaningless unless the *indicia* are linked to a suitable threshold criterion.

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544 These factors are also substantially similar to those listed in Queensland's *Discrimination Law Amendment Act* 2002 (No. 74, 2002) in order to ascertain "whether 2 persons are living together as a couple on a genuine domestic basis" and hence qualify as *de facto* partners for the purpose of a number of statutes such as the *Anti-Discrimination Act* 1991 (see section 13 of the 2002 Act).

545 See note 528 above.

11.2.4 Formal requirements

In 2003 Goldblatt[546] opined that no formal requirements should be prescribed in order for a non-formalised domestic partnership to enjoy legal recognition:

> Such formalities are unrealistic in South Africa where many people are illiterate, have little knowledge of the law and no easy access to it. There is also the issue of unequal power relations between men and women, which means that women may not be able to insist on registration. This is because women, rather than men, are likely to want to use the law to protect their interests within the partnership. Men generally benefit from the lack of legal coverage and may well create obstacles to registration. While this may demonstrate unwillingness on the part of men to accept proposed legal consequences of domestic partnerships, this should not prevent women from obtaining legal protection.

The fact that chapter 4 of the Bill does not prescribe any formalities for the recognition of an unregistered domestic partnership is supported, not only for the reasons mentioned by Goldblatt, but also for the purposes of facilitating the interplay between the registered and unregistered domestic partnership throughout the Bill.[547]

11.2.5 Prohibited degrees of affinity and consanguinity and so-called "care partners"

It will be recalled that it was proposed in 3.2 that clause 26 should be amended in order to recognise non-conjugal "care partnerships" as the only exception to the rule that unregistered domestic partnerships may not be constituted by relationships between persons who would be prevented from marrying one

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546 2003: 624.

547 It has however been suggested that the Bill should be amended in order to protect partnerships that have not been registered due to *bona fide* error or oversight—see 5.2.1.1 above.

another on the basis of affinity or consanguinity. To this end it was proposed that subsections (6)[548] and (7)[549] be inserted into the clause in question.

11.2.6 Calibration with other legislation

In 5.2.2.1 above the necessity for providing for the possibility of conflict between the provisions of any potential legislation governing the recognition of purely religious marriages and a claim under chapter 4 of the Bill was discussed. This provision is inserted into clause 26 as subsection (8).

It will also be recalled that the final facet of the domestic partnership rubric mandates the calibration of the modified Bill (as the legislative substructure of the domestic partnership in South Africa) with attendant legislation impacting on such partnerships in existing or prospective legislation. This facet of the rubric will be discussed in the next paragraph of this Chapter. For now it will suffice to say that certain of these pieces of legislation are problematic in the sense that while they specifically *refer* to life or domestic partnerships, they prescribe no criteria for establishing whether or not such a partnership exists for the purposes of that specific Act. In this regard it is submitted that a cross-reference to [section] 26 of the *Domestic Partnerships [Act]* may provide a solution to this problem. While further detail regarding this issue will be provided in 12.1 and 12.2.5 below, it is suggested for now that a subsection 9 that provides for such a cross-reference should be inserted into clause 26 of the Bill.

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548 "[A] Court may not make an order under this Chapter regarding a relationship between two persons who would be prohibited by law from concluding a marriage on the basis of consanguinity or affinity, unless that relationship is a non-conjugal relationship in terms of which one person provided the other with domestic support and/or personal care."

549 "[A] Court may not make an order under this Chapter regarding a relationship between two persons where one of them provided the other with domestic support and/or personal care:

(a) for fee or reward, or

(b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation)."

11.2.7 Conclusion: The recommended amended version of clause 26

(1) One or both unregistered domestic partners may, after the unregistered domestic partnership has ended through death or separation, apply to a court for a maintenance order, an intestate succession order or a property division order.

(2) When deciding an application for an order under *this Chapter*, a court must, *in ascertaining whether the relationship qualifies as a permanent unregistered domestic partnership for the purposes of this Chapter,* have regard to all the circumstances of the relationship, including the following matters as may be relevant in a particular case:

(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.

(3) A finding in respect of any of the matters mentioned in subsection (2), or in respect of any combination of them, is not essential before a court may make an order under this Act, and regard may be had to further matters and weight to be attached to such matters as may seem appropriate in the circumstances of the case.

(4) A court may not make an order under this Act regarding a relationship of a person who, at the time of that relationship, was also a spouse in a civil

marriage or a partner in a civil ~~union~~*partnership* or a registered domestic partnership with a third party.

(5) A court may only make an order under this Act regarding a relationship where at least one of the parties to the relationship is a South African citizen or a permanent resident.

(6) [A] Court may not make an order under this Chapter regarding a relationship between two persons who would be prohibited by law from concluding a marriage on the basis of consanguinity or affinity, unless that relationship is a non-conjugal relationship in terms of which one person provided the other with domestic support and/or personal care.

(7) [A] Court may not make an order under this Chapter regarding a relationship between two persons where one of them provided the other with domestic support and/or personal care:

(a) for fee or reward, or

(b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).

(8) In the event of a conflict between the provisions of this Chapter and a provision in any Act that has been promulgated with the specific purpose of recognising the validity of; requirements for; regulation, proprietary consequences and termination of; or status and capacity of spouses to any marriage that has been concluded in accordance with a system of religious law subject to specified procedures, the provisions of that Act shall prevail in respect of a claim instituted by such a spouse.[550]

(9) [This subsection will be the cross-referencing provision dealt with in 12.1 and 12.2.5 below].

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[550] See 5.2.2.1 above.

11.3 Part II of chapter 4: "Maintenance after termination of an unregistered domestic partnership"

11.3.1 Introduction

The position regarding post-termination maintenance of unregistered domestic partners stands to be regulated by clauses 27 – 30 of the Bill. The general principle is contained in clause 27 which states that such partners "are not liable to maintain one another and neither partner is entitled to claim maintenance from the other, except as provided for in this Act."[551] This clause was, according to the South African Law Reform Commission, included as a consequence of the fact that the creation of an *ex lege* duty of support (such as the one attached to marriage by the common law and the one proposed in the Bill for *registered* domestic partners) was impossible in view of the decision to opt for a judicial discretion (*ex post facto*) model as opposed to one in which *de facto* recognition was provided during the existence of a relationship that exhibited certain pre-determined characteristics.[552] An outflow of this model would be that "limited" rights to post-termination maintenance and succession could be provided by the relevant legislation.[553] Proceeding from this premise and its manifestation in clause 27, the provisions regulating post-termination maintenance will be analysed in the paragraphs that follow.

11.3.2 Maintenance after separation

11.3.2.1 Introduction

According to clause 28(1) of the Bill an application may be made to Court by either or both unregistered domestic partners for a maintenance award that is "just and equitable" in terms of which maintenance will be payable by one partner

551 See section 26 of the New South Wales *Property (Relationships) Act* 1984.
552 SALRC 2006: 397.
553 SALRC 2006: 397, 398.

to the other "for a specific period" after the partnership has been terminated by separation. One question that immediately springs to mind is what the reason is for the differentiation between the registered and unregistered models as far as the duration of the maintenance award is concerned. (In the case of a registered domestic partnership, a Court is not empowered to grant an order for maintenance that extends beyond the death or remarriage of the entitled partner, or beyond the date on which he or she enters into a registered domestic or civil partnership.)[554] As it stands, clause 28 grants a wider discretion than that provided by both the *Divorce Act*[555] and by clause 18 by potentially permitting a Court to grant an order that extends beyond these events. This state of affairs cannot be condoned, as there is no justification for extending the duration of a maintenance order beyond the date upon which the entitled person enters into a relationship with someone else that creates an *ex lege* duty of support between the entitled person and her new spouse or partner. It is therefore submitted that the Court's discretion in subsection (1) should be curtailed by providing that an order granted under that provision will automatically lapse when the partner in whose favour the order is given dies, remarries or enters into a registered domestic or civil partnership. This amendment is illustrated below.

A second difficulty that appears from subsection (1) in its current guise is that no provision is made for the fact that the parties may have entered into an agreement regarding maintenance which one of them may deem to be unjust or inequitable with the result that he or she may wish to approach the Court for relief. While the correct forum for an aggrieved party to revisit the validity or enforceability of such an agreement may *strictu sensu* be the Maintenance Court, it is submitted that the novel and unique considerations which apply in the case of unregistered domestic partnerships coupled with the tailor-made contextualised criteria listed in clause 28 justify an application under this piece of

554 Clause 18(1).
555 70 of 1979 (section 7(2)).

legislation as opposed to the *Maintenance Act* 99 of 1998.[556] To this end it is submitted that clause 28(1) should be modified in order to cater for this eventuality. This can be achieved by modifying the first part of subsection (1) as follows:

> In the absence of a maintenance agreement, or, *if the court is not satisfied that the maintenance agreement entered into between the unregistered domestic partners is just and equitable*, a court may, upon application by one or both of them after their separation, make an order which is just and equitable in respect of the payment of maintenance …

The third and possibly most glaring problem with the way in which the Bill attempts to regulate post-termination maintenance is the fact that it disregards the principle identified in the "contextualised choice model" in respect of all needs-based claims (such as a claim for maintenance) in terms of which the existence of a reciprocal duty of support *during the existence* of a relationship has been found to be a *sine qua non* for the extension thereof beyond its termination.[557] To illustrate: Clause 27 expressly states that unregistered domestic partners "are not liable to maintain one another" or to claim maintenance from one another. From this statement the logical assumption flows—as stated above—that no *ex lege* duty is created between unregistered domestic partners; a fact which stands to reason when it is considered that no formal public commitment has ever been undertaken by the parties. However, it has also been emphasised throughout this study that parties to non-formalised relationships are perfectly capable of *contractually* binding themselves to support one another, and that the existence of such mutual obligations has often been inferred on the facts of a particular case.[558] Moreover, it has been seen that an

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556 In the alternative, the *Maintenance Act* may need to be amended in order to provide for such a situation, with a possible cross-reference to clause 28.

557 See 3.3.2.2 in Chapter 5 as well as 7.3.4.2 above.

558 See for example *Gory v Kolver NO and Others* 2006 (5) SA 145 (T) at par [18]; *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) at par [25]; *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) at par [11] – [16]. As was pointed out in Chapter 5, it is submitted

ex contractu duty of support is as robust and capable of enforcement as its *ex lege* counterpart.[559] However, when a situation arises where *neither* an *ex lege* nor a contractually-created duty to maintain is present during the existence of a relationship, it would be impossible to lodge a claim that is essentially based on that duty after its termination. The conclusion, therefore, is that while the South African Law Reform Commission has—with respect correctly—decided not to impose an *ex lege* duty of support on unregistered domestic partners, such partners must have undertaken contractual mutual support obligations *during the existence of their relationships* in order for *any* need-based claim to be instituted after their termination. Consequently, it is submitted that the *sine qua non* for a post-termination maintenance claim under chapter 4 of the Bill is that mutual support obligations must either expressly or by implication have been undertaken during the existence of the relationship. This principle will apply irrespective of whether the unregistered domestic partnership is terminated *inter vivos* or by death. It is imperative for both clauses 28 and 29 of the Bill to be amended to reflect this fact.

In the light of the preceding conclusions, it is also recommended that clause 27 of the Bill should be amended so as to reinforce the fact that contractual support obligations are permissible and enforceable between the parties involved. The amended form of clause 27 is included below.

11.3.2.2 The effect of a purely religious marriage on a maintenance order

It has been emphasised throughout this Chapter that the parties to a "marriage" that has never purported to constitute a valid civil or customary marriage may qualify as unregistered domestic partners provided that they comply with chapter 4 of the Bill.[560] By the same token, it has also been seen that clause 26(4) of the

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that the Courts erred by not inferring the existence of mutual support obligations on the facts in *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).

559 See 3.3.1.2 in Chapter 5 above.

560 See 5.2.2.1 above.

Bill does not proscribe polygynous purely religious marriages provided that no person involved is a party to a subsisting civil marriage, civil partnership or registered domestic partnership with a third party.[561] In the discussion of the latter category of persons it was however specifically mentioned that the Bill would need to be amended in order for this possibility to take full effect. Clause 28(2)(h) of the Bill provides an example of a provision which in effect hamstrings the recognition of polygynous unregistered domestic partnerships. The provision in question states the following:

> (2) When deciding whether to order the payment of maintenance and the amount and nature of such maintenance, the court must have regard to the following matters:
>
> (a) …
>
> (h) the relevant circumstances of another unregistered domestic partnership or *customary marriage* of one or both unregistered domestic partners, where applicable, insofar as they are connected to the existence and circumstances of the unregistered domestic partnership, and any other factor which, in the opinion of the court, should be taken into account.[562]

It will be seen that the provision in question only refers to one type of marriage that is potentially polygynous, namely the customary marriage. However, it is important to note that customary marriages are not the only marriages that often assume a polygynous form, but that certain religious systems also sanction the conclusion of such marriages. The observation attributed to Van Schalkwyk[563] to the effect that "although the legal recognition of a polygamous relationship would be *contra* the nature of a civil marriage it is not *contra* a customary marriage" is therefore equally applicable within the context of purely religious marriages. While it is undoubtedly true that polygynous purely religious marriages are, unlike

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561 See 5.2.2.1 above (example (iii) in discussion of "polygamous" domestic partnerships).

562 Emphasis added.

563 See SALRC 2006: 383 (italics added).

customary marriages, not valid marriages, there consequently appears to be no reason why the existence of a purely religious marriage cannot be taken into account alongside the existence of an unregistered domestic partnership. In other words, if X and Y are parties to a Hindu marriage that has never been solemnised in accordance with applicable South African marriage legislation, and during the existence of this marriage X enters into an unregistered domestic partnership with Z, there appears to be no reason why the existence of this marriage should not be taken into account when Z approaches a Court for relief at the termination of her relationship with X. As the Bill stands, this will not appear to be the case, unless, of course, it could be argued that the religious marriage between X and Y qualifies as an "another unregistered domestic partnership" of which the relevant provision permits cognisance to be taken alongside the unregistered domestic partnership that exists between X and Z. As this is a matter of speculation[564] it is submitted that the safest route to take would be to amend clause 28(2)(h) by inserting the words "or marriage that has been concluded in accordance with a system of religious law subject to specified procedures" after the words "customary marriage."

Finally, it is important to reiterate the fact that clause 28(2)(g) specifically permits "the relevant circumstances of another unregistered domestic partnership" to be taken into account. The significance hereof in terms of permitting "polygynous" unregistered domestic partnerships that are *not* culture-based has already been referred to in 5.2.2.1 above, and will again become apparent in the paragraphs that follow.

11.3.2.3 Conclusion

The discussion above highlights, first, that the discretion granted to a Court to grant a maintenance order in terms of clause 28(1) should be limited and that provision should be made for a maintenance agreement entered into between

564 See the discussion in 5.2.2.1 above.

the partners. Furthermore, it is imperative that clause 28 should reflect the fact that the existence of a reciprocal duty of support during the existence of a relationship is a *sine qua non* for the extension thereof beyond its termination, and that clause 27 should also be amended in order to reflect the significance of a contractual duty of support. Finally, it was concluded that a Court should specifically be permitted to take cognisance of the existence of purely religious marriages when granting maintenance orders. Bearing the above in mind, it is submitted that clauses 27 and 28 should be amended as follows:

27. Maintenance

Unregistered domestic partners are not *by operation of law* liable to maintain one another and neither party is entitled to claim maintenance from the other, except as provided for in this Act *or by agreement between such partners.*

28. Application for maintenance order after separation

(1) *In the absence of a maintenance agreement, or, if the court is not satisfied that the maintenance agreement entered into between the unregistered domestic partners is just and equitable, a court may, upon application by one or both of them after their separation, and provided that the Court is satisfied that a reciprocal duty of support existed between the unregistered domestic partners,* make an order which is just and equitable in respect of the payment of maintenance by one unregistered domestic partner to the other for a specified period.

(1A) An order granted under subsection (1) will automatically lapse when the partner in whose favour the order is given dies, remarries or enters into a registered domestic or civil partnership.

(2) When deciding whether to order the payment of maintenance and the amount and nature of such maintenance, the court must have regard to the following matters:

(a) the age of the unregistered domestic partners;

(b) the duration of the unregistered domestic partnership;

(c) the standard of living of the unregistered domestic partners prior to separation;

(d) the ability of the applicant to support himself or herself adequately in view of him or her having custody of a minor child of the unregistered domestic partnership;

(e) the respective contributions of each unregistered domestic partner to the unregistered domestic partnership;

(f) the existing and prospective means of each unregistered domestic partner;

(g) the respective earning capacities, future financial needs and obligations of each unregistered domestic partner; and

(h) the relevant circumstances of another-

(i) unregistered domestic partnership; or

(ii) customary marriage; or

(iii) *marriage that has been concluded in accordance with a system of religious law subject to specified procedures;*

of one or both unregistered domestic partners, where applicable, insofar as they are connected to the existence and circumstances of the unregistered domestic partnership; and

(i) *any other factor which, in the opinion of the Court, should be taken into account.*

11.3.3 Maintenance after the death of an unregistered domestic partner

The possibility of a surviving unregistered domestic partner instituting a claim for maintenance against the estate of his or her deceased partner is regulated by clauses 29 and 30 of the Bill. These provisions state the following:

29. Application for a maintenance order after death of unregistered domestic partner

(1) A surviving unregistered domestic partner may after the death of the other unregistered domestic partner, bring an application to a court for an order for the provision of his or her reasonable maintenance needs from the estate of the deceased 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.

(2) The surviving unregistered domestic partner will not, in respect of a claim for maintenance, have a right of recourse against any person to whom money or property has been paid, delivered or transferred in terms of section 34(11) or 35(12) of the Administration of Estates Act, or pursuant to an instruction of the Master in terms of section 18(3) or 25(l)(a)(ii) of that Act.

(3) The provisions of the Administration of Estates Act apply with the changes required by the context to a claim for maintenance of a surviving unregistered domestic partner, subject to the following:

(a) the claim for maintenance of the surviving unregistered domestic partner must have the same order of preference in respect of other claims against the estate of the deceased as a claim for maintenance of a dependent child of the deceased has or would have against the estate if there were such a claim;

(b) in the event of competing claims of the surviving unregistered domestic partner and that of a dependent child of the deceased, the court may make an order that it regards just and equitable with reference to all the relevant circumstances of the unregistered domestic partnership;

(c) in the event of competing claims of an unregistered domestic partner and that of a surviving customary spouse, the court must make an order that it regards just and equitable with reference to the existence and circumstances of multiple

relationships between the deceased and an unregistered domestic partner, and between the deceased and a customary spouse;

(d) in the event of a conflict between the interests of the surviving unregistered domestic partner in his or her capacity as claimant against the estate of the deceased and the interests in his or her capacity as guardian of a minor dependent child or children of the unregistered domestic partnership, the court must make an order that it regards just and equitable with reference to all the relevant circumstances of the unregistered domestic partnership; and

(e) the executor of the estate of a deceased spouse has the power to enter into an agreement with the surviving unregistered domestic partner and the heirs and legatees having an interest in the agreement, including the creation of a trust, and in terms of the agreement to transfer assets of the deceased estate, or a right in the assets, to the surviving unregistered domestic partner, or to impose an obligation on an heir or legatee, in settlement of the claim of the surviving unregistered partner or part thereof.

30. Determination of reasonable maintenance needs of surviving unregistered domestic partner

When determining the reasonable maintenance needs of the surviving unregistered domestic partner, the court may consider-

(a) the amount in the estate of the deceased available for distribution to heirs and legatees;

(b) the existing and expected means, earning capacity, financial needs and obligations of the surviving unregistered domestic partner;

(c) the standard of living of the surviving unregistered domestic partner during the subsistence of the unregistered domestic partnership and his or her age at the time of death of the deceased;

(d) the existence and circumstances of multiple relationships between the deceased and an unregistered domestic partner, and between the deceased and a customary spouse; and

(e) any other factor that it regards relevant.

A perusal of clauses 29 and 30 reveals the following areas of concern:

(1) The same problem as that identified in the discussion of clause 28 appears in clause 29 regarding the principle identified in the "contextualised choice model" in respect of a need-based claim in that the clause nowhere requires a reciprocal duty of support to have existed during the existence of the unregistered domestic partnership. This *lacuna* requires urgent attention for the same reasons as those proffered in the discussion of clause 28.

(2) It will be recalled that clause 28(2)(h) made specific provision for a Court to consider the fact of "another unregistered domestic partnership" that co-existed with the one in which the applicant was involved. No similar provision is found in clause 29(3). This should be remedied.

(3) As is the case with clause 28(2)(h), clauses 29(3) and 30(d) present a similar problem in that they only permit a Court to consider polygynous relationships that arise as a result of customary marriages. No provision is made for a Court to consider the effect of polygyny where the *ratio* therefore is based on the existence of a purely religious marriage that is concluded in terms of a recognised religion. This state of affairs also requires urgent attention as it is quite conceivable that an applicant in terms of clause 29 may be involved in an unregistered domestic partnership that exists alongside such a purely religious marriage.

Bearing these observations in mind, it is suggested that the relevant provisions in clauses 29 and 30 ought to be revised as follows:

29. Application for a maintenance order after death of unregistered domestic partner

(1) A surviving unregistered domestic partner may after the death of the other unregistered domestic partner, bring an application to a court for an order for the provision of his or her reasonable maintenance needs from the estate of the deceased 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*: Provided that a Court is satisfied that a reciprocal duty of support existed between the unregistered domestic partners.*

(2) …

(3) The provisions of the Administration of Estates Act apply with the changes required by the context to a claim for maintenance of a surviving unregistered domestic partner, subject to the following:

(a) …

(b) …

(c) in the event of competing claims of an unregistered domestic partner and that of-

(i) a surviving customary spouse; *or*

(ii) *a spouse to a marriage that has been concluded in accordance with a system of religious law subject to specified procedures*, *or*

(iii) *another unregistered domestic partner*

the court must make an order that it regards just and equitable with reference to the existence and circumstances of *such* multiple relationships ~~between the deceased and an unregistered domestic partner, and between the deceased and a customary spouse~~

(d) …

30. Determination of reasonable maintenance needs of surviving unregistered domestic partner

When determining the reasonable maintenance needs of the surviving unregistered domestic partner, the court may consider-

(a) …

(d) the existence and circumstances of multiple relationships between the deceased and an unregistered domestic partner, and between the deceased and a customary spouse *or a spouse to a marriage that has been concluded in accordance with a system of religious law subject to specified procedures, or another unregistered domestic partnership*; and

(e) …

11.4 Intestate succession

According to clause 31:

(1) Where an unregistered domestic partner dies intestate, his or her surviving unregistered domestic partner may bring an application to court, subject to subsections (2) and (3), for an order that he or she may inherit the intestate estate.

(2) Where the deceased is survived by an unregistered domestic partner as well as a descendant, such unregistered domestic partner inherits a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Cabinet member responsible for the administration of Justice by notice in the *Gazette,* whichever is the greater, as provided for in the Intestate Succession Act.

(3) In the event of a dispute between a surviving unregistered domestic partner and the customary spouse of a deceased partner regarding the benefits to be awarded, a court may, upon application by either the unregistered domestic partner or the customary spouse, make an order that it regards just and equitable with reference to all the relevant circumstances of both relationships.

By not providing for the merits of a claim for intestate succession to be assessed according to any defined criterion, the structure of this clause indicates that it is intended to operate on the sole basis of the Court's discretion as exercised in clause 26(2) and (3). In other words, it creates the impression that an unregistered domestic partner who satisfies the threshold criteria mentioned in the latter provision will automatically be entitled to inherit either the entire intestate estate (subsection (1)), a child's share (subsection (2)) or a portion of the estate which the Court deems "just and equitable" after considering the competing claims of a customary spouse (subsection (3)). This approach cannot be supported. In view of the fact that a claim for intestate succession can in principle be regarded as a need-based claim,[565] the first observation that needs to be made regarding this clause is that it ignores the fact that a reciprocal duty of support is, in accordance with the "contextualised choice model" a *sine qua non* in order for such a claim to succeed.

Secondly, the failure of this clause to take purely religious marriages and multiple unregistered domestic partnerships into account is, for precisely the same reasons as those mentioned in respect of maintenance claims in 11.3 above, an oversight that requires urgent attention.

Furthermore, cognisance must be taken of the fact that the recent promulgation of the *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009 has introduced a new dimension to all intestate succession claims that involve customary unions. This Act—which was assented to by the President on 19 April 2009 but is yet to come into operation—arises as a consequence of the Constitutional Court's decision in *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae)*[566] in which it was in essence held that the principle of male primogeniture was unconstitutional and that the deceased estates of customary spouses would

565 See 3.4.1 in Chapter 5.

566 2005 (1) SA 580 (CC).

henceforth devolve according to the *Intestate Succession Act* 81 of 1987 (as amended by the Court order *in casu*).[567] In terms of Act 11 of 2009 provision is made for women who had entered into a union with the deceased for the purposes of providing children for his spouse's house[568] (or, for the deceased's house in the case of "woman-to-woman marriages")[569] to be regarded as descendants in terms of the *Intestate Succession Act*.[570] Where the union between such a woman and the deceased does not qualify as a customary marriage in terms of the *Recognition of Customary Marriages Act*,[571] an interesting situation arises in that such a woman could potentially qualify as an unregistered domestic partner due to the fact that clause 26(4) of the 2008 Bill does not exclude such a union from the ambit of the Bill. This may lead to a potential conflict between the provisions of clause 31 of the Bill and Act 11 of 2009 in that, for example, in terms of the former a Court will be required to make a "just and equitable" order regarding the benefits to be distributed,[572] while in terms of the latter such a woman is entitled to qualify as a descendant outright.[573] In order to circumvent this problem, it is submitted that a provision should be inserted into clause 31 in terms of which, in the event of a conflict such as the one described above arising, the provisions of Act 11 of 2009 should prevail in view of the fact that the latter Act has specifically been drafted with the aim of regulating the customary law of succession.

A final issue to consider is whether partners involved in a non-conjugal "care partnership" should be permitted to inherit intestate from one another. In this regard it is important to note that the legislation proposed in the 2003 *Discussion*

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567 See par [136] of the judgment.

568 Referred to as the *seantlo* custom or the marrying of a "seedraiser" (the latter commonly occurring amongst the South Eastern Nguni). These unions are entered into in the event of a wife dying or being unable to bear children and such a woman becomes a substitute wife—Olivier *et al* 1995: 34 and 166 respectively.

569 See in general Oomen 2000: 274 *et seq* for a discussion of these so-called "woman-to-woman marriages."

570 Section 2(2)(b) and (c), *cf* section 3(1) where such a person is regarded as a "spouse."

571 120 of 1998.

572 See clause 31(3) of the *Domestic Partnerships Bill,* 2008.

573 Sections 2(b) and (c).

Paper limited the partners entitled to inherit intestate to intimate partners only.[574] A similar restriction is imposed by section 61B of the New South Wales *Probate and Administration Act* 1898 in terms of which only a *de facto* spouse (a term that corresponds in meaning with a "*de facto* partner" under the New South Wales *Property (Relationships) Act* 1984) is permitted to do the same. The law of New Zealand adopts an approach in terms of which a surviving *de facto* partner or spouse may under certain circumstances elect whether to apply for a division of property or to inherit in accordance with a will or the law of intestate succession. In this regard section 61 of that country's *Property (Relationships) Act* 1976 states that:

> **Surviving spouse or partner may choose option**
>
> (1) If 1 of the spouses or partners has died (except in a situation described in section 10D(1) [that is where proceedings are commenced while both parties are alive but where one of them dies in the interim]), the surviving spouse or partner may choose option A or option B.
>
> (2) Option A is to elect to make an application under this Act for a division of relationship property.
>
> (3) Option B is as follows:

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574 SALRC 2003: 326 (clause 22). This provision was based on the now-repealed Swedish *Cohabitees (Joint Homes) Act* of 1987. The new Act (the *Cohabitees Act* 2003: 376) automatically applies to all cohabitants who (regardless of sex) are both at least 18 years of age who are not already married or involved in a registered partnership and who satisfy the following criteria (see section 1 of the Act): (i) They must live together on a permanent basis; (ii) they must live "as a couple" (which implies a conjugal relationship) and (iii) and they must share a joint household. According to the Swedish Ministry of Justice (2003: 2), these criteria imply that, "for example, two siblings living together may not be considered to be cohabitees." Despite the fact of its *de facto* application, Swedish cohabitees have no right to inherit from one another—Swedish Ministry of Justice 2003: 1. This approach differs from the approach in the Canadian province of British Columbia which, like the position in Sweden, also adheres to the *de facto* (or ascription) model in terms of which unmarried couples are automatically protected during the existence of their relationship if they comply with certain minimum criteria. In terms of section 1 of this province's *Estate Administration Act* of 1996 [RSBC 1996: Chapter 122] (as amended by section 4 of the *Definition of Spouse Amendment Act* of 2000) a "spouse" includes a "common law spouse" which in turn includes either (i) a marriage that is "valid by common law" although not being a "legal marriage" or (ii) a "marriage-like relationship" in which two persons (regardless of gender) have cohabited for at least two years prior to the deceased's death. By virtue hereof a person who qualifies as a "spouse" is fully entitled to inherit as an intestate heir under Part 10 of the Act ("Distribution of Intestate Estate").

(a) to elect not to make an application under this Act for a division of the relationship property; and

(b) if the surviving spouse or partner is a beneficiary under the will of the deceased spouse or partner, to receive that property; and

(c) if the surviving spouse or partner is entitled to a beneficial interest on the intestacy or partial intestacy of the deceased spouse or partner, to receive that interest.

It is noteworthy of mentioning that the New Zealand Act only provides for conjugal relationships and not for care partners to qualify as *de facto* partners.[575] Furthermore, as seen above, the election between property division and intestate succession does not only apply to *de facto* partners, but applies equally to married persons. Viewed in this light, it is submitted that although the approach in New Zealand makes sense, permitting a similar type of election within the context of unregistered domestic partnerships in South Africa may be problematic as it would differentiate between the position of spouses and registered domestic partners on the one hand and such unregistered partners on the other; a situation which might open the Bill to an unnecessary constitutional challenge. It would therefore *prima facie* be more likely for the position in New South Wales (in terms of which only survivors to conjugal partnerships are permitted to inherit intestate) to be carried over into South African law. It must however be remembered that the position in New South Wales differs from that which is proposed for South African law by this study in the sense that the former does not insist on the existence of a reciprocal duty of support before permitting an unmarried partner to inherit intestate. In the light of what has been said regarding need-based claims above, it is submitted that this is a crucial reason for justifying a deviation from the position in the Australian Act. Nevertheless, before a final opinion can be expressed on this issue in as far as the draft *Domestic Partnerships Bill* is concerned, it is important to take note of recent case law pertaining to the intestate succession rights of life partners in the form

[575] See the definition of "*de facto* relationship" (italics added) in section 2D of the 1976 Act.

of the now well-known case of *Gory v Kolver NO*.[576] It will be recalled that in this case two criteria were set for the surviving same-sex life partner to inherit intestate, namely (i) that the partnership was required to be permanent; and (ii) that reciprocal duties of support were required to have been undertaken during the existence of the relationship.[577] Although it is conceded that the relationship *in casu* dealt with a conjugal relationship, it is noteworthy that the Court did not deem it necessary to attach a condition of intimacy to the unmarried surviving partner's right to inherit. Furthermore, it has been noted earlier in this Chapter that the Constitutional Court has expressly mentioned the fact that it is "entirely within their protected sphere of freedom and privacy" for a couple to elect not to be sexually intimate.[578]

It is also useful to consider the opinion expressed by Wood-Bodley to the effect that

> [s]urely the reason for a 'spouse' inheriting on intestacy is because the spouse is now regarded as close family of the deceased, equivalent to a close blood relation, not because of the existence of duties of support …

Regarding this opinion, it has been opined in Chapter 5 that Wood-Bodley's sentiments fail to take cognisance of the fact that it is "the existence of a reciprocal duty of support in a permanent relationship [that] in fact establishes the fact that the survivor of such a non-formalised relationship is 'now regarded as close family of the deceased' thereby justifying his or her claim" to inherit intestate.[579] In the light hereof it surely cannot be contended that conjugality alone could serve to justify a deviation from this principle.

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576 2007 (4) SA 97 (CC).

577 Par [19].

578 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [52].

579 Quote taken from 3.4.1.2 in Chapter 5.

Applying this rationale to the position proposed for the South African Bill leads to the inevitable conclusion that provided a relationship satisfies the threshold criterion of permanence and the condition of non-conjugality regarding relationships that are in the prohibited degrees (see the amendments proposed to clause 26 in 11.2) and, in addition, satisfies the further *sine qua non* for any need-based claim under the "contextualised choice model" namely that a reciprocal duty of support must have existed, it is simply irrelevant whether the relationship was a care partnership or otherwise. It is therefore submitted that a care partner who satisfies these conditions should in principle be permitted to inherit intestate in the same way as a partner to a conjugal relationship would.

A final *quaere* must however be mentioned: Bearing the structure of subsections (1) – (3) of clause 31 in mind and the fact that it permits the interests of polygynous relationships to be taken into account, would it be justifiable to require that the interests of another potential intestate heir (for example the parents or siblings of the deceased) must be taken into account in determining the *quantum* of an intestate claim? In other words, should subsection (3) of clause 31 be extended so as to permit a Court to make an order that is "just and equitable" where the claims of an unregistered (non-conjugal) domestic partner compete with the claims of a blood relation of the deceased who would, but for such partner, be entitled to inherit (a portion of) the deceased estate? It is submitted that three reasons can be proffered for answering this question in the negative: First, any application for intestate inheritance could be opposed by any other potential heir who is of the opinion that he or she should be entitled to inherit instead of the applicant. Second, extending subsection (3) in such a manner would—despite the fact that the Constitutional Court has made it clear that the Legislature is permitted to "fine-tune" the impact of the case law relating to same-sex couples who at the time were not permitted to marry[580]—conflict with the baseline criteria of permanence and undertakings of mutual support established by the *Gory* case. Finally, if subsection (3) were indeed to be

[580] See *Gory v Kolver NO* 2007 (4) SA 97 (CC) at par [27] – [31].

extended in the manner described, this would create an inconsistent legal position regarding the intestate succession rights of spouses and registered domestic partners versus those of unregistered domestic partners; a situation which would once again expose the domestic partnership legislation to the risk of unconstitutionality.

It is submitted that the preceding observations necessitate the following amendments to clause 31 of the 2008 Bill:

(1) Where an unregistered domestic partner dies intestate, his or her surviving unregistered domestic partner may bring an application to court, subject to subsections (2) and (3), for an order that he or she may inherit the intestate estate*: Provided that a Court is satisfied that a reciprocal duty of support existed between the unregistered domestic partners.*

(2) Where the deceased is survived by an unregistered domestic partner as well as a descendant, such unregistered domestic partner inherits a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Cabinet member responsible for the administration of Justice by notice in the *Gazette,* whichever is the greater, as provided for in the Intestate Succession Act.

(3) In the event of a dispute between a surviving unregistered domestic partner and—

(i) the customary spouse of a deceased partner; *or*

(ii) *a spouse to a marriage that has been concluded with the deceased partner in accordance with a system of religious law subject to specified procedures*; *or*

(iii) *another unregistered domestic partner*

regarding the benefits to be awarded, a court may, upon application by either the unregistered domestic partner or the customary spouse, make an order that it regards just and equitable with reference to all the relevant circumstances of ~~both~~ *such multiple* relationships.

(4) In the event of a conflict between the provisions of this section and a provision in the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009 (Act 11 of 2009), the provisions of that Act shall prevail.

11.5 Time limits within which unregistered domestic partners are required to bring an application for the relief provided by the Bill

According to clause 33 of the Bill:

(1) Except as otherwise provided for by this section, an application to a court for an order in terms of section 31 of this Act must be made within two years after the date on which an unregistered domestic partnership has terminated through separation or death.

(2) A court may, at any time after the expiration of the period referred to in subsection (1) grant leave to an applicant to apply to the court for an order in terms of section 31 of this Act, where the court is satisfied, having regard to such matters as it considers relevant, that greater hardship would be caused to the applicant if the leave was not granted than would be caused to the respondent if the leave was granted.

It is immediately apparent that clause 33 of the Bill in essence transplants clause 23 of the Bill into an unregistered domestic partnership setting, with the result that much of what was said regarding the latter provision pertains equally to clause 33. As was the case with clause 23, clause 33 also contains an incorrect cross-reference, namely to section 31 that deals with intestate succession. However, contrary to the position regarding the registered domestic partnership, ascertaining the correct cross-reference from clause 33 is a far simpler task due to the fact that the applicability of Part 3 (specifically section 18(1)) of the New South Wales *Property Relationships Act* 1984 can more readily be inferred as both clauses deal with the *ex post facto* recognition of non-formalised (as opposed to registered) domestic partnerships. On the basis of the analysis

conducted in 9.3.4 above, it can therefore be assumed that, as in the case of the Australian legislation, clause 33 should contain a cross-reference to both claims for post-separation inter-partner maintenance and for post-termination property division. The references to "section 31" in subsections (1) and (2) should therefore be replaced with "sections 28 and/or 32."

11.6 Property division

With the exception of subsections (6) and (7), clause 32 substantially recasts clause 22 of chapter 3 of the Bill, with the result that it must be noted from the outset that many of the conclusions reached in 9.3.5 are also directly applicable to clause 32. The clause in question states:

> (1) In the absence of an agreement, one or both unregistered domestic partners may apply to court for an order to divide their joint property or the separate property, or part of the separate property of the other unregistered domestic partner.
>
> (2) Upon an application for the division of joint property, a court may order the division of that property which it deems just and equitable with due regard to all relevant circumstances.
>
> (3) Upon an application for the division of separate property or part of the separate property, a court may order that the separate property or such part of the separate property of the other unregistered domestic partner as the court regard [sic] just and equitable, be transferred to the applicant.
>
> (4) A court considering an order as contemplated in subsections (2) and (3) must take into account-
>
> (a) the existing means and obligations of the unregistered domestic partners;
>
> (b) any donation made by one unregistered domestic partner to the other during the subsistence of the unregistered domestic partnership;
>
> (c) the circumstances of the unregistered domestic partnership;

(d) the vested rights of interested parties in the joint and separate property of the unregistered domestic partnership; and

(e) any other relevant factors.

(5) A court granting an order contemplated in subsection (3) must be satisfied that it is just and equitable to do so by reason of the fact that the unregistered domestic partner in whose favour the order is granted, made direct or indirect contributions to the maintenance or increase of the separate property or part of the separate property of the other unregistered domestic partner during the existence of the unregistered domestic partnership.

(6) A court granting an order contemplated in subsection (3) may, on application by the unregistered domestic partner against whom the order is granted, order that satisfaction of the order be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court regards just and equitable.

(7) A court may make any order proper for the protection of the rights of interested parties.

Drawing on the conclusions reached in 9.3.5 above, it is submitted that:

(1) As in the case of clause 22, clause 32 must make provision for the fact that the parties to an unregistered domestic partnership (i) may enter into a written agreement between themselves regarding property division; and (ii) that it may be necessary for a Court to overrule the provisions of such an agreement where the interests of justice and equity so require;

(2) For the same reasons submitted in the discussion of clause 22, it is submitted that clause 32(4) should be aligned with divorce law and therefore should separate the *quantum* and merit processes as far the redistribution of *separate* property is concerned. By the same token, subsection (4) should reflect the fact that the factors listed in (a) through

(e) may be used in order to assess *both* the merits as well as the *quantum* of the division of *joint* property; and

(3) The lessons that can be taken from the law of divorce as far as the redistribution competency granted in terms of section 7 of the *Divorce Act* 70 of 1979 is concerned, are capable of application in the case of both the registered and the unregistered domestic partnership, and the risk of unconstitutionality of the competency granted under clause 32 is as real as that granted under clause 22 due to the differentiation created between domestic partnerships and marriage.

A final consideration regarding property division within the context of the unregistered domestic partnership is the role, if any, to be portrayed by the so-called "choice argument" in terms of which it is contended that parties who have elected not to marry one another (or to enter into a civil partnership) are, by virtue of this choice, not entitled to avail themselves of the protection provided by matrimonial (property) law. For the purposes of clarity it may be prudent briefly to recap the conclusions thus far reached in this study. In developing the "contextualised choice model" in Chapter 5, the conclusion was reached that the "choice argument" would have no role to play as far as need-based claims are concerned, but that if a person who had chosen not to formalise his or her relationship attempted to institute a claim based on a property dispute (division of assets), "the "choice argument" would be a highly persuasive factor in deciding to exclude the possibility of applying matrimonial (property) law to solve the dispute." This conclusion was re-examined within the context of registered domestic partnerships, where it was concluded that despite the fact that such partners have made a positive choice not to marry, the fact that chapter 3 of the Bill does not provide "an effective and well-defined alternative to matrimonial property law" implied that the extension of matrimonial property law could be justifiable and that the Bill needed to be amended accordingly.[581]

[581] See the amendments suggested in 7.3.4.2 above.

Attempting to apply (or to adapt) this rationale within the context of the unregistered domestic partnership must be based on the foundational principle that the fact of such a partnership is based on one of two possibilities: In the first place, the partners may have made a positive choice not to marry or to enter into a registered domestic partnership. In the alternative, it may happen that the applicant partner was never given the choice to formalise the relationship, either because his or her partner simply refused to co-operate in this regard or because of a lack of awareness of the possibilities of formalisation provided by the law. It goes without saying that the "choice argument" can at best apply only within the context of the former possibility. In addition, where a conscious choice not to formalise the relationship has been taken this autonomous choice must as far as possible be respected. This notwithstanding, the law must still provide adequate protection for an applicant partner who falls into this category, particularly where this positive choice was made in ignorance.[582] It is submitted that the comparative analysis conducted thus far throughout this study[583] shows that the *ex post facto* options provided under chapter 4 of the Bill will indeed provide adequate protection *provided that the amendments suggested throughout this Chapter are implemented*. In the result, it is suggested that if any protection were to be required beyond the scope of that already offered by the amended chapter 4, the fact that the parties had deliberately chosen not to formalise their relationship could be deemed by a Court to be a cogent reason for refusing to extend the protection any further for, as the South African Law Reform Commission has remarked, "the protection offered to relationships should be on a par with the level of commitment by the parties."[584] Furthermore, the fact that the enactment of a registered domestic partnership option provides an additional formalisation alternative would strengthen this assumption. On the other hand, where the facts of an application lead a Court to conclude that a vulnerable

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582 Also see Lind 2005: 119: "[I]t is possible to argue convincingly that even the most ardent choice made to cohabit [and hence not to formalise one's relationship] impacts disproportionately upon women and men, because it is made in a severely gendered environment."

583 The range of remedies available in chapter 4 of the Bill compares favourably with other jurisdictions that adhere to the judicial discretion model.

584 SALRC 2003: 321.

applicant was unable to convince his or her partner to formalise their relationship, the extension of a principle of matrimonial (or registered domestic partnership) property law may conceivably be justifiable due to the lack of any real choice. Fortunately the wide range of protection provided by chapter 4 (as modified in accordance with the rubric) makes it unlikely that such an extension would ever be necessary.

In the light of these conclusions, it is submitted that clause 32 should be amended as follows:

> In the ~~absence of an agreement~~ *event of a dispute regarding the division of property after an unregistered domestic partnership has terminated, or, if the court is not satisfied that an agreement entered into between the partners is just and equitable as far as the division of property is concerned in the light of the factors listed in subsection (4) of this section, a Court may, upon application by* one or both of the unregistered domestic partners, order *the division of* their joint property or separate property, as the court may deem fit.[585]
>
> (2) Upon an application for the division of joint property, a court may order the division of that property which it deems just and equitable with due regard to all relevant circumstances.
>
> (3) Upon an application for the division of separate property or part of the separate property, a court may order that the separate property or such part of the separate property of the other unregistered domestic partner as the court regard just and equitable, be transferred to the applicant.
>
> (4) A court considering *whether to grant* an order contemplated in subsection (2) and *determining the assets or part thereof to be transferred under subsection* (3) must take into account-
>
> (a) the existing means and obligations of the unregistered domestic partners;

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585 The word order of this clause has been altered but is not shown in the interests of greater readability.

(b) any donation made by one unregistered domestic partner to the other during the subsistence of the unregistered domestic partnership;

(c) the circumstances of the unregistered domestic partnership;

(d) the vested rights of interested parties in the joint and separate property of the unregistered domestic partnership; and

(e) any other relevant factors.

(5) A court granting an order contemplated in subsection (3) must be satisfied that it is just and equitable to do so by reason of the fact that the unregistered domestic partner in whose favour the order is granted, made direct or indirect contributions to the maintenance or increase of the separate property or part of the separate property of the other unregistered domestic partner during the existence of the unregistered domestic partnership.

(6) A court granting an order contemplated in subsection (3) may, on application by the unregistered domestic partner against whom the order is granted, order that satisfaction of the order be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court regards just and equitable.

(7) A court may make any order proper for the protection of the rights of interested parties.

11.7 "Contracting out"

An issue that deserves some attention is whether unregistered domestic partners should be able to "contract out" of the protection offered by chapter 4 of the Bill. Contrary, for example, to Part 6 of the New Zealand *Property (Relationships) Act* 1976, the 2008 Bill does not expressly empower unregistered domestic partners to avail themselves of such an option. In its current form, clause 32(1) of the Bill does however empower them to reach an agreement regarding property division. It is submitted that by specifically empowering the Courts to disregard informal agreements between the partners where the interests of justice and equity so demand, the amendments that have been proposed to clauses 28 and 32 of the

Bill not only ensure better protection of vulnerable parties, but also remove the need for provisions regulating both the ability to contract out as well as the Courts' power to set such agreements aside.

11.8 Other claims based on a reciprocal duty of support

In paragraph 4.2.2 it was pointed out that chapter 4 of the Bill contains a vital *lacuna* in that it does not specifically provide for the extension of certain claims based on the existence of a reciprocal duty of support to unregistered domestic partners. For example, while the Supreme Court of Appeal has extended the dependant's claim for loss of support to "a same-sex partner of the deceased in a permanent life relationship similar in other respects to marriage, in which the deceased had undertaken a contractual duty of support to [such partner]",[586] chapter 4 of the Bill does not provide for an unregistered domestic partner to do the same. This differentiation cannot be countenanced for as stated earlier in this Chapter:

> It goes without saying that the dependant's claim for loss of support is a need-based claim … The Bill loses sight of the fact that such a claim—as a need-based claim—requires only that the partners to the permanent union have undertaken reciprocal support obligations in order for it to be instituted. [As far as the issue of a "public formal commitment" is concerned] the existence of [such a commitment] is as irrelevant for the unregistered partners as it was for the same-sex couple in the *Du Plessis* case.[587]

It is submitted that this *prima facie* unconstitutional differentiation can readily be remedied by inserting the following provision into chapter 4 of the Bill:

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586 See *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA).

587 See 4.2.2.2.1 (b) above.

33A Claims based on a reciprocal duty of support

For the purposes of the institution of any claim that is based on the existence of a legally-enforceable reciprocal duty of support, unregistered domestic partners are deemed to be spouses to a valid marriage provided that a Court is satisfied that such a reciprocal duty of support has indeed been undertaken between the unregistered domestic partners in question.

Such a provision will entitle a surviving unregistered domestic partner to institute the dependant's action for loss of support against a person who unlawfully killed his or her breadwinner.

11.9 *Consortium omnis vitae*

11.9.1 Introduction

An important aspect to consider is the extent to which the law will, in view of the enactment of the *Domestic Partnerships Bill* (as modified in accordance with the rubric), recognise the concept of *consortium omnis vitae* within the context of the unregistered domestic partnership. In the discussion of life partnerships in Chapter 5 it was opined that the South African Courts have—at least as far as homosexual life partnerships are concerned[588]—thus far recognised a contextualised form of the concept of *consortium omnis vitae* as traditionally encountered in the law of marriage as a constitutive element of the broader right to family life (which in turn is protected by the constitutional right to dignity).[589] In the result, the positive law dictates that while "the ability to establish a *consortium omnis vitae*"[590] has been recognised within the context of conjugal homosexual life partnerships, no similar development has occurred in respect of their

588 See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [53] and [54].

589 Cronjé and Heaton 2004: 51.

590 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [53].

unmarried opposite sex counterparts despite the undoubted ability of the latter to establish the same. It was further suggested that the Legislature should be the appropriate forum by which to remedy this discrepancy, and that the *Domestic Partnerships Bill* (as modified in accordance with the rubric) should do just that. With reference to *registered* domestic partnerships it has been seen that there is no reason for distinguishing between the concept of *consortium* within the contexts of marriage and such domestic partnerships, and to this end an amendment to clause 9 of the Bill was proposed which, in effect, would entitle a registered domestic partner to protect his or her right to *consortium* as against third persons in the same way as a spouse to a marriage. The question that remains is whether chapter 4 of the Bill should protect unregistered domestic partners in the same manner.

It stands to reason that one of the main grounds for justifying the full extension of the notion of *consortium* to registered domestic partners while not permitting the same in the case of unregistered partnerships is that the former have undertaken a public commitment that entitles them to obtain rights that are enforceable against outsiders,[591] while the failure of the latter group to undertake any similar commitment implies that the same does not hold true for them. If this line of reasoning is applied specifically to the concept of *consortium*, it follows that, analogous to the law of marriage,[592] the *consortium omnis vitae* is created by the act of registration and by virtue of the same act simultaneously becomes enforceable against outsiders. The public nature of the act of marriage or registering a domestic partnership therefore proclaims to the outside world—to individual citizen and to State alike—that the spouses or partners have entered into a relationship that instantaneously alters their standing both in private as well as public law.[593] In short, therefore, the act of marriage or registration is an objectively ascertainable fact that not only instantly creates ineluctable moral and

591 SALRC 2006: 320.

592 See *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) at par [33].

593 See *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at par [58]; Hahlo 1985: 127; Sinclair and Heaton 1996: 417.

legal obligations for the spouses or registered domestic partners, but also ensures certainty for outsiders. As Sachs J stated in *Minister of Home Affairs v Fourie*: [594]

> It is true that marriage … constitutes a highly personal and private contract between a man and a woman in which the parties undertake to live together, and to support one another. Yet the words "I do" bring the most intense private and voluntary commitment into the most public, law-governed and State-regulated domain.

As a corollary of this position, the fact that no formal commitment has been undertaken between unregistered domestic partners implies that even though the partners have "the same *ability* to establish a *consortium omnis vitae*,"[595] the conduct by which the same would formally be established so as to become enforceable against outsiders at an objectively ascertainable moment has never taken place. Indeed, the application of an *ex post facto* judicial discretion model to South African unregistered domestic partnerships *ipso facto* implies that, on the basis of sheer pragmatism, an aggrieved partner could not institute the actions traditionally employed to protect *consortium* against a third party who interfered in the relationship by, for example, enticing the other partner to leave the common household. By the same token an unregistered domestic partner involved in criminal or civil proceedings would presumably not be able to insist on the evidentiary privilege to which a spouse is (and, as has been submitted earlier in this study, a registered domestic partner should be)[596] entitled.

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[594] *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC) at par [63].

[595] *Per* Ackermann J in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [53].

[596] See 6 above where it is suggested that the *Criminal Procedure Act* 51 of 1977 and the *Civil Proceedings Evidence Act* 25 of 1965 should extend the privilege related to marital communication to registered domestic partners.

11.9.2 Constitutional considerations

In the alternative, if the preceding conclusions are incorrect, it is submitted that there is another reason that can be raised in support of the contention that the *consortium omnis vitae* between unregistered domestic partners is not binding on outsiders or on the State. This argument draws from a number of opinions that have been expressed in respect of the possible unconstitutionality of the continued recognition of claims traditionally used to protect the *consortium* between spouses to a marriage as against outsiders. In this regard Cronjé and Heaton[597] submit that:

> The continued existence of the action on the ground of adultery (and even more so the actions on the ground of enticement and harbouring) has rightly been questioned in view of the fact that adultery is no longer a ground for divorce but merely a factor that may indicate that the marriage has broken down irretrievably. All these actions may also be challenged on the ground that they violate the third party's (and the other spouse's) constitutional right to freedom of association.

Heaton[598] does however mention that despite this possibility it may be argued that the fact that these actions "serve to protect the sanctity of marriage" may lead a Court to conclude that their continued recognition constitutes a justifiable limitation of this constitutional right.

The continued existence and constitutional validity of delictual claims based on adultery was considered in the recent case of *Wiese v Moolman*.[599] *In casu* the plaintiff and his wife (L) were divorced in 2003. It was common cause that L had been involved in an adulterous relationship with the defendant prior to the divorce. When the plaintiff instituted a claim for damages against the defendant on the basis of adultery, the latter raised a special plea to the effect that such a

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597 2004: 50, 51.
598 2005: 3C19.1.
599 2009 (3) SA 122 (T).

claim no longer had a right of existence in modern-day South Africa and that it should be abolished.[600]

Regarding the defendant's argument that the legal convictions of the community no longer militated against adulterous conduct Du Plessis J held that South African law accepts that a collection of personality rights which must be respected by outsiders accrues to spouses in consequence of the nature of the intimate personal relationship upon which marriage is based.[601] In this regard it was held that adulterous conduct conflicts with a constituent element of marriage, namely the parties' undertaking—both between themselves and towards outsiders—to engage in sexual intercourse within the marriage only.[602] According to the learned Judge, constitutional jurisprudence has confirmed not only the importance of the institution of marriage and the necessity for it to be respected, but also that its nature and content—including the undertaking in respect of exclusively intra-marital sexual relations—be recognised. As a result, Du Plessis J held that the legal convictions of the community still required adulterous conduct to be regarded as wrongful. Furthermore, legal policy demanded that the spouses' undertakings of exclusively intra-marital sexual relations be protected from outside interference.[603]

For the purposes of this study an important contention made by the defendant was that a claim based on adultery was no longer constitutionally valid as it infringed the right to equality as (i) only *married* persons were permitted to avail themselves of such a claim, and (ii) such claims were not available in same-sex marriages. In this regard Du Plessis held that:

> Daar is regtens geen rede waarom eggenote in sulke huwelike [that is to say same-sex marriages] nie presies die regte het wat hierbo uiteengesit is nie. Wat die betoog betref

600 At 124 (B) – (C).
601 At 125 (F) – (G).
602 At 125 (G) – (H) and 126 (C) – (D).
603 At 127 (H) – (J).

> dat die aksie gegrond op owerspel slegs getroude persone toekom, is dit eenvoudig so omdat owerspel 'n huwelik veronderstel. Persone wat verkies om in andersoortige verhoudings saam te leef maak self daardie keuse en kan hulle nie bekla as die gevolge van 'n huwelik, wat hulle self besluit het om nie aan te gaan nie, nie op hulle van toepassing is nie. Daarby moet in ag geneem word dat ons reg nie 'n geslote aantal handelinge erken wat persoonlikheidsregte kan krenk nie. 'n Persoon wat bewys dat sy of haar persoonlikheidsregte onregmatig aangetas is met die nodige opset, kan op genoegdoening met die *actio iniuriarum* aanspraak maak.

In respect of the defendant's contention that his right to dignity was infringed by the plaintiff's claim, Du Plessis J held that no such infringement could take place where a person intentionally interfered with a private relationship and incurred liability as a result. Finally, regarding the argument that the plaintiff's claim breached the fundamental rights to freedom of religion, belief and opinion[604] and to freedom of association[605] by not taking cognisance of the fact that L and the defendant had the right "om hulle liggame volgens hulle eie oortuigings aan te wend," Du Plessis J held that L had limited her right when she married the plaintiff, and that the defendant was aware thereof.[606] In addition, this action had developed over the years so as to become "'n aksie wat 'n unieke verhouding en persoonlikheidsregte wat daaruit voortspruit beskerm ongeag die geslag van die betrokkenes," so that the defendant's argument that the action had developed from the notion that a woman's body was the property of her husband and was for this reason no longer relevant in a constitutional dispensation, could not hold water.[607]

It is submitted that the *Wiese* judgment affirms Heaton's opinion to the effect that the actions which protect *consortium* should be retained so as to protect the sanctity of the "unieke verhouding" that is marriage, and that an outsider's right to

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604 Section 15 of the *Constitution*, 1996.
605 Section 18 of the *Constitution*, 1996.
606 At 129 (D) – (F).
607 At 129 (F) – (J).

freedom of association cannot trump an action instituted on the basis of an intentional infringement of *consortium*. Furthermore, as will be seen below, Du Plessis J's analysis of the constitutional issues raised in *Wiese* serves to provide some guidance in respect of the constitutional considerations that should apply when the issue of *consortium omnis vitae* arises within the context of unregistered domestic partnerships.

With reference to this issue, it has been seen that unmarried same-sex life partners have "the same ability to establish a *consortium omnis vitae*" and that they "are capable of constituting a family" and "benefiting from family life" in the same way as spouses to a marriage.[608] Nevertheless, it has also been seen that a contextualised form of *consortium omnis vitae* that applies *inter partes* only has thus far been recognised by our Courts,[609] and, importantly, that there is no reason why the same should not be recognised in the case of heterosexual life partnerships. Drawing on these conclusions, it is submitted that a similar nuanced and limited *consortium omnis vitae* that applies *inter partes* only should be retained within the context of unregistered life partnerships under chapter 4 of the Bill. In testing the validity of this assertion, the question arises as to whether the rights to equality and dignity (the latter of which protects the right to family life[610] of which *consortium omnis vitae* forms a part)[611] of an unregistered domestic partner can justifiably be limited in terms of section 36 of the *Constitution,* 1996 so as to recognise a *consortium* that exists between herself and her partner only and is not binding on outsiders. In order for these rights to be so limited, it would have to be shown that there is a sufficient proportionality between the infringement of the partner's rights to dignity and equality (and hence, in the case of the latter right, to family life) and the purpose of the law that

608 *Per* Ackermann J in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [53].

609 See 3.7 in Chapter 5.

610 Cronjé and Heaton 2004: 51.

611 *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) at par [30] as interpreted by Cronjé and Heaton 2004: 51.

limits these rights.[612] In this regard it is submitted that the purpose of the law that restricts the right of persons who are capable of instituting claims based on *consortium* against outsiders to married spouses only would be, first, to protect the sanctity of marriage and the commitments that relate specifically thereto, and second to avoid a situation where limitless liability would potentially result if delictual actions could indiscriminately be instituted whenever an informal relationship was terminated due to outside interference (often referred to in similar contexts as the so-called "floodgate argument").[613] As far as the first purpose (sanctity of marriage) is concerned a Court would respectfully be advised to heed the observation made by Ackermann J in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*[614] that "protecting the traditional institution of marriage as recognised by law may not be done in a way which unjustifiably limits the constitutional rights of partners in a permanent same-sex life [and, it is submitted, a permanent unregistered heterosexual or homosexual domestic] partnership." On this line of reasoning it may be so that the extension of the right to protect their *consortium* from outside interference to unregistered domestic partners would in no way constitute "a disparagement of the traditional institution of marriage."[615] On the other hand it is submitted that the flood of litigation that may be occasioned by the lack of objective certainty as to the relationship status of an unregistered domestic partner may indeed justify the limitation of the aggrieved partner's right. In this respect it is however important to note that the limitation in question would not leave an aggrieved partner without any remedy whatsoever for, as Du Plessis J observed in *Wiese v Moolman*[616] "[daar moet in ag geneem word dat ons reg nie 'n geslote getal handelinge erken wat persoonlikheidsregte kan krenk nie. 'n Persoon wat bewys

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612 Currie and De Waal 2005: 176.

613 See *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at par [19]; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) at par [15] and 36]; *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2000 (2) SA 54 (C) at 67 (C).

614 2000 (2) SA 1 (CC) at par [55].

615 *Per* Ackermann J in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [56].

616 2009 (3) SA 122 (T) at 129 (B) – (C).

dat sy of haar persoonlikheidsregte onregmatig aangetas is met die nodige opset, kan op genoegdoening met die *actio iniuriarum* aanspraak maak."

In terms of the privilege relating to marital communications that is guaranteed by both the *Criminal Procedure Act* 51 of 1977 and the *Civil Proceedings Evidence Act* 25 of 1965, the failure to extend the same to unregistered domestic partners may be justified by the significant burden that doing so would place on the administration of justice by in each instance requiring a Court first to have to determine on the facts whether a specific relationship qualified for such protection and also by the lack of legal certainty that such an *ad hoc* state of affairs would produce. (In passing it may be mentioned that the imposition of a minimum duration requirement for unregistered domestic partnerships in order to qualify as such for the purposes of these Acts may have a palliative effect on this problem.)

11.9.3 Conclusion: *Consortium omnis vitae inter partes*

It is submitted that the preceding discussion shows that although a *consortium omnis vitae* is undoubtedly established by parties to an unregistered domestic partnership that qualifies as such under clause 26 of the Bill, the *ex post facto* application of chapter 4 of the *Domestic Partnerships Bill* necessitates confining the legal recognition thereof to the partners themselves, with the effect that neither outsiders nor the State can be bound to such *consortium* beyond the boundaries set by chapter 4 of the Bill. (In the case of non-conjugal relationships, the *consortium omnis vitae* that exists between them will have to be further contextualised, to the extent that the *eros* (sexual intimacy) element that generally applies between married persons or conjugal domestic partners is lacking.)

11.9.4 *Consortium omnis vitae*, the unregistered domestic partnership and the "choice argument"

In conclusion, it is important to ascertain how the approach towards *consortium omnis vitae* within the context of unregistered domestic partnerships fits into the "contextualised choice model." Would it be correct to say that the failure of the law to recognise a *consortium omnis vitae* between such partners that is in all respects the equivalent of that recognised in a marriage can be ascribed to the fact that the partners have chosen not to marry one another (or to enter into a registered domestic partnership)?

The answer to this question is partly yes and partly no. Where the parties have made a positive choice not to marry or to register their partnership, the fact that their *consortium omnis vitae* is not (but to the extent provided for by the Bill) binding on outsiders or on the State will be a direct consequence of this decision. On the other hand, where no real choice was ever made in this regard, the consequence, unfortunately, would be the same. While one would undoubtedly sympathise with a vulnerable partner who would be unable to sue an outsider for "adultery," harbouring or for enticing his or her partner to leave the common household, this would, in the light of the conclusions reached above, constitute a justifiable limitation of such a partner's rights to equality[617] and dignity (and hence to family life).

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617 See the finding in *Wiese v Moolman* 2009 (3) SA 122 (T) at 129 (A) – (C) (briefly discussed in the main text above) regarding the restriction of claims based on adultery to married couples only and the effect hereof on the right to equality.

12. THE FINAL FACET OF THE RUBRIC: CALIBRATING THE MODIFIED *DOMESTIC PARTNERSHIPS BILL* WITH LEGISLATION DEALING WITH LIFE OR DOMESTIC PARTNERSHIPS

12.1 Introduction: Assessing the need for reform and determining the principles that should guide the way forward in compliance with the rubric's calibration injunction

As seen in Chapter 6, the Legislature has enacted various pieces of legislation over the years that have specifically catered for unmarried couples. While many salutary developments have undoubtedly occurred, the downside of this piecemeal recognition is the patchwork of laws that have resulted, with many Acts employing diverging terminology leading to an uncertain legal position. One thinks, for example, of the *Insolvency Act* [618] which, while being revolutionary at the time of its enactment in 1936 for specifically providing for unmarried heterosexual cohabitants,[619] is probably unconstitutional today for not including same-sex life partners.[620] Other problems arise due to inconsistent terminology, where the term "life partnership" is used in the majority of these Acts,[621] while another refers to a "*de facto* spouse"[622] and yet another to a "domestic life-partnership."[623] This state of affairs makes it almost impossible to determine with certainty whether, for example, a simple reference without more to "life partnership" in any given Act must—once the *Domestic Partnerships Bill* is promulgated as an Act of Parliament—be interpreted as referring to either a registered domestic partnership, or to an unregistered domestic partnership, or to neither, or even to both. Another significant problem is posed by a combination

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618 24 of 1936.

619 Section 21(13).

620 This problem is discussed in 3.2.7 in Chapter 6.

621 For example those Acts which establish Boards or appoint Commissioners such as the *South African Civil Aviation Authority Act* 40 of 1998 (see section 9(4)); the *Land and Agricultural Development Bank Act* 15 of 2002 (see section 21(3)(a)) and the *National Energy Regulator Act* 40 of 2004 (see for example section 6(4)).

622 Section 6(2) of the *Independent Media Commission Act* 148 of 1993.

623 See sections 231(1)(a) and 242(1)(a) of the *Children's Act* 38 of 2005.

of the difficulty just described coupled with the fact that very few Acts provide clear guidelines as to *how* to establish whether the partnership, cohabitation relationship or *de facto* marriage referred to in that specific Act in fact exists.[624] The result is that, while these Acts provide for such relationships *de iure*, most of them are silent in terms of assessing whether the relationship exists *de facto*.[625]

This situation is clearly untenable, and must be addressed in accordance with the rubric's calibration injunction and its aim to ensure legal certainty. Doing so must, of necessity, be based on a number of steadfast underlying principles. The following are suggested:

- In view of the fact that according to its long title the draft *Domestic Partnerships Bill* seeks to regulate the "legal recognition of", to enforce the "legal consequences of" and to provide for "matters incidental" to domestic partnerships, the Bill should, once enacted, provide the legislative

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624 Examples in this regard are legion—see for example the *Children's Act* 38 of 2005 which refers to "domestic life-partnership" in *inter alia* sections 231 and 242 without this concept being defined; labour legislation which refers to "life partner" but does not explain who qualifies as such (see for example the *Employment Equity Act* 55 of 1998 section 6 read with the section 1 definition of "family responsibility" and section 30 of the *Unemployment Insurance Act* 63 of 2001) and those Acts which establish Boards or appoint Commissioners (such as the *South African Civil Aviation Authority Act* 40 of 1998). Tax legislation also seems to be lacking in this regard, and will receive special attention in 12.2.3 below.

625 It is interesting to note the approach taken by the South African Law Commission in its 2009 draft *Consultation Paper* on the revision of legislation administered by the Department of Labour (Project 25). In respect of the *Unemployment Insurance Act* 63 of 2001 the Commission remarks that the Act in its current form does not define the concepts "dependant", "spouse" or "life partner." To this end, the Commission opines that such definitions must be inserted into the Act "to reflect the changes made by [the *Civil Union Act* 17 of 2006]" (at 28). While it is certainly true that these definitions should take Act 17 of 2006 into account, this alone will not solve the problems discussed above. Therefore, the point must be reiterated that, over and above allowing for Act 17 of 2006, it will be of cardinal importance to align these definitions with the prospective domestic partnership legislation. Although it must be conceded that the Commission could hardly be expected to take the provisions of a draft Bill into account, the necessity of alignment should be brought to their attention, as it is possible that domestic partnerships legislation may be promulgated before the Commission's investigation is finalised. It is also interesting to note that although the Commission acknowledges the fact that the *Employment Equity Act* 55 of 1998 as well as the *Basic Conditions of Employment Act* 75 of 1997 are all administered by the Department of Labour (see Annexure B), no mention is made of similarly amending or defining the concept of "life partner" or alignment of these Acts with prospective domestic partnership legislation. This oversight should also be brought to the attention of the Commission.

substructure of the domestic partnership. (As will be recalled, this is also the point of departure taken by the domestic partnerships rubric.)[626] As such, the Bill should provide the benchmark or point of reference for all ancillary legislation. As a consequence, the first principle should be that all legislation that seeks to regulate permanent life partnerships in any way should, as far as possible, be aligned with the *Domestic Partnerships Bill* as modified in terms of the rubric.

- However, in order for this goal to be achieved, it is essential for the *Domestic Partnerships Bill* to provide a solid and reliable list of criteria according to which the existence of such a relationship is to be determined. (This aspect was addressed earlier in this Chapter when clause 26 of the Bill was discussed.)

- In principle, any Act that has been (or will be) promulgated before the *Domestic Partnerships Bill* is enacted should be presumed *not* to intend to distinguish between registered and unregistered domestic partnerships, for the simple reason that no such distinction would have existed at the time when that specific Act was promulgated. Furthermore, no current Act requires any form of (formal) public commitment[627] in order for the couple to qualify as a life partnership (or something similar) for the purposes of that Act. Similarly, no Act differentiates between couples who have undertaken such a commitment and those who have not. Therefore, in cases where doubt persists as to whether a reference to "life partnership" (or a similar term) should henceforth encompass *both* the registered and unregistered domestic partnership, the point of departure must be that the Act in question intends to include *both* of these partnership options, unless the contrary intention appears from the Act itself or from the *Domestic Partnerships Bill*.

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626 See 5 in Chapter 3, again referred to in 1 above.

627 For example, in the form of a so-called "commitment ceremony."

- It must however be borne in mind that certain pieces of legislation have been drafted in such a way as to enable them to function independently of the *Domestic Partnerships Bill*. This occurs, for example, where an Act is self-sufficient in that regulations have been promulgated in order to provide specific guidance as to how that Act is to be applied.[628] In such an instance, it may be presumed that amendment in order to facilitate alignment with the Bill is unnecessary.

- In order to streamline the interrelationship between the Bill and the other Acts, a system of cross-referencing between the definition clauses in these Acts and the Bill should be introduced where apposite.

The following conclusions can be drawn from the principles listed above:

(1) Where any Act:
   (i) already contains a tailor-made description coupled with context-specific criteria pertaining to the relationships to which it applies; and/or
   (ii) is required to be read in conjunction with regulations that have been promulgated under that Act in order to give effect to its provisions;

   in such a way as to enable that Act to function independently of the *Domestic Partnerships Bill*, it should be presumed that no amendment of that Act is required;

(2) Where an Act provides specific criteria with which a non-formalised relationship must comply *for the purposes of that Act* (for instance a minimum duration requirement), these criteria should as far as possible be respected;

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628 For example, the regulations promulgated under the *Immigration Act* 13 of 2002. This Act is discussed below.

(3) Where any Act other than one referred to in conclusion (1) above makes use of a term other than “domestic partnership” or “domestic partner”, that Act should, in order to ensure uniformity, be amended to reflect the terminology employed by the *Domestic Partnerships Bill*;

(4) With the exception of legislation mentioned in conclusion (1) above, a definition of “domestic partnership” should be inserted into all legislation referred to in conclusion (3) which should state that “‘domestic partnership’ means a registered or unregistered domestic partnership in accordance with the *Domestic Partnerships Act …* ”; and, finally

(5) Even if the term “domestic partnership” were to be inserted into all legislation mentioned in conclusion (3) coupled with the insertion of the definition mentioned in conclusion (4), this would do little to solve the problem mentioned earlier to the effect that a lack of criteria may make it difficult to establish whether a given relationship qualifies as a domestic partnership *for the purposes of that specific Act*. While it is self-evident that it will not be difficult to determine whether the parties have entered into a *registered* domestic partnership, the question as to whether a relationship that has not been registered qualifies as an *unregistered* domestic partnership for the purposes of that Act may be more difficult to answer. This problem is exacerbated by the fact that, in its current format, clause 26 of the *Domestic Partnerships Bill* only permits *a Court* to determine whether an unregistered domestic partnership exists for the purposes of the Bill, with the result that a mere cross-reference from the Act to the Bill will not suffice. Consequently it is submitted that a sub-clause should be inserted into clause 26 of the Bill which requires the factors listed *in clause 26* to be considered for the purposes determining whether an unregistered domestic partnership exists for the purposes of any Act which has been amended in accordance with conclusions (3) and

(4) above. The suggested wording of this sub-clause will be provided in 12.2.5 below.

12.2 Giving effect to these principles

12.2.1 Acts that are self-sufficient and therefore do not require alignment with the Bill

12.2.1.1 The *Immigration Act* 13 of 2002

According to section 1 of this Act, the word "spouse" includes a person involved in "a permanent homosexual or heterosexual relationship as prescribed." The word "prescribed" in turn means "prescribed by regulation." The regulation in question was published in the Government Gazette on 27 June 2005.[629] The comprehensive nature of this regulation[630] makes it clear that it is unnecessary to align this Act with the *Domestic Partnerships Bill*.

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629 GN 616 in Gazette no 27725.

630 "3. A permanent homosexual or heterosexual relationship contemplated in paragraph (b) of the definition of 'spouse' in section 1(1) of the Act shall be a relationship proved by the parties-

(a) in the case of a relationship between a foreigner and a citizen or permanent resident, irrespective of where the relationship was concluded, or between two foreigners where the relationship was concluded inside the Republic-

(i) by submitting an affidavit signed by both parties attesting-

(aa) to the exclusion of any other person to the spousal relationship; and

(bb) that neither of the parties is at the relevant time a partner to a marriage;

(ii) by proving a legal divorce or the death of a spouse in the event of a preceding marriage; and

(iii) by submitting documentation proving cohabitation and the extent to which the related financial responsibilities are shared by the parties; or

(b) in the case of a relationship concluded between two foreigners in a foreign country, by submitting an official recognition thereof issued by the authorities of the relevant country, in addition to the documentation contemplated in paragraph (a)(i), (ii) and (iii)."

12.2.1.2 The *Domestic Violence Act* 116 of 1998

It is submitted that this Act's thorough and contextualised definition of "domestic relationship"[631] in section 1 negates the need for a cross-reference to the *Domestic Partnerships Bill*.

12.2.1.3 The *Rental Housing Act* 50 of 1999

The broad and neutral wording adopted by the non-discrimination provision of this Act (section 4(1))[632] does not appear to evince any need for a closer link between this Act and the *Domestic Partnerships Bill*.

12.2.1.4 The *Diplomatic Immunities and Privileges Amendment Act* 35 of 2008

Once enacted, the Conventions to which the *Diplomatic Immunities and Privileges Act* 37 of 2001 relates will regard a "life partner" as being a "member of a family" or, where applicable, as "spouses and [relative] dependant." Such a partner must, however, be "officially recognised as such by the sending State or

631 "'[D]omestic relationship' means a relationship between a complainant and a respondent in any of the following ways:
(a) they are or were married to each other, including marriage according to any law, custom or religion;
(b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;
(c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);
(d) they are family members related by consanguinity, affinity or adoption;
(e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or
(f) they share or recently shared the same residence …"

632 "In advertising a dwelling for purposes of leasing it, or in negotiating a lease with a prospective tenant, or during the term of a lease, a landlord may not unfairly discriminate against such prospective tenant or tenants, or the members of such tenant's household or the visitors of such tenant, on one or more grounds, including race, gender, sex, pregnancy, marital status, sexual orientation, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language and birth."

the United Nations, a specialised agency or an international organization." This Act's inherent recognition requirement circumvents the need for any reference to the *Domestic Partnerships Bill*.

12.2.1.5 The *Maintenance Act* 99 of 1998

It is submitted that the wording of this Act in as far as it states that it applies "to the legal duty of any person to maintain any other person, irrespective of the nature of the relationship between those persons giving rise to that duty"[633] is clear and unambiguous and therefore requires no amendment.

12.2.2 Cases of uncertainty

The *Older Persons Act* 13 of 2006 is an example of an Act which, due to the possible uncertainty regarding the way in which the *Domestic Partnerships Bill* will be interpreted, is possibly best left unaffected by the Bill. Section 21(3)(b)(i) of this Act makes an unqualified reference to the word "partner" as one of a class of persons who may under certain circumstances consent to the admission of an older person to a residential facility. Although it would normally be suggested that the word "partner" is too vague and that amendment is required, it is submitted that this specific Act must be overlooked. This is so because within the context of relationships involving older persons the word "partner" must take on a nuanced meaning, so that the requirement of intimacy, for example, cannot be viewed as an essential requirement of such a relationship.[634] Furthermore, it stands to reason that non-conjugal "care partnerships" will be more prevalent in relationships involving older persons than those in which younger persons are

633 Section 2(1).

634 An example where the specific context of older persons was considered within the context of a broader argument appears in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) where, in dismissing the argument that the ability to procreate was a defining characteristic of all conjugal relationships, Ackermann J stated that such an argument was "demeaning to couples who commence such a relationship at an age when they no longer have a desire for sexual relations" (at par [51]).

involved.[635] Although it may be true that the *Domestic Partnerships Bill* in its current guise does not appear to preclude such relationships from qualifying as unregistered domestic partnerships,[636] the position is unclear in view of the fact that the South African Law Reform Commission's 2006 *Report* categorically stated that such relationships were to be excluded from the ambit of the legislation proposed by the Commission.[637] Therefore, although it was submitted earlier in this Chapter that such relationships should indeed qualify for the purposes of the Bill, the situation remains uncertain. Viewed in this light, it is submitted that the *status quo* regarding the unqualified reference to "partner" in the *Older Persons Act* should be maintained so as to reinforce the impression that intimacy is not required.

12.2.3 Acts that should be aligned with the Bill

As seen in Chapter 6, quite a number of Acts currently provide piecemeal recognition to the relationships between unmarried couples, with the result that the Acts specifically mentioned in the two preceding paragraphs constitute only a handful of the total group. The general principles outlined above dictate that the remaining Acts must be aligned with the provisions of the *Domestic Partnerships Bill*. This will, in the main, require a process of "cross-pollination" between these Acts and the Bill so that all of these Acts are firstly amended so as to make use of the term "domestic partnership" coupled with a cross-reference to the Bill, and secondly that the criteria in the Bill must be used in order to ascertain whether or not an unregistered domestic partnership exists for the purposes of each Act. In the light hereof, the following remedial legislative action is recommended:

(i) The insertion of the words "domestic partner" as well as the insertion of a definition of that term which should read "'domestic partner' means a partner in a registered or unregistered domestic partnership in accordance

635 See SALRC 2003: 301 where a number of examples are provided.
636 See 3.2 above.
637 See SALRC 2006: 384 – 387.

with the *Domestic Partnership Act* …" is recommended in the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007;[638] the *Employment Equity Act* 55 of 1998;[639] the *Basic Conditions of Employment Act* 75 of 1997;[640] the *Unemployment Insurance Act* 63 of 2001;[641] the *Government Employees Pension Law, 1996*;[642] the *Medical Schemes Act* 131 of 1998;[643] and certain Acts in terms of which Boards are created or Commissioners are appointed.[644]

(ii) The insertion of the words "domestic partnership" as well as the insertion of a definition of that term which should read "'domestic partnership'

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638 Replacement of the word "life" with the word "domestic" before "partner" in the definition of "interested person" in section 27 so as to read "means any person who has a material interest in the well-being of a victim, including a spouse, same sex or heterosexual permanent *domestic* partner, parent, guardian, family member, care giver, curator, counsellor, medical practitioner, health service provider, social worker or teacher of such victim" and the insertion of the proposed definition of "'domestic partner" into that section.

639 The insertion of the word "domestic" before the word "partner" in the definition of "family responsibility" in section 1 so as to read "means the responsibility of employees in relation to their spouse or *domestic* partner, their dependent children or other members of their immediate family who need their care or support" and the insertion of the proposed definition of "'domestic partner" in that section.

640 The replacement of the word "life" with the word "domestic" before the word "partner" in section 27(2)(c)(i) as well as the insertion of the definition of "domestic partner" in section 1 of the Act.

641 The replacement of the word "life" with the word "domestic" in section 30(1) and 30(2)(a) of the Act, and the insertion of the suggested definition of "'domestic partner" in section 1 of the Act.

642 The deletion of the words "life partner (including a same sex life partner)" in the definition of "spouse" in section 1 of Schedule 1 of the Law and the replacement of these deleted words by "domestic partner", coupled with an insertion of the definition of "domestic partner" in that section.

643 The insertion of the word "domestic" before "partner" in the section 1 definition of "dependant", and the insertion of the definition of "domestic partner" in that section.

644 The replacement of the word "life" with the word "domestic" before the word "partner" in: Sections 9(4) and 11(5)(b) of the *South African Civil Aviation Authority Act* 40 of 1998 (and, if and when the latter Act is repealed by the *Civil Aviation Authority Act* 13 of 2009, similar amendments to section 24(2); 84(1) and 93 of that Act); sections 10(2) and 15(9) of the *Road Traffic Management Act* 20 of 1999; sections 3(7) and (8) and 7(5) of the *National Lotteries Act* 57 of 1997; sections 21(3)(a), 21(3)(d) and 47(3)(b),(c) and (d) of the *Land and Agricultural Development Bank Act* 15 of 2002; section 8(9) of the *National Nuclear Regulator Act* 47 of 1999; section 6(3)(c), 6(4) and 6(6) of the *National Energy Regulator Act* 40 of 2004; section 8(10)(b) of the *National Energy Act* 34 of 2008; section 9 of the *Construction Industry Development Board Act* 38 of 2000 and section 8(9) of the *National Railway Safety Regulator Act* 16 of 2002. In addition, the definition of "domestic partner" (in the format proposed in the main text above) should be inserted into all of these Acts.

means a registered or unregistered domestic partnership in accordance with the *Domestic Partnership Act* …" is recommended in the *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.[645]

(iii) The insertion of the words "registered domestic partnership" as well as the insertion of a definition of that term which should read "'registered domestic partnership' means a registered domestic partnership in accordance with the *Domestic Partnership Act* …" is recommended in the *Identification Act* 68 of 1997.[646]

(iv) Certain Acts require less generic amendments. These are the following: The *Judges' Remuneration and Conditions of Employment Act* 47 of 2001;[647] the *Pension Funds Act* 24 of 1956;[648] and the *Special Pensions Act* 69 of 1996.[649]

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645 In par (c) of the definition of "dependant of an employee" in section 1 of the Act, the words "as husband and wife" should be deleted and the words "living in a domestic partnership" should be inserted, so that paragraph (c) henceforth reads "if there is no widow or widower referred to in paragraph (a) or (b), a person with whom the employee was at the time of the employee's death living ~~as husband and wife~~ *in a domestic partnership.*" (It is proposed that the "living with" requirement should be retained in view of principle 2 mentioned in 12.1 above which requires the specific requirements of the Act to be respected.) In addition, the definition of "'domestic partnership" as proposed above should be inserted into section 1 of the Act.

646 Section 8(e) of this Act must be amended in order to require the particulars of a partner to a registered domestic partnership to be included in the population register. The unnecessary reference to "marriage register" should also be amended. It is interesting to note that the amendment of this subsection was suggested by the SALRC in its 2003 *Discussion Paper* (see note 13 in Annexure D), but was apparently overlooked in both the 2006 *Report* (at 328) as well as in the 2008 Bill. The amended section 8(e) should read as follows: "[T]he particulars of his or her marriage *or registered domestic partnership* contained in the relevant ~~marriage~~ register or other documents relating to the contracting of his or her marriage *or registered domestic partnership*, and such other particulars concerning his or her marital status as may be furnished to the Director-General…" In addition, as proposed in the main text above, the definition of "registered domestic partnership" should be inserted into section 1 of the Act.

647 It is proposed the definition of "partner" should be amended to "domestic partner" and that the definition itself should be amended to read: "'domestic partner' means only one person with whom a Constitutional Court judge or judge, who is not legally married, is involved in a permanent ~~heterosexual or same sex life partnership~~ *registered or unregistered domestic partnership in accordance with the Domestic Partnerships Act …* -

(a) in which the Constitutional Court judge or judge and the person concerned have undertaken reciprocal duties of support; and

(v) Tax legislation

In order to avoid the possibility of the definition of "spouse" in the *Transfer Duty Act*,[650] the *Income Tax Act* [651] and the *Estate Duty Act* [652] from being found to be unconstitutional, the *Taxation Laws Amendment Act* 5 of 2001 broadened the definition of this word in all three Acts as from 20 June 2001. Although these new definitions contain minor variations, the gist of this development can be illustrated by the *Transfer Duty Act* [653] which now defines "spouse" to include "the partner of such person-

(a) in a marriage or customary union recognised in terms of the laws of the Republic;

(b) in a union recognised as a marriage in accordance with the tenets of any religion; or

(c) in a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent:

(b) which is, for the purposes of this Act, registered as such with the Director-General: Justice and Constitutional Development in accordance with the regulations made under section 13…"

[648] In this Act, it is recommended that the definition of "spouse" should be amended to read "means a person who is the permanent ~~life partner~~ *registered or unregistered domestic partner* or spouse or civil union partner of a member in accordance with *the Domestic Partnerships Act, …,* the *Marriage Act*, 1961 (Act 68 of 1961), the *Recognition of Customary Marriages Act*, 1998 (Act 68 of 1997), or the *Civil Union Act*, 2006 (Act 17 of 2006), or the tenets of a religion…" (italics added).

[649] In section 31(2)(a) of this Act, it is recommended that the definition of "spouse" be amended so that subsection (a) reads: "'spouse' mentioned in subsection (1) 'marriage relationship' means-

(i) a marriage;

(ii) a union contracted in accordance with customary law or which is recognised as marriage in accordance with the tenets of any religion;

(iii) a continuous cohabitation in a ~~homosexual or heterosexual~~ *registered or unregistered domestic* partnership *in accordance with the Domestic Partnerships Act ...* for a period of at least 5 years."

[650] 40 of 1949.

[651] 58 of 1962.

[652] 45 of 1955.

[653] 40 of 1949.

> Provided that a marriage or union contemplated in paragraph (b) or (c) shall, in the absence of proof to the contrary, be deemed to be a marriage or union without community of property.

It is interesting to note that although the Acts all require the Commissioner for the South African Revenue Service to be satisfied that the union is "permanent", the statutes provide no guidelines according to which the Commissioner should ascertain this fact. Furthermore, the explanatory memorandum on the amending legislation provides no assistance in this matter as it simply regurgitates the new definitions without further comment.[654] This state of affairs entails that the Commissioner is not provided with a uniform list of criteria according to which he is to assess the permanent status of any given union. In the light of this fact, it is proposed that an amendment of the terminology employed by these Acts coupled with a cross-reference to the *Domestic Partnerships Bill* may be desirable. To this end, it is proposed that paragraph (c) of the definition of "spouse" in all three of these Acts be amended to read "in a registered domestic partnership as provided for in the *Domestic Partnership Act* of … or in an unregistered domestic partnership which the Commissioner is satisfied is permanent in accordance with section 26 of that Act."

(vi) The suggested amendments to the *Insolvency Act* 24 of 1936

As seen in Chapter 6, section 21(13)[655] of the *Insolvency Act* was one of the first South African legislative provisions to cater expressly for unmarried couples. However it was also pointed out in that Chapter that the Act's gender-biased

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654 See the "Explanatory memorandum on the Taxation Laws Amendment Bill, 2001" (available at http://www.sars.gov.za/home.asp?pid=2631 accessed on 25 May 2009) at pages 12 – 15.

655 This provision reads: "In this section the word 'spouse' means not only a wife or husband in the legal sense, but also a wife or husband by virtue of a marriage according to any law or custom, and also a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another."

wording may be unconstitutional, and that this result should best be avoided by an amendment to the statute.[656]

(vii) The *Independent Media Commission Act* 148 of 1993

Section 6(2) of this Act states that the word "spouse" must be interpreted so as to include a "*de facto* spouse." This concept is however not further defined. In view hereof it is suggested that these words should be replaced by "registered or unregistered domestic partner in accordance with the *Domestic Partnerships Act* …"

(viii) The *National Credit Act* 34 of 2005

As seen in Chapter 6, section 20(2)(b) of this Act is problematic in that the wording "spouse, partner, or associate" (in reference to a person who is disqualified from being a member of the National Credit Regulator established in terms of that Act) creates uncertainty as to whether the word "partner" is to be interpreted as referring to a partner in the commercial or domestic senses.[657] Most of the statutes that govern the creation and membership of similar Boards (see 3.2.8 in Chapter 6) clearly indicate that a partner in the latter sense is intended.[658] However, in view of the fact that Act 34 of 2005 deals with consumer credit largely regulated by the law of contract,[659] it was suggested in Chapter 6 that the safest option would be to assume that both of these

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656 In 3.2.7 it was proposed that the words "woman living with a man as his wife or a man living with a woman as her husband, although not married to one another" be deleted and replaced with the words "person who lives with the insolvent in a permanent domestic partnership." In addition, a definition of "domestic partnership" that cross-refers to a registered or unregistered domestic partnership in accordance with the *Domestic Partnership Act* was proposed.

657 Compare section 40(2)(d) of the Act: "(d) 'associated person'- (i) with respect to a credit provider who is a natural person, includes the credit provider's spouse or *business partners*…" (emphasis added).

658 See for example sections 16(f), 24(1), 84 93 and 98 of the yet-to-be-enacted *Civil Aviation Authority Act* 13 of 2009 where a clear distinction between partners in these senses is maintained.

659 See Mould 2008: 109 *et seq* for an analysis of the role played by the law of contract in giving effect to this Act.

interpretations are permissible. In order finally to clarify this matter it is suggested that the words "domestic or business" be inserted before the word "partner." In addition, a definition of "domestic partner" must also be inserted in section 1 of the Act as meaning "a partner in a registered or unregistered domestic partnership in accordance with the *Domestic Partnerships Act* …"[660]

(ix) The *Refugees Act* 130 of 1998

A definition of "spouse" stands to be inserted into this Act by the *Refugees Amendment Act* 33 of 2008.[661] Once amended, the definition will include "a permanent homosexual or heterosexual relationship" as prescribed by the regulations under the Act. It is submitted that these regulations should be aligned with domestic partnerships legislation.

(x) The *Prescription Act* 68 of 1969

As seen in the introduction to Chapter 5, this Act currently makes no provision for domestic partners. This fact, coupled with the fact that sections 3(1)(b), 8 and 13(1)(c) of the Act apply only to spouses married out of community of property[662] (and bearing in mind that a registered domestic partnership is by default out of community of property)[663] highlights the need for the provisions in question to be amended so as to provide for registered domestic partners.[664] In addition, a

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The relevant section will henceforth read as follows: "20(2) A person may not be a member of the Board if that person-

(a) …

(b) personally or through a spouse, *domestic or business* partner or associate-

(i) has or acquires a direct or indirect financial interest in a registrant; or

(ii) has or acquires an interest in a business or enterprise, which may conflict or interfere with the proper performance of the duties of a member of the Board…."

661 This Act was assented to on 21 November 2008 but is yet to come into operation.

662 Sinclair and Heaton 1996: 421 (note 17).

663 Clause 7.

664 Section 3(1)(b) should be amended thus: "(b) the person in favour of whom the prescription is running is outside the Republic, or is married to *or in a registered domestic partnership with* the person against whom the prescription is running, or is a member of the governing body of a

definition of "registered domestic partnership" should be inserted into the *Prescription Act*.[665]

12.2.4 An Act that requires special attention: The *Children's Act* 38 of 2005

In paragraph 4 of Chapter 5 it was pointed out that the *Children's Act* needs to be amended as far as its provisions relating to children conceived by artificial fertilisation was concerned, and that it was necessary for the Act to be terminologically aligned with the *Domestic Partnerships Bill* regarding the concept of a "domestic partnership." In this regard, particular emphasis was placed on aligning section 231 (dealing with persons who may adopt a child) of the Act with the *Domestic Partnerships Bill*,[666] as well as on the recommendation that definitions of "domestic partnership", "domestic partner" and "unregistered domestic partnership" should be inserted into the Act.[667] These amendments were, however, only the tip of the proverbial iceberg as far as children are concerned, as both pieces of legislation require a number of further amendments in order for the aims of both to be realised. Three major problems present themselves, which will be discussed in the paragraphs (i) – (iii) that follow. In the final instance, a number of less vital amendments will be recommended in paragraph (iv).

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juristic person against whom the prescription is running…". Section 8 merely makes the provisions of (*inter alia*) section 3 applicable to the acquisition and extinction of servitudes by prescription and therefore requires no amendment. Section 13(1)(c) should however be amended to read: "the creditor and debtor are married to each other *or are partners in a registered domestic partnership*…"

665 "'[R]egistered domestic partnership' means a registered domestic partnership in accordance with the *Domestic Partnership Act* …"

666 In its current form section 231 refers to an (undefined) "domestic life-partnership".

667 "'[D]omestic partner' means a partner to a registered or unregistered domestic partnership in accordance with the *Domestic Partnerships Act, …*"; "'domestic partnership' means a registered or unregistered domestic partnership in accordance with the *Domestic Partnerships Act, …*" and "'unregistered domestic partnership' means an unregistered domestic partnership in accordance with the *Domestic Partnerships Act, … "*

(i) The interaction between the definition of "child of a domestic partnership" in the Bill, the position of the male partner in a registered domestic partnership and the position of unmarried fathers in terms of the *Children's Act* 38 of 2005

According to clause 1 of the *Domestic Partnerships Bill*, a "child of a domestic partnership" includes:

> (a) any child born as a result of sexual relations between the domestic partners;
> (b) any child of either domestic partner;
> (c) any child adopted by the domestic partners jointly; or
> (d) any other child who was a dependant of the domestic partners—
> (i) at the time when the domestic partners ceased to live together;
> (ii) if the domestic partners had not ceased to live together, at the time immediately before an application under this Act; or
> (iii) at the date of the death of one of the domestic partners…

As can be seen from this definition, paragraph (b) of the definition of "child of a domestic partnership" in the *Domestic Partnerships Bill* includes "any child of either domestic partner" as constituting such a child. While this provision may seem fairly innocuous at first reading, the difficulty underlying it can be illustrated by the following set of facts:

Assume that A (male) and B (female) live together for a period of time, during which a child (C) is born to them. As they are unmarried, this immediately implies that B (as the biological mother of the child) automatically has full parental responsibilities and rights in respect of C,[668] while A, as an unmarried biological father, must comply with section 21 of the *Children's Act* in order to acquire such responsibilities and rights. However, assume that shortly after C's birth A and B's relationship comes to an end, and within a few months A has

[668] Section 19 of the *Children's Act* 38 of 2005.

entered into a registered domestic partnership with Z (another female woman). According to paragraph (b) of the current definition of "child of a domestic partnership", C (as A's biological child) will qualify as a child of the domestic partnership which exists between *A and Z*—a result which would obviously be ludicrous in view of the fact that no legal bond exists between Z and C.

The history behind the inclusion of this definition provides for interesting reading. The first reference to a definition of this kind appeared in the South African Law Reform Commission's 2003 *Discussion Paper*, where a definition of "child of an intimate partnership" was included in both options 1 and 2 of annexure E in which the Commission's proposed unregistered partnership legislation was contained.[669] In both instances, the definition of "child of an intimate partnership" contained one sole footnote reference, namely to the New South Wales *(Property) Relationships Act* of 1984,[670] a fact which would lead any reader thereof to conclude that the Commission's proposed definition was gleaned from the latter Act. A comparison with the definition in the New South Wales Act however reveals not only that there are substantial differences between the definition in that Act and the one proposed by the Commission,[671] but also, and

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669 Both definitions were identical: "'child of an intimate partnership' means-
(a) any child born as a result of sexual relations between the intimate partners; or
(b) any child of either intimate partner; or
(c) any child adopted by one or both of the intimate partners jointly; or
(d) any other child who was a member of the family of the intimate partners-
(i) at the time when the intimate partners ceased to live together; or
(ii) if at that time the intimate partners had not ceased to live together, at the time immediately before an application under this Act; or
(iii) at the date of the death of one of the intimate partners…"

670 See SALRC 2003: 379 and 402.

671 According to section 5(3) of the New South Wales *(Property) Relationships Act* of 1984: "A reference in this Act to a child of the parties to a domestic relationship is a reference to any of the following:
(a) a child born as a result of sexual relations between the parties,
(b) a child adopted by both parties,
(c) where the domestic relationship is a de facto relationship between a man and a woman, a child of the woman:
(i) of whom the man is the father, or
(ii) of whom the man is presumed, by virtue of the *Status of Children Act 1996*, to be the father, except where such a presumption is rebutted,

more particularly, that the New South Wales Act contains no unqualified reference to such a child including "any child of either intimate partner."[672] Further research into Acts with similar wording led to New Zealand's *Property (Relationships) Act* 1976 No 166 according to which children of civil unions, *de facto* relationships and marriage all include "any other child (whether or not a child of either [partner or spouse]) who was a member of the family of the [partners or spouses]…"[673] While the wording "a child of either [partner or

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(c1) where the domestic relationship is a de facto relationship between two women, a child of whom both of those women are presumed to be parents by virtue of the *Status of Children Act 1996*,

(d) a child for whose long-term welfare both parties have parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*)."

672 An analysis of the comparative survey in the 2003 *Discussion Paper* (Chapter 6) reveals that the Commission only made specific reference to the fact that the New South Wales *(Property) Relationships Act* "introduced limited changes for parenting relationships by defining children of a domestic relationship as including 'a child for whose long-term welfare both parties have parental responsibility'" (see SALRC 2003: 136). The only other paragraph that appears in the Commission's proposed definition that wholly corresponds with the Australian Act is paragraph (a) namely "a child born as a result of sexual relations between the parties." It is therefore clear that the Commission's footnote references as they appear on pages 329 and 402 of annexure E are misleading.

673 See section 2 of the Act: "***child of the civil union***—

(a) means any child of both civil union partners; and

(b) includes any other child (whether or not a child of either civil union partner) who was a member of the family of the civil union partners—

(i) at the time when they ceased to live together; or

(ii) at the time immediately before an application under this Act, if at that time they had not ceased to live together; or

(iii) at the date of the death of 1 of the civil union partners

child of the civil union: this definition was inserted, as from 26 April 2005, by section 3(4) Property (Relationships) Amendment Act 2005 (2005 No 19).

child of the de facto relationship—

(a) means any child of both de facto partners; and

(b) includes any other child (whether or not a child of either de facto partner) who was a member of the family of the de facto partners—

(i) at the time when they ceased to live together; or

(ii) at the time immediately before an application under this Act, if at that time they had not ceased to live together; or

(iii) at the date of the death of 1 of the de facto partners

child of the marriage—

(a) means any child of both spouses; and

(b) includes any other child (whether or not a child of either spouse) who was a member of the family of the spouses—

(i) at the time when they ceased to live together; or

(ii) at the time immediately before an application under this Act, if at that time they had not ceased to live together; or

(iii) at the date of the death of 1 of the spouses; and

spouse]" may resemble paragraph (b) of the definition proposed by the South African Law Reform Commission, it immediately becomes clear that there is an important difference between the two in that the New Zealand Act qualifies the term by requiring such a child to be a *member of the family* of those partners or spouses.[674]

The conclusion that can be drawn from this brief analysis is that despite the impression created in the *Discussion Paper*, paragraph (b) of the definition proposed by the Commission does not appear to have been included on the basis of its being recognised in any comparable jurisdiction. Nevertheless, this definition was retained in substance[675] in the Commission's 2006 *Report* in which a "Recommended Domestic Partnerships Act" was proposed.[676] From there, it was included verbatim in the first *Civil Union Bill* of August 2006,[677] and later transplanted to the draft *Domestic Partnerships Bill* of 2008.

It is submitted that this strange state of affairs highlights the necessity for paragraph (b) to be qualified in order for the definition to be tenable. Within the context of the example provided above, what is required is the existence of some or other bond between Z and C before the latter truly can be regarded as being a

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(c) if the marriage was immediately preceded by a de facto relationship or civil union between the spouses, includes any child of the de facto relationship or civil union

child of the marriage: paragraph (b) of this definition was amended, as from 26 April 2005, by section 3(4) Property (Relationships) Amendment Act 2005 (2005 No 19) by inserting the words "or civil union" after the word "relationship" in both places it appears."

674 It is important not to lose sight of this qualification. For example, in a pamphlet prepared by the New Zealand Law Society dealing with the division of relationship property in terms of the *Property (Relationships) Act*, the term "child of the relationship" is described as "a wide-ranging definition—it includes not only any child the couple have together *but also any child of either partner* and any other child *who is a member of the family* when the couple ceased to live together or at the date of death of a partner" (emphasis added). A hasty reading of this description may lead one to overlook the qualification regarding family membership. The pamphlet is available at http://www.communitylawtaranaki.org/downloads/Family/Dividing%20up%20Relationship%20Property%20NZLS%20Pamphlet.pdf (accessed on 6 June 2009).

675 The definition was altered to refer to "child of a domestic partnership", and all other references to "intimate" in the 2003 definition were removed.

676 See Annexure E.

677 [B 26—2006].

"child of the domestic partnership" that exists between A and Z. Furthermore, although much of the *Children's Act* is not yet in operation, it is submitted that the suggested insertion into the Bill must align itself with the applicable provisions of this Act. In order to achieve both of these goals it is submitted that the following be inserted into paragraph (b):

> "**Child of a domestic partnership**" includes–
>
> (a) …
>
> (b) any child of either domestic partner *[who has been adopted by the other domestic partner or in respect of whom such other domestic partner has otherwise acquired parental responsibilities and rights in accordance with the Children's Act 38 of 2005; or]*
>
> (c) …

A further benefit of this amendment is that it will not only accomplish the two goals mentioned above, but will also serve to align the Bill with international trends.[678]

Unfortunately, the difficulties caused by the definition of "child of a domestic partnership" are not confined to those created by paragraph (b) thereof. The discussion that follows will illustrate the reasons for this assertion.

(ii) The interaction between the *Children's Act* 38 of 2005 and the *Domestic Partnerships Bill,* 2008 regarding children conceived by artificial fertilisation and children born to a surrogate mother

Clause 17 of the draft Bill is entitled "Children of registered partners of opposite sex" and it states the following:

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[678] See the definitions that currently appear in the Oceanic legislation quoted in notes 671 and 673 above.

> Where a child is born into a *registered* domestic partnership between *persons of the opposite sex*, the male partners [sic] in the registered domestic partnership is deemed to be the biological father of that child and has the legal rights and responsibilities in respect of that child that would have been conferred upon him if he had been married to the biological mother of the child.[679]

This section was included by the South African Law Reform Commission as it was "concomitant with the formal commitment of registered partners," and was clearly intended to refer to children "born to the female registered partner."[680] However, it is submitted that neither clause 17 of the Bill nor its definition clause succeeds in conveying this intention, as no definition of the concept of a child "born into" a domestic partnership is to be found in the Bill. Indeed, the only definition which contains a reference to "child" is the definition of "child of a domestic partnership", (referred to in (i) above) which is defined in clause 1 of the Bill as including:

> (a) any child born as a result of sexual relations between the domestic partners;
> (b) any child of either domestic partner;
> (c) any child adopted by the domestic partners jointly; or
> (d) any other child who was a dependant of the domestic partners–
> (i) at the time when the domestic partners ceased to live together;
> (ii) if the domestic partners had not ceased to live together, at the time immediately before an application under this Act; or
> (iii) at the date of the death of one of the domestic partners…

It is unclear whether this definition is to be referred to in order to determine which children will qualify as children who are "born into" registered domestic partnerships for the purposes of clause 17. This uncertain situation is only made more confusing by the fact that the heading to clause 17 of the Bill is entitled

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679 Emphasis added.

680 See SALRC 2006: 364.

"Children *of* registered partners of opposite sex",[681] which, it may be argued, serves to indicate that clause 17 indeed requires a cross-reference to the definition of "child *of* a domestic partnership"[682] in clause 1.

A further analysis of the definition in clause 1 reveals a number of additional difficulties with the definition in its current form. The first is that, while it is self-evident that a child "born into" a domestic partnership must of necessity include a child born as a result of sexual relations between the domestic partners (paragraph (a)), there appears to be no reason why a child conceived by way of artificial fertilisation or born as result of a valid surrogacy agreement should not also qualify as a child that is "born into" that domestic partnership. The definition in clause 1 however contains no direct reference to such children. The only possibility which may permit the inclusion of such children is paragraph (b) of the definition, namely "any child of either domestic partner," but, as has already been seen in (i) above, this paragraph cannot be retained in its current form. A further difficulty is that it is also self-evident that a child who falls into paragraph (c) of the definition (i.e. a child adopted by the partners jointly) could not be regarded as a child "born into" the domestic partnership. Furthermore, with regards to paragraph (d) of the definition (i.e. any other child who was a dependant of the domestic partners), there is no wording in that paragraph that requires such a child to be *born of* the female domestic partner.

The preceding difficulties arising from the definition of "child of a domestic partnership" serve to indicate two important facts, namely, first, that the definition cannot be used in order to ascertain which children are "born into" a domestic partnership for the purposes of clause 17, with the result that the Bill requires the insertion of a specific definition pertaining to children "born into" domestic partnerships. Secondly, the definition of "child of a domestic relationship" must in

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681 Emphasis added.

682 Emphasis added.

principle be retained, but extended in order to provide for certain categories of children which it currently appears to exclude.

This notwithstanding, it is crucial to note that even if these amendments were to be brought about, they would be meaningless unless section 40 of the *Children's Act* 38 of 2005 were amended in the manner suggested in Chapter 5.[683] To illustrate: Even if a definition of "child born into a domestic partnership" that makes specific provision for a child conceived by artificial fertilisation is inserted into clause 1 of the *Domestic Partnerships Bill*, a problem presents itself in that section 40(2) of the *Children's Act* 38 of 2005 (in its current form) states that if any woman (other than a surrogate mother) is fertilised artificially any such child "must *for all purposes* be regarded to be the child of that woman."[684] This immediately entails that such a woman, whether married or unmarried, has full parental responsibilities and rights in respect of that child according to section 19 of the Act. If she is involved in a life partnership with another man, section 21 of

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683 The amendment proposed in 4.3 in Chapter 5 (words in italics) was the following:
"**Rights of child conceived by artificial fertilisation**
(1)
(a) Whenever the gamete or gametes of any person other than a […] person or his or her spouse *or permanent domestic partner* have been used with the consent of both such spouses *or permanent domestic partners* for the artificial fertilisation of one spouse *or permanent domestic partner*, any child born of that spouse *or permanent domestic partner* as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses *or permanent domestic partners*: *Provided that this subsection shall not be interpreted in such a way as to include a surrogate motherhood agreement*.
(b) For the purpose of paragraph (a) it must be presumed, until the contrary is proved, that both spouses *or permanent domestic partners* have granted the relevant consent.
(2) Subject to section 296, whenever the gamete or gametes of any person have been used for the artificial fertilisation of a woman *in circumstances other than those contemplated in subsection 1(a)*, any child born of that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman.
(3) Subject to section 296, no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete has or gametes have been used for such artificial fertilisation or the blood relations of that person, except when-
(a) that person is the woman who gave birth to that child; or
(b) that person was the husband *or permanent domestic partner* of such woman at the time of such artificial fertilisation."

684 Emphasis added.

the Act ("Parental responsibilities and rights of unmarried fathers") would not apply to such a man, as he is not the biological father of the child. However, in accordance with clause 17 of the *Domestic Partnerships Bill,* 2008 if they have entered into a *registered* domestic partnership, that man will be *deemed* to be the biological father of the child as if he had been married to the mother of the child. Although this provision might at first appear to contradict section 40(2), it is submitted that the two provisions can be read alongside one another. Nevertheless, two problems arise in this regard. The first is that the deeming provision implies that the father is regarded as being a married father, which in turn implies that section 20 of the *Children's Act* applies, with the result that he acquires full parental responsibilities and rights of such a child. The problem in this regard is that section 40(2) of the *Children's Act* does not require his consent to the artificial fertilisation of his partner.[685] This could potentially imply that such a man will be deemed to have full responsibilities and rights of a child who was conceived without his consent. (This problem would however be remedied if section 40(2) were to be amended as suggested in Chapter 5.)[686]

The second difficulty can also be illustrated by assuming that the amendments to the definition clause of the Bill proposed above have indeed been brought about by the Legislature.[687] The problem would be that unless section 40 of the *Children's Act* is amended in the manner suggested in Chapter 5,[688] the combined effect of reading this unamended section with clause 17 of the Bill would create a totally inconsistent position with regard to all categories of domestic partnerships (such as all-female domestic partnerships and those

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685 See Heaton 2007: 3-43.

686 See note 683.

687 In other words, assuming that the definition of "child of a domestic partnership" was amended so as to include surrogacy and artificial fertilisation and that a definition of "child born into a domestic partnership" was inserted into clause 1 of the Bill.

688 See note 683 above.

involving persons who have altered their sex descriptions) as far as artificial fertilisation and surrogacy is concerned.[689]

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689 Scenario 1: If an opposite sex couple (M and F) were to enter into a registered domestic partnership and a child were to be conceived as a result of F being artificially fertilised with the sperm of a third person, the child would, by virtue of clause 17 of the Bill read with the proposed definition of "child born into a domestic partnership" be deemed to be M's child, with the result that he would be deemed to be the biological father of the child with full parental responsibilities and rights as if he had been married. According to section 40(2) of the *Children's Act* 38 of 2005, the child would for all purposes be regarded as F's child. In this respect it may be assumed that clause 17 of the Bill and section 40(2) of the Act would complement one another.

Scenario 2: However, if two female persons (F1 and F2) were to register a domestic partnership and a child were to be conceived by the artificial fertilisation of F2 with the sperm of an outsider, such a child would, by virtue of the proposed definition of "child born into a domestic partnership" be regarded as a child "born into" the relationship between F1 and F2. However the mere fact that this would be the case would not confer any rights and responsibilities on F1, as clause 17 of the Bill could not apply due to the fact that the relationship is not between two persons of the opposite sex. Furthermore, unless section 40 were amended in the manner suggested in Chapter 5, section 40(1) could not apply in order to regard both F1 and F2 as being the parents of the child. In the end result, section 40(2) of the Act would imply that the child "must for all purposes be regarded as the child of" F2 (the birth mother). This position would prevail even if a direct biological link existed between F1 and the child, such as where the child had been born to F2 by using the oocytes of F1 (as had occurred in *J and Another v Director General, Department of Home Affairs and Others* 2003 (5) SA 621 (CC)).

Scenario 3: Assume that J was born a female person, and that J's sex description was altered to that of a male. If J (now male) were to register a domestic partnership with a female (F), the following possibilities could arise: If a child were conceived as a result of natural intercourse between F and a male third person (X), J would, by virtue of clause 17 of the Bill, be deemed to be the biological father of the child with all the legal rights and responsibilities in respect of the child as if he were married to F. If he rebutted this presumption (for example by proving that he was incapable of procreating), section 21 of the *Children's Act* would apply to X. In the alternative, if a child were to be conceived as a result of F being artificially fertilised with the sperm of a third person, the child would, by virtue of clause 17 of the Bill read with the proposed definition of "child born into a domestic partnership" be deemed to be J's child, with the result that he would be deemed to be the biological father of the child with full parental responsibilities and rights as if he had been married. As far as F was concerned, section 40(2) of the (non-amended) *Children's Act* 38 of 2005 would entail that the child would for all purposes be regarded as F's child. In this respect it may appear that clause 17 of the Bill and section 40(2) of the Act would complement one another as in the first scenario.

Scenario 4: Assume that K was born male, and that K's sex description was later altered to that of a female. A few years later K (now female) registers a domestic partnership with a male (M). In such a case, despite the fact that the union between K and M is a heterosexual registered domestic partnership, clause 17 of the Bill could not apply to K as she is no longer legally regarded as being a male partner. Assuming that K and M enter into a surrogate motherhood agreement with a third (female) person (Z), Chapter 19 of the *Children's Act* would regulate the position and the commissioning parents (K and M) would, where apposite, be regarded as the parents of the child. In the absence of a surrogacy agreement, Z would, by virtue of section 40(2) of the Act, be regarded as being the child's parent. If the child were conceived by natural intercourse between M and Z, such a child could not (provided that paragraph (b) of the definition of "child of a domestic partnership" has been amended as earlier proposed) be regarded as being "a child of" the registered domestic partnership between K and M. Regardless

It is submitted that a four-pronged approach comprising the following developments will solve these problems and create a far more consistent legal position:

- First, section 40 of the *Children's Act* must be amended in the manner suggested in Chapter 5. This amendment was discussed in detail in that Chapter and therefore need not be repeated here.[690]

- The definition of "child of a domestic partnership" in clause 1 of the Bill should be amended so as clearly to provide for children conceived by artificial fertilisation and for those born in terms of surrogacy agreements. Furthermore, this definition must also include the amendments suggested in (i) above so as to remove the uncertainty created by the reference to "child of either domestic partner" in paragraph (b) of this definition. The amended definition (new words in italics) would now read:

"**Child of a domestic partnership**" includes–

(a) any child born as a result of sexual relations between the domestic partners;

(b) any child–

(i) of either domestic partner who has been adopted by the other domestic partner or in respect of whom such other domestic partner has otherwise acquired parental responsibilities and rights in accordance with the Children's Act 38 of 2005;

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hereof, Z, as the biological mother of the child, would automatically have full parental responsibilities and rights in respect of the child (section 19 of Act 38 of 2005), while section 21 of the *Children's Act* would apply to M.

General scenario: For the sake of interest it may also be mentioned that if the Bill should come into operation in its current guise, the reference therein to joint adoption by domestic partners (paragraph (c) of the definition of "child of a domestic partnership") would also be problematic as it is dependent on the coming into operation of section 231 of the *Children's Act* 38 of 2005. Until this happens, joint adoptions by heterosexual life partners will not be possible.

690 See note 683 where the amended section is repeated for the sake of convenience.

(ii) who, subject to section 40 of the Children's Act 38 of 2005 (as amended) was born into a domestic partnership after being conceived by artificial fertilisation;

(iii) who, subject to Chapter 19 of the Children's Act 38 of 2005, was born into a domestic partnership in consequence of a surrogate motherhood agreement; or

(c) any child adopted by the domestic partners jointly; or

(d) any other child who was a dependant of the domestic partners–

(i) at the time when the domestic partners ceased to live together;

(ii) if the domestic partners had not ceased to live together, at the time immediately before an application under this Act; or

(iii) at the date of the death of one of the domestic partners.

- Third, a definition of "child *born into* a domestic partnership" should be inserted into clause 1 of the Bill that not only provides for children conceived by artificial fertilisation and for those born in terms of surrogacy agreements, but also clearly indicates that it refers to children born to the female domestic partner.[691] Such a definition should read as follows:

"**Child born into a domestic partnership**" includes–

(a) any child born as a result of sexual relations between the domestic partners;

(b) any child–

(i) who, subject to section 40 of the Children's Act 38 of 2005 (as amended) was born into a domestic partnership after being conceived by artificial fertilisation;

691 It is submitted that the latter insertion would give effect to the South African Law Reform Commission's motivation behind the insertion of clause 17 in the first place: "Despite the simplification of the registered partnership model, the Commission decided to recommend that a male registered partner be presumed to be the biological father of a child *born to the female registered partner*"—see SALRC 2006: 364 (emphasis added).

(ii) who, subject to Chapter 19 of the Children's Act 38 of 2005, was born into a domestic partnership in consequence of a surrogate motherhood agreement; or

(d) any other child *born of a female partner* who was a dependant of the domestic partners–

(i) at the time when the domestic partners ceased to live together;

(ii) if the domestic partners had not ceased to live together, at the time immediately before an application under this Act; or

(iii) at the date of the death of one of the domestic partners.[692]

- Finally the heading of clause 17 of the Bill must be amended so as to reflect the fact that it refers only to children "born into" the domestic partnership. This would entail replacing the current heading ("Children of registered partners of opposite sex") with "Children born into registered partnerships between persons of the opposite sex".

The benefits of these amendments become clear when their effect is considered within the context of various hypothetical settings (set out in the footnote reference to this sentence).[693]

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692 Certain sections are italicised in order to emphasise them.

693 An analysis of the impact of the combined effects of the amendment of the definition clause of the Bill read with clause 17 thereof as well as the *amended* section 40 of the *Children's Act* along with Chapter 19 of the same Act (surrogate motherhood) would entail that the **hypothetical** legal position would be as follows:

Scenario 1: If two female persons (F1 and F2) were to register a domestic partnership and a child were to be conceived by the artificial fertilisation of F2, such a child would, by virtue of the amended definitions in clause 1 of the Bill, be regarded as being a child born of the domestic partnership. However, as the registered partnership would not exist between two persons of the opposite sex, F1 would not be deemed to be the father of the child. Nevertheless, both F1 and F2 would by virtue of the amended section 40(1)(a) of the *Children's Act* 38 of 2005 be deemed to be the parents of the child provided that they both consented to the fertilisation. If not, section 40(2) would apply, and only F2 would be the mother of the child.

Scenario 2: If two male persons (M1 and M2) registered a domestic partnership and a child were to be born in consequence of the artificial fertilisation of Z (a female person) in terms of a surrogate motherhood agreement, Chapter 19 of the *Children's Act* would regulate the position and the commissioning parents (M1 and M2) would, where apposite, be regarded as the parents of the child. In the absence of a surrogacy agreement, Z would, by virtue of section 40(2) of the Act, be regarded as being the child's parent. If the child were conceived by natural intercourse between (for example) M2 and Z, such a child could not (due to the fact that paragraph (b) of the

definition of "child of a domestic partnership" has been amended as earlier proposed) be regarded as being "a child of" the registered domestic partnership between M1 and M2. Regardless hereof, Z, as biological mother of the child, would automatically have full parental responsibilities and rights in respect of the child (section 19 of Act 38 of 2005), while section 21 of the *Children's Act* would apply to M2. Due to the specific facts of the case, clause 17 of the *Domestic Partnership Bill,* 2008 would have no application as far as M1 or M2 are concerned.

Scenario 3: If an opposite-sex couple (M and F) were to enter into a registered domestic partnership and a child were conceived as a result of natural intercourse between F and a male third person (X), M would, by virtue of clause 17 of the Bill, be deemed to be the biological father of the child with all the legal rights and responsibilities in respect of the child as if he were married to F. If he rebutted this presumption, section 21 of the *Children's Act* would apply to X.

Scenario 4: If an opposite sex couple (M and F) were to enter into a registered domestic partnership and a child were to be conceived as a result of F being artificially fertilised with the sperm of a third person, the child would, by virtue of clause 17 of the Bill be deemed to be M's child, with the attendant consequences as described in the previous scenario. Furthermore, this deeming provision would overlap with *the amended* section 40(1)(a) of the *Children's Act*, so that both M and F would be regarded as being the parents of the child, provided that both of them consented to the fertilisation. If M did not consent to his partner's fertilisation, section 40(2) of the same Act would apply, with the result that only F would be regarded as being the child's parent.

Scenario 5: Assume that J was born a female person, and that J's sex description was altered to that of a male. If J (now male) were to register a domestic partnership with a female (F), the same scenarios as those described in 3 and 4 above would apply (substituting "M" with "J").

Scenario 6: Assume that J was born a female person, and that J's sex description was altered to that of a male. If J (now male) were to register a domestic partnership with a male (M), the same scenario as that described in scenario 2 above would apply (substituting "M1" with "J" and "M2" with "M").

Scenario 7: Assume that K was born male, and that K's sex description was later altered to that of a female. If K (now female) were to register a domestic partnership with a male (M), clause 17 of the Bill could not apply to K as, despite the fact that the union between K and M is regarded as being a heterosexual one, she is no longer legally regarded as being a male partner. Assuming that K and M entered into a surrogate motherhood agreement with a third (female) person (Z), Chapter 19 of the *Children's Act* would regulate the position and the commissioning parents (K and M) would, where apposite, be regarded as the parents of the child. In the absence of a surrogacy agreement, Z would, by virtue of section 40(2) of the Act, be regarded as being the child's parent. If the child were conceived by natural intercourse between M and Z, such a child could not (due to the fact that paragraph (b) of the definition of "child of a domestic partnership" has been amended as earlier proposed) be regarded as being "a child of" the registered domestic partnership between K and M. Regardless hereof, Z, as biological mother of the child, would automatically have full parental responsibilities and rights in respect of the child (section 19 of Act 38 of 2005), while section 21 of the *Children's Act* would apply to M.

Scenario 8: Assume that K was born male, and that K's sex description was later altered to that of a female. Assume further that K (now female) were to register a domestic partnership with a female (F). If a child were to be conceived by the artificial fertilisation of F, such a child would, by virtue of the amended definitions in clause 1 of the Bill, be regarded as being a child born of the domestic partnership. However, as the registered partnership would not exist between two persons of the opposite sex, clause 17 of the Bill would not apply and K would not be deemed to be the father of the child. Nevertheless, both K and F would, by virtue of the amended section 40(1)(a) of the *Children's Act* 38 of 2005, be deemed to be the parents of the

(iii) Section 21 of the *Children's Act*

In terms of clause 17 of the *Domestic Partnerships Bill,* 2008 the male partner in a heterosexual *registered* domestic partnership is deemed not only to be the biological father of a child born into that partnership, but also to have those legal rights and responsibilities with reference to that child that he would have had if he had been married to the child's mother.

Should the Bill be promulgated as an Act of Parliament, clause 17 will have an important effect on the differentiation between married and unmarried fathers that currently appears in the *Children's Act.* The first consequence will be that the male partner to a registered domestic partnership between two persons of the opposite sex will be deemed to be a married father in terms of section 20 of the *Children's Act*.[694] As a consequence, section 20 would henceforth have to be read as if all references to the word "married" included the male partner to a heterosexual registered domestic partnership.

The second important consequence would relate to the *unmarried* biological father; the position of whom has featured on a number of occasions throughout this study.[695] In this regard, it will be recalled that section 21 places such a father in the position to acquire full parental responsibilities of his child, provided that certain requirements are met. One of the possibilities mentioned in section 21(1) is that a father will automatically acquire such responsibilities and rights:

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child provided that they both consented to the artificial fertilisation. If not, section 40(2) would apply, and only F would be the mother of the child.

694 "**20 Parental responsibilities and rights of married fathers**
The biological father of a child has full parental responsibilities and rights in respect of the child-
(a) if he is married to the child's mother; or
(b) if he was married to the child's mother at-
(i) the time of the child's conception;
(ii) the time of the child's birth; or
(iii) any time between the child's conception and birth."

695 See for example Chapter 4 (at 2.2.3) and this Chapter at 5.2.

> (a) if at the time of the child's birth he is living with the mother in a permanent life-partnership; or …

Unless this subsection is amended, the unqualified reference to "permanent life-partnership" will create a discrepancy between sections 20 and 21 of the *Children's Act* as, on the one hand, clause 17 of the Bill will deem the male partner to a heterosexual *registered* domestic partnership to be a *married* father, while section 21 in its current form is wide enough also to interpret that same person as being an *unmarried* father. This discrepancy can be resolved by having recourse to the rationale behind clause 17 of the Bill which, according to the South African Law Reform Commission, was to include the deeming provision in consequence of the formal commitment undertaken by the registered domestic partners. On the other hand, it is clear that section 21 of the *Children's Act* was enacted on the basis of similar but opposite reasoning, namely to require some form of a commitment from an unmarried father *precisely because no formal commitment existed between himself and the child's mother*. Within the framework of the draft *Domestic Partnerships Bill*, it is therefore patent that section 21(1)(a) of the *Children's Act* must refer to relationships in which no "formal commitment" has been undertaken, namely the unregistered domestic partnership. As a consequence it is suggested that the subsection in question must be amended to read:

> (a) if at the time of the child's birth he is living with the mother in a permanent *unregistered domestic* partnership; or …

The amendment of section 21(1)(a) in this fashion immediately explains why it was suggested in Chapter 5 that a definition of "unregistered domestic partnership" be inserted into section 1 of the *Children's Act* 38 of 2005.[696]

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[696] See 4.3 where the following definition was proposed: "'[U]nregistered domestic partnership' means an unregistered domestic partnership in accordance with the *Domestic Partnerships Act, …*"

(iv) Other amendments required

A number of other less-drastic amendments are required in order to align the *Children's Act* of 2005 with the *Domestic Partnerships Bill*. These amendments are all based on the presumption (see the list of principles in 12.1) that no distinction is to be made between registered and unregistered domestic partnerships as no such distinction was recognised or available at the time of the enactment of the *Children's Act* 38 of 2005. Furthermore, in contrast, for example, with section 21 as discussed above, no distinction between such partnerships appears to be necessary in order to give effect to the aim of each specific provision in the list mentioned below. For these reasons it is suggested that a simple reference to "domestic partner" or "domestic partnership" should be facilitated by amending each of the following provisions of the *Children's Act* (in each case, the words struck out are indicated as such, and words inserted are italicised):

- Section 231(a) and (c);[697]
- Section 242(1)(a);[698]
- Section 292(1)(d);[699]

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697 "**231 Persons who may adopt child**
(1) A child may be adopted-
(a) jointly by-
(i) …;
(ii) partners in a permanent domestic ~~life~~ partnership; or
(iii) other persons sharing a common household and forming a permanent family unit;
(b) by a widower, widow, divorced or unmarried person;
(c) by a married person whose spouse is the parent of the child or by a person whose permanent domestic ~~life~~ partner is the parent of the child;
(d) …"

698 "**242 Effect of adoption order**
(1) Except when provided otherwise in the order or in a post-adoption agreement confirmed by the court an adoption order terminates-
(a) all parental responsibilities and rights any person, including a parent, step-parent or partner in a domestic ~~life~~ partnership, had in respect of the child immediately before the adoption; …"

699 "**292 Surrogate motherhood agreement must be in writing and confirmed by High Court**
(1) No surrogate motherhood agreement is valid unless-

- Section 293 (the heading as well as subsections 1, 2 and 3);[700]
- Section 297 (subsections (1)(c), (d) and (f));[701] and
- Section 299(a), (b) and (c).[702]

(a) …;
(b) …;
(c) …;
(d) the surrogate mother and her husband or *domestic* partner, if any, are at the time of entering into the agreement domiciled in the Republic; and…"

[700] "**293 Consent of husband, wife or *domestic* partner**
(1) Where a commissioning parent is married or involved in a permanent relationship, the court may not confirm the agreement unless the husband, wife or *domestic* partner of the commissioning parent has given his or her written consent to the agreement and has become a party to the agreement.
(2) Where the surrogate mother is married or involved in a permanent relationship, the court may not confirm the agreement unless her husband or *domestic* partner has given his or her written consent to the agreement and has become a party to the agreement.
(3) Where a husband or *domestic* partner of a surrogate mother who is not the genetic parent of the child unreasonably withholds his or her consent, the court may confirm the agreement."

[701] "**297 Effect of surrogate motherhood agreement on status of child**
(1) The effect of a valid surrogate motherhood agreement is that-
(a) …;
(b) …;
(c) the surrogate mother or her husband, *domestic* partner or relatives has no rights of parenthood or care of the child;
(d) the surrogate mother or her husband, *domestic* partner or relatives have no right of contact with the child unless provided for in the agreement between the parties;
(e) …; and
(f) the child will have no claim for maintenance or of succession against the surrogate mother, her husband or *domestic* partner or any of their relatives."

[702] "**299 Effect of termination of surrogate motherhood agreement**
The effect of the termination of a surrogate motherhood agreement in terms of section 298 is that-
(a) where the agreement is terminated after the child is born, any parental rights established in terms of section 297 are terminated and vest in the surrogate mother, her husband or *domestic* partner, if any, or if none, the commissioning father;
(b) where the agreement is terminated before the child is born, the child is the child of the surrogate mother, her husband or *domestic* partner, if any, or if none, the commissioning father, from the moment of the child's birth;
(c) the surrogate mother and her husband or *domestic* partner, if any, or if none, the commissioning father, is obliged to accept the obligation of parenthood;
(d) …"

12.2.5 Facilitating the process of "cross-pollination": Clause 26 of the Bill

The necessity for an amendment to clause 26 of the Bill was distilled from the general principles identified regarding alignment in 12.1 above. In this regard it was pointed out that any person, Court, tribunal or forum should, where necessary, be required to have recourse to the factors listed in subsections 2 and 3 of clause 26 in order to determine whether an unregistered domestic partnership exists for the purposes of any other law that deals with non-formalised relationships.[703] To this end it is suggested that such a clause may read:

> (9) Unless the contrary intention is evident from the law in question, the provisions of subsections (2) and (3) of this section must be considered by any person, Court, tribunal or forum who or which is required to determine whether any relationship constitutes an unregistered domestic partnership for the purposes of that law.

12.3 Conclusion

The amendments to the legislation discussed in this section are essential for these Acts to be aligned with the *Domestic Partnerships Bill*. However, the preceding paragraphs also make it clear that the Bill itself also needs to be amended in order to achieve such alignment. In this regard it was suggested that clause 26 be amended by the insertion of a subsection which will in apposite cases require recourse to the factors listed in that clause for the purposes of determining whether any given relationship qualifies as an unregistered domestic partnership for the purposes of any other law. In addition, it was seen that the definitions in clause 1 of the Bill also need to be reconsidered.

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[703] Also see 11.2.7 above.

13. CONCLUSION

While this Chapter may have appeared to embark upon an excoriation of the Bill, this is not the intention. The Bill is the result of a decade's worth of valuable research conducted by the South African Law Reform Commission and the astuteness of the integrated registered and unregistered models which it propagates testifies to the thoroughness and foresightedness of the Commission's research and its appreciation for contextualised and effective legislation that it is capable of pliable application to the realities of domestic relationships in Southern Africa. Commendable aspects of the Bill include:

1. The dual system of registered and unregistered partnerships and the relatively reliable interplay that exists between them implies that the Bill caters for all domestic partners, regardless of their level of sophistication. For example, by providing for unregistered domestic partnerships, the Bill complies with Goldblatt's[704] fundamental condition that "recognition and legal coverage of domestic partnerships should not be dependant on any formalities (such as registration or a written contract of partnership)."

2. The general *grundnorm* of the Bill, namely the provision of a simplified alternative to marriage is supported. However, as emphasised throughout this Chapter, this simplification has limits beyond which it cannot be pressed.

3. The imposition of a default complete separation of property regime coupled with a redistributive competency provides a user-friendly and uncomplicated system that is probably best-suited to registered domestic partners. This state of affairs seems to accord with the opinion expressed

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704 2003: 624.

by Hahlo[705] who, in commenting on the range of matrimonial property systems offered by South African law, states that:

> One cannot help feeling that there is much to be said for the English system, under which there is complete separation of goods but where the courts, on granting a divorce or on dissolution of the marriage by death have discretionary powers, after taking all the circumstances, from the duration of the marriage to the financial means and earning capacity and the ages and health of the spouses, into account, to order one of the spouses to make financial provision for the other, be it by periodic payments, by payment of a lump sum or by a property transfer.

4. The range of remedies offered by chapter 4 of the Bill compares favourably with those offered by other jurisdictions that adhere to a judicial discretion model such as New South Wales and New Zealand.

5. The Bill appears to be flexible enough to accommodate pluralistic relationships encountered within the realm of customary law, while maintaining the requirement of monogamy in civil marriage and civil partnership settings.

That there are many further commendable aspects of the Bill is patent. However, this study has shown that it is essential for non-marital unions in South Africa to be governed by legislation modified in accordance with a robust domestic partnership rubric and, in consequence of that rubric, calibrated with attendant legislation. Furthermore the legislation should provide not only a domestic partnership regime that is alternative and supplementary to marriage, but moreover an alternative that is *realistic*. To this end, this Chapter has proposed a number of modifications to the *Domestic Partnerships Bill*, including that:

- The preamble to the Bill should be reworded;

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705 1985: 312.

- The Bill should contain clearer guidelines as far as “care partners” are concerned;
- The procedure prescribed by the Bill for the registration of the domestic partnership should be revised;
- The registration requirements of the registered partnership agreement need to be adapted, particularly with a view to binding outsiders;
- The principles pertaining to the enforcement or setting aside of a registered partnership agreement need to be streamlined with the prevailing principles of the law of contract;
- The termination procedure prescribed by the Bill for registered domestic partnerships should be adapted, particularly so as to provide for the situation where one of the partners refuses to co-operate;
- Clause 16 of the Bill should be aligned with the *Divorce Act* 70 of 1979 so as better to regulate the consequences of termination as far as maintenance and care of, and contact with children are concerned;
- The applicability of the putative spouse doctrine in a domestic partnership setting should be considered;
- The Bill should prescribe the correct “threshold criterion” for the recognition of a non-formalised relationship as an unregistered domestic partnership, namely that it should be permanent;
- The requirement of a reciprocal duty of support should be prescribed as a *sine qua non* of all need-based claims at the termination of an unregistered domestic partnership;
- Chapter 4 of the Bill should, where apposite, be aligned with the pre-*Civil Union Act* judgments dealing with unmarried life partners;
- The Bill should take proper cognisance of the (where necessary contextualised) recognition of *consortium omnis vitae* between registered and unregistered domestic partners and outsiders;
- Various pieces of legislation should be aligned with the Bill in its capacity as the “legislative substructure” of the domestic partnership in South Africa; and

- A cross-pollination between the Bill and other Acts (such as the *Divorce Act* 70 of 1979) should be achieved.

Regarding the development of the "contextualised choice model," it is important to take note of the progression that has taken place from the preliminary conclusions reached in Chapter 5 to those expressed in the preceding paragraphs. First, it was found in Chapter 5 that it cannot blindly be accepted that parties who have never married necessarily chose not to do so and that the choice of formalisation was often merely illusory. Second, it was found that a distinction needed to be drawn between claims based on need (such as claims for maintenance and intestate succession) and those dealing with a possible extension of matrimonial property law in order to solve property disputes. As far as the former category is concerned, it was found that regardless of whether or not a positive choice not to formalise the relationship was ever made, the choice argument is irrelevant as far as any such claim is concerned, and that the decisive factor was instead whether or not a contractual reciprocal duty of support existed between the life partners during the existence of their relationship. Regarding the latter, it was found that the choice not to marry could play a persuasive role in deciding not to grant the extension sought. In this Chapter this line of reasoning was applied within the context of registered and unregistered domestic partnerships. The general proposition regarding the necessity of the existence of a reciprocal duty of support as a prerequisite for granting any need-based claim was confirmed, but as far as property disputes are concerned the preliminary conclusions reached in Chapter 5 were expanded to require that an effective alternative statutory regime would be required before a positive choice not to marry could properly justify the refusal to extend matrimonial property law to registered domestic partnerships. As the proposed registered domestic partnerships legislation did not comply with this requirement, it was suggested that claims for extension could be permitted in apposite circumstances. The need-based / property dispute dichotomy was also applied to chapter 4 of the Bill dealing with unregistered domestic partnerships. In the

case of the former type of claim, it was found that the failure of the Bill specifically to require factual reciprocal duties of support was a crucial *lacuna* which required urgent amendment. For the purposes of property disputes, it was concluded that, provided the amendments suggested in this study are implemented, a positive choice neither to marry nor to enter into a registered domestic partnership would be a relevant consideration for justifying a refusal to extend (matrimonial) property law to such partnerships beyond the protection already provided by the modified Bill, while evidence on the facts of a lack of real choice could permit the opposite conclusion where the extension sought would be necessary to protect a vulnerable partner. It was however concluded that the wide range of protection provided by the modified chapter 4 would make this eventuality unlikely.

Finally, regarding the concept of *consortium omnis vitae*, it was concluded that this concept should be fully recognised where partners have entered into a registered domestic partnership. As far as unregistered domestic partners are concerned, such partners should only be entitled to the contextualised form of *consortium* that has thus far been recognised by the judiciary within the context of non-formalised life partnerships.

PART 4

COMPLETING THE PICTURE

CHAPTER 8:

EVALUATING THE CONTINUED NEED FOR THE *CIVIL UNION ACT* OF 2006 AND A NOTE ON THE WAY FORWARD FOR SOUTH AFRICAN FAMILY LAW

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1. INTRODUCTION TO PART 4

Chapter 8 will firstly attempt, against the backdrop of the *Domestics Partnerships Bill* as modified and adapted according to the domestic partnership rubric advocated in the preceding Chapters, to evaluate the desirability of the continued existence of the *Civil Union Act* 17 of 2006 by comparing the South African Law Reform Commission's recommendation to the effect that separate legislation was required in order to allow for same-sex marriages on the one hand, with the Legislature's response to the Constitutional Court's judgment in *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae); Lesbian & Gay Equality Project v Minister of Home Affairs*[1] (hereafter "*Minister of Home Affairs v Fourie*") on the other. As an example of an established and well-ordered family law system, the legal position in the Netherlands will be compared to that in South Africa with a view to ascertaining which approach is more acceptable. In this regard a number of fundamental differences between the two countries' legal systems will be highlighted, such as the fact that Dutch law provides for marriage as a civil

[1] 2006 (1) SA 524 (CC).

institution only, while South African law permits both Church and State to solemnise civil marriages. The second aim of Chapter 8 is to consider the validity of recent calls for the deregulation of marriage and for a new statutory dispensation to regulate all interpersonal relationships in South Africa, and to consider the significance of the proposals made in this study in this regard.

The closing Chapter (Chapter 9) contains a summary of the major conclusions drawn throughout this study.

2. SAME-SEX MARRIAGE IN SOUTH AFRICA

2.1 The South African Law Reform Commission

The history behind the validation of same-sex marriage in South Africa has been considered in Chapter 3 and therefore need not be repeated. For the purposes of this discussion it will suffice to recall, therefore, that the Constitutional Court's judgment in *Minister of Home Affairs v Fourie*[2] gave Parliament one year as from 1 December 2005 within which to enact legislation that provided for same-sex marriages. The issue that however needs to be considered in this Chapter is whether the option exercised by the Legislature in response to *Fourie* was the correct one, and to this end a convenient point of departure is to consider the South African Law Reform Commission's recommendations in this regard.

The first steps towards assessing the post-1994 suitability of the South African law of marriage were taken in 1996 when the Minister of Home Affairs requested the South African Law Reform Commission to investigate this matter.[3] In the light of case law such as the 1998 decision in *Langemaat v Minister of Safety*

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2 See note 1.

3 SALRC 2006: 1.

and Security,[4] the Commission's investigation was subsequently expanded to include the issue of "domestic partnerships."[5] As a result of this development two separate projects were launched; the first dealing with the technical aspects of the law of marriage (Project 109) and the second dealing with domestic partners as such (Project 118). Project 109 was completed in 2001[6] and in March 2006 the Commission presented a *Report* dealing with the second project that was simply entitled *Report on Domestic Partnerships.*

As can be deduced from this brief summary, the *Report* produced in consequence of Project 118 only saw the light of day after the judgment in *Minister of Home Affairs v Fourie*[7] had been delivered. A memorandum which summarised the Commission's findings up until that point was however provided to the Constitutional Court at that Court's request, and it is important to note from the outset that in his majority judgment Sachs J made it abundantly clear that one of the reasons for suspending his order was precisely to afford the Legislature sufficient opportunity to take proper cognisance of the Commission's comprehensive research.[8] In as far as they pertain to same-sex marriage, the recommendations made by the Commission in the 2006 *Report* can be summarised as follows:

(i) The *Marriage Act* 25 of 1961 ought to be amended by:

- the insertion of definitions of the concepts "spouse" and "marriage"; the latter of which should clearly provide for both heterosexual and homosexual marriages;[9] and

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4 1998 (3) SA 312 (T). This case is considered in 2 and 3.2.1 in Chapter 5.

5 SALRC 2006: 1, 2.

6 This report is entitled *Report on the Review of the Marriage Act 25 of 1961,* and it is available at http://www.doj.gov.za/salrc/reports/r_prj109_marr_2001may.pdf.

7 See note 1.

8 Par [156].

9 SALRC 2006: 306 (par 5.6.6).

- the inclusion of the words “or spouse” after the word “husband” in section 30(1) of the Act so as to provide a gender-neutral marriage formula;

and

(ii) The Commission was of the opinion, for considerations of policy, that it was necessary “to accommodate the religious and moral objections” that had been raised before the Commission against permitting same-sex marriage. In the result, the Commission opined that (over and above the amendments to the *Marriage Act* of 1961 described above) a new Act should be promulgated that allowed only for the solemnisation of “orthodox marriages” involving one man and one woman. This Act would furthermore provide only for the solemnisation of religious marriages and only ministers of religion or other persons holding responsible positions in religious denominations or organisations would consequently be permitted to qualify as marriage officers for the purpose of that Act.[10]

As will be seen in the paragraphs that follow, the current position in South African family law does not reflect the Commission’s recommendations in any way.

2.2 The Legislature’s response to *Minister of Home Affairs v Fourie*: The *Civil Union Act* 17 of 2006

As seen in Chapter 3, the *Civil Union Act* came into operation on 30 November 2006. It defines the concept “civil union” 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

[10] SALRC 2006: 311 – 313 (par 5.6.23 and 5.6.24).

> accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others.[11]

The concept "civil union partner" is defined as "a *spouse* in a marriage or a *partner* in a civil partnership, as the case may be, concluded in terms of this Act."[12]

The definitions quoted lead to the conclusion that the term "civil union" is merely semantic and that it has been employed merely to differentiate between marriage and civil partnership.[13] In addition, it is important to note that South African law permits marriages between persons of the same sex that are in all respects the equivalent of heterosexual marriages under the *Marriage Act* 25 of 1961. This is facilitated by section 13 of the *Civil Union Act* which states that:

> (1) The legal consequences of a marriage contemplated in the *Marriage Act* apply, with such changes as may be required by the context, to a civil union.
>
> (2) With the exception of the *Marriage Act* and the *Customary Marriages Act*, any reference to-
>
> (a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and
>
> (b) husband, wife or spouse in any other law, including the common law, includes a civil union partner.[14]

This brief summary shows that instead of expanding the *Marriage Act* in the manner suggested by the South African Law Reform Commission, the Legislature instead opted to introduce a "separate but equal"[15] regime to cater for same-sex marriage.

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11 Emphasis added.
12 Emphasis added.
13 Smith and Robinson 2008(b): 426. Also see 4.3.1.3 below.
14 Italics added.
15 De Vos and Barnard 2007: 821.

2.3 Summary of marriage and analogous interpersonal relationships that are currently recognised in South African law

For the sake of completeness, it is useful briefly to summarise the various interpersonal relationships that currently enjoy some form of legal recognition in South Africa. These are:

2.3.1 Civil marriages

Civil marriages are concluded in terms of the common law as amended by the *Marriage Act* 25 of 1961. Only monogamous heterosexual marriages may be solemnised in terms of this Act. As a general rule both prospective spouses must have reached the age of majority (18 years) in order to marry in terms of this Act, but the Act makes provision for minors to be permitted to marry under certain circumstances.[16]

2.3.2 Marriages under the *Civil Union Act* 17 of 2006

This Act caters for a specific form of marriage as a creature of statute. It ostensibly[17] provides for both opposite and same-sex couples to marry one another. Both prospective spouses must be at least 18 years of age and, in contrast with the *Marriage Act*, no provision is made for persons younger than 18 to marry one another.

2.3.3 Customary marriages

The *Recognition of Customary Marriages Act* 120 of 1998 makes provision for the legal recognition of both monogamous and polygynous customary marriages. This Act applies only to marriages concluded according to "the customs and

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16 See sections 24 – 26 of the Act.

17 See 3 in Chapter 3 above.

usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples."[18] A customary marriage concluded in accordance with this Act is currently the only means by which a polygynous marriage can be clothed with complete legal validity in South African law.[19]

2.3.4 Civil partnerships

Over and above marriage, the *Civil Union Act* also provides for persons (irrespective of their gender)[20] involved in a monogamous relationship to enter into a civil partnership with one another. This concept is unfortunately not defined by the Act and doubt persists as to the precise legal nature thereof. It is submitted that the Legislature has attempted to create a mechanism by which two persons can formalise their relationship in instances where they do not wish to *marry* one another but nevertheless wish to ensure that their relationship obtains legal recognition.[21] According to De Vos[22] an example of such a relationship may occur within the context of "more conservative same-sex couples who view marriage as an institution exclusively associated with heterosexual relationships." This would appear to tie in with Bilchitz and Judge's[23] opinion that the civil partnership provides an alternative to those who view marriage as an "oppressive institution marked by rigid gender roles and expectations" by providing couples with a means of determining the social meaning of their relationship. This aspect will be considered in more detail later.

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18 Definition of "customary marriage" read with definition of "customary law" in section 1 of the Act.

19 Sonnekus 2009: 138.

20 See 3 in Chapter 3 above.

21 It is important to remember that until domestic partnerships legislation is enacted the civil partnership will be the only means by which such recognition can be obtained outside of marriage.

22 2007(a): 462.

23 2007: 484.

2.3.5 Purely religious marriages

The position of persons who enter into a marriage in accordance with the tenets of their religion without such a marriage being solemnised or registered according to applicable marriage legislation has been discussed in Chapter 3 and need not be repeated. It is however important to note that although such marriages are not recognised as valid marriages by South African law, the Courts and the Legislature have been prepared to grant piecemeal extensions of the law of marriage to such relationships.[24]

2.3.6 Domestic or life partnerships

The position of unmarried life partners has been discussed throughout the course of this study. For the purposes of this Chapter it will suffice to say that until domestic partnership legislation is enacted in accordance with the behests of the domestic partnership rubric as developed in this study, the position pertaining to unmarried domestic partners will continue to be fragmented, inconsistent, and fraught with uncertainty in that, for example, there would be no definitive answer to the question as to whether or not the piecemeal developments occasioned in respect of same-sex partnerships by the judiciary will be nullified by the so-called "choice argument" in view of the fact that same-sex couples have subsequently been permitted marry.[25]

2.3.7 Graphic illustration[26]

The spectrum of interpersonal relationships described above and the legal recognition which they currently enjoy can be summarised by the following diagram (which also appears as Figure 3.1 in Chapter 3):

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[24] See 4 in Chapter 3.

[25] See 5 in Chapter 3 as well as Chapter 5 in general.

[26] This graphic originally appeared in a chapter written by the author of this study in Robinson *et al* 2009 (see page 16). It has been reproduced in a slightly adapted format with permission of the editor.

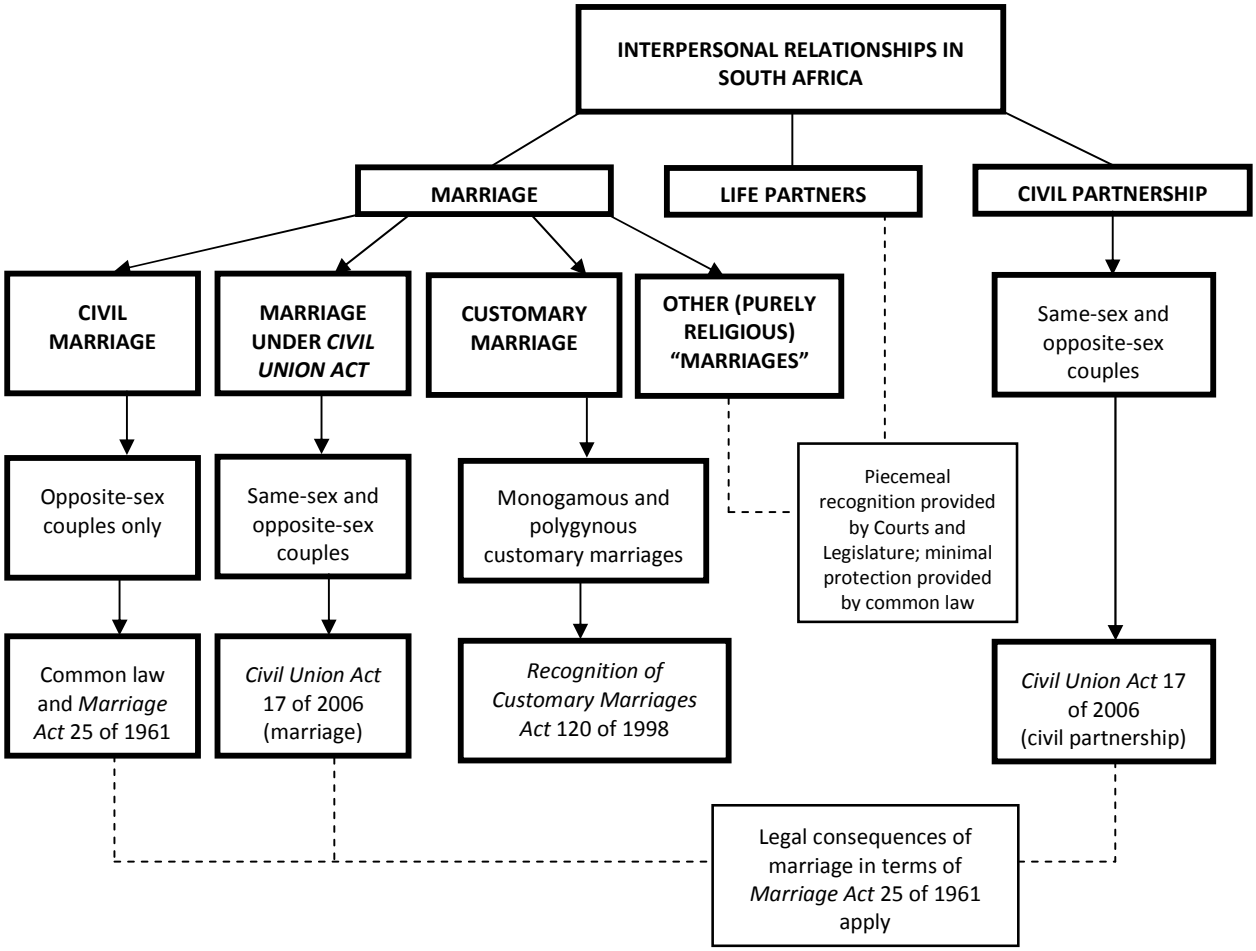

Figure 8.1: Legal recognition of interpersonal relationships in South Africa

2.3.8 Conclusion

Both the preceding discussion and Figure 8.1 illustrate the complex manner in which marriage, civil partnership and unmarried life partnerships are currently regulated in South African law. The question that now arises is whether this state of affairs should persist, and, if not, what remedial action should be proposed. Before making suggestions in this regard, it is useful to consider the example provided by a well-structured family law system such as the one encountered in the Netherlands.

3. THE LEGAL POSITION IN THE NETHERLANDS

Preliminary research conducted as a precursor to this study has shown that the family law framework in the Netherlands is clearly demarcated and is the product of "well-conceived and carefully considered Parliamentary procedures."[27] As such, it is submitted that it provides an effective sounding board for evaluating whether the separate Act approach towards same-sex marriage occasioned by the enactment of the *Civil Union Act* 17 of 2006 was the correct one.

Over the past decade or so Dutch family law has undergone a number of progressive and trend-setting developments that have galvanised jurisdictions across the globe. Unlike the position in South Africa these developments have been occasioned by way of legislative processes as opposed to judicial pronouncements.[28] According to Maxwell[29] the role played by the Dutch judiciary can be summarised as follows: In 1990 two Dutch Courts (a District Court in Amsterdam[30] and the Dutch Supreme Court)[31] were requested to adjudicate on the possible recognition of same-sex marriages. Two arguments were raised in this regard: First, it was contended that, as article 30 of the *Burgerlijk Wetboek* did not make any direct reference to gender (it simply stated that "*De wet beschouwt het huwelijk alleen in zijn burgerlijke betrekkingen*"), it could be interpreted so as to provide for same-sex marriages. Both Courts however held that article 30 was enacted with a view to heterosexual marriages only and was thus not capable of being interpreted in this fashion. Second, it was suggested that the limitation to heterosexual marriage infringed certain individual rights and discriminated against same-sex couples. This argument also failed as the Amsterdam Court held that it was the task of the Legislature to rectify differential treatment. The Supreme Court in turn relied on the "traditional" definition of

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27 Smith and Robinson 2008(a): 376 and 377.

28 See 4.1.1 below.

29 2000: 2.2.1.

30 Rb Amsterdam 13 februari 1990, *NJCM-Bulletin*, 456-560, *per* Maxwell 2000: 2.2.1 and Merin 2002: 123.

31 HR 19 oktober 1990, *NJ* 1992, 192, m.nt EAAL en EAA (homohuwelijk), *per* Maxwell 2000: 2.1.1.

marriage in order to justify its refusal to grant the relief sought by the applicants. The latter Court did however concede that while the limitation of matrimonial benefits to heterosexual couples could in principle be unjustifiable, it should be left to the Legislature to decide this issue. In contrast to the Courts, the Dutch Legislature has played a far more active role in reforming matrimonial law: Dutch legislation has not only provided for the formalisation of cohabitation relationships since 1998,[32] but in April 2001 the Netherlands also became the first country in the world to accord full legal recognition to same-sex marriages.[33]

Dutch law currently provides couples wishing to formalise their unions with three methods of doing so:[34]

3.1 Civil marriage

As far back as April 1996 the Dutch Parliament passed a resolution in terms of which the extension of civil marriage to same-sex couples was demanded.[35] The *Burgerlijk Wetboek* was amended five years later so as to provide full legal recognition to gay and lesbian marriages.[36]

Previously the major difference between heterosexual and homosexual marriages in Dutch law was encountered in the law of adoption that only permitted heterosexual spouses to participate in inter-country adoptions. As of 1 February 2009 the *Wet opneming buitenlandse kinderen ter adoptie*[37] was amended so as to permit same-sex spouses to adopt children from abroad.[38] A same-sex marriage has no effect on the legal relationship between a same-sex

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32 See 3.2 below.
33 Waaldijk 2004: 572.
34 See Smith and Robinson 2008(a): 374 – 376 for a more detailed discussion.
35 Maxwell 2000: 2.2.1.
36 This was achieved by amending article 1:30 of the *Wetboek* to read: "1. *Een huwelijk kan worden aangegaan door twee personen van verschillend of van gelijk geslacht*."
37 Act of 24 October 2008.
38 Curry-Sumner 2009: 330, 331.

spouse and the biological child of his or her spouse,[39] unless the former person adopts the child.[40] (In this regard it is worth mentioning that the adoption procedures pertaining to female same-sex couples have been simplified as from 1 February 2009.)[41] Both spouses to a lesbian marriage automatically acquire parental responsibility over a child born to one of them during the currency of their marriage "tenzij het kind tevens in familierechtelijke betrekking staat tot een andere ouder."[42] If the child was conceived as a result of sperm donated by the father, the latter may, with the mother's consent, recognise the child in which case he and the mother will be regarded as the legal parents of the child while the mother and her spouse will share parental responsibility.[43]

Irrespective of the gender of the spouses, Dutch law only recognises civil marriages[44] with the result that marriages solemnised only by way of a religious ceremony are not legally valid.[45] The secular and religious components of marriage are therefore completely divorced from one another and marriages may only receive an ecclesiastical blessing after the completion of the civil ceremony.[46]

3.2 Registered partnership

As from 1 January 1998 parties of the same or opposite sex may enter into a *geregistreerd partnerschap* with one another. Both parties must be at least 18 years of age and the partnership comes into existence as soon as the partners

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39 Waaldijk 2004: 575; Vonk 2009: 125.

40 Netherlands Ministry of Justice (2006) Fact sheet: "Same-sex marriages." Accessed from http://english.justitie.nl/currenttopics/factsheets/ (12 September 2007).

41 Curry-Sumner 2009: 330, 331.

42 Article 1:253sa.

43 Curry-Sumner 2009: 335.

44 Article 1:30(2) of the *Wetboek*: "*De wet beschouwt het huwelijk alleen in zijn burgerlijke betrekkingen.*" Also see Waaldijk 2004: 572.

45 SALRC 2006: 167; Waaldijk 2004: 572, 573.

46 Netherlands Ministry of Justice (2006) Fact sheet: "Same-sex marriages." Accessed from http://english.justitie.nl/currenttopics/factsheets/ (12 September 2007).

have signed and registered a so-called *akte van registratie van partnerschap*.[47] All of the consequences of a civil marriage apply to a registered partnership,[48] but certain differences occur with respect to children in that registered partners may not partake in inter-country adoptions, and where a child is born to a female partner in a lesbian relationship, her female partner is not regarded as the parent of that child unless she adopts the child.[49] In the case of a child born as a consequence of sexual intercourse to a female partner who is involved in a heterosexual registered partnership, the male partner is not presumed to be the father of the child, with the result that he can acknowledge the child if his partner consents hereto.[50] If the child was conceived artificially by making use of the male partner's sperm, the latter is regarded as a sperm donor with the result that he has no rights to the child unless his partner consents thereto or unless a "family life" exists between himself and the child.[51] If a child is born to lesbian or heterosexual partners both partners acquire parental responsibility over such a child unless the biological father has—with the mother's consent—acknowledged paternity before the child's birth.[52]

A registered partnership can be terminated in the following ways: (i) by death of either or both partners; (ii) where one partner has been missing for more than five years; (iii) by converting the partnership into a marriage;[53] (iv) by mutual agreement and (v) by an order of Court.[54]

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47 Article 1: 80a.

48 Article 1: 80a.

49 SALRC 2006: 174; Vonk 2008: 125.

50 Vonk 2008: 122; Waaldijk 2005: 140.

51 Curry-Sumner 2009: 340, referring to a decision of the *Hoge Raad* (Supreme Court) of 24 January 2003, *NJ* 2003/386.

52 Waaldijk 2005: 140.

53 See 9.4 in Chapter 7 for the principles pertaining to conversion.

54 Article 1: 80c.

3.3 Contract

Cohabitants may regulate the patrimonial consequences of their relationship by way of a contractual undertaking to this effect. The usual principles of the Dutch law of contract apply to such an agreement with the result that it binds only the parties thereto and does so only to the extent of the provisions therein.[55] As in South Africa, Dutch law provides only piecemeal recognition to non-formalised domestic partnerships.[56] It would however appear that this piecemeal recognition provides more comprehensive protection as far as the patrimonial consequences of such a union are concerned than in South Africa as the fact that the existence of a tacit cohabitation agreement is readily inferred implies that it is sometimes possible to "borrow" from certain patrimonial consequences of marriage, unless the parties have specifically elected not to marry.[57] So, for example, while general community of property applies in the case of a civil marriage,[58] Van der Burght[59] mentions that the facts of the case may permit a "limited community" to be found to exist between the parties to non-formalised unions.[60] Nevertheless, an important parallel that can be drawn between the position of cohabitants in the Netherlands and their South African counterparts is that no specific legislation as yet caters for such unions.[61] Consequently Schrama mentions that while approximately one half of all cohabitants in the Netherlands opt for entering into a cohabitation contract, this does little to solve the problems faced by the parties thereto when the relationship breaks down, as the "general rules of contract law and property law" that apply to such cohabitants are not only "primarily designed to regulate economically based relations", but are also not applied in a consistent fashion by the Courts, leading

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55 Waaldijk 2005: 139.

56 See Van der Burght 2000: 78 – 80; SALRC 2006: 167.

57 Van der Burght 2000: 78.

58 Netherlands Ministry of Justice (2006) Fact sheet: "Same-sex marriages." Accessed from http://english.justitie.nl/currenttopics/factsheets/ (12 September 2007).

59 2000: 78.

60 In South Africa the partners would have to rely on a universal partnership, provided of course that they can prove the existence thereof. The universal partnership is discussed in Chapter 6.

61 Schrama 2008: 321.

to legal uncertainty and "injustice towards partners who have substantially invested in the relationship by taking care of children or contributing to the other partner's assets."[62]

4. EVALUATION OF THE CURRENT POSITION IN SOUTH AFRICA

4.1 Important similarities and differences between South Africa and the Netherlands

4.1.1 The cursory analysis conducted above shows that the family law system in the Netherlands provides its citizens with a well-structured and relatively straightforward framework within which to regulate their interpersonal relationships. In contrast with the position in South Africa, all drastic changes and developments have been occasioned by the Legislature in consequence of judicial pronouncements to the effect that this arm of government was best suited to this task.[63] On the other hand, in South Africa the Courts have initiated change by way of *ad hoc* pronouncements in consequence of which the Legislature has (at times) been prompted or instructed to act.[64] (It must be mentioned that this legislative activity has not always been progressive. One thinks, for example, of the development occasioned by the decision in *J and Another v Director General, Department of Home Affairs, and Others*[65] that was not reflected in the subsequently enacted section 40 of the *Children's Act* 38 of 2005.)[66] The difference in approach between South Africa and the Netherlands is however not surprising given the fact that the Dutch Constitution does not

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62 Schrama 2008: 321.

63 Maxwell 2000: 2.1.1; 2.1.2 and 2.2.1.

64 It can however be agreed with Robson's (2007: 429) observation that the order of the Constitutional Court in *Minister of Home Affairs v Fourie* actually had the effect of "maintain[ing] judicial supremacy."

65 2003 (5) SA 621 (CC).

66 This issue is discussed at length in Chapter 5 (see 4.2).

provide for judicial review of legislation; a fact which explains the less active role played by the Courts.[67] The position in Dutch law has however not escaped criticism, with the ever-narrowing gap between marriage and registered partnership prompting the question as to whether Dutch law provides couples with "a real choice, rather than simply a hollow shell."[68] The same question can also be asked of South African law: As the law stands couples who do not wish to marry one another but still wish to formalise their relationships only have the option of entering into a civil partnership open to them. However, the legal consequences of (civil) marriage and civil partnership are not merely similar as in the Netherlands (regarding civil marriage and registered partnership) but are in fact identical.[69] As will be seen below, this raises serious doubts as to whether the *Civil Union Act* provides a true alternative to marriage and also greatly strengthens the case for the enactment of the *Domestic Partnerships Bill* as modified and calibrated in accordance with the domestic partnerships rubric propagated in this study. Nevertheless, despite its well-structured framework, Dutch law lacks comprehensiveness in that it contains no specific legislation regulating non-formalised life partnerships. In this regard it is submitted that the enactment of legislation akin to the unregistered domestic partnership in the (modified) South African *Domestic Partnerships Bill* may be a salutary development.

4.1.2 Dutch law has, since the early nineteenth century, provided for a clear separation between State and Church as far as the solemnisation and registration of marriages is concerned, and in this regard only the State—the so-called *Burgerlijke Stand*—is permitted to solemnise a marriage.[70] On the other hand, South African law permits both State and religious

67 SALRC 2006: 166, 167.
68 Curry-Sumner 2008: 274.
69 Section 13 of the *Civil Union Act* 17 of 2006.
70 Waaldijk 2004: 572, 573.

officials to qualify as competent marriage officers. This aspect is considered in more detail in 4.3.1.3 and 4.3.3 below.

4.1.3 A clear distinction between Dutch and South African law presents itself when the developmental processes of the two countries' family law legislation is compared: In the Netherlands the Legislature gradually paved the way for the validation of same-sex marriages over a period of five years. Regarding registered partnerships, the *Commissie voor de toetsing van wetgevingsprojecten* published the first report concerning the possible recognition of the same a full six years before the legislation in question was eventually enacted in 1998. When compared with the position in South Africa, it can be seen that not only was the South African Legislature only granted a period of twelve months to enact same-sex marriage legislation, but—more alarmingly—the document eventually promulgated as the *Civil Union Act* was first tabled a mere three weeks before its enactment. To make matters worse, this document was never made available for public scrutiny or comment.[71]

4.1.4 Dutch law makes use of one provision in one piece of legislation in order to provide for both heterosexual and homosexual marriages. In addition, no inconsistent terminology is used as the word "*huwelijk*" is universally applied. In contrast, South African law not only employs a separate piece of legislation to provide for "civil unions", but these unions moreover differ markedly from the generic international conception thereof, in terms of which "[a]s a duplicate of marriage, civil unions award couples all the rights and obligations of a marriage relationship *without actually providing for them to get married*."[72] South African law thus provides for a unique "civil union" concept: No other jurisdiction employs a similar dualistic use of this term in the sense of using it to create an institution which potentially

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71 See Smith and Robinson 2008(a): 1A for a comprehensive discussion of the strange circumstances under which the *Civil Union Act* was drafted and enacted.

72 SALRC 2006: 285 (emphasis added).

qualifies either as a "full" marriage or as a civil partnership that enjoys identical legal status to and the same legal consequences as a civil marriage.

Having considered these differences, the desirability or otherwise of maintaining the *status quo* in South Africa can now be assessed.

4.2 The case for retaining the *Civil Union Act* of 2006

Bilchitz and Judge[73] classify the "purposes and goals" behind the validation of same-sex marriage into three main categories, namely (i) a "formal rights" perspective in terms of which the rights and benefits of marriage are extended to same-sex couples without necessarily equalising the "social meaning" of marriage; (ii) a "substantive rights" perspective that, by granting same-sex couples the full right to marry, equalises the "social meaning" but retains marriage as the central form of intimate relationship; and (iii) the "transformative" perspective that "seeks to de-centre marriage as the sole and primary legal (and social) form for the recognition of interpersonal relationships and seeks to create legal possibilities for the recognition of a plurality of familial forms." According to them, the *Civil Union Act* 17 of 2006 has the ability to achieve all three of these ideals; particularly due to the fact that, by introducing the concept of a civil union that allows the parties to such a union to choose between marrying one another or concluding a civil partnership, the pre-eminence traditionally accorded to marriage can to some extent be displaced.[74] The essence of this contention, therefore, is that the South African Legislature's unique use of the term "civil union"[75] implies that marriage is not the only means of securing legal and societal recognition of an interpersonal relationship.[76] Moreover, by offering the parties an alternative to marriage, the authors contend that the Act provides those who

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73 2007: 467, 468.
74 2007: 485.
75 See 4.1.4 above.
76 2007: 486.

wish to disassociate their relationship from marriage with the scope to determine the "social meaning" that is to attach to their relationship.[77] From this postulation Bilchitz and Judge proceed to contend that the *Marriage Act* 25 of 1961 is superfluous and that it should be repealed. Further reasons for this assertion include:

(i) That it is "irrational" to have two Acts that perform the same function; and, moreover, "an affront" to same-sex couples to force them to marry in terms of separate legislation;[78]

(ii) That the effect of the continued existence of the *Marriage Act* on the "status equality" of same-sex couples may either (i) be non-existent, in which case the Act will become redundant; or (ii) have a symbolic effect that prevents full equality for same-sex couples and therefore necessitates its repeal;

(iii) That the 1961 Act is a product of the *Apartheid* era and that some of its provisions (such as those prescribing different ages pertaining to the consent required for male and female minors to marry) are outdated and based on gender distinctions that are "constitutionally suspect";[79] and

(iv) That repealing the Act will contribute towards attaining both the "substantive rights" and "transformative" ideals identified above.

Bearing the arguments supporting the case for repealing the *Marriage Act* in mind, the counter-argument for retaining the Act and instead repealing the *Civil Union Act* can now be considered.

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77 Bilchitz and Judge 2007: 484.

78 2007: 487. Also see De Vos and Barnard 2007: 821, 822.

79 2007: 488, 489.

4.3 The case for repealing the *Civil Union Act* of 2006

The case for repealing the *Civil Union Act* is based on the premise that, in as far as same-sex marriage is concerned, both the South African Law Reform Commission as well as the Legislature erred in their respective approaches to the validation of same-sex marriages. This point of view is substantiated by the following considerations:

4.3.1 The nature of the institution of civil marriage in South Africa

As has been seen throughout this study, there can be no doubt that, from a legal point of view, the civil marriage is a secular institution.[80] As observed by Farlam JA in his minority judgment in *Fourie and Another v Minister of Home Affairs and Others*:[81]

> I have dealt in some detail with the history of the law of marriage because it throws light on a point of cardinal importance in the present case, namely that *the law is concerned only with marriage as a secular institution*. *It is true that it is seen by many as having a religious dimension also, but that is something with which the law is not concerned*.[82]

Despite the fact that the law regards marriage as a purely secular institution, it is nevertheless important to remember that South African law provides for both State and Church to solemnise civil marriages.[83] The *Marriage Act* of 1961 thus permits duly authorised ministers of religion or other similarly situated persons to act as marriage officers and to solemnise marriages in accordance with the prescripts of their religion while simultaneously solemnising that marriage as a

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80 See the *Fourie* case at par [63] where Sachs J stated that while marriage was highly personal in nature, "the words 'I do' bring the most intense private and voluntary commitment into the most public, law-governed and State-regulated domain."

81 2005 (3) SA 429 (SCA) at par [80].

82 Emphasis added.

83 Bonthuys 2008: 475.

civil marriage.[84] Although a single ceremony may therefore comprise both a civil and a religious component, it is compliance with the civil component as opposed to participating in the religious ceremony that creates legal consequences for the marriage.[85] As opposed to the law of the Netherlands, South African law therefore does not require an absolute separation between State and Church regarding the formation of a civil marriage.[86] Section 31 of the *Marriage Act* does however permit a religious marriage officer[87] to refuse to solemnise a marriage that does not "conform to the rites, formularies, tenets, doctrines or discipline" of his or her religion. (It is to be noted that Act 25 of 1961 does not permit an *ex officio* marriage officer to refuse to solemnise any marriage that complies with civil requirements, or to refuse to do so on the basis of his or her religious beliefs.)

Bearing the nature of the South African civil marriage in mind it becomes clear that the proposals of both the Legislature (in terms of the form and structure of the *Civil Union Act*) and the Law Reform Commission are off the mark. In terms of point (i) of the Commission's proposal (see 2.1 above) there is no problem. However, it is submitted that the second point of the proposal is problematic as it is questionable whether it was necessary to promulgate separate legislation in order to realise the eventual aim of validating same-sex marriages without prejudicing religious freedom in any way. It is submitted that the following reasons can be proffered in support of the contention that the Legislature should have confined its reaction to *Minister of Home Affairs v Fourie*[88] to point (i) of the Law Reform Commission's proposal and should thus simply have expanded the *Marriage Act*:

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84 See section 3 of the *Marriage Act* 25 of 1961 and *Singh v Ramparsad* 2007 (3) SA 445 (D) at par [34] and [52]. Section 33 of the 1961 Act expressly provides for a marriage that has been solemnised by a marriage officer subsequently to be blessed by a minister of religion or a person holding a responsible position in a religious denomination.

85 SALRC 2006: 284; *Singh v Ramparsad* 2007 (3) SA 445 (D) at par [34].

86 See 3.1 and 4.1 above.

87 That is to say a minister of religion or a person who holds a responsible position in a religious denomination or organisation.

88 2006 (1) SA 524 (CC).

4.3.1.1 The wording of the *Civil Union Act* creates uncertainty

In background research to this study,[89] it was pointed out that the *Civil Union Act* 17 of 2006 causes a number of interpretative problems, one of the most glaring of which is the Act's references to gender.[90] The problem caused in this regard can be summarised by stating that wherever the Act refers to gender it only

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89 See in general Smith and Robinson 2008(a) and 2008(b).

90 Also see Van Schalkwyk (2007: 168 and 172, 173) who exposes a further interpretative difficulty namely that it is unclear whether the Act permits civil unions that are concluded according to customary law (see further in this regard Bakker (2009: 8,9)). It is submitted that the Act contains another interpretative difficulty over and above those created by its references to gender and the uncertainty regarding "customary" civil unions identified by Van Schalkwyk. This difficulty is created by a conflict that appears to exist between section 8(6) of the Act and section 13(2) thereof. First, section 8(6) (italics added) states that "[a] civil union may only be registered by prospective civil union partners who would, apart from the fact that they are of the same sex, not be prohibited by law from concluding a marriage under the *Marriage Act* [25 of 1961] or the *[Recognition of] Customary Marriages Act* [120 of 1998]." On the other hand, section 13(2) informs the reader thereof that "With the exception of the *Marriage Act* and the *Customary Marriages Act*, any reference to-

(a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and

(b) husband, wife or spouse in any other law, including the common law, includes a civil union partner."

At first glance these two sections may appear to conflict with one another as it could be argued that while section 8(6) states that any impediment to marriage that is specifically prescribed in the *Marriage Act* or the *Recognition of Customary Marriages Act* would prevent the conclusion of a civil union, section 13(2) on the other hand tells us that a reference to "marriage", "husband", "wife" or "spouse" under the latter legislation does not include a civil union. To illustrate: It is clear that section 8(6) intends, for example, to make the provisions relating to marriages between a person and the relatives of his or her deceased or divorced spouse (section 28 of the *Marriage Act*) applicable to civil unions. However, on the wording of section 13(2) this would not be possible. It is submitted that the answer to this predicament lies in the headings to the respective sections in question—section 8(6) falls under the heading "[r]equirements for solemnisation and registration of civil union" while section 13 is entitled "[l]egal consequences of civil union." If the use of headings in our jurisprudence is considered, it becomes clear that they may be used as an interpretative tool in apposite circumstances—see *Turffontein Estates v Mining Commissioner Johannesburg* 1917 AD 419 at 431 and *President of the RSA v Hugo* 1997 (4) SA 1 (CC) at par [12] (also see 7.2.2.2.2 (b) (ii) in Chapter 7 for the role played by headings in interpreting the *Domestic Partnerships Bill,* 2008). This would probably support the contention that, although the *Civil Union Act* is not divided into chapters, it can be deduced from the headings employed throughout the Act that it envisions two separate scenarios: Sections 4 – 12 of the Act deal with the solemnisation of the civil union *per se* while section 13 deals with the consequences that follow once the requirements in sections 4 – 12 have in fact been complied with. Under this dichotomy it could be contended that the headings indicate that sections 8(6) and 13(2) have nothing to do with one another. It is worth pointing out that this argument may be flawed in that section 13(2) does not specifically indicate that it applies to legal consequences *per se* but instead has a rather generic look to it. Be that as it may, the conflict between section 8(6) and 13(2) once again proves that the drafting of the Act is problematic.

refers to *same-sex* couples,[91] with the result that it is uncertain whether it is possible for a heterosexual couple to conclude a civil union.[92] At the time of promulgation of the Act the Minister of Home Affairs intimated that both homosexual and heterosexual couples were included within the ambit of the Act,[93] but irrespective of whether or not this occurs in practice the fact remains that a literal reading of the Act conveys the message that it only applies to homosexual couples. This unsatisfactory situation may well imply that, if constitutionally challenged, the Act would, in accordance with section 39(2) of the *Constitution*, 1996 need to be *interpreted* in such a manner as to be aligned with the Bill of Rights;[94] a state of affairs that proves that the Act was not drafted in such a way as to enable the average South African citizen or official to understand what the law expects of him or her.[95]

4.3.1.2 The anomalies pertaining to heterosexual life partners

Over and above the interpretative difficulties posed by the *Civil Union Act*, its enactment has also either created or in other instances perpetuated certain legal anomalies. Smith and Robinson[96] identify the following:

(i) The *Civil Union Act* has not clarified the issue as to why the law currently permits same-sex life partners to adopt children jointly but does not allow heterosexual life partners to do the same;[97]

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91 See sections 6 and 8(6) of the Act.

92 The answer to this question is particularly relevant as far as the civil partnership is concerned as this partnership is currently the only alternative means by which an unmarried couple may obtain full legal recognition of their relationship—see 2.3.4 above.

93 Statement made by the then Minister of Home Affairs NN Mapisa-Nqakula which is available at http://home-affairs.pwv.gov.za/speeches.asp?id=181 (accessed on 18 October 2007).

94 Smith and Robinson 2008(a): 367, 368.

95 See *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) at par [24] where Langa DP observed that the obligation to interpret legislation in line with the Constitution at times needs to be weighed up against the Legislature's duty to promulgate legislation that is clear and precise.

96 2008(a): 368 – 374.

97 Smith and Robinson 2008(a): 370.

(ii) The *Civil Union Act* provides no indication as to why same-sex couples do not—in the wake of a decision such as *Du Plessis v Road Accident Fund*[98]—need to take the proactive step of entering into a civil union in order to have a claim for loss of support extended to the surviving life partner, while heterosexual life partners will—in consequence of *Volks NO v Robinson*[99]—have to register a civil union in order to do the same;[100] and

(iii) The *Civil Union Act* has not altered the fact that the heterosexual life partnership is still the only form of interpersonal relationship that has no right of intestate succession in terms of the *Intestate Succession Act* 81 of 1987.[101]

Smith and Robinson may have expected too much from the *Civil Union Act* in terms of clarifying all of these anomalies—the Act was, after all, promulgated with the chief aim of legalising same-sex marriage. Nevertheless, the fact remains that by specifically enacting the civil partnership *as an alternative to marriage*, the Legislature did in fact—perhaps unwittingly—enter into the realm of the life partnership.[102] This being the case, it might not have been unreasonable to expect at least some of the anomalies identified above to have received legislative attention. The inescapable fact is however that when considered in conjunction with the interpretative difficulties referred to above it becomes clear that the *Civil Union Act* has further complicated an already complicated legal framework. It will however be seen below that the legislation developed in accordance with the domestic partnership rubric—and not the *Civil Union Act*—is best-suited to remove the anomalies identified by Smith and Robinson.

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98 2004 (1) SA 359 (SCA).

99 2005 (5) BCLR 446 (CC).

100 Smith and Robinson 2008(a): 372.

101 Smith and Robinson 2008(a): 373, 374.

102 See Sinclair 2008: 404.

4.3.1.3 The concept "civil union" is purely semantic and in fact meaningless

Although the *Civil Union Act* compels same-sex couples to marry one another in terms of separate legislation, their union is not termed a "civil union" but is instead referred to as a "marriage."[103] This strengthens the assumption referred to earlier[104] that the reference to "civil union" is merely of a semantic and cosmetic nature, as there is no doubt that this Act in fact allows parties *to marry* one another. Furthermore, the legal consequences of a marriage concluded under the *Civil Union Act* are identical to those of a "traditional" civil marriage under the *Marriage Act*,[105] as a result of which it can be concluded that same-sex marriages are accorded a "public and private status"[106] that is indistinguishable from that enjoyed by heterosexual spouses under the 1961 Act. The question therefore arises: Why was it necessary to promulgate a separate Act if precisely the same legal content would be ascribed to marriages concluded in terms thereof as those ascribed to the "traditional" heterosexual marriage under the 1961 Act?

In *Minister of Home Affairs v Fourie*[107] the Constitutional Court emphasised the fact that in selecting an appropriate legislative format for same-sex marriage it was important to note that "symbolism and intangible factors play a particularly important role" and that "[w]hat might appear to be options of a purely technical character could have quite different resonances for life in public and private."[108] It is however questionable whether the mere provision of a separate piece of legislation assigns appropriate significance to these symbolic considerations and intangible factors. That there is no clear answer to this question becomes apparent when the following considerations are borne in mind:

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103 See section 12(3) of the Act as well as forms B-E in the addenda to the regulations of the Act.
104 See 2.2 above.
105 Section 13.
106 See par [81] of the *Fourie* case.
107 See note 1.
108 Par [139].

- Although the *Marriage Act* of 1961 permits religious marriages to be solemnised by religious marriage officers, the Act remains a "secular" piece of legislation.[109] This is confirmed by the fact that the Act applies in a uniform fashion to all civil marriages irrespective of the prescripts of any particular religious dogma, and irrespective of whether the parties adhere to any form of religion whatsoever.[110]

- As seen in the preceding discussion, it is (and has always been) possible for a religious marriage officer to refuse to solemnise a marriage that conflicts with the tenets or beliefs of his or her religious denomination or organisation.[111] In consequence it is submitted that even if same-sex marriages were in principle permitted to be solemnised in terms of the 1961 *Marriage Act*, section 31 of that Act would still provide adequate means by which any religious organisation or denomination could protect its beliefs by simply permitting its ministers of religion to refuse to solemnise marriages between persons of the same sex.

- The *Civil Union Act* does not alter the fact that South African law does not require a complete separation between "religious" and "purely civil" marriages. Both the *Marriage Act* as well as the *Civil Union Act* provide for "religious" as well as "purely civil" marriages. It can therefore rightly be asked whether it is worth having a separate Act (that brings about precisely the same consequences as the original Act) or whether such a state of affairs does not create unnecessary obfuscation.

In view of these considerations it is submitted that it would have been far simpler to have followed the Dutch example by simply expanding the *Marriage Act* of 1961 instead of promulgating a new Act that in reality does little (if anything at all)

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109 *Fourie and Another v Minister of Home Affairs and Others* 2005 (3) SA 429 (SCA) at par [78]; Van der Vyver and Joubert 1991: 457; Robinson *et al* 2009: 28, 29.

110 *Singh v Ramparsad* 2007 (3) SA 445 (D) at par [45]; Robinson *et al* 2009: 28, 29.

111 See par [97] of the *Fourie* case.

in terms either of assigning appropriate significance to the symbolic considerations and intangible factors associated with marriage or of giving effect to the South African Law Reform Commission's recommendations. A preliminary conclusion, therefore, is that the mere expansion of the *Marriage Act* would have been the preferred option.

4.3.2 The effect of repealing the *Civil Union Act* on Bilchitz and Judge's "transformative" perspective

It will be recalled that Bilchitz and Judge[112] opine that the validation of same-sex marriage should ideally achieve the combined "purposes and goals" of both the "substantive rights" perspective (according to which granting same-sex couples the full right to marry equalises the "social meaning" of marriage but retains marriage as the central form of intimate relationship) as well as those of the "transformative" perspective (in terms of which marriage is de-centred by creating "a plurality of familial forms").[113] With specific reference to the latter perspective, Bilchitz and Judge[114] submit that "the creation of an equal alternative option to marriage [i.e. the civil partnership] also in some way de-centres marriage as the primary and privileged social option for committed interpersonal relationships."

As a point of departure it may be conceded that repealing the *Civil Union Act* so as to require all marriages henceforth to be performed in terms of the *Marriage Act* 25 of 1961 will most likely satisfy only the requirements set by the "substantive rights" perspective and will therefore do little to erode the pre-eminence enjoyed by marriage. Nevertheless, an important question to be asked is why Bilchitz and Judge insist that the validation of same-sex marriage should be required to achieve anything beyond the "substantive rights" perspective in the first place. In fact, it seems illogical to lay the responsibility for de-centring marriage on the law of marriage itself. After all, it is the extension of *marriage*

112 2007: 466 *et seq*.
113 Bilchitz and Judge 2007: 468.
114 2007: 485.

that is at issue; nothing more and nothing less. The validation of same-sex marriage should be left at that and therefore limited to achieving the goals set by the "substantive rights" perspective, thus guaranteeing equality of marriage *per se*. In the end result, the goals sought to be achieved in terms of the "transformative" perspective cannot be achieved by the simple act of extending marriage to same-sex couples but must instead be achieved by creating a broader family law system of which marriage forms but one part. This is so because marriage can only be de-centred by providing realistic alternatives thereto. This is where legislation adapted according to the domestic partnership rubric comes in. (In this regard it is important to remember that the application of the rubric narrows the gap between the registered domestic partnership and marriage to a far greater extent than the original *Domestic Partnerships Bill,* 2008 did, while still maintaining a distinction between the two.)[115]

Viewed in this light, it is submitted that Bilchitz and Judge overestimate the extent to which the introduction of the civil partnership in the *Civil Union Act* achieves the objectives of the "transformative" perspective. In fact, by creating an institution that is identical to marriage in all but name, it is submitted that the norm of marriage is not de-centred but in fact reinforced. Indeed, as Goldblatt states:[116] "The [objection in this regard] is that marriage and domestic partnership will become identical and that this may undermine marriage and the idea of pluralism within family law." This objection strengthens the argument for legislation formulated on the basis of an effective domestic partnership rubric that provides a true alternative to marriage.

Having said this, the "civil partnership" requires closer analysis. This will be done after the further arguments raised by Bilchitz and Judge have been considered in the paragraph that follows.

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115 See Part 3 of this study.

116 2003: 621.

4.3.3 Countering Bilchitz and Judge's additional reasons for asserting that the *Marriage Act* should be repealed

In 4.2 Bilchitz and Judge's main reasons for suggesting that the *Marriage Act* should be repealed and that the *Civil Union Act* should henceforth govern the solemnisation of all civil marriages in South Africa were set out. Over and above the "transformative" arguments that have been dispensed with in the preceding paragraph, a few brief comments are apposite regarding the additional reasons proffered by these authors:

(i) It can be agreed with the assertion that it is irrational to have two pieces of legislation that moreover have the effect of forcing same-sex couples to marry in terms of only one of them. However, this reason could just as well apply in favour of retaining a broadened version of the *Marriage Act* and repealing the *Civil Union Act*.

(ii) Regarding the uncertain effect of retaining the 1961 *Marriage Act* on the "status equality" of same-sex marriages, it is submitted that the entire reason for this uncertainty would fall away if all spouses were henceforth to be required to marry in terms of the 1961 Act. This fact alone provides a good reason for repealing the *Civil Union Act*. Furthermore, the "status equality" of same-sex couples would be enhanced by compelling them to marry in terms of the very Act that traditionally only catered for heterosexual marriages.[117]

(iii) Although it is true that certain provisions of the *Marriage Act* are outdated in as far as they prescribe differing age requirements in order for male and female minor persons to marry, these and other "outdated" aspects of the Act are currently receiving legislative attention. The draft *Marriage*

[117] These considerations are of particular relevance as far as Bakker's (2009: 1 *et seq*) hierarchy argument is concerned.

Amendment Bill, 2009[118] *inter alia* aims to streamline the 1961 Act by bringing it into line with other legislation and by effecting a number of technical corrections to the Act.[119] An important outflow of this process is that the 1961 Act will be aligned with the *Children's Act* 38 of 2005 in as far as the reduction of the age of majority is concerned and, equally importantly, regarding the requirements in order for minor persons to marry. The amending legislation aims to standardise the consent requirements for boys and girls who wish to marry by requiring all persons under the age of 15 to obtain the written consent of the Minister of Home Affairs in order to marry.[120] This will imply that all minors of 15 years or older but under the age of 18 will require parental consent (or the equivalent thereof) to marry. A minor who cannot obtain parental consent will be entitled to approach the Children's Court for permission to marry, provided that such impossibility is not due to a parent's refusal to consent.[121] In the event of refusal, the draft *Marriage Amendment Bill* retains the legal position in terms of which the High Court can be approached for permission to marry, which will be granted if the Court is of the opinion that the refusal "is without adequate reason and contrary to the interests" of the applicant minor.[122] As an aside, mention must be made of a problematic aspect of the 2009 draft Bill in that it is silent on whether the common law minimum age requirements for marriage (presently 14 for boys and 12 for girls) are to be retained. In this regard the 2009 draft Bill's predecessor (the draft *Marriage Amendment Bill,* 2008),[123] proposed that the minimum age for marriage would be set at 12 years for both sexes;[124]

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118 Gazette No. 31864 of 13 February 2009.

119 See the long title to the Bill.

120 Amended section 26. The ages are currently set at 18 for boys and 15 for girls, with the result that, bearing the common law ages of puberty in mind, boys of 14 years or older but under the age of 18 require the consent of the Minister while girls of 12 years of age or older but under the age of 15 require the same.

121 Amended section 25(1).

122 Section 25(4) of the *Marriage Act* 25 of 1961.

123 Published in Government Gazette 30663 of 14 January 2008 which, incidentally, was the same Gazette in which the draft *Domestic Partnerships Bill*, 2008 appeared.

124 Clause 15 of the 2008 draft Bill.

a development which would have served to iron out the current gender-based distinction. If the proposals of the 2009 draft Bill were to be enacted in their current form, the law of marriage would retain the *prima facie* "unjustifiable" distinction between boys and girls.[125]

In as far as customary marriages are concerned, the *Recognition of Customary Marriages Act* 120 of 1998 generally requires all prospective spouses to be at least 18 years of age,[126] but permits minor persons to marry in certain instances provided that the requisite consent is obtained.[127] In many instances these consent requirements are similar to those prescribed by the *Marriage Act* and, moreover, Act 120 of 1998 contains a number of cross-references to the consent provisions contained in the 1961 Act.[128] If the latter Act were therefore to be amended in the manner intended by the *Marriage Amendment Bill*, this would imply that these amendments would also pertain to customary marriages under the 1998 Act. On the other hand, if Bilchitz and Judge's recommendation in terms of repealing the *Marriage Act* were ever to be followed, this would have a definite impact on the *Recognition of Customary Marriages Act* as the latter Act would need to be amended. Moreover, if it is borne in mind that the *Civil Union Act* prescribes an absolute age requirement of 18 before two persons may marry or enter into a civil partnership with one another,[129] repealing the *Marriage Act* would imply that the legal position would remain inconsistent (and *prima facie* unconstitutional) as persons under the age of 18 would then be permitted to enter into customary marriages but would not be capable of

125 See *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA) at par [16].

126 Section 3(1).

127 Section 3(3) – (6).

128 See sections 3(b) and 5.

129 Sinclair 2008: 408 raises the possibility that the age differentiation encountered in the *Marriage Act* and the *Civil Union Act* may have been occasioned "on the 'moral' basis that gay and lesbian persons under the age of 18 years are too young to be taking a decision to marry. But this is pure conjecture. A mistaken inconsistency is the more likely answer. Either way, the differentiation may amount to unfair discrimination, and a constitutional challenge may be lurking here." The opinion of possible unconstitutionality is shared by Van Schalkwyk 2007: 168.

entering into marriages or civil partnerships under the *Civil Union Act*. It is submitted that repealing the latter Act and simultaneously updating the *Marriage Act* in the manner described above will iron-out these inconsistencies.[130]

(iv) Concerning Bilchitz and Judge's argument that the *Civil Union Act* realises the goals and objectives of the "transformative" perspective, it has already been pointed out that the validation of same-sex marriage need only succeed from the "substantive rights" perspective, and that domestic partnerships legislation should instead be tasked with the objective of de-centring marriage.

(v) A final aspect to consider is that the *Civil Union Act* creates a problem as far as the position of the marriage officer is concerned. While the *Marriage Act* of 1961 permits "religious" marriage officers to refuse to solemnise marriages that are not aligned with their religious beliefs,[131] section 6 of the *Civil Union Act* goes a step further by permitting even *ex officio* marriage officers employed by the state to refuse to solemnise marriages between persons of the same sex "on the ground of conscience, religion and belief."[132] This provision appears to have been included in the latter Act on the basis of Sachs J's observation in *Minister of Home Affairs v Fourie*[133] that the principle of reasonable

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130 The draft *Domestic Partnership Bill* currently prescribes a minimum (and at the same time absolute) age requirement of 18 years, with the result that different rules are prescribed for entering into a marriage on the one hand (in terms both of the 1961 *Marriage Act* and in terms of the *Recognition of Customary Marriages Act* 120 of 1998) and for entering into a domestic partnership on the other. This issue was discussed in Chapter 7 at 6.3.2.2 where it was opined that although the Legislature is in the best position to decide whether this differentiation should remain, a minimum age requirement should be retained for the purposes of the unregistered domestic partnership but not for the registered domestic partnership.

131 Section 31 of Act 25 of 1961.

132 Bonthuys 2008: 474 makes the interesting comment that it is ironic that at the time of voting the second *Civil Union Bill* into law in November 2006 the Members of Parliament of the ruling party (the African National Conference) were not permitted a "conscience vote" while the Act allows *ex officio* marriage officials to refuse to solemnise same-sex civil unions on this ground.

133 See note 1.

accommodation could possibly permit such officers who had "sincere religious objections" to same-sex marriages to refuse to solemnise the same.[134]

It is interesting to note that a similar debate regarding conscientious objection has also been raging in the Netherlands, where the Government Coalition Agreement has permitted registrars to refuse to solemnise same-sex unions on such grounds since 2007.[135] Curry-Sumner[136] reports that many municipalities nevertheless force registrars to solemnise marriages regardless of sex, while other permit registrars "to voice their objections and find an alternative registrar."

Section 6 of the *Civil Union Act* has come under fire in recent times, with authors such as De Vos and Barnard[137] opining that a provision of this nature "provides further evidence that [the inequality posed by the Act's co-existence with the *Marriage Act*] is perpetuated and not eradicated." On the basis of similar reasoning Bilchitz and Judge[138] hold that such a provision cannot be countenanced in that it "reinforces the message that same-sex relationships, as a class, merit different and unequal treatment to heterosexual relationships." In a thorough analysis of the matter, Bonthuys[139] points out that the "cumulative effect" of granting *ex officio* marriage officers the right to object coupled with the more rigorous appointment procedures prescribed by the *Civil Union Act*[140] along with the effects of "widespread homophobia" could imply that a same-sex

134 Par [159]. Also see Bonthuys 2008: 474.

135 Curry-Sumner 2008: 259.

136 2008: 259.

137 2007: 821. Also see Robson 2007: 430 who opines that this "opt-out" clause is "constitutionally suspect."

138 2007: 491, 492.

139 2008: 476, 477.

140 In terms of section 5 of the *Civil Union Act* of 2006 an application must be made both by the religious organisation or denomination as well as by the prospective marriage officer him or herself, while section 3 of the 1961 *Marriage Act* requires only the individual minister of religion to apply.

couple may experience difficulty in finding a civil servant who is willing to marry them, with the result that such a couple would not have "access to the basic social services that are freely available to opposite-sex couples." Bilchitz and Judge conclude that "[p]ublic officials should be required to uphold the law in an impartial manner and not cast judgment on people who approach them to fulfil an official function … public officials should be bound to apply the law of the country without fear, favour or prejudice." This sentiment is in essence shared in the Dutch context by Curry-Sumner[141] who opines that:

> In the end, the law is, and should always remain, the law. Since marriage as regulated in Art 1:30, Dutch Civil Code, is a civil ceremony, a civil servant must abide by the law and execute his or her tasks in accordance with the law. Allowing registrars to express conscientious objections undermines the very essence of separation of Church and State, and should not be permitted under any circumstances.

When transposed into the South African context the opinion expressed by Curry-Sumner may at first appear unnecessarily rigid. It is however important to remember that Dutch law is far less accommodating of religious marriages and marriage officers than South African law.[142] It is submitted that by providing for the latter South African law already complies with the constitutional imperative to protect religious freedom regarding marriage—granting a right of conscientious objection to civil marriage officers may be pushing the boundaries too far, and may violate the constitutional rights of the same-sex couple in question.[143] An alternative may be to follow the approach alluded to earlier by Curry-Sumner[144] in terms of which a civil marriage officer is permitted to object,

141 2008: 260.
142 See 3.1 above.
143 Bonthuys 2008: 478.
144 2008: 259.

but is then obliged to arrange for an alternative marriage officer. Whether this would be a realistic and constitutionally tenable alternative is however debatable, for the fact would remain that the objection is based solely on the sexual orientation of the prospective spouses, a situation which implies that homophobia is effectively condoned by the State, while no other form of prejudice is.[145] When all is said and done the inescapable fact remains that in solemnising a marriage a civil marriage officer is tasked with performing a secular as opposed to a religious function.[146] For this reason it is submitted that the ability to object on religious grounds should therefore, as in section 31 of the *Marriage Act*, be limited to religious marriage officers.

It is however important to refer to one further observation made by Bonthuys who states that when the conscientious objection clauses in the *Marriage Act* and the *Civil Union Act* are compared, it becomes clear that the provision in the latter Act is more widely phrased than its counterpart in that it allows objections on the basis of "conscience" and "belief" in addition to those based on religious beliefs *per se*. As a result she is of the view that "the legislation, as it stands, does not consistently, rationally and efficiently protect the religious and conscience rights of marriage officers."[147] This in turn leads Bonthuys to conclude that any conscientious objection permitted by same-sex marriage legislation on the basis of reasonable accommodation should be aligned with the *Marriage Act* and therefore limited to religious marriage officers who may object *on*

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145 Bonthuys 2008: 479, 480.

146 Also see Bonthuys 2008: 476. It is a pity that Bekink (2008: 481 *et seq*) does not comment on par [159] of the *Fourie* case (see main text above) regarding the effect that section 6 of the *Civil Union Act* has on the "uneasy triangle between secularism, constitutionalism and the right to freedom of religion" (see note 4 in Chapter 3). While he is absolutely correct in stating that the failure to ensure that "religious equality" (i.e. the equal treatment of religions) is maintained will place the "uneasy triangle" in "further jeopardy" (at 497, 498), it is submitted that the continued recognition of section 6 of the *Civil Union Act* will do the same.

147 Bonthuys 2008: 481.

religious grounds only.[148] This argument is not only to be supported, but it also lends further credence to the contention that the expansion of the *Marriage Act* so as to encompass same-sex marriage would have been the better option; hence necessitating the repeal of the *Civil Union Act*.

4.3.4 Preliminary conclusion

It is submitted that repealing the *Civil Union Act* would serve to simplify the complex system of laws that currently regulate inter-personal relationships in South African family law. The clarifying effect of such a development is perhaps more strikingly illustrated by way of comparing the following diagram to Figure 8.1 shown earlier in this Chapter:

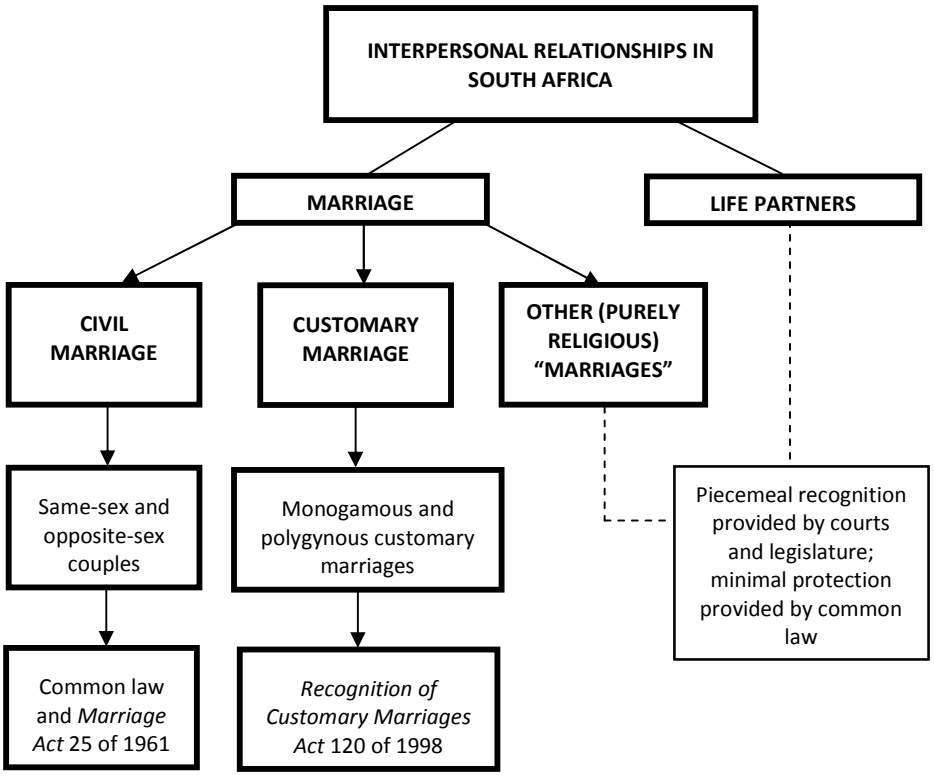

Figure 8.2: The legal position after repealing the Civil Union Act 17 of 2006

[148] Bonthuys 2008: 483.

It is however important to note that repealing the *Civil Union Act* would obviously imply that the civil partnership would no longer exist. With a view to ascertaining whether this would be a salutary development, two important questions need to be answered, namely (i) what exactly is a civil partnership, and (ii) is the continued existence of this form of partnership an absolute necessity in view of the proposed domestic partnership legislation as modified and adapted by the domestic partnership rubric in Part 3 of this study?

5. IS THERE STILL A NEED FOR THE CIVIL PARTNERSHIP?

If the arguments in 4.3.1.3 pertaining to the needlessness of separate legislation to validate same-sex marriage without infringing religious freedom are borne in mind it becomes clear that, in real terms, the *Civil Union Act*'s only contribution is the introduction of the civil partnership institution. It is however regrettable that the Legislature made no attempt to define this institution, particularly in view of its novel nature. It appears that a civil partnership will be used as a vehicle by means of which the legal consequences of a civil marriage can be attached to an otherwise non-formalised life partnership (in the narrow sense)[149] without the parties having to marry one another. Bearing the lack of legal protection currently provided to unmarried life partnerships in mind (particularly where they involve opposite-sex couples)[150] this institution could surely be of value, although—as has been seen above—it is debatable whether the civil partnership provides any real alternative to marriage. The situation becomes even more complicated when the provisions of the *Domestic Partnerships Bill,* 2008 are borne in mind. As seen in the preceding Chapters, this Bill provides for both registered and unregistered *domestic* partnerships, and extends many of the legal consequences of civil marriage to such partnerships. If one considers that our legal system currently provides for (undefined) *civil* partnerships and in future

149 See Chapter 4.

150 See Chapters 5 and 6.

may provide for registered and/or unregistered *domestic* partnerships, it becomes clear—from a purely pragmatic point of view—that this multitudinous, illogical and overly complicated legal system would be confusing for legal practitioners, officials and the public.[151] (This confusing picture would be complicated further by the fact that the term "*life* partnership" has also become entrenched in post-1994 South African family law.)[152]

This raises a further important question: If the 2008 Bill were to be enacted, is there any room for the civil partnership to co-exist with the registered domestic partnership? A point of departure from which this question can be answered is to assume that both institutions exist with a view to providing a means by which life partners can formalise their unions *without marrying one another*. Secondly, it has been seen that a system which merely replicates marriage is undesirable: What is required is a realistic *alternative* to marriage.[153] However if one considers the legal position that will obtain if the Bill were to be enacted in its current form, a problematic state of affairs will arise as, although both forms of partnership share the same point of departure, a huge distinction exists between the legal consequences attached to each.[154] This is clearly undesirable as there

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151 See Goldblatt 2003: 624 and 628 where she opines that recognition of "domestic partnerships" should involve minimal formality and that any new legislation should be drafted with caution as "many disadvantaged people may not benefit from new laws. Ignorance of the law, illiteracy and lack of access to the courts are barriers to justice that face many."

152 See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [36].

153 See SALRC 2006: 320 and Goldblatt 2003: 621, 622 and 7.3.4.2, 7.3.4.3 and 13 in Chapter 7.

154 An example of such a difference is that a registered domestic partnership is not automatically concluded in community of property (see clause 7(1) of the Bill) while the opposite is true of a civil partnership, where this regime is the default regime. In addition certain invariable consequences of marriage (or civil partnership) do not apply to domestic partnerships. For example, the privilege relating to marital communications (see section 195 of the *Criminal Procedure Act* 51 of 1977) applies to married spouses to a civil, customary or religious marriage (see section 195(2)) and as a consequence, also to partners to a civil partnership (by virtue of section 13 of Act 17 of 2006). In contrast, the 2008 Bill does not currently provide for the same privilege to be extended to domestic partners. (This discrepancy is addressed in the rubric—see 6 in Chapter 7). Furthermore, partners involved in a civil partnership will have to divorce one another in terms of the *Divorce Act* 70 of 1979 if they wish to terminate their partnership *inter vivos*. This implies that all the (patrimonial) consequences of divorce will apply to such a termination. So, for example, the partners would not be able to rely on the Court's power to redistribute assets in terms of section 7(3) – (6) of the Act, due (*inter alia*) to the time limits

simply is no logical reason why the law should on the one hand provide for a form of partnership that is a marriage in all but name, and on the other for a registered domestic partnership that, despite being based on the identical notion of *consortium omnis vitae*, differs so markedly from marriage. While it has already been seen that the current state of affairs (in terms of which civil partnership is the only "alternative" to marriage) is problematic, it appears that the dichotomous approach that would be created by recognising both civil and domestic partnerships does little more in terms of providing an uncomplicated and realistic alternative to marriage. In fact, enacting the Bill in its current form would only serve to superimpose an inchoate domestic partnership regime onto an already flawed and overly complicated system. It is submitted that this is precisely where the domestic partnership rubric that has been developed and applied throughout this study with the precise aim of providing an alternative that co-exists with (and in so doing supplements) the institution of marriage in a meaningful, effective and realistic manner, comes into its own. On the basis of these considerations it is submitted that if the *Domestic Partnerships Bill* were to be modelled on the rubric suggested in this study there would be no need for the "hollow shell"[155] civil partnership institution to be available any longer.

6. THE COURSE OF ACTION SUGGESTED

One of the most important differences between the prevailing legal positions in South Africa and in the Netherlands is that the latter country's family law system is well-demarcated and clearly regulated.[156] Parties wishing to solemnise their relationships are provided with three options that each function within set

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imposed by section 7(3). In contrast, registered domestic partners can terminate their union in a less formal manner and only need approach the Courts for a termination order where minor children are involved (clause 15). Regarding the patrimonial consequences of the termination of the partnership, a redistribution order is competent irrespective of the date on which the partnership was entered into (see clause 22).

155 To borrow Curry-Sumner's (2008: 274) description of contemporary Dutch law.

156 Also see Smith and Robinson 2008(a): 376 – 379.

parameters and exist independently of one another. For example, while Dutch law draws a clear distinction between marriages and registered partnerships, the confusing and overlapping terminology such as "civil partnership", "civil union", "domestic partnership" and "life partnership" proves that the same cannot be said of South African family law. This notwithstanding, Dutch law can possibly be criticised for providing two choices that, in the words of Curry-Sumner[157] are "more-or-less identical." In this regard, the Dutch Legislature may do well to consider enacting unregistered domestic partnership legislation along the lines of that proposed in chapter 4 of South Africa's *Domestic Partnerships Bill,* 2008 (as adapted in accordance with the rubric).

Second, it is insightful to consider that in *Minister of Home Affairs v Fourie*[158] Sachs J cautioned that:

> The circumstances of the present matter call out for enduring and stable legislative appreciation. A temporary remedial measure would be far less likely to achieve the enjoyment of equality as promised by the Constitution than would lasting legislative action compliant with the Constitution.[159]

The legal position sketched above shows that the *Civil Union Act* was unfortunately not the product of "enduring and stable legislative intervention." In addition, the fact that the Minister of Home Affairs expressly stated that the Act was merely a temporary measure[160] serves to underscore the contention that the Legislature paid scant attention to Sachs J's cautionary remarks.

It is submitted that the *Civil Union Act* is an unnecessary piece of legislation and that the mere amendment of the *Marriage Act* of 1961 (in accordance with point

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157 2008: 274.

158 2006 (1) SA 524 (CC).

159 Par [136].

160 http://196.35.74.234/south_africa/social/0,2172,139205,00.html (accessed on 11 August 2009).

(i) of the South African Law Reform Commission's proposals)[161] would have been a more effective option. This opinion is bolstered by the possibility of the enactment of domestic partnerships legislation: It stands to reason that such legislation should be aligned with and should supplement existing legislation such as the *Marriage Act* and the *Civil Union Act*. The problem is however, that the dichotomy that would be created by the enactment of the *Domestic Partnerships Bill* in its current form along with the continued existence of the civil partnership would not only fail to achieve such an alignment, but would also create an overly complicated legal position that provides no effective, realistic and clearly understandable alternative to marriage. On the other hand the enactment of the modified domestic partnership legislation suggested in this study will facilitate a better alignment with marriage and will prove that the civil partnership (as an effective carbon copy of as opposed to realistic alternative to marriage) is superfluous and unnecessary. In addition, enacting the legislation while simultaneously repealing the *Civil Union Act* would imply that the interpretative and legal anomalies that authors such as Smith and Robinson[162] describe as either being created or perpetuated by the *Civil Union Act* would fall away. Such a development would also go a long way towards providing the means by which not only the pre-eminence enjoyed by marriage could to some extent be displaced, but also by which better legal protection could be provided for the vulnerable members to whom Bonthuys[163] refers when she states that the enactment of same-sex marriage legislation that is effectively based on the civil marriage "not only reinforces the centrality of existing marriage rules and requirements, holding them up as the ideal which all should aspire to, but it also fails to address the inadequacy of marriage law to protect the interests of vulnerable family members, often women and children."

In the final analysis it must be concluded that the Legislature should dispense with the *Civil Union Act* by (i) incorporating same-sex marriage into the *Marriage*

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161 See 2.1 above.

162 2008(a) and 2008(b).

163 2007: 542.

Act of 1961,[164] and (ii) simultaneously doing away with the civil partnership by replacing it with domestic partnership legislation adapted according to the domestic partnership rubric.

7. TYING UP THE LOOSE ENDS—THE IMPACT OF THE DOMESTIC PARTNERSHIP LEGISLATION MODIFIED ACCORDING TO THE RUBRIC

In the preceding paragraphs a case was made out for repealing the *Civil Union Act*, and it is submitted that the progressive effects of this course of action cannot be ignored. Nevertheless, if one considers Figure 8.2 above, one final aspect still needs to be considered, namely where exactly the domestic partnership legislation fits into this framework, and whether any further problematic issues would remain despite such legislation being enacted.

Throughout this study the problems and anomalies presented by the inconsistent and fragmented body of law impacting on non-formalised life partnerships in South Africa have been considered. As from Chapter 3 the suggestion has been made that domestic partnership legislation developed according to the robust domestic partnership rubric[165] is required not only to iron-out these inconsistencies (in this regard it is of the utmost importance to note that many inconsistencies would remain unless the *Domestic Partnerships Bill,* 2008 were adapted in accordance with this rubric),[166] but also to exist alongside the law of marriage as a supplementary mechanism by which couples or partners could

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164 It goes without saying that the *Marriage Act* would have to contain a provision guaranteeing the validity of all marriages and civil partnerships concluded under the *Civil Union Act*. The Act could also provide a period of grace within which all civil partnerships could be converted into marriages or domestic partnerships.

165 See 5 in Chapter 3 for the structure of the rubric.

166 For example, the development occasioned by the case of *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) regarding the dependant's claim for damages for loss of support is not catered for in the 2008 Bill. See Part 3 of this study for an extensive analysis of this and other discrepancies.

regulate and formalise their inter-personal relationships. In addition, the enactment of such legislation has been found to be essential for the sake of better protecting vulnerable members of society such as women and children. In the end result, the enactment of a *Domestic Partnerships [Act]* modelled on and adapted according to the rubric would play a vital role in replacing the patchwork of laws that has resulted from piecemeal legislative and judicial activity with a coherent, reliable and effective body of law. This can be illustrated as follows:

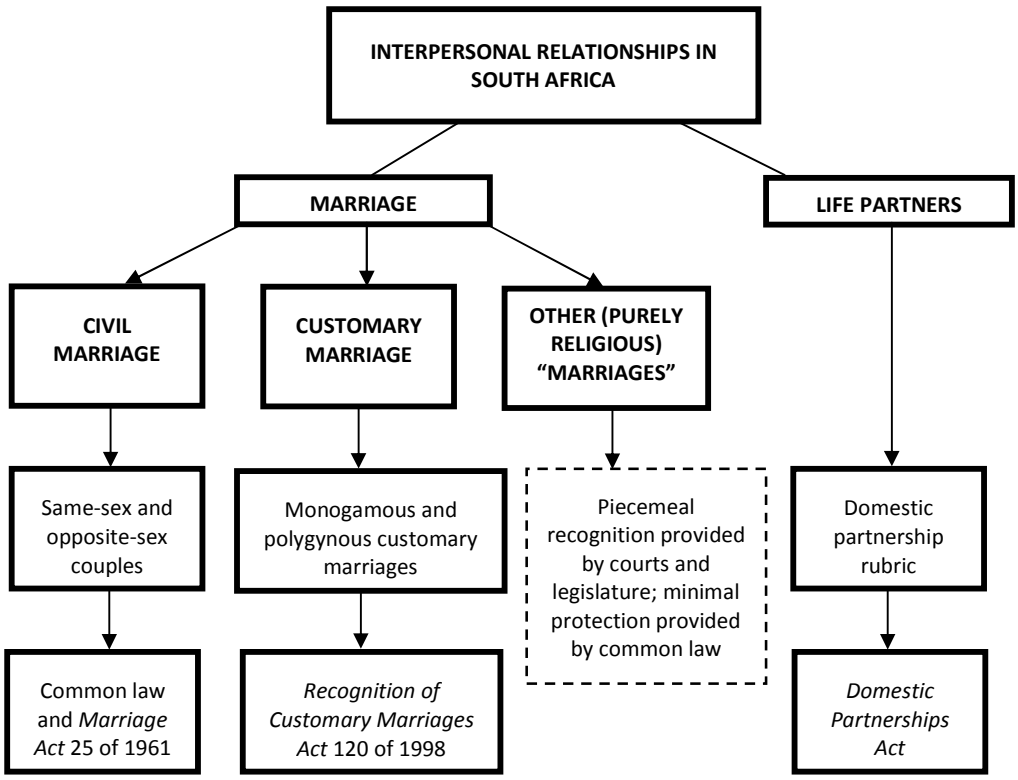

Figure 8.3 The legal position after adoption of the proposals made in this Chapter.

The preceding diagram shows that the only problematic aspect that will persist despite the enactment of domestic partnerships legislation modelled on the rubric suggested in this study is the inconsistent position pertaining to purely religious

marriages.[167] The manner in which this difficulty should be resolved however falls beyond the scope of this study. Nevertheless, the outcome of recently-commenced litigation in this regard is eagerly anticipated.[168]

8. DIVERGING PERSPECTIVES ON THE WAY FORWARD

8.1 Introduction

In Chapter 3 the conclusion was reached that in post-*Apartheid* South Africa "the civil marriage has come full circle in embracing the reforms that have typified the 'second wave' of the Enlightenment contractarian model in foreign jurisdictions."[169] The question, however, is whether it is sufficient for the purposes of this study simply to leave the discussion at that. The preceding Chapters have clearly shown that it is not; a submission that is confirmed by various examples from recent case law and legislation that point to the fact that focussing only on civil marriage has largely become obsolete in present-day South Africa. These developments include:

- The enactment of the *Recognition of Customary Marriages Act* 120 of 1998;
- The acknowledgment of the "conjugal relationship between two people of the same sex" as an independent legal entity[170] and the resultant

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167 See 4 in Chapter 3 for a summary of the legal position and recent developments in this regard.

168 In *Women's Legal Centre Trust v President of the Republic of South Africa and Others* (unreported judgment of the Constitutional Court (Case CCT 13/09) delivered on 22 July 2009) the Constitutional Court refused to allow an application for direct access to compel the state to promulgate legislation that recognised Islamic marriages, and held that it was in the interests of justice that such an application be exposed to the full spectrum of the judicial process—see 4 in Chapter 3 where this case is briefly discussed.

169 See 5 in Chapter 3.

170 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [36]; De Vos 2007(a): 450.

recognition afforded to such couples by the Courts and by the Legislature;[171] and

- The piecemeal recognition given to purely religious marriages by case law and legislation.[172]

In addition, it has been pointed out[173] that there is a need for legislation developed according to a domestic partnership rubric that exists alongside marriage that (i) contributes towards a "coherent set of family law rules" by superseding the "patchwork of laws" that currently regulate non-martial unions;[174] (ii) plays a role in de-centralising marriage "as the primary social form, allowing a diversity of relationships to be recognized in our law"[175] and (iii) contributes towards the "acknowledgment and acceptance of difference"[176] by displacing the "notion of heteronormativity."[177] In the light of this proposed domestic partnership legislation, a case has also been made out in this Chapter for repealing the *Civil Union Act* 17 of 2006. In the preceding paragraphs the conclusion was reached that, if the latter Act should be repealed, the sole major problem regarding the legal recognition of interpersonal relationships would be the persisting invalidity and consequent piecemeal recognition of purely religious marriages.

These proposals having been made, this concluding note attempts to round off this study with a few brief observations regarding the significance of this study on the way forward for South African family law.

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171 See Chapters 5 and 6.

172 See 4 in Chapter 3.

173 See 5 in Chapter 3.

174 Quotes taken from Sachs J's judgment in *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) at par [125].

175 Bilchitz and Judge 2007: 466.

176 *Per* Ackermann J in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at par [134].

177 *Per* De Vos 2007(a): 449.

8.2 A brief note on the way forward

A recent contribution by Bakker[178] suggests that a hierarchy of intimate relationships is currently encountered in South African family law as a consequence of

> die traagheid van die wetgewer om afstand te doen van die gemeenregtelike definisie van die burgerlike huwelik en 'n strewe om die gevolge van die huwelik so ver moontlik onveranderd te hou en enige akkulturasie teen te staan. Eerder as om die onderskeie huweliksregsisteme te harmoniseer poog die wetgewer om eenvormigheid van die huweliksregsisteem te bereik deur die gemeenregtelike huweliksregsisteem op alle lewensverhoudings toe te pas.[179]

According to Bakker the heterosexual civil marriage concluded in terms of the 1961 *Marriage Act* sits at the apex of this hierarchy, followed by civil unions (marriages or civil partnerships) entered into terms of the *Civil Union Act*. Regarding the latter group, heterosexual civil unions are, according to Bakker more acceptable than homosexual unions, and somewhere between this hierarchy of marriage and civil union "voer gebruiklike huwelike 'n kwasi bestaan." The lowest tier will, provided of course that the *Domestic Partnerships Bill* is enacted, be occupied by such partnerships, with the registered partnership enjoying superior status to its judicial-discretion-based unregistered counterpart. Regarding this state of affairs Bakker[180] opines that:

> 'n Hiërargie van wetgewing wat lewensverhoudings reël erken nie diversiteit nie maar het ten doel om lewensverhoudings aan 'n maatstaf gebaseer op 'n Christelike en Westerse lewensuitkyk te meet. So 'n maatstaf is nie aanvaarbaar in 'n samelewing gebaseer op menswaardigheid, gelykheid en vryheid nie.

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178 2009: 15 *et seq*.
179 Bakker 2009: 16.
180 2009: 18.

Bakker proposes that this situation could be resolved if the law were to shift its point of departure from the institution of marriage to the domestic or life partnership (to which he refers as a "lewensverhouding"), so that the question would no longer be whether a particular life partnership resembled marriage, but instead should be "hoeveel beskerming aan 'n bepaalde spesie van lewensverhouding verleen moet word."[181] In order to facilitate this new approach and to counter the problems posed by the prevailing inaccurately drafted legislation ("onnoukeurige wetsopstelling"), Bakker advocates an approach in terms of which "secular" legislation akin to the domestic partnerships legislation contained in the 2008 Bill should be enacted to regulate all (intimate)[182] interpersonal relationships by prescribing the minimum requirements to which such a relationship should adhere and the invariable consequences thus occasioned, and then permitting the parties to regulate additional matters contractually. In this regard he opines that:

> Dit sal dan moontlik wees vir partye om te kies welke persoonlike regstelsel op hulle lewensverhouding van toepassing moet wees, so kan partye kontrakteer dat byvoorbeeld Islamitiese reg of gewoonte reg [sic] op hulle huwelik van toepassing moet wees. Die partye kan kontrakteer of hulle huwelik monogaam of poligeen van aard gaan wees. Partye kan dan ook self kies wat hulle die lewensverhouding wil noem hetsy 'n huwelik, verbinding of deelgenootskap. Ontbinding geskied bloot deur deregistrasie en kan gepaard gaan met 'n ontbindingsooreenkoms.[183]

Where problems arise in terms of such an undertaking, Bakker suggests that the proposed legislation should vest the Courts with the discretion to intervene. In this respect he acknowledges that provision should be made for unequal bargaining positions, by *inter alia* empowering the Courts to scrutinise unfair ("onregmatige") agreements, and that a Court procedure should be required to dissolve unions involving minor children. In addition, the legal consequences of

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181 Bakker 2009: 18.

182 Bakker does not express himself regarding non-conjugal unions.

183 Bakker 2009: 19.

non-formalised unions should be adjudicated on an *ad hoc* basis provided that certain minimum requirements posed by the legislation are met. In the end result, Bakker agrees with an opinion expressed by Labuschagne[184] to the effect that humankind's desire for autonomy and individualism requires interpersonal relationships to be controlled by the parties themselves and for the community and the State to play a minimal role:

> Die huidige strewe na die erkenning van lewensverhoudings buite die huwelik en geloofshuwelike om gevolg te gee aan kulturele, religieuse en sosiale diversiteit skep die ideale geleentheid *om staatsbetrokkenheid sover moontlik uit lewensverhoudings te verwyder*. Op grond van menseregte oorwegings is dit egter nie moontlik om staatsbetrokkenheid geheel en al uit lewensverhoudings te verwyder nie. Die staat sal altyd 'n belang by die beskerming van die individu hê. Tog moet die individu sover moontlik die vryheid gegun word om volgens sy/haar kulturele en religieuse oortuigings te leef.[185]

In response to Bakker's views, a few comments are apposite, particularly in view of the conclusions reached and proposals made in this study. These comments relate, on the one hand, to the role played by the State in regulating interpersonal relationships, and to the interrelationship between the hierarchy of relationships, and the issues of legal certainty and autonomy on the other.

(i) The role played by the State

Bakker's comments regarding the role ideally to be played by the State in regulating interpersonal relationships creates the impression that he is of the opinion that the State's role is overemphasised in the dispensation that currently prevails as well as the one that will prevail once the *Domestic Partnerships Bill*,

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184 Labuschagne (1989: 374) wrote that "… menslike waardigheid en outonomie [verg] dat die huwelik sover moontlik uit die gemeenskapsbeheer onttrek word en oorgelaat word aan beheer van die betrokke partye self, sodat hulle hulle verhouding by wyse van konsensus kan reël."

185 Bakker 2009: 19 (emphasis added).

2008 is enacted.[186] It is submitted that the enactment of the *Domestic Partnerships Bill* as modified in this study shows that this is not the case. A proper consideration of this submission requires an understanding of the interrelationship between two crucial components of the regulation of interpersonal relationships, namely autonomy and State regulation. Assuming that domestic partnerships legislation is indeed enacted, this interrelationship can be illustrated as follows:

- **Autonomy**: The regulation of interpersonal relationships must recognise the autonomy of the individuals concerned for, as Ackermann J stated in *National Coalition for Gay and Lesbian Equality v Minister of Justice*,[187] "[the constitutional right to privacy] recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community." Recognition of autonomy entails, *inter alia*, that the legal framework must provide context-specific protection of the *consortium omnis vitae*[188] and must recognise the so-called "dignity of difference."[189] As an outflow hereof, a couple should be free to determine the extent of formal and public recognition to be accorded to their union and the religious significance (or otherwise) attached thereto, and must be allowed to elect whether their union is to be governed by civil or customary law. A couple must however take cognisance of the fact that context-specific recognition of their *consortium* entails that the extent of recognition of the same is determined *inter alia* by the degree of public commitment involved. So, for example, while parties to a purely religious marriage could conceivably approach the Courts for an order that recognises a *consortium* identical to that created by a valid marriage,[190] parties to a

186 Bakker does not suggest any modifications to the Bill.
187 1999 (1) SA 6 (CC) at par [32].
188 See 5 in Chapter 3 and 6 and 11.9 in Chapter 7.
189 See *Robinson v Volks NO* 2004 (6) SA 288 (C) at 299 (D) – (E).
190 See 5 in Chapter 3.

non-formalised relationship (that complies with the minimum requirements set by legislation such as chapter 4 of the modified *Domestic Partnership [Act]*) would most likely at best be able to rely on a *consortium* that binds only themselves and neither outsiders nor the State.[191]

- **State regulation**: While the role of the State should as far as possible be kept to the minimum, there are limits beyond which this cannot be pressed, particularly where human rights issues arise.[192] The role of the State in regulating interpersonal relationships is currently limited to the position as set out in Figure 8.1, which implies that unions not recognised as valid marriages or as civil partnerships enjoy only the piecemeal recognition provided by the Courts and the Legislature,[193] with minimal protection being provided to such unions by the common law (for example, by the universal partnership).[194] The position will however change if domestic partnership legislation is enacted, as, over and above the registered domestic partnership option, the statutory recognition of claims instituted at the termination of the so-called "unregistered domestic partnership" will imply that the State will potentially play a more prominent role even in relationships that have not been formalised in any way. The increasing role played by the State in this manner is to be supported, particularly in terms of recognising the *consortium omnis vitae* that exists between persons involved in non-formalised relationships and also in terms of acknowledging its responsibility to protect the vulnerable members of relationships in which no real choice of formalisation is present, such as those affected by unequal power relations or those discouraged from formalising their unions due to homophobia or bigotry.[195]

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191 See 11.9 in Chapter 7.

192 See for example Bakker 2009: 18, 19.

193 See Chapters 5 and 6.

194 See Chapter 6.

195 See Goldblatt 2003: 615, 616 for a concise discussion of the merits of State regulation.

It is essential that there must be an interrelationship between autonomy and State regulation. So, for example, the extent to which the *consortium omnis vitae* is protected against outside interference will depend on the extent of State regulation applied to the union which, in turn, is dependent on the degree of public commitment that is a decision to be made on the basis of an autonomous choice. Further, while it is essential that the State must play a role in regulating all forms of interpersonal relationships, the principle of autonomy will dictate that State regulation has certain limits beyond which it cannot be pressed. For instance, while matrimonial property law provides an *ex lege* legal framework for regulating the proprietary consequences when a marriage is terminated by divorce, the same does not hold true in the case of the termination of an unregistered domestic partnership. Consequently, an individual who was a party to the erstwhile partnership is free to exercise an autonomous choice regarding whether or not to institute a claim for property division—he or she must opt-in to the legislative framework as the law will not intervene of its own accord. On the other hand, autonomy must at times be limited by State intervention, by, for example, ensuring that the parties have a more limited degree of freedom relating to the termination of their union where children are involved. Finally, it is important to note that the *Constitution*, 1996 also plays an important role regarding the interrelationship of autonomy and State regulation by, for example, providing the means by which the Courts adjudicate whether the autonomous choice made regarding the nature and structure of a particular relationship (such as, for example, a purely religious Islamic marriage[196] or another less

[196] See for example *Hassam v Jacobs NO and Others* (unreported judgment of the Constitutional Court (Case CCT 83/08) delivered on 15 July 2009) where the concept of "transformative constitutionalism" that is informed by "the new ethos of tolerance, pluralism and religious freedom" (see par [28] of the judgment where Nkabinde J quoted Mahomed CJ in *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA) at par [20]) was employed in interpreting the *Intestate Succession Act* 81 of 1987 and concluding that the words "or spouses" should be read into the Act in order for it to provide for polygynous (Islamic) marriages (see Chapter 3 note 73 where the question is asked as to whether the Court's order is indeed restricted to Islamic marriages). For a discussion of what the concept of transformative constitutionalism entails see Klare 1998: 150 who describes it as "a long-term project of constitutional enactment, interpretation and enforcement committed … to transforming a country's political and social institutions and power relationships in a democratic,

conventional relationship)[197] should qualify for State recognition and regulation. Furthermore, while the *Constitution* requires that the "dignity of difference"[198] of individuals is respected, it also enjoins the State to comply with its constitutionally imposed obligations towards the parties themselves, their children and outsiders to the relationship.

This illustration shows that the State presently plays a vital role in regulating interpersonal relationships. It is consequently difficult to imagine how the legislation proposed by Bakker could diminish this role any further.

(ii) Hierarchy, autonomy and legal certainty

Bakker's perceptions regarding the hierarchy of relationships currently encountered in South African law are also worthy of further consideration. In this regard, the first part of this Chapter has proposed that the *Civil Union Act* 17 of 2006 should be repealed with the result that all civil marriages should henceforth be concluded in terms of the *Marriage Act* 25 of 1961. Furthermore, it has also been proposed that *ex officio* marriage officers should no longer be permitted to refuse to solemnise marriages involving same-sex couples.[199] It is submitted that these developments would remove the perceived lesser status of same-sex and opposite-sex civil unions, at least as far as *marriage* is concerned. The problem would however remain that relationships other than marriage would most likely still be *perceived* as being of inferior status to marriage. In this regard, it is submitted, as seen above, that the modifications to the proposed domestic

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participatory, and egalitarian direction [that] connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law." Also see Langa 2006: 351 *et seq* who in essence opines that "transformative constitutionalism" involves moving towards "a truly equal society" by way of a "social and economic revolution" that occurs in conjunction with a transformation of the legal culture and is based on the realisation that transformation is an ongoing process that must constantly be "promote[d] and sustain[ed]."

197 De Vos (2004: 198 at note 76) mentions examples such as "a male and female same-sex couple who decide to beget and raise children together as a family; or where more than two individuals in an intimate relationship with the others decide to beget and raise children…"

198 See *Robinson v Volks NO* 2004 (6) SA 288 (C) at 299 (D) – (E).

199 See 4.3.3 above.

partnerships legislation occasioned by the domestic partnerships rubric would provide legislation that plays a role in de-centralising marriage "as the primary social form"[200] and contributes towards displacing the "notion of heteronormativity."[201] In addition, the modifications to the *Domestic Partnerships Bill* suggested in Chapter 7 would also provide an alternative means by which parties to purely religious marriages could secure better recognition of their relationships and would also facilitate better recognition of polygamous relationships.[202] Nevertheless, it is conceded that despite this development, some form of perceived hierarchy could still remain. It is however submitted that while any residual hierarchy may be a *perceived* hierarchy, this does not mean that it is a *legal or juridical* hierarchy, and, moreover, that it is unconstitutional. Indeed, it is submitted that this is where a proper understanding of autonomous choice comes into play. In his dissenting minority judgment in *Volks NO v Robinson*[203] Sachs J made the following perceptive remarks pertaining to respecting autonomy:

> Respecting autonomy means giving legal credence not only to a decision to marry *but to choices people make about alternative lifestyles*. Such choices may be freely undertaken, either expressly or tacitly. *Alternatively, they might be imposed by the unwillingness of one of the parties to marry the other*. Yet if the resulting relationships involve clearly acknowledged commitments to provide mutual support and to promote respect for stable family life, then the law should not be astute to penalise or ignore them because they are unconventional. It should certainly not refuse them recognition because of any moral prejudice, whether open or unconscious, against them.[204]

This remark reiterates the need (as explained above) for the law as far as possible to respect the autonomous choices made by individuals regarding their relationships. However, as seen throughout this study, it is when *no* such choice

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200 Bilchitz and Judge 2007: 466.
201 *Per* De Vos 2007(a): 449. See note 106 in Chapter 3.
202 See 3, 5 and 11 in Chapter 7.
203 2005 (5) BCLR 446 (CC).
204 Par [156] (emphasis added).

is possible that the law should intervene (or at least provide the means to intervene). In this regard, the contextualised choice model has been developed and applied to the modified *Domestic Partnerships Bill* in Part 3 of this study. In so doing, the modified Bill will comply with the injunction imposed on the law to intervene *where no real choice of formalisation presented itself*. The law cannot necessarily be expected to intervene where a clear and legally-valid autonomous choice was indeed exercised, even if that choice relates to a hierarchy of relationships. It is submitted that this is where a true understanding of autonomy comes in: If the parties exercise a *truly autonomous choice* to enter into any given relationship (for example marriage or registered domestic partnership) *they also choose to enter into the hierarchy that prevails*. The law can only intervene if that hierarchy is, or leads to consequences that are, unconstitutional. In this regard it is of crucial importance to note that where the parties have indeed exercised an autonomous choice, the modifications proposed to the Bill in Part 3 (Chapter 7) of this study achieve a better alignment between the legal consequences of and protection enjoyed by marriage with those of the domestic partnership than originally provided by the Bill. The implementation of these proposals coupled with the repealing of the *Civil Union Act* would substantially deconstruct the hierarchy to which Bakker refers, thereby—it is submitted—greatly reducing any remaining risk of unconstitutionality.

The final comment regarding Bakker's proposals pertains to the issue of legal certainty. In this regard it submitted that his proposal of a sole "secular" Act based on life partnerships is untenable from the point of view of ensuring legal certainty. It appears that what Bakker would have the Legislature do is to topple the entire structure of family law overnight and to replace it with a generic Act that relies largely on the law of contract to regulate aspects which may be of extreme importance not only to the couple itself but also to outsiders. All of this would, it appears, be done in the name of ensuring that no hierarchy of relationships exists and in the interests of compensating for inaccurate legislation. The question is, is this really necessary? It is submitted that—

bearing in mind not only that the existing hierarchy would be substantially reduced by the proposals made in this study but also that these proposals were made largely with a view to ensuring legal certainty and removing the "patchwork of laws"[205] that currently exists—the answer to this question must be in the negative. In the end result, it is submitted that greater legal certainty will be achieved by implementing the proposals in this study than by adopting the drastic measures proposed by Bakker.

8.3 Conclusion

It is submitted that due recognition of comments (i) and (ii) in the preceding paragraph leads to the conclusion that the implementation of the proposals in this study will succeed in achieving an acceptable midway between Bakker's calls for the outright removal of the prevailing hierarchy and enactment of new legislation while still maintaining an acceptable level of State regulation and ensuring legal certainty.

9. CONCLUSION

This Chapter concludes that the *Civil Union Act* is an unnecessary and confusing piece of legislation and that, when compared to Dutch law, South African family law is supererogatory and overly complicated and therefore out of touch with the needs of South African society. This unfortunate state of affairs arose as a result of critical errors made by both the South African Law Reform Commission as well as the Legislature in its response to the Constitutional Court's decision in *Minister of Home Affairs v Fourie*.[206] This much becomes evident when it is considered that:

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205 See *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) at par [125].

206 2006 (1) SA 524 (CC).

- The *Civil Union Act* is problematic from an interpretative point of view, leading to unnecessary confusion;
- The *Civil Union Act* has in certain instances created—and in others perpetuated—a number of legal anomalies;
- The *Civil Union Act* does little to address the policy decision taken by the South African Law Reform Commission as far as religious autonomy and moral objections to same-sex marriage are concerned as the concept of a "civil union" is merely semantic and there is no *de iure* difference between a civil marriage in terms of the *Marriage Act* and a marriage in terms of the *Civil Union Act*;
- Nevertheless, if homosexual marriages could in principle take place in terms of the *Marriage Act* (which, it must be remembered, is only concerned with marriage as a secular institution), religious autonomy could still have been maintained within the existing framework of the *Marriage Act* as section 31 of the Act allows marriage officers to refuse to solemnise marriages that conflict with the viewpoints of their religions; and
- The validation of same-sex marriage should not be tasked with de-centring marriage as the primary form of interpersonal relationship in South Africa. Instead, this task should be accomplished by legislation that is modified and calibrated according to the domestic partnership rubric that was developed in this study. Enacting such legislation would furthermore not only succeed in providing a realistic alternative to marriage, but would simultaneously facilitate doing away with the civil partnership.

In the end result, it is proposed that the *Civil Union Act* should be repealed.

In the second part of this Chapter diverging perspectives on the way forward for family law were discussed. In this regard the conclusion was reached that the proposals made in this study negate the need for the implementation of

Bakker's[207] drastic proposal to replace the existing family law legislative structure with a single uniform Act akin to the *Domestic Partnerships Bill* of 2008.

[207] 2009: 1 *et seq*.

CHAPTER 9:

CONCLUSION

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1. The analysis of the development of matrimonial law and the juxtaposition of the development of marriage in pre-1994 South Africa with the global development of marriage in the Western legal tradition conducted in Chapter 2 leads to three major conclusions:

1.1 Although the question as to whether the Dutch settlers at the Cape of Good Hope were vested with the competence to legislate has no clear-cut answer, the broader interpretation of the 1602 charter under which they received their instructions may permit the inference that the same was in fact granted to them. Nevertheless, the *Political Ordinance* of 1580 as (most likely inadvertently) applied in Batavia and consequently at the Cape of Good Hope implies that family law constitutes one of the building blocks of the common law as it is still applied in South Africa today.

1.2 Second, there can be no doubt that the South African law of marriage as it existed at 27 April 1994 was "concerned with marriage solely as a secular institution."[1] Nevertheless, while gradually beginning to align itself with many of the reforms occasioned by the general shift in Western jurisdictions towards the "contractarian" model of marriage during the final decade of *Apartheid* rule, South African matrimonial law confined itself to recognising and regulating the civil marriage inherited from the Western legal tradition, with the result that it refused (*inter alia*) to broaden the essence and objective hallmark of marriage as embodied in the concept of *consortium omnis vitae* beyond the monogamous heterosexual marriage so as to embrace any form of plurality.

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[1] *Per* Farlam JA in *Minister of Home Affairs v Fourie* 2005 (3) SA 429 (SCA) at par [78].

1.3 Finally, Chapter 2 also concludes that the problems encountered in the wake of the global shift towards a contractarian model of marriage cannot be solved by a reversion towards the pre-Enlightenment models of marriage (a development which on the contrary could in fact exacerbate these problems), but that it is imperative for legislation to be enacted on the basis of a domestic partnership rubric that provides legal recognition to relationships outside of marriage and adequately protects the men, women and children involved in such relationships, and the outsiders who deal with them.

2. In Chapter 3 the post-1994 developments in South African family law are considered, and the conclusion is reached that interpersonal relationships in South Africa are currently governed by an incoherent interpersonal relationship framework, thereby making the enactment of "catch-all"[2] domestic partnership legislation that is developed on the basis of a robust domestic partnership rubric essential. The conclusion is also reached that an essential feature of such legislation would be for it to provide *context-specific* recognition of the *consortium omnis vitae* that exists between such partners, in the sense of differentiating between the extent to which *consortium* is recognised in formalised versus non-formalised domestic partnerships. As far as the composition of the rubric is concerned, the conclusion is reached that the draft *Domestic Partnerships Bill* of 2008 should constitute the legislative substructure of the rubric, which Bill is then (i) to be modified in the light of conclusions drawn in consequence of an in-depth analysis of case law, common law and legislation impacting on unmarried couples, and (ii) to be calibrated with attendant legislation.

3. After considering the various terms used to describe the incidence of non-marital unions in Chapter 4, the conclusion is reached that the narrow sense of the term

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[2] In this sense, "catch-all" implies that the legislation should cater for both formalised and non-formalised relationships by permitting the partners to elect to formalise their relationships (such as by registration) as well as, in the alternative, that the legislation should—under the so-called "judicial-discretion model"—permit an application to Court to be brought at the termination of a non-formalised partnership that permits a Court to grant relief (for example, in the form of maintenance or property division) to one of the partners to a relationship that satisfies the criteria posed by the legislation.

"life partnership" should—in the interests, *inter alia*, of not confusing it with the terminology employed by the *Domestic Partnerships Bill,* 2008—as far as possible be utilised for the purposes of conducting the analysis of case law, common law and legislation that takes place throughout Part 2 of the study.

4. Chapter 5 is dedicated to the analysis of post-1994 case law involving heterosexual and homosexual life partnerships. In this regard one of the major focal areas of this Chapter is the so-called "choice argument" in terms of which it is generally argued that persons who have chosen not to marry one another are not entitled to the protection provided to married spouses by matrimonial (property) law. The impact of the legalisation of same-sex marriage in this regard is considered, and the conclusion is reached that the "lived reality" experienced by both heterosexual and homosexual unmarried couples in contemporary South African society implies that neither same-sex nor opposite-sex couples necessarily have the option of marriage available to them. Nevertheless, in terms of the *preliminary* "contextualised choice model" that is developed in that Chapter it is found that the choice not to marry cannot be discarded completely, and that, drawing from Canadian jurisprudence, a distinction may be drawn between claims based on need and those involving property disputes. In the former regard, the model holds that choice is irrelevant and that such claims are permissible *provided that a reciprocal duty of support existed while the relationship subsisted*, while in the case of claims based on property disputes, a clear choice not to marry could possibly justify the refusal to extend matrimonial property law in order to resolve the dispute. A further conclusion reached in Chapter 5 is that the Courts have not yet fully extended *consortium omnis vitae* to unmarried life partners. Finally, it is concluded that various provisions of the *Children's Act* 38 of 2005 require amendment in order (i) to be aligned with the Constitutional Court's pronouncement in *J v Director General, Department of Home Affairs, and Others*[3] and (ii) to ensure a consistent legal position regarding

[3] 2003 (5) SA 621 (CC).

children conceived by artificial fertilisation and those born in terms of surrogacy agreements.

5. As far as the protection provided by the law of obligations is concerned, it is pointed out in Chapter 6 that neither proprietary estoppel nor unjustified enrichment provides a viable protective mechanism for life partners. The same could also be said for the (constructive) trust which, although providing a valuable means of protection in a jurisdiction such as England, is not recognised in South Africa. As far as the law of contract is concerned, although valuable protection can be ensured by means of a life partnership agreement or by relying on the existence of a universal partnership, the major problem encountered in the context of such protection is the relatively high level of sophistication required in order for it to be effective. In this Chapter it is also seen that the positive law currently dictates that no protection is provided to a "second spouse" to an existing civil marriage;[4] a situation which, unfortunately is out of touch with the rationale behind the putative spouse doctrine and is one which cannot be countenanced. The possible development of the legal position in this regard is proposed, and it is submitted that such a development may have important implications for a life partner who is involved in a partnership with someone who is still a party to a subsisting civil marriage with a third person. The analysis of legislation impacting on life partnerships in the second part of the Chapter reveals that such legislation employs diverging and inconsistent terminology and that certain Acts are *prima facie* unconstitutional. It is concluded that legislative intervention is urgently required in this regard.

6. In Part 3 (Chapter 7) the domestic partnerships rubric is put into action. The following remarks are apposite in this regard:

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4 *Zulu v Zulu and Others* 2008 (4) SA 12 (D).

6.1 The application of the rubric commences with an analysis of the scope and ambit of the draft *Domestic Partnerships Bill* of 2008 in consequence of which it is *inter alia* found:

6.1.1 That the preamble to the Bill should be amended; and

6.1.2 That the Bill should cater for so-called "care partners" in its chapter dealing with unregistered domestic partnerships (chapter 4).

6.2 An analysis of the prospective legal position under the Bill *vis-à-vis* pre-*Civil Union Act*[5] case law reveals that although no major discrepancies are encountered within the context of the *registered* domestic partnership, significant discrepancies present themselves in the unregistered domestic partnership setting as far as the reciprocal duty of support (particularly regarding claims for loss of support) and the legal position of children are concerned. Measures to address these discrepancies are proposed later in the Chapter.

6.3 An assessment of the need to modify the formal and substantive requirements for the entering into and recognition of registered domestic partnerships as well as the role (if any) to be played by the putative spouse doctrine reveals the need for legislative amendments in respect of grounds that *do not nullify* domestic partnerships (such as defective registration) and the concomitant need for a contextualised form of the putative spouse doctrine to play a role in as far as *invalid* domestic partnerships are concerned. The legislative prescription of various other formal requirements (such as witnessing and identification documents) is also proposed.

6.4 Regarding the concept of *consortium omnis vitae*, the conclusion is reached in Chapter 7 that the act of entering into a registered domestic partnership should entail that a *consortium* that is identical to that created by marriage is recognised

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5 17 of 2006.

and protected by domestic partnership legislation. As far as the unregistered domestic partnership is concerned, it is concluded that a contextualised form of *consortium* that is recognised *inter partes* only should be recognised.

6.5 Various amendments are proposed regarding the property regime and the termination of the registered domestic partnership. In the interests of avoiding unnecessary repetition, these amendments will not be discussed here as they are considered fully in paragraphs 7 and 9 of the Chapter in question. It is however important to note that the preliminary "contextualised choice model" is updated so as to conclude that, within the context of property disputes, the refusal to permit the extension of matrimonial property law to solve a dispute involving unmarried partners can only be justified *if domestic partnership legislation provides an effective and well-defined alternative to matrimonial property law.* As the *Domestic Partnerships Bill* does not do so, it should be amended so as to empower a Court to permit such an extension to take place in apposite circumstances.

6.6 The enactment of registered domestic partnership legislation will necessitate the amendment of a number of statutes that will otherwise not provide due recognition of such partnerships. In this regard a number of examples are considered including the *Marriage Act* 25 of 1961, the *Recognition of Customary Marriages Act* 120 of 1998 and the *Wills Act* 7 of 1953.

6.7 A number of vital conclusions are reached in paragraph 11 of Chapter 7 which is dedicated to a detailed analysis of the unregistered domestic partnership as it appears in chapter 4 of the Bill. These include:

6.7.1 The necessity of the provision of an appropriate threshold criterion which must (as the preliminary enquiry) be satisfied before any specific claim under the legislation (such as a claim for property division) is to be adjudicated;

6.7.2 As far as need-based claims under chapter 4 of the Bill are concerned (such as maintenance and succession), the crucial conclusion is reached that, in the light of the "contextualised choice model," the presence of a reciprocal duty of support that existed during the relationship is a *sine qua non* for any such claim to be granted;

6.7.3 Regarding property disputes, the conclusion is reached that even in the event of a clear choice not to marry (or, for that matter to enter into a registered domestic partnership) being evident, the law should still provide adequate protection for an applicant partner involved in such a non-formalised relationship. Nevertheless, it is opined that *provided the modifications suggested for the Bill are indeed adopted*, the Bill should comply with the adequate protection requirement, with the result that the refusal to extend the protection any further could possibly be justified on the basis of the choice not to marry or to formalise the union in any other way. It is however submitted that such a scenario would be unlikely in view of the more comprehensive protection offered to unregistered domestic partners by the modified Bill.

6.8 The final facet of the rubric involves the calibration of the newly-modified *Domestic Partnerships Bill* with legislation that already provides some form of recognition of or protection for domestic or life partners. In this regard a significant number of amendments are proposed in paragraph 12 of Chapter 7.

7. In the final Part of this study (Part 4; Chapter 8) the conclusion is reached that the *Civil Union Act* 17 of 2006 should, in view both of the enactment of domestic partnerships legislation in accordance with the rubric and the uncertainty and confusion which the Act creates, be repealed. The Chapter closes with a consideration of the way forward for South African family law and concludes that, despite recent calls for the deregulation of marriage and a completely new statutory dispensation,[6] the proposals made in this study are to be preferred as

[6] See Bakker 2009: 1 *et seq*.

they succeed in attaining certain commendable objectives behind these drastic proposals while still maintaining an acceptable level of State regulation and ensuring that legal certainty is not compromised.

SUMMARY / OPSOMMING

In strictly adhering to the concept of marriage inherited from the Western legal tradition, pre-1994 South African family law paid scant regard to marriages other than monogamous heterosexual civil marriages, while the common law provided no express legal recognition for unmarried life or domestic partnerships. The advent of the democratic constitutional era in 1994 however spawned a flurry of legal development that broadened the notion of marriage by recognising customary marriages as well as certain consequences of marriages concluded according to the tenets of a recognised faith such as Islam. Commencing with the watershed *National Coalition for Gay and Lesbian Equality* cases,[1] the legal position in which same-sex life partners found themselves was also dramatically improved by a number of *ad hoc* judicial pronouncements which extended certain consequences of marriage to such partners on the premise that they were at the time precluded from marrying one another. The flipside of this premise—namely that heterosexual life partners have always been permitted to marry one another and thus cannot request an extension of matrimonial (property) law where they have exercised a choice not to marry (the so-called "choice argument")—was, however, to constitute the major justification for the judiciary's refusal to extend similar recognition to heterosexual life partners. The application of this line of reasoning has implied that, within little more than a decade into the democratic constitutional dispensation, same-sex life partners ostensibly enjoy better legal protection and recognition of their relationships than their heterosexual counterparts. This state of affairs implies that the current legal position regarding unmarried life partners is inconsistent and fraught with anomalous legal consequences.

[1] In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) the Constitutional Court struck down the crime of sodomy as well as certain other laws that prohibited male-to-male sexual relations, and in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) the same Court, *inter alia*, specifically recognised "conjugal relationship[s] between two people of the same sex" as "another form of life partnership" distinct from marriage (at par [36]) and also recognised the ability of such couples "to establish a *consortium omnis vitae*" (at par [53]).

Over and above the judicial developments, post-1994 legislation has also provided increasing recognition for unmarried life partners. However, as was the case with the judicial developments, the legislative developments were also merely piecemeal in nature. The upshot of this state of affairs is that interpersonal relationships in South Africa are governed by "a patchwork of laws that did not [and still do not] express a coherent set of family law rules."[2]

While the validation of same-sex marriages by way of the promulgation of the *Civil Union Act* 17 of 2006 was a salutary development from a human rights perspective, this development has created difficulties of its own. To begin with, the validation of same-sex marriage implies, *strictu sensu*, that the "choice argument" applies equally to same-sex couples who elect not to marry one another. This entails that such couples could potentially be deprived of the *consortium omnis vitae* that the Courts have in principle found to exist between them and that they may no longer be able to rely on the piecemeal judicial extensions granted by the Courts prior to 30 November 2006 (the day on which same-sex marriage became permissible). The legal position in this regard however remains unclear. In addition, the validation of same-sex marriage has been accomplished by way of legislation that not only requires same-sex couples to marry one another in terms of separate legislation but that also further overcomplicates the legal landscape by providing for "civil unions" that can take the form of either marriages or civil partnerships. As such, no legislation has as yet been enacted that deals with the position of life or domestic partners *per se*.

In January 2008 a draft *Domestic Partnerships Bill*, 2008 saw the light of day. Using this Bill as a prototype, this study attempts—by applying a domestic partnership rubric that requires the modification of the Bill and its calibration with attendant legislation—to iron out the inconsistencies and anomalies alluded to above by providing effective domestic partnership legislation. In order to achieve this, an in-depth analysis of case law, legislation and common law is conducted with a view to establishing certain

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[2] *Per* Sachs J in *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae); Lesbian & Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) at par [125].

fundamental principles that ought not only to feature in the domestic partnerships legislation itself, but which are also required in order to facilitate the Bill's alignment with applicable legislation. In the light of the modified Bill, the study concludes with an evaluation of the case for retaining the *Civil Union Act* 17 of 2006. In the final analysis, the conclusion is reached that the enactment of the *Domestic Partnerships Bill* as developed in accordance with the rubric, coupled with the repeal of the *Civil Union Act* 17 of 2006, will provide a more consistent, coherent and less complex legal framework within which interpersonal relationships in South Africa can be regulated.

DIE ONTWIKKELING VAN DIE SUID-AFRIKAANSE HUWELIKSREG MET SPESIFIEKE VERWYSING NA DIE BEHOEFTE AAN EN TOEPASSING VAN 'N HUISHOUDELIKE DEELGENOOTSKAPSRUBRIEK[3]

Deur die huweliksbegrip soos van die Westerse regstradisie geërf streng na te volg, het die Suid-Afrikaanse familiereg voor 1994 wynig aandag aan ander huwelike dan die heteroseksuele monogame siviele huwelik gegee. Die gemenereg het geen uitdruklike erkenning aan buite-egtelike lewensverhoudings (oftewel huishoudelike deelgenootskappe) verleen nie. Die koms van die demokratiese grondwetlike bestel in 1994 het egter 'n vlaag van regsontwikkeling ontketen. Die huweliksbegrip is verbreed deur onder andere die erkenning van gebruiklike huwelike, asook die erkenning van sekere regsgevolge van huwelike wat ingevolge erkende geloofstelsels soos Islam gesluit is. Na aanleiding van die waterskeidende *National Coalition for Gay and Lesbian Equality*-sake[4] is die posisie waarin homoseksuele

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3 Die skepping van die term "huishoudelike deelgenootskap" ("domestic partnership") kan aan Bakker (2009: *et seq*) toegeskryf word.

4 In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) het die Konstitusionele Hof die kriminalisering van sodomie asook dié van ander seksuele aktiwiteite tussen mans ongrondwetlik verklaar en in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) het dieselfde hof *inter alia* spesifieke erkenning verleen aan "conjugal relationship[s] between two people of the same sex" as "another form of life partnership" wat losstaan van die huwelik (op par [36]) en het ook partye tot sodanige verhoudings se vermoë "to establish a *consortium omnis vitae*" (op par [53]) erken.

lewensmaats hulself bevind het stelselmatig deur ‘n aantal *ad hoc* hofuitsprake waarin sekere gevolge van huweliksluiting na sodanige verhoudings uitgebrei is, aansienlik verbeter. Die uitgangspunt vir hierdie ontwikkeling was die feit dat partye van dieselfde geslag op daardie stadium nie regtens met mekaar kon trou nie. Die omgekeerde van hierdie uitgangspunt—dat heteroseksuele lewensmaats nog altyd die keuse gehad het om met mekaar in die huwelik te tree en derhalwe nie geregtig kan wees om te versoek dat die huweliks(goedere)reg na hul verhouding uitgebrei kan word waar hulle gekies het om nie te trou nie (die sogenaamde “keuse-argument”)—was die vernaamste rede vir die howe se weiering om soortgelyke erkenning aan heterosekuele lewensverhoudings te gee. ‘n Uitvloeisel van die toepassing van hierdie redenasie is dat homoseksuele lewensmaats, binne net meer as ‘n dekade van die bestaan van die demokratiese grondwetlike bestel, skynbaar beter regsbeskerming en -erkenning van hul verhoudings geniet as dié van hul heteroseksuele eweknieë. Hierdie stand van sake impliseer dat die huidige regsposisie ten aansien van ongetroude lewensvershoudings deurspek is met inkonsekwensies en onreëlmatighede.

Bo- en behalwe die ontwikkeling wat deur die howe na 1994 teweeggebring is het die wetgewer ook toenemende erkenning aan ongetroude lewensmaats verleen. Soos in die geval van die regsprekende ontwikkelings is die wetgewende ontwikkelings ook slegs stuksgewys van aard. Die uiteinde van hierdie toedrag van sake is dat lewensverhoudings in Suid-Afrika deur ““a patchwork of laws that did not [and still do not] express a coherent set of family law rules”[5] gereguleer word.

Terwyl die wettiging van homoseksuele huwelike deur middel van die *Civil Union Act* 17 van 2006 ‘n gesonde ontwikkeling vanaf ‘n menseregte oogpunt was, het hierdie ontwikkeling probleme van sy eie veroorsaak: Eerstens impliseer die wettiging van homoseksuele huwelike dat die “keuse argument” *strictu sensu* ook op homoseksuele lewensmaats wat besluit om nie in die huwelik te tree nie, van toepassing is. Hierdie argument kan veroorsaak dat die *consortium omnis vitae* wat die howe reeds in

[5] Volgens Sachs R in *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae); Lesbian & Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) op par [125].

beginsel tussen sodanige lewensmaats erken het, asook die stuksgewyse uitbreiding van die huweliksreg na sodanige verhoudings wat voor 30 November 2006 (die datum waarop die sluiting van homoseksuele huwelike moontlik geword het) plaasgevind het, verval. Die regsposisie in hierdie verband is egter steeds onduidelik. Die wettiging van homoseksuele huwelike is voorts deur wetgewing teweeggebring wat nie alleen van homoseksuele pare vereis om ingevolge aparte wetgewing te trou nie, maar wat ook die regsterrein oorkompliseer deur vir "civil unions" voorsiening te maak, wat die vorm van óf 'n huwelik óf 'n "civil partnership" kan aanneem. Daar bestaan as sodanig geen wetgewing om lewensverhoudings *per se* te reguleer nie.

In Januarie 2008 het 'n konsep *Domestic Partnerships Bill* die lig gesien. Deur hierdie konsepwet as 'n grondbeeld te gebruik, poog hierdie studie om—deur middel van die toepassing van 'n huishoudelike deelgenootskapsrubriek wat aanpassing van die konsepwet en die belyning daarvan met relevante wetgewing vereis—die inkonsekwensies en onreëlmatighede waarna vroeër verwys, is uit die weg te ruim deur die daarstelling van doeltreffende huishoudelike deelgenootskapswetgewing. Ten einde dit te bewerkstellig word 'n in-diepte ondersoek na regspraak, wetgewing en die gemenereg onderneem met die oog op die vasstelling van grondliggende beginsels wat nie net in die huishoudelike deelgenootskapswetgewing ingesluit behoort te word nie, maar ook die belyning daarvan met toepaslike wetgewing sal bewerkstellig. In die lig van die gewysigde konsepwet, sluit die studie af met 'n evaluering van die argument ten gunste van die behoud van die *Civil Union Act* 17 van 2006. Daar word tot die slotsom gekom dat die promulgering van die *Domestic Partnerships Bill* (soos deur die rubriek aangepas), tesame met die herroeping van die *Civil Union Wet* 17 van 2006, 'n meer konsekwente, samehangende en eenvoudige regsraamwerk waarbinne lewensverhoudings gereguleer kan word, daar sal stel.

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3. Universal partnership
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9. Civil partnership
10. Civil marriage
11. Customary marriage
12. Purely religious marriage
13. Rubric

14. Life partnership agreement

15. Reciprocal duty of support

16. Contextualised choice model

17. Choice argument

18. Models of marriage

19. *Consortium omnis vitae*

20. Putative marriage

21. Common-law marriage

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